

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL MOTORS, LLC

and

Case 07-CA-053570

MICHAEL ANTHONY HENSON

NOTICE TO SHOW CAUSE

On May 30, 2012, Administrative Law Judge Ira Sandron issued a decision in this case.

The General Counsel and the Respondent each filed exceptions and a supporting brief, an answering brief, and a reply brief.

This case involves complaint allegations that several provisions of the Respondent's "GM Employee and Representative Social Media Policy" violate Section 8(a)(1) of the National Labor Relations Act based on the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that held an employer's maintenance of a facially neutral work rule would be unlawful "if employees would reasonably construe the language to prohibit Section 7 activity." *Id.* at 647.¹ Recently, the Board overruled the *Lutheran*

¹ We note that on March 21, 2017, the Supreme Court held in *NLRB v. SW General, Inc. d/b/a Southwest Ambulance*, 137 S. Ct. 929 (2017) that, under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., former Acting General Counsel Lafe Solomon's authority to take action as Acting General Counsel ceased on January 5, 2011, when President Obama nominated him to be General Counsel. We need not consider this issue because the Respondent never questioned Solomon's authority under the FVRA or timely raised the issue before the Board. See *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015). However, even if the Respondent had raised the issue, events subsequent to the issuance of the complaint on February 7, 2012, rendered moot any potential argument that Solomon's lack of authority after his nomination precludes further litigation in this matter. Specifically, on May 23, 2016, General Counsel Richard F. Griffin, Jr. issued a Notice of Ratification in this case that states, in relevant part, as follows:

Heritage “reasonably construe” test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017).

Accordingly, the Board hereby issues the following notice to show cause why this proceeding should not be remanded to the judge for further proceedings in light of *Boeing*,

The prosecution of this case 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 as moot any challenge to the actions taken by Solomon as Acting General Counsel after his nomination on January 5, 2011.

including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision.

NOTICE IS GIVEN that any party seeking to show cause why this case should not be remanded to the administrative law judge must do so in writing, filed with the Board in Washington, D.C., on or before November 21, 2018 (with affidavit of service on the parties to this proceeding). Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C., November 7, 2018.

By direction of the Board:

Farah Z. Qureshi

Associate Executive Secretary