

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD REGION 10**

SCHNELLECKE LOGISTICS ALABAMA, LLC

and

Case 10-CA-199183

DONALD EDWIN BUSSEY, III, an Individual

SCHNELLECKE LOGISTICS ALABAMA, LLC

and

Case 10-CA-199732

LASHOAN THOMAS, an Individual

SCHNELLECKE LOGISTICS ALABAMA, LLC

and

Case 10-CA-201235

**INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), REGION 8**

**RESPONDENT'S MOTION TO STAY PROCEEDING PENDING OUTCOME OF
RESPONDENT'S MOTION TO DISMISS FILED WITH THE BOARD**

Schnellecke Logistics Alabama, LLC, ("Schnellecke" or "Respondent") moves, pursuant to 29 C.F.R. § 102.24(a), to stay the current unfair-labor-practice proceeding and hearing currently scheduled for December 11, 2017, pending resolution of its dispositive motion to dismiss the case for lack of subject matter jurisdiction and Administrative Law Judge disqualification filed with the National Labor Relations Board ("the Board"). The dispositive motion challenges an Administrative Law Judge's authority to hear this case; resolution of the motion is necessary prior to proceeding with a hearing before an Administrative Law Judge.

1. On October 25, 2017, the Regional Director issued a Consolidated Complaint and Notice of Hearing (“Complaint”).

2. A hearing date of December 11, 2017 in Birmingham, Alabama, has been issued.

3. This hearing date was set merely 47 days after the Complaint issued.

4. Respondent filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction and Disqualification (“Motion”) with the Board on November 13, 2017. (**Exhibit "A"**).

5. The Motion asserts that the Administrative Law Judge (ALJ) who will be appointed to hear this matter lacks jurisdiction over the dispute because the ALJ was not appointed consistent with the Appointments Clause of the United States Constitution.

6. As best as Respondent can discern, Respondent's Motion is a matter of first-impression before the Board.

7. If Respondent's motion is successful, the appointed ALJ will lack authority to hear this case, and any hearing would be improper and a waste of time and resources. Accordingly, resolution of the pending Motion is necessary prior to proceeding with a hearing in this matter.

8. Because of the pendency of Respondent's Motion, this proceeding should be stayed until its resolution.¹

9. Respondent filed a similar Motion to Stay Proceedings with the Board on November 13, 2017 (concurrent with its Motion to Dismiss), pursuant to 102.24(b) of the Board's rules and regulations which provides, *inter alia*, the Board may “postpone[] indefinitely” a hearing upon the filing of a motion for dismissal. Counsel for the General Counsel (“CGC”) opposed Respondent's motion on multiple grounds, including that Respondent's non-dispositive

¹ See, e.g., *Int'l Total Servs.*, 270 NLRB 645 (1984) (Motion to Stay appropriate following Motion to Dismiss for Lack of Subject Matter Jurisdiction).

motion (which was filed in conjunction with a dispositive motion) should have been filed with the Chief Administrative Law Judge, citing 102.24(a) of the Board's rules and regulations. Respondent disagrees with CGC and will oppose CGC's opposition. Regardless, in an abundance of caution, Respondent now files this Motion with the Chief Administrative Law Judge.

WHEREFORE Respondent asks that the case be stayed pending resolution of Respondent's motion to dismiss.

Respectfully submitted this the 21st day of November, 2017.

/s/ Marcel L. Debruge

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Michael L. Lucas

Meryl L. Cowan

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the Division of Judges via Electronic Filing, a copy has also been served via email and/or U.S. First-Class Mail on the following, on this the 21st day of November, 2017:

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Marcel L. Debruge

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Exhibit A

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**INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), REGION 8**

**RESPONDENT’S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION AND DISQUALIFICATION**

Schnellecke Logistics Alabama, LLC (“Schnellecke” or “Respondent”), by and through its undersigned attorneys, pursuant to 29 C.F.R. §§ 102.24, 102.36(a), and 102.50, hereby moves the National Labor Relations Board (the “NLRB” or “the Board”) to dismiss the Complaint for lack of subject matter jurisdiction and disqualification because, for the reasons explained in the recent decisions of Burgess v. FDIC, 871 F.3d 297 (5th Cir. 2017), and Bandimere v. U.S. SEC., 844 F.3d 1168 (10th Cir. 2016), NLRB Administrative Law Judges (“ALJs”) do not have the authority to preside over this matter because their appointment violated the Appointments Clause of the United States Constitution. In support of its motion, Schnellecke states as follows:

I. INTRODUCTION

“Inferior officers” are subject to the Appointments Clause of the Constitution, and must be appointed by the President, the Courts of Law, or by the Heads of a Department. NLRB ALJs are “inferior officers” because their work is directed and supervised by the NLRB and because they exercise significant statutory authority. NLRB ALJs, however, are not appointed in accordance with Appointments Clause. The NLRB is not a Court of Law nor a Head of Department. Accordingly, the NLRB’s current procedures for ALJ assignment and exercise of authority are unconstitutional and invalidate these proceedings.

II. LEGAL ARGUMENT

A. NLRB ALJs are inferior officers.

For purposes of the Appointments Clause, a government employee qualifies as an “inferior officer” if he or she (1) performs work that is “directed and supervised at some level by others who are appointed by Presidential nomination with the advice and consent of the Senate,” and (2) exercise “significant authority pursuant to the laws of the United States.” See Edmond v. United States, 520 U.S. 651, 662–63 (1997) (internal citations omitted).

NLRB ALJs meet the first part of the inferior officer test as their work is directed and supervised by the NLRB, whose members are “appointed by the President by and with the advice and consent of the Senate,” per LMRA § 3(a), 29 U.S.C. § 153(a). “Whether one is an ‘inferior’ officer depends on whether he has a superior ... whose work is directed and supervised at some level by others.” Edmond, 520 U.S. at 662. While an ALJ has not yet been assigned to hear this matter, an ALJ’s work is subject to the NLRB’s rules and its review and oversight, satisfying the first prong of the inferior officer test.

NLRB ALJs also meet the second part of the inferior officer test as they have significant statutory authority. The Supreme Court has established a three part analysis for determining whether a government employee exercise sufficient authority to qualify as an inferior officer; under this test, an employee qualifies as an inferior officer if

- (1) he or she is in a position established by law,
- (2) his or her duties, salary, and means of appointment are specified by statute, and
- (3) he or she exercises significant discretion in the course of carrying out important functions.

Freytag v. Comm’r, 501 U.S. 868, 881-82 (1991) (holding trial judges appointed by the Chief Judge of the Tax Court were inferior officers not appointed as required by the Appointments Clause); see Burgess, 871 F.3d at 303–04 (5th Cir. 2017) (applying Freytag test to find that Federal Deposit Insurance Corporation ALJs were inferior officers); Bandimere v. Sec. & Exch. Comm’n, 844 F.3d 1168, 1179 (10th Cir. 2016) (adopting Freytag test and holding that “[Securities and Exchange Commission] ALJs are inferior officers under the Appointments Clause”).¹

The first prong under Freytag is clearly satisfied because NLRB ALJ positions are established by law. See 5 U.S.C. § 3105 (2012) (authorizing agencies to “appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with [the Administrative Procedures Act]”); 5 U.S.C. 556(b)(3) (portion of the

¹ In Raymond J. Lucia Cos. v. SEC, 868 F.3d 1021 (D.C. Cir. 2017) (per curiam), the D.C. Circuit, sitting *en banc*, denied review to the SEC's administrative determination that its ALJs were "employees" and thus were not subject to the Appointments Clause. However, the D.C. Circuit only denied review to the SEC's determination because the *en banc* court was split fifty-fifty. Previously, a three-judge panel of the D.C. Circuit had denied review to (and therefore upheld) the SEC's decision, see Raymond J. Lucia Cos. v. SEC, 832 F.3d 277 (D.C. Cir. 2016), but that decision was vacated when the D.C. Circuit decided to grant *en banc* review. In light of the split in D.C. Circuit in Raymond J. Lucia Cos., it appears that half of the judges in the D.C. Circuit would agree with the Tenth Circuit's interpretation in Bandimere that SEC ALJs are, in fact, inferior officers.

Administrative Procedures Act authorizing administrative law judges to preside over agencies' administrative hearings); 29 U.S.C. § 154 (portion of LMRA directing the NLRB to appoint employees necessary for the proper performance of the NLRB's duties).

The second prong is clearly satisfied because NLRB ALJs' duties, salaries and means of appointment are specified by statute. See 5 U.S.C. 556(c) (portion of the Administrative Procedures Act setting forth administrative law judges' powers and duties during hearings); 5 U.S.C. § 557 (portion of the Administrative Procedures Act directing administrative law judges to issue initial decisions to responsible agencies); 5 U.S.C. § 5372 (detailing pay rates and systems for administrative law judges); 5 C.F.R. §§ 930.204-205 (setting forth appointments and pay, respectively, for administrative law judges).

NLRB ALJ appointments also satisfy the third, and final, Freytag prong because they exercise significant discretion in carrying out the important function of adjudicating unfair labor practices. ALJs are charged with conducting a "hearing for the purpose of taking evidence upon a complaint [of an unfair labor practice]." 29 C.F.R. § 102.34. In managing a case, they are granted significant authority to:

administer oaths and affirmations, grant applications for subpoenas, rule upon petitions to revoke subpoenas, rule upon offers of proof and receive relevant evidence, take or cause depositions to be taken whenever the ends of justice would be served, regulate the course of the hearing and, if appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question, hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases, dispose of procedural requests, motions, or similar matters... approve stipulations... make and file decisions... call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence, request the parties at any time during the hearing to state their respective positions concerning any issue in the case and/or supporting theory(ies), [and] take any other necessary action authorized by the Board's published Rules and Regulations.

Id. § 102.35 (internal citations omitted). ALJs are also tasked with making credibility determinations and other factual findings and reaching conclusions of law, as explained in the Board's regulations:

At the conclusion of the hearing the administrative law judge prepares a decision stating findings of fact and conclusions, as well as the reasons for the determinations on all material issues, and making recommendations as to action which should be taken in the case. The administrative law judge may recommend dismissal or sustain the complaint, in whole or in part, and recommend that the respondent cease and desist from the unlawful acts found and take action to remedy their effects.

See 29 C.F.R. § 101.11. Such discretion in conducting NLRB hearings is commensurate with the power exercised by the trial judge in Freytag who was determined to be an "inferior officer." Freytag, 501 U.S. at 881–82 (holding that special trial judges were inferior officers as they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders."). Such discretion is also commensurate with the power exercised by other ALJs who have been determined to be "inferior officers." Burgess, 871 F.3d at 303 (holding that FDIC ALJs were inferior officers after noting the Freytag judicial functions and finding that "FDIC ALJs perform all of these functions") (internal citations omitted); Bandimere, 844 F.3d at 1179–81 (holding that SEC ALJs were inferior officers because they were responsible for, among other things, "taking testimony, regulating document production and depositions, ruling on the admissibility of evidence, receiving evidence, ruling on dispositive and procedural motions, issuing subpoenas, and presiding over trial-like hearings" as well as making "credibility findings" and making "initial decisions that declare respondents liable"). As in Freytag, Burgess and Bandimere, the Board's ALJs exercise significant discretion and are inferior officers for purposes of the Appointments Clause.

B. NLRB ALJs were appointed to the NLRB in violation of the Appointments Clause.

As an inferior officer subject to the Appointments Clause, NLRB ALJs are required to have been appointed by the President, the Courts of Law, or by the Heads of a Department. See U.S. Const. art. II, § 2, cl. 2. NLRB ALJs are not appointed by a Court of Law or a Head of Department.² Accordingly, the NLRB’s current procedures for ALJ assignment and exercise of authority are unconstitutional and invalidate these proceedings.

1. The NLRB is not a Court of Law for purposes of the Appointments Clause.

The NLRB does not qualify as a Court of Law. The Supreme Court indicated that Courts of Law, for purposes of the Appointments Clause, include (1) Article III judges and (2) some judges within Article I courts who exercise judicial power. See Freytag, 501 U.S. at 890. The NLRB’s “members” are not Article III judges or judges who have an “exclusive” judicial role bringing them under the Freytag guidance.

NLRB members are not Article III judges. Article III judges are appointed for life while NLRB members hold their term for 5 years. Stern v. Marshall, 564 U.S. 462, 482 (2011) (the text of Article III requires that Article III judges “shall hold their Offices during good Behavior” and “receive for their Services[] a Compensation[] [that] shall not be diminished” during their tenure).

The NLRB members also are not the type of Article I judges contemplated in Freytag. In discussing when an Article I court can constitute a “Court of Law”, the Supreme Court analyzed the United States Tax Court and stated:

² An NLRB ALJ has not been assigned to this case and, at this stage, Respondent does not know how the ALJ was appointed.

The Tax Court exercises judicial power to the exclusion of any other function. It is neither advocate nor rulemaker. As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service. It does not make political decisions

Freytag, 501 U.S. at 891. The Court found that the United States Tax Court constituted a Court of Law by noting that the “Tax Court's exclusively judicial role **distinguishes it from other non-Article III tribunals that perform multiple functions** and provides the limit on the diffusion of appointment power that the Congress demands” and finding that including courts “that exercise judicial power and perform **exclusively judicial functions** among the Courts of Law does not significantly expand the universe of actors eligible to receive the appointment power.” Id. at 892 (emphasis added) (internal citations omitted).

The NLRB, unlike the Tax Court in Freytag, does not perform “exclusively judicial functions” (its orders are not even self-enforcing³) but rather performs “multiple functions.” For example, the NLRB “approves the budget [and] opens new offices” and advocates on behalf of employees as it houses the General Counsel who is charged with “general supervision over attorneys employed by the Board” as well as “the officers and employees in the Regional Offices.” Together, these employees are responsible for “on behalf of the Board ... the investigation of charges and issuances of complaints” as well as “the prosecution of such complaints before the Board.” *NLRB Organizations & Functions*, § 202, *The General Counsel*. In addition, the NLRB functions as a rulemaker wrestling with political decisions. In fact, the “[Supreme] Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy.” NLRB v. Curtin Matheson Scientific, Inc., 494

³ NLRB members also do not have the authority of Article III judges. See e.g., NLRB v. Millwrights Local No. 1102, 1998 U.S. App. LEXIS 30129 (6th Cir. 1998) (“a Board order is not self-enforcing -- the NLRA does not grant the Board enforcement power.”); NLRB v. Steinerfilm, Inc., 702 F.2d 14, 17 (1st Cir. 1983) (“the Board must rely upon the courts to enforce its substantive orders”).

U.S. 775, 786 (1990) (citing Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500-501 (1978); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); NLRB v. Truck Drivers, 353 U.S. 87, 96, 77 (1957)). Indeed, the Supreme Court has found that “[b]ecause it is to the Board that Congress entrusted the task of applying the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms, that body, if it is to accomplish the task which Congress set for it, **necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.**” Curtin Matheson, 494 U.S. at 786, (emphasis added). Finally, a principal responsibility of the NLRB is the “conduct of secret-ballot elections among employees in appropriate collective-bargaining units to determine whether or not they desire to be represented by a labor organization.” *NLRB Organizations & Functions*, § 201, *The Board*. This is not a judicial function. The NLRB does not qualify as a Court of Law for purposes of the Appointments Clause.

2. The NLRB is Not a Head of Department.

a. *The NLRB is an Agency, not a Department*

The NLRB does not qualify as a Department and, accordingly does not have a “Heads of Department.” In Freytag, the Supreme Court stated that the “Court for more than a century has held that the term Department refers only to a part of or division a part or division of the executive government, as the Department of State, or of the Treasury, expressly created and given the name of department by Congress” and suggested “[c]onfining the term Heads of Departments in the Appointments Clause to *executive divisions like the Cabinet-level departments.*” Freytag, 501 U.S. at 886 (emphasis added) (internal citations omitted).

The NLRB is not a Department named by Congress and is instead an executive agency. Specifically, the Wagner Act created the NLRB as an “agency” to administer the National Labor

Relations Act of 1935. See 29 U.S.C. § 153 (“The National Labor Relations Board (hereinafter called the ‘Board’) created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C.A. § 141 et seq.], is continued as **an agency of the United States**”) (emphasis added) (internal citations in the original)). Moreover, the NLRB is not listed as a statutory executive department. *See* 5 U.S.C. § 101 (finding that “[t]he Executive departments are” the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, Veterans Affairs, and Homeland Security). Likewise, the United States Government Manual, which lists every U.S. administrative agency and its functions, provides that the NLRB is an agency, not a Department.⁴ No Court has ever held that the NLRB is a Department, or that its members qualify as a Heads of Department.⁵

Even if the NLRB was a Department, is it not cabinet-level. The Ninth Circuit explained what qualifies as Cabinet-level like, when it found that the United States Postal Service was Cabinet-level. Specifically, the Court held that “the head of the Postal Service is capable of appointing inferior officers” after finding that “[u]p until its reorganization in 1970, the Post Office Department was in fact a Cabinet-level department” and that its reorganization “into the present United States Postal Service” meant that it “was no longer a member of the Cabinet” but that its reorganization did not “fundamentally change the nature and purpose of the Postal Service,” such that the reorganization “did not render what was once a Cabinet-level department into an entity that was not like a Cabinet-level department.” Silver v. U.S. Postal Serv., 951 F.2d

⁴ <https://www.gpo.gov/fdsys/pkg/GOVMAN-2016-12-16/xml/GOVMAN-2016-12-16-158.xml>.

⁵ After Freytag, the Supreme Court found that the SEC constituted a Department, and noted that “[b]ecause the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a ‘Department’ for the purposes of the Appointments Clause.” Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 511 (2010).

1033, 1038 (9th Cir. 1991). Here, as noted above, the NLRB, unlike the United States Postal Service, was never a Cabinet-level department.

b. *Finding the NLRB is a Department Would Be Inconsistent with the Intent of the Appointments Clause*

Extending Heads of Department to independent agencies like the NLRB is the exact opposite result the framers of the Constitution imagined when designing the Appointments Clause. Freytag, 501 U.S. at 884 (noting that “[t]he Constitutional Convention rejected Madison’s complaint that the Appointments Clause did not go far enough if it be necessary at all” by declining to adopt Madison’s argument that “Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser office” and instead “limiting the appointment power” so that “they could ensure that those who wielded it were accountable to political force and the will of the people.”) (Internal citations omitted). As the Supreme Court noted, “[g]iven the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint” and that “[t]he Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power.” Id. at 885. Indeed, Freytag directed that Heads of Department should be limited to agencies that “are subject to the exercise of political oversight and share the President’s accountability to the people.” Id. at 886. In fact, Justice Scalia, in his concurring opinion in Freytag, recognized this danger as he noted that “independent regulatory agencies,” like the NLRB, have “heads [that] are specifically designed not to have the quality that the Court earlier thinks important, of being subject to the exercise of political oversight and sharing the President’s accountability to the people.” Id. at 916 (Scalia, J., concurring). For the reasons stated above, the NLRB is not a Department and, accordingly, does not have a Heads of Department.

III. CONCLUSION

As shown above, the NLRB's ALJs are inferior officers because they exercise significant statutory authority in conducting hearings and issuing recommendations to the NLRB. As a result, ALJs must, under the Appointments Clause, have been appointed by the President, the Courts of Law, or the Heads of a Department. NLRB ALJs are not so appointed. For this reason, a NLRB ALJ does not have jurisdiction to hear this matter and is not qualified to hear this Complaint.

/s/ Marcel L. Debruge

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Michael L. Lucas

Meryl L. Cowan

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the NLRB via Electronic Filing, a copy has also been served via email and/or U.S. First-Class Mail on the following, on this the 13th day of November, 2017:

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