

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

**SCHNELLECKE LOGISTICS  
ALABAMA, LLC**

**and**

**Case No. 10-CA-199183**

**DONALD BUSSEY, III,**

**and**

**SCHNELLECKE LOGISTICS  
ALABAMA, LLC**

**and**

**Case No. 10-CA-199732**

**LASHOAN THOMAS**

**SCHNELLECKE LOGISTICS  
ALABAMA, LLC**

**and**

**Case No. 10-CA-201235**

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

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**OPPOSITION OF CHARGING PARTY UAW TO RESPONDENT'S  
MOTION TO DISMISS**

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Region 8 (“Union” or “UAW”), the Charging Party in Case No. 10-CA-201235, files the following Opposition to the Motion to Dismiss filed by Schnellecke Logistics

Alabama, LLC (“Schnellecke” or “respondent”).

## **I. Introduction**

In its Motion, Schnellecke asserts that Administrative Law Judges (“ALJs”) of the National Labor Relations Board (“NLRB”) must be disqualified because they were purportedly appointed in violation of the Appointments Clause of the United States Constitution. Schnellecke asserts that the NLRB ALJs were appointed in violation of the Appointments Clause of the U.S. Constitution because they are “inferior Officers” who have not been appointed by “the President alone, [ ] the Courts of Law, or [ ] the Heads of Departments.”

Schnellecke’s argument is both legally and factually incorrect. NLRB ALJs are not inferior officers under the U.S. Constitution because they do not issue binding decisions or engage in any other judicial functions. Moreover, even if the NLRB ALJs are deemed inferior officers under the Appointments Clause of the U.S. Constitution, they are, in fact, appointed by the Head of a Department in accordance with the Appointments Clause. Finally, contrary to their claim, the issue raised by Schnellecke is not jurisdictional in nature.

The Appointments Clause of the United States Constitution states:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II § 2, cl. 2.

Under the Appointments Clause of the United States Constitution (1) the President may appoint principal officers only with Senate approval and (2) Congress may confer appointment power over inferior officers to the President, courts, or department heads but may not itself make appointments. *Bandimere v. Sec. & Exch. Comm'n*, 844 F.3d 1168, 1172 (10th Cir. 2016).

Schnellecke has not claimed, because it cannot, that NLRB ALJs are Officers of the United States that require appointment by the President by and with the Advice and Consent of the Senate. In addition, Schnellecke has not asserted that Congress did not vest the appointment of the NLRB ALJs in the NLRB. At bottom, Schnellecke's claim boils down to the following: (1) whether the NLRB ALJs are inferior officers under the Appointments Clause of the U.S. Constitution; and (2) if the NLRB ALJs are inferior officers, whether they have been appointed by the President, by Courts of Law or by the Head of a Department. As shown below, Schnellecke's argument fails on both counts.

The United States Court of Appeals for the District of Columbia has determined that Administrative Law Judges, such as the NLRB ALJs, that do not have final decision power or discretion are not inferior officers subject to appointment under the Appointments Clause of the U.S. Constitution. *Raymond J. Lucia Companies, Inc. v. Sec. & Exch. Comm'n*, 832 F.3d 277, 283-288 (D.C. Cir. 2016), *reh'g en banc granted* (Feb. 16, 2017), *petition for review denied*, 868 F.3d 1021 (D.C. Cir. 2017).

Moreover, even if the NLRB ALJs are inferior officers subject to appointment under the Appointments Clause of the U.S. Constitution, the United States Supreme Court has held that independent agencies of the Executive Branch of the United States, such as the NLRB,

are departments for purposes of the Appointments Clause of the U.S. Constitution and therefore, the NLRB's appointment of its ALJs satisfies the requirement of the Appointments Clause of the U.S. Constitution that inferior officers be appointed by a department head. See, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 US 477, 510-513 (2010).

## **II. Argument**

### **A. The NLRB ALJs Are Not Inferior Officers Under the Appointments Clause.**

The Supreme Court has held that only those deemed to be employees or other “lesser functionaries” need not be selected in compliance with the strict requirements of Article II.” *Freytag v. Comm’r, Internal Revenue*, 501 U.S. 868, 880 (1991) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976)). But, the Supreme Court has explained that generally an appointee is an Officer, and not an employee who falls beyond the reach of the Appointments Clause, only if the appointee exercises “significant authority pursuant to the laws of the United States.” *Buckley*, 424 U.S. at 126.

In *Freytag*, the Supreme Court decided that special trial judges (“STJs”) were inferior officers and therefor subject to appointment in accordance with the Appointments Clause, because STJs have the authority to render the *final* decision of the Tax Court in declaratory judgment proceedings and in certain small-amount tax cases. 501 U.S. at 881–82. Critically, the Court in *Lucia Companies* determined that whether an appointee exercises significant authority pursuant to the laws of the United States is dependent on whether he or she issues final decisions or otherwise binds the agency. *Lucia Companies*, 832 F.3d at 285 (“[W]hether Commission ALJs issue final decisions of the Commission [o]ur analysis begins, and ends,

there.”). The Court also found that the SEC ALJs were not inferior officers subject to the Appointments Clause of the U.S. Constitution, because their “initial decision becomes final when, and only when, the Commission issues the finality order, and not before then” and “the Commission’s ALJs neither have been delegated sovereign authority to act independently of the Commission nor, by other means established by Congress, do they have the power to bind third parties, or the government itself, for the public benefit.” *Id.* at 286.<sup>1</sup> The same is true in this case with respect to the NLRB ALJ’s.

Similarly, under the NLRB’s Rules and Regulations, the NLRB ALJs do not issue final orders but only offer recommendations:

Administrative Law Judge’s decision; contents of record; alternative dispute resolution program. (a) Administrative Law Judge’s decision. After a hearing for the purpose of taking evidence upon a complaint, the Administrative Law Judge will prepare a decision. The decision will contain findings of fact, conclusions of law, and the reasons or grounds for the findings and conclusions, and **recommendations** for the proper disposition of the case. If the Respondent is found to have engaged in the alleged unfair labor practices, the decision will also contain a **recommendation** for such affirmative action by the Respondent as will effectuate the policies of the Act.

NLRB’s Rules and Regulations §102.45 (emphasis added).

Like the FDIC ALJs in *Landry* and the SEC ALJs in *Lucia Companies*, the NLRB ALJs have no authority to issue a final decision, no authority to act independently of the Board and no power to bind third parties, or the government itself, for the public benefit. All of the

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<sup>1</sup> Similarly, in *Landry*, the Court held that FDIC ALJs were not inferior officers subject to the Appointments Clause because the FDIC ALJs can never render the decision of the FDIC but must file a recommended decision, recommended findings of fact, recommended conclusions of law, and a proposed order with final decisions being issued only by the FDIC Board of Directors. 204 F.3d 1125 at 1133. The Court ruled that the “power of final decision” is critical to the determination of whether someone is an inferior officer. *Id.* at 1134. The Union acknowledges that the 5<sup>th</sup> and 10<sup>th</sup> Circuits have recently reached different results with respect to FDIC and SEC ALJ’s. *Burgess v. Federal Deposit Insurance Corporation*, 871 F.3d 297 (5th Cir. 2017)(FDIC ALJs are inferior officers); *Bandimere v. Securities and Exchange Commission*, 844 F.3d 1168 (2016)(SEC ALJs are inferior officers).

NLRB ALJ decisions are recommendations subject to being finalized only by action of the Board itself. Accordingly, the decisions in *Landry* and *Lucia Companies*, make crystal clear that the NLRB ALJs are not inferior officers subject to the Appointments Clause of the U.S. Constitution.

**B. Even if the NLRB ALJs Are Inferior Officers, They Are Appointed in Accordance with the Appointments Clause of U.S. Constitution.**

Schnellecke's motion to dismiss is without merit as the NLRB ALJ's, even if the ALJ's are inferior officers, as they are appointed in accordance with the Appointments Clause of the U.S. Constitution.

Pursuant to the Appointments Clause of the U.S. Constitution, inferior officers can be appointed in one of three ways – by the President, by a Court of Law and by the Head of a Department. While NLRB ALJs are not appointed by the President or a Court of Law, they are appointed by the Head of a Department, and therefore they are appointed in accordance with Article II, Clause 2 of the U.S. Constitution.

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court held that independent agencies of the Executive Branch of the U.S. Government, such as the NLRB, are departments for purposes of the Appointments Clause of the U.S. Constitution. 561 US 477, 510-513 (2010) (holding that the Securities and Exchange Commission is a department for purposes of the Appointments Clause of the U.S. Constitution).

Like Schnellecke does here, the Petitioners in *Free Enterprise Fund* argued that the Securities and Exchange Commission (“Commission”) was not a department because it was not a Cabinet-level Executive Department such as State, Treasury or Defense. 561 U.S. at 510. (Schnellecke Motion to Dismiss, pp. 8-9). The Supreme Court rejected this argument. The

Supreme Court held that the proper “reading of the Appointments Clause is consistent with the common, near-contemporary definition of a ‘department’ as a ‘separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person.’ 1 N. Webster, *American Dictionary of the English Language* (1828) (def.2) (1995 facsimile ed.)” *Id.* at 511. The Supreme Court concluded that any “free-standing, self-contained entity in the Executive Branch” is a department for the purposes of the Appointments Clause. *Id.* (citations omitted). The Supreme Court went on to state that the head of an independent agency within the Executive Branch has always been treated as the Head of a Department “without the title of Secretary or any role in the President’s Cabinet,” and consistent with its prior cases, the Court has “never invalidated an appointment made by the head of such an establishment.” *Id.* (citing *Freytag, supra*, at 917; *Burnap v. United States*, 252 U.S. 512, 515 (1920); *United States v. Germaine*, 99 U.S. 508, 511 (1879)). The Supreme Court found 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 ‘Departmen[t]’ for the purposes of the Appointments Clause.” *Id.*

Schnellecke, admits that the NLRB is an independent agency of the Executive Branch. (Schnellecke Motion to Dismiss, p. 8-10). See also, 29 U.S.C. § 153; *Guide to Board Procedures* at 1 (April 2017)(“The National Labor Relations Board is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act. . . .”). Indeed, the NLRB, by definition, is a free-standing, self-contained agency within the Executive Branch not subordinate to or contained within any other component. Accordingly, under the established the Supreme Court standard, the NLRB qualifies as a Department for purposes of the Appointments Clause, just as the SEC, another free-standing, self-contained entity in the

Executive Branch that is not a Cabinet-level agency, qualified as a Department.

Thus, as a Department, so long as the “head” of the NLRB appoints the NLRB ALJs, the appointment of NLRB ALJs, if they are inferior officers, is in accordance with the Appointments Clause of the U.S. Constitution. The Supreme Court in *Free Enterprise Fund* held, “As a constitutional matter, we see no reason why a multimember body may not be the ‘Hea[d]’ of a ‘Departmen[t]’ that it governs.” *Id.* at 512-513 (holding that the five Commissioners of the Securities and Exchange Commission are properly the head of that department). The Supreme Court ruled that so long as the Commission’s powers are generally vested in the Commissioners jointly, not the Chairman alone, and the Commissioners do not report to the Chairman, then the Commission members as a whole are the Head of the Department, not just the Commission’s Chairman. *Id.*

Similarly, the five members of the National Labor Relations Board are the Head of the NLRB Department. Like the SEC in *Free Enterprise Fund*, the powers of the NLRB are vested in the five Board members jointly and the Board Members do not report to the Board Chairman. 29 U.S.C. § 153. Just as the Supreme Court held that the five Commissioners of the SEC are the Head of their Department, the five Board members of the NLRB are the Head of their Department.

As Head of their Department, the Supreme Court held that when the SEC Commissioners appointed the members of the Public Company Accounting Oversight Board, they did so in accordance with their authority under the Appointments Clause of the U.S. Constitution. *Id.* at 513. A critical distinction between the instant case and the facts of *Bandimere* is that the SEC Commissioners, the Head of the Department, did not appoint the

SEC Administrative Law Judges but left that task to the SEC's Chief Administrative Law Judge. See *Bandimere*, 844 F.3d at 1177 (“The SEC’s Chief ALJ hires from the top three candidates subject to ‘approval and processing by the [SEC’s] Office of Human Resources.’”); *Hill v. SEC*, 114 F.Supp 3d 1297, 1303 (N.D. Ga. 2015)(“SEC ALJs are ‘not appointed by the President, the Courts, or the [SEC] Commissioners. Instead, they are hired by the SEC’s Office of Administrative Law Judges, with input from the Chief Administrative Law Judge, human resource functions, and the Office of Personnel Management.’”); *Duka v. U.S. SEC*, 2015 WL 5547463, \*5 (S.D.N.Y. Sept. 17, 2015)(“There appears to be no dispute between Duka and the SEC that the ALJs in this matter are not appointed by the President or the SEC Commissioners.”).

Thus, the issue in the cases that have found that the SEC ALJs have been appointed in violation of the Appointments Clause of the U.S. Constitution stem not from questions as to whether the SEC is a department for purposes of the Appointments Clause, but are due to the fact that the Head of the SEC Department, the SEC Commissioners, failed to appoint the SEC ALJs as required by the Appointments Clause. Assuming that the SEC ALJs are indeed inferior officers, if the SEC Commissioners had appointed the SEC ALJs, the SEC ALJs would have been appointed in accordance with the Appointments Clause of the U.S. Constitution. *Ironridge Global IV, Ltd. V. Securities and Exchange Commission*, 146 F.Supp. 3d 1294, 1317 (N.D. Ga. 2015) (the SEC’s constitutionally infirm ALJ appointments could be “easily cured” by having the SEC Commissioners issue a reappointment of the SEC ALJs).

This case is completely different. The Members of the NLRB, the Head of the NLRB Department, appoint the NLRB ALJs. Accordingly, since the NLRB ALJs are appointed by

the NLRB, the NLRB ALJs are appointed in accordance with the requirements of the Appointments Clause of the U.S. Constitution.

**C. The Challenge Raised by Schnellecke Is Not Jurisdictional.**

Schnellecke claims that its challenge to the NLRB ALJ's constitutional authority is a subject matter challenge. (Schnellecke Motion to Dismiss, p. 1) This argument is specious. The Supreme Court, as well as the District of Columbia Circuit and the Sixth Circuit, have all held that challenges regarding the appointments of officers under Article II of the U.S. Constitution are nonjurisdictional. See *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991); *Intercollegiate Broad Sys. V. Copyright Royalty Bd.*, 574 F.3d 748, 755-756 (D.C. Cir. 2009); *GGNSC Springfield v. NLRB*, 721 F.3d 403, 405-07 (6<sup>th</sup> Cir. 2013).

**III. Conclusion**

For the above stated reasons, Schnellecke's Motion to Dismiss should be denied and a finding should be made that the NLRB ALJs have been appointed in accordance with the Appointments Clause of the U.S. Constitution.

Dated: November 27, 2017

Respectfully Submitted

/s/ George N. Davies  
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## Certificate of Service

I hereby certify that I have this the 27<sup>th</sup> day November, 2017 caused the following people to be served via Electronic Mail and First Class Mail with a copy of the foregoing Opposition of Charging Party to Respondent's Motion to Dismiss:

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