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August 25, 2008

VIA ELECTRONIC FILING

Ms. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

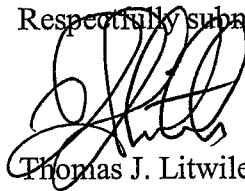
Re: **Finance Docket No. 35171**
Ashbro, Inc. -- Petition for Declaratory Order --
Wilson Spur Track in Denham Springs, Louisiana

Dear Secretary Quinlan:

Attached for filing in the above-captioned proceeding is the **Reply of Illinois Central Railroad Company to Petition for Declaratory Order, Injunctive Relief and Damages**, dated August 25, 2008.

Should any questions arise regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Thomas J. Litwiler
Attorney for Illinois Central
Railroad Company

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35171

ASHBRO, INC.
-- PETITION FOR DECLARATORY ORDER --
WILSON SPUR TRACK IN DENHAM SPRINGS, LA

**REPLY OF ILLINOIS CENTRAL RAILROAD COMPANY
TO PETITION FOR DECLARATORY ORDER,
INJUNCTIVE RELIEF AND DAMAGES**

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**ATTORNEYS FOR ILLINOIS CENTRAL
RAILROAD COMPANY**

Dated: August 25, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35171

ASHBRO, INC.
-- PETITION FOR DECLARATORY ORDER --
WILSON SPUR TRACK IN DENHAM SPRINGS, LA

**REPLY OF ILLINOIS CENTRAL RAILROAD COMPANY
TO PETITION FOR DECLARATORY ORDER,
INJUNCTIVE RELIEF AND DAMAGES**

Illinois Central Railroad Company ("IC") hereby replies to the "Petition for Declaratory Order, Injunctive Relief, and Damages" filed herein by Ashbro, Inc. ("Ashbro").¹ Ashbro seeks to forcibly terminate rail service to multiple shippers served by IC via a spur track (the "Wilson Spur") in Denham Springs, Louisiana. A federal district court has previously rejected Ashbro's efforts to terminate rail service over the Wilson Spur, and dismissed Ashbro's state law claims in their entirety as federally preempted. That court did not refer the preemption issue or any other matter to the STB, and thus this is not the usual administrative case of whether federal preemption applies. Instead, Ashbro simply seeks to re-present its preempted state law claims to the Board for adjudication. It cites no provision of the Interstate Commerce Act or the Board's regulations in support of its claims, and provides no basis to consider or grant the relief that it seeks. Ashbro's petition should be denied.²

¹ The body of Ashbro's Petition was filed on August 1, 2008, and the various attachments to the Petition were subsequently filed on August 4, 2008. IC has considered August 4th as the filing date for the complete Petition and has proceeded accordingly.

² IC has treated Ashbro's filing as a petition for declaratory order. To the extent that the Board determines that the Ashbro filing is more appropriately treated as a complaint, IC requests that this reply be considered as a motion to dismiss.

BACKGROUND

The Wilson Spur is approximately 1200 feet long, and is immediately south of and parallel to IC's Hammond District main line between Hammond and Baton Rouge, Louisiana. Verified Statement of John W. Dinning, attached hereto ("Dinning V.S.") at 1 and Exhibit A. The Wilson Spur connects with the Hammond District at the spur's western end. IC utilizes the Wilson Spur to provide rail service to Adell Compounding, Inc. ("Adell"), located at the eastern end of the spur, and to Bercen, Inc. ("Bercen"), located at the western end of the spur nearest the switch to IC's main line.³ Between Bercen and Adell, the Wilson Spur traverses a parcel of land now assertedly owned by Ashbro. Adell, a plastics manufacturer, receives inbound plastic pellets, while Bercen, a manufacturer of chemicals used in the paper industry, receives inbound syrup, soy oil and vegetable oil. IC serves the Wilson Spur on a weekly as-needed basis, and handled 86 carloads of traffic to the two industries in 2007. Dinning V.S. at 5.

IC initially constructed the Wilson Spur in the mid-to-late 1960s, pursuant to an industry track agreement between IC and the then-owner and occupant (Livingston Redevelopment Corporation and Wilson Steel Company, Inc., respectively) of the parcels now occupied by Bercen, Ashbro and Adell. Dinning V.S. at 2-3 and Exhibit B.⁴ Under that fairly standard agreement, IC owned and maintained the portion of the Wilson Spur located on IC's right-of-way, while Livingston owned and was responsible for maintenance on the remainder of the spur. IC had the right to serve any industries that might locate along the Wilson Spur, and the agreement specifically provided that it "shall run with the land upon which the Track is located

³ Adell and Bercen are both named with IC as "Defendants" in Ashbro's Petition. The Petition likewise names Misuri Associates Limited Partnership ("Misuri") as a "Defendant." IC understands that Misuri owns the land on which Adell's manufacturing facility is located.

⁴ It is from the historical relationship to Wilson Steel Company, Inc. that the Wilson Spur derives its current name. Dinning V.S. at 2.

and shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto." Dinning V.S. at 3. A later, 1973 sidetrack agreement between the same three parties and a predecessor of Bercen specifically confirms Bercen's right to use the Wilson Spur for the loading and unloading of rail cars. Dinning V.S. at 3-4. Subsequent transactions involving the Bercen parcel expressly recited the parties' rights regarding the Wilson Spur and its associated "servitude." Dinning V.S. at 4 and Exhibit E.

IC has provided service on the Wilson Spur continuously for 40 years, handling the traffic of Adell, Bercen and their predecessors. Dinning V.S. at 1, 5. Nonetheless, after acquiring the middle parcel between Adell and Bercen (apparently in 1999), Ashbro late last year brought a state law court lawsuit seeking "peaceable possession" of the Wilson Spur, a permanent injunction prohibiting IC and the shippers from using the Wilson Spur, a finding that any rights and servitudes of IC and the shippers with respect to the Wilson Spur had been extinguished, and damages for past and any future use of the Wilson Spur.⁵

After IC's removal of the case to federal district court and briefing by the parties, the court found that Ashbro's "state law claims are entirely preempted by 49 U.S.C. § 10501(b)" and dismissed the action for lack of jurisdiction. Ashbro, Inc. v. Misuri Associates L.P., et al., No. 08-086-JVP-SCR (M.D. La. July 3, 2008), attached hereto as Attachment 1, at 5. Citing governing precedent, the court explained that the "plain language" of Section 10501(b) "clearly

⁵ Ashbro's complaint, subsequently amended, is not of record in this proceeding but substantially tracks the Petition which Ashbro has filed before the Board. Both pleadings seek, inter alia, a declaration that the defendants "have no right to use or cross-over that portion of the Spur Track located on the Ashbro Property" and a permanent injunction "prohibiting and enjoining Defendants from using and/or crossing over the portion of the Spur Track located on the Ashbro Property." See Ashbro Petition at 18 (requests for relief (c) and (f). As noted below, the only (and unexplained) difference in this regard between Ashbro's judicial complaint and its current Petition is that IC is excluded from these requests for relief in the current Petition.

establishes that the operation of side tracks [such as the Wilson Spur] shall be exclusively regulated by federal law and shall be subject to the exclusive jurisdiction of the Surface Transportation Board." District Court Order at 4 (citing Friberg v. Kansas City Southern Ry. Co., 267 F.3d 449, 443 (5th Cir. 2001) and Cedarapids, Inc. v. Chicago, Cent. & Pac. R. Co., 265 F. Supp. 2d 1005, 1013 (N.D. Iowa 2003)). In response to Ashbro's argument that the court had jurisdiction over state law property issues which had to be resolved judicially, the court held that Ashbro "has failed to state any issue in controversy that is subject to state law." District Court Order at 5.

Neither party asked the court to seek the STB's guidance or input on the federal preemption question, and in rendering its decision the court did not refer any issue or matters to the STB. No appeal has been taken from the court's order, and Ashbro does not purport to challenge that order before the Board. Instead, without further explanation, Ashbro has now refiled its requests for relief with the Board, in the form of a "Petition for Declaratory Order, Injunctive Relief, and Damages." As was the case before the courts, the requested relief if granted would terminate the existing rail service that IC provides over the Wilson Spur to Adell and Bercen. *Dinning V.S.* at 1.

DISCUSSION

Ashbro's Petition proceeds on the mistaken assumption that any state law claim that is preempted by ICCTA can be heard by the Board. Essentially, Ashbro's approach would mean that federal preemption can only apply to matters that can be heard by the Board. But that plainly is not the law. "[T]he availability of a federal remedy is not a prerequisite for federal preemption." Lister v. Stark, 890 F.2d 941, 946 (7th Cir. 1989). While federal preemption under ICCTA certainly applies to matters that the STB regulates and adjudicates directly, the scope of

federal preemption is significantly broader and applies to any state common law claims that would prevent or unreasonably interfere with railroad transportation -- regardless of whether the Board itself has any regulatory function to perform with respect to such claims. E.g., CSX Transportation, Inc. -- Petition for Declaratory Order, Finance Docket No. 34662 (STB served May 3, 2005) at 3-4; Mark Lange -- Petition for Declaratory Order, Finance Docket No. 35037 (STB served January 28, 2008) at 3-4 ("remedies afforded under 49 U.S.C. 11101-11908 concerning rail transportation are 'exclusive and preempt' all other remedies." (citing 49 U.S.C. § 10501(b)); cf. Friends of the Aquifer, et al -- Petition for Declaratory Order, 5 S.T.B. 880, 886 (2001) ("But the absence of environmental review by the Board does not mean that a project is open to environmental review at the state or local level.").

This is particularly the case with respect to spur or industrial tracks like the Wilson Spur, which are subject to the exclusive jurisdiction of the STB but are not under the regulatory authority of either the STB or state law:

When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove our authority over the entry and exist of these auxiliary [spur or switching] tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of auxiliary tracks entirely to railroad management. . . . Thus, although we may not regulate the construction and disposition of spur and switching tracks, it is equally clear that state and local authorities may not regulate those activities either.

Auburn & Kent, WA -- Pet. for Declar. Order -- Stampede Pass Line, 2 S.T.B. 330, 341-342 (1997), aff'd sub nom. City of Auburn v. U.S., 154 F.3d 1025 (9th Cir. 1998), cert. denied, 572 U.S. 1022 (1999). See also, e.g., United Transp. Union v. STB, 183 F.2d 606, 612 (7th Cir. 1999); Friends of the Aquifer, 5 S.T.B. at 886 ("In other words, the Board may not have regulatory authority under 49 U.S.C. 10901 or 49 U.S.C. 10906 but state and local activity is

preempted under 49 U.S.C. 10501(b) because of the Board's exclusive jurisdiction over rail transportation.").⁶

Ashbro's Petition invokes no provisions of the Interstate Commerce Act in its requests for relief, and appears to be simply a resubmission of its prior court complaint with minor changes. For reasons that are not entirely clear, for example, Ashbro now purports to seek relief against IC in only one portion of its Petition. Ashbro Petition at 14 (identified as "Count One"). The remainder of the Petition purports to seek relief only against Adell, Bercen and Misuri -- entities over which the Board would not even appear to have jurisdiction. Ashbro Petition at 14-17 (identified as Counts Two through Five). All of the "counts" are rooted in state law claims which the federal district court has already found to be preempted by ICCTA. The existence of federal preemption under 49 U.S.C. § 10501(b), however, does not convert those claims into federal matters to be heard by the Board.⁷ In short, there is nothing for the Board to do here.

The ultimate relief sought by Ashbro is the removal of IC from the Wilson Spur and, necessarily, the cessation of the rail service that IC currently provides to Adell and Bercen:

⁶ This outcome does not differ for the Wilson Spur simply because IC may not own the trackage or underlying right-of-way. The Board's exclusive jurisdiction over rail "transportation" includes a "yard, property [or] facility . . . of any kind related to the movement of passengers or property, or both, by rail, *regardless of ownership or an agreement concerning use . . .*" 49 U.S.C. § 10101(9) (emphasis added). Where a spur track is operated by a regulated rail carrier as part of the interstate rail network, "[t]he fact that the track owner . . . is not itself a rail carrier is not relevant" to the Board's exclusive jurisdiction and the application of federal preemption. The New York City Economic Development Corporation -- Petition for Declaratory Order, Finance Docket No. 34429 (STB served July 15, 2004) at 8. See also Fletcher Granite Company, LLC -- Petition for Declaratory Order, Finance Docket No. 34020 (STB served June 29, 2001).

⁷ It is thus true but unnecessary to note that the Board generally does not decide matters of state contractual and property law such as those presented in Ashbro's Petition. The federal district court has already dismissed those claims as preempted under ICCTA, and the Ashbro Petition presents no independent jurisdictional basis for the Board to hear such claims.

The right sought to be recognized herein is [sic] the right of Petitioner [Ashbro] in and to [the Wilson Spur], free and clear of any servitudes, rights of-way, easements, rights of use or claim of ownership of any improvements, including rights of use or occupancy, of any person made a Defendant herein [i.e., IC, Adell, Bercen or Misuri].

Ashbro Petition at 3. Ashbro goes on to seek "injunctive relief" "prohibiting and enjoining Defendants from using and/or crossing over the portion of the Spur Track located on the Ashbro Property," and to seek "peaceable possession" of that property. Ashbro Petition at 15, 17. While those claims are supposedly made only against Adell, Bercen and Misuri -- and not IC -- they necessarily involve the termination of IC's ability to operate over the Wilson Spur and provide service to Adell and Bercen.

The federal district court quite properly found these claims to be preempted by ICCTA.⁸ See, e.g., Lange, supra, at 3 (where relief sought by underlying landowner would deprive the railroad of the ability to continue to use property needed for rail operations, "the state law claims would effectively regulate rail transportation, and thus are preempted under section 10501(b)."); Cedarapids, supra, 265 F. Supp. 2d at 1014 ("[T]o the extent that [landowner's] state law claims seek to force [railroad] to abandon the track in question, such claims are preempted by the ICCTA."); Wisconsin Central Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); State v. Illinois Central R. Co., 928 So. 2d 60, 70 (La. App. 2005) (where railroad has continuously operated tracks for many years, ICCTA preemption does not turn on valid ownership or servitude interest in land under state law). The same is true for Ashbro's claims seeking damages for the presence of the Wilson Spur on its property. Lange at 4; A&W Properties, Inc. v. Kansas City Southern Ry. Co., 200 S.W.3d 342, 349 (Tex. App. 2006) ("[W]e

⁸ As noted above, the court did not refer any issue to the STB. Nothing in the court's order indicates that the court thought that there was anything for the Board to do.

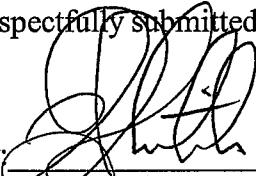
agree with courts that have stated that when a state requires a railroad to pay damages to the civil litigant for a claim related to the railroad's operations, that claim is the equivalent of state regulation of the railroad.").⁹

The Board likewise has no authority under 49 U.S.C. § 10906 to order discontinuance of the rail service provided by IC over the Wilson Spur, or to impose monetary damages for those operations. Even if the Board did have such authority, comparable to so-called "adverse abandonment" authority for regulated lines of railroad, Ashbro has not demonstrated or alleged any basis consistent with the Interstate Commerce Act, the national Rail Transportation Policy, 49 U.S.C. § 10101, or the public interest for forcibly terminating the rail service that IC currently provides to Adell and Bercen via the Wilson Spur. IC provides regular rail service to those customers, with increasing traffic volumes and a total of more than 85 carloads per year. Such operations have been conducted without interruption for more than forty years, and IC's customers have undergone or are considering expansions of their rail facilities. *Dinning V.S.* at 5. As Mr. Dinning points out, Ashbro's petition, if successful in federal or state court or before the Board, would cut off existing rail transportation service to existing shippers. ICCTA preempts efforts under state common law to obtain such a result, and provides no basis for a party to achieve such relief before the STB.

⁹ The Board in Lange recognized that in certain circumstances a landowner might present inverse condemnation claims against a railroad which would not be preempted by ICCTA, and left it to the referring court to decide when the landowner had pled such a claim. Lange at 4; see also A&W Properties, 200 S.W.3d at 351. Here, the federal district court has already made such a ruling. Lange's holding regarding inverse condemnation was presented directly to the district court. See IC Reply Memorandum in Support of Motion to Dismiss, excerpts attached hereto as Attachment 2, at 6-7 & n.7 (arguing that Ashbro did not make an inverse condemnation claim). The district court went on to find that "Ashbro . . . has failed to state any issue in controversy that is subject to state law" and that "[i]ts state law claims are entirely preempted by 49 U.S.C. § 10501(b)" District Court Order at 5.

WHEREFORE, IC respectfully requests that Ashbro's Petition for Declaratory Order, Injunctive Relief and Damages be denied or dismissed in its entirety.

Respectfully submitted,

By: 

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(312) 252-1500

**ATTORNEYS FOR ILLINOIS CENTRAL
RAILROAD COMPANY**

Dated: August 25, 2008

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FILED
U.S. DIST. COURT
MIDDLE DIST. OF LA

2008 JUL -3 P 2:11

ASHBRO, INC.

VERSUS

MISURI ASSOCIATES LIMITED
PARTNERSHIP, ET AL

CIVIL ACTION FILED BY DEPUTY CLERK

NO. 08-086-JVP-SCR

RULING ON MOTION TO DISMISS

This matter is before the court on a motion by defendant, Illinois Central Railroad Company ("Illinois Central"), to dismiss for lack of subject matter jurisdiction (doc. 24). Plaintiff, Ashbro, Inc. ("Ashbro"), has opposed the motion (doc. 29) and Illinois Central has replied to the opposition (doc. 30). Jurisdiction is alleged under 28 U.S.C. § 1331 and 1332 (doc. 1). There is no need for oral argument and the matter is now submitted.

FACTS AND PROCEDURAL HISTORY

This action was originally filed in the Twenty-First Judicial District Court for the Parish of Livingston, State of Louisiana, on December 28, 2007. The petition alleges that on October 29, 1999, Ashbro acquired and commenced possession of immovable property in Livingston Parish over which ran a railroad spur track. Plaintiff further alleges that a search of the public records of Livingston Parish reveals no documents "that provide for, create, evidence, or make any grant(s), or

which create any rights or obligations in favor of defendants with respect to the spur track and/or the Ashbro Property.” (Original complaint, ¶¶ 5-25).

Plaintiff’s petition alleges that, without any recorded evidence of any right to do so, and without the consent or permission of the plaintiff, defendants continue to use the spur on the Ashbro property (original petition, ¶ 26; doc. 29, p. 1). Ashbro therefore seeks, inter alia: (1) a judgment declaring that defendants have no right to use the spur or enter the Ashbro property for any reason; (2) a permanent injunction prohibiting defendants from entering the Ashbro property for any reason; and (3) damages for past use of the railroad spur on the Ashbro property (original petition, ¶ 43; amended petition, ¶ IV).

Defendant, Canadian National Railway Company, removed this action on February 8, 2008, asserting that removal was properly grounded on federal question jurisdiction pursuant to 28 U.S.C. § 1331 because 49 U.S.C. § 10501 preempts plaintiff’s state law claims. The notice of removal also alleged that removal was proper under 28 U.S.C. § 1332, diversity jurisdiction, because the plaintiff is a Louisiana corporation with its principal place of business in Louisiana whereas: (1) defendant, Canadian National Railway Company, is incorporated under Canadian law and has its principal place of business in Montreal, Canada; (2) defendant, Bercen, Inc., is a Rhode Island corporation with its principal place of business in Rhode Island; (3) defendant Adell Compounding, Inc. is a Maryland corporation with its principal place of business in Maryland; and (4) defendant, Misuri Associates

Limited Partnership, is a limited partnership whose general and limited partners are all natural persons who are citizens of either Maryland or New Mexico. The jurisdictional minimum of \$75,000 is met because plaintiff seeks both past and future damages as well as eviction of defendants from a valuable railroad right of way. (Doc. 1, ¶¶ 3-13).

On March 17, 2008, plaintiff amended its complaint by adding Illinois Central Railroad Company, described as a foreign corporation with its principal address in Chicago, Illinois (doc. 15, ¶ 2).¹ Upon a motion by plaintiff, its claims against defendant, Canadian National Railway Company were dismissed without prejudice on March 19, 2008 (doc. 18). On April 8, 2008, Illinois Central Railroad Company filed the current motion to dismiss pursuant to Rule 12(b)(1) of the Rules of Civil Procedure.

LAW AND DISCUSSION

A federal district court is a court of limited jurisdiction and can only exercise that jurisdiction which is statutorily conferred upon it by Congress. *Margin v. Sea-Land Services, Inc.*, 812 F.2d 973, 976 (5th Cir. 1987).

49 U.S.C. § 10501(b) provides:

¹A corporation's principal address does not necessarily indicate its principal place of business. However, for purposes of this motion, the court does not need to address the citizenship of Illinois Central because a plaintiff's action subsequent to removal cannot deprive the court of jurisdiction if removal was proper at the time it occurred. See *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 F.3d 283, 292, 58 S.Ct. 586, 592, 82 L.Ed. 845 (holding that post-removal events cannot deprive a court of jurisdiction once it has attached).

The jurisdiction of the [Surface Transportation Board] over

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(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part [49 U.S.C. §§ 10101 et seq.], the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b)

The Fifth Circuit has held that the plain language of 49 U.S.C. § 10501(b) clearly establishes that the operation of side tracks shall be exclusively regulated by federal law and shall be subject to the exclusive jurisdiction of the Surface Transportation Board.² *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001); see also *Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Company*, 265 F.Supp.2d 1005, 1013 (N.D.Iowa 2003) (stating that section 10501 grants the Surface Transportation Board exclusive jurisdiction over nearly all matters

²Because section 10501(b)(2) preempts state law with regard to the acquisition, operation, abandonment or discontinuance of spur tracks, the court concludes that, at the time of removal, federal question jurisdiction was present under 28 U.S.C. § 1331. Thus, this court has jurisdiction to rule upon the current Rule 12(b)(1) motion.

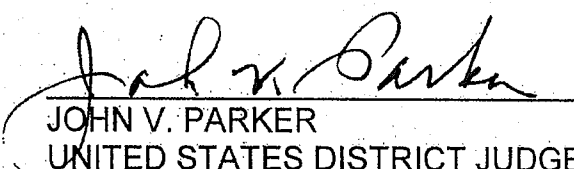
related to rail regulation, including spurs, in order to apply uniform federal standards to this intrinsically interstate form of transportation).

Ashbro argues that this action should not be dismissed at this time because the court retains jurisdiction over state law property issues which must be resolved before the Surface Transportation Board can determine the rights of the various parties in this dispute (doc. 29, pp. 3-5). Ashbro, however, has failed to state any issue in controversy that is subject to state law. Its state law claims are entirely preempted by 49 U.S.C. § 10501(b), which also provides that the Surface Transportation Board has exclusive jurisdiction over this matter.

CONCLUSION

Accordingly, the motion by defendant, Illinois Central Railroad Company, to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure (doc. 24), is hereby **GRANTED**, and this action shall be dismissed because of the lack of jurisdiction.

Baton Rouge, Louisiana, July 3, 2008.


JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ASHBRO, INC.	*	CIVIL ACTION
	*	
versus	*	NO. 3:08-cv-00086
	*	
MISURI ASSOCIATES LIMITED	*	SECTION JVP
PARTNERSHIP, <i>ET AL.</i>	*	
* * * * *		MAG. DIV. SCR

REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS PURSUANT TO RULE 12(b)
OF THE *FEDERAL RULES OF CIVIL PROCEDURE*
FOR LACK OF SUBJECT MATTER JURISDICTION

MAY IT PLEASE THE COURT:

Defendant Illinois Central Railroad Company (IC) respectfully submits this reply memorandum to address arguments raised by plaintiff Ashbro, Inc. (Ashbro) in its opposition to IC's motion to dismiss for lack of subject matter jurisdiction.

ARGUMENT

In its opposition memorandum, Ashbro attempts to escape the preclusive effect of the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10501 *et seq.*, by mischaracterizing the nature of the claims it has actually made in this action, then arguing that the claims are outside the exclusive jurisdiction of the Surface Transportation Board (STB) because they involve "state property law issues" that this Court is "best suited" to resolve. Ashbro's argument both misstates the nature of the relief it is seeking in this action and misappreciates the preemptive scope of ICCTA.

Notably, no showing was required that the railroad “owned” the property itself or a right to use the property in order for ICCTA preemption to take effect.⁶

While ruling that Lange’s dispossession and damage claims were preempted, the STB noted that Lange was not without a remedy against the railroad in the event that the railroad had not already paid compensation for its acquisition/use of the property, as an inverse condemnation/taking claim would not be preempted by ICCTA. *Id.* at *4. The STB left it to the Wisconsin state court to determine whether Lange had pleaded such a claim and, if so, whether WCL or a predecessor had previously obtained ownership of, or the right to use, the property. *Id.*; see also *id.* at *4 n.5. See also *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 110 S. Ct. 914 (1989) (property owners retain a takings claim for loss/delay of exercise of their reversionary right when federal act allows for conversion of railroad rights-of-way to interim public trail use).

In the present case, Ashbro admits IC is utilizing the disputed spur track to “service its clients” and has been doing so since before Ashbro acquired ownership of the parcel on which the spur is located in 1999. Petition at ¶¶ 6, 26; Opposition memorandum at 1. Ashbro’s admission is confirmed by the declaration of John W. Dinning, attached hereto as Exhibit B, which establishes that most of the spur track situated across the northern part of Ashbro’s property had been installed not later than January 1, 1969 and the remainder of the spur needed to reach and service the present

⁶ In fact, in footnote 5 of the ruling, the STB specifically noted that it could not determine from the record whether WC or its predecessor had, through a condemnation proceeding or agreement with a former property owner, acquired the right to use the disputed property. As discussed *infra*, the Board stated that these are matters left to the state court “should they become relevant” in the context of an inverse condemnation claim by Lange.

Adell property was installed in 1989. Because the relief sought by Ashbro (dispossession of the spur and/or the assessment of money damages to compensate for the trespass resulting from its use) would interfere with these ongoing operations, Ashbro's claims are preempted in their entirety pursuant to Section 10501.⁷

Because Ashbro's claims are preempted in their entirety under ICCTA, the proper remedy in disposition of IC's jurisdictional Rule 12(b) motion is dismissal of the action, not entry of a stay enjoining further prosecution of Ashbro's claims in this action while the claims are referred to the STB for consideration, as Ashbro argues. As discussed by another district court in this circuit, the *Pejepscot* decision cited by Ashbro (for the proposition that STB jurisdiction is concurrent, not exclusive) is distinguishable because it involved a claim by the plaintiff for damages *for violations of ICCTA* pursuant to 49 U.S.C. 11704 and 11101(a). See *Rushing v. Kansas City Southern Ry. Co.*, 194 F. Supp. 2d 493, 500 (S.D. Miss. 2001) (dismissing the plaintiff's state nuisance and

⁷ Review of Ashbro's original and amended petitions herein shows undeniably it has not made an inverse condemnation/taking claim in this action. Amending now to assert such a claim would be futile. Even assuming that Ashbro is correct that IC cannot assert a contractual servitude against Ashbro to legitimate its use of the spur because the contractual servitude agreement was not recorded, Louisiana law is clear that a railroad like IC can obtain such a servitude through the "*St. Julien* doctrine," which has existed under Louisiana law for over a century in jurisprudential or statutory form and allows entities possessing the power of expropriation to acquire servitudes by unopposed use and possession of another's land for a public purpose. See *St. Julien v. Morgan Louisiana & Texas R. Co.*, 35 La. Ann. 924 (1883); La. R.S. 19:14. See also *Trustee Corp. v. Allen*, 359 So. 2d 715 (La. App. 4th Cir. 1978) (even if the railroad's servitude agreement with prior property owner was unrecorded, the railroad acquired a servitude for its spur track through the *St. Julien* doctrine).

While a landowner is entitled to make a claim for compensation resulting from a *St. Julien* taking/appropriation of such a servitude, Ashbro cannot successfully claim such compensation from IC in this case because: (1) any claim for compensation has prescribed, as it was not brought within even the longest possible applicable prescriptive period (see La. R.S. 19:2.1 and *Brooks v. New Orleans Publ. Serv., Inc.*, 370 So. 2d 686 (La. App. 4th Cir. 1979) (applying two-year prescriptive period); La. R.S. 13:511 and *Howard v. Louisiana Power & Light Co.*, 583 So. 2d 503 (La. App. 5th Cir. 1991) (applying three-year prescriptive period); *Brewer v. Yazoo & Mississippi Valley R. Co.*, 54 So. 987 (1911) (applying ten-year prescriptive period)); and (2) even if the claim were not facially prescribed, Ashbro has no right of action for compensation because such a right of action is personal to the person from whom the right was obtained and is not conveyed with the property absent an express assignment, which assignment is not present in Ashbro's acquisition document (attached as Exhibit A to Ashbro's original petition). See *Brooks*, 370 So. 2d at 689-90.

**VERIFIED STATEMENT
OF
JOHN W. DINNING**

My name is John W. Dinning. I am Manager of Public Works for Illinois Central Railroad Company ("IC"), a unit of the CN rail system. My office is located in CN/IC's Central Division offices in Jackson, Mississippi. I have been employed in IC's Engineering Department since 1998. As part of IC's Technical Services Group, Central Division, I coordinate matters relating to rail-related public works projects, grade crossings and special projects in the Central Division's five-state area including Louisiana. I also function as the Central Division Engineering Department's liaison with respect to information and records retrieval. I am familiar with the location and history of the spur track located at Denham Springs, Louisiana known as the Wilson Spur (the "Wilson Spur" or "the Spur") which is the subject of the petition filed with the Board by Ashbro, Inc. ("Ashbro").

As discussed below, IC has provided rail transportation service over the Wilson Spur to industries at this location since the 1960s. The relief sought by Ashbro in its petition would force the discontinuance of all rail service to the existing industries located on the Wilson Spur despite recent increasing demand from them for rail service. IC strongly opposes any such relief.

The Wilson Spur is located at Denham Springs, Louisiana on IC's Hammond District between Hammond and Baton Rouge, Louisiana. The Spur is generally a stub-ended industry spur track approximately 1,200 feet in length located just south of and parallel to IC's east-west main track. The Spur consists of two tracks at its east end. The connection with IC's main track is at the west end of the Spur. The Wilson Spur runs along the northern edge of, and provides the sole rail access to, three parcels of industrial land adjacent to and south of the Spur:

the easternmost parcel currently occupied by Adell Compounding, Inc. ("Adell"), the westernmost parcel currently occupied by Bercen, Inc. ("Bercen"), and the middle parcel which I understand is now owned by Ashbro. See map attached as Exhibit A. Though IC does not own the tracks of the Wilson Spur or the property underlying it, IC has used the Wilson Spur to serve industries located along it for more than 40 years, including to serve Adell and Bercen today.

IC's property and contract records indicate that the initial (westernmost) segment of the Wilson Spur was constructed sometime in the mid-to-late 1960s. At that time, all of the industrial land served by the Spur was owned by Livingston Redevelopment Corporation ("Livingston") and leased to Wilson Steel Company, Inc. ("Wilson"). That is how the Wilson Spur got its name. According to IC's records, the history of the Wilson Spur is as follows:

On September 7, 1966, Livingston, Wilson and IC entered into an agreement (the "1966 Agreement") for the construction of a track (the "Track") at Denham Springs to serve certain premises "which Owner [Livingston] has demised to Tenant [Wilson]" and "setting forth the parties' rights and obligations in connection with the construction, operation, ownership and maintenance of the Track." Under the Agreement, Livingston agreed to provide "all of the ground required for the construction, operation, maintenance and use of the Track." IC agreed to construct the Track which would be owned and maintained by Livingston. IC would construct, own and maintain at its expense, the portion of the Track from the point of switch in the IC's main track to its right-of-way line. Wilson agreed to fund the construction of the entire Track and IC agreed to refund to Wilson over a five-year period an amount not exceeding \$6,013.00 (the cost to IC of constructing that portion of the Track on IC's right-of-way) at \$3.00 per carload of freight yielding \$100.00 or more road haul revenue to IC. The Agreement included the usual covenants and indemnifications standard in such agreements. Section 11 of the 1966

Agreement provides that it “shall run with the land upon which the Track is located and shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.” Section 11 also provides that the Agreement “shall continue in force and effect until the expiration of thirty (30) days after notice in writing shall have been given by any party hereto to the others of its desire to terminate this agreement.” IC has no record of ever having received a notice of termination. As far as IC is concerned, this Agreement is still in effect. A copy of the 1966 Agreement is attached as Exhibit B.

Five years later, Livingston leased the easternmost parcel to Polyform, Inc. (a predecessor of Adell) and granted Polyform an option to purchase the property. Sometime thereafter, the Spur was extended eastward to its present length. In 1989, Livingston sold the parcel and assigned the lease to Misuri Associates LP (“Misuri”) who in turn subleased the parcel to Adell. IC was not a party to these transactions, but a copy of the conveyance documents for each transaction is contained in IC’s records.

On April 5, 1973, by Cash Sale (the “Cash Sale”) Wilson sold the westernmost parcel to March Chemical Co., Inc. (“March”). Wilson also granted to “Purchaser, its heirs, successors and assigns, the right to tie into Seller’s spur track located in the northwestern corner of Seller’s remaining contiguous property” shown on the plat attached thereto. In addition, Wilson granted March “a servitude for railroad tracks and railroad passage” over the Wilson tract with “the right of ingress and egress over the property of Seller . . . in order to construct, maintain and repair trackage to be laid in the servitude.” Though IC was not a party to this transaction, a copy of the Cash Sale is contained in its records and is attached as Exhibit C.

In a “User Agreement (Sidetrack)” dated August 1, 1973 (the “1973 Agreement”), among IC, Livingston, Wilson and March, March was granted permission to load and unload its

rail carload shipments on the Wilson Spur and March agreed to perform and be bound by all covenants, provisions and conditions of the 1966 Agreement (except for the refund obligation to IC for the cost of constructing and maintaining the track on IC's property). A copy of the 1973 Agreement is attached hereto as Exhibit D.

On October 5, 1978, March sold its tract to Bercen Chemical Company, Inc. (now Bercen), including "all other rights and servitudes created or acquired by the Cash Sale" including the right previously granted to March to "tie into the spur track located on the northwestern corner of the contiguous property now or formerly owned by the Wilson Steel Company, Inc., the servitude for railroad tracks and railroad passage, [and] the right of ingress and egress over the property now or formerly owned by the Wilson Steel Company, Inc. in order to construct, maintain and repair trackage to be laid in said servitude...all as more fully described in the Cash Sale". IC was not a party to these transactions, but a copy of the 1978 conveyance document is contained in IC's records. It is attached as Exhibit E.

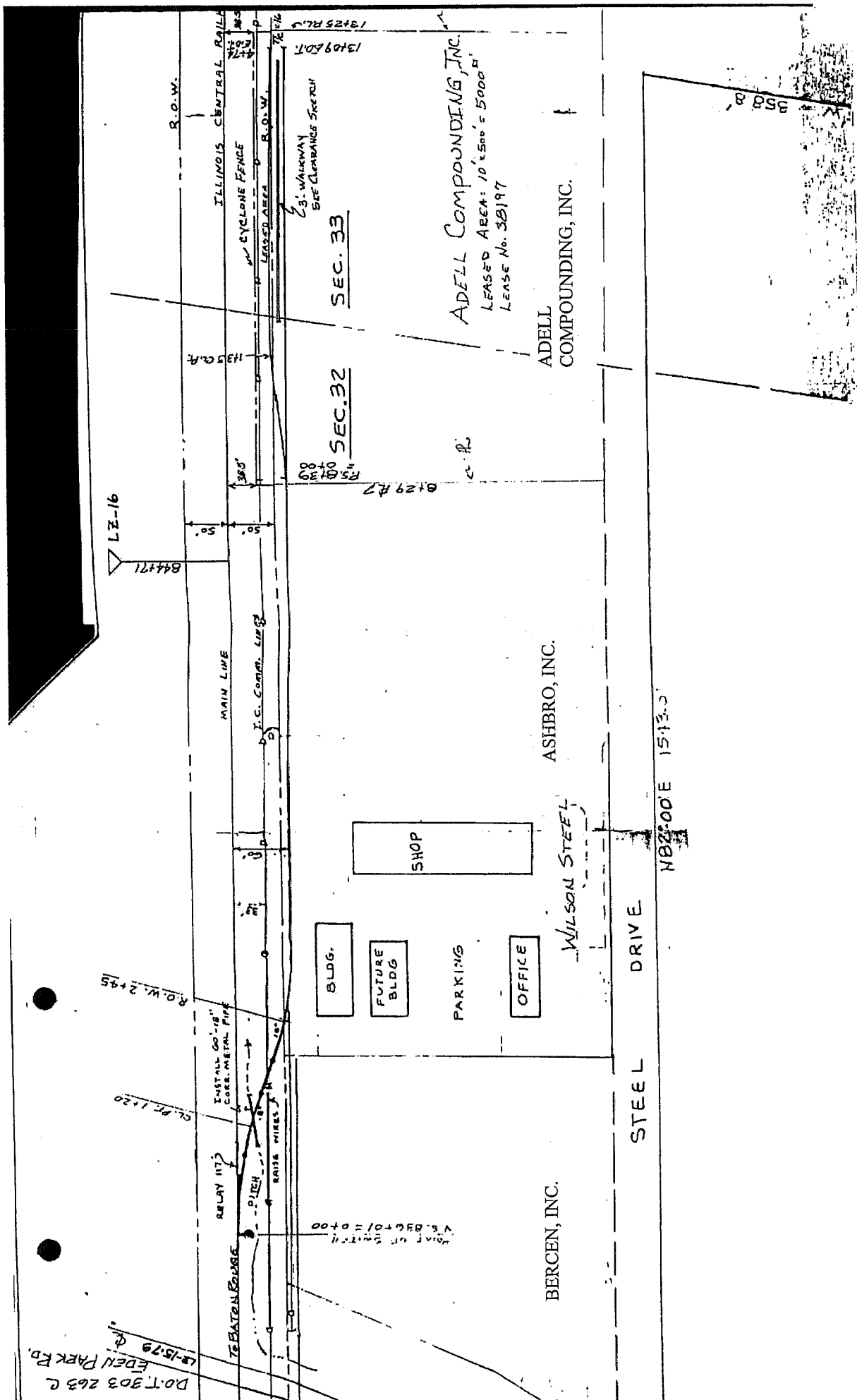
Apparently sometime in late 1999, Ashbro acquired the middle parcel on which a portion of the Wilson Spur lies. I understand that in the court filings by Ashbro that preceded the filing of its petition with the STB, Ashbro asserted, among other things, that all prior rights of Adell and Bercen to a servitude across Ashbro's parcel had been extinguished, that Ashbro is not bound by the 1966 Agreement, that Defendants, including IC, had no right to use the Spur across Ashbro's property and that Defendants, including IC, owe unspecified "damages" for past use of the Spur. I understand that Ashbro seeks essentially the same relief in its petition to the Board. The effect of such relief would be to terminate all rail service to Adell and Bercen.

Adell, located on the eastern end of the Spur, is a producer of plastic compounds which receives inbound carloads of plastic pellets. Sometime in the 1980's Adell added a second track to the Wilson Spur adjacent to its plant to expand its capacity to load and unload rail cars.

Bercen is a manufacturer of chemicals used in the paper industry. Bercen receives inbound carloads of syrup, soy oil and vegetable oil. Cars from Bercen are spotted by IC one or two cars at a time on the Wilson Spur for unloading. Bercen, which is moving its headquarters from Rhode Island to its Denham Springs plant, has indicated to IC that it is interested in acquiring additional property with which to expand its operations.

Though modest, the rail traffic of these industries has steadily increased in recent years. In 2007, the two industries combined received 86 carloads, the highest ever. This represents nearly a doubling in volume since 2002. Traffic volumes for 2008 are on track to exceed 2007 volumes. IC serves Adell and Bercen weekly as needed with a switch job based in Baton Rouge.

Ashbro's petitions to the court and to the Board seek to terminate IC's use of the Spur and thereby force the discontinuance of rail transportation service to Adell and Bercen. IC has provided rail transportation service to industries at this location under long-standing written agreement for more than 40 years and desires to continue to do so. Adell and Bercen are valued customers of IC. Their traffic volumes are increasing. Both industries have expanded their facilities at Denham Springs in recent years and may do so again. IC strongly opposes Ashbro's efforts to cut off IC's ability to serve them. This is not about providing potential rail transportation service to potential shippers. This is about cutting off existing rail transportation service to existing shippers. I urge the Board to deny Ashbro's petition.



18-14034
9-7-66

THIS AGREEMENT, dated this 7th day of September, 1966,
by and among ILLINOIS CENTRAL RAILROAD COMPANY, party of the first
part, hereinafter called the "Railroad Company", LIVINGSTON
REDEVELOPMENT CORPORATION, party of the second part, hereinafter
called the "Owner", whose post office address is P. O. Box 532,
Denham Springs, Louisiana, and WILSON STEEL COMPANY, INC., party
of the third part, hereinafter called the "Tenant", whose post
office address is Denham Springs, Louisiana,

ORIGINAL
THIS DOCUMENT MUST NOT BE TAKEN
FROM I. C. R. R. CO. ARCHIVES

83342

OFFICE OF SECRETARY
ILLINOIS CENTRAL RAILROAD CO.
CHICAGO, ILLINOIS

WHEREAS, Railroad Company shall construct, or has con-
structed, a certain track, hereinafter called the "Track", as shown
by the red line on the blueprint attached hereto and made a part
hereof, to serve certain premises which Owner has demised to Tenant
at Denham Springs, Louisiana, and the parties hereto desire to
enter into an agreement setting forth their rights and obligations
in connection with the construction, operation, ownership and
maintenance of the Track;

NOW, THEREFORE, it is agreed as follows:

1. Owner, at its sole cost, shall provide all the ground
required for the construction, operation, maintenance and use of
the Track in case and insofar as the Track extends beyond the
property of the Railroad Company, and Owner agrees to protect, in-
demnify and save harmless the Railroad Company from and against any
and all claims, demands and causes of action of any person whomso-
ever and all cost or expense incident thereto, which may be sustained
or incurred by Railroad Company arising from or growing out of the
lack of or failure of title of Owner to said ground. Owner shall

1.

9-7-66

also pay all charges and assume all obligations which may be imposed by proper authority as a result of the operation, maintenance and use of the Track.

2. Railroad Company shall be the owner of that portion of the Track from point of switch to right of way line and Owner shall be the owner of that portion of the Track from right of way line to end, and Railroad Company and Owner hereby grant to Tenant the right to use the Track for the transaction of its business at the aforesaid location.

3. Owner shall maintain that portion of the Track from clearance point to end in a condition which in the judgment of the Chief Engineer of the Railroad Company or his authorized representative will safely and satisfactorily accommodate the equipment to be operated thereover by Railroad Company, provided, however, that if any portion of the Track to be maintained by Shipper is located upon property of Railroad Company, maintenance of said portion of the Track shall be performed by Railroad Company at the cost and risk of Owner. In the event Owner shall fail to fulfill the obligation of maintenance imposed upon it, Railroad Company shall be under no obligation to operate thereover while such condition shall exist, nor shall Railroad Company be liable for any loss, cost, damage or expense sustained or incurred by Owner or Tenant as a result thereof. Railroad Company shall have the right but not the duty in the event Tenant fails to fulfill the obligation of maintenance imposed upon it to make all necessary repairs at the cost and risk of Tenant.

At the written request of Owner and provided the labor and material are available, Railroad Company shall maintain that portion of the Track from clearance point to end at the cost and risk of Tenant.

"Cost", as referred to in this Section 3, shall include, but not be limited to, the cost of labor plus 10% to cover supervision and use of tools, cost of materials plus 15% to cover freight charges and cost of handling, and in addition, the term "cost" shall include vacation allowance, paid holiday allowance, health and welfare allowance, premium for workmen's compensation, public liability, and property damage insurance, taxes payable by the Railroad Company under the Railroad Retirement and Unemployment Insurance Acts, and under any excise, sales or use tax based on the wages of labor, cost of material, or the gross cost of such maintenance, as the case may be.

4. Railroad Company shall maintain, at its expense, that portion of the Track from point of switch to clearance point and shall have sole control of that portion of the Track located upon its property and shall also have the right to use or extend the entire Track for the purpose of serving any other industry or shipper now or hereafter located adjacent to the Track or beyond the premises or plant of Owner and/or Tenant. In such event or in the event Railroad Company shall use the Track for purposes other than serving Tenant, Railroad Company shall make an equitable adjustment of the cost of maintaining the Track.

5. It is understood that the movement of railroad locomotives involves some risk of fire, and the Owner and Tenant assume all responsibility for and agree to indemnify the Railroad Company against loss or damage to property of the Owner and Tenant or to property upon their premises, regardless of railroad negligence, arising from fire caused by locomotives operated by the Railroad Company on the Track, or in its vicinity, for the purpose of serving the Owner and Tenant, except to the premises of the Railroad Company and to rolling stock belonging to the Railroad Company or to others, and to shipments in the course of transportation.

Except as otherwise provided in this agreement, each party hereto shall assume liability for loss, damage or injury from any act or omission on its part or that of its employees or agents, to the person or property of any other person or corporation, while on or about the Track, and if any claim or liability other than from fire shall arise from the joint or concurring negligence of two or more of the parties hereto, it shall be borne by them equally.

6. In the event of damage to or destruction of any cars placed on the Track for loading or unloading by the Tenant while on the Track, whether due to the improper use of said cars by Tenant, or Tenant's agents or employees, or to fire not originating from the locomotives of the Railroad Company, or to any other cause, unless the same be the result of the negligence of the Railroad Company, its agents or employees, Tenant shall pay to the Railroad Company the loss due to such damage to or destruction of such car or cars.

7. The Railroad Company shall not be liable for any goods, articles or property of any description that may be shipped by the Tenant over the Track until and unless the car or cars containing such goods, articles or other property shall have been tendered to the Railroad Company for removal and transportation

9-7-66

and shipping directions given, nor shall the Railroad Company be liable or responsible for any goods, articles or other property of any description whatsoever delivered by it on the Track after the car or cars containing the same is or are placed on the Track.

8. Neither Owner nor Tenant shall erect or maintain, or allow to be erected, maintained or to exist, any building, structure or physical obstruction of any kind adjacent to or over said Track at distances less than those prescribed by lawful authority; and in the absence of any such clearances as prescribed by governmental authority, no building, structure or physical obstruction shall be erected, maintained, or allowed to exist within eight and one-half ($8\frac{1}{2}$) feet of the center line of said Track or at a height of less than twenty-three (23) feet above the top of the rails of the Track, except as to wires, the overhead minimum clearance of which shall be in accordance with specifications of the current National Electrical Safety Code, and in no case less than twenty-seven (27) feet (twenty-five (25) feet in the case of wires or cables suspended from messengers) above the top of the rails of said Track. Owner and Tenant will hold and keep harmless the Railroad Company from all liability, loss, damage and cost, including attorneys' fees, for death of or injury to persons, including employees of the parties, or damage to property, including that belonging to the parties, in any manner or degree resulting from or arising out of Owner and Tenant's failure to perform this covenant, regardless of any negligence of the Railroad Company, its agents or employees. Knowledge of or notice to Railroad Company of such failure and its continued operation over the Track thereafter shall not be a waiver of this covenant.

9. Railroad Company agrees to refund to Tenant an amount not to exceed \$6,013.00, which is the cost of constructing that portion of the Track from point of switch to right of way line, in the manner and upon conditions as follows: \$3.00 per carload of freight yielding \$100.00 or more road haul revenue to the Railroad Company delivered or received by it on the Track, provided that the Railroad Company shall not be required to make such refunds for a period longer than five years after the date the Track shall have been completed and ready for use, nor to refund to the Shipper at the end of said five year period the difference, if any, between the aggregate amount of refunds made at said rate per car during said five year period and said sum of \$6,013.00. Said refunds shall be made monthly in the usual course of business.

10. By an Indenture dated November 1, 1949, the Illinois Central Railroad Company has, subject to the terms and conditions

recited in said Indenture (known as the Consolidated Mortgage), assigned and pledged to Guaranty Trust Company of New York, (now known as Morgan Guaranty Trust Company of New York), Trustee, as collateral security, all its right, title and interest in the property covered by this agreement, that under the said Mortgage Indenture the Railroad Company has the right, until default, to possess, use, manage, operate and enjoy the mortgaged premises and to collect, receive and use the rents, issues, tolls, profits and other income thereof, that notice of such assignment and pledge is given pursuant to Section 6.10 of the said Indenture and that the signatures of the parties of the second and third parts to this instrument shall be deemed to be an acknowledgment by such parties of the receipt of such notice.

11. This agreement shall continue in force and effect until the expiration of thirty (30) days after notice in writing shall have been given by any party hereto to the others of its desire to terminate this agreement. This agreement shall run with the land upon which the Track is located and shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in triplicate the day and year first above written.

ILLINOIS CENTRAL RAILROAD COMPANY

By O.H. Zimmerman
Vice President

LIVINGSTON REDEVELOPMENT CORPORATION

By Jack E. C. C. C.
President

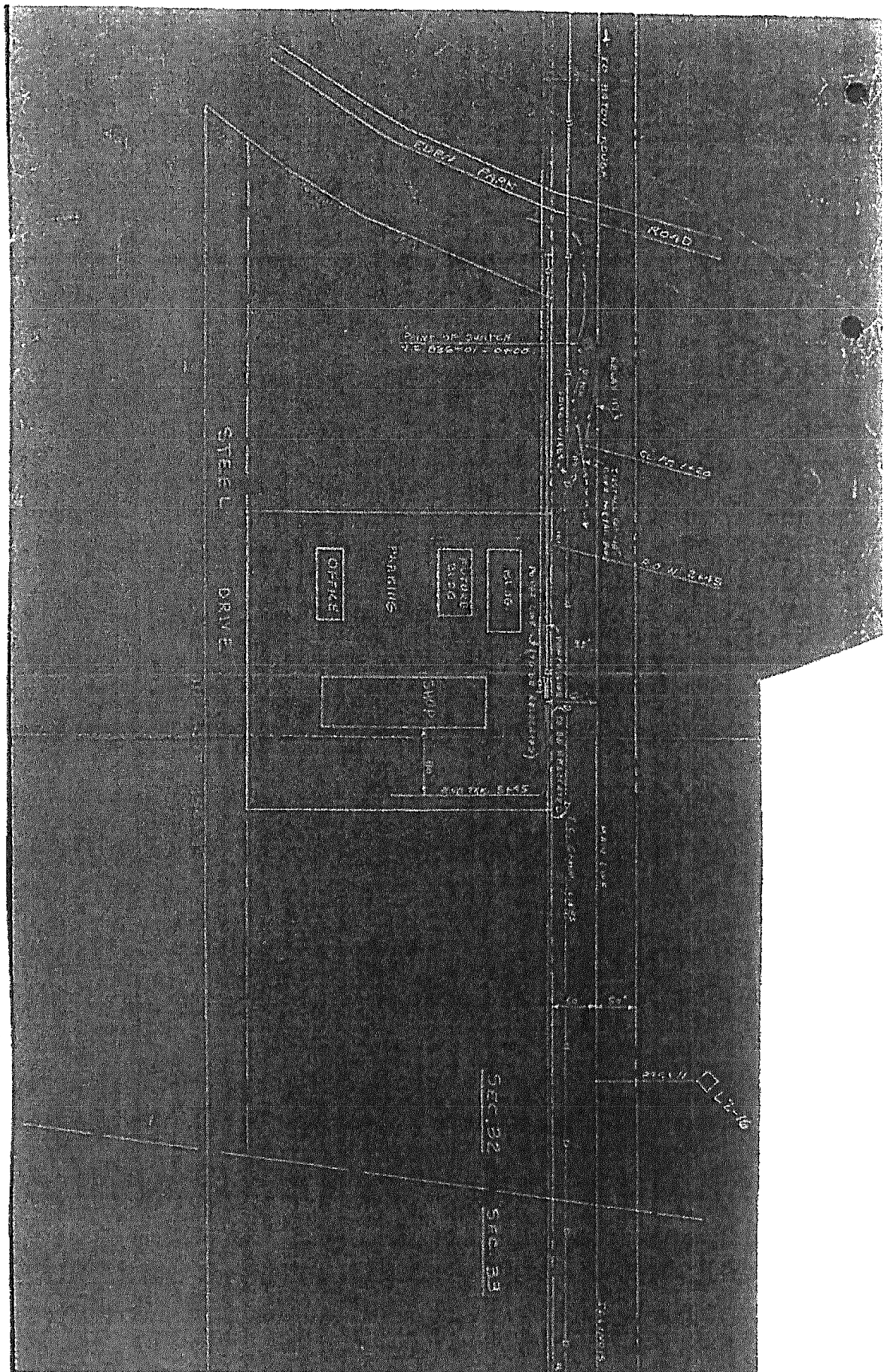
WILSON STEEL COMPANY, INC.

By A. H. H.
President

APPROVED AS TO
FORM

Engineering T. D. Kern
Accounting A. H. H.
Law E. H. H.
EXECUTION
Law R. H. H.

*Wife
Lun*



311

COB 178
311

Original _____ Bundle _____

C A S H S A L E

STATE OF LOUISIANA

On this 5th day of April, 1973, before me, a Notary Public for the Parish of East Baton Rouge, Louisiana, and in the presence of the subscribing witnesses, personally appeared:

THE WILSON STEEL COMPANY, INC., a Louisiana corporation domiciled in East Baton Rouge Parish, State of Louisiana, herein represented by its duly authorized President, A. J. Loup, Jr., acting pursuant to the attached resolution,

herein called SELLER, whose permanent mailing address is declared to be Sorrell and Neoshe Avenue, Baton Rouge, Louisiana, who declared that, for the price of FIFTEEN THOUSAND THREE HUNDRED FORTY-TWO AND 50/100 (\$15,342.50) DOLLARS, cash, receipt of which is acknowledged, SELLER hereby sells and delivers with full warranty of title and subrogation to all rights and actions of warranty SELLER may have, unto:

MARCH CHEMICAL CO., INC., a Louisiana corporation domiciled in East Baton Rouge Parish, State of Louisiana, herein represented by its duly authorized President, Stafford Palombo,

herein called BUYER, whose permanent mailing address is declared to be 1464 Sierra Vista, Baton Rouge, Louisiana, the following described property the possession and delivery of which BUYER acknowledges:

A certain tract or parcel of land containing 3.23 acres including all buildings and improvements thereon and subject to all rights, ways, privileges and servitudes thereunto appertaining, situated in the Parish of Livingston, State of Louisiana, in Section 32, Township 6 South, Range 3 East, Greensburg Land District of Louisiana as outlined in red on plat of survey made by A. J. Loup, Jr., and being more particularly described as follows:

Begin at a point located at the intersection of the East right-of-way line of the Gulf States Utilities servitude, and the South right-of-way line of the Illinois Central Railroad; thence proceed S 10° 25' 28" W a distance of 105.96 feet; thence proceed S 20° 55' 54" W a distance of 16.53 feet to the point of beginning; thence proceed N 82° E a distance of 390.78 feet to a point and corner; thence proceed S 08° E a distance of 295.18 feet to a point and corner; thence proceed S 82° W a distance of 579.30 feet to the West right-of-way of Eden Church Road to a point and corner, then follow the West right-of-way of Eden Church Road N 31° 46' 34" E a distance of 118.01 feet to a point and corner; then continue along the West right-of-way line of Eden Church Road N 20° 55' 54" E a distance of 233.64 feet to the point of beginning.

Seller does hereby grant to Purchaser, its heirs, successors and assigns, the right to tie into Seller's spur track located in the Northwestern corner of Seller's remaining contiguous property shown on the plat attached hereto in blue in the name of The Wilson Steel Company. Seller does further grant unto Purchaser a servitude for railroad tracks and railroad passage. Said servitude to run from the Northwestern corner of the Wilson

COB BOOK NO. 178

93600

PAGE NO. 311

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RECORDED

CM

BY CLERK

FILED April 6, 1973 at 3:45 pm
C. B. Clark

CLERK OF COURT
PARISH OF LIVINGSTON

2007 DEC 28 AM 11:00

DEPUTY CLERK

track as encircled in blue on the attached plat and to run in a generally Southwesterly direction over the Wilson tract as encircled in blue on the attached plat to the 3.23 acres sold by Seller to Purchaser in accordance with this Act, and Purchaser will have the right of ingress and egress over the property of Seller and encircled in blue on the attached plat, in order to construct, maintain, and repair trackage to be laid in the servitude.

Purchaser and Seller do hereby establish for their joint use and benefit a servitude for passage, said servitude to be a private servitude for the benefit of the owners of the property covered by the servitude, said servitude hereby established being that servitude on the South boundaries of the property herein conveyed and on the property circled in blue of The Wilson Steel Company, said servitude being 50 feet wide at right-angles from the South property lines in the aforesaid two tracts. The parties hereby agree and bind their heirs, successors and assigns, that the servitude hereby created on the South property lines of their respective properties shall be used solely for motor vehicles and that they shall share, on a pro rata basis determined by measuring the frontage of their property on said servitude, the maintenance cost and cleaning costs incurred in connection with said servitude. The cost of any road turnout desired by any property owner, including the cost of culverts, headwalls, etc., shall be constructed by such owner at his sole expense.

At such time as the Livingston Parish Police Jury agrees to assume the obligation of maintaining and policing said roadway, the parties agree to grant and dedicate the above described servitude for a public road.

All parties signing the within instrument have declared themselves to be of full legal capacity.

The certificate of mortgages as required by Article 3364 of the revised Civil Code of Louisiana is dispensed with by the parties. All taxes assessed against the property herein conveyed have been paid as appears from the certificate hereto annexed. Taxes for the year of 1973 will be paid by Buyer.

All agreements and stipulations herein contained and all the obligations herein assumed shall inure to the benefit and be binding upon the heirs, successors, and assigns of the respective parties, and the BUYER, his heirs and assigns shall have and hold the described property in full ownership forever.

Thus done, read and passed at my office in Baton Rouge, Parish of East Baton Rouge, Louisiana, in the presence of me, Notary, and the undersigned competent witnesses who have signed in the presence of the parties and me, Notary, on the date first above written.

WITNESSES:

Edm. "Red" Clark
Michael A. [Signature]

THE WILSON STEEL COMPANY, INC.

By: [Signature]
J. J. LOUP, JR., President

MARCH CHEMICAL CO., INC.

By: [Signature]
STAFFORD PALOMBO, President

James E. [Signature]
NOTARY PUBLIC

MSAY ADDISON

18-16246

8-1-73

USER AGREEMENT (SIDETRACK)

THIS AGREEMENT, made as of the 1st day of August 1973,
by and among ILLINOIS CENTRAL GULF RAILROAD COMPANY, hereinafter
called "Railroad", LIVINGSTON REDEVELOPMENT CORPORATION, herein-
after called "Owner", WILSON STEEL COMPANY, INC., hereinafter
called "Industry" and MARCH CHEMICAL COMPANY, whose address is
Eden Church Road, Denham Springs, Louisiana 70726, hereinafter
called "User";

83342

ORIGINAL
THIS AGREEMENT WAS FILED
FROM I. C. G. R. R. CO. RECORDS

WITNESSETH:

WHEREAS, on the 7th day of September, 1966 the Rail-
road, Owner and Industry (or their predecessors) entered into
a written contract, covering the construction, ownership,
maintenance and operation of a certain track at Denham Springs,
Louisiana, being hereinafter called "Sidetrack Agreement" and

WHEREAS, the Sidetrack Agreement is currently in
effect between the Railroad, the Owner and the Industry; and

WHEREAS, the User desires to secure permission from
the Owner, the Industry and the Railroad to load or unload
carload rail shipments on said trackage, which permission the
Owner, the Industry and the Railroad are willing to give upon
the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and
of the benefits to each of them accruing, the parties hereto
do mutually agree as follows:

1. The User may load or unload its carload rail
shipments on the said trackage.

2. The User assumes and agrees to perform and be
bound by all of the covenants, provisions and conditions of
the Sidetrack Agreement to be kept and performed by the Industry
except that the User shall not be obligated to the Railroad for

any part of the cost of constructing or maintaining said trackage as may be required by the Sidetrack Agreement to be paid by the Owner.

3. This agreement shall not relieve the Owner or the Industry of any of its obligations under the Sidetrack agreement, nor shall it otherwise amend the Sidetrack Agreement, except to permit the User to load or unload its carload rail shipments on said trackage, as herein provided.

4. This contract may be terminated by any of the parties hereto upon thirty (30) days' written notice to the other parties of a desire to terminate, and in no event shall it continue in effect beyond the termination of the Sidetrack Agreement.

IN WITNESS WHEREOF, the parties have executed this agreement in triplicate as of the date first above written.

ILLINOIS CENTRAL GULF RAILROAD COMPANY

By J. C. Humbert
Vice President-Operations

LIVINGSTON REDEVELOPMENT CORPORATION

By Jack C. Adams
President

WILSON STEEL COMPANY, INC.

By Choupe
President

MARCH CHEMICAL COMPANY

By [Signature]
President

APPROVED AS TO FORM	
Materials Management	<u>H. C. Miller</u>
Engineering	<u>[Signature]</u>
Accounting	<u>[Signature]</u>
Law	<u>[Signature]</u>
Law	<u>[Signature]</u>
EXECUTION	

ACT OF CASH SALE

BY

MARCH CHEMICAL CO., INC.

TO

BERCEN CHEMICAL COMPANY, INC.

UNITED STATES OF AMERICA

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BE IT KNOWN, That on this fifth day of October, 1978;

BEFORE ME, a Notary Public, duly commissioned and qualified in and for the Parish of East Baton Rouge, State of Louisiana, therein residing, and in the presence of the witnesses hereinafter named and undersigned;

PERSONALLY CAME AND APPEARED:

MARCH CHEMICAL CO., INC., a Louisiana corporation, herein appearing through and represented by Stafford Palombo, its President, duly authorized under and by virtue of the unanimous consent of its shareholders and Board of Directors, a certified copy of which consent is annexed hereto and made part hereof, whose mailing address is declared to be P. O. Box 1197, Denham Springs,

Louisiana 70726 (hereinafter "SELLER");

who declared that SELLER does by these presents grant, bargain, sell, convey, transfer, assign, set over, abandon and deliver, with full warranty of title and with substitution and subrogation in and to all rights and actions of warranty that SELLER has or may have against all preceding owners and vendors, unto:

BERCEN CHEMICAL COMPANY, INC., a Rhode Island corporation, herein appearing through and represented by Charles A. Davis, its President, duly authorized, whose mailing address is declared to be 1381 Cranston St., Cranston, Rhode Island 02920 (hereinafter "BUYER");

the following described property, situated in the Parish of Livingston, State of Louisiana, the possession and delivery of which BUYER acknowledges:

1. A certain tract or parcel of land containing 3.23 acres including all buildings and improvements thereon and all rights, ways, privileges and servitudes thereunto appertaining, situated in the Parish of Livingston, State of Louisiana, in Section 32, Township 6 South, Range 3 East, Greensburg Land District of Louisiana as outlined in red on a plat of survey made by A. J. Loup, Jr., and being more particularly described as follows:

CLERK OF COURSE OF LIVINGSTON

2007 DEC 28 AM 11:00

DEPUTY

Begin at a point located at the intersection of the East right-of-way line of the Gulf States Utilities servitude, and the South right-of-way line of the Illinois Central Railroad; thence proceed S 10° 25' 28" W a distance of 105.96 feet; thence proceed S 20° 55' 54" W a distance of 16.53 feet to the point of beginning; thence proceed N 82° E a distance of 390.78 feet to a point and corner; thence proceed S 08° E a distance of 295.18 feet to a point and corner; thence proceed S 82° W a distance of 579.30 feet to the West right-of-way of Eden Church Road to a point and corner, then follow the West right-of-way of Eden Church Road N 31° 46' 34" E a distance of 118.01 feet to a point and corner; thence continue along the West right-of-way line of Eden Church Road N 20° 55' 54" E a distance of 233.64 feet to the point of beginning.

Seller expressly includes herein all other rights and servitudes created or acquired by the act of Cash Sale recorded in COB 178, page 311, Entry No. 93,600, Livingston Parish, including, but not limited to, the right granted to BUYER, its heirs, successors, and assigns, to tie into the spur track located on the northwestern corner of the contiguous property now or formerly owned by The Wilson Steel Company, Inc., the servitude for railroad tracks and railroad passage, the right of ingress and egress over the property now or formerly owned by The Wilson Steel Company, Inc. in order to construct, maintain and repair trackage to be laid in said servitude, and the servitude of passage on the south boundaries of the property herein conveyed and on the property of The Wilson Steel Company, Inc., being fifty feet (50') wide at right angles from the south property lines in the aforesaid two tracts, all as are more fully described in said Cash Sale recorded in COB 178, page 311, Entry No. 93,600, Livingston Parish, Louisiana.

Being the same property acquired by SELLER from The Wilson Steel Company, Inc. by act of Cash Sale recorded in COB 178, page 311, Entry No. 93,600, of the Official Records of Livingston Parish, Louisiana.

2. A certain tract or parcel of land containing .97 acres including all buildings and improvements thereon and subject to all rights, ways, privileges and servitudes thereunto appertaining, situated in the Parish of Livingston, State of Louisiana, in Section 32, Township 6 South, Range 3 East, Greensburg Land District of Louisiana, shown on a plat of survey made by A. J. Loup, Jr., which is attached to the Exchange recorded in COB 178, page 288, Entry Number 93,601, Livingston Parish, and paraphed for identification therewith, and being more particularly described as follows:

Begin at a point located at the intersection of the East right-of-way line of Gulf States Utilities Company servitude and the South right-of-way line of the Illinois Central Railroad which is the POINT OF BEGINNING.

Thence proceed N 82° E a distance of 349.29 feet to a point and corner; thence proceed S 08° E a distance of 115.00 feet to a point and corner; thence proceed S 82° W a distance of 390.78 feet to the West right-of-way line of Eden Church Road; thence proceed along the West right-of-way line of Eden Church Road N 20° 55' 54" E a distance of 16.53 feet to a point and corner; thence proceed along the West right-of-way line of Eden Church Road N 10° 25' 28" E a distance of 105.96 feet to the POINT OF BEGINNING.

Said property being subject to a utility servitude of unspecified dimensions in favor of Dixie Electric Membership Corporation extending over and across the northerly side of said property and running parallel and adjacent to the northerly boundary thereof.

Being the same property acquired by March Chemical Co., Inc. from John M. Fairbanks by act of Exchange recorded in COB 178, page 313, Entry No. 93,601, of the Official Records of Livingston Parish, Louisiana.

3. All equipment, machinery, fixtures, structures and facilities, whether movable or immovable, located on the above described tracts or parcels of land.
4. Any and all other property, rights and benefits owned by SELLER, whether movable or immovable, tangible or intangible, and wherever located.

TO HAVE AND TO HOLD the above described property unto BUYER, its successor and assigns, in full ownership forever.

This sale and conveyance is made and accepted for and in consideration of sum of SIX HUNDRED TEN THOUSAND AND 00/100 DOLLARS (\$610,000.00), cash, which BUYER has well and truly paid in ready and current money to SELLER, who hereby acknowledge the receipt thereof and grants full acquittance and discharge therefor. The total sales price, at the option of BUYER, may be allocated among the land, improvements and other movable and immovable property and rights herein conveyed.

And now, intervening herein for the purposes more fully set forth hereinbel come:

STAFFORD PALOMBO, married to and residing with Peggy Ann LeBlanc, born LeBlanc, of the full age of majority and domiciled in East Baton Rouge Parish, Louisiana, whose permanent mailing address is declared to be 1464 Sierra Vista Drive, Baton Rouge, Louisiana 70815;

and

ROBERT E. FARMER, married to and residing with Catherine Langford Martin, born Martin, of the full age of majority and domiciled in East Baton Rouge Parish, Louisiana, whose permanent mailing address is declared to be 12345 Warwick Avenue, Baton Rouge, Louisiana 70815.

SELLER, PALOMBO and FARMER do hereby jointly and severally and in solido ,
nant and agree, as part of the consideration for this sale and conveyance and for
ment therefor, that neither they, whether individually or together, nor any person
persons controlling SELLER, including but not limited to PALOMBO and FARMER, shall
period of five (5) years from the date of this Act, compete with BUYER, its success
assigns, in any manner whatsoever, by participating in any manner whatsoever in any
business which is substantially similar to the business conducted by SELLER within
twenty-four (24) months preceeding the date of this Act, whether directly or indire
or individually or together, or as a member or an employee of a partnership or join
venture, or as an employee, officer, shareholder or director of a corporation other
BUYER, or as a consultant or advisor to anyone other than BUYER, including, but not
limited to, the manufacture or marketing of any product or products of the type man
factured or marketed by SELLER within the twenty-four (24) months preceeding the da
this Act, in the following geographical areas of the business of SELLER being conve
hereby and by said Act executed contemporaneously herewith, namely, in the States o
Arkansas, Louisiana, South Carolina and Texas, and they do further agree and admit
covenants and agreements contained in this paragraph are of the essence of said sa
and conveyance, and that any breach thereof will cause irreparable injury to BUYER,
successors and assigns, and that, accordingly, the terms and conditions of this par
graph shall be enforceable by way of injunction.

SELLER, PALOMBO and FARMER do hereby jointly and severally and in solido
covenant and agree that PALOMBO and FARMER have each, contemporaneously herewith,
executed an Employment Contract with Bercen Chemical Company, Inc. and that the
negotiations for each of said Employment Contracts was conducted simultaneously with
negotiations for the sale of the property conveyed hereby and by the Act of Cash Sale
executed contemporaneously herewith before John L. Glover, Notary Public in and for
Parish of East Baton Rouge, State of Louisiana, by SELLER, PALOMBO, FARMER and BUYER
and that each of said Employment Contracts and the covenants not to compete and othe
terms and conditions contained in each are incidents of and are ancillary to the sale
of the property conveyed hereby and conveyed by said Act of Cash Sale executed con-
temporaneously herewith.

to better serve said covenants not to compete and other terms and conditions contained therein and in each of said Employment Contracts, and for BUYER'S greater protection SELLER, PALOMBO and FARMER hereby name and appoint Lawrence R. Anderson, Jr.,
1976 Wooddale Blvd., Baton Rouge, La. 70806

as the Agent and Attorney-in-Fact of each on whom all legal notices and process of law in connection with any legal proceedings that may be brought for the enforcement of obligations of each hereunder and under each of said Employment Contracts, particularly but not limited to said covenants not to compete, in the Courts of the State of Louisiana or in any Federal District Court located in the State of Louisiana may be served, with the same force and effect as if such legal notices or process of law were served either or both of appearers personally, and the said Agent is fully authorized to receive and accept such services on behalf of each appearer.

The parties and intervenors hereto further stipulate that BUYER is not obligated to assume or become liable for any of SELLER'S liabilities, obligations or commitments of any kind whatsoever, but should BUYER decide later to assume any such liability, obligation or commitment, such assumption by BUYER of any liability, obligation or commitment of SELLER in connection with any of the property or rights conveyed hereby is not intended to create, nor shall it create, any vendor's lien or privilege, resolutory condition or stipulation pour autrui.

BUYER assumes the payment of the ad valorem taxes on said property for the current year.

All parties signing the within instrument have declared themselves to be of full legal capacity.

All agreements and stipulations herein, and all the obligations herein assumed shall inure to the benefit of and be binding upon the successors and assigns of the respective parties.

The certificate of mortgages required by Article 3364 of the Revised Civil Code of Louisiana is dispensed with by the parties. Certificates are annexed showing that taxes assessed against the property have been paid.

THUS DONE AND PASSED in Baton Rouge, Louisiana, on the day, month, and year first written, in the presence of me, Notary, and the undersigned competent witnesses, who have signed in the presence of the parties and me, Notary.

WITNESSES:

MARCH CHEMICAL CO., INC.

By [Signature]
Stafford Palombo, President

[Signature]
Stafford Palombo, Individually

[Signature]
Robert E. Farmer, Individually

BERCEN CHEMICAL COMPANY, INC.

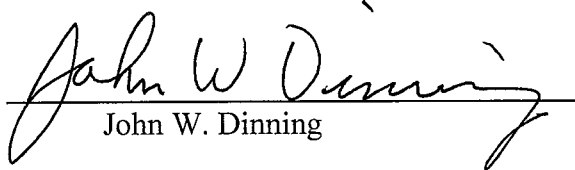
By [Signature]

[Signature]
Notary Public

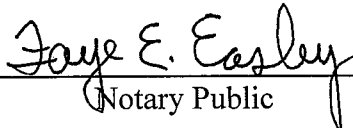
VERIFICATION

State of Mississippi)
)
County of Hinds) SS:

John W. Dinning, being duly sworn, deposes and says that he is Manager of Public Works for Illinois Central Railroad Company, that he has read the foregoing statement, knows the facts asserted therein, and the same are true as stated.


John W. Dinning

SUBSCRIBED AND SWORN TO
before me this 19th day of
August, 2008.



Notary Public



My commission expires:

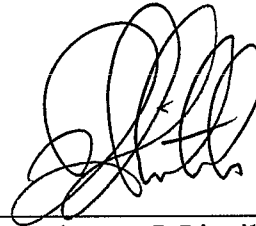
August 22, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2008, a copy of the foregoing
**Reply of Illinois Central Railroad Company to Petition for Declaratory Order, Injunctive
Relief and Damages** was served by overnight delivery upon:

Christopher B. Bailey, Esq.
Gordon, Arata, McCollam, Duplantis & Eagan, L.L.P.
400 East Kaliste Saloom Road
Suite 4200
Lafayette, LA 70508

Donald L. Miers, Jr., Esq.
1930 Florida Avenue, S.W.
Denham Springs, LA 70726-4911



Thomas J. Litwiler