

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA )  
MADIGAN, Attorney General of the State of Illinois,)

Complainant, )

v. )

PCB No. 16-61

AMSTED RAIL COMPANY, INC., )  
A Delaware Corporation. )

Respondent. )

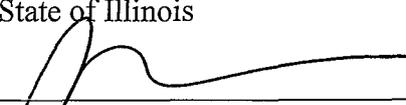
NOTICE OF FILING

TO: Please see attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board by electronic filing COMPLAINANT'S MOTION FOR RECONSIDERATION OF APRIL 7, 2016 ORDER, a copy of which is attached and hereby served upon you.

Respectfully submitted,

LISA MADIGAN  
Attorney General  
State of Illinois

  
\_\_\_\_\_  
Jamie D. Getz

Dated: April 15, 2016

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served via electronic mail on the date of April 15, 2016 the attached NOTICE OF FILING and COMPLAINANT'S MOTION FOR RECONSIDERATION OF APRIL 7, 2016 ORDER, to the addresses listed on the attached Service List.



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Date: April 15, 2016

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEOPLE OF THE STATE OF ILLINOIS, )  
by LISA MADIGAN, Attorney )  
General of the State of Illinois, )  
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Complainant, )  
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v. )  
AMSTED RAIL COMPANY, INC., )  
a Delaware corporation, )  
 )  
Respondent. )

No. 16-61  
(Enforcement – Air)

**COMPLAINANT’S MOTION FOR RECONSIDERATION OF APRIL 7, 2016 ORDER**

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois (“Complainant”), pursuant to Sections 101.520 and 101.902 of the Illinois Pollution Control Board (“Board”) Procedural Rules, 35 Ill. Adm. Code 101.520 and 101.902 and hereby moves the Board to Reconsider its April 7, 2016 Order that denies the Complainant’s Motion to Strike Affirmative Defenses (“Motion to Strike”) as to the first and second affirmative defenses. In support thereof, Complainant states as follows:

**I. SUMMARY**

This Motion for Reconsideration asks the Board to enter an Order striking Respondent’s first and second affirmative defenses, which assert that claims are barred by statutes of limitations. The Board’s April 7, 2016 Order did not address the threshold inquiry of whether the affirmative defenses are legally insufficient. They are not, because (1) no set of facts entitle Respondent to relief under a statute of limitations defense, (2) the Board already determined that statutes of limitations are inapplicable to the Complaint in its March 3, 2016 Order, and (3) the Board has consistently stricken statutes of limitations affirmative defenses as legally insufficient in enforcement cases.

**II. BACKGROUND**

On November 16, 2015, Complainant filed its Complaint against Respondent. The Complaint alleges violations of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/1 *et seq.*, Board Air Pollution Regulations, 35 Ill. Adm. Code Subtitle B, and conditions of various permits Illinois Environmental Protection Agency (“Illinois EPA”) issued to Amsted Rail Company, Inc. (“Respondent”) for operation of its steel manufacturing foundry and roadways located at 1700 Walnut Street, Granite City, Madison County, Illinois.

On January 15, 2016, Respondent filed its Answer and Affirmative Defenses (“Answer”), which listed five purported affirmative defenses. Two of the affirmative defenses, directed to Counts VII, VIII, X, XI, and XII, were premised on the alleged applicability of statutes of limitations.

On the same date (January 15, 2016), Respondent filed its Motion to Dismiss Counts I through VI of the Complaint (“Motion to Dismiss”). In its Motion to Dismiss, Respondent relied on the alleged applicability of a statute of limitations. Motion to Dismiss p. 4. On March 3, 2016, the Board denied Respondent’s Motion to Dismiss (“March 3, 2016 Order”), holding that a statute of limitations is not applicable to the State when it is asserting a public right, as distinguished from a private right, and that “[t]his complaint does not concern any private right.” March 3, 2016 Order, p. 4.

On February 11, 2016, Complainant filed its Motion to Strike. The first and second affirmative defenses each depend on the alleged applicability of statutes of limitations. On April

7, 2016 the Board denied Complainant's Motion to Strike the first and second affirmative defenses ("April 7, 2016 Order").<sup>1</sup>

The Board determined that the Respondent sufficiently pled facts in support of its first and second affirmative defenses and denied the Motion to Strike those defenses. April 7, 2016 Order, p. 2. However, the Board did not address the threshold question of whether the first and second affirmative defenses are legally sufficient. The Complainant respectfully requests that the Board reconsider its April 7, 2016 Order and grant Complainant's Motion to Strike the first and second affirmative defenses.

### III. ARGUMENT

A motion to reconsider may be filed "to bring to the [Board's] attention errors in the [Board's] previous application of existing law. Chatham BP, LLC v. Ill. Env'tl. Prot. Agency PCB 15-173, slip op. at 2 (Nov. 5, 2015).

The Board's ruling on the Motion to Strike did not address the threshold question of whether Respondent's first and second affirmative defenses are legally sufficient. Instead, the Board only considered the secondary question of whether the Respondent provided sufficient facts to support those defenses. April 7, 2016 Order, p. 2. However, the factual sufficiency of the pleading is irrelevant where, as in this matter, the affirmative defenses do not pass the threshold inquiry of whether they are legally sufficient. Complainant provided extensive support for the premise that the first and second affirmative defenses are legally insufficient in its Motion to Strike and does not reiterate them here. *See* Motion to Strike at pp. 2-7.

This Motion for Reconsideration urges the Board to strike the first and second affirmative defenses for the reasons stated in the Motion to Strike, and because:

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<sup>1</sup> The Board granted Complainant's Motion to Strike with respect to the third, fourth, and fifth affirmative defenses, and those are not at issue in this Motion to Reconsider.

1. No set of facts entitle Respondent to relief under a statute of limitations defense,
2. The Board already determined that statutes of limitations are inapplicable to the Complaint in its March 3, 2016, and
3. The Board has consistently stricken statutes of limitations affirmative defenses due to their legal insufficiency in enforcement cases.

**1. No set of facts entitle Respondent to relief under a statute of limitations Defense.**

A motion to dismiss a defendant's affirmative defense should be stricken<sup>2</sup> if "it is clearly apparent that there is no set of facts that might entitle the defendant to some relief." U.S. Bank, N.A. v. Kosterman, 2015 IL App (1st) 133627, ¶ 7. In other words, factual sufficiency is not enough to survive a motion to strike, if the affirmative defense is not legally sufficient in the first place. In the Board's Order denying the Motion to Strike the first and second affirmative defenses, the Board relied on Elmhurst Mem'l Healthcare and Elmhurst Mem'l Hosp. v. Chevron U.A.A., Inc. and Texaco, Inc., PCB 09-066, slip op. at 21 (March 18, 2010), stating that "a motion to strike an affirmative defense attacks only the legal sufficiency of the facts." April 7, 2016 Order, p. 2. However, the statute of limitations defenses are legally insufficient in this matter, regardless of the sufficiency of the facts pleaded by the Respondent.

In ruling on a motion to strike affirmative defenses, the Board evaluates whether the affirmative defense "alleges new facts or arguments that, if true, will defeat... the government's claim. People v. Texaco Ref. and Mktg., Inc., PCB 02-03, slip op. at 3 (Nov. 6, 2003). An affirmative defense must therefore be both factually sufficient ("alleges new facts") and legally sufficient ("if true, will defeat the government's claim"). It is not enough that a respondent allege

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<sup>2</sup> Complainant moved that the Board "strike" affirmative defenses from the pleadings. Some of the applicable case law provides that the Board can "dismiss" with prejudice affirmative defenses that are legally insufficient, as Complainant argues. *See e.g. Kosterman*. The Complainant does not address the semantics of these two actions and uses the terms interchangeably. The result Complainant seeks is the same whether the first and second affirmative defenses are stricken or dismissed: that they be removed from the record and from consideration before the Board.

sufficient facts in support of its affirmative defense; the asserted defense has to have legal merit as well. The statutes of limitations affirmative defenses are legally insufficient because they are inapplicable in enforcement cases brought by the State pursuant to Section 31 of the Act. *See* Motion to Strike, pp. 2-7.

In Elmhurst, the legal sufficiency of the statute of limitations affirmative defense was never in question. In that case, a private cost recovery action, the parties argued about the applicability of the defense due to a dispute about the underlying facts. Elmhurst at 31-33. The Board's decision to deny the motion to strike that defense in that case was because, "[t]he well-pled facts of this affirmative defense and the reasonable inferences drawn therefrom *raise the possibility that Respondents will prevail on this issue.*" Elmhurst at 33 (*emphasis added*). In other words, because there is an applicable statute of limitations in private cost recovery actions, the respondent in that case could possibly prevail on that defense. Elmhurst can be distinguished from this matter because, here, the State is enforcing violations of the Act on behalf of the public, and therefore there is no applicable statute of limitations. Motion to Strike, pp. 2-7. Elmhurst is only definitive on the question of factual sufficiency of a statute of limitations defense in a private cost recovery action, and not on the broader question of legal sufficiency, particularly in an enforcement action by the State.

**2. The Board already determined that statutes of limitations are legally inapplicable to the Complaint in its March 3, 2016 Order in this matter.**

The Board already considered and denied the legal sufficiency of any statutes of limitations in this matter in its March 3, 2016 Order. The Board held: "[t]his complaint does not concern any private right" and thus no statutes of limitations apply. March 3, 2016 Order, p. 4. The Board noted that the Complainant is seeking civil penalties for violations of laws and regulations that are "integral to the Act and to protecting public health and the environment" and

that, furthermore, such civil penalties would be used for “purposes of environmental protection and related enforcement programs.” *Id.* Although the Motion to Dismiss concerned only Counts I through VI of the Complaint, the reasoning behind the Board’s decision applies to all counts because they all pertain to enforcement of the public’s right to a clean environment. *See* Ill. Const. art. XI, § 2. Therefore, the April 7, 2016 Order denying the Motion to Strike appears to be inconsistent with the March 3, 2016 Order, where statutes of limitations were held to be legally inapplicable to the Complaint in this matter.

3. **The Board has consistently stricken statute of limitations as affirmative defenses in enforcement cases due to their legal insufficiency.**

The Board has consistently stricken statute of limitations defenses in enforcement proceedings due to their legal insufficiency. *See* People v. Am. Waste Processing Ltd., PCB 98-37, slip op. at 1, 3 (Mar. 19, 1998) (striking statute of limitations defense and finding “that the instant action is being brought on behalf of the public, and therefore the statute of limitations does not apply.”); People v. Altivity Packaging, LLC, PCB 12-21, slip op. at 2 (Feb. 16, 2012) (striking statute of limitations defense “because no statute of limitations applies”); Ill. Env’tl. Prot. Agency v. Capital Eng’g & Mfg., PCB 85-101, slip op. at 1 (Oct. 10, 1985) (striking statute of limitations defense because “[t]he Board has consistently held that the statute of limitations does not bar enforcement actions under the Act”). Complainant is unaware of any cases where the Board denied a motion to strike an affirmative defense of statute of limitations in an enforcement proceeding brought by the State under the Act. Likewise, Complainant is unaware of any cases where a respondent has prevailed, in whole or in part, on a statute of limitations defense in an enforcement proceeding brought by the State under the Act.

**IV. CONCLUSION**

Respondent cannot prevail on a statute of limitations affirmative defense because it fails the threshold requirement that an affirmative defense be legally sufficient. Complainant therefore respectfully requests that the Board reconsider its April 7, 2016 Order denying the Motion to Strike the first and second affirmative defenses and issue an Order consistent with applicable law that requires affirmative defenses to be legally sufficient.

WHEREFORE, Complainant respectfully asks this Board to 1) reconsider its April 7, 2016 ruling on Complainant's Motion to Strike with respect to the first and second affirmative defenses 2) strike Respondent's first and second affirmative defenses; and 3) grant such other relief as the Board deems appropriate and just.

Respectfully submitted,

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