UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of:	)	
	)	
MICHAEL RICE	)	
	)	
and	)	
	)	
WILLIAM L. NORVELL,	)	
	)	
Charging Parties,	)	
	)	
and	)	**Case Nos. 05-CA-097810**
	)	**05-CA-097854 and**
	)	**05-CA-094981**
	)	
BUTLER MEDICAL TRANSPORT, LLC,	)	
	)	
	)	
Respondent.	)	

RESPONDENT'S REPLY TO THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Submitted by:
Gil A. Abramson
Louis J. Cannon, Jr.
Jackson Lewis LLP
2800 Quarry Lake Drive
Suite 200
Baltimore, Maryland 21209
Phone: (410) 415-2000
Fax: (410) 415-2001
gil.abramson@jacksonlewis.com
louis.cannon@jacksonlewis.com

I. INTRODUCTION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Butler Medical Transport, LLC ("Butler" or "the Company"), by its undersigned labor counsel, hereby files this Reply to the Acting General Counsel's Answering Brief. On September 30, 2013, Butler filed Exceptions, with a supporting brief, to portions of the Administrative Law Judge's ("ALJ") decision. On November 1, 2013, the Acting General Counsel filed an Answering brief. For the reasons that follow, the Board should reject the Acting General Counsel's arguments.

II. ARGUMENTS IN SUPPORT OF BUTLER'S REPLY

A. The Acting General Counsel Lacked Authority to Issue Complaint in This Case.

The ALJ erred in failing to grant Butler's motion to dismiss under *Noel Canning*.[1] The Acting General Counsel's Complaint, as well as these proceedings, is barred because at the time the Complaint issued in this case, the National Labor Relations Board lacked a legally constituted quorum and was therefore without authority to act. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2636 (2010). Because the President's recess appointments of Members Block and Griffin were constitutionally invalid, the Board lacked a quorum when the Complaint issued. *See Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013); *NLRB v. New Vista Nursing & Rehab.*, No. 11-3440, Nos. 12-1027 & 12-1936, 2013 U.S. App. LEXIS 9860, at *116-117 (3d Cir. May 16, 2013).[2]

---

[1] In its Exceptions, Butler referred to the Supreme Court's decision in *Noel Canning*; this was, of course, a typographical error, and Butler was referring to the District of Columbia Circuit's *Noel Canning* decision. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. Jan. 25, 2013). However, the thrust of Butler's argument is that the Board cannot act without a valid quorum, which the Supreme Court held in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2636 (2010). Because of President Obama's invalid recess appointments to the Board, it lacked a quorum (and therefore the authority to act) when the Complaint in this case was issued.

[2] Additionally, the Complaint is invalid because the Acting General Counsel under the Federal Vacancies Reform Act. *Hooks v. Kitsap*, No. C13-5470, 2013 U.S. Dist. LEXIS 114320 (W.D. Wash. Aug. 13, 2013). Because the Acting General Counsel's appointment was invalid, the Board could not have delegated its authority to him to issue the Complaint. The Senate's confirmation of Richard Griffin as General Counsel in October 2013 does not affect the conclusion that the Complaint in this case was void *ab initio*. While counsel for the Acting General Counsel is

B. The ALJ Exceeded His Authority in Finding That Norvell Made "Common Cause" With Chelsea Zalewski Regarding Butler's Ambulances.

The Acting General Counsel unconvincingly argues that the ALJ was within his authority to conclude that Norvell made "common cause" with Zalewski regarding an issue of mutual concern to employees: the condition of Butler's ambulances. As Butler argued in its Exceptions, the theory that Norvell made common cause with Zalewski because she had allegedly been terminated for criticizing Butler's ambulances never was raised by the Acting General Counsel. Exc. Br. at 12-17. Butler therefore was not given the opportunity to litigate fully all material facts. The arguments made in the Answering Brief simply underscore that the ALJ erred in reaching this conclusion.

For example, the Acting General Counsel faults Butler for "tak[ing] us through a very technical—and...unsupported by the record—tutorial about the quirks inherent in Facebook's layout..." Ans. Br. at 19. Butler made the point that only four comments are automatically displayed at once and that because General Counsel's Exhibit 13 shows that Zalewski's post about Butler's "units" was more than 4 posts away from Norvell's, it could not be taken for granted that Norvell had seen that post. Exc. Br. at 13. In response, the Acting General Counsel argues that Butler's "representation on brief as to what any Facebook user can attest to is not a substitute for record evidence" and that Butler failed to introduce testimony from any Facebook user "about this phenomenon." Ans. Br. at 20. The Acting General Counsel faults Butler for

---

correct that Butler did not "specifically urge" any exception to the ALJ's failure to find on this point (and that Butler did not raise the argument in its papers or at trial), the Third and Sixth Circuits have concluded that challenges to the Board's overall authority to act are jurisdictional in nature and cannot be waived. *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013); *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403 (6th Cir. 2013). Therefore, Butler respectfully urges the Board to consider Butler's argument on this point and to reverse its holding in *Belgrove Post Acute Care Ctr.*, 359 NLRB No. 77 (Mar. 13, 2013) with respect to the propriety of the Acting General Counsel's appointment.

failing to cross-examine Norvell on General Counsel's Exhibit 13.[3] Finally, inexplicably, the Acting General Counsel argues that no evidence in the record establishes that Butler management did not see the Zalewski post regarding Butler's "units" prior to the hearing. Ans. Br. at 20.

The Acting General Counsel ignores the fact that Butler would not have had any occasion whatsoever to adduce testimony from any witness about how many Facebook posts are displayed when they appear on one's page. Butler had no reason to question Ellen Smith as to whether she had seen General Counsel's Exhibit 13—or its contents—prior to the hearing. Why would it have done so, if the Acting General Counsel never argued that Norvell was responding to Zalewski's alleged complaint about Butler's vehicles? Butler's counsel similarly had no reason to cross-examine Norvell as to whether he had seen General Counsel's Exhibit 13—the entire Zalewski conversation thread—before or after he made his post.[4] Indeed, the Acting General Counsel never explains how it would have been practical for Butler to do so: he does not quarrel with Butler's contention that the document was presented to Butler for the first time during the hearing. Is an employer really expected to have its counsel pore over a document introduced for the first time at trial and anticipate each and every inference that might be drawn from such evidence? Hardly.

Rather, Board precedent dictates that the mere introduction of evidence in the record is not sufficient to have put a respondent on notice of a theory not pursued by the General Counsel.

---

[3] The Acting General Counsel takes issue with Butler's characterization of his Exhibit 13 as a "pasted-together" Facebook posting created by Norvell. Ans. Br. at 20. There is no basis for this argument; Norvell testified that he created the document. Tr. 19:9-12. Norvell did not testify that he printed the conversation thread from its native format; how could he possibly have created the document if he did not cut and paste its contents from Facebook?

[4] Indeed, common sense dictates that Norvell made the document after he was terminated. Why else would he have created the document but to illustrate to a third party why he was terminated? Likely, Norvell saw Zalewski's post about Butler's "units" for the first time after he was terminated, when he accessed the entire thread to transfer it to another document. Of course, Butler has no way of knowing this, as the issue never arose at trial and only surfaced with the ALJ's decision.

Champion Int'l Corp., 339 NLRB 672, 673 (2003); *United Mine Workers of Am., Dist. 29*, 308 NLRB 1155, 1158 (1992). As stated by the Seventh Circuit, there are due process concerns that preclude a Board finding based on a theory not litigated at trial. *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir. 1987).

While testimony and other evidence on the above points would have been preferable to the arguments Butler was forced to make in its Exceptions Brief, the Acting General Counsel ignores the fact that Butler effectively was denied the chance to litigate any of these issues. The "faults" the Acting General Counsel finds with Butler's having made those arguments in brief rather than through the introduction of evidence merely highlight that all material facts were not litigated. Therefore, to the extent that the ALJ's finding of protected activity on Norvell's part depends on his having "made common cause" with Zalewski's regarding Butler's vehicles,[5] the conclusion is untenable and should be reversed.

C. The Acting General Counsel Fails to Establish That Norvell's Post Was Protected.

The Acting General Counsel argues that Norvell's discharge was unlawful under the *Meyers Industries* test. 268 NLRB 493 (1984) (*Meyers I*); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*). The dispositive issue here is whether Norvell's post was protected, and the Acting General Counsel fails to establish that it was. The Acting General Counsel attempts to distinguish *Holling Press*, 343 NLRB 301 (2004), on the ground that the alleged discriminatee in that case was terminated for trying to enlist coworkers to substantiate her meritless sexual harassment claim. Ans. Br. at 12. As the Acting General Counsel argues, the employee's conduct "was not protected because it was not undertaken for mutual aid and protected, having been 'uniquely designed to advance her own cause.'" *Id.* (*citing Holling Press*, 343 NLRB at

[5] As established in Butler's Exceptions Brief and in Section II.C. below, a finding of protected activity would depend entirely on the improper conclusions reached by the ALJ.

301). According to the Acting General Counsel, because Zalewski was not "begging individual employees to participate in her individual issue," *Holling Press* is inapposite. Ans. Br. at 13.

The Acting General Counsel misconstrues *Holling Press*. As the Board stated at the beginning of its analysis in that case, for conduct to fall within the protection of Section 7, "it must be both concerted and engaged in for the purpose of 'mutual aid or protection.'" *Id.* at 302. Upholding the ALJ's finding that the alleged discriminatee had engaged in concerted activity, the Board nevertheless found that she had not engaged in protected activity because her potential sexual harassment claim was personal in nature. *Id.* No collective goal was implicated but, rather, the employee's own cause. *Id.* The Acting General Counsel apparently takes the position that because Norvell was advising another employee about her rights (rather Norvell asking employees for help with his own claim against Butler), *Holling Press* is distinguishable. No basis exists for such a conclusion. As the Board stated in *Holling Press*, there must be some mutual or collective goal present, as opposed to an issue affecting a single employee.

The Acting General Counsel's contention that a collective concern about "job security" satisfies the requirement of mutual aid or protection (Ans. Br. at 13) simply stretches Board precedent such that any suggestion to a terminated coworker that he or she sue their employer, no matter the motivation the employee had in making it, implicates a collective concern and would make the coverage of Section 7 effectively limitless. Nothing in Board's precedent allows for such a conclusion. The cases the Acting General Counsel cites do not support its position here.

The Acting General Counsel cites *Relco Locomotives, Inc.*, where the Board found protected activity where two employees were terminated for discussing their concerns about a coworker having been terminated, where a collective concern regarding job security existed. 358

NLRB No. 37, Slip Op. at 86 (Apr. 30, 2012). As the Board put it, "if [the terminated coworker] (by all accounts, a good employee) could be fired, then all employee jobs were at risk." *Id.* The facts here are distinguishable; Norvell did not discuss his "concerns" about Zalewski's termination with a coworker; there is no evidence that Norvell indeed had "concerns" about job security; there is no evidence in the record at all that Norvell intended to induce group action related to job security. The other cases the Acting General Counsel cites involved several employees banding together to advance an issue of concern to all employees. *Supreme Optical Co.*, 235 NLRB 1432 (1978) (attendance by several employees at a discharged employee's unemployment hearing protected where actions made it more likely that they would themselves be supported by coworkers in the future were they to be put in similar situation); *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975) (three employees who filed civil suit against employer for unpaid wages engaged in protected activity).

Although the Acting General Counsel argues that Norvell "was seeking to initiate or induce group action, as contemplated by *Meyers II*" (Ans. Br. at 12), he does not explain what kind of "group action" Norvell possibly could have sought to induce. What evidence in the record supports this contention? None at all. Norvell simply told Zalewski that she should sue or file an administrative claim of some kind against Butler. There is no indication at all that Norvell contemplated or sought to induce group action by his sham "advice" to Zalewski. He did not even know why she had been terminated, and he had no way of knowing whether she actually had any basis to seek recourse against Butler.

Even if the ALJ's erroneous conclusion were allowed to stand that Norvell was responding to Zalewski's post allegedly referring to Butler's vehicles, his post nevertheless was not protected. Zalewski's post reads as follows: "The [patient] said I told her that they never fix

anything on the units...Yeah i no [sic] that [patient] **I'm not dumb enough to tell her let alone any [patient] how shitty those units are they see it all on their own**." GC Exh. 13. at 1 (emphasis added). Zalewski denied saying anything to anyone about Butler's "units." Even if Norvell had seen that post, it does not indicate that Zalewski was terminated for complaining about Butler's vehicles (which the ALJ mistakenly characterized as a matter of concern among Butler's employees). Rather, it indicates that she did not complain about Butler's ambulances. This fact completely undercuts any conclusion that Norvell was "making common cause" with Zalewski over alleged complaints about the condition of Butler's ambulances – complaints that Zalewski herself claimed not to have made.

D. The Acting General Counsel Incorrectly Argues that Butler "Failed to Expand" on its Exception to the ALJ's Conclusion That Norvell was "Advising" Chelsea Zalewski to Obtain an Attorney or File a Complaint with a Government Agency.

The Acting General Counsel argues in his Answering Brief that Respondent did not offer support for Exception 3 (that Norvell was advising Chelsea Zalewski to obtain an attorney or contact the "labor board"). Ans. Br. at 8. It is true that Norvell told Zalewski that she could obtain an attorney or contact the labor board in connection with her termination. However, Norvell's "advice" was not advice at all, as he was unaware of the reason for Zalewski's termination. As established above, the ALJ impermissibly concluded that Norvell was responding to a post made in General Counsel's Exhibit 13.

Norvell's own testimony shows that he did not know the reason for Zalewski's termination. For example, when asked why he told Zalewski she could get a lawyer, Norvell responded in the abstract that it was "to see if anything was – any laws were broke..." Tr. 23:18-23. When asked what "specific facts" he was aware of regarding the basis for Zalewski's termination, Norvell responded that he was not aware of any specific facts: just "what she posted

on [Facebook]." Tr. 24:23-25, 25:1-3. Norvell never testified to the content of Zalewski's Facebook posting. Moreover, as established above, it cannot be concluded that Norvell read Zalewski's post about claiming to a patient about Butler's "units" breaking down. While the Acting General Counsel argues that Norvell's testimony that he was aware of "what [Zalewski] posted" on Facebook establishes his awareness and knowledge of the reason for her termination, this contention is not supported by the record.

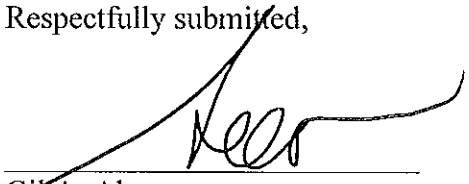
The record evidence, and all inferences permissibly drawn therefrom, show that at the time he responded to Zalewski's Facebook post, all Norvell knew was that she had been fired. As evidenced by his own testimony, it cannot be concluded that Norvell was "advising" Zalewski to do anything. The record evidence conclusively establishes that Norvell simply saw that Zalewski had posted on Facebook that she had been terminated, at which point he told her to sue or file a claim against the Company. Such conduct cannot, under any reasonable definition, constitute "advice" to Zalewski. Rather, Norvell maliciously was attacking his employer by telling Zalewski she should pursue litigation against the Company, without even knowing why she had been terminated. For the foregoing reasons, the Board should conclude that the ALJ's conclusion that Norvell was "advising" Zalewski was in error.

IV. CONCLUSION

For the foregoing reasons, the Company respectfully requests that the Board disregard the arguments made in the Acting General Counsel's Answering Brief and that it find that Butler did not violate the Act in terminating William Norvell.

Dated: November 15, 2013

Respectfully submitted,



Gil A. Abramson
Louis J. Cannon, Jr.
JACKSON LEWIS LLP
2800 Quarry Lake Drive
Suite 200
Baltimore, Maryland 21202
Tel: 410-415-2000
Fax: 410-415-2001

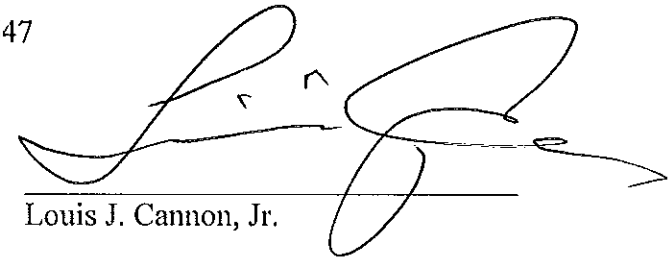
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of November, 2013, a copy of the foregoing Respondent's Reply to the Acting General Counsel's Answering Brief To Respondent's Exceptions was sent by e-mail and/or U.S. Mail, postage prepaid, to:

Matthew Turner, Counsel for the Acting General Counsel
Andrew Andela, Counsel for the Acting General Counsel
National Labor Relations Board, Region 5
Bank of America Center - Tower II
100 South Charles St., 6th Floor
Baltimore, MD 21201
Matthew.Turner@nlrb.gov
Andrew.Andela@nlrb.gov

William Norvell
42 ½ Carroll Street
Westminster, MD 21157-4831

Michael Rice
17223 Gay Street
Hagerstown, MD 21740-7647



Louis J. Cannon, Jr.