

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

INTERNATIONAL	:	
BROTHERHOOD OF ELECTRICAL	:	
WORKERS, LOCAL 98	:	Case No. 04-CC-223346
	:	
and	:	
	:	
SHREE SAI SIDDHI SPRUCE, LLC	:	
D/B/A FAIRFIELD INN & SUITES	:	
BY MARRIOTT	:	

**CHARGING PARTY SHREE SAI SIDDHI SPRUCE LLC'S
RESPONSE IN OPPOSITION TO THE ACTING GENERAL
COUNSEL'S MOTION TO DISMISS**

On January 21, 2021, the day after his inauguration, President Biden terminated the Board's General Counsel Peter Robb before his term had expired. Before President Biden's summary termination of Mr. Robb, no President has ever terminated the Board's general counsel before the expiration of his term. In his place, President Biden appointed Acting General Counsel Peter Sung Ohr. Despite never being confirmed by the United States Senate, much less nominated, Acting General Counsel Ohr has swiftly moved to dismiss cases, like this one, Mr. Robb brought before this Board and undo other policies, such as rescinding dozens of general counsel memorandum. The maneuver is unabashedly

political. But what is worse, the Acting General Counsel lacks authority to undertake such maneuvers.

This Board, not the Acting General Counsel, has the exclusive authority to determine what proceeding before it will be abandoned. *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957) (“the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned.”) And the Board should not exercise that exclusive power unless “the unfair labor practices are *substantially* remedied and when, in the Board’s considered judgment, such dismissal would effectuate the policies of the Act.” *Id.* That is not the case here and the Acting General Counsel raises no argument whatsoever that the Union’s offending conduct in displaying a large inflatable rat and using a loud bullhorn has been remedied, much less substantially.

The other problem with the Acting General Counsel’s artifice is that he lacks authority to dismiss the charges. He lacks authority to do much of anything for that matter. The President lacked authority under Article II of the Constitution to remove Mr. Robb because the general counsel is not a purely executive officer. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). The text of the Act is clear that the general counsel

serves at the behest of the Board, not the President. And the legislative history of the LMRA, which created the general counsel position, suggests that Congress wished the general counsel to be independent from the Board itself. The President's unconstitutional termination of Mr. Robb led to the unconstitutional appointment of the Acting General Counsel. But the President's unconstitutional appointment of the Acting General Counsel leaves him powerless to act. *N.L.R.B. v. SW Gen., Inc.*, 137 S.Ct. 929 (2017).

Accordingly, the Board should deny the Acting General Counsel's motion.

I. PROCEDURAL HISTORY

The charging party operates a Fairfield Inn & Suites by Marriot in Philadelphia. It also leases a portion of the hotel to a restaurant. Over the course of several days in June and July 2018, members of the International Brotherhood of Electrical Workers, Local 98 (the "Union") targeted the charging party, a neutral employer, because a non-union electrical contractor worked on the charging party's hotel during the hotel's construction several months earlier. At the time of the dispute, the non-union electrical contractor was not working on the hotel and had

been finished its job for several months. On June 26, 2018, four members of the Union set up a large (approximately 12 feet tall) inflatable rat directly next to the entrance of the hotel's lobby, which is the primary means of egress and ingress into the hotel. N.T. 27:24-25, 28:1-25; General Counsel Exhibit 2. Additionally, the Union's agent, John Donahue, patrolled the entrance and confronted guests as they entered and exited the hotel. N.T. 34:4-7, 35:18-25. On June 27, 2018, the Union engaged in the same conduct. It inflated the twelve-foot (12) rat next to the hotel's lobby entrance and Donahue confronted guests as they entered and exited the hotel. N.T. 43:1-10. On June 28, 2018, the Union upped the ante and for three (3) hours Donahue used an amplified bullhorn to confront guests as they entered and exited the hotel and disrupted guests of the hotel's restaurant tenant. N.T. 56:13-20, 57:21-25, 60:8-23. Additionally, the Union did as it pleased with the hotel's personal property and moved tables and chairs and confronted hotel vendors to achieve its secondary objective. N.T. 37:16-22, 45:1-8.

Region 4 believed the Union's conduct violated Section 8(b)(4) of the Act and filed a complaint against the Union on November 18, 2018. After a hearing on April 9, 2019, the administrative law judge agreed, in part,

and found that the Union's use of the bullhorn violated the Act. ALJ Decision 11:20-34. But, following existing Board precedent in *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010) and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center) (Brandon II)*, 356 NLRB 1290 (2011), the ALJ declined to find that the display of the inflatable rat violated the Act.

On July 16, 2019, then General Counsel Peter Robb filed exceptions to the ALJ's dismissal of that portion of the Complaint concerning the inflatable rat and urged the Board to overturn its decisions in *Eliason & Knuth of Arizona* and *Sheet Metal Workers Local 15*. The charging party joined in the General Counsel's exceptions. The Union filed cross-exceptions urging the Board to overturn the ALJ's decision that its use of the bullhorn violated the Act. The case is currently pending before the Board since then.

Underscoring the significance of this case and the issues before the Board, on October 28, 2020, the Board issued a notice and invitation to file amicus briefs in the matter *International Union of Operating Engineers, Local Union No. 150 (Lippert Components, Inc.)*, 25-CC-228342, 370 NLRB No. 40, which is a case raising identical issues to this

one and that also seeks to overturn the Board's decisions in *Eliason & Knuth and Sheet Metal Workers Local 15*.

Following President Biden's termination of General Counsel Robb, the Acting General Counsel has moved to dismiss this action, including the opposition to the Union's cross-exceptions to the ALJ's determination that the Union violated the Act by using the bullhorn. Mot., 3, fn. 2. The charging party now responds to that motion.

II. ARGUMENT

A. The Acting General Counsel has not articulated a recognized basis for dismissal.

The Acting General Counsel seeks dismissal of this case because he disagrees with Mr. Robb's decision to seek to overturn Board law that the Union's conduct violated Section 8(b)(4) of the Act. Mot., 2. Alternatively, the Acting General Counsel invokes prosecutorial discretion to dismiss the case because it "is a waste of valuable Agency resources and not in the public interest." Mot., 4. But neither is a basis for dismissal.

First, the Board, not the general counsel, decides when cases before it should be abandoned or dismissed and it is only when the unfair labor practice has been substantially remedied that the Board considers it. *Robinson Freight Lines*, 117 NLRB at 1485. The Acting General Counsel

does not even attempt to explain how this case meets this standard. Second, prosecutorial discretion plays no role once the matter is before the Board as the general counsel is divested of prosecutorial discretion. *NLRB v. UFCW Local 23*, 484 U.S. 112, 126 (1987) (“decisions whether to file a complaint are prosecutorial. In contrast, the resolution of contested unfair labor practice cases is adjudicatory.”)

1. The Board, not the general counsel, has exclusive authority to abandon a claim.

When a matter is pending before the Board, the basis for dismissal is not based on the policy position of the current general counsel. Rather, it is the Board *alone* who has the authority to determine when a proceeding before it should be abandoned. *Robinson Freight Lines*, 117 NLRB at 1485; *Indep. Stave Co.*, 287 NLRB 740, 741 (1987) (“the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned.”) Furthermore, the Board should exercise that discretion “only when, the unfair labor practices are *substantially remedied* and when, in the Board’s considered judgment, such dismissal would effectuate the policies of the Act.” *Id.* (emphasis added).

The Acting General Counsel sidesteps entirely a discussion of why this case should be dismissed under this standard first articulated in *Robinson Freight Lines*. There is no discussion of how the unfair labor practices charges levied against the Union have been remedied, let alone substantially. If the Acting General Counsel cannot articulate why this case should be dismissed under the proper standard, the motion should be dismissed on that basis singlehandedly. Furthermore, granting a request for dismissal based on the policy whims of the general counsel would undermine the standard by which the Board dismisses cases that has stood for over fifty years.

2. The Acting General Counsel lacks prosecutorial discretion to dismiss the case.

It is true that under the Act, the general counsel enjoys a modest amount of prosecutorial discretion. 29 U.S.C. § 153(d). Under Section 3(d), the general counsel possesses the final authority to issue investigate charges and to issue a complaint based on that investigation. He also enjoys the discretion to withdraw a complaint before a hearing. *N.L.R.B. v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 124 (1987). But “at some point, however, a complaint may be said to have advanced so far into the adjudicatory process that a

dismissal takes on the character of an adjudication, and at that point the General Counsel no longer possesses unreviewable authority in the matter.” *Sheet Metal Workers Int’l Ass’n, Local Union 28*, 306 NLRB 981, 982 (1992). That point of demarcation is when evidence is presented at a hearing. *Id.*; *Int’l Bhd. of Boilermakers v. N.L.R.B.*, 872 F.2d 331, 334 (9th Cir. 1989)(“the Board [has] no authority to review the NLRB’s General Counsel’s decision to withdraw an unfair labor practice complaint *after* the hearing has commenced *but before* evidence on the merits has been introduced is upheld.”) Once that point of demarcation is reached, the exclusive authority of the Board to adjudicate complaints takes over. *United Food & Commercial Workers Union*, 484 U.S. at 125 (1987)

Here too, the Acting General Counsel fails to articulate why the Board should abandon this well-settled standard, ignore the Act, and grant him broad deference to his perceived prosecutorial discretion. This case has progressed well beyond that point of demarcation. The complaint was issued, hearing commenced, evidence heard, and a decision reached. The matter has been before the Board for adjudication for over a year. Accordingly, the Board should not give any deference to

the supposed prosecutorial discretion of the Acting General Counsel because there simply is none at this stage.

B. The Acting General Counsel lacks statutory authority to request dismissal of the case.

There is another problem with the Acting General Counsel's motion - he lacks statutory authority to make it. The President terminated Mr. Robb because of politics, plain and simple. But the President's Constitutional authority under Article II to summarily remove an official at-will extends only "purely executive officials." *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Weiner v. United States*, 357 U.S. 349 (1958). A "purely executive officer" is an officer who is "restricted to the performance of executive functions," and thus the office is "charged with no duty at all related to either the legislative or judicial power." *Humphrey's Executor*, 295 U.S. at 692. A "purely executive officer" performs no quasi-legislative or quasi-judicial tasks and the President does not enjoy the power to remove such officers. *Wiener v. United States*, 357 U.S. 349, 352 (1958)

Unlike Section 3(a), Section 3(d) does not contain an express restriction on the President's power to remove the general counsel. Whereas Section 3(a) expressly states that the President cannot remove

a member of the Board except for neglect of duty or malfeasance, Section 3(d) is silent on the issue of removal. Yet the President's powers under Article II to remove an officer does not hinge on whether Congress expressly limited his power of removal. *Wiener*, 357 U.S. at 352. Rather, the President's power rests on the officer's duties and functions. In *Humphrey's Executor* decision the Supreme Court:

“drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body ‘to exercise its judgment without the leave or hindrance of any other official or any department of the government,’ (citation omitted), as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference.”

Id. at 353.

There are several reasons that the Board's general counsel is not a purely executive officer. For starters, the statute is clear that Congress endowed a level independence on the general counsel to make decisions concerning the Act on behalf of the Board, not the President. Section 3(d) states that the general counsel “*shall* have final authority, *on behalf of the Board*, in respect of the investigation of charges and issuance of

complaints.” 29 U.S.C.A. § 153(d). He also “shall have such other duties *as the Board may prescribe* or as may be provided by law.” *Id.* Under the statute the general counsel serves on behalf of the Board, not on behalf of the President.

In fact, despite the text, the legislative history suggests, “Congress may have desired the general counsel to be independent of the Board as well.” *United Food & Commercial Workers Union*, 484 U.S. at 124–25. When the Board was created in 1935 with the passage of the Wagner Act, the general counsel position did not originally exist. Congress created the position in 1947 when it passed the Labor Management Relations Act (“LMRA”). Congress initially considered making the general counsel part of a new agency independent from the Board but settled on an independent position within the Board’s structure. The House Conference Report on the LMRA states: “The conference agreement does not make provision for an independent agency to exercise the investigating and prosecuting functions under the Act, but does provide that *there shall be a General Counsel of the Board ... [who] is 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 125 unfair labor practices, and in respect of the prosecution of such complaints before the Board.” Id. H.R.Conf.Rep. No. 510, 80th Cong., 1st Sess., 37 (1947), U.S.Code Cong.Serv.1947, p. 1135 (emphasis added).

Furthermore, as the Supreme Court recognized in *United Food & Commercial Workers Union* , the general counsel also wears an adjudicative hat at times, which further erodes any argument that the general counsel is a purely executive officer. If a regional director dismisses a charge, the charging party may appeal that decision to the general counsel. 29 C.F.R. § 101.6. A charging party may also appeal to the general counsel an informal settlement agreement entered into between the Regional Director and the charged party. 29 C.F.R. § 101.7.

As the *Weiner* Court laconically stated Article II authorizes Presidents to appoint “their men” to purely executive positions. *Wiener*, 357 U.S. at 354. But the general counsel position is not one of the President’s men or women. The general counsel is a position of the Board and perhaps even independent of it.

All that being said, based on the text of the statute, its legislative history, and his duties and functions, it cannot be said that the general

counsel is a purely executive officer acting at the behest of the President. Therefore, the President lacked authority under Article II of the Constitution to terminate Mr. Robb because he was not a purely executive officer. His unconstitutional termination led to the unconstitutional appointment of the Acting General Counsel. And because his appointment is unconstitutional, the Acting General Counsel's actions are void as he lacks authority to take them. *N.L.R.B. v. SW Gen., Inc.*, 137 S.Ct. 929 (2017). That includes this current motion.

CONCLUSION

Based on the foregoing, the charging party respectfully requests that the Board deny the Acting General Counsel's motion.

Respectfully submitted,

Date: February 18, 2021

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PROOF OF SERVICE

I certify that on the date indicated below I caused to be served a copy of the foregoing by e-filing and electronic mail on the following:

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