UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

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| THE BOEING COMPANY<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS | Case 19-CA-32431 |

**OPPOSITION TO THE ACTING GENERAL COUNSEL'S MOTION TO STRIKE RESPONDENT'S FOURTEENTH AFFIRMATIVE DEFENSE AND RESPONSE TO THE ADMINISTRATIVE LAW JUDGE'S SOLICITATION OF THE PARTIES' POSITIONS CONCERNING THAT DEFENSE**

The Acting General Counsel has moved to strike Boeing's fourteenth affirmative defense, which alleges that the complaint is *ultra vires* because the Acting General Counsel did not lawfully hold office at the time he directed the complaint to be filed. *See* Answer ¶ 14. The Acting General Counsel's motion should be denied. Although the affirmative defense in question is meritorious and dispositive of this case, Boeing acknowledges that Board precedent precludes this tribunal from ruling on the merits of that defense. This tribunal therefore should preserve Boeing's fourteenth affirmative defense for review by an appropriate court of appeals, should that review be necessary.

The NLRA provides that, "[i]n case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel

during such vacancy." 29 U.S.C. § 153(d). The statute places an express limitation on this authority to designate an Acting General Counsel: "[N]o person or persons so designated shall so act . . . 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 . . . ." *Id.* Here, the President designated Lafe Solomon as the Acting General Counsel effective June 21, 2010. Mot. to Strike at 5. The President did not, however, submit a nomination to the Senate to fill the position of General Counsel within 40 days of that designation. Rather, it was only on January 5, 2011, that the President nominated Mr. Solomon to serve as General Counsel. *Id.* at 7. Accordingly, the NLRA prohibited Mr. Solomon from serving as Acting General Counsel beyond July 31, 2010—forty days after his appointment—and he therefore lacked authority to direct the complaint to be filed against Boeing more than eight months later on April 20, 2011.

The Federal Vacancies Reform Act of 1998 ("FVRA") does not alter this conclusion. The FVRA provides that, if an office in an executive agency becomes vacant, the President may "direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(3). The FVRA also provides that an officer acting temporarily under § 3345 may serve "(1) for no longer than 210 days beginning on the date the vacancy occurs; or (2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate." *Id.* § 3346(a).

"It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007) (same). Unless

the general statute has repealed the specific one, the specific statute controls. *See Defenders of Wildlife*, 551 U.S. at 662–63.

Under these principles, the Acting General Counsel's authority to direct the filing of the complaint in this case is controlled by the NLRA, not the FVRA. The provision of the NLRA at issue specifically addresses vacancies in the office of General Counsel within the NLRB. The FVRA, in contrast, governs vacancies in executive agencies generally. It does not directly address the time period in which an Acting General Counsel may serve—much less expressly repeal the NLRA's forty-day limitation on that service. Nor does the FVRA effect an implied repeal of that limitation. "[R]epeals by implication are not favored," and should be found only when "the later statute expressly contradicts the original act"—that is, when the two are in "irreconcilable conflict"—or when "such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Defenders of Wildlife*, 551 U.S. at 662–63 (internal quotation marks and alterations omitted).

Rather than being in "irreconcilable conflict," the provisions here are readily compatible: The FVRA provides that acting officers may not serve for more than 210 days without the submission of a nomination to the Senate, and the NLRA further limits that time period to 40 days in the case of the Acting General Counsel. It is also unnecessary to find an implied repeal for the FVRA to "have any meaning at all." The FVRA still limits the service of other acting officers to 210 days, even if the more specific limitation of the NLRA applies to the Acting General Counsel. Indeed, the FVRA itself provides that it is not the "exclusive means" for appointing acting officers if another statutory provision authorizes such an appointment. 5 U.S.C. § 3347(a). Section 3347(a) makes clear that the FVRA continues to have general effect

regardless of whether specific provisions of other statutes apply in particular circumstances. Thus, the NLRA controls, and the complaint is *ultra vires*.

The Acting General Counsel resists this conclusion by relying primarily on a Senate Report, and arguing that the FVRA serves as an "alternative avenue for appointment of an Acting General Counsel" in spite of the explicit limitations imposed by the NLRA. Mot. to Strike at 6 (citing S. Rep. No. 105-120 (1998)). But the FVRA does not say that. Even if the FVRA can be considered to provide an "alternative" means of appointment, neither the FVRA nor the Senate Report cited by the Acting General Counsel states that the FVRA overrides the express 40-day limitation imposed by Section 3 of the NLRA.

The Supreme Court recently rejected a similar request to ignore the legislative judgments expressed in the very same section of the NLRA. In *New Process Steel, L.P. v. NLRB*, 560 U.S. __ (2010), the Board had delegated its authority to a three-member group; the term of one of those members soon expired; and the remaining two-member group continued to exercise, for 27 months, the authority of the Board. The Supreme Court held that this arrangement violated the terms of Section 3(b), including the three-member quorum requirement for the Board enacted in 1947. *Id.* at __ (slip op. 1, 3); *see also* 29 U.S.C. § 153(b). The Court rejected the Board's argument that an interest in "efficiency" dictated the opposite result. 560 U.S. at __ (slip op. 12). If Congress desired the efficiency sought by the Board, the Court explained, "it could have kept the Board quorum requirement at two." *Id.*

The same basic choice is presented in this case: whether to respect the express limitations enacted by Congress in the NLRA, or whether to set aside those limitations for the sake of expediency. The NLRA reflects a legislative judgment of checks and balances, both granting authority to the Board and the General Counsel, and placing limits on that authority.

That legislative judgment "must be given practical effect rather than swept aside." *New Process Steel*, 560 U.S. at __ (slip op. 14). This case illustrates well that the Board and the General Counsel have too much power to ignore the checks that Congress also chose to place on that power.

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For the foregoing reasons, Boeing maintains that the complaint is *ultra vires*, and that its fourteenth affirmative defense is dispositive of this case. Boeing acknowledges, however, that this tribunal is bound by decisions of the Board, and that the Board has determined that it is improper to decide challenges to the President's designation of an Acting General Counsel in administrative proceedings regarding unfair labor practices. *See Lutheran Home at Moorestown*, 334 N.L.R.B. 340, 340 (2001). Boeing accordingly acknowledges that neither the Administrative Law Judge nor the Board may decide this question.

That does not mean, however, that Boeing's fourteenth affirmative defense should be stricken. Indeed, that would be entirely improper. Rather, this tribunal should defer ruling on Boeing's fourteenth affirmative defense, thereby preserving it for review by an appropriate court of appeals, should that review be necessary.

For the foregoing reasons, the Acting General Counsel's motion to strike Boeing's fourteenth affirmative defense should be denied.

Respectfully submitted,

June 27, 2011

/s/ William J. Kilberg
William J. Kilberg P.C.
Eugene Scalia
Matthew McGill
Paul Blankenstein
Daniel J. Davis

GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue N.W.
Washington, District of Columbia 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

J. Michael Luttig
Bryan H. Baumeister
Brett C. Gerry
Eric B. Wolff
THE BOEING COMPANY
100 N. Riverside Plaza
Chicago, Illinois 60606

Richard B. Hankins
Alston D. Correll
Drew E. Lunt
MCKENNA LONG & ALDRIDGE
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
Telephone: 404.527-4000
Facsimile: 404.527-4198

Attorneys for The Boeing Company

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**CERTIFICATE OF SERVICE**

I certify that a copy of Respondent's Opposition to the Acting General Counsel's Motion to Strike Respondent's Fourteenth Affirmative Defense and Response to the Administrative Law Judge's Solicitation of the Parties' Positions Concerning that Defense was electronically filed on June 27, 2011, and was sent via overnight mail to the following parties, as well as electronically served where emails are listed:

The Honorable Clifford H. Anderson
Associate Chief Administrative Law Judge
National Labor Relations Board Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103-1779

Richard L. Ahearn
Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174-1078
Richard.Ahearn@nlrb.gov

Mara-Louise Anzalone
Peter G. Finch
Rachel Harvey
Counsel for the Acting General Counsel
National Labor Relations Board
915 2nd Avenue, Suite 2948
Seattle, Washington 98174-1078
Mara-Louise.Anzalone@nlrb.gov
Peter.Finch@nlrb.gov
Rachel.Harvey@nlrb.gov

David Campbell
Carson Glickman-Flora
Robert H. Lavitt
Sean Leonard
Jennifer Robbins
Jude Bryan
SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT LLP
18 West Mercer Street, Suite 400
Seattle, Washington 98119
Campbell@workerlaw.com
Flora@workerlaw.com
lavitt@workerlaw.com
leonard@workerlaw.com
robbins@workerlaw.com
bryan@workerlaw.com

Christopher Corson, General Counsel
IAM
9000 Machinists Pl.
Upper Marlboro, MD 20772-2687
ccorson@iamlaw.org

Dennis Murray, Cynthia Ramaker & Meredith Going, Sr.
National Right to Work Legal Defense Foundation, Inc.
c/o Glen M. Taubman
8001 Braddock Road, Suite 600
Springfield, VA 22151-2110
gmt@nrtw.org

Matthew C. Muggeridge
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22151-2110
mcm@nrtw.org

Jesse Cote, Business Agent
Machinists District Lodge 751
9135 15th Pl. S
Seattle, WA 98108-5100

James D. Blacklock
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
Jimmy.blacklock@oag.state.tx.us

Andrew M. Kramer
Jessica Kastin
Jones Day
51 Louisiana Ave., N.W.
Washington, D.C. 20001-2113

Daniel V. Yager
General Counsel
HR Policy Association
1100 Thirteenth Street, NW
Suite 850
Washington, D.C. 20005

DATED this 27th Day of June, 2011

/s/ Daniel J. Davis
Daniel J. Davis
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue N.W.
Washington, D.C. 20036-5303
DDavis@Gibsondunn.com