



Status Of Former NLRB General Counsel Still Up In The Air

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The National Labor Relations Board issued an order on April 20, 2021, in which it [declined to rule](#) on whether the agency's acting general counsel, Peter Sung Ohr, was legally appointed. Shortly after President Biden took office, he terminated the Board's prior General Counsel Peter Robb [after Robb refused to resign](#). Robb was serving the last year of a statutory four-year term when he was fired. Biden replaced Robb with Peter Sung Ohr, who is currently serving as the acting general counsel while Biden's permanent appointment, Jennifer Abruzzo, awaits Senate confirmation.

Robb's abrupt departure sparked a series of legal challenges before the Board, as challengers argued that President Biden fired Robb illegally and thus his appointment of a successor is invalid. The National Labor Relations Act defines the conditions in which the President can remove board members, but is silent on whether the President can remove the general counsel. Those challenging Ohr's appointment argue that silence means the general counsel can only be fired for sufficient cause, while Acting General Counsel Ohr asserts that Robb could be removed at will.

The NLRB's recent order came in the case of [National Association of Broadcast Employees & Technicians](#), where the charging party challenged the validity of Robb's removal and the subsequent appointment of Ohr. The Board declined to rule on the issue, saying it is instead a matter for the federal courts to decide. The Board stated:

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“[T]he 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.”

The NLRB’s decision is appealable to the federal circuit courts and could ultimately be decided by the U.S. Supreme Court. The Board’s decision to punt the issue to the federal courts is not too surprising, but now parties must wait and see what the courts have to say on the issue. Regardless, challenges are expected to continue if the Senate confirms Jennifer Abruzzo as the permanent NLRB general counsel. In the meantime, employers who are issued complaints by Ohr, or potentially by Abruzzo in the future, may consider raising the legitimacy of those complaints as a defense until the federal courts rule on the issue. Stay tuned for more updates on this front.