

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES**

STERN PRODUCE COMPANY, INC.

and
UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99

Cases 28-CA-163215
28-CA-166351
28-CA-168680

**ORDER DENYING GENERAL COUNSEL'S
MOTION FOR A BILL OF PARTICULARS**

This matter is before me on the General Counsel's Motion for a Bill of Particulars. For the reasons set forth below, the Motion is DENIED.

On July 19, 2016, the Regional Director for Region 28 (Regional Director) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing. The consolidated complaint alleges that Stern Produce Company, Inc. (Respondent) violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the Act) when it made multiple threats, promises of benefits and unspecified reprisals to employees, interrogated employees, interfered with a Board investigation and failed to recognize the Union.

On July 25, 2016, Respondent filed an Answer to the consolidated complaint. In the answer, Respondent set forth eight affirmative defenses. At issue here are Respondent's fifth and sixth affirmative defenses. Respondent's fifth separate defense stated that "the complaint is barred by the doctrine of unclean hands." Respondent's sixth separate defense states that "Respondent was denied due process." See R. Answer, at 5.

On August 25, 2016, the General Counsel moved for a bill of particulars regarding Respondent's fifth and sixth separate defenses, arguing that those defenses, as written, are conclusory, unsupported and lacked sufficient details in order for counsel for the General Counsel to prepare and respond to them at the hearing. In response, on August 29, 2016, Respondent amended its Answer to the Consolidated Complaint and Notice of Hearing.¹

A bill of particulars is warranted when a complaint, or in this case, an affirmative defense is so vague that the party charged is unable to meet its case. See *North American Rockwell Corp v. NLRB*, 389 F.2d 866, 871 (10th Cir. 1968). An affirmative defense may be stricken if it is not a recognized affirmative defense in law or is irrelevant to the issues set for hearing. See *TNT Logistics, North America*, 346 NLRB 1301 fn. 1 (2006), enfd. 246 Fed. Appx. 220 (4th Cir. 2007)(unpub). If the defense is insufficiently detailed, it also

¹ Respondent entitled its pleading "Answer to Amended Consolidated Complaint and Notice of Hearing." However, the Consolidated Complaint has not been amended since it was filed on July 19. Thus, I believe the title of Respondent's Answer was simply an inadvertent typographical error.

may be stricken if it is introduced so that the party charged must engage in a "fishing expedition" to discover the evidence needed to support the defense. See *Flaum Appetizing Corp.*, 357 NLRB No. 162 (2011).

In its Amended Answer, Respondent's fifth separate defense, which originally alleged that the complaint denied it due process, is now contained in Respondent's fourth separate defense. However, Respondent new fourth separate defense set forth with more specificity why it believes the consolidated complaint denied it due process. With this clarification, I find that the defense alleged is sufficiently detailed and particularized so as to not prejudice counsel for the General Counsel in its trial preparation.

Respondent's new fifth separate defense now states, "The complaint seeks remedies beyond the Board's statutory authority." Further clarification of this defense is found earlier in Respondent's Answer at paragraph 10, which states:

In response to the proposed remedies set forth in the Complaint, Respondent denies that General Counsel or Charging Party are entitled to any relief, much less the extraordinary remedies set forth in the Complaint. Respondent affirmatively states that the remedies requested are otherwise unwarranted and beyond the Board's authority. See R. Am. Answer at 4.

Again, I find Respondent's new fifth separate defense is now pled with sufficient particularity so as to not prejudice counsel for the General Counsel.

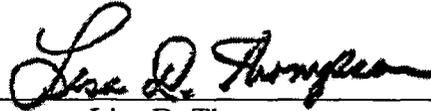
Respondent's sixth separate defense, which previously alleged that the complaint was barred by the doctrine of unclean hands, now states:

Respondent relies on all proper defenses lawfully available that may be disclosed by the evidence in the instant case and reserves the right to amend this pleading to state such other defenses and/or to otherwise supplement this pleading upon discovery of facts or evidence rendering such action appropriate.

This defense does not require a response on the part of the counsel for the General Counsel. However, even assuming it did, I find that the defense is sufficiently detailed and does not prejudice the General Counsel's case.

Accordingly, for the reasons set forth above, the General Counsel's Motion for a Bill of Particulars is DENIED.

Date: September 1, 2016, San Francisco, California



Lisa D. Thompson
Administrative Law Judge

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Cc: SM-Nass
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