

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**STERN PRODUCE COMPANY, INC.**

**and**

**Case 28-CA-163215  
28-CA-166351  
28-CA-168680**

**UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 99**

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**RESPONDENT'S RESPONSE TO GENERAL COUNSEL'S  
MOTION TO STRIKE FOURTH SEPARATE DEFENSE**

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Stern Produce Company, Inc. ("Respondent" or "Stern"), by and through its attorneys Sherman & Howard L.L.C., pursuant to Sections 102.23 and 102.24 of the Rules and Regulations of the National Labor Relations Board ("NLRB"), hereby responds to General Counsel's Motion to Strike Respondent's Fourth Separate Defense ("Motion") as follows:

While Respondent agrees that the investigation into the above referenced charges may have been affected by inappropriate disregard of credible evidence and possible misconduct, its Fourth Separate Defense is not based on any misconduct in the investigation.<sup>1</sup> Rather, the Fourth Separate Defense is a direct reference to the vague and conclusory allegations in the Complaint and is meant to preserve Respondent's right to challenge alterations in the theory of violations

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<sup>1</sup> The reference to possible fabrication of allegations was indeed a reference to conduct in the course of the investigation. Respondent agrees that any such misconduct is not currently before the Administrative Law Judge. Respondent nevertheless reserves its right to cross examine all witnesses regarding their prior statements and any conduct by any person that may have affected prior testimony or testimony before the Administrative Law Judge.

that unfold in the course of trial. Given Counsel for the General Counsel's zeal to strike the due process defense, it seems that Respondent's preservation of the argument is warranted.

In NYP Holdings, Inc., 353 NLRB 343, 344 (2008), the Board stated:

The Board has indicated that “[t]o satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Additionally, an agency may not change theories in midstream without giving respondents reasonable notice of the change.” *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (citations and internal quotation marks omitted). In determining whether a respondent's due process rights were violated, the Board has considered the scope of the complaint, and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and the judge's theory. See generally *Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003) (violation based when General Counsel expressly litigated case on narrow theory).

Clearly, the Board did not intend to limit that case to its specific facts. The Board was discussing the general requirements of due process. Although Counsel for the General Counsel agrees that NYP Holdings, Inc. is the relevant precedent, he claims that it “is entirely inapplicable at this stage of the proceedings.” Motion at 4. That is, Counsel for the General Counsel concedes that Respondent has a right to raise due process, but contends Respondent must wait until the *Administrative Law Judge* has violated Respondent's due process rights. Motion at 5.

This interpretation of “due process” suggests that the General Counsel is free to alter its theory of violations mid-stream, exceed the scope of the Complaint, and/or otherwise ‘hide the ball’ from Respondent. Such an interpretation is directly contrary to NYP Holdings, Inc.

Counsel for General Counsel apparently also contends that the failure to specify any date for over 35 allegations that are the alleged basis for extraordinary remedies (including the denial of the right to vote) provides Respondent sufficient due process. Respondent respectfully disagrees that the Complaint sufficiently advises Respondent of General Counsel's theory of violations. While Counsel for the General Counsel evidently embraces a ‘notice pleading’

standard for the Complaint, he demands that Counsel for Respondent provide a thorough recitation of all bases for any asserted separate defense. In a recent case before Administrative Law Judge Geoffrey Carter, the General Counsel similarly sought to strike a due process defense and Judge Carter denied the Motion, indicating that the respondent in that matter was “within its rights to plead” the defense. See excerpt of transcript in Case No. 27-CA-140724, et al., attached hereto as Exhibit “A”.

Respondent merely requests the same consideration in the instant matter. Accordingly, Respondent requests that General Counsel’s Motion to Strike be denied.

Respectfully submitted this 31<sup>st</sup> day of August 2016.

*s/ John Alan Doran*

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 31, 2016, a true and correct copy of the foregoing **RESPONDENT'S RESPONSE TO GENERAL COUNSEL'S MOTION TO STRIKE** was E-filed with the NLRB E-Filing System and served via Federal Express, postage/delivery prepaid, to the following:

Honorable Gerald M. Etchingham                    e-filed  
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NLRB – Division of Judges  
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*s/ Lori Hinkel* \_\_\_\_\_

**EXHIBIT A**

**EXHIBIT A**

OFFICIAL REPORT OF PROCEEDINGS  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION 27

In the Matter of:

Colorado Symphony  
Association,  
and

Case No. 27-CA-140724  
27-CA-155238  
27-CA-161339  
27-CA-179032

American Federation of  
Musicians of the United  
States and Canada, AFL-  
CIO/CLC,

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Place: Denver, Colorado

Dates: August 15, 2016

Pages: 1 through 180

Volume: 1

OFFICIAL REPORTERS

AVTranz  
E-Reporting and E-Transcription  
7227 North 16th Street, Suite 207  
Phoenix, AZ 85020  
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1 welcome to object and then we can address that as that comes  
2 up.

3 MR. SCULLY: Thank you, Your Honor.

4 JUDGE CARTER: So for the record, that petition to revoke  
5 is denied, but then obviously counsel can object as need be.

6 And there was also the General Counsel's motion to strike  
7 certain of Respondent's affirmative defenses. And as I  
8 mentioned off the record in a conference call we had a few days  
9 ago, that motion will be denied. As a pleading, Respondent was  
10 within its rights to plead various defenses, including ones  
11 that General Counsel objected to. And I think we'll see how  
12 that plays out in terms of what they can offer by way of  
13 evidence to prove those up. That certainly as a matter of  
14 pleading, they are within fair bounds to plead them. So that  
15 motion is denied.

16 Anything else before we start with opening statements?

17 MR. FRUEND: Nothing from Charging Party.

18 MS. DEVITT: Nothing from General Counsel.

19 MR. SCULLY: Nothing from Respondent, Your Honor, thank  
20 you.

21 JUDGE CARTER: Okay. All right, we'll start with the  
22 General Counsel. You're opening.

23 MS. DEVITT: Your Honor, this case boils down to the  
24 Employer, Colorado Symphony Association, taking an escape from  
25 its bargaining obligations with both of the longstanding