

BEFORE THE NATIONAL LABOR RELATIONS BOARD

**INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 1970,**

Charging Party,

v.

**H&M INTERNATIONAL TRANSPORTATION,
INC.,**

Respondent.

Case No. 05-CA-241380

**RESPONDENT H&M INTERNATIONAL TRANSPORTATION, INC.'S
MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF ITS
REQUEST FOR SPECIAL APPEAL**

Respondent H&M International Transportation, Inc. ("Respondent"), by and through counsel, and pursuant to Section 102.26 of the Board's Rules and Regulations, hereby files this Motion for Leave to File a Reply in Support of its Request for Special Appeal, and states:

1. On Monday, January 25, 2021, upon the opening of the record in the trial of the above-captioned proceeding, Respondent filed a Motion to Dismiss seeking to dismiss the Complaint, or in the alternative, to stay further proceedings on the grounds that the General Counsel lacks authority to prosecute it.

2. During arguments with respect to Respondent's Motion, Counsel for the General Counsel acknowledged that the Office of the General Counsel of the Board was unoccupied. Thus the record in this case was improperly opened at a time when there was no lawfully-appointed Acting General Counsel, and the vacancy in the office was created by President Biden's unlawful firing of General Counsel Robb.¹

¹ Late in the day on January 25, 2021, after a full day of hearing, Peter Sung Ohr was named Acting General Counsel.

3. The Administrative Law Judge denied Respondent's Motion, but granted Respondent leave to pursue its Special Appeal. On the same day, Respondent filed a Request for Special Appeal, which included its Motion to Dismiss as Exhibit A and incorporated that Motion by reference. On January 29, 2021, the Executive Secretary, on behalf of the Board, granted Counsel for the Acting General Counsel and Charging Party an extension of time to file a response to Respondent's request to February 12, 2021.

4. On February 12, 2021, Counsel for the Acting General Counsel and Charging Party filed their Oppositions to Respondent's Request. Counsel for the General Counsel also filed a "Notice of Ratification" in which Acting General Counsel Ohr stated that the prosecution of this case, even when there was no one occupying the Office of the General Counsel, "is a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act."

5. Next, at the Executive Secretary's request, on February 18, 2021, Counsel for the Charging Party filed a 1954 Memorandum from the Department of Justice's Office of Legal Counsel ("OLC") regarding the President's authority to remove the NLRB General Counsel, on which it relied in its Opposition to Respondent's Special Appeal. Charging Party's Brief at 11-12. This Memorandum was not available on the Office of Legal Counsel's opinion page at the time Respondent filed its Motion to Dismiss or Special Appeal, and is not available on this website as of the filing of this Motion. See <https://www.justice.gov/olc/opinions> (last accessed February 25, 2021).

6. Because Respondent was only able to obtain the 1954 Office of Legal Counsel Memo on February 18, 2021, and because its proposed Reply addresses the arguments and opinions raised in that Memo, Respondent respectfully requests that the Board grant it leave to file

the attached Reply in Support of Its Request for a Special Appeal. There is no deadline for seeking leave to file a Reply under R&R 102.26. Given the significance and unprecedented nature of this issue, allowing Respondent to file its Reply will assist the Board in rendering a proper decision.

WHEREFORE, Respondent respectfully requests that the Board grant this Motion and allow it to file the attached Reply in Support of Its Request for Special Appeal.

Respectfully submitted,

LITTLER MENDELSON, P.C.

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Attorneys for Respondent

Dated: February 25, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of February, 2021, the foregoing Request has been electronically provided to the following:

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**RESPONDENT H&M INTERNATIONAL TRANSPORTATION, INC.'S
REPLY IN SUPPORT OF ITS REQUEST FOR SPECIAL APPEAL**

Respondent H&M International Transportation, Inc. ("Respondent"), by and through counsel, and pursuant to Sections 102.26 of the Board's Rules and Regulations, hereby files this Reply in Support of Its Request for Special Appeal and states:

Both Counsel for the Acting General Counsel's and Charging Party's Oppositions to Respondent's Request for Special Appeal argue that Section 3(d)'s establishment of a term of four years for NLRB General Counsels does not limit a President's authority to remove an NLRB General Counsel at-will. (CAGC Brief at 8-10; Charging Party Brief at 9-12). In the course of making its argument, Charging Party cited a 1954 legal opinion authored by J. Lee Rankin on behalf of the Department of Justice's Office of Legal Counsel ("OLC"), opining that the President did have the authority to remove an NLRB General Counsel at-will, despite the four-year term appointment. Charging Party did not attach this legal opinion to its Brief; rather, it filed the Memo on February 18, 2021 in response to a request from the Executive Secretary. For the following reasons, the opinion set forth in this Memorandum is incorrect.

A. The Memo Was Authored Before the Supreme Court Decided *Wiener v. U.S.*, Which Held the President Does Not Have At-Will Removal Authority Over Officials in Independent, Adjudicatory Agencies.

First, the Memo was authored before the Supreme Court decided *Wiener v. U.S.*, 357 U.S. 349 (1958). In *Wiener*, the Supreme Court addressed President Eisenhower’s removal of members of the War Claims Commission because he wanted his own appointees in those positions. The Commissioners were appointed by the President with the advice and consent of the Senate for a term of years, and Congress did not specify any ability for the President to remove them for cause or otherwise. *Id.* at 350. Faced with this situation, the Court held that the President’s summary removal authority under Article II of the Constitution was limited to “purely executive officials,” *Id.* at 352, whom it had previously defined as an official who is “charged with no duty at all related to either the legislative or judicial power.” *Humphrey’s Ex’r v. U.S.*, 295 U.S. 602, 628 (1935).

The Court concluded:

Judging the matter in all the nakedness in which it is presented, namely the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission, we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it. The philosophy of *Humphrey’s Executor*, in its explicit language as well as its implications, precludes such a claim.

Wiener, 357 U.S. at 356. Thus, under *Weiner*, the mere fact that Congress did not include a “for cause” removal provision in Section 3(d) does not mean that the President automatically retained at-will removal authority over the NLRB General Counsel.

Indeed, when Congress wants to allow a President to remove a Senate-confirmed official in an independent agency prior to the end of that official’s term, it says so. Thus, the Federal Labor Relations Act states that the Federal Relations Authority’s General Counsel is appointed by the President and confirmed by the Senate for a five-year term, but that, “The General Counsel may

be removed at any time by the President.” 5 U.S.C. § 7104(f)(1). Such language is absent in Section 3(d). Under *Wiener*, the absence of such language in Section 3(d) does not imply at-will removal authority as Counsel for the Acting General Counsel and Charging Party contend; rather, it clearly conveys the lack of such authority.²

B. The NLRB General Counsel Is Not a “Purely Executive Official” Under *Humphrey’s*.

Second, the NLRB General Counsel is not a “purely executive official” as that term was defined by the Supreme Court in *Humphrey’s* and *Wiener*. The “purely executive official” the *Humphrey’s* Court identified was the postmaster at issue in *Myers v. U.S.*, 272 U.S. 52 (1926), the case on which the 1954 OLC Memo (and the 1983 John Roberts Memo cited by Charging Party) principally relied. But *Humphrey’s* distinguished *Myers* because the postmaster was charged “with no duty at all related to either the legislative or judicial power.” 295 U.S. at 627. *Wiener* stated that *Humphrey’s* “narrowly confined the scope of the Myers [sic] decision” to such “purely executive officers.” 357 U.S. at 352.

The NLRB General Counsel is not a “purely executive officer” like a postmaster, who is not part of an agency with quasi-judicial and quasi-legislative responsibilities. Nor is the NLRB General Counsel like the U.S. Attorney at issue in *Parson v. U.S.*, 167 U.S. 324 (1897),³ also relied

² In fact, when Congress wants to allow a President to remove a Senate-confirmed official of an independent agency like the NLRB for cause prior to the end of a fixed term, it says that, too. As the Counsel for the Acting General Counsel pointed out in footnote 7 of her opposition, the Federal Reserve Act states that 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.” 12 U.S.C. § 242 (emphasis added). The same holds true for Section 3(a) of the Act. Here, Congress did not include any language allowing for the early removal of a NLRB General Counsel by the President. The only logical conclusion is that, at most, the President must have good cause, such as malfeasance in office, to remove an NLRB General Counsel. Arguably, given the absence of removal authority language in Section 3(d), the President has no power to effect an early removal under Section 3(d). *Wiener*, 357 U.S. at 356.

³ The U.S. Supreme Court says that comparisons between the NLRB General Counsel and criminal

on by the 1954 OLC Memo, Counsel for the Acting General Counsel and Charging Party, because s/he does not work inside an Executive Branch agency like the Department of Justice, and the Department of Justice is not an independent quasi-judicial agency. Rather, s/he works inside the NLRB, which Counsel for the Acting General Counsel acknowledged is “a single agency” (CAGC Brief at 8), and Congress made clear that it wanted this “single agency” to be separate from executive control to insure its independence.⁴ See, e.g., LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, v. 2 at 3211-12 (Comments of Member Marcantonio quoting *Humphrey’s* Executor and stating the Board should be established as an independent agency rather than a bureau of the Department of Labor as a result); Ralph S. Rice, “The Wagner Act: It’s Legislative History and It’s Relation to National Defense” at 54-55 https://kb.osu.edu/bitstream/handle/1811/72498/OSLJ_V8N1_0017.pdf (last accessed Jan. 24, 2021) (stating the “absolute necessity for independence of the Board from any departmental influence was insisted upon by many of those testifying concerning the bill).

In fact, Section 3(d) undercuts any notion that the NLRB General Counsel should be treated as anything other than a presidentially-appointed, Senate-confirmed official of an independent, quasi-judicial agency for removal purposes. It states that the General Counsel acts “on behalf of the Board” regarding the investigation of charges, issuance of complaints and the prosecution of

prosecutors are “far from perfect,” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 156, n. 22 (1975), and analogizing the NLRB General Counsel’s role to other contexts is “of little aid.” *NLRB v. UFCW Local 23*, 484 U.S. 112, 126, n. 21 (1987).

⁴ As a district court found in *Borders v. Reagan*, 581 F. Supp. 250 (D.D.C. 1981), the *Parsons* Court determined that Congressional intent was to keep U.S. Attorneys from “becoming too independent,” in contrast to the principle that “some offices that by their nature and function are meant to be independent of control, direction, or interference from the President.” *Id.* at 259 (holding that the President lacked authority to summarily remove a District commissioner, notwithstanding the absence of any “for cause” language in the text of the governing statute). Just the opposite is true of the NLRB and its officials—the NLRB was intended to be independent of executive control.

such complaints. 29 U.S.C. § 153(d). Thus, unlike the postmaster in *Myers* or the U.S. Attorney in *Parsons*, the NLRB General Counsel does carry out duties on behalf of the quasi-legislative, quasi-judicial NLRB because the statute says he does.

C. Regardless of the Opinion of Executive Branch Officials in 1954 and 1983, No President Removed an NLRB General Counsel At-Will Until Now.

Third, both the 1954 OLC Memo and the 1983 Roberts Memo express the opinions of Executive Branch personnel on the scope of presidential authority to remove an NLRB General Counsel. It should come as no surprise that the Memos concluded that the President has the authority to act in this way. After all, in both situations, the Presidents wanted to remove the officials at issue, and there was clearly a question as to whether they could do so. The Memos simply offered the Presidents the available legal arguments they could use to support their decision. However, the conclusions in the Memos are nothing more than argument. Neither was actually put to the test, because both Presidents decided not to remove the NLRB General Counsel. Indeed, it is quite telling that notwithstanding the legal arguments put forth in the Memos, neither President actually removed the NLRB General Counsel.

Perhaps more compelling are the 73 years of precedent established under the Act. Prior to the actions of President Biden with respect to General Counsel Robb, no President has ever removed an NLRB General Counsel, even if that General Counsel was appointed by a President of the other party. Nine times Presidents have had the opportunity to remove General Counsels appointed by a predecessor from the other party, and nine times they have not done so. This is compelling evidence that, even in light of the arguments put forth in the two Memos, the President ultimately deferred to the Supreme Court precedent in *Humphrey's* and *Wiener* and did not remove the NLRB General Counsel. This history is strong evidence that because an NLRB General Counsel is appointed to a term of years under Section 3(d), the incumbent cannot be removed at-

will by a sitting President, absent congressional expression of intent to the contrary. *See* Hunter, Irving, and Meisburg, “Firing the NLRB General Counsel Was Unprecedented – and Wrong,” *The Hill* (Feb. 16, 2021);⁵ *see also The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (“Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions.”).

D. The Acting General Counsel’s “Ratification” Is of No Effect, and *Bonwitt Teller* Is Inapposite, Since General Counsel Robb Was Unlawfully Fired.

Finally, Acting General Counsel Ohr’s “ratification” of actions taken while there was no one occupying the Office of General Counsel is without effect for all of the reasons discussed herein and in Respondent’s Motion. The vacancy he was appointed to fill was not lawfully created, he therefore was not validly appointed, and his acts are *ultra vires*.

Further, *Bonwitt Teller*, 96 NLRB 608, 609 (1951) is inapposite and does not provide a basis for continuing this prosecution for two reasons: (i) unlike General Counsel Denham at issue there, General Counsel Robb did not resign, but rather was fired unlawfully; and (ii) the record in this case did not open until five days *after* General Counsel Robb was fired. Hence, the hearing was not already in progress as it was in *Bonwitt Teller* at the time the vacancy occurred. Although in *NLRB v. Gemalo*, 130 F. Supp. 500, 501 (S.D.N.Y. 1955), a court enforced a subpoena issued after an NLRB General Counsel resigned, *Gemalo* is not binding on the Board and also did not involve an unlawful vacancy like this case does.

E. Conclusion.

For all of the reasons set forth in Respondent’s Motion, its Request for Special Appeal and in this Reply, Respondent respectfully requests that the Board dismiss, or in the alternative stay,

⁵ <https://www.msn.com/en-us/news/politics/firing-the-nlr-general-counsel-was-unprecedented-and-wrong/>

these proceedings until an NLRB General Counsel is lawfully in place.

Respectfully submitted,

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