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

THE BOEING COMPANY

and **Case 19-CA-32431**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

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

Pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board (the "Board"), Counsel for the Acting General Counsel moves to strike the fourteenth affirmative defense advanced by Respondent The Boeing Company ("Respondent") in its Answer to the Complaint in this matter ("Answer"). With neither an articulated theory nor supporting facts, Respondent baldly asserts that "[t]he Complaint is *ultra vires* because the Acting General Counsel of the NLRB did not lawfully hold the office of Acting General Counsel at the time he directed that the Complaint be filed." (Answer at 4, ¶ 14). Counsel for the Acting General Counsel respectfully requests that Administrative Law Judge Anderson strike Respondent's defense because it fails to either give the Acting General Counsel fair notice of the nature of the defense or set forth sufficient facts to plausibly support a claim for relief.

Further, in response to Administrative Law Judge Anderson's solicitation of the parties' positions regarding Respondent's fourteenth affirmative defense,[1] Counsel for the Acting General Counsel respectfully avers that, even if Respondent's defense were not defective on its face, it would be inappropriate for Administrative Law Judge Anderson to rule on the propriety of President Obama's appointment of the Acting General Counsel. Respondent has proffered nothing to suggest that the appointment of the Acting General Counsel was in any way improper; thus, the presumption of regularity applies.

I. Respondent's Fourteenth Affirmative Defense Is Inadequately Pled

Affirmative defenses are insufficiently pled if they do not provide fair notice of the nature of the defense. *Wyshak v. City Nat'l Bank,* 607 F.2d 824, 827 (9th Cir. 1979). The standard used to assess sufficiency of the pleading was set forth by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007): does the pleading set forth "enough facts to state a claim to relief that is plausible on its face"? *See Hudson v. First Transit, Inc.* 2011 WL 445683, slip op. at *2 (N.D. Cal. Feb. 3, 2011).

Although, as the Administrative Law Judge has noted, Respondent's claim concerning the authority of the Acting General Counsel goes to the very viability of the Complaint,[2] Respondent has not articulated any basis for its assertion in either its affirmative defense or its pending Motion to Dismiss. Likewise, Respondent did not

[1] (Tr., Day 1, 28:5-12). References to the transcript are as produced in rough copies delivered daily and referenced by "Day ___," rather than the standard format for official certified transcripts, which will be generated in due course.

[2] (Tr., Day 1, 26:18-22; 43:16-23).

move the Board for summary judgment before the hearing under Rule 102.24(b) of the Board's Rules and Regulations and has stated that it has no plans "to make a motion with regard to the authority of the General Counsel." (Tr., Day 1, 26:10-12). Rather, Respondent has indicated that it wishes to await the Acting General Counsel's response to its unsubstantiated defense before even setting forth the basis for that asserted defense. (Tr., Day 1, 47:14-18). Thus, Respondent has never articulated any basis for its claim.

As such, Respondent's Answer does not and cannot remotely be considered to provide fair notice of the nature of its defense, or to set forth, as required, "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. at 570, *cited in Hudson v. First Transit, Inc.* 2011 WL 445683, slip op. at *2 (granting motion to strike certain affirmative defenses). *See also South Coast Refuse Corp.*, 337 NLRB 841, 842 (2002) (striking respondent's baseless affirmative defense challenging General Counsel's authority to seek specific relief).

While motions to strike are "generally disfavored because the motions may be used as delaying tactics and because of the strong policy favoring resolution on the merits," such is not the case here. *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program,* 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010), *cited in Seals v. Mitchell* 2010 WL 5094264, slip op. at *2 (N.D. Cal. Dec. 8, 2010). Rather, the circumstances are such that, as Administrative Law Judge Anderson has effectively noted, it "will streamline the ultimate resolution of the matter." *Federal Sav. and Loan Ins. Corp. v. Gemini Mgt.,* 921 F.2d 241, 244 (9th Cir. 1990). Counsel for the Acting General

Counsel therefore respectfully requests that the Administrative Law Judge strike Respondent's fourteenth affirmative defense as inadequately pled.

II. Even If Respondent's Fourteenth Affirmative Defense Were Adequately Pled, a Hearing on the Merits of This Case Must Proceed

As explained below, Counsel for the Acting General Counsel respectfully avers that, even if Respondent's defense were adequately pled, it would be inappropriate for Administrative Law Judge Anderson to either rule on the propriety of President Obama's appointment of the Acting General Counsel or halt the proceedings merely upon this Motion, as Respondent has proffered nothing to suggest that the appointment of the Acting General Counsel was improper.

The Board has found that it is not appropriate for it to decide, in an unfair labor practice case, whether or not the President made a proper appointment of an Acting General Counsel under the Federal Vacancies Reform Act of 1998 (the "FVRA"), 5 U.S.C. §§ 3345-3349. *Lutheran Home at Moorestown*, 334 NLRB 340, 340 (2001). In deciding whether to proceed with the disposition of a case on the merits, notwithstanding a claim concerning the Acting General Counsel's authority, the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." *Lutheran Home at Moorestown*, 334 NLRB at 341, *citing U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). *See also Anderson v. P.W. Madsen Inv. Co.*, 72 F.2d 768, 771 (10th Cir. 1934) ("There is a presumption of authority for official action rather than want of authority ..."). Given this presumption, the Board will proceed with the disposition of a case on its merits, notwithstanding claims concerning the authority of an Acting General Counsel,

so long as there is nothing to suggest that the Acting General Counsel's appointment was "clearly improper." *Lutheran Home at Moorestown*, 334 NLRB at 340.

Under such precedent,[3] Counsel for the Acting General Counsel submits that, even if Respondent's claim concerning the Acting General Counsel's authority were adequately pled, it would be inappropriate for the Administrative Law Judge to rule on the propriety of President Obama's appointment of the Acting General Counsel in this unfair labor practice case. Rather, the Administrative Law Judge should proceed with a hearing on the merits of this case because there is nothing to suggest any impropriety in President Obama's appointment of the Acting General Counsel.

President Barack Obama appointed Lafe Solomon to the position of Acting General Counsel effective Monday, June 21, 2010, following the resignation of the previous General Counsel, Ronald Meisburg (Exhibit A attached). The President appointed Mr. Solomon pursuant to "the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998 ....,"[4] which provides in relevant part:

> (a) If an officer of an Executive agency ... whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, ... resigns ...
>
> > (3) ... the President ... may direct an officer or employee of such Executive agency to perform the

[3] To the extent Article III courts have applied the FVRA to the Board, they have found no impropriety in a Deputy General Counsel's serving as General Counsel temporarily in an acting capacity pursuant to § 3345(a)(1) of the FVRA. *See, e.g., Muffley v. Mammoth Coal Co.*, 570 F.3d 534, 540, n.1 (4th Cir. 2009); *Muffley v. Massey Energy Co.*, 547 F. Supp.2d 536, 540 (S.D. W.Va. 2008).

[4] Mr. Solomon is the third Acting General Counsel of the Board to be appointed pursuant to such authority. President Clinton's December 19, 2000, appointment of Acting General Counsel Leonard Page and President Bush's July 1, 2005, appointment of Acting General Counsel Arthur F. Rosenfeld were made pursuant to the same authority.

> functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if--
>
> > (A) during the 365-day period preceding the date of ... resignation, ... the officer or employee served in a position in such agency for not less than 90 days; and
> >
> > (B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

By its terms, 5 U.S.C. § 3345 applies to all appointments where advice and consent of the Senate is required (with four enumerated exceptions, which have no bearing in this matter). 5 U.S.C. § 3345(a). Thus, § 3345 applies to the Board and authorizes the President to appoint an officer or employee of the Board to serve as the Acting General Counsel. Revision of Statement of Organization and Functions; Position of Deputy General Counsel, 66 Fed. Reg. 63,416-17 (Dec. 6, 2001). A person serving as an acting officer may serve "for no longer than 210 days after the vacancy occurs," or, absent rejection, withdrawal, or return of a Senate nomination, as long as a first or second Senate nomination is pending. 5 U.S.C. § 3346.

Section 3347(a)(1)(A) of the FVRA preserves § 3(d) of the National Labor Relations Act, 29 U.S.C. § 153(d), as an alternate avenue for appointment of an Acting General Counsel. *See also* S. Rep. No. 105-250, 105th Cong. 2d Sess. 17 (1998) ("even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternate procedure for temporarily occupying the office"). Thus, the President has the

option of appointing an Acting General Counsel pursuant to either § 3345(a) of the FVRA or § 3(d) of the Act.[5]

In accordance with these requirements, President Obama submitted his nomination of Mr. Solomon to serve as General Counsel to the Senate on January 5, 2011. 157 Cong. Rec. S68 (Jan. 5, 2011). While Mr. Solomon's nomination remains pending before the Senate, he continues to serve as the Board's Acting General Counsel, a job for which he is unquestionably qualified under § 3345(a) of the FVRA due to his current employment, longevity, and pay grade. Specifically, for the 10 years preceding his appointment as Acting General Counsel, Mr. Solomon, who began his career with the Board in 1972, served in the position of Director of the Board's Office of Representation Appeals, a Senior Executive Service position. Mr. Solomon's service as Acting General Counsel also falls squarely within the time limitations set forth in § 3346, as he served as Acting General Counsel for fewer than 210 days before his nomination on January 5, 2011, and his nomination remains pending before the Senate. Thus, there is nothing raising the spectre of clear impropriety vis-à-vis Mr. Solomon's appointment, and the presumption of regularity applies as the case moves forward.

III. Conclusion

For the reasons set forth above, Counsel for the Acting General Counsel moves to strike Respondent's fourteenth affirmative defense as inadequately pled. Counsel for the Acting General Counsel further respectfully avers that even if that defense were

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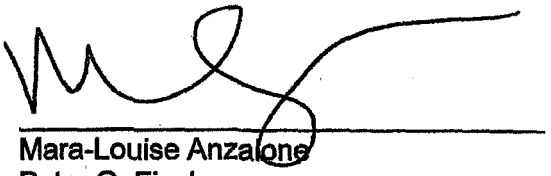
[5] Section 3(d) of the NLRA provides in relevant part:

> 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.

adequately pled, a hearing on the merits of this case must proceed because there is nothing to suggest that the appointment of the Acting General Counsel was clearly improper.

Respectfully submitted on this 21st day of June, 2011.



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THE WHITE HOUSE

WASHINGTON

June 18, 2010

MEMORANDUM FOR LAFE E. SOLOMON
Director, Office of Representation Appeals,
National Labor Relations Board

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998, you are directed to perform the duties of the office of, General Counsel of the National Labor Relations Board, effective June 21, 2010.

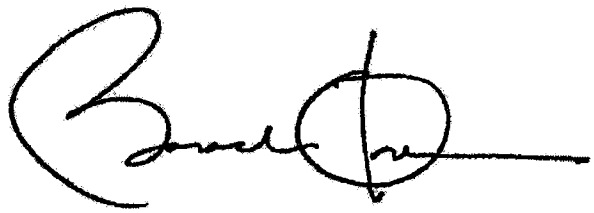

Exhibit A

CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Motion to Strike Respondent's Fourteenth Affirmative Defense and Response to Administrative Law Judge's Solicitation of the Parties' Positions Concerning that Defense was served on the 21st day of June, 2011, on the following parties:

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