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National Association of Broadcast Employees and Technicians—The Broadcasting and Cable Television Workers Sector of the Communication Workers of America, AFL–CIO, Local 51 (American Broadcasting Companies, Inc.) and Jeremy Brown. Cases 19–CB–244528 and 19–CB–247119

April 30, 2021

ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN,
EMANUEL, AND RING

On December 3, 2020, Administrative Law Judge Jeffrey D. Wedekind issued a decision in this case, dismissing, as relevant here, allegations that the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act by sending overbroad and false or misleading evidence-preservation letters to or through the Charging Party’s legal counsel. On December 31, 2020, the Charging Party and the then-serving General Counsel separately filed exceptions to the judge’s dismissal of these allegations and supporting briefs.¹

On February 12, 2021, counsel for the Acting General Counsel filed a motion to withdraw exceptions. In support, the motion states as follows:

On January 25, 2021, after having removed the former General Counsel, President Biden designated Peter Sung Ohr as Acting General Counsel of the Board. The Acting General Counsel has since had the opportunity to revisit the basis for the General Counsel’s exceptions filed in this matter and has decided not to continue the prosecution of this issue. Accordingly, Counsel for the Acting General Counsel moves to withdraw her exceptions.

¹ We omit mention of filings that pertain to issues other than whether the Respondent violated the Act by sending the evidence-preservation letters.

² This is not the only case in which these issues are implicated. See, e.g., *Pittsburgh Post-Gazette*, 06–CA–233676 (March 19, 2021) (denying motion to file supplemental brief changing position on overruling precedent); *AM/NS Calvert, LLC*, 15–CA–244523, 15–CB–244598 (Feb. 19, 2021) (denying motion challenging RD’s withdrawal of complaint); *International Union of Operating Engineers Local 150 (Lippert Components)*, 25–CC–228342 (motion pending to remand to the RD for dismissal of complaint); *International Union of Operating Engineers Local 150 (Maglish Plumbing)*, 25–CC–230368 (same); *International Brotherhood of Electrical Workers Local 98 (Fairfield Inn)*, 04–CC–223346 (same); *National Nurses Organizing Committee*, 16–CB–225123 (same); *International Union of Operating Engineers Local 150 (Donegal Services)*, 13–CP–227526 (motion pending to withdraw exceptions); *Stericycle, Inc.*, 04–CA–137660 (motion pending to withdraw

The Charging Party filed an opposition to the Acting General Counsel’s motion, the Respondent filed a brief in support of the motion, the Charging Party filed a reply to the Respondent’s brief in support, and the Acting General Counsel filed a reply to the Charging Party’s opposition.

The Charging Party’s opposition to the Acting General Counsel’s motion challenges the validity of Acting General Counsel Ohr’s designation. As the Charging Party observes, Acting General Counsel Ohr was designated by the President following the removal of General Counsel Peter Robb, who, at the time of his removal from office, was serving a statutory 4-year term ending November 15, 2021. The Charging Party contends that the removal of Robb was contrary to Section 3(d) of the Act. The Charging Party asserts that the subsequent designation of Acting General Counsel Ohr was invalid for these reasons and because it violated the Appointments Clause of the Constitution. The Acting General Counsel, in turn, asserts that the removal of Robb was lawful and that the subsequent designation of Ohr was valid because the General Counsel is removable at will by the President.

We understand both parties’ positions, and we acknowledge the obvious importance of these issues.² This is far from the first time that the Board has been asked to consider a challenge to the validity of the President’s actions with respect to one of the Board’s Presidential appointees or designees, including both the General Counsel and the Board members. Previous Boards have addressed these challenges in a variety of ways. Some prior Boards have declined to reach the merits of the challenges, relying on a presumption of regularity.³ At least one prior Board member has taken the position that the Board lacks jurisdiction to address such challenges.⁴ Other Boards have opted to reach the merits of these challenges, albeit often without detailed analysis.⁵

exceptions to violations found by ALJ); *Hospital Menonita de Guayama, Inc.*, 12–CA–214830 (motion pending to withdraw portions of former General Counsel’s brief arguing for change in precedent).

³ See *Center for Social Change, Inc.*, 358 NLRB 161, 161 (2012) (“Historically, the Board has declined to determine the merits of claims attacking the validity of Presidential appointments to positions involved in the administration of the Act,” and “[i]nstead, it has applied the well-settled presumption of regularity of the official acts of public officers in the absence of clear evidence to the contrary.”).

⁴ See *Center for Social Change, Inc.*, supra at 161 fn. 2 (2012) (concurring opinion of Member Hayes).

⁵ See, e.g., *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. at 2 fn. 5 (2016) (rejecting challenge to appointment of Acting General Counsel Lafe Solomon); *Entergy Mississippi, Inc.*, 361 NLRB 892, 892–893 (2014) (rejecting challenge to recess appointment of Member Craig Becker); see also *Bloomington, Inc.*, 359 NLRB

The current members of the Board have different views on the appropriateness of these approaches, but we are all in agreement that reviewing the actions of the President is ultimately a task for the federal courts. Moreover, the Board has no authority to remedy an invalid appointment to the Board or a designation or appointment to serve as General Counsel, unless it is to halt the operation of the Agency, in part or in whole. That step is in tension with our official duty to faithfully administer the National Labor Relations Act. Thus, we have determined that even assuming, *arguendo*, that the Board would have jurisdiction to review the actions of the President, it would not effectuate the policies of the Act to exercise this jurisdiction. Cf. *Contract Services, Inc.*, 202 NLRB 862 (1973) (declining jurisdiction based on foreign relations considerations). It is for the courts, not the Board, to make the initial and final determinations on the issues presented here.

Turning to the Acting General Counsel's motion, withdrawal of his predecessor's exceptions will not affect the Board's ability to address Judge Wedekind's dismissal of the allegations that the Respondent violated the Act by sending the records-preservation letters. The Charging Party has also filed exceptions to the judge's dismissal of these allegations and a supporting brief, and those exceptions remain pending before the Board. In these circumstances, we find it appropriate to grant the Acting General Counsel's Motion to Withdraw Exceptions to the Administrative Law Judge's Decision.

Dated, Washington, D.C. April 30, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

1015, 1015 (2013) (nonprecedential recess Board decision rejecting challenge to Board recess appointments).