

DAVID A. ROSENFELD, Bar No. 058163
ANNE I. YEN, Bar No. 187291
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1375 55th Street
Emeryville, CA 94608
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: drosenfeld@unioncounsel.net;
ayen@unioncounsel.net

Attorneys for Respondent, NABET-CWA Local 51

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 19

Jeremy Brown,

Charging Party,

and

National Association of Broadcast Employees
and Technicians - The Broadcasting and Cable
Television Workers Sector of the
Communications Workers of America, AFL-
CIO, Local 51 (“NABET-CWA Local 51” or
“Respondent”),

Respondent.

Case Nos. 19-CB-244528;
19-CB-247119

**RESPONSE TO GENERAL COUNSEL’S
MOTION TO WITHDRAW COMPLAINT**

The representative of the Charging Party has shirked his responsibility to think about a position that he would take on behalf of his client. The shirking is so apparent that the Board must wonder who is paying his bill.

The Respondent vigorously disagrees with the position that he has taken in this case. We believe the action of the acting General Counsel is lawful. We assert that the President had every right to fire Peter Robb. We are thrilled he has now nominated Jennifer Abruzzo to fill the position. We believe that the former President was part of a criminal conspiracy not unlike that

of the representative of the Charging Party. We attach as **Exhibit A** and **B** briefs that have been filed supporting the right of the President to fire Peter Robb.

Nonetheless, we hasten to point out that if Mr. Solem is correct, then the entire complaint in this matter cannot be prosecuted and must be dismissed. We also point out that if Mr. Solem is correct, something he never thought about, then all of the complaints currently pending involving right to work for less or right to shirk issues must also be dismissed because the current General Counsel does not have authority to prosecute those complaints.

We emphasize that we believe that the position is incorrect. We also believe that it is being taken in bad faith in order to assist employers who are the subject of current complaints. That is why we believe that the representative of the Charging Party is part of a criminal conspiracy to assist employers not to assist workers.

For these reasons, the motion should be denied. The matter should be referred to the General Counsel to determine whether Mr. Solem should be sanctioned for taking this position which does not benefit his client but benefits his sponsors that is employers who pay for his entity to function. This is an irreconcilable conflict. He puts the employer sponsors of his organization ahead of the interests of Mr. Brown, the charging party.

Respectfully submitted,

Dated: February 17, 2021

ORGANIZE,
WEINBERG, ROGER & ROSENFELD
A Professional Corporation



By:

David A. Rosenfeld
Anne I. Yen
Attorneys for Respondent, NABET-CWA Local 51

148320/1135630

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

H&M INTERNATIONAL TRANSPORTATION, INC.

and

Case 5-CA-241380

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 1970, AFL-CIO

and

TEAMSTERS LOCAL UNION No. 822,
affiliated with the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, PARTY IN INTEREST

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
OPPOSITION TO RESPONDENT'S REQUEST TO THE BOARD FOR
SPECIAL APPEAL AND OPPOSITION TO RESPONDENT'S REQUEST FOR STAY**

Counsel for the Acting General Counsel hereby opposes Respondent H&M International Transportation, Inc.'s Request to the Board for Special Appeal, and further opposes Respondent's Request for Stay of the unfair labor practice hearing in the above-captioned case. Counsel for the Acting General Counsel respectfully moves for an Order denying Respondent's requests.

In its motion for a special appeal, Respondent contends that the complaint should be dismissed or the proceedings should be stayed because President Biden allegedly removed former General Counsel Peter B. Robb improperly. But the President may remove a General Counsel at any time and for any reason under the National Labor Relations Act. Under Section 3(a) of the Act, Board members may be removed only for cause; Section 3(d) creates the position of the General Counsel, yet states no such for-cause removal protection. Respondent fails to show that this distinction was anything other than what it appears to be on its face: a purposeful Congressional choice to decline to disturb the default rule that Senate-confirmed officers like the

General Counsel are removable by the President at will. In any event, there are no grounds for the Board to upend the statutory scheme by dismissing the complaint—inarguably issued by former General Counsel Robb—or to grant a stay. This motion should be denied forthwith.

I. Background: By default, federal officers are removable at the will of the appointing authority.

Before turning to the text of Section 3(d) of the Act, we believe that some background will assist the Board. The basic principle is this: in the absence of any specific statutory protection, the power to appoint to office carries with it the power to remove from that office. That default rule helps ensure that the President can carry out the functions of the Executive Branch. In this section, we describe the caselaw establishing that principle. In the next section, we show that Section 3(d) does not limit the President’s power to remove the General Counsel.

Although the Constitution details how executive-branch officers may be appointed,¹ it is “silent with respect to the power of removal from office,”² aside from the power of Congress to impeach. Through the years, therefore, the Supreme Court has repeatedly been called upon to construe the nature of, and limitations on, the power to remove officers. These cases dictate a clear standard. Where Congress has not spoken to the question of removal of an officer, that officer may be removed at any time by the person or body authorized to make the appointment.³ But where Congress has limited this authority, such limitations offend the Constitution where

¹ See U.S. Const., Art. II, Sec. 2, Cl. 2.

² *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839).

³ *Free Enterprise Fund v. Public Co. Acct’g Oversight Bd.*, 561 U.S. 477, 493 (2010) (citing *Sampson v. Murray*, 415 U.S. 61, 70, n. 17 (1974); *Myers v. United States*, 272 U.S. 52, 119 (1926); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259-60 (1839)).

they would interfere with the President’s duty to “take Care that the Laws be faithfully executed.”⁴

Parsons v. United States established long ago that merely stating a term of years for an office did not imply any limitation upon the President’s authority to remove officials from that office.⁵ As the Supreme Court there explained, a statute providing a four-year term of office for United States Attorneys established a limitation on the period of time for which those attorneys could hold office, but did not entitle them “to hold for four years as against any power of the President to remove.”⁶

In short, the default rule is that the President has authority to remove officers he appoints at will, absent clear congressional intent to the contrary.

II. The NLRB’s General Counsel serves at the pleasure of the President.

Respondent asserts that former General Counsel Peter B. Robb could not be removed from office by President Biden. This contention is based on respondent’s argument that the Act *implicitly* limits the President’s power to remove the General Counsel. This argument fails.

A. The Act does not shield the General Counsel from removal.

Section 3(a) of the Act establishes the Board, provides that members “shall be appointed for terms of five years each,” and states that “[a]ny member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.” By contrast, Section 3(d) of the Act, states that the General Counsel “shall be appointed

⁴ U.S. Const., Art. II, Sec. 3, Cl. 5.

⁵ 167 U.S. 324, 342 (1897).

⁶ *Id.*

by the President, by and with the advice and consent of the Senate, for a term of four years.”

Respondent says that these two provisions mean the same thing. This is absurd.

Begin with the plain text. The Board’s tenure provisions are standard for a multi-member independent administrative agency.⁷ The General Counsel’s tenure provisions—and absence of a removal restriction—are standard for a prosecutor.⁸ If the 1947 Congress, when creating the General Counsel position, had wanted to grant tenure protection, it would simply have cribbed the language it had already used regarding Board members in 1935. Cases too legion to count hold that the use of different language in analogous parts of the same statute requires that those sections be construed to have different meanings.⁹ And Respondent does not even attempt an argument as to why that settled canon of statutory construction does not apply here.

⁷ E.g. 12 U.S.C. § 242 (Federal Reserve Act) (“each member [of the Board of Governors] shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President”); 15 U.S.C. § 41 (FTC Act) (“Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.”).

⁸ *Parsons*, 167 U.S. at 342.

⁹ E.g., *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (“This Court generally presumes that when Congress includes particular language in one section of a statute but omits it in another, Congress intended a difference in meaning.”) (cleaned up) (citing *Digital Realty Trust, Inc. v. Somers*, 583 U.S. ___, 138 S.Ct. 767, 777 (2018); *Loughrin v. United States*, 573 U.S. 351, 358 (2014)); *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (“Instead we ‘generally presum[e] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.’”) (quoting *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 537 (1994)); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (“Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.”) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Fairbanks v. Superior Court*, 46 Cal. 4th 56, 62 (2009) (“The use of differing language in otherwise parallel provisions supports an inference that a difference in meaning was intended.”); accord *Lincoln Lutheran of Racine*, 362 NLRB 1655, 1659 n.18 (2015) (quoting *Russello*, 464 U.S. at 23), *overruled on other grounds*, *Valley Hosp. Med. Ctr.*, 368 NLRB No. 139 (2019), *rev. granted and remanded sub nom.*, *Local Jt. Exec. Bd. of Las Vegas v. NLRB*, ___ Fed. Appx. ___, 2020 WL 7774953 (9th Cir. Dec. 30, 2020).

Applying the plain language according to its terms also accords with the well-entrenched default rule that removal authority follows appointment authority.¹⁰ When Congress wants to alter the President’s ability “to keep [executive] officers accountable—by removing them from office, if necessary,” it does (and must) clearly express its intent to do so.¹¹

The Act’s context further supports this plain reading of its text. Here, Section 153(d)’s language reflects that Congress had every reason to want to treat the General Counsel differently from the Board with respect to tenure. The General Counsel and Board have entirely distinct functions. The Board makes rules, 29 U.S.C. § 156, issues certificates of representative, 29 U.S.C. § 159, adjudicates unfair labor practice cases, 29 U.S.C. § 160(c), and subpoenas evidence, 29 U.S.C. § 161. Congress’s decision to restrict the removal of Board members serving such “quasi-legislative and quasi-judicial” functions accords with the Supreme Court’s endorsement of such restrictions in *Humphrey’s Executor v. United States*,¹² decided weeks before Congress created the Board’s tenure protections on July 6, 1935.

In contrast, the General Counsel’s sole statutory functions are to supervise attorneys and regional office officials, 29 U.S.C. § 153(d), and litigate unfair labor practice complaints, 29 U.S.C. § 160(b). In performing those functions, the General Counsel acts with significant prosecutorial discretion, holding the sole power to initiate or refuse to initiate an unfair labor practice case.¹³ The remainder of the General Counsel’s functions are delegated to that position by the Board, pursuant to Section 3(d)’s authorization to perform “such other duties as the Board

¹⁰ See *supra* n. 3.

¹¹ *Free Enterprise Fund*, 561 U.S. at 483.

¹² 295 U.S. 602, 629 (1935).

¹³ E.g., *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (“the Board’s General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint”).

may prescribe.” And while the Board has delegated *executive* functions to the General Counsel,¹⁴ two powers that the General Counsel has no authority whatsoever to exercise are the enactment of quasi-legislative rules under Section 6 and the adjudication of cases under Sections 9 and 10.¹⁵ In short, the General Counsel is a purely prosecutorial position under the plain text of the Act. Congress’s decision to provide tenure protections for the Board-member office in no way suggests Congress intended such restrictions to implicitly extend to the very different General Counsel role, particularly in light of *Humphrey’s Executor’s* then-recent reiteration of the importance of Presidential removal power over executive officers whom he has appointed.¹⁶

Nor is this some recent *ad hoc* interpretation of the Act. To the contrary, the Executive Branch has so understood the Act since it was enacted. Current Chief Justice John Roberts, early in his career, explained the Executive Branch position on this very question in a memorandum written in 1983. Memo from J. Roberts to Fred Fielding, White House Counsel re: NLRB Dispute 1, 3 (July 18, 1983), attached as **Exhibit 1** (“clear” that General Counsel is “a purely executive officer and that the President has inherent constitutional power to remove him from office at pleasure”) (cleaned up). And as that memorandum makes clear, this merely reaffirmed long-held views. *Id.*

¹⁴ Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board, 20 Fed. Reg. 2175 (April 1, 1955), at § 1(b) (court litigation to enforce the Act).

¹⁵ The General Counsel does, to be sure, supply hearing officers in most representation and jurisdictional-dispute cases, but all such cases are subject to review *by the Board*, not the General Counsel. 29 C.F.R. §§ 102.67; 102.71; 102.90.

¹⁶ 295 U.S. at 632.

Finally, the construction that Respondent would put on the Act may raise serious questions about whether such a construction would be constitutional.¹⁷ If there were any ambiguity, the Board would have to construe the Act to avoid any such questions.¹⁸ And given that such a construction is not only readily available here, but also the best reading of the statute, there is no reason to follow Respondent’s invitation down the proverbial primrose path.

B. Respondent’s contrary arguments have no merit.

In the teeth of this overwhelming authority, Respondent makes three counterarguments. First, it suggests that the General Counsel somehow derives for-cause protections from the Board’s own. Second, it notes that the General Counsel is installed for a term of years. Third, further turning logic on its head, it cherry-picks the statement of a single legislator who *opposed* the 1947 Taft-Hartley Amendments to the Act as evidence that it means something other than what it says. None of these makeweights even remotely suggests that Section 3(d) contains an implied for-cause removal protection.

The first of these arguments—that Congress intended the General Counsel to be “fully blended” with the Board such that the Board Members’ for-cause removal protections somehow bleed over to the General Counsel (Mot. at 5)—runs afoul of *NLRB v. UFCW Local 23*.¹⁹ That case—which involved an attempt to judicially review prosecutorial actions taken by the General Counsel “on behalf of” the Board—explained that “the structure of the Act . . . leads inescapably to the conclusion that Congress distinguished orders of the General Counsel from Board

¹⁷ *Seila Law*, 140 S. Ct. at 2199.

¹⁸ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1987).

¹⁹ 484 U.S. 112, 128-29 (1987).

orders.”²⁰ And rightly so—Section 3(d) of the Act gives the General Counsel supervision over any agency attorneys “other than administrative law judges and legal assistants to Board members.” The two sides of the agency have entirely different functions, personnel, and chains of command.²¹ So it does not detract from the General Counsel’s independence that Congress included in Section 3(d) language “on behalf of the Board.” (Mot. at 2, 9.) That language was included merely to make clear that the NLRB is a single agency. As the *UFCW* Court recognized, the legislative history of the 1947 amendments to the Act shows that the acts of the General Counsel were not to be considered “acts of the Board.” *UFCW*, 484 U.S. at 128-29.

Relatedly, Respondent also suggests that Congress specifically created a different term of years for the General Counsel (four years instead of five) in Section 3(d), yet “impute[d] the for cause language of Section 3(a)” into that separate term provision *without saying so*. (Mot. at 6.) To state this argument is to refute it—it fails utterly to explain why different words in the same statute should be given the same meaning, and impermissibly suggests that a provision that Congress did not enact should be written into the statute.²²

The General Counsel’s appointment for a term of years, meanwhile, says nothing about the President’s removal powers. As noted above, it has been standard practice for well over one hundred years for United States Attorneys to be appointed for terms of years, yet the Supreme Court in *Parsons* held squarely that such appointments, without for-cause removal protection language, merely set an outer limit upon the duration of an appointment and do not allow the

²⁰ *Id.* at 128.

²¹ *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010).

²² *See supra* n. 9.

appointee to hold the position against the President’s will.²³ Respondent’s effort to reverse the standard presumption—to suggest that the absence of language *permitting* removal somehow “implicit[ly]” shows (Mot. at 7) that Congress wished to *prohibit* such removal—thus flatly contravenes controlling precedent. And the fact that past presidents elected not to remove General Counsels appointed by their predecessors does not in any way imply that they could not have done so; it shows only that for their own reasons, they chose not to. Officials do not acquire for-cause removal protection by adverse possession.

Finally, Respondent’s argument from legislative history (Mot. at 8) fails on every level. First, the Act is not ambiguous. Adjudicators “do not resort to legislative history to cloud a statutory text that is clear.”²⁴ Second, “[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.”²⁵ Statements of an *opponent* of legislation, such as what Respondent (Mot. at 8) proffers here, have almost no weight at all.²⁶ Third, the nature of what Respondent asks here—for the Board to, in effect, copy and paste its own for-cause removal provision into Section 3(d)—far exceeds the limits of its authority. It seeks “not a construction of a statute, but, in effect, an enlargement of it by the [Board], so that what was

²³ 167 U.S. at 342. Indeed, *Parsons* is so nearly on all fours with the present case that it virtually disposes of Respondent’s argument on its own.

²⁴ *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994).

²⁵ *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); accord *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).

²⁶ “In their zeal to defeat a bill, [opponents] understandably tend to overstate its reach.” *NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 66 (1964). Thus, “[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.” *Id.* (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951)).

[allegedly] omitted . . . may be included within its scope. To supply omissions transcends the judicial function.”²⁷

President Biden had the constitutional power and authority to remove former General Counsel Robb, and he exercised that power. Respondent’s arguments are contrary to the Act and seek to casually overthrow over a hundred years of settled law on the question of removal of federal officers. The Board should not entertain this request.

III. *Even assuming former General Counsel Robb’s removal was improper, Respondent has not established grounds for the Board to dismiss the complaint.*

As shown above, Respondent’s argument is entirely without merit. But *even if* it was not, Respondent’s motion should nevertheless be denied.²⁸ Respondent admits (Mot. at 9), as it must, that the complaint in this case issued under former General Counsel Robb prior to his removal by the President. Thus, the Regional Director and his staff were authorized by delegation to issue and prosecute the complaint.²⁹

²⁷ *Iselin v. United States*, 270 U.S. 245, 251 (1926).

²⁸ In *SW General v. NLRB*, the D.C. Circuit resolved the threshold question of whether the then-Acting General Counsel was properly designated before addressing subsidiary questions as to whether an improper designation affected the validity of the decision. 796 F.3d 67, 72-78 (addressing whether Acting General Counsel was properly designated); *id.* at 78-83 (addressing whether Board decision could be affirmed even if designation was improper). Counsel for the General Counsel agrees with this approach, although a sound regard for administrative efficiency dictates that the Board should rule on both questions. A ruling on both questions would help to diminish the likelihood that cases might later be remanded for the agency to address questions left unaddressed in its earlier ruling, causing unnecessary delay.

²⁹ See 29 C.F.R. § 102.15-26, *passim* (noting General Counsel’s standing delegation to Regional Directors of authority to issue and amend complaints, set hearings, receive answers and amendments, and rule upon procedural motions); 32 Fed. Reg 9588 § 203.1, 203.3(d) (1967) (Board Description of Organization and Functions delegating from the Regional Director to the Regional Attorney to the Field Attorney “to appear and participate as counsel in Board hearings.”).

Respondent asserts, without support, that the Board must dismiss the undisputedly valid complaint or otherwise intervene to stop its prosecution because it contends that Robb's removal was improper. (Mtn. at 1-2, Ex. A at 2, 9). But courts have allowed the continued prosecution of complaints issued prior to a vacancy in the office of the General Counsel.³⁰ Indeed, in *NLRB v. Gemalo*, the court compelled a party to testify in an unfair labor practice hearing that commenced after the position of General Counsel had become vacant, and rejected the same claim Respondent makes here.³¹ As the court stated, "the attorney acting for the General Counsel in requesting the subpoena and in seeking its enforcement is [not,] in effect a 'headless horseman'" and "once a complaint has been filed while a General Counsel is in office, that complaint may be prosecuted."³² Thus, any alleged impropriety regarding Robb's removal is irrelevant to the continued prosecution of the complaint issued under his authority.

³⁰ See *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640, 644 (2d Cir. 1952) ("Before his resignation, the General Counsel had delegated to his representative at the hearing authority to prosecute the complaint. We find no impropriety in such a procedure . . ."), *aff'g in rel. part* 96 NLRB 608, 608-09 (1951).

³¹ 130 F. Supp 500, 501 (S.D.N.Y. 1955).

³² *Id.* Accordingly, once the complaint issued, the prosecution was able to proceed even after the removal of former General Counsel Robb and Acting General Counsel Alice Stock, and prior to the designation of Acting General Counsel Ohr. In an abundance of caution, however, Acting General Counsel Ohr ratified the actions that took place prior to his designation on January 25, 2021. (**Exhibit 2**). Proper ratification of an administrative decision can remedy a defect arising from the decision of an improperly appointed official. *Midwest Terminals of Toledo Int'l, Inc. v. NLRB*, 783 Fed. App'x 1, 7 (D.C. Cir. 2019) (upholding General Counsel's ratification of complaint and prosecution); *1621 Route 22 West Operating Co., LLC v. NLRB*, 725 F. App'x 129, 137 (3d Cir. 2017) (same); see also *Advanced Disposal East, Inc. v. NLRB*, 820 F.3d 592, 604-06 (3d Cir. 2016) (upholding Board ratification of Regional Director's appointment as well as Regional Director's ratification of his own prosecution); *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998) (upholding ratification by properly appointed official).

IV. Respondent’s Specific Request for a Stay Should Be Denied.

Finally, Respondent has failed to otherwise establish grounds to stay the prosecution in this case. It is well settled that a party does not suffer irreparable harm by having to participate in administrative procedures prior to securing judicial review.³³ And Respondent’s allegations could well be moot by the time Robb’s original appointment would expire in November 2021, because this case could end in dismissal on the merits, or a Senate-confirmed General Counsel could ratify any or all of the acts of Acting General Counsel Ohr in the meantime.³⁴ Thus, there are no grounds for the Board to allow any further delay in these proceedings.

Respondent’s special appeal, and its motion to dismiss the complaint or stay the proceedings in this case, should be denied in their entirety.

Respectfully submitted,

/s/ Barbara Duvall

Barbara Duvall, Esq.
Stephanie Eitzen, Esq.
Counsel for the Acting General Counsel
NLRB, Region 5
100 S. Charles St., Tower II, Ste 600
Baltimore, MD 21201
barbara.duvall@nlrb.gov
stephanie.eitzen@nlrb.gov

³³ See, e.g., *Renegotiation Board v. Bannerkraft Clothing Co.*, 414 U.S. 1, 24 (1974); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938) (“[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury”).

³⁴ See *supra* n. 32 (citing judicial approval of ratification by properly-appointed officials).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February 2021, the foregoing Counsel for the Acting General Counsel's Opposition to Respondent's Request to the Board for Special Appeal and Opposition to Respondent's Request for Stay, was served by electronic mail upon the following persons:

Stefan Marculewicz, Esq.
Littler Mendelson, P.C.
smarculewicz@littler.com
Counsel for Respondent

Brendan Fitzgerald, Esq.
Littler Mendelson, P.C.
bfitzgerald@littler.com
Counsel for Respondent

A. John Harper III, Esq.
Littler Mendelson, P.C.
ajharper@littler.com
Counsel for Respondent

Brian Esders, Esq.
Abato, Rubenstein & Abato, P.A.
besders@abatolaw.com
Counsel for Charging Party

Elizabeth Alexander, Esq.
Marrinan & Mazzola Mardon, P.C.
ealexander@mmmpc.com
Counsel for Charging Party

John Sheridan, Esq.
Marrinan & Mazzola Mardon, P.C.
jsheridan@mmmpc.com
Counsel for Charging Party

Craig Becker, Esq.
American Federation of Labor and Congress of Industrial Organization
cbecker@aficio.org
Counsel for Charging Party

Matthew Ginsburg, Esq.
American Federation of Labor and Congress of Industrial Organization
mginsburg@afcio.org
Counsel for Charging Party

Yona Rozen, Esq.
American Federation of Labor and Congress of Industrial Organization
yrozen@afcio.org
Counsel for Charging Party

Justin Keating, Esq.
Beins, Axelrod, P.C.
jkeating@beinsaxelrod.com
Counsel for Teamsters Local Union No. 822, affiliated with International Brotherhood of Teamsters

/s/ Barbara Duvall

Barbara Duvall, Esq.
Stephanie Eitzen, Esq.
Counsel for the Acting General Counsel
NLRB, Region 5
100 S. Charles St., Tower II, Ste 600
Baltimore, MD 21201
barbara.duvall@nlrb.gov
stephanie.eitzen@nlrb.gov

EXHIBIT 1

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 18, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: NLRB Dispute

On July 14, Donald Dotson sent Mr. Hauser a note advising that Dotson and NLRB member Robert Hunter wanted to meet with him to "discuss alternatives" in connection with the dispute at NLRB concerning the respective powers of the Solicitor and the General Counsel. Dotson enclosed a legal analysis of the dispute and noted that it was urgent that the matter be resolved. Hauser asked that I review the question and determine (1) whether the Board had the authority to act as it did in transferring authority from the General Counsel to the Solicitor, (2) whether the General Counsel may be removed by the President, (3) if the General Counsel's defiance of the Board directive constitutes "cause" for removal of the General Counsel, and (4) how Mr. Meese's office is involved in the dispute.

I first reported on this dispute in a memorandum of May 18, 1983 (attached). You will recall that on May 4, 1983, the Board required the General Counsel to submit "all pleadings and briefs in proceedings involving enforcement, review, Supreme Court litigation, contempt, and miscellaneous litigation" to the Solicitor for his review, and directed that such pleadings and briefs may be filed only after approval of the Solicitor, acting for the Board. The Board also assumed authority to "transfer, promote, discipline, discharge" and take other appropriate personnel action with respect to NLRB attorneys engaged in the activities to be reviewed by the Solicitor. The General Counsel, however, was directed to exercise "general supervisory responsibility" over those attorneys.

The legal memorandum submitted by Dotson defends the Board's action by noting the statutory authority of the Board to "appoint... attorneys... necessary for the proper performance of its duties... Attorneys appointed under this section may, at the discretion of the Board, appear for and represent the Board in any case in court." 29 U.S.C. § 154(a). The Board recognizes that the General Counsel, under 29 U.S.C. § 153(d), has independent authority to investigate charges and issue unfair labor practice complaints. The Board's action does not affect attorneys employed in these areas. The Board maintained, however, that the General Counsel's

EXHIBIT A

authority to represent the Board in court is based not on any similar statutory grant of authority but rather on a revocable delegation of authority from the Board. The Board's legal memorandum notes that a similar dispute between the Board and its General Counsel arose in 1950, and was resolved when the President requested and obtained the General Counsel's resignation.

We have not been provided with a copy of the General Counsel's legal analysis, but I understand that it focuses on the language of 29 U.S.C. § 153(d): "The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board..." This clear statutory language, according to the General Counsel, flatly prohibits any effort by the Board to place control over enforcement and appellate attorneys in the hands of the Solicitor. Simply stating, as the Board did, that the General Counsel will continue to exercise "general supervisory responsibility" over such attorneys is a meaningless assertion in the face of the Board's requirement that the Solicitor review and approve briefs and pleadings and the Board's assertion of authority over attorney promotions, disciplining, transfers, and terminations.

As I pointed out in my earlier memorandum, the Board's position is not illogical, nor does it contravene the intent of the Taft-Hartley Act, which established the office of NLRB General Counsel. It was the purpose of that Act to insulate the General Counsel from the Board with respect to the presentation of complaints before the Board. Such insulation with respect to enforcement of orders issued by the Board was not necessary (no problem of commingling adjudicative and prosecutive roles being present once the Board had issued an order), and accordingly this question was not specifically addressed by the Taft-Hartley amendments. In addition, there is a great deal of common sense appeal to the proposition that the Board should be able to control the legal arguments presented on its behalf before the courts.

On the other hand, the plain language of 29 U.S.C. § 153(d) presents a major hurdle to the Board's legal analysis. Even if the intent of Congress was only to insulate NLRB attorneys from the Board with respect to the filing of complaints, the language chosen -- giving the General Counsel "general supervision over all attorneys employed by the Board" (emphasis supplied) -- is not so limited. In sum, it is not apparent which side in this dispute would prevail if the matter were put to the proof, which in this case would presumably entail an Attorney General opinion rather than a court test.

There is a clear answer to the second query posed by Mr. Hauser. In an opinion dated March 11, 1959, Malcolm Wilkey, then Assistant Attorney General for the Office of Legal Counsel, concluded that "the General Counsel of the Board is a purely Executive Officer and that the President has inherent constitutional power to remove him from office at pleasure under the rule of Myers v. United States, 272 U.S. 52." We were advised in April of this year that the Department of Justice still adhered to the Wilkey opinion. Since the General Counsel serves at the pleasure of the President, it is unnecessary to consider Mr. Hauser's third question, viz., whether the General Counsel's conduct constitutes "cause" justifying Presidential dismissal for cause.

With respect to the fourth question, Ken Cribb advised me on July 15 that it was his understanding that Craig Fuller would be meeting with Dotson to discuss the matter, at Mr. Meese's direction. Hauser called Fuller, who seemed unaware of any such arrangement. In any event, Hauser advised Fuller that our office was looking into the matter and should be kept apprised of any developments.

In light of the NLRB's status as an independent agency, we should keep some distance from the legal dispute. Dotson may want a meeting to discuss firing the General Counsel, the step taken over thirty years ago when the NLRB was similarly deadlocked. Since such a move can only come from the President, we are inevitably involved if Dotson seeks that solution. I would, however, recommend against taking sides in the legal dispute. Dotson took this action without consulting us or, more appropriately, the Justice Department, and we should not be anxious to sleep in a bed not of our own making.

EXHIBIT 2

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

H&M INTERNATIONAL TRANSPORTATION, INC.

and

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 1970, AFL-CIO

Case 05-CA-241380

and

TEAMSTERS LOCAL UNION No. 822,
affiliated with the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
PARTY IN INTEREST

NOTICE OF RATIFICATION

The prosecution of this case commenced under the authority of former General Counsel Peter B. Robb, when complaint was issued on June 11, 2020.

On January 20, 2021, President Biden removed General Counsel Robb. Subsequently, President Biden removed Alice B. Stock as Acting General Counsel on January 21, 2021.

The President designated me as Acting General Counsel on January 25, 2021.

From the time that President Biden removed former Acting General Counsel Stock, to the time of my designation as Acting General Counsel, the complaint continued to be prosecuted.

After appropriate review and consultation with my staff, I have decided that the continued prosecution of this complaint is a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.

For the foregoing reasons, I hereby ratify all actions that took place in this case after the President removed Acting General Counsel Stock and prior to my designation as Acting General Counsel. I further ratify the continued prosecution of the complaint.

PETER OHR Digitally signed by PETER OHR
Date: 2021.02.12 10:52:18
-06'00'

Peter Sung Ohr
Acting General Counsel

Date: 2/12/2021

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

H&M INTERNATIONAL TRANSPORTATION, INC.

and

Case 5-CA-241380

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 1970, AFL-CIO

and

TEAMSTERS LOCAL UNION No. 822,
affiliated with the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, PARTY IN INTEREST

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on this 12th day of February 2021, the Notice of Ratification
was served by electronic mail upon the following persons:

Stefan Marculewicz, Esq.
Littler Mendelson, P.C.
smarculewicz@littler.com
Counsel for Respondent

Brendan Fitzgerald, Esq.
Littler Mendelson, P.C.
bfitzgerald@littler.com
Counsel for Respondent

A. John Harper III, Esq.
Littler Mendelson, P.C.
ajharper@littler.com
Counsel for Respondent

Brian Esders, Esq.
Abato, Rubenstein & Abato, P.A.
besders@abatolaw.com
Counsel for Charging Party

Elizabeth Alexander, Esq.
Marrinan & Mazzola Mardon, P.C.
ealexander@mmmpc.com
Counsel for Charging Party

John Sheridan, Esq.
Marrinan & Mazzola Mardon, P.C.
jsheridan@mmmpc.com
Counsel for Charging Party

Craig Becker, Esq.
American Federation of Labor and Congress of Industrial Organization
cbecker@afcio.org
Counsel for Charging Party

Matthew Ginsburg, Esq.
American Federation of Labor and Congress of Industrial Organization
mginsburg@afcio.org
Counsel for Charging Party

Yona Rozen, Esq.
American Federation of Labor and Congress of Industrial Organization
yrozen@afcio.org
Counsel for Charging Party

Justin Keating, Esq.
Beins, Axelrod, P.C.
jkeating@beinsaxelrod.com
Counsel for Teamsters Local Union No. 822, affiliated with International Brotherhood of Teamsters

Barbara E. Duvall

Barbara Duvall, Esq.
Stephanie Eitzen, Esq.
Counsel for the Acting General Counsel
NLRB, Region 5
100 S. Charles St., Tower II, Ste 600
Baltimore, MD 21201
barbara.duvall@nlrb.gov
stephanie.eitzen@nlrb.gov

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

International Longshoremen's
Association, Local 1970

Charging Party,

and

H&M International
Transportations, Inc.,

Petitioner,

Case No. 05-CA-241380

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970'S
OPPOSITION TO H&M INTERNATIONAL TRANSPORTATION, INC.'S
REQUEST TO THE BOARD FOR SPECIAL APPEAL FROM THE DENIAL OF ITS
MOTION TO DISMISS

Brian Esders
Abato, Rubenstein & Abato, PA
[809 Gleneagles Court, Suite 320](#)
[Baltimore, MD 21286](#)

John Sheridan
Elizabeth Alexander
Marrinan & Mazzola Mardon, P.C.
[26 Broadway, 17th Floor](#)
[New York, NY 10004](#)

Craig Becker
Yona Rozen
James Coppess
Matthew Ginsburg
Maneesh Sharma
AFL-CIO
815 Sixteenth St.
NW
Washington, DC
20006
(202) 637-5310
cbecker@aficio.org

TABLE OF CONTENTS

Table of Authoritiesii

Argument 1

 I. As the Instant Complaint Issued Prior to General Counsel Robb’s
 Departure, there is No Basis for Dismissal or a Stay of
 Proceedings 1

 II. A Vacancy in the Office of the General Counsel Existed on
 January 25, 2021, and the President was Authorized to Fill It..... 3

 III. President Biden had the Authority to Remove Robb 6

 IV. The Board Should Not Address the Company’s Request in an
 Interlocutory Appeal 13

Conclusion 14

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bonwitt Teller, Inc.</i> , 96 NLRB 608 (1951)	2
Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477 (2010)	10
<i>Hennen</i> , 38 U.S. 230 (1839)	10
<i>Holtzman v. Schlesinger</i> , 414 U.S. 1304 (1973)	8
<i>Humphrey’s Executor v. United States</i> , 295 U.S. 602 (1935)	11
<i>Keim v. United States</i> , 177 U.S. 290 (1900)	10
<i>Midwest Terminals of Toledo Int’l, Inc. v. NLRB</i> , 783 F. App’x 1 (D.C. Cir. 2019)	13
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988)	11
<i>NLRB v. Gemalo</i> , 130 F.Supp. 500 (S.D.N.Y. 1955)	2
<i>NLRB v. SW General, Inc.</i> , 137 S.Ct. 929 (2017)	8, 13
<i>NLRB v. United Food and Commercial Workers Local 23</i> , 484 U.S. 112 (1987)	8, 9
<i>Parsons v. United States</i> , 167 U.S. 324 (1897)	10
<i>Russello v. U.S.</i> , 464 U.S. 16 (1983)	7

TABLE OF AUTHORITIES (Continued)

Cases	Page(s)
<i>Seila Law LLC v. Consumer Financial Protection Bureau</i> , 140 S.Ct. 2183 (2020).....	10
<i>United States v. Pabon-Cruz</i> , 391 F.3d 86 (2d Cir. 2004)	8
Statutes and Regulations	
16 C.F.R.	
§ 0.8	9
§0.11	9
29 U.S.C.	
§ 3(a)	7
§ 153(a)	7
§ 153(d)	2, 5, 9
5 U.S.C.	
§ 3345(a)	6
§ 3347	6
§ 3349	3
Other Authorities	
<i>Authority of the President to Remove the General Counsel of the National Labor Relations Board 2</i> (Feb. 23, 1954)	11
Black's Law Dictionary (11th ed. 2019)	5
https://news.bloomberglaw.com/daily-labor-report/nlrbs-number-two-lawyer-fired- by-biden-one-day-after-her-boss?context=article-related	4, 5
https://www.nlr.gov/about-nlr/who-we-are/general-counsel/ general-counsels-1935	2, 4, 5
<i>Memo from J. Roberts to Fred Fielding, White House Counsel re: NLRB Dispute 1, 3</i> (July 18, 1983).....	12
The Purpose and Effects of the Administrative Changes Made by Taft-Hartley, 47 Cath. U. L. Rev. 941 fn. 82 (1998).....	13

ARGUMENT

H&M International Transportation, Inc.'s request for a special appeal asks this Board to take the unprecedented action of overruling the President's authority to fill a vacancy in an office independent of the Board itself, and to dismiss a properly issued complaint. The Company's request must be denied for the reasons provided in this response.

I. As the Instant Complaint Issued Prior to General Counsel Robb's Departure, There is No Basis for Dismissal or a Stay of Proceedings

The Company's motion to dismiss is premised on the notion that President Biden lacked authority to direct that General Counsel Peter Robb leave office and, as a result, no lawful successor to Robb could be appointed until some unspecified future date, presumably the date on which Robb's term would have ended, but for his early departure. Accordingly, it follows that, without a properly appointed General Counsel, all pending unfair labor practice complaints must be dismissed, or in the alternative, stayed until this Board determines that a properly appointed General Counsel holds the office. The Company now applies this theory to President Biden's appointment of Peter Ohr as Acting General Counsel.

But the instant complaint was issued prior to Robb's departure as General Counsel. The Company does not, and cannot, raise any issues regarding Robb's authority to issue the complaint. The Company instead claims that the complaint must be dismissed, or proceedings stayed, because Counsel for the General Counsel cannot prosecute the case without a properly appointed General Counsel. The only authority it cites for this assertion is § 3(d) of the NLRA, which makes the General

Counsel the “final authority” over the “prosecution” of unfair labor practice complaints. 29 U.S.C. § 153(d).

The Board has squarely rejected the argument that complaints must be dismissed “based solely on [this type of] very literal reading of [§] 3(d).” *Bonwitt Teller, Inc.*, 96 NLRB 608, 609 (1951). In *Bonwitt Teller*, the Board denied an employer’s request to dismiss a complaint that issued prior to the resignation of the first General Counsel, John Denham, but whose hearing largely proceeded during a gap period between Denham’s departure and the appointment of his successor. *Id.* at 608-9. The Board determined that “[§] 3(d) of the Act d[id] not require that th[e] proceeding be set aside,” and that dismissal of the complaint would not effectuate “the purposes and policies of the Act[.]” *Id.* at 609; *see also NLRB v. Gemalo*, 130 F.Supp. 500, 501 (S.D.N.Y. 1955) (finding that Counsel for General Counsel maintains authority to prosecute a complaint after it issued, even if a vacancy in the office of General Counsel occurs).

Moreover, on February 12, 2021, Acting General Counsel Ohr ratified the continue prosecution of this complaint.

Accordingly, there is simply no authority to find that Counsel for General Counsel cannot continue to litigate complaints issued prior to a vacancy in the office of General Counsel. Indeed, a review of the tenures of the past General Counsels and Acting General Counsels shows gaps in time between occupants of the office of General Counsel continued to occur, and yet the Board has not deviated from *Bonwitt Teller*. (See <https://www.nlr.gov/about-nlr/who-we-are/general->

[counsel/general-counsels-1935](#)).¹ This is unsurprising, as the consequences of accepting the Company's theory would be periodic and wholly unwarranted delay in the enforcement of the Act. Therefore, the Company's request must be denied.

II. A Vacancy in the Office of the General Counsel Existed on January 25, 2021, and the President was Authorized to Fill It

As explained above, the Company's motion to dismiss asserts that President Biden lacked authority to direct General Counsel Robb to leave office and, therefore, the President also lacked authority to appoint Peter Ohr as Acting General Counsel. The Company's theory is entirely without merit, and its request for special appeal must be denied.

The clearest weakness in the Company's theory is its simple incoherence. Either Robb continues to hold the office of General Counsel, in which case there is no issue with this case moving forward before the ALJ. Or Robb has vacated the office, in which case the President was clearly entitled to designate an Acting General Counsel to carry on the functions of that office pursuant to § 3(d) of the Act.

No one denies that Robb vacated the office of General Counsel. The NLRB does not. On January 29, the agency forwarded two notices related to the vacancy in the office of General Counsel to the President of the Senate, the Speaker of the House, and Comptroller General of the United States, as required by the Federal Vacancies Reform Act, 5 U.S.C. § 3349. (notices attached as Ex. 1). The first of

¹ As an example, Acting General Counsel Leonard Page's term ended on April 20, 2001. He was replaced by Acting General Counsel John Higgins, whose term began on May 16, 2001.

these notices informed the recipients that the office of General Counsel became vacant on January 20, and that Alice Stock had been designated Acting General Counsel. The second notice, which continued to acknowledge that the office of General Counsel was vacated on January 20, notified the recipients that Peter Ohr had been designated the Acting General Counsel as of January 25. In addition, the NLRB's website accurately reports the end of Robb's tenure as of January 20, 2021 (<https://www.nlr.gov/about-nlr/who-we-are/general-counsel/general-counsels-1935>); press statements made by an NLRB spokesperson announced that Alice Stock became Acting General Counsel on January 21, 2021 (<https://news.bloomberglaw.com/daily-labor-report/nlrbs-number-two-lawyer-fired-by-biden-one-day-after-her-boss?context=article-related>).² Robb himself does not deny that he vacated the office. On January 21, Robb sent a farewell email to staff that acknowledged his departure from the office. (email attached as Ex. 2). Moreover, Robb has taken no action as of this date to suggest that he believes he still occupies the office of General Counsel.³ Lastly, not even the Company denies that the General Counsel's office was vacated on January 20. Its request for special appeal and its motion to dismiss repeatedly acknowledge that Robb is no longer General Counsel.

Accordingly, the only issue is the President's authority to designate an Acting General Counsel following Robb's departure. Section 3(d) of the NLRA specifies

² All dates hereafter are 2021, unless specified otherwise.

³ Notably, Robb has also taken no action to contest the legality of the events surrounding his departure from the office.

that “[i]n case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy[.]” 29 U.S.C. § 153(d). President Biden exercised that authority to designate Ohr Acting General Counsel on January 25. (See Order, attached as Ex. 3).

It is undisputed that Robb departed the office of General Counsel on January 20, and therefore, that office was vacant on January 25.⁴ Due to this vacancy, President Biden had clear authority to designate an Acting General Counsel pursuant to § 3(d) of the Act.

Even if the Company attempted to argue that the vacancy was not a proper vacancy under § 3(d), that argument would have no merit. While the Act does not define “vacancy,” any common sense definition of the word encompasses Robb’s departure.⁵ Additionally, while President Biden did not rely on the Federal Vacancies Reform Act (“FVRA”) to fill the vacancy, that statute provides useful

⁴ As mentioned, Alice Stock, first assistant to General Counsel Robb, was elevated to Acting General Counsel on January 21, 2021, due to a vacancy in the office of General Counsel. However, as the NLRB acknowledges, she vacated that office on the same day. (See <https://www.nlr.gov/about-nlr/who-we-are/general-counsel/general-counsels-1935>; <https://news.bloomberglaw.com/daily-labor-report/nlrbs-number-two-lawyer-fired-by-biden-one-day-after-her-boss?context=article-related>). The Company makes no arguments regarding Stock.

⁵ For instance, Black’s Law Dictionary defines vacancy as “1. The quality, state, or condition of being unoccupied, esp. in reference to an office, post, or piece of property. 2. The time during which an office, post, or piece of property is not occupied. 3. An unoccupied office, post, or piece of property; an empty place.” VACANCY, Black’s Law Dictionary (11th ed. 2019).

guidance on the meaning of a vacancy.⁶ According to the FVRA, the President has authority to appoint an acting officer when the incumbent “dies, resigns, or is otherwise unable to perform the functions and duties of the office.” 5 U.S.C. § 3345(a). Clearly after January 20, Robb was “unable to perform the functions and duties of the office” that he no longer claimed to occupy. Perhaps most importantly, the Board’s January 29 notices acknowledge that a vacancy in the office of General Counsel has existed since January 20. Thus, even if one were to contest the President’s authority to dismiss Robb, there can be no question that the office of General Counsel was vacant on January 25, when President Biden appointed Ohr as Acting General Counsel.

As Ohr was properly designated Acting General Counsel pursuant to a vacancy, he has the full authority of the office of General Counsel, and there is no basis to grant the Company’s requested relief. Its request for special appeal must be denied.

III. President Biden had the Authority to Remove Robb

The Company’s main contention is that Robb was improperly removed from office. Even if that argument is relevant, considering Robb’s departure and the subsequent uncontested filling of the General Counsel vacancy, the Company’s

⁶ In fact, the definition for a “vacancy” under the FVRA must be consistent with the definition for a “vacancy” under the NLRA. Otherwise, you could have the incongruent situation in which the President would have authority to fill a vacancy under one of the statutes, but not the other. *See* 5 U.S.C. § 3347 (making FVRA non-exclusive for filling a vacancy where a separate statute provides the President the authority to fill a vacancy, such as § 3(d) provides for office of General Counsel).

argument regarding the President’s authority to remove the General Counsel is as incoherent as its argument that the President cannot fill the vacancy. The Company argues that the tenure protections for Board members in § 3(a) of the Act extend to the General Counsel. That argument is contrary to the clear language of the Act, the explicit intent of the Taft-Hartley amendments’ creation of an office of General Counsel that is independent of the Board, and Supreme Court precedent on tenure protections.

Section 3(a) of the Act provides that “[a]ny member of the Board may be removed by the President, upon notice of hearing, for neglect of duty or malfeasance in office, but for no other cause.” 29 U.S.C. § 153(a). The Company argues that “the General Counsel is tantamount to a member of the Board” and thus “operates as a member of the Board for purposes of the 3(a) removal protections.” Mot. to Dismiss 6. But even the most cursory review of § 3(a) makes clear that it applies solely to the five-member Board. 29 U.S.C. § 3(a) (“[t]he National Labor Relations Board . . . shall consist of five . . . members . . . appointed for terms of five years each.”). The General Counsel is not one of the five Board Members and thus is not subject to the appointment and tenure provisions of Section 3(a). Indeed, the position of General Counsel is established by an entirely different subsection, namely § 3(d), which is conspicuously devoid of the type of tenure protection language found in § 3(a). Obviously, Congress knew how to include such language; its choice not to do so in § 3(d) evinces a clear intent to not extend those protections to the General Counsel. *Russello v. U.S.*, 464 U.S. 16, 23 (1983) (“where Congress includes particular

language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”).⁷

Not only does the clear language of § 3 contradict the Company’s claim that the General Counsel is tantamount to a Board Member, so does Congress’s clear intent in creating a separate office of the General Counsel subject to presidential appointment and Senate confirmation in the Taft-Hartley Act. Prior to passage of Taft-Hartley, the Board performed the dual functions of prosecuting and adjudication unfair labor practices. Taft-Hartley added § 3(d) to the Act, creating an office of the General Counsel that, while “within the agency,” was “independent of the Board's authority.” *NLRB v. United Food and Commercial Workers Local 23*, 484 U.S. 112, 129 (1987). As the Supreme Court recognized, Congress intended the General Counsel “to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices,

⁷ The Company cites to a single senator’s statement found in the legislative history of Taft-Hartley as evidence of congressional intent to extend the Board Members’ tenure protections to the General Counsel. Mot. to Dismiss 8 (selectively quoting a floor statement of Sen. James Murray of Montana, who, in speaking in opposition to the legislation, sought to portray the proposed General Counsel as an unaccountable “labor czar”). “[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.” *SW Gen., Inc.*, 137 S. Ct. at 943 (2017). This is even more the case where the statement is made by a legislator speaking in opposition to the proposed legislation. *United States v. Pabon-Cruz*, 391 F.3d 86, 101 (2d Cir. 2004) (“it is well established that speeches by opponents of legislation are entitled to relatively little weight in determining the meaning of the Act in question.” (quoting *Holtzman v. Schlesinger*, 414 U.S. 1304, 1313 n. 13 (1973) (Marshall, J., in chambers))).

and in respect of the prosecution of such complaints before the Board.” *Id.* at 124-25 (cleaned up). Congress, then, clearly *did not* intend the General Counsel to be tantamount to a Board Member, and subject to the tenure protections extended to those Members.⁸

The only language in § 3(d) that addresses the General Counsel’s tenure states that he or she is appointed “for a term of four years.” 29 U.S.C. § 153(d). The Company claims that this language, coupled with the absence of any removal provision in § 3(d), guarantees the General Counsel a term of four years, apparently regardless of any malfeasance in office.⁹ Mot. to Dismiss 7. The Supreme Court

⁸ In order to establish the General Counsel is “tantamount to a member of the Board,” the Company relies heavily on an analogy with the Federal Trade Commission. But that analogy proves the opposite of what the Company suggests. The General Counsel of the FTC is appointed by and reports to the Chairman of the Commission, who is a member of the Commission itself. 16 C.F.R. §§ 0.8 & 0.11. The NLRB had a similar structure until 1947 when the Taft-Hartley Act made the General Counsel independent of the Board and subject to appointment by the President.

Similarly unavailing is the Company’s assertion that the title “General Counsel of the Board” proves that the General Counsel is tantamount to a member of the Board. Mot. to Dismiss 5. Such references to the Board in relation to the General Counsel simply “make it clear that the General Counsel act[s] within the agency, [but do] not [] imply that the acts of the General Counsel [sh]ould be considered acts of the Board.” *UFCW Local 23*, 484 U.S. at 130.

The Company’s argument that permitting removal of the General Counsel “would undermine the independence of the Board,” Mot. to Dismiss 6, suggests that the President cannot remove the Attorney General or U.S. Attorneys without undermining the independence of the courts and is thus clearly wrong.

⁹ Actually, the Company argues that the four-year term, plus a lack of a removal provision, creates a “for cause” requirement for removal. Mot. to Dismiss 7. However, the Company provides no explanation for why the President would be entitled to remove the General Counsel for cause when § 3(d) contains no removal provision at all. The absence of a removal provision either means that the President has no authority to remove the General Counsel, regardless of the General Counsel’s conduct, or the Act places no limit on the President’s authority to

has made clear that the type of tenure language found in § 3(d) offers the General Counsel no tenure protection.

It is long-settled that a statutorily fixed term of office constitutes an express “limitation” on an officer’s right to hold office – *i.e.*, “in no event can they remain in office longer than that period without being reappointed” – not an “entitle[ment] to hold [office] . . . as against any power of the president to remove.” *Parsons v. United States*, 167 U.S. 324, 342 (1897). In other words, “[i]n the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment.” *Keim v. United States*, 177 U.S. 290, 293-94 (1900). *See generally In re Hennen*, 38 U.S. 230, 258-60 (1839) (describing the origin of this doctrine in the so-called “Decision of 1789”).¹⁰

The Court has repeatedly reaffirmed that view, most recently in *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183 (2020). There, the Court stated that it is “*the general rule* that the President possesses ‘the authority to remove those who assist him in carrying out his duties.’” *Id.* at 2198 (quoting *Free Enterprise Fund*, 561 U.S. at 513-14 (emphasis added)). The Court explained that this “general rule” is subject only to “two exceptions – one for multimember

remove the General Counsel. The fact that the Company felt the need to insert a non-existent “for cause” removal provision into § 3(d) evidences the weakness of its position.

¹⁰ As the Court recently explained, “[t]he removal of executive officers was discussed extensively in Congress when the first executive departments were created.” *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010). The view that “prevailed . . . was that the executive power included a power to oversee executive officers through removal.” *Ibid.* (citation and quotation marks omitted).

expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority.” *Id.* at 2199-2200 (citing *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988)).

Neither of the narrow exceptions to the general rule apply to the General Counsel. The General Counsel is clearly not an “inferior officer[] with limited duties and no policymaking or administrative authority.” And though the Company argues that the *Humphrey’s Executor* exception applies, Mot. to Dismiss 2-3, that argument has no merit. First, as shown above, the General Counsel is not a Board Member, who are the only NLRB officials to whom the *Humphrey’s Executor* exception would apply. Second, unlike the Federal Trade Commissioners at issue in *Humphrey’s Executor*, Congress provided no tenure protection to the General Counsel in § 3(d). Accordingly, the General Counsel falls within the general rule that the President has the authority to remove executive officers, and President Biden had the authority to remove General Counsel Robb.

The Office of Legal Counsel (OLC) has reached the same conclusion, including in a memorandum issued a few years after the Taft-Hartley Act that stated that “[t]here would appear to be little doubt that the General Counsel of the National Labor Relations Board is an executive official subject to removal at the pleasure of the President.” J. Lee Rankin, Assistant Attorney General, OLC, *Authority of the President to Remove the General Counsel of the National Labor Relations Board* 2 (Feb. 23, 1954) (explaining that “the President was empowered by

the Constitution to remove any executive official appointed by him by and with the advice and consent of the Senate,” and because “[t]he functions of the General Counsel are in no sense of a quasi-legislative or quasi-judicial nature,” but instead “solely executive in character,” “the term of four years is not an unconditional term of office for that period.”). Several decades later, John Roberts, as an Associate Counsel in the Reagan-era White House Counsel’s Office, considered “whether the General Counsel may be removed by the President,” and concluded that the “clear answer” is that “the General Counsel serves at the pleasure of the President.” *Memo from J. Roberts to Fred Fielding, White House Counsel re: NLRB Dispute 1, 3* (July 18, 1983) (further stating that the OLC, “in an opinion dated March 11, 1959,” “concluded that the General Counsel of the Board is a purely Executive Officer and that the President has inherent constitutional power to remove him from office at pleasure” and that “the Department of Justice still adhered to th[at] [] opinion.” (cleaned up)).¹¹

President Biden had the authority to remove General Counsel Robb from office. To the extent that issue is relevant to the Company’s request for special appeal and motion to dismiss, the Company’s position to the contrary is meritless, and its request must be denied.¹²

¹¹ Even if § 3(d) could be interpreted to provide the General Counsel some sort of tenure protection, the cited Supreme Court precedent, as well as the OLC and Roberts’ memorandum, make clear that such tenure protection would be unconstitutional.

¹² The Company cites an article by John E. Higgins, Jr., to support its assertion that the General Counsel can only be removed for cause. Mot. to Dismiss 7, *citing* Higgins, “Labor Czars – Commissars – Keeping Women in the Kitchen –

IV. The Board Should Not Address the Company's Request in an Interlocutory Appeal

The Union finally urges this Board to deny the Company's request because of its interlocutory nature. Interlocutory appeals are disfavored both in the courts and before the Board. The issue the Company raises will likely become moot if the proceedings follow their normal course. The Board will likely not rule on any exceptions prior to the date General Counsel Peter Robb's term was set to expire. At that point, any potential issue surrounding Robb's departure and the subsequent designation of Acting General Counsel Peter Ohr would be entirely moot, particularly considering a confirmed or Acting General Counsel's authority to ratify any prior actions at that time, as happened after the Supreme Court's decision in *NLRB v. SW General, Inc.*, 137 S.Ct. 929 (2017), which the Company argues presented an analogous situation. *See Midwest Terminals of Toledo Int'l, Inc. v. NLRB*, 783 F. App'x 1, 7 (D.C. Cir. 2019) (subsequent ratification by properly appointed General Counsel cured any potential defect related to improperly appointed Acting General Counsel). Of course, if the Respondent prevails at trial and no exceptions are taken, the matter would become moot for that reason as well.

The Purpose and Effects of the Administrative Changes Made by Taft-Hartley," 47 Cath. U. L. Rev. 941, 963 fn. 82 (1998). Higgins' article, which broadly discussed the administrative changes made to the NLRB by Taft-Hartley, simply asserts in a footnote that the General Counsel can only be removed for cause based on the "practice since 1947." The article offers no further analysis. In light of the weight of precedent discussed above, as well as legal analysis directly examining the question, Higgins' claim is unpersuasive.

This likelihood of mootness if the case proceeds along the normal course is a strong reason for denying this interlocutory request.¹³

CONCLUSION

For the reasons stated above, the Board should deny the Company's request for special appeal.

Respectfully submitted,

/s/ Craig Becker
Craig Becker
Yona Rozen
James Coppess
Matthew Ginsburg
Maneesh Sharma
AFL-CIO
815 Sixteenth St. NW
Washington, DC 20006
(202) 637-5310
cbecker@aflcio.org

Brian Esders
Abato, Rubenstein & Abato, PA
[809 Gleneagles Court, Suite 320](#)
[Baltimore, MD 21286](#)

John Sheridan
Elizabeth Alexander
Marrinan & Mazzola Mardon, P.C.
[26 Broadway, 17th Floor](#)
[New York, NY 10004](#)

Date: February 12, 2021

¹³ The Company cites the burden of proceeding with the trial as grounds for the interlocutory appeal, Mot. to Dismiss 9, but that argument would be grounds for immediate appeal of an adverse ruling on every potentially dispositive motion, including all motions to dismiss.

CERTIFICATE OF SERVICE

I, Maneesh Sharma, hereby certify that on February 12, 2021, a true and correct copy of the foregoing Opposition on behalf of Charging Party International Longshoremen's Association, Local 1970 was e-filed with the NLRB's Executive Secretary and served via e-mail on the following:

Stefan J. Marculewicz
Littler Mendelson, P.C.
[815 Connecticut Ave., NW, Ste. 400
Washington, DC 20006
smarculewicz@littler.com](mailto:smarculewicz@littler.com)

Justin Keating
Beins, Axelrod, P.C.
[1717 K Street, N.W., Suite 1120
Washington, DC 20006
jkeating@beinsaxelrod.com](mailto:jkeating@beinsaxelrod.com)

Brendan J. Fitzgerald
Littler Mendelson, P.C.
[41 South High St., Ste. 3250
Columbus, OH 43215
bfitzgerald@littler.com](mailto:bfitzgerald@littler.com)

Sean R. Marshall, Regional Director
Barbara Duval
Stephanie Eitzen
National Labor Relations Board,
Region 5
Bank of America Center, Tower II
[100 S. Charles Street, Ste. 600
Baltimore, MD 21201
Sean.marshall@nlrb.gov
Barbara.Duvall@nlrb.gov
Stephanie.Eitzen@nlrb.gov](mailto:Sean.marshall@nlrb.gov)

A. John Harper III
Littler Mendelson, P.C.
[1301 McKinney St., Ste. 1900
Houston, TX 77010
ajharper@littler.com](mailto:ajharper@littler.com)

Sharon Steckler, Administrative Law Judge
sharon.steckler@nlrb.gov

/s/ Maneesh Sharma

Exhibit 1

SAVE AS

Submission Under the Federal Vacancies Reform Act

Addressees

- President of the United States Senate Speaker of the U.S. House of Representatives Comptroller General of the United States

This Report Provides Notification of:

- Vacancy Designation of acting officer Nomination Action on nomination
 Change in previously submitted reported information Discontinuation of service in acting role (date: _____)

Name of Department or Agency and Any Suborganization

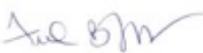
National Labor Relations Board

Vacancy Title General Counsel		Date Vacancy Began 1/20/2021
Name of Acting Officer Alice B. Stock	Date Service Began 1/20/2021	Authority for Acting Designation if Other Than Vacancies Act
Name of Nominee for Position		Date Nomination Submitted
Action on Nomination: <input type="radio"/> Confirmed <input type="radio"/> Rejected, withdrawn, returned		Date of Action

Agency Contact

Name and Title Fred B. Jacob, Solicitor	
Contact's Address NLRB, 1015 Half St., NW, Washington, DC 20570	
Contact's Phone Number (202) 273-2711	Contact's E-Mail Address fred.jacob@nlrb.gov

Submitted By

Name and Title Fred B. Jacob, Solicitor	Telephone Number (202) 273-1711
Signature 	Date 01/29/21

For Congressional Use Only

Committee of Jurisdiction
Date Received

For GAO Use Only

GAO Control Number

2/8/00

Submission Under the Federal Vacancies Reform Act

Addressees

- President of the United States Senate
 Speaker of the U.S. House of Representatives
 Comptroller General of the United States

This Report Provides Notification of:

- Vacancy
 Designation of acting officer
 Nomination
 Action on nomination
 Change in previously submitted reported information
 Discontinuation of service in acting role
 (date: _____)

Name of Department or Agency and Any Suborganization

National Labor Relations Board

Vacancy Title General Counsel		Date Vacancy Began 1/20/2021
Name of Acting Officer Peter Sung Ohr	Date Service Began 1/25/2021	Authority for Acting Designation if Other Than Vacancies Act 29 U.S.C. 153(d)
Name of Nominee for Position		Date Nomination Submitted
Action on Nomination: <input type="radio"/> Confirmed <input type="radio"/> Rejected, withdrawn, returned		Date of Action

Agency Contact

Name and Title

Fred B. Jacob, Solicitor

Contact's Address

NLRB, 1015 Half St., NW, Washington, DC 20570

Contact's Phone Number

(202) 273-2711

Contact's E-Mail Address

fred.jacob@nlrb.gov

Submitted By

Name and Title

Fred B. Jacob, Solicitor

Telephone Number

(202) 273-1711

Signature



Date

01/29/21

For Congressional Use Only

Committee of Jurisdiction

Date Received

For GAO Use Only

GAO Control Number

2/8/00

Exhibit 2

From: Stock, Alice B. <Alice.Stock@nrb.gov>
Sent: Thursday, January 21, 2021 2:03 PM
To: Coleman, Jocelyn <Jocelyn.Coleman@nrb.gov>
Subject: Message from Peter Robb to the Agency

Please send the following message with attachments to everyone at the Agency.

The following is a message from Peter Robb to the Agency:

I apologize for the delay in sending this message but unexpected events have been moving quickly and my priority was to make sure operations would continue as best as possible under the circumstances. As you know, I was asked to resign minutes after the President was sworn in. I declined as a matter of principle to avoid improper politicization of the Office of the General Counsel. I have attached copies of the emails.

I cannot express my sincere appreciation to all NLRB employees for the hard work and support over the last three years. At the risk of forgetting valuable contributions, I want to thank John Kyle, Alice, Dolores, Beth, John Doyle, Lasharn, Prem, Isabel, Richard, Mark, Nancy, Brenda, Christine, the Board Members, and every Regional Director. I have benefitted from the best Senior Leadership team in the federal government. But most of all, I am grateful for the hard work performed day-in and day-out by the managers, supervisors and rank and file employees who remain the backbone of the Agency and without whom our mission could not be fulfilled. I am so proud to have served with such fine, caring people. I am proud of what has been accomplished in the face of unprecedented challenges. I will always cherish this time at the Board. In leaving, I ask that you provide the same dedication, effort and excellence to my successors. In that way, the Board will continue to thrive. Thanks to all. I will carry you in my heart.

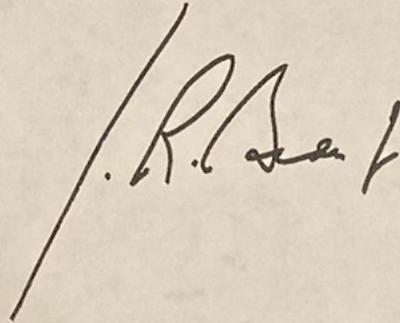
Alice B. Stock
Deputy General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
Tel. (202) 273-3819
Fax (202) 273-4483
Alice.stock@nrb.gov

Exhibit 3

O R D E R

- - - - -

Pursuant to the provisions of section 3 of the National
Labor Relations Act (29 U.S.C. 153(d)), I hereby designate
Peter Sung Ohr, to serve as Acting General Counsel of the National
Labor Relations Board.

A handwritten signature in dark ink, appearing to read "J. R. O'Connell". The signature is written in a cursive style with a prominent vertical stroke on the left side.

THE WHITE HOUSE,
January 25, 2021.

CERTIFICATE OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On the date below, I served the following documents in the manner described below:

RESPONSE TO GENERAL COUNSEL'S MOTION TO WITHDRAW COMPLAINT

- (BY ELECTRONIC SERVICE)** By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from larnold@unioncounsel.net to the email addresses set forth below.

On the following parties in this action:

Mr. Aaron B. Solem
Mr. Glenn M. Taubman
c/o National Right to () Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
Email: abs@nrtw.org
Attorney for Charging Party Jeremy Brown

Ms. Sarah Ingebritsen
NLRB, Subregion 36
Green-Wyatt Federal Bldg.
1220 SW 3rd Ave., Ste. 605
Portland, OR 97204
Email: Sarah.Ingebritsen@nlrb.gov
Attorney for the General Counsel

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 17, 2021 at Emeryville, California.

/s/ Laureen D. Arnold

Laureen D. Arnold