UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of	:	
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AMERICAN ELECTRIC POWER AND ITS SUBSIDIARIES APPALACHIAN POWER COMPANY, INDIANA MICHIGAN POWER COMPANY, KENTUCKY POWER COMPANY, KINGSPORT POWER COMPANY, OHIO POWER COMPANY, PUBLIC SERVICE COMPANY OF OKLAHOMA AND SOUTHWESTERN ELECTRIC POWER COMPANY	:	**CASE 9-CA-095384**
	:	
and	:	
	:	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, SYSTEM COUNCIL U-9 AND LOCALS 329, 386, 696, 738, 876, 934, 978, 1002, 1392 AND 1466, AFL-CIO	:	

CHARGING PARTIES' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

I. INTRODUCTION

Regional Director Muffley issued a Complaint against Respondents on February 28, 2013, alleging that they committed unfair labor practices in violation of Sections 8(a)(1), and 8(a)(5) of the National Labor Relations Act (the "Act"). Administrative Law Judge Eric M. Fine held a hearing on April 29 and 30, 2013. Administrative Law Judge Fine issued his Decision on July 31, 2013, finding that Respondents committed unfair labor practices in violation of Sections 8(a)(1), 8(a)(5) and 8(d) by modifying the parties' master collective bargaining agreement by failing and refusing to keep in effect all terms of the agreement by eliminating retiree medical benefits for employees hired after January 1, 2014. Respondents filed exceptions to the Decision and a brief in support on September 13, 2013. The Charging Parties will file their response to the exceptions concurrently with this filing.

Concurrently with the filing of their exceptions, Respondents filed a Motion to Dismiss alleging that the Complaint and proceedings in this matter were improper because NLRB Acting General Counsel Lafe E. Solomon was not validly appointed. Respondents base their position on the decision of the United States District Court for the Western District of Washington in *Hooks ex rel. NLRB v. Kitsap Tenant Support Servs., Inc.*, 2013 U.S. Dist. LEXIS 114320 (W.D. Wash. August 13, 2013).

Respondents argue that the nonbinding *Kitsap* case somehow voids the Complaint and all proceedings against Respondents in this matter. Respondents argue that when Regional Director Muffley issued the Complaint, he did so under the alleged authority of Acting General Counsel Solomon. As an alternative theory, Respondents argue that, if Regional Director Muffley derives his authority from the Board itself, his actions were still improper because the Board lacked sufficient members for a quorum at the time Regional Director Muffley issued the Complaint. This alternative theory is also based on nonbinding case law. Respondents argue that the proceedings subsequent to the issuance of the Complaint are *ultra vires* under *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

The nonbinding decision in *Kitsap* was improperly decided. Neither *Kitsap, Noel Canning* nor any other case provides a valid argument that the Complaint or proceedings in this matter were improper. The Charging Parties respectfully request that the Board deny Respondents' Motion to Dismiss.

II. ARGUMENT

Respondents correctly assert that Acting General Counsel Solomon has authority independent of the Board. 29 U.S.C. § 153(d); Respondents' Motion to Dismiss, Ex. 2. However, Respondents' assertion that Acting General Counsel Solomon was not validly appointed is

incorrect. Further, Respondents' assertion that, if the appointment was invalid, the actions of Acting General Counsel Solomon and Regional Director Muffley are void is incorrect.

A. **<u>The President's Appointment of Acting General Counsel Solomon Was Lawful</u>.**

Acting General Counsel Solomon was appointed under the Federal Vacancies Reform Act (Vacancies Act). Respondents and the District Court in *Kitsap* rely on the language in 5 U.S.C. § 3345(b), to assert that Acting General Counsel Solomon's appointment was invalid because he did not serve as the First Assistant to the Office of General Counsel prior to his appointment. This Board has already specifically found that "the Acting General Counsel was properly appointed under the Vacancies Act." *Belgrove Post Acute Care Center*, 359 NLRB No. 77 at n. 1, 2013 NLRB LEXIS 159, 195 L.R.R.M. 1188 (March 13, 2013). The Board's finding is the law of the case and should be followed in this matter.

The argument made by the court in *Kitsap* and by Respondents herein is not supported by the language of the statute. President Obama's appointment of Solomon was appropriate under 5 U.S.C. § 3345(a)(3), which provides:

> [N]otwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if –
>
> > (A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and
> >
> > (B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

There is no dispute that Solomon served in a position in the agency for more than 90 days in the 365 day period preceding the vacancy or that his pay was greater than a position at GS-15 of the

General Schedule. Instead, the court in *Kitsap* found and Respondents argue that Solomon was ineligible for the position due to the language in 5 U.S.C. § 3345(b). Their argument is incorrect based on the language of the statute.

5 U.S.C. § 3345(b)(1) provides:

> Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if –
>
> > (A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person –
> >
> > > (i) did not serve in the position of first assistant to the office of such officer; or
> > >
> > > (ii) served in the position of first assistant to the office of such officer for less than 90 days; **and**
> >
> > (B) the President submits a nomination of such person to the Senate for appointment to such office.

(Emphasis added).

At the time President Obama appointed Solomon to the position of Acting General Counsel, he was not disqualified under the language in 5 U.S.C. § 3345(b). The President had not nominated Solomon for the position of General Counsel at the time he appointed him to Acting General Counsel. Solomon was appointed to the position of Acting General Counsel on June 21, 2010. That appointment was during the 111th Congress, which ended on December 22, 2011. The 112th Session of Congress commenced on January 5, 2011, at which time President Obama nominated Solomon to serve as General Counsel.[1] Neither Respondents nor the court in *Kitsap* have provided authority to support an argument that although Solomon was properly

[1] Dates of Sessions of the Congress, present-1789, http://www.senate.gov/reference/Sessions/sessionDates.htm (last visited October 7, 2013).

appointed, he became ineligible at a later time when, under a different Congress, the President nominated him for the position of General Counsel.[2]

The court in *Kitsap* did not even engage in an analysis of the two required conditions for disqualification under 5 U.S.C. § 3345(b)(1). The court stated only that "the FVRA, however, only permits the appointment of a person under specific circumstances and the only circumstance that could apply to Hooks is appointing a person who, within the last 365 days, has served as a personal assistant to the departing officer." The court sites 5 U.S.C. § 3345(b). The court's assertion is not correct. 5 U.S.C. § 3345(a)(2) and (3) provide circumstances where the President can appoint a person who was not the personal assistant to the departing officer. The court failed to engage in an appropriate analysis of the two separate and necessary disqualifying factors under 5 U.S.C. § 3345(b)(1). The President's appointment of Solomon under the Vacancies Act was appropriate, and the Board should deny the Respondents' Motion to Dismiss.

B. <u>Even if the appointment was invalid, there is no basis to void the actions of either Acting General Counsel Solomon or Regional Director Muffley</u>.

Even if Acting General Counsel Solomon had been improperly appointed under the Vacancies Act, Respondents and the District Court in *Kitsap* completely ignore the language in 5 U.S.C. § 3348, which establishes, as a matter of law, that an invalid appointment would not void the actions of the General Counsel of the NLRB. There is no authority to void the actions of Acting General Counsel Solomon or Regional Director Muffley, and thus the Board should deny Respondents' Motion to Dismiss.

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[2] In footnote 6 of their Memorandum in Support of their Motion to Dismiss, Respondents appear to allege that Solomon's tenure under the Vacancies Act was limited to 210 days, and his appointment improperly exceeded that time limit. Respondents reference 5 U.S.C. § 2245, which does not exist. If Respondents intended to reference 5 U.S.C. § 3346, their allegation is still incorrect, because that section permits the individual appointed under the Vacancies Act to remain in the position while nominations are pending before the Senate.

As part of the enforcement provisions of the Vacancies Act, 5 U.S.C. § 3348(d)(1) provides that:

> an action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

However, 5 U.S.C. § 3348(e)(1), specifically states that the section "shall not apply to the General Counsel of the National Labor Relations Board." Therefore, as the Board noted in *Belgrove Post Acute Care Center*, regardless of whether Acting General Counsel Solomon was properly appointed under the Vacancies Act, the Complaint is not subject to attack based on the circumstances of his appointment. 359 NLRB No. 77 at n. 1.

The District Court in *Kitsap* improperly disregarded the language in 5 U.S.C. § 3348(e)(1), stating "Hooks is correct that the actions of Solomon are exempted from the penalty provision. This fact, however, does not grant him the authority to act pursuant to an improper appointment." The court cites no authority for its position, and its interpretation to void all actions taken ostensibly within the scope of authority of the Acting General Counsel, which is also the interpretation advanced by Respondents herein, would render the specific statutory language in 5 U.S.C. § 3348(e)(1) meaningless. Such an interpretation is impermissible as a matter of statutory construction. *Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001).

Further, neither the court in *Kitsap* nor Respondents connect the alleged improper appointment to the Complaint in this matter. While the General Counsel has supervisory authority over the Regional Directors and has final authority with regard to the issuance and prosecution of complaints, 29 C.F.R. § 102.15, grants the Regional Director the authority to issue a Complaint. This regulation represents a longstanding delegation from the General Counsel to the Regional Directors. *United Elec. Contractors Ass'n v. Ordman*, 258 F. Supp. 758 (D.C. N.Y.

1965). A previous valid delegation would survive any invalidity in the appointment of Acting General Counsel Solomon, even if it did exist. *Overstreet ex rel. NLRB v. SFTC, LLC*, No. 13-CV-0165, 2013 U.S. Dist. LEXIS 66694 (D.N.M. May 9, 2013). Respondents and the court in *Kitsap* offer no support for their apparent allegation that an invalid appointment of the Acting General Counsel would invalidate a Complaint issued by a Regional Director pursuant to specific regulatory authority.

Others have tried and failed to rely on the *Kitsap* decision to broadly invalidate actions taken by the Acting General Counsel or Regional Directors. In *Alcoa Inc.*, Case No. 06-CA-065365, 2013 NLRB LEXIS 631 (September 20, 2013), the respondents filed supplemental authority citing the *Kitsap* decision and requesting that Administrative Law Judge Carissimi dismiss the Complaint. Administrative Law Judge Carissimi correctly noted that the Board had rejected a similar argument in the *Belgrove Post Acute Care Center* case. Accordingly, Administrative Law Judge Carissimi noted that he was bound to follow Board precedent unless it is reversed by the United States Supreme Court. *Id.* at *5 (citing *Waco, Inc.*, 273 NLRB 746, 749 n. 14 (1984)).

In *A & B HVAC Servs.*, Case No. 22-CA-093446, 2013 NLRB LEXIS 629 (September 19, 2013), Administrative Law Judge Esposito considered an argument similar to Respondents' herein. Administrative Law Judge Esposito noted that the Board has rejected such arguments in previous cases and has noted that at least three other Circuits have reached a different conclusion than the recent case law relied upon by Respondents herein. (citing *Bloomingdale's, Inc.*, 359 N.L.R.B. No. 113 (2013); *Belgrove Post Acute Care Center, supra*).

C. **The Respondents' Quorum of the Board Theory Must Also Fail.**

As an alternate argument, Respondents argue that if Regional Director Muffley's authority was derived from the Board itself rather than Acting General Counsel Solomon at the time of the issuance of the Complaint, the Complaint and proceedings thereafter are still invalid because the Board's authority was invalid at that time. The Respondents rely on *Noel Canning*, 705 F.3d 490 for this argument. In *Noel Canning*, the United States Court of Appeals for the District of Columbia found President Obama's recess appointments of two former members of the Board, Sharon Block and Richard Griffin, Jr., to be improper. The Court in *Noel Canning* found that the Board lacked authority for want of quorum. The United States Supreme Court has accepted *certiorari*.

While the United States Court of Appeals for the Fourth Circuit agreed with the D.C. Circuit in *NLRB. v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013), other courts of appeals, including the United States Court of Appeals for the Ninth Circuit, have found differently when faced with the issue. *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004); *See also Paulsen v. Renaissance Equity Holdings, LLC*, LLC, 849 F. Supp. 2d 335 (E.D.N.Y. 2012).

Further, the Board has rejected a broad application of the *Noel Canning* decision, such as the one advanced by Respondents herein. *Belgrove Post Acute Care Center*, 359 NLRB No. 77. The Board has determined that, because the question remains in litigation and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. The Board has proceeded to fulfill its duties and rule on cases. The Board should continue to fulfill its duties in relation to this case by denying Respondents' Motion to Dismiss and issuing its Decision.

III. CONCLUSION

Acting General Counsel Solomon's appointment pursuant to the Vacancies Act was appropriate. Neither his nor Regional Director Muffley's actions should be voided by the Board for any reason. For the reasons set forth herein, the Charging Parties respectfully request that the Board deny Respondents' Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 28th, 2013, the foregoing Memorandum in Opposition was electronically filed with the National Labor Relations Board. Copies of the Post-Hearing Brief were served via electronic mail upon:

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