

ILLINOIS POLLUTION CONTROL BOARD  
February 17, 2022

PHILIP E. CARPER, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 22-12  
 ) (Citizens Enforcement - Noise)  
 TOPFLIGHT GRAIN COOPERATIVE, )  
 )  
 Respondent. )

ORDER OF THE BOARD (by B.F. Currie):

On October 13, 2021, Philip E. Carper filed a complaint (Complaint) against Topflight Grain Cooperative (Topflight). The complaint concerns allegations of noise pollution from Topflight’s grain elevator located at 202 North Main Street, Seymour, in Champaign County. On December 2, 2021, Topflight filed an answer to the complaint (Answer) which included two listed affirmative defenses. On December 10, 2021, Mr. Carper filed a motion to dismiss (Motion) the affirmative defenses. Today, the Board finds the affirmative defenses were insufficiently pled and grants Mr. Carper’s motion to dismiss Topflight’s affirmative defenses.

The entirety of Topflight’s affirmative defense pleading is: “1. Complainant's allegations are barred by the applicable statute of limitations. 2. Complainant's allegations are barred by the doctrine of laches.” Answer at 5. Topflight includes no specific facts or arguments supporting its affirmative defenses.

Complainant Carper requests that the Board dismiss Topflight’s affirmative defenses in their entirety, arguing, “[i]n the instant case, Respondent has failed to provide any facts in support of either of its Affirmative Defenses.” Mot. at 1. As to Topflight’s assertion that the allegations are barred by the statute of limitations, Mr. Carper argues that, “the Board is neither advised as to which, if any, statute of limitation Respondent asserts is applicable, or as to what, if any facts it relies in making its assertion, including without limitation the date or dates upon which it asserts any such statute first applied.” *Id.* As to the Topflight’s second affirmative defense, laches, Mr. Carper argues, “the Board is similarly not informed as to the basis of Respondent’s claim of laches, including, without limitation, the alleged factual circumstances giving rise to the Complainant’s knowledge of his claim, or any action by Complainant giving rise to an inference of acquiescence.” *Id.* at 2.

Topflight did not file a response to Mr. Carper’s motion to dismiss.

## **DISCUSSION**

The Board's procedural rules identify the available responses in an answer to a complaint. 35 Ill. Adm. Code 103.204(d). An answer must admit, deny, or state insufficient knowledge of the complaint's allegations. *Id.* If a respondent intends to assert an affirmative defense, the defense and supporting facts must be plainly stated. *Id.* An affirmative matter raised in the answer that is not properly pled as an affirmative defense cannot later be asserted as an affirmative defense. *See* 35 Ill. Adm. Code 103.204(d) ("must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing"). Properly pleading affirmative defenses provides notice to the other parties of their claims and position. *See Hawkins v. Chicago Commission on Human Relations*, 2020 IL App. (1st) 191201, 171 N.E.3d 21, *citing Moller v. Lipov*, 368 Ill. App. 3d 333, 345-346 (1st Dist. 2006). An affirmative defense must be pled to put the complainant on notice and include facts so the complainant is not unfairly precluded from moving to strike, or otherwise objecting to, the affirmative defense. *See* 35 Ill. Adm. Code 101.506.

The Board finds that Topflight has failed to plead its affirmative defenses with any supporting facts. Therefore, the Board finds that Topflight has failed to meet the standard set forth in 35 Ill. Adm. Code 103.204(d), and grants Mr. Carper's motion to dismiss the affirmative defenses.

## **ORDER**

1. The Board grants Mr. Carper's motion to dismiss Topflight's affirmative defenses.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 17, 2022, by a vote of 5-0.



Don A. Brown, Clerk  
Illinois Pollution Control Board