

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

AMERICAN MEDICAL RESPONSE MID-ATLANTIC, INC.

and

Case 05-CA-221233

MOSIAH O. GRAYTON, AN INDIVIDUAL

**COUNSEL FOR THE GENERAL COUNSEL’S OPPOSITION TO RESPONDENT’S  
MOTION FOR LEAVE TO FILE AMENDED ANSWER**

Counsel for the General Counsel respectfully opposes American Medical Response Mid-Atlantic, Inc.’s (Respondent) Motion for Leave to File Amended Answer after the Board issued its decision in the above-captioned matter, reported at 369 NLRB No. 125 (July 17, 2020). Respondent’s Motion is inexcusably untimely, and its proposed Amended Answer raises three affirmative defenses which were available at hearing, but which Respondent failed to plead at any time prior to the Board’s issuance of the decision in the instant case. The mere issuance of a *General Motors LLC*, after the Board decided the instant case, does not provide Respondent with an excuse to raise untimely affirmative defenses. 369 NLRB No. 127 (2020).

Under Section 102.23 of the Board’s Rules and Regulations, a respondent may amend its answer any time prior to hearing. However, after hearing opens, it is within “the discretion of the Administrative Law Judge or the Board” to determine whether to grant a motion to amend the answer. See Board’s Rules and Regulations, §102.23. Respondents have been prohibited from amending their answer even as early as the second day of hearing. See *St. George Warehouse, Inc.*, 349 NLRB 870 (2007) (a judge did not abuse her discretion by denying a respondent’s motion, on day two of trial, to amend its answer to deny supervisory status, which it previously admitted by mistake). Further, respondents have been precluded from adding

affirmative defenses at the close of hearing because the case was fully litigated. See e.g. *Oak Harbor Freight Lines, Inc.*, 358 NLRB 328, 332 fn. 2 (2012), reaffid. 361 NLRB 884 (2014). It is well settled that affirmative defenses raised after hearing are untimely and may be considered waived. See, e.g., *EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1, fn. 2 (2015) (defense that allegation is barred by Sec. 10(b) limitations period), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017); *Springfield Manor*, 295 NLRB 17, 17 fn. 2 (1989).

Here, Respondent failed to raise any affirmative defenses before or during hearing. Instead, Respondent attempts to inject three affirmative defenses into this case more than one year since the case was fully litigated and the record was closed, and *after* the Board issued its decision.<sup>1</sup> Respondent was well aware of the facts and legal theories underlying each of its proposed affirmative defenses prior to hearing and simply failed to raise them in a timely manner. Further, the Board already rejected two of the arguments that Respondent now attempts to rebrand and untimely reassert as affirmative defenses.

Respondent fails to explain how the issuance of *General Motors LLC*, supra, compels the extraordinary measure of allowing such a late amended answer. First, for the reasons set forth in counsel for the General Counsel's contemporaneously filed Opposition to Respondent's Motion for Reconsideration, the Board should refuse to reconsider its decision in *American Medical Response Mid-Atlantic, Inc.*, supra. The Board properly decided the case based on extant Board law at the time of its decision. Second, *General Motors LLC*, supra, does not change the legal

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<sup>1</sup> The complaint in this case issued on February 4, 2019. Respondent filed its answer to that complaint on February 14, 2019. The hearing occurred on May 22 and 23, 2019. Counsel for the General Counsel and Respondent filed briefs to the Administrative Law Judge on July 11, 2019. The Administrative Law Judge issued his decision in this case on July 18, 2019. Respondent filed its Exceptions and Brief in Support on August 29, 2019. Finally, the Board issued its decision in this case on July 17, 2020.

landscape to warrant Respondent's untimely proposed affirmative defenses. Respondent was aware of the facts underpinning its defenses and the available legal theories from the outset of this case. Counsel for the General Counsel was not required to plead its theory of the case in the Complaint. *McDonald's USA, LLC*, 362 NLRB No. 168 (2015); *Artesia Ready Mix Concrete, Inc.*, 339 NLRB 1224, 1226, fn. 3 (2003); *Boilermakers Local 363 (Fluor Corp.)*, 123 NLRB 1877, 1913 (1959). Instead, the Complaint properly put Respondent on notice by pleading "a clear and concise description of the acts which are claimed to constitute unfair labor practices." Board's Rules and Regulations, §102.15(b). Further, the *Wright Line* framework is not novel.<sup>2</sup> 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Board in *General Motors LLC* simply announced its expanded application to setting-specific adverse employment actions. *Supra*, slip op. at 1-2. The defenses based on this familiar framework were available to Respondent prior to hearing. Counsel for the General Counsel asserted a primary theory under *Atlantic Steel*, 245 NLRB 814 (1979), but also presented an alternative argument pursuant to *Wright Line*, *supra*. Moreover, counsel for the General Counsel adduced evidence at hearing to support the *Wright Line* theory. Respondent admits as much, and thereby concedes that it was on notice of this potential theory while the record remained open.<sup>3</sup> Regardless, Respondent failed to amend its Answer prior to or during hearing, and its attempt to do so now is untimely.

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<sup>2</sup> The Board in *General Motors LLC* referred to it as "the Board's familiar *Wright Line* standard." *General Motors LLC*, *supra*, slip op. at 2.

<sup>3</sup> Respondent's Motion for Reconsideration states, "the General Counsel also made the choice to adduce evidence that would only be relevant under a *Wright Line* analysis." Respondent's Motion for Reconsideration, page 8.

The substance of Respondent’s three proposed affirmative defenses illustrates that the Board should not take the extraordinary measure of permitting an amended answer at this late stage. The Board already rejected Respondent’s first proposed affirmative defense, that the Complaint was time-barred by Section 10(b) of the Act, both as untimely raised and on the merits. *American Medical Response Mid-Atlantic, Inc.*, supra, slip op. at 1, fn. 1. The Board stated, “[w]e agree with the judge that the Respondent’s Sec. 10(b) defense was not timely raised and, in the alternative, that the defense lacked merit.” Id. It is well settled that a statute of limitations defense is waived unless raised at hearing, and Respondent only first attempted to raise it in its Exceptions to the Administrative Law Judge’s Decision. See e.g. *Headlands Contracting & Tunnelling, Inc.*, 368 NLRB No. 4, slip op. at 7, fn. 2 (June 12, 2019). As the statute of limitation defense is a standard affirmative defense, available regardless of the General Counsel’s underlying unfair labor practice theory, it strains credulity that *General Motors LLC*, supra, opens the door for its late addition into the proceeding. Counsel for the General Counsel’s unfair labor practice legal theory had no bearing on Respondent’s failure to raise this defense. Accordingly, the *General Motors LLC*, supra, framework does not support Respondent’s contention that this extraordinary remedy is warranted.

Similarly, the Board already rejected Respondent’s second proposed affirmative defense, that the Complaint is barred by the last chance agreement Respondent issued to Mosiah Grayton (Grayton). In his Decision and Order, the Administrative Law Judge properly found that the defense was untimely. ALJD 8, fn. 14. Respondent’s Exceptions raised the issue both as to timeliness and the merits of the underlying issue. The Board considered Respondent’s Exceptions, and after that consideration, still affirmed the Administrative Law Judge’s findings. See *American Medical Response Mid-Atlantic, Inc.*, supra, slip op. at 1, fn. 1 (2020). The Board

also found that the last chance agreement violated the Act. *Supra*, slip op. at 1, fn. 2. The Board's role of protecting Section 7 rights includes assessing settlements. See *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB 1127, 1131 (2014). The last chance agreement in this case violates the Act, regardless of whether Grayton or the Union accepted it because of a Hobson's choice.<sup>4</sup> Accordingly, the last chance agreement cannot stand. Respondent had the facts and legal theory available to it at Complaint issuance, and failed to timely act.<sup>5</sup> Even if Respondent timely raised this defense, the Board, having found the last chance agreement constitutes an unfair labor practice, should reject the defense on the merits.

Finally, Respondent's third proposed affirmative defense is that Respondent would have taken the actions set forth in Complaint paragraphs 5 and 6 regardless of Grayton's protected concerted activity.<sup>6</sup> This argument amounts to a respondent's burden of persuasion in a typical *Wright Line* analysis. See *General Motors LLC*, *supra*, slip op. at 2 ("if the General Counsel has made his initial case, the burden of persuasion shifts to the employer to prove it would have taken the same action even in the absence of the Section 7 activity"). As discussed above, Respondent had every opportunity to raise this argument earlier in the proceeding. Respondent

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<sup>4</sup> As discussed in counsel for the General Counsel's Opposition to Respondent's Motion for Reconsideration, notably here, the last chance agreement was accepted without a collectively-bargained grievance and arbitration procedure in place, and possibly with ignorance as to the protections of the Act.

<sup>5</sup> Respondent's former counsel even mentioned it in his opening statement:

The issue in the case, as the complaint says in GC Exhibit 1(g), is whether or not the last chance agreement was issued in violation of the National Labor Relations Act for punishing Ms. Grayton for engaging in protected and concerted activities. Hearing Transcript at 210:4-8.

<sup>6</sup> The Board determined that Grayton engaged in protected concerted activity on December 6, 2017. *American Medical Response Mid-Atlantic, Inc.*, *supra*, slip op. at 1, fn. 1. Respondent's Motion does not admit as much.

simply chose not to do so. Respondent's attempt to amend its Answer and raise affirmative defenses now, more than a year the closure of the record and issuance of the Administrative Law Judge's decision, and after the Board issued its decision, is an extraordinary request, patently untimely, and should be denied.

For the reasons set forth above, counsel for the General Counsel respectfully requests that the Board deny Respondent's Motion for Leave to File Amended Answer.

Dated at Washington, DC, on September 10, 2020, and respectfully submitted by:

**/s/ Christy E. Bergstresser**

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## CERTIFICATE OF SERVICE

I hereby certify that, on September 10, 2020, copies of the Counsel for the General Counsel's Opposition to Respondent's Motion for Leave to File Amended Answer were electronically served on the following individuals by e-mail:

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