UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 30

METCALFE, INC.

and Case 30-CA-083792

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1473

GENERAL COUNSEL'S RESPONSE IN OPPOSITION TO METCALFE, INC.'S MOTION FOR SUMMARY JUDGMENT

In its motion for summary judgment, Respondent claims that the complaint in this case could not issue. Respondent proffers two arguments for this proposition. First, citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281), Respondent argues that the Board could not issue the complaint because it had no quorum. Next, Respondent argues that Acting General Counsel Solomon, and Regional Director Gottschalk on his behalf, could not issue the complaint because Mr. Solomon was invalidly appointed. As shown below, both arguments fail.

1. **Under Section 3(d) of the Act, the General Counsel has independent authority to issue complaints**

Respondent cites Section 10(b) of the Act and argues that a complaint can only be issued by the Board "or any agent or agency designated by the Board for such purposes." (MSJ at 2 (quoting Section 10(b).) Because the Board lacked a quorum when it issued the complaint in

this case, Respondent argues, the complaint must be dismissed. But Respondent's argument ignores the General Counsel's authority to issue complaints under Section 3(d) of the Act.[1]

The Board's composition is irrelevant to the issuance of complaints: the Acting General Counsel has independent authority to issue and prosecute complaints. *Bloomingdale's*, 359 NLRB No. 113, slip op. at 1 ("[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel.") (citing 29 U.S.C. § 153(d); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987) ("*UFCW*"); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010)). Thus, "[t]he authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any 'power delegated' by the Board, but rather directly from the language of the NLRA." *Id.*

2. The Regional Director had authority to issue a complaint in this case because the Acting General Counsel was properly appointed

Respondent next claims that Acting General Counsel Lafe Solomon lacked authority to issue and prosecute the complaint in this matter because he was invalidly appointed under either Section 3(d) of the Act or the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345, et seq. As an initial matter, Section 3(d) provides one avenue to fill Board General Counsel vacancies, and the subsequently-enacted FVRA clearly provides another. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, n.1 (Mar. 13, 2013) (FVRA is valid alternative procedure to

[1] The Wagner Act gave the Board the authority to issue and prosecute complaints. *See* Section 10(b). The Taft-Hartley amendments created the office of the General Counsel and added Section 3(d), which gave the General Counsel "final authority" to issue complaints. Although Section 10(b) remained unchanged, the authority for issuing and prosecuting complaints moved from the Board to the General Counsel. *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1349 (9th Cir. 2011).

Section 3(d) of the Act). The President had the option of appointing an Acting General Counsel under either Section 3(d) of the Act or the FVRA. Here, he chose to appoint Mr. Solomon under the FVRA, and that appointment was lawful. *Id.* Accordingly, Respondent's argument that Mr. Solomon could not issue the complaint in this case because his appointment under Section 3(d) had expired is irrelevant.

Next, Respondent argues that Mr. Solomon was invalidly appointed under the FVRA, based on a ruling of a lone district court, *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), which dismissed an application for preliminary relief under Section 10(j). Although *Kitsap's* rationale is not entirely clear, the district court appears to have accepted *Kitsap's* argument that the Acting General Counsel was not qualified to be designated an acting officer under the Federal Vacancies Reform Act, 5 U.S.C. § 3345, et seq., because he had never served as a first assistant to the departing officer, as assertedly required by Section 3345(b)(1). The text, structure and history of Section 3345 stand against *Kitsap's* construction of its terms.

Subsection (a) of Section 3345 designates three categories of persons who can serve in an acting capacity: first assistants to the vacant office (subsection (a)(1)), Senate-confirmed officers in the government (subsection (a)(2)), and any other qualified high-level officers or employees of the agency in which the vacancy arises (subsection (a)(3)). The President directed Acting General Counsel Solomon to perform the duties of the office of General Counsel pursuant to subsection (a)(3). To qualify under subsection (a)(3), the person named must have served in the agency in which the vacancy arises for at least 90 days during the 365 days preceding the vacancy, and the person must have been paid at a rate at least equal to a GS-15. It is undisputed that Mr. Solomon satisfies the requirements of subsection (a)(3).

The employer in *Kitsap* contended, however, that Mr. Solomon was also subject to the minimum service requirements set forth in subsection (b)(1) of Section 3345. That provision states that "[n]otwithstanding subsection (a)(1)," the subsection authorizing service by a first assistant, a person may not serve as an acting officer "under this section" if that person did not serve as a first assistant for a minimum period during the prior year and has been nominated by the President to fill the vacant office. The employer hinged its argument on subsection (b)(1)'s use of the phrase "under this section," claiming that the conditions set forth in subsection (b)(1) therefore applied to all three categories of acting officials listed in subsection (a).

That argument fails as a textual matter, because it conflicts with other language in subsection (b)(1). By its terms, subsection (b)(1) specifies that its limitations apply "[n]otwithstanding subsection (a)(1)." Subsection (b)(1) thereby expressly directs its limitations toward the class of officials covered by subsection (a)(1) – namely, first assistants. If Congress had meant for the service limitation in subsection (b)(1) to apply to all three categories of officials identified in subsection (a), rather than just to first assistants, it would have said "notwithstanding subsection (a)" rather than referring more specifically and exclusively to subsection (a)(1). The position taken by the employer and the district court in *Kitsap* would render the explicit and specific textual cross-reference to subsection (a)(1) meaningless.

Moreover, even if Respondent's reading of subsection (b)(1) were "textually permissible in a narrow sense," it is "structurally implausible." *New Process Steel, L.P. v, NLRB*, 130 S.Ct. 2635, 2641 (2010). All of subsection (b)(1)'s limiting conditions are linked to service as a first assistant. In addition, subsection (b)(1) constitutes the sole source of any limitations on a first assistant's serving as an acting officer pursuant to subsection (a)(1). By contrast, subsection (a)(3), the provision applicable to Mr. Solomon, has its own self-contained minimum service

requirements, noted above. The proposition that a person independently qualified to serve as an officer or employee under subsection (a)(3) must also satisfy requirements linked to service as a first assistant is structurally implausible.

Finally, *Kitsap*'s reading of subsection (b)(1) is squarely foreclosed by the legislative history of the provision. The amendment's chief sponsor, Senator Thompson, stated explicitly that subsection (b)(1) applies only to first assistants: "Under § 3345(b)(1), the revised reference to § 3345(a)(1) means that *this subsection applies only when the acting officer is the first assistant*, and *not* when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3)." Cong. Rec., 105th Cong., 2nd sess. (Oct. 21, 1998) at p. 27496 (emphasis added). Moreover, Congress' purpose in adding subsection (a)(3) to the bill after it was reported out of Committee would be frustrated by *Kitsap's* construction of Section 3345(b)(1). As Senator Thompson explained, subsection (a)(3) was added because Congress feared that the pool of available first assistants was too small and therefore sought to expand categories from which acting officers could be selected. *Id.* It would seriously undermine Congress's stated goal of expending the pool of potential acting officials beyond first assistants if subsection (b)(1) were construed, as *Kitsap* construes it, to disqualify Senate-confirmed officials and other senior agency officials who have been nominated to fill the vacancy unless those officials had also served as first assistants.

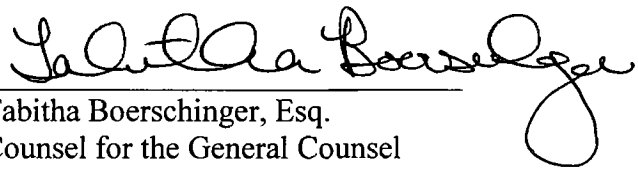
Moreover, as AGC Solomon was properly appointed under the FVRA, his delegation of authority to Regional Director Gottschalk to issue and process complaints is valid.[2] Therefore,

[2] The General Counsel has delegated the authority to the Regional Directors for issuing complaints. *See United Elec. Contractors Ass'n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965), *aff'd.* 366 F.3d 776 (2d Cir. 1966).

the Board should reject Respondent's contention that the complaint should be dismissed.

Dated at Milwaukee, Wisconsin, September 30, 2013.

Respectfully submitted,



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AFFIDAVIT OF SERVICE OF GENERAL COUNSEL'S RESPONSE IN OPPOSITION TO METCALFE, INC'S MOTION FOR SUMMARY JUDGMENT DATED SEPTEMBER 30, 2013.

I, the undersigned employee of the National Labor Relations Board, state under oath that on September 30, 2013, I served the above-entitled document(s) by post-paid regular mail and e-mail upon the following persons, addressed to them at the following addresses:

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