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 REQUEST TO THE BOARD FOR SPECIAL APPEAL FROM THE DENAL OF ITS MOTION TO DISMISS THE COMPLAINT DUE TO THE GENERAL COUNSEL'S INABILITY TO PROSECUTE AND REQUEST FOR STAY

Respondent H&M International Transportation, Inc. ("Respondent"), by and through counsel, and pursuant to Sections 102.24, 102.25 and 102.26 of the Board's Rules and Regulations, hereby files this Request to the Board for a Special Appeal from the Denial of its Motion to Dismiss the Complaint due to the General Counsel's Inability to Prosecute, and requests a stay of the unfair labor practice trial in the above-captioned case. In support of this position, Respondent states as follows:

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 in this case on the grounds that the General Counsel lacks authority to prosecute it. Respondent's motion is attached hereto as Exhibit A, and is fully incorporated by reference herein (Respondent's Motion).

2. In Respondent's Motion, the Respondent argues that President Biden's removal of General Counsel Robb without proper cause was unlawful under the National Labor Relations Act.

Because of that unlawful removal, anyone acting on behalf of the General Counsel to prosecute the above-captioned matter is acting *ultra vires*, or without lawful authority to do so. Respondent seeks to dismiss the case because the General Counsel's lack of legal authority to prosecute the case, makes the office unable to prosecute the case and therefore carry its burden of proof. In the alternative, Respondent seeks to have the matter stayed pending the General Counsel's reinstatement or the taint of his unlawful removal is eliminated.

3. During arguments with respect to Respondent's Motion, Counsel for the General Counsel also acknowledged that the office of the General Counsel of the Board was unoccupied, and there was no Acting General Counsel.[1] While the lack of an Acting General Counsel may have further complicated matters, it should not cloud the focus of Respondents' Motion that even with the naming of an Acting General Counsel, the unlawful termination of General Counsel Robb will render the Acting General Counsel's actions *ultra vires* as well.

4. In response to Respondent's arguments, Counsel for the General Counsel asserted that she did have authority to continue prosecuting the case based on issuance of the Complaint alone. Specifically, she asserted that because the Complaint issued when General Counsel Robb was serving, the case can proceed. However, that position contravenes Section 3(d) of the National Labor Relations Act, which, in addition to filing complaints, confers upon the General Counsel of the Board the final authority "in respect of the ***prosecution*** of such complaints before the Board." 29 U.S.C. § 153(d)(emphasis added). Without a lawfully appointed General Counsel of the Board, regardless of the lawfulness of the complaint's issuance, there can be no prosecution of that complaint.

5. The Administrative Law Judge denied Respondent's Motion, but granted

[1] It appears that late in the day on January 25, 2021, after a full day of hearing, Peter Sung Ohr was named Acting General Counsel.

Respondent leave to pursue this immediate Special Appeal.

6. Respondent therefore requests that the Board accept this Special Appeal from the denial of Respondent's Motion and, for the reasons stated in Respondent's Motion and this request, either dismiss the above-referenced case or, in the alternative, stay the case until there is a General Counsel with the lawful authority to prosecute it.

7. Further, because there is a significant legal question regarding the General Counsel's authority, Respondent requests that the Board grant an emergency stay of these proceedings while it considers Respondent's Special Appeal. Any delay caused by staying these proceedings during the pendency of the Special Appeal will be outweighed by avoiding the costs of unnecessary litigation, and avoiding a situation like *Noel Canning v. NLRB*, 573 U.S. 513 (2014), where the Board had to revisit many already-decided cases after the fact due to a similar legal infirmity. This case is currently scheduled for trial during the weeks of January 25, March 1 and March 22, 2020. Given this extended trial schedule and Respondent's request for an expedited briefing schedule, there is no prejudice in staying these proceedings while Respondent's appeal is considered.

8. WHEREFORE, Respondent requests that the Board grant this request for a Special Appeal, grant Respondent's Motion and stay these proceedings while the Special Appeal is being considered. Respondent further requests that the Board schedule a briefing schedule to enable all parties to present their positions with respect to this matter.

Respectfully submitted,

LITTLER MENDELSON, P.C.

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Attorneys for Respondent

Dated: January 25, 2021

CERTIFICATE OF SERVICE

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

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EXHIBIT A

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

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 TO DISMISS THE COMPLAINT DUE TO THE GENERAL COUNSEL'S INABILITY TO PROSECUTE

Respondent H&M International Transportation, Inc. ("Respondent"), by and through counsel, and pursuant to Section 102.24 of the Board's Rules and Regulations, hereby files this Motion to Dismiss the Complaint due to the General Counsel's Inability to Prosecute, and in support thereof states as follows:

1. On Wednesday, January 20, 2021, President Biden unlawfully terminated the General Counsel of the Board, Peter Robb. President Biden did this without cause, or any notice or hearing. The removal of General Counsel Robb was unlawful because the General Counsel of the Board is a key member of a quasi-judicial independent agency established by Congress to administer the nation's labor laws. The National Labor Relations Act limits the ability of the President to remove the General Counsel of the Board without cause prior to the end of his term. The unlawful removal of General Counsel Robb impacts this case because anyone acting on behalf of the General Counsel during the period of his unlawful removal is acting *ultra vires*, or without legal authority to act. In prosecution of unfair labor practices, it is the General Counsel that bears

the burden of proof that the alleged unfair labor practices occurred. Without the legal authority to participate in this proceeding and present its case on the date of the trial, a dates set months ago, the General Counsel cannot carry its burden, and the case must be dismissed for the office's inability to prosecute.

2. Under Section 3(d) of the Act, the General Counsel of the Board is "appointed by the President by and with the advice and consent of the Senate, for a term of four years." The General Counsel plays a unique role as a part of the Board. With respect to unfair labor practices, the General Counsel has "final authority, ***on behalf of the Board***, in respect of the investigation of charges and issuance of complaints under section 10, ***and in respect to the prosecution of such complaints before the Board***." *Id.* (emphasis added).

3. Under Section 3, members of the Board are not removable by the President at will. Specifically, Section 3(a) provides 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."

4. The authority of Congress to limit the ability of a President to remove officials in charge of quasi-judicial independent agencies has long been recognized by the Supreme Court. *Humphrey's Ex'r v. U.S.*, 295 U.S. 602, 621-26 (1935). *See also, Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183, 2199 (2020). In *Humphrey's* the Court reviewed the limitations on removal of members of the Federal Trade Commission (FTC). The Court wrote that "[t]he commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative." *Id.* at 624. The Court noted that the fixed term of an FTC Commissioner was an important

consideration because it would be long enough to enable the occupant of the office to secure the necessary expertise in the field to properly administer the law. *Id.* at 625-26. It wrote,

> [T]he language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

Id..

The *Humphrey's* Court also recognized that honoring the term limits and restrictions on removal of officials was central to maintaining the independence of a quasi legislative or quasi judicial agency. It wrote,

> The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

Id. at 629.

5. The National Labor Relations Board is a quasi judicial quasi legislative agency much like the FTC, on which it was modeled,[1] and relies almost exclusively on adjudication of

[1] The FTC and the ICC served as models of the NLRB. At least one judge recognized near the time of the passage of the Wagner Act, that the NLRA's "administrative machinery is substantially the same as the Federal Trade Commission Act." *Precision Castings Co. v. Boland*, 13 F. Supp. 877, 884 (W.D.N.Y. 1936). Congress relied on the experience of the Federal Trade Commission in promulgating the Wagner Act. *See, e.g.*, NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935 (1949), v. 2 at 3211 ("To enforce the prohibition of the unfair labor practices described in section 8, the Wagner-Connery bill contemplated the creation of a tribunal…modeled closely after the Federal Trade Commission").

unfair labor practice and representation cases to develop the law. The quasi-legislative and quasi-judicial nature of the NLRB is set forth in Section 10 of the Act (29 U.S.C. § 160), and has been repeatedly recognized by the courts. *See, e.g., Amalgamated Util. Workers v. Consolidated Edison of N.Y.*, 309 U.S. 261, 267 (1940) (citing Sen. Rep. No. 573, 74th Cong., 1st sess., p. 15, which stated the intent of congress to establish "a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining"); *NLRB v. Beech-Nut Life Savers, Inc.*, 406 F.2d 253, 257 (2d Cir. 1968) (stating that the Board can resolve problems arising within its limited jurisdiction either by quasi-legislative promulgation of rules or quasi-judicial proceedings when the problem arises in a case before the Board).

6. The National Labor Relations Board, like the Federal Trade Commission at issue in *Humphrey's Executor*, 295 U.S. at 625-26 , was created as an agency of limited jurisdiction and with congressional intent to establish a quasi-legislative and quasi-judicial agency, composed of a body of experts who gain experience by length of service, and which operated independently of executive authority except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or department. The fact that the Board is composed of subject matter experts whose tenure allows them to develop the necessary expertise also has been repeatedly recognized. *See, e.g., Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 191 (1978) (The NLRA "created a regulatory scheme to be administered by an independent agency which would develop experience and expertise in the labor relations area."); *Tamburello v. Comm-Tract Corp.,* 67 F.3d 973, 976 (1st Cir. 1995) ("The NLRA reflects

congressional intent to create a uniform, nationwide body of labor law interpreted by a centralized expert agency—the National Labor Relations Board[.]")

7. Legislative history demonstrates that the Board was intended to operate as a quasi-judicial agency independent of the influence of the executive branch. *See* LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, v. 2 at 3211-12 (Comments of Member Marcantonio quoting *Humphrey's Exceutor*, expressing concern that the President might have unrestrained power to remove Board members and stating the Board should be established as an independent agency rather than a bureau of the Department of Labor as a result). Indeed the "absolute necessity for independence of the Board from any departmental influence was insisted upon by many of those testifying concerning the bill." *See* 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). NLRB Chairman Biddle further expressed a fear that the Board administration might become too susceptible to purely political fluctuations if it were not completely independent. *See* LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, v.1 at 1462-63

8. The General Counsel of the Board does not serve at the pleasure of the President, and cannot be remove absent sufficient cause. There is ample authority to support this conclusion.

First, the position the General Counsel of the Board occupies is inextricably intertwined with the Board itself, such that it cannot operate without an incumbent in the position. Indeed, the title of the position is "General Counsel ***of the Board***" which demonstrates how fully blended the position is with the Board itself. In order for the Board to operate in a truly independent manner, as would be expected of a quasi-judicial agency that relies almost exclusively on adjudications of cases to determine the law, its members cannot be removed at the pleasure of

the President. Rather, they must be able to serve out their terms so as to ensure an orderly transition of policy from one administration to the next. This serves to facilitate predictability of the law, and to avoid rapid swings in the policy pendulum were the President able to remove everyone on the Board as soon as he or she is sworn into office. This furthers the purpose of the Act, which as set forth in Section 1 of the Act, is in part "to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other..." Rapid and uncontrolled swings in labor policy brought about by not honoring the terms set by Congress in the Act and replacing officials contravenes these stated purposes.

Second, the title General Counsel of the Board, as well as the responsibilities delegated to the position by the Board, makes is clear that the General Counsel is tantamount to a member of the Board. Such a role would directly impute the for cause language of Section 3(a) of the Act to the General Counsel position. This makes clear that the General Counsel is an officer member of the Board qua agency subject to this removal provision. In short, because the GC exercises powers of the Board, he operates as a member of the Board for purposes of the 3(a) removal protections. To hold otherwise would undermine the independence of the Board, and thus Congressional purpose that the Board make decisions independent of intervention by elected officials or political appointees. *See, Precision Castings*, 13 F. Supp. at 884 ("Like the Federal Trade Commission, the National Labor Relations Board is an independent agency largely free from

the executive control except in the matter of appointment") (citing *Humphrey's Executor*, 295 U.S. at 628).

Third, even without imputing Section 3(a) to the General Counsel position, Section 3(d)'s creation of a four year term and the absence of language providing that the position serves at the pleasure of the President shows the existence of a for cause termination requirement. Noted scholar of the National Labor Relations Act and editor of the labor law treatise *The Developing Labor Law*, John E. Higgins, Jr., has written that "[w]hile section 3(d) does not explicitly set forth criteria and procedures governing this situation, the practice since 1947 has been that the General Counsels serve four-year terms, and not at the pleasure of the President. Thus, they can only be removed for cause." John E., Higgins, Jr., *Labor Czars – Commissars – Keeping Women in the Kitchen – The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 Cath. U. L. Rev. 941, fn. 82 (1998). Nowhere in Section 3(d) is there language that states the General Counsel of the Board serves at the pleasure of the President. Implicit in the creation of a four-year term by Congress is the fact that an incumbent in such a position once confirmed by the Senate, has the ability to finish that four-year term undisturbed by changing political winds associated with a new administration. Indeed, except for the situation involving General Counsel Robb, in the history of the position, no General Counsel of the Board has ever been removed by a President.[2] This conclusion is further reinforced by the fact that the General Counsel is assigned duties similar to the duties held by the boards of other quasi legislative and quasi judicial agencies subject to removal for malfeasance. For example, the Chairman of the FTC, on which the NLRB was

[2] It should be noted that the first General Counsel of the Board under Section 3(d), Robert Denham, tendered his resignation upon the President's request, but he was not terminated by the President. John E., Higgins, Jr., *Labor Czars – Commissars – Keeping Women in the Kitchen – The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 Cath. U. L. Rev. 941, fn. 82 (1998).

modeled, is the executive and administrative head of the agency. *See* 16 C.F.R. § 0.8. At the Board, these duties are shared by the Chairman and the General Counsel.

Fourth, the legislative history of the Taft-Hartley amendments show that Congress sought to place limitations on the removal of the General Counsel, demonstrating its intent to tenure the General Counsel of the Board with a four-year term. One Senator, registering his objection to the creation of the office of the General Counsel of the Board, stated "[a]ny discipline of this individual is precluded by making him a Presidential appointee, subject to Senate confirmation ***removable only for clear malfeasance in office***." NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1567 (1948). Clearly, Congress intended to give the General Counsel of the Board the ability to serve out his or her term without the fear or risk of being removed at the pleasure of the President.

9. Because General Counsel Robb was removed from office unlawfully, any action by the office of the General Counsel during the remainder of his term, and thereafter only once a new General Counsel is nominated by the President and confirmed by the Senate, is *ultra vires*. This includes actions by any Acting General Counsel who may be named to serve in the role during the remainder of General Counsel Robb's term. Installation of an Acting General Counsel to serve during a vacancy created by an unlawful act makes service in an acting capacity likewise unlawful.

This is not the first time the actions of someone serving in the role of General Counsel have been challenged based upon their unlawful occupation of the office. In *NLRB v. Southwest General*, 137 S.Ct. 929 (2017), the Supreme Court refused to enforce a Board Order against an employer in an unfair labor practice proceeding because it concluded that then Acting General Counsel Lafe Solomon was unlawfully serving in his acting position when he issued the complaint against the Respondent. Because he was acting without legal authority, the Court

voided his issuance of the Complaint in the case. The instant case is only somewhat different since General Counsel Robb was in the position when the Complaint issued in this case. However, the General Counsel of the Board's authority is not just limited to issuing complaints. Section 3(d) of the Act makes it clear that the office also has responsibility on behalf of the Board "in respect of the ***prosecution*** of such complaints before the Board." (emphasis added). Any prosecution of the complaint in this case by the General Counsel's office during this time is likewise unlawful. In fact, no one from the office of the General Counsel has the authority to act in any manner.

10. As a practical matter, the situation created by the unlawful firing of General Counsel Robb creates a significant burden on the Respondent and others involved in this case. The risk of having this situation result in a weeks' long trial only to have the actions of the General Counsel's office declared void will cause the parties to incur undue hardship if required to re-litigate the case. Because the role of the General Counsel is so central to the operation of the Board, the impact of an unlawful termination of the General Counsel could be daunting and far more serious than the situation confronted by the Board as a result of *NLRB v Noel Canning,* 573 U.S. 513 (2014) in which hundreds of Board decisions were impacted.

11. Because there is no General Counsel to prosecute this case or carry the burden of proof, the matter must be dismissed for the inability to prosecute. In the alternative, this matter should be stayed pending General Counsel's reinstatement or the taint of his unlawful removal is eliminated.

Respectfully submitted,

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Attorneys for Respondent

Dated: January 25, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on this 25nd day of January, 2021, the foregoing Motion has been electronically provided to the following:

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