

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

EXELA ENTERPRISE SOLUTIONS

and

Case 22-CA-272676

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED-INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO/CLC**

The above-captioned case involves a test of certification of representative issued by the National Labor Relations Board (Board) to United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC (Union) as the exclusive collective-bargaining representative of a unit of certain employees employed by Exela Enterprise Solutions (Respondent). Pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations, Series 8, as amended, and to effectuate the purposes of the Act and to avoid unnecessary costs and unwarranted delay, Counsel for the Acting General Counsel respectfully moves that the above-captioned case be transferred to and continued before the Board, and that the Board enter summary judgment in this matter.

MEMORANDUM IN SUPPORT

I. PROCEDURAL HISTORY

The instant charge was filed on February 12, 2021, by the Union, alleging that Respondent violated Section 8(a)(1) and (5) of the Labor Relations Act (the Act). On February 22, 2021, the Regional Director for Region 22 issued a Complaint, based upon said charge. On March 8, 2021, Respondent filed an Answer to the Complaint.

II. STATEMENT OF FACTS

The Union filed an election petition in Case 22-RC-237040 on March 1, 2019.

Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 22 on March 18, 2019, a secret ballot election was conducted on March 29, 2019 under the direction and supervision of the Regional Director, among employees of the Respondent in the following described unit (The Unit):

Included:

All Full-Time and Regular Part-Time Customer Service Associates, including Customer Service Associates – Coffee Associates, Customer Service Technical Specialists, Team Leads, Forklift Operators, CSA TS Client Services, TL Tech Services, Shipping and Receiving Hazmat Associates, employed by the Employer at its 1 Squibb Drive, New Brunswick, New Jersey facility.

Excluded:

All Office Clericals employees, Professional employees, Guards and Supervisors as defined in the Act, and all other employees.

The Tally of Ballots prepared at the conclusion of the election and furnished to the parties shows that of approximately fourteen eligible voters, there were 8 votes cast for the Union and 6 votes cast against the Union, with no challenged ballots, a number that is not sufficient to affect the results of the election.

On April 5, 2019, Respondent filed timely Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election (Objections). On April 19, 2019, the Acting Regional Director for Region 22 issued an Order Directing Hearing and Notice of Hearing on Objections, scheduling the Hearing to commence on April 24, 2019. Respondent's objections alleged as follows:

Objection No. 1:

Within the twenty-four-hour period immediately preceding the opening of the polls in the subject election, the Union, through its agents, visited groups of voters on working time at the Employer's job site and engaged in pro-union electioneering meetings and talks, in contravention of the rule established by Peerless Plywood Co., 107 NLRB 427 (1954), and its progeny.

Objection No. 2:

The Union, through its agents, engaged in objectional conduct by improperly electioneering near the entrance to the polling site during the March 29, 2019 election.

After the conduct and closing of the April 24 2019 Hearing, the designated Hearing Officer issued a Report on Objections (Report) on June 27, 2019 in which he recommended that Respondent's objections be overruled in their entirety. The Hearing Officer's Report found that Respondent failed to establish that the issues raised in its Objections reasonably tended to interfere with employee free choice or that they otherwise interfered with the election and/or the conduct of the election.

On July 19, 2019, Respondent filed Exceptions to the Hearing Officer's Report in Case 22-RC-237040 seeking to overrule the Hearing Officer's recommendations and requesting that a rerun election be directed. On August 13, 2020, the Regional Director for Region 22 issued a Decision adopting the Hearing Officer's findings and recommendations and overruling Respondent's objections in their entirety, and issued a Certification of Representative certifying that a majority of the valid ballots had been cast for the Union and that it is the exclusive representative of the employees in the Unit:

On September 10, 2020, Respondent filed a Request for Review to the Board of the Regional Director's Decision and Certification of Representative.

On January 5, 2021, the Board issued its Order denying Respondent's Request for Review of the Regional Director's Decision and Certification of Representative in Case 22-RC-237040 as it did not raise any substantial issues warranting review. That same date, the Union in writing requested *inter alia* that Respondent initiate negotiations for a collective-bargaining agreement with the Union.

By email dated February 5, 2021, Respondent replied to the Union stating that it does not consider the Union to be the properly certified representative of its employees and declined to bargain with the Union. On February 12, 2021, the Union filed this instant charge, alleging that Respondent violated Sections 8(a)(1) and 8(a)(5) of the Act by failing and refusing to meet and bargain in good faith for an initial collective bargaining agreement. On February 18, 2021, Counsel for Respondent notified investigating Board agent Saulo Santiago, by email, that Respondent was testing the Certification issued in Case 22-RC-237040.

III. NO MATERIAL ISSUES ARE RAISED BY THE PLEADING

A. PLEADINGS ANALYSIS

In its Answer, Respondent generally admits: the filing and service of the charge (par. 1) and that it is engaged in commerce and is an employer within the meaning of the Act (par. 2 and 3).

Respondent denies: that the Union is a labor organization within the meaning of Section 2(5) of the Act (par. 4); that the Union was certified by the Board as the representative of the Unit (par. 6(a) and 6(c)); that the Union requested to bargain and that the Respondent has refused to bargain with the Union violates Section 8(a)(1) and (5) of the Act (par. 8, 9(a), 9(b) and 10); and that the unfair labor practices affect commerce under the Act (par. 11).

Respondent's denial that the Union is a labor organization under Section 2(5) of the Act is easily dispelled. Respondent never raised the status of the Union as a labor organization in the representation proceeding in Case 22-CA-237040 and in fact, Respondent agreed in the Stipulated Election Agreement that the Union is a labor organization. Thus, Respondent cannot now litigate the Union's labor organization status in this unfair labor practice proceeding. See *Transit Connection, Inc. and Amalgamated Transit Union Local 1548*, 365 NLRB No. 9, slip op. 1 fn. 2 (2016) (citing *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992)); See also, *American Finishing Co.*, 159 NLRB 976, 977 (1966).

Despite Respondent's arguments to the contrary, the Regional Director for Region 22 certified the Union on August 13, 2020. Respondent's assertions in the instant matter are merely a reiteration of the contentions it raised during the objections hearing, exceptions to the Hearing Officer's Report, and request for review to the Board in Case 22-RC-237040. Those issues were already considered and decided to be meritless by both the Regional Director and the Board. In fact, the Board ruled that:

“We agree with the Hearing Officer and Regional Director that the Union agents' conduct does not meet the *Milchem* standard for objectionable electioneering, and we agree with the Regional Director that the conduct is not objectionable under *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982). Further, the alleged conduct would not constitute objectionable electioneering under *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), *enfd.* 703 F.2d 876 (5th Cir. 1983). Even assuming the Union agents disregarded a Board agent instruction to move ‘far, far away’ — which is not necessarily the case here — they did not engage in any electioneering, were 80 feet away from the entrance to a polling site and were not in any designated no-electioneering area, and there is no evidence that, at the time, there were any complaints regarding their brief presence in the parking lot. See, e.g., *C & G Heating and Air Conditioning*, 356 NLRB 1054, 1055 (2011) (union representative's mere presence 77 feet from entrance to polling site not objectionable).”

Therefore, because Respondent has not presented any new evidence for consideration on the issue of the alleged improper certification, Respondent's contentions in this regard cannot now be considered, and the Union must be treated as the properly certified exclusive representative of the Unit employees for collective-bargaining purposes. This certification shows that the Union has been and is currently the exclusive representative of the Unit employees for collective-bargaining purposes. The only defense that Respondent raises to justify its generally admitted refusal to recognize and bargain with the Union is Respondent's contentions that the Union was improperly certified.

Furthermore, while Respondent denies that the Union demanded bargaining and that Respondent failed and refused its requests, the evidence in Case 22-RC-237040 and Case 22-CA-272676 belies Respondent's denials. In fact, the Union demanded bargaining on January 5, 2021, the same date the Board denied Respondent's request for review. Further, Respondent by email responded to the Union's request to commence bargaining, advising the Union that it:

“intends to test the Union's certification by filing a petition for review in a United States Court of Appeals challenging the National Labor Relations Board's January 5, 2021 decision. Accordingly, the Employer will not bargain with the Union, or otherwise respond to the Union's January 5, 2021 letter, at this time.”

As such, there are no material facts in dispute which would prevent the Board from granting this summary judgment motion as there are no triable issues warranting a hearing.

B. RESPONDENT'S AFFIRMATIVE DEFENSES

i. RESPONDENT REFUSED TO RECOGNIZE AND BARGAIN WITH THE UNION

Respondent asserts, as an affirmative defense in its Answer, that it acted in good faith and did not violate any provision of the National Labor Relations Board when it refused to recognize and bargain with the Union. Respondent is seeking to re-litigate issues previously

determined in the underlying representation case, Case 22-RC-237040. Respondent does not assert the existence of any newly discovered or previously unavailable evidence or special circumstances that would cause the Board to reconsider the Certification of Representative that has issued. Contrary to Respondent's assertion, there is no question that it has refused to recognize and bargain with the Union because it intends to test the Union's certification as the exclusive bargaining representative of the Unit of Respondent's employees at its New Brunswick, New Jersey facility. Thus, Respondent's conduct is the only path it can take to challenge the Regional Director's and the Board's rejections of its exceptions to the results of the election and certification of representative. Accordingly, Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding, and there is no need for a hearing in this matter.

ii. **THE RESPONDENT'S CHALLENGE TO THE AUTHORITY OF THE AGC IS WITHOUT MERIT**

In its Fourth Affirmative Defense, Respondent asserts that President Biden removed former General Counsel Peter B. Robb improperly and designated Acting General Counsel Peter Ohr unlawfully. This defense fails and judgment is therefore appropriate in favor of the Acting General Counsel as a matter of law.

A. **GENERAL COUNSEL ROBB WAS LAWFULLY REMOVED**

The Respondent contends that former General Counsel Robb was unlawfully removed and, therefore, that Acting General Counsel Ohr's designation under Section 3(d) of the Act is infirm. As shown below, former General Counsel Robb was lawfully removed and thus Acting General Counsel Ohr's designation is not subject to attack on these grounds.

1. **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 be of assistance. The basic principle is this: in the absence of any specific statutory provision to the contrary, the power to appoint to office carries with it the power to remove from that office at will. 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 and convict. 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 they would interfere with the President’s duty to “take Care that the Laws be faithfully executed.”⁴

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)).

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

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, at will, officers he appoints, absent clear congressional indication to the contrary.

2. **THE NLRB’S GENERAL COUNSEL SERVES AT THE PLEASURE OF THE PRESIDENT**

The National Labor Relations Act neither expressly nor implicitly creates any removal protections for the General Counsel. Judgment as a matter of law on that question is therefore appropriate.

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

The plain text demonstrates that the General Counsel, unlike the Board, is not insulated from removal by the President. The Board’s tenure provisions are standard for a multi-member independent administrative agency.⁷ The General Counsel’s tenure provisions—and absence of

⁵ 167 U.S. 324, 342 (1897).

⁶ *Id.*

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

a removal restriction—are standard for an officer carrying out a prosecutorial function.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 Applying the plain language according to its terms also accords with the well-entrenched default rule that removal authority follows appointment authority. 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.¹⁰

The Act’s context further supports this plain reading of its text. Here, Section 3(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.

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., Me. 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); *Intel Corp. Inv. Pol’y 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. Resol. Tr. Corp.*, 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), *review granted and remanded sub nom. Loc. Joint Exec. Bd. of Las Vegas v. NLRB*, ___ F. App’x ___, 2020 WL 7774953 (9th Cir. Dec. 30, 2020).

¹⁰ *Free Enterprise Fund*, 561 U.S. at 483.

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.¹¹ 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 may prescribe.” And while the Board has delegated *executive* functions to the General Counsel,¹² 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 10.¹³

In short, the General Counsel is a purely executive 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. The difference in treatment of those two offices was no coincidence.

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, then a member of the White House counsel’s office, explained the Executive Branch position on this

¹¹ *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”).

¹² 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).

¹³ Regional offices do supply hearing officers in most representation and jurisdictional-dispute cases, but such hearing officers are acting on behalf of the Regional Director and the Board, respectively, and all such cases are subject to review *by the Board*, not the General Counsel. 29 C.F.R. §§ 102.67; 102.71; 102.90.

very question in a memorandum written in 1983.¹⁴ And as that memorandum makes clear, this merely reaffirmed long-held views. *Id.*

Finally, any construction that would limit the President’s power to remove the General Counsel may raise questions about whether such a construction would be constitutional.¹⁵ If there were any ambiguity, the Board would have to construe the Act to avoid any such questions.¹⁶ 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 the Respondent’s invitation down the proverbial primrose path.

In short, President Biden had the constitutional and statutory power and authority to remove former General Counsel Robb, and he exercised that power.¹⁷ Summary judgment is appropriate.

B. ACTING GENERAL COUNSEL OHR WAS PROPERLY DESIGNATED

Respondent also asserts in its affirmative defense that President Biden unlawfully designated Peter Ohr as *Acting* General Counsel. Respondent’s defense is frivolous.

1. THE ACT EXPRESSLY AUTHORIZED PRESIDENT BIDEN’S DESIGNATION OF AN ACTING GENERAL COUNSEL

On January 25, 2021, President Biden designated Peter Sung Ohr Acting General Counsel. He did so pursuant to Section 3(d) of the Act, which states:

¹⁴ Memo from John Roberts to Fred Fielding, White House Counsel re: NLRB Dispute 1, 3 (July 18, 1983), (“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).

¹⁵ *Seila Law*, 140 S. Ct. 2182, 2199 (2020) (unconstitutional to insulate Director of the Consumer Finance Protection Bureau from removal at the President’s pleasure).

¹⁶ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1987).

¹⁷ *See Myers*, 272 U.S. at 119 (“This principle [that the power of removal of executive officers was incident to the power of appointment] as a rule of constitutional and statutory construction, then generally conceded, has been recognized ever since [the First Congress].”)

In 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, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment *sine die* of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 153(d). On February 22, President Biden submitted the nomination of Jennifer Abruzzo to be General Counsel of the NLRB.¹⁸ By the terms of the Act, therefore, Acting General Counsel Ohr may continue to act until the adjournment *sine die* of the current session of the Senate.

To the extent Respondent asserts a constitutional argument regarding Acting General Counsel Ohr's designation, that argument fails. The Appointments Clause of the Constitution states that the President:

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Any potential claim that Acting General Counsel Ohr's designation as such transforms him into a principal officer of the United States, but one appointed without the advice and consent of the Senate, would run head-first into a brick wall of history and judicial precedent.¹⁹

¹⁸ 167 Cong. Rec. D141 (Feb. 22, 2021).

¹⁹ Such an argument would be necessarily premised upon the view that the position of General Counsel is a principal officer when held by a permanent appointee. If the General Counsel were an inferior officer, such an argument would hold no water since statutes may authorize the President alone to appoint inferior officers. The classification of officers into principal and inferior categories is not always a straightforward task. *See generally Edmond v. United States*, 520 U.S. 651 (1995). Indeed, the Supreme Court is currently deciding a case addressing that very issue. *United States v. Arthrex, Inc.*, No. 19-1434 (U.S. oral argument held March 1, 2021). Fortunately, that task need not be performed here. As we now show, the Board may *assume arguendo* that the General Counsel is a principal officer, because the designation of an acting official to temporarily perform the duties of that office raises no constitutional question.

2. THE ACT IS CONSISTENT WITH A LONG LINE OF VACANCY STATUTES THAT, SINCE THE FOUNDING OF THE UNITED STATES, HAVE AUTHORIZED THE DUTIES OF SENATE-CONFIRMED OFFICES TO BE PERFORMED ON AN ACTING BASIS WITHOUT SENATE CONFIRMATION

It is well settled that when addressing the constitutionality of a statute affecting the relationship of the branches of the federal government, “historical practice” is entitled to “significant weight.”²⁰ Here, that practice is dispositive. Since the George Washington administration, Congress has “authoriz[ed] the President to direct certain officials to temporarily carry out the duties of a vacant PAS office [i.e., one requiring Presidential Appointment and Senate confirmation] in an acting capacity, without Senate confirmation.”²¹ This history provides compelling support for the conclusion that the position of an acting principal officer is not itself a principal office.

In 1792, Congress first “authorized the appointment of ‘any person or persons’ to fill specific vacancies in the Departments of State, Treasury, and War.”²² Although the 1792 statute “allowed acting officers to serve until the permanent officeholder could resume his duties or a successor was appointed,” Congress “imposed a six-month limit on acting service” in 1795.²³ It substantially revised those statutes in 1863,²⁴ 1868,²⁵ and 1891,²⁶ each time preserving in at least some situations the possibility of non-senate-confirmed officials assuming acting duties. So long before Section 3(d)’s enactment in 1947, Congress had demonstrated its belief that the

²⁰ *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014); see also, e.g., *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

²¹ *SW General, Inc. v. NLRB*, 137 S. Ct. 929, 934 (2017); see also *Noel Canning*, 573 U.S. at 600 (Scalia, J., dissenting in relevant part) (observing that the President does not need to use recess appointments to fill vacant offices because “Congress can authorize ‘acting’ officers to perform the duties associated with a temporarily vacant office—and has done that, in one form or another, since 1792”).

²² *SW General*, 137 S. Ct. at 935 (quoting Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281).

²³ *Id.* at 935 (citing Act of Feb. 13, 1795, ch. 21, 1 Stat. 415).

²⁴ Act of Feb. 20, 1863, ch. 45, § 1, 12 Stat. 656, 656.

²⁵ Act of July 23, 1868, ch. 227, 15 Stat. 168.

²⁶ Act of Feb. 6, 1891, ch. 113, 26 Stat. 733.

Appointments Clause did not require Senate confirmation for temporary service in a principal office.

Nor were these statutes mere paper authorities—Presidents repeatedly exercised them to designate non-principal officers as acting principal officers. The Justice Department’s Office of Legal Counsel comprehensively surveyed this practice in 2018 and found at least 325 instances *prior to 1860 alone* in which acting officials were designated to perform the duties of a principal office.²⁷ As early as 1809, the non-Senate confirmed chief clerk of the War Department was designated to serve as Acting Secretary of War for 50 days spanning the end of the Jefferson and beginning of the Madison Administrations.²⁸

But courts addressing questions of pay for these appointments consistently held that acting officials were entitled to payment as “ad interim” officers, not as holders of the principal office itself.²⁹ The Court of Claims, in 1857, specifically held that such positions were inferior and not principal offices of the United States.³⁰

When the Supreme Court addressed this Appointments Clause issue in 1898, it reached a similar conclusion. In *United States v. Eaton*, the Court considered whether Congress could authorize the President alone to designate a vice-consul to temporarily perform the duties of a consul.³¹ The Constitution expressly includes “Consuls” in the category of officers whose appointment requires the Senate’s advice and consent.³² The *Eaton* Court, however, concluded that a “vice-consul” is an inferior officer whose appointment Congress may “vest in the

²⁷ Office of Legal Counsel, *Designating an Acting Attorney General*, 2018 WL 6131923, at *8-*10 (Nov. 14, 2018).

²⁸ *Id.* at *8 (citing *Biographical Directory of the American Congress, 1774-1971*, at 14 (1971)).

²⁹ *Id.* at *9.

³⁰ *In re Cornelius Boyle*, 34th Cong., 3d Sess., Rep. C.C. 44, at 9, 1857 WL 4155, at *3 (Ct. Cl. 1857).

³¹ 169 U.S. 331, 343 (1898).

³² U.S. Const. art. II, § 2, cl. 2.

President” alone.³³ The Court held that Eaton’s exercise of the authority of a Senate-confirmed office did not transform him into an officer requiring Senate confirmation:

Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.³⁴

The Court concluded that more than forty years of practice “sustain the theory that a vice-consul is a mere subordinate official,” which defeated the contention that Eaton’s appointment required Senate confirmation.³⁵ In view of the long history of such appointments, *Eaton* simply confirmed the general rule.

The Court has not retreated from *Eaton*. In *Edmond v. United States*, the Court restated *Eaton*’s holding that “a vice consul charged temporarily with the duties of the consul” is an “inferior” officer.³⁶ And in *Morrison v. Olson*, the Court emphasized that a subordinate who performed a principal officer’s duties “for a limited time and under special and temporary conditions” is not “thereby transformed into the superior and permanent official.”³⁷

Consistent with this longstanding practice, Section 3(d) provides for the designation of an acting General Counsel. The Board’s records indicate no fewer than 16 different periods of acting service in this single office since its creation in 1947, i.e., more distinct periods (albeit for a much shorter total period of time) than the 14 Senate-confirmed General Counsels who served during that span.³⁸ Some of those acting appointments were made under authorities other

³³ 169 U.S. at 343.

³⁴ *Id.*

³⁵ *Id.* at 344.

³⁶ 520 U.S. at 661.

³⁷ 487 U.S. 654, 672-73 (1988) (quoting *Eaton*, 169 U.S. at 343)).

³⁸ *General Counsels Since 1935*, <https://www.nlr.gov/about-nlr/who-we-are/general-counsel/general-counsels-since-1935> (last visited Feb. 24, 2021).

than Section 3(d), such as the Federal Vacancies Reform Act, but all of them would be potentially unconstitutional under a theory challenging the designation of Acting General Counsel Ohr on constitutional grounds. Any such argument raised by Respondent would have no merit, and the Acting General Counsel is again entitled to judgment as a matter of law as to Respondent's defense that Acting General Counsel Ohr was improperly designated.

In short, President Biden had the constitutional power and authority to remove former General Counsel Robb, and he exercised that power. Equally, his designation of Acting General Counsel Ohr fell well within long-settled statutory and constitutional limitations upon the designation of acting officials. Affirmative Defense Four therefore provides no basis to deny summary judgment in this case.

IV. REMEDY

As an appropriate remedy for Respondent's refusal to bargain and in order to accord the Unit employees the services of their selected bargaining representative for the period covered by law, it is submitted that the initial year of certification should be construed as beginning on the date Respondent commences to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 786, 786 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert denied* 379, U.S. 817.

WHEREFORE, because Respondent has failed to raise any issues of material fact requiring a hearing, it is respectfully requested that:

- (A) This case be transferred to and continued before the Board;
- (B) The allegations of the Complaint be found to be true;
- (C) This motion for summary judgment be granted; and
- (D) The Board issue a Decision and Order containing findings of fact and conclusions

of law in accordance with the allegations of the Complaint, and remedying Respondent's unfair labor practices by including a provision that, for the purpose of determining the effective date of the Union's certification, the initial year of certification shall be deemed to begin on the date that Respondent commences to bargain in good faith with the Union, and any other relief as is deemed just and proper.

Dated at Newark, New Jersey this 16th day of March, 2021.

/s/ Saulo Santiago_____

Saulo Santiago
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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2021, copies of the foregoing Motion to Transfer Case and Continue Proceedings Before the Board and for Summary Judgment have been served electronically upon the following parties:

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