UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO OFFICE

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

RULING ON GENERAL COUNSEL'S MOTION TO STRIKE RESPONDENT'S FOURTEENTH AFFIRMATIVE DEFENSE

On June 21, 2011, the General Counsel filed a motion to strike the Respondent's fourteenth affirmative defense to the complaint herein. On June 27, 2011, the Respondent filed an opposition thereto.

The Respondent's answer contains the following at Defenses, No. 14: "The 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."

In pre-trial conference calls with the parties and in off the record and on the record exchanges with counsel, I indicated a desire to address this allegation at the soonest possible opportunity and asked the parties to consider whether or not as a matter of law I had the power to rule on the matter.

The General Counsel argues in his motion at 4-5

> 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, 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.

The Respondent in its opposition to the General Counsel's motion to strike the affirmative defense maintains its position as alleged in its answer that the Acting General Counsel did not lawfully hold the office of Acting General Counsel at the time he directed that the instant complaint be filed. The Respondent notes further however in its opposition at 5:

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.

The Board in *Lutheran Home at Moorestown*, 334 NLRB 340, (2001) stated at 340-341 :

> We do not believe it appropriate for us to decide, in this unfair labor practice case, whether or not the President of the United States made a proper appointment under that statute. In any event, we are not persuaded, based on the Respondent's arguments, that the Acting General Counsel's appointment was clearly improper. We therefore reject the Respondent's contention that the Motion for Summary Judgment should be denied on this ground. See *U.S. v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15 (1926) (presumption of regularity supports the official acts of public officers in the absence of clear evidence to the contrary).

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3 In addition to defending the propriety of the appointment under §3345, the Acting General Counsel argues that the Office of the General Counsel is afforded special protections under §3348 that insulate complaints from any challenge based on alleged defects in his appointment. In view of our finding that the Respondent has failed to establish that the appointment was clearly defective under §3345, we find it unnecessary to address this additional argument. Chairman Hurtgen does not agree that the Respondent must show that the appointment was "clearly improper." It is sufficient to show that it was improper. However, Chairman Hurtgen agrees that this showing has not been made.

Given the quoted Board holding in *Lutheran Home at Moorestown* and the noted positions of the General Counsel and the Respondent, there is essential agreement that I do not have the power to address the issue raised by the affirmative defense quoted above.[1] The only difference between the General Counsel and the Respondent is whether or not - given that I do not have power to address the contentions regarding the Acting General Counsel, I should strike the pleading as the General Counsel argues or whether, as the Respondent argues, I "should defer ruling on ... [the] affirmative defense, thereby preserving it for review by an appropriate court of appeals, should that review be necessary."

I find this seeming issue to be a classic distinction without a difference. If the issue ripens, reviewing authority, presumably with this order before them, will have little trouble ascertaining the issues, argument, and ruling made herein irrespective of the striking of the defense as alleged in the answer or not. Given the Board's explicit rejection of the respondent's contention in *Lutheran Home at Moorestown*, I will follow their teaching and simply reject the affirmative defense rather than striking it as requested by the General Counsel or defer ruling on it as requested by the Respondent.

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[1] I specifically find in this case that there has not been a showing that the appointment of the Acting General Counsel was "clearly improper".

Based on the General Counsel's motion, the opposition of the Respondent, the argument and cases cited, and the record as a whole to date, I issue the following:

ORDER[2]

1. **The General Counsel's motion to strike the Respondent's fourteenth affirmative defense to the complaint herein is denied.**

2. **The Respondent's fourteenth affirmative defense to the complaint herein is rejected.**

Issued at San Francisco, California this 28th day of June, 2011.

Clifford H. Anderson
Administrative Law judge

[2] Appeals from administrative law judge rulings on motions are governed by the Board's Rule 102.26.

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SERVICE OF: Ruling on GC Motion to Strike Respondent's 14th Affirm. Defense by Judge Clifford Anderson dated 6-28-2011

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