

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

**THE BOEING COMPANY,**

**Employer,**

**and**

**Case No. 19-CA-093656**

**SOCIETY OF PROFESSIONAL ENGINEERING  
EMPLOYEES IN AEROSPACE, IFPTE,  
LOCAL 2001, AFL-CIO,**

**Union.**

**THE BOEING COMPANY'S SUPPLEMENTAL AUTHORITY IN SUPPORT  
OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

The Boeing Company (hereinafter referred to as “Boeing” or “the Company”) submits this supplemental authority in support of Exception No. 37 to the decision of the Administrative Law Judge issued on July 31, 2014 in the above-captioned case. Specifically, Boeing notes that in *SW General, Inc. v. NLRB*, -- F.3d --, 2015 WL 4666487 (D.C. Cir. Aug. 7, 2015), the Court of Appeals, District of Columbia Circuit held that a complaint issued by the improperly appointed Acting General Counsel must be dismissed. Because the Complaint in the instant case was also issued during the Acting General Counsel’s improper appointment, and Boeing presented this defense to the ALJ, this case should also be dismissed. To the extent leave is required to submit supplemental authority, Boeing requests that this submission be treated as a motion pursuant to Section 102.47 of the NLRB’s Rules and Regulations and granted for the following reasons:

1) Boeing's Exceptions to the decision of the Administrative Law Judge, filed on September 10, 2014, included an exception based on "[t]he Administrative Law Judge's failure to find that the issuance of the Complaint against Boeing was unauthorized and void." (Exception No. 37). In support of that exception, Boeing asserted in its brief that the Complaint was unauthorized because of Acting General Counsel Lafe Solomon's improper appointment:

Like the severed proceedings, this case presents the jurisdictional question of whether the issuance of complaint was unauthorized and void. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, C13-5470 BHS, 2013 WL 4094344, at \*1-2 (W.D. Wash. Aug. 13, 2013) (Acting General Counsel could not delegate authority to initiate legal action to Regional Director for Region 19 because Acting General Counsel was not validly appointed); *see also NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (holding that President Obama's January 2012 recess appointments of Sharon Block, Richard F. Griffin, and Terence F. Flynn were unconstitutional and invalid, and thus the Board lacked authority to act). This jurisdictional issue was addressed by the Administrative Law Judge in the severed proceedings, which were prosecuted pursuant to the same Complaint. Transcript of Hearing at 13-14, *The Boeing Co.*, Nos. 19-CA-90932, 19-CA-90948, 19-CA-95926 (NLRB San Fran. Div. of Judges, Sept. 24, 2013). This jurisdictional issue is, in any event, for judicial determination, and is only noted here to foreclose any claim of waiver.

(Boeing's Brief in Support of Exceptions, p. 2 n.1). In *Hooks*, the United States District Court for the District of Washington held that Acting General Counsel Lafe Solomon's appointment under the Federal Vacancies Reform Act ("FVRA") was invalid:

[NLRB Regional Director] Hooks contends that, even if the Board lacks authorization, the actions of the Acting General Counsel Lafe E. Solomon ("Solomon"), including his delegation of authority to initiate legal action to Hooks, are still valid. First, Hooks asserts that President Obama validly appointed Solomon pursuant to the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345, *et seq.* Dkt. 13 at 14–21. 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. *Id.* § 3345(b). It is undisputed that Solomon has never served as a first assistant. Therefore, Hooks's argument is without merit.

*Hooks*, 2013 WL 4094344, at \*2.

2) On August 7, 2015, the United States Court of Appeals, District of Columbia Circuit issued an opinion in *SW General, Inc. v. NLRB*, -- F.3d --, 2015 WL 4666487 (D.C. Cir. Aug. 7, 2015), in which it held that Solomon’s appointment to Acting General Counsel under the FVRA was invalid from January 5, 2011 until November 4, 2013. Specifically, Solomon’s appointment became invalid when the President submitted his nomination to be General Counsel to the Senate.

3) Under the FVRA, there are three categories of people who may serve temporarily in an acting capacity for a vacant presidentially appointed, Senate-confirmed position (“PAS”):

- a) “the first assistant to the office of such [PAS] officer” (5 U.S.C. § 3345(a)(1));
- b) other PAS officers designated by the President (5 U.S.C. § 3345(a)(2));  
and
- c) “an officer or employee of such Executive agency” if such officer or employee served in a position for the agency not less than 90 days in the preceding year and the rate of pay for such position “is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule” (5 U.S.C. §3345(a)(3)).

The FVRA further provides that:

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.

5 U.S.C. §3345(b)(1).

4) The D.C. Circuit held that because Solomon did not previously serve in the position of first assistant, “the text of the FVRA plainly” prohibited Solomon from serving as the Acting General Counsel once the President submitted his nomination to the Senate on January 5, 2011. *SW General*, 2015 WL 4666487, at \*7-8.<sup>1</sup> The Court thus concluded that Solomon improperly served as Acting General Counsel from January 5, 2011 to November 4, 2013. *Id.*

5) The Court then evaluated whether the FVRA violation was harmless or whether Solomon’s unauthorized action—issuance of the complaint—was ultimately ratified by the NLRB. Despite the fact that the unfair labor allegations against the employer were simple and straight forward—an alleged violation of Section 8(a)(5) by unilaterally changing the terms and conditions of employment while the parties were negotiating a new collective bargaining agreement—the Court found that NLRB’s order did not cure Solomon’s unauthorized act:

The Board nonetheless argued that, because of the type of ULP charged against [the employer] was not “of substantial legal interest” to Acting General Counsel Solomon, that particular complaint did not require submission to the General Counsel’s Office for review beforehand....[The employer] rightly points out, however, that a different General Counsel may have imposed different requirements and procedures during his tenure. *See, e.g.*, Memorandum GC 11–11 from Acting Gen. Counsel Lafe Solomon to All Reg’l Dirs., Officers–in–Charge, and Resident Officers 1 (Apr. 12, 2011) (identifying four “groups” of matters that must be submitted to General Counsel for advice, including those that “involve a policy issue in which I am particularly interested” and “involve issues as to which the law is in flux as the result of Board or court decisions”). Accordingly, notwithstanding the final Board order, we cannot be confident that the complaint against [the employer] would have issued under an Acting General Counsel other than Solomon. *See Haleston Drug Stores*, 187 F.2d at 422 n. 5 (“[O]scillations in rigor are characteristic of prosecuting officers.”). Our uncertainty is sufficient to conclude that [the employer] has carried its burden of demonstrating that the FVRA violation is non-harmless under the Administrative Procedures Act.

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<sup>1</sup> Solomon directed the NLRB’s Office of Representation Appeals for approximately 10 years before serving as Acting General Counsel.

*See Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 n. 5 (D.C.Cir.2010) (although “[t]he burden to demonstrate prejudicial error is on the party challenging agency action,” it “is not a particularly onerous requirement” (quotation marks and ellipsis omitted)). We therefore conclude that the NLRB order did not ratify or otherwise render harmless the FVRA defect in the ULP complaint against [the employer].

*Id.* at \*10. Accordingly, the Court vacated the NLRB order.

6) In this case, the original Complaint was issued on March 29, 2013, and was later superseded by the issuance of the Consolidated Complaint on April 29, 2013, during the period in which the FVRA precluded Solomon from serving as the Acting General Counsel. As was conceded to the D.C. Circuit, the NLRB cannot issue complaints if the General Counsel’s office is vacant. *Id.* at \*10. *See also* 29 U.S.C. §§ 153(d), 160(b); 29 C.F.R. §§ 102.9, 102.15.

Accordingly, both the original Complaint and the Consolidated Complaint in the instant matter were unauthorized and thus improperly issued under the FVRA.

7) Like the FVRA violation in *SW General*, the FVRA violation here is not harmless and the issuance of the Board’s order will not serve to ratify it because of the prosecutorial discretion given to the General Counsel’s office. Like the complaint in *SW General*, the Consolidated Complaint alleges that Boeing violated Section 8(a)(5), and it is unclear whether a different Acting General Counsel would have proceeded, especially where the General Counsel sought an order compelling Boeing to provide the Union with stale information requested during bargaining for a new collective bargaining agreement despite the fact that the parties already successfully concluded those negotiations with a new agreement. Accordingly, the issuance of both the original Complaint on March 29, 2013 and the Consolidated Complaint on April 29, 2013 was not harmless error and cannot be ratified by a Board order.

8) Therefore, based on the D.C. Circuit's decision in *SW General*, the Board must reverse the Administrative Law Judge's Decision and dismiss Case No. 19-CA-093656 in its entirety.

Respectfully submitted this 17th day of August, 2015.

s/Richard B. Hankins

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**CERTIFICATE OF SERVICE**

This is to certify that I have served a true and correct copy of **THE BOEING COMPANY'S SUPPLEMENTAL AUTHORITY IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** was served via electronic mail upon the following individuals:

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This 17th day of August 2015.

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