BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 16-61
	)	(Enforcement – Air)
AMSTED RAIL COMPANY, INC.,	)	
	)	
Respondent.	)	

NOTICE OF FILING

ORIGINAL

To: Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

Jamie D. Getz
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

PLEASE TAKE NOTICE that on this 20th day of April 2016, the following was filed with the Illinois Pollution Control Board: **Respondent Amsted Rail Company, Inc.'s Response to Complainant's Motion for Reconsideration of this Board's Order on Complainant's Motion to Strike**, which is attached and herewith served upon you.

AMSTED RAIL COMPANY, INC.

By: _____
Michael J. Maher
One of its attorneys

Michael J. Maher
Elizabeth S. Harvey
SWANSON, MARTIN & BELL, LLP
330 North Wabash, Suite 3300
Chicago, Illinois 60611
Telephone: 312.321.9100
Facsimile: 312.321.0990
mmaher@smbtrials.com
eharvey@smbtrials.com

CERTIFICATE OF SERVICE

I, the undersigned, state that a copy of this notice and the above-described document were served electronically upon all counsel of record on April 20, 2016.

Jeanette Podlin
Jeanette Podlin

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	)	
Respondent.	)	

RESPONSE TO COMPLAINANT'S MOTION FOR RECONSIDERATION OF THIS BOARD'S ORDER ON COMPLAINANT'S MOTION TO STRIKE

Respondent AMSTED RAIL COMPANY, INC. (Amsted), by its attorneys Swanson, Martin & Bell, LLP, responds in opposition to Complainant's motion for reconsideration of this Board's April 7, 2016, Order, on Complainant's motion to strike.

ARGUMENT

1. **Complainant's motion to reconsider is procedurally improper as it is not compliant with the Illinois Administrative Code.**

Complainant's motion is an improper attempt to reargue its earlier motion, which the Board granted in part and denied in part. This is improper and contrary to law. The basis for a motion to reconsider before the Illinois Pollution Control Board is "new evidence [] or a change in the law." 35 Ill. Adm. Code 101.902. Complainant does not raise either of these bases to challenge the Board's April 7, 2016, Order. Instead, the Complainant seeks a clarification from the Board on what Complainant defines as the "legal sufficiency" of Amsted's first and second affirmative defenses. The Board's ruling was clear. Plaintiff's questions about the ruling can be addressed by the Hearing Officer, in normal case procedures. Furthermore, a "clarification" is not provided for by procedural rules governing a motion to reconsider. It would be unfair and impermissible for Respondent to gain a "second bite at the apple," without support by

established regulations, merely by seeking "clarification." Plaintiff's real purpose is clear: To reargue its original motion.

The Board's Order was clear that the Complainant's motion to strike was denied as to the first and second affirmative defenses. Furthermore, the Board's Order was clear, that the Board was not making any ruling or suggestion regarding the ultimate success or failure of those affirmative defenses. The Board's Order stated that Amsted's affirmative defenses met applicable pleading requirements. That is the test for purposes of attacking an affirmative defense: "Does the pleading contain the necessary pleading elements?" The Board (correctly) found the answer is "yes." There is no ambiguity and no need for clarification. Without ruling on the substance, the Board held respondent's pleadings contained the required, necessary pleadings of an affirmative defense.

The Illinois Administrative Code plainly addresses a motion to reconsider and the proper basis for a motion to reconsider. The Board's procedural rules should be followed by the parties during proceedings before the Illinois Pollution Control Board. 35 Ill. Adm. Code 101.100. The Board should not have to reissue an Order because Complainant disagreed with how the Board addressed the Complainant's motion to strike. Instead, the Board should rely on its original ruling and deny the Complainant's motion to reconsider as procedurally improper under 35 Ill. Adm. Code 101.902.

2. **The Board's Order denying Complainant's motion to strike as to Amsted's first and second affirmative defenses was correctly decided and should not be disturbed.**

In addition to the procedural faults of the Complainant's motion to reconsider, the motion to reconsider should be denied because the Board correctly denied Complainant's motion to strike Amsted's first and second affirmative defenses. The Board correctly found that a motion to strike "raises only the question of whether the defense is sufficiently pled," and correctly held

that Amsted's first and second affirmative defenses "meet the pleading requirements." April 7, 2016 Order, p. 2. Complainant's attack on the Board's well-reasoned opinion is improper and presents no persuasive reason on why the Board should reconsider its opinion.

"Where well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." Wood River Refining, slip op. at 4, citing *International Insurance Co. v. Sargent & Lundy*, 242 Ill.App.3d 614, 630-631 (1st Dist. 1993)(emphasis added)(finding the trial court erred in striking an affirmative defense where the facts alleged in the affirmative defense could "conceivably" form the basis of a defense). There are innumerable, untold future facts which might impact Amsted's affirmative defenses. Those facts will be addressed at the upcoming hearing. That is why the Board stated it was not offering any prognostication on the future success/failure of those facts – because those facts have not yet been presented and their impact is unknown. But Illinois law clearly holds that Amsted's well-pleaded answer allows for presenting of applicable facts. The Board was correct in denying Complainant's motion to strike.

In its motion to reconsider, Complainant relied on *U.S. Bank, N.A. v. Kosterman*, 2015 IL App (1st) 133627 to support its argument that its motion to strike should have been granted. Motion to Reconsider, p. 4. However, the First District in *Kosterman* found that the trial court ***was incorrect in striking the defendants' affirmative defenses***. *Kosterman*, 2015 IL App (1st) 133627, ¶ 10. In *Kosterman*, the Court found that a challenge of standing is clearly an affirmative defense that should be pled at the responsive pleading stage and, therefore, the trial court erred by striking the defense. *Id.* Likewise, a statute of limitations defense is also an affirmative defense that must be pled at the responsive pleading stage. *Dever v. Simmons*, 292 Ill.App.3d 70, 73 (1st Dist. 1997); s*ee also Findley v. Posway*, 118 Ill.App.3d 824, 827 (1st

Dist. 1983)(statute of limitations is an affirmative defense). The ultimate facts are not decided merely by filing the affirmative defense.

Complainant's reliance on the Board's denial of Amsted's motion to dismiss is also misplaced. The Board's denial of Amsted's motion to dismiss has no bearing on Amsted's affirmative defenses. In denying Amsted's motion to dismiss, the Board simply found that the deferential standard applicable to a pleadings challenge (with all of Complainant's facts being taken as true and in the light most favorable to Complainant) meant that Complainant had sufficiently stated a cause of action. March 3, 2016, Order, p. 2. The Board did not state, as the Complainant argues, that *no statute of limitations defense could ever succeed under any circumstances*. This would violate Illinois law. In fact, the deferential standard afforded Complainant regarding Amsted's prior motion to dismiss is similar to the deferential standard given to Amsted in a motion to strike. The Board's Order on the motion to dismiss allows Amsted to proceed on well-pleaded allegations. The Board's Order is not a finding as to the ultimate impact or outcome of the facts.

Ultimately, Complainant's motion to reconsider repeats the same errors that plagued the original motion to strike. Complainant does not claim Amsted failed to properly plead all necessary elements of an affirmative defense. Complainant is prematurely attempting to prevent Amsted from presenting any facts regarding any statute of limitations – prior to hearing. This is improper. As noted above, there are innumerable, potential future facts which may impact Amsted's affirmative defense. For instance, in a recent case involving the same federal air rules at issue here, the 10th Circuit upheld dismissal based on a statute of limitations. (See *Sierra Club v. Oklahoma Gas & Electric Company*, 46 ELR 20054, No 14-7065 (10th Circuit) decided March 8, 2016.)

Complainant is coaxing the Board to decide Amsted's defenses on the merits. This offends traditional notions of fair play and substantive justice – and should not be allowed by this Board. Amsted's correctly pleaded affirmative defenses should not be decided on the merits at this early stage of proceedings. Complainant's motion to reconsider should be denied.

CONCLUSION

Complainant's motion is merely a rehash of its original argument. No new facts or law is presented. Nothing has changed. This Honorable Board should deny Complainant's Motion for Reconsideration for the same reasons the arguments were originally denied. Further, Complainant's motion to reconsider is procedurally improper and fails to follow 35 Ill.Adm.Code 101.902. For all of these reasons, Complainant's motion to reconsider should be denied.

Respectfully submitted,

AMSTED RAIL COMPANY, INC.

By: _____
One of its attorneys

Dated: April 20, 2016

Michael J. Maher
Elizabeth S. Harvey
SWANSON, MARTIN & BELL LLP
330 North Wabash, Suite 3300
Chicago, Illinois 60611
Telephone: 312.321.9100 (main)
Facsimile: 312.321.0990
mmaher@smbtrials.com
eharvey@smbtrials.com