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 LEAVE TO FILE A REPLY TO RESPONDENT'S RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES, a copy of which is attached and hereby served upon you.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

Jamie D. Getz

Dated: March 8, 2016

Jamie D. Getz
Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
69 W. Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-6986
jgetz@atg.state.il.us

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served via electronic mail on the date of March 8, 2016 the attached NOTICE OF FILING and COMPLAINANT'S MOTION FOR LEAVE TO FILE A REPLY TO RESPONDENT'S RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES to the addresses listed on the attached Service List.

Jamie D. Getz
Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
69 W. Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-6986

Date: March 8, 2016

SERVICE LIST

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794
Carol.Webb@illinois.gov

Elizabeth S. Harvey, Esq.
Swanson, Martin & Bell, LLP
330 N. Wabash, 33rd Floor
Chicago, IL 60611
eharvey@smbtrials.com

Michael L. Maher, Esq.
Swanson, Martin & Bell, LLP
330 N. Wabash, 33rd Floor
Chicago, IL 60611
mmaher@smbtrials.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois,	)	
Complainant,	)	
v.	)	No. 16-61
	)	(Enforcement – Air)
AMSTED RAIL COMPANY, INC., a Delaware corporation,	)	
Respondent.	)	

COMPLAINANT'S MOTION FOR LEAVE TO FILE A REPLY TO RESPONDENT'S RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES

NOW COMES Complainant, People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois ("Complainant"), and hereby moves for Leave to File a Reply. In support of this Motion, the Complainant states as follows:

Section 101.500(e) of the Board's procedural rules, 35 Ill. Adm. Code 101.500(e), permits the filing of a reply to prevent material prejudice. Respondent, Amsted Rail Company, Inc. ("Respondent") included statements in its Response to Motion to Strike Affirmative Defenses ("Response") that could materially prejudice the Complainant with respect the Board's consideration of and decision on Complainant's Motion to Strike Affirmative Defenses ("Motion to Strike") in two ways:

(1) The Response conflates two issues: whether an affirmative defense is legally insufficient or whether it is merely factually sufficient; and

(2) Respondent raises new arguments in its Response that are outside of the scope of the Motion to Strike and Complainant requires the opportunity to address them.

Complainant seeks to clarify how the arguments in the Response do not properly address the Motion to Strike, and seeks to demonstrate that Respondent's new arguments are inapplicable to the arguments in the Motion to Strike by filing its Reply, attached hereto as Exhibit A.

WHEREFORE, Complainant, People of the State of Illinois, respectfully requests that the Board grant Complainant's Motion for Leave to File a Reply to Respondent's Response to Motion to Strike Affirmative Defenses and file the attached Complainant's Reply to Respondent's Response to Motion to Strike Affirmative Defenses *instanter*.

Respectfully submitted,

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

BY: _____

JAMIE D. GETZ
Assistant Attorney General
Environmental Bureau
69 W. Washington St., Suite 1800
Chicago, Illinois 60602
Tel: (312) 814-6986
jgetz@atg.state.il.us

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COMPLAINANT'S REPLY TO RESPONDENT'S RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by Lisa Madigan, Attorney General of the State of Illinois, hereby files this Reply for the purpose responding to statements made by Respondent, AMSTED RAIL COMPANY, INC., in its Response to Motion to Strike Affirmative Defenses ("Response").

Complainant's Motion to Strike Affirmative Defenses ("Motion to Strike") establishes that the purported affirmative defenses offered by Respondent are legally unavailable and should therefore be stricken. The explanation of legal insufficiency for each purported affirmative defense is detailed at length in the Motion to Strike and the Complainant will not restate those reasons in this Reply.

In its Response, however, Respondent obfuscates the notion that its affirmative defenses are legally insufficient by claiming they have alleged sufficient facts which raise the possibility of prevailing on those defenses. Complainant did not address factual sufficiency or the underlying merits of the affirmative defenses in its Motion to Strike simply because Respondent cannot prevail on affirmative defenses that are not legally sufficient in the first place. The

EXHIBIT
tabbies A

affirmative defenses must meet the fundamental requirement that an affirmative defense give color to a plaintiff's claim and assert a new matter which defeats it. *Worner Agency v. Doyle,* 121 Ill. App.3d 219, 222 (4th Dist. 1984). An affirmative defense should be dismissed with prejudice if it is apparent that there is no set of facts that might entitle the defendant to some relief. *U.S. Bank, N.A. v. Kosterman*, 39 N.E.3d 245, 247 (1st Dist. 2015).

1. First Affirmative Defense: Illinois Statute of Limitations

The first affirmative defense is legally insufficient because no statute of limitations applies to the claims asserted in the Complaint. As described at length in the Motion to Strike, the Board has consistently held that there is no statute of limitations that applies to enforcement actions brought by the State pursuant to Section 31 of the Illinois Environmental Protection Act. *People of the State of Ill. v. John Crane, Inc.*, (May 17, 2001), PCB 01-76, slip op. at 5. The Illinois Supreme Court has held that a statute of limitation is not applicable to the State when it is asserting a public right. *People of the State of Ill. v. Amsted Rail Co.* (Mar. 3, 2016), PCB 16-61, slip op. at 4, citing *Clare v. Bell*, 378 Ill. 128, 130-131 (1941). The Board has already held in this matter that "The complaint does not concern any private right." *Amsted* at 4.

Contrary to Respondent's assertion that "Complainant's motion argues the merits of the affirmative defenses…" (Response p. 3), the parties are actually not arguing about the underlying merits of defense (e.g., relevant dates of notifications or compliance activities). The Complainant does not address, and the Board need not consider, the underlying merits of an affirmative defense that is legally insufficient because no set of facts could be pled to entitle Respondent to any relief.

Additionally, Respondent's assertion that a statute of limitations defense must be raised affirmatively to avoid waiver, accompanied by a litany of case citations, distracts from the fact

that no statute of limitations defense applies at all in this matter. The case law provided by Respondent (Response pp. 4-5) only applies where a statute of limitations is applicable to the underlying claims in the first place. Notably, none of the cases pertain to environmental enforcement.

2. Second Affirmative Defense: Federal Statute of Limitations

Respondent's assertion that the State is endeavoring to bring an enforcement action under the Clean Air Act (Response p. 6) is incorrect. As clearly delineated in the Complaint, this matter is brought pursuant to the Illinois Environmental Protection Act before the Board, a state administrative agency. The cases cited by Respondent that discuss enforcement of the Clean Air Act in federal courts are inapplicable to the present matter due to the differences of both the statutes and the forums.

3. Third Affirmative Defense: Error in Permit Terms

Respondent has not and cannot possibly substantiate this purported affirmative defense, because a claim of "error in permit terms" is, in and of itself, not a legally valid affirmative defense. The Complainant does not argue, as Respondent suggests, the substantive merits of the affirmative defense in its Motion to Strike. The underlying merits would pertain to the permit terms themselves and whether they were in error. The Board need not even consider the underlying merits of the affirmative defense, and whether the Respondent could thus prevail, because whether or not the terms of the permit were an error is irrelevant in determining the legal sufficiency of the affirmative defense.

4. Fourth Affirmative Defense: Incorrect Testing Method

Respondent's claim that Illinois EPA demands the use of an improper opacity testing method is legally insufficient because it does not allege "new facts or arguments that, if true, will

defeat.... the government's claims even if all allegations in the complaint are true." *People v. Texaco Refining and Marketing, Inc.*, PCB 02-03, slip op. at 3 (Nov. 6, 2003) (emphasis added). The Complaint alleges that Respondent failed to conduct proper testing. Respondent claims that it did conduct proper testing. This claim does not satisfy the legal requirements of an affirmative defense.

Alternatively, even if the Board were to determine that an allegation of "incorrect testing method" could properly be raised as an affirmative defense, Respondent fails to adequately plead facts in support thereof. Respondent merely states that "on the contrary, respondent has been conducting required opacity testing." Answer p. 66. Respondent claims in its Response that it "has alleged sufficient, additional facts which would defeat the claim and which would take complainant by surprise, if not asserted as such." Response p.7. However, Illinois is a fact pleading jurisdiction. *People v. Waste Hauling Landfill, Inc. et al.* (Dec. 3, 2009), PCB 10-9, slip op. at 7. Legal conclusions unsupported by allegations of specific facts are insufficient. *LaSalle Natl Trust N.A. v. Vill. of Mettawa,* 249 Ill. App. 3d 550, 557 (2nd Dist. 1993). Affirmative defenses that are totally conclusory in nature and devoid of any specific facts supporting the conclusion are inappropriate and should be stricken. *People of the State of Ill. v. Hicks Oil and Gas* (Dec. 17, 2009), PCB 10-12, slip op. at 5. The party asserting the affirmative defense must plead it with the same degree of specificity necessary for establishing a cause of action. *Elmhurst Memorial Healthcare et al. v. Chevron U.S.A. Inc. et al.* (Jul. 7, 2011), PCB 09-66 (July 7, 2011). Respondent's assertion that it has been conducting "required opacity testing" is a legal conclusion without any factual support. As such, the fourth affirmative defense should, at a minimum, be stricken for factual insufficiency.

5. Fifth Affirmative Defense: Additional Affirmative Defenses

For the reasons set forth in the Motion to Strike, the fifth affirmative defense is legally insufficient and is meaningless. To the extent that Respondent requests in its Response that the Complainant agree that reserving the right to assert additional affirmative defenses is "unnecessary as an affirmative defense" (Response p. 8), Complainant declines to offer a legal conclusion to Respondent on this issue or to stipulate to an interpretation of a Board procedural rule via the briefings on its Motion to Strike.

Respectfully submitted,

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

BY: 

JAMIE D. GETZ
Assistant Attorney General
Environmental Bureau
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