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**H&M International Transportation, Inc. and Harry Neilan**

**UFCW, Local 312 and Harry Neilan.** Cases 22–CA–089596, 22–CA–095095, and 22–CB–106127

May 11, 2016

ORDER DENYING MOTION FOR  
RECONSIDERATION AND TO REOPEN THE  
RECORD

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND MCFERRAN

On March 1, 2016, a three-member panel of the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,<sup>1</sup> affirming an administrative law judge’s findings that the Respondent H&M International Transportation, Inc., violated Section 8(a)(3) and (1) of the Act by suspending and then discharging four employees because they engaged in protected concerted or union activities.

On March 28, 2016, the Respondent filed a motion for reconsideration and to reopen the record.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having duly considered the matter, we find that the Respondent’s motion fails to present “extraordinary circumstances” warranting reconsideration or reopening the record under Section 102.48(d)(1) of the Board’s Rules and Regulations.

The Respondent requests that the Board reconsider its decision and dismiss the complaint “on the grounds of newly established law holding that the appointment of former Acting General Counsel of the NLRB (‘AGC’), Lafe Solomon, violated the Federal Vacancies Reform Act (‘FVRA’) and, therefore, he lacked the authority to delegate the power to Regional Director J. Michael Lightner to issue the August 29, 2013 Complaint against [the Respondent] in this matter.” The Respondent argues that “[p]ursuant to recent case law in the D.C. and Ninth Circuits, issued after [the Respondent] filed its Exceptions, the appointment of Mr. Solomon as AGC was invalid,” citing *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), petition for rehearing en banc denied, Case No. 14–1107 (Jan. 20, 2016), petition for cert. filed, \_\_\_ U.S.L.W. \_\_\_ (U.S. April 6, 2016) (No. 15–1251),

<sup>1</sup> 363 NLRB No. 139.

and *Hooks v. Kitsap Tenant Support Services (Kitsap II)*, 816 F.3d 550 (9th Cir. 2016).

For the reasons discussed below, we find no merit in the Respondent’s contentions.

Prior to filing its motion for reconsideration, the Respondent’s only reference to the authority of the Acting General Counsel was the following affirmative defense in its October 17, 2013 answer to the complaint:

The Complaint was unlawfully issued in this case. As recently set forth by a District Court in the State of Washington, the appointment of Acting General Counsel Lafe Solomon was constitutionally invalid. Accordingly, the Acting General Counsel, and the Regional Director and Board Agents of Region 22 acting on behalf of the Acting General Counsel to investigate Case 22–CA–089596, 22–CA–095095 and 22–CB–106127, lack the authority to act in this matter, including but not limited to the authority to issue said Complaint. See *Hooks v. Kitsap Tenant Support Services Inc.*, 3:13-cv-05470 (W.D.Wa. Aug. 20, 2013).

The Respondent did not offer any argument in support of this affirmative defense during the hearing before the administrative law judge, and it did not mention it in its posthearing brief to the judge. Nor did the Respondent raise any question about the authority of the AGC or the Regional Director in its exceptions to the judge’s decision, or in its brief in support of its exceptions. Under these circumstances, we find that the Respondent has waived any argument regarding the authority of former Acting General Counsel Solomon in this matter. See Section 102.46(b)(2) and (g) of the Board’s Rules and Regulations (“Any exception . . . not specifically urged shall be deemed to have been waived,” and “No matter not included in exceptions . . . may thereafter be urged before the Board, or in any further proceeding.”).

The Board’s rules governing extraordinary postdecisional motions provide that a party to a proceeding before the Board may move for reconsideration based upon material error in the Board’s decision or order disposing of timely filed and proper exceptions to an administrative law judge’s decision. See Section 102.48(b) and (d)(1) of the Board’s Rules and Regulations. The purpose of this procedure is not to allow a party to circumvent the Board’s Rules and Regulations and raise new issues that were not preserved for appeal through the filing of timely exceptions. See Section 102.46 of the Board’s Rules and Regulations. Because the Respondent did not raise any issue regarding the authority of Acting General Counsel Solomon before the judge or in its exceptions to the judge’s decision, we find that the Respondent has waived its right to challenge the authority

of Acting General Counsel Solomon under the FVRA. Insofar as the Respondent's motion for reconsideration seeks to overturn the judge's decision on this basis, we reject the motion as an untimely effort to file additional exceptions. See *Bloomington's, Inc.*, 363 NLRB No. 172, slip op. at 2–3 fn. 4; *Boeing Co.*, 362 NLRB No. 195, slip op. at 1 fn. 1 (2015).

Moreover, even assuming, arguendo, that we were to consider the Respondent's challenge to the authority of the AGC under the FVRA, we would not find it appropriate to dismiss the complaint. At the outset, we note that under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., a person is not "appointed" to serve in an acting capacity in a vacant office that otherwise would be filled by appointment by the President, by and with the advice and consent of the Senate. Rather, either the first assistant to the vacant office performs the functions and duties of the office in an acting capacity by operation of law pursuant to 5 U.S.C. § 3345(a)(1), or the President directs another person to perform the functions and duties of the vacant office in an acting capacity pursuant to 5 U.S.C. § 3345(a)(2) or (3).

On June 18, 2010, the President directed Lafe Solomon, then-Director of the NLRB's Office of Representation Appeals, to serve as Acting General Counsel pursuant to subsection (a)(3)—the senior agency employee provision. Under that provision, Solomon was eligible to serve as Acting General Counsel at the time the President directed him to do so. Accordingly, neither *Kitsap II* nor *SW General* supports the Respondent's assertion that the "appointment" of the Acting General Counsel was unlawful or invalid. See *Kitsap II*, 816 F.3d at 557; *SW General*, 796 F.3d at 73. Thus, Solomon properly assumed the duties of Acting General Counsel, and the Respondent's affirmative defense that "the appointment of Acting General Counsel Lafe Solomon was constitutionally invalid" is without foundation.

We acknowledge that the decisions in *Kitsap II* and *SW General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. *Kitsap II*, 816 F.3d at 558; *SW General*, 796 F.3d at 78. Although that question is still in litigation, we find that subsequent events have rendered moot any argument that Solomon's alleged loss of authority after his nomination precludes further litigation in this matter. Specifically, on February 5, 2016, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification in this case that states, in relevant part,

The prosecution of these cases commenced under the authority of Acting General Counsel Lafe E. Solomon

during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013.

The United States Court of Appeals for District of Columbia Circuit recently held that Acting General Counsel Solomon's authority under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the position of General Counsel. *SW General, Inc. v. NLRB*, \_\_\_ F.3d \_\_\_, 2015 WL 4666487, (D.C. Cir., Aug. 7, 2015). The Court found that complaints issued while Mr. Solomon's nomination was pending were unauthorized and that it was uncertain whether a lawfully-serving General Counsel or Acting General Counsel would have exercised discretion to prosecute the cases. *Id.* at \*10.

I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.

My action does not reflect an agreement with the appellate court ruling in *SW General*. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by *SW General* are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. *Id.* at \*9 (citing 5 U.S.C. § 3348(e)(1)).

For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

In view of the independent decision of General Counsel Griffin to continue prosecution in this matter, we would reject the Respondent's affirmative defense challenging the circumstances of Solomon's "appointment" as Acting General Counsel as moot, even were the argument properly before us.<sup>2</sup>

<sup>2</sup> For the same reason, we reject the Respondent's assertion in its motion for reconsideration that "[n]either the Board nor the parties can be certain that the office of a validly-appointed General Counsel would have sanctioned the same actions against [the Respondent] as did Mr. Solomon's office." In this regard, although the court in *SW General* also found that the subsequent final Board order "did not ratify or oth-

Finally, Section 102.48(d)(1) of the Board's Rules and Regulations provides that a "motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result." The Respondent identifies no additional evidence sought to be adduced in support of its motion to reopen the record.

Accordingly, the Respondent's motion does not present extraordinary circumstances warranting reconsideration or reopening the record.

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erwise render harmless the FVRA defect in the ULP complaint," it did so because, given the scope of prosecutorial discretion of the General Counsel under the Act, it could not be confident that the complaint against Southwest would have been issued by a different General Counsel. 796 F.3d at 80–81. In the instant matter there is no similar uncertainty—the issuance of the complaint and its continued prosecution were expressly ratified by General Counsel Griffin, a subsequent, properly appointed General Counsel.

### ORDER

IT IS ORDERED that the Respondent's motion for reconsideration and to reopen the record is denied.

Dated, Washington, D.C. May 11, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD