ADMINISTRATIVE REVIEW BOARD
U.S. DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of:	)	
BRAD RIDDELL	)	ARB Case No. 2019-0016
Complainant,	)	ALJ Case No. 2014-FRS-00054
v.	)	
CSX TRANSPORTATION, INC.,	)	
Respondent.	)	

BRIEF FOR THE SOLICITOR OF LABOR AS AMICUS CURIAE

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STATEMENT OF INTEREST

The Solicitor of Labor ("Solicitor") submits this brief as *amicus curiae*. The Solicitor seeks to address the argument related to the appointment of Administrative Law Judge ("ALJ") Almanza raised by Respondent CSX Transportation, Inc. ("CSXT"). In its petition for review and opening brief, CSXT raises a constitutional challenge to the authority of ALJ Almanza to hear the case and seeks remand for a new hearing. The Appointments Clause issue in this case represents a significant question of law and the Solicitor has a substantial interest in the adjudication of this issue, including whether the issue has been properly raised to the Administrative Review Board ("ARB" or "Board"). For the reasons set forth more fully below, the Solicitor respectfully urges the Board to hold that CSXT has waived its challenge under the Appointments Clause by failing to raise it before the ALJ. In the alternative, if the Board does consider the arguments, the Solicitor agrees with CSXT that the case should be remanded for a

new hearing before a different ALJ. However, in the event of any such remand, the Solicitor requests the Board hold, as a matter of law, that the Secretary's December 2017 ratification of the Department of Labor ALJs was valid and that the ALJs are properly appointed.[1]

STATEMENT OF THE ISSUE

Whether CSXT's Appointments Clause challenge is properly before the Board.

STATEMENT OF THE CASE

A. Statutory Background

This case arises under the anti-retaliation provisions of the Federal Railroad Safety Act ("FRSA" or "the Act"), 49 U.S.C. 20109, which prohibits railroad carriers from discriminating against, or taking an unfavorable personnel action against, an employee because the employee reported a work-related injury, unsafe conditions, or engaged in other protected activity. 49 U.S.C. 20109(a); *see* 29 C.F.R. 1982.102(b). FRSA proceedings are governed by the rules and procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 41 U.S.C. 42121(b), which have been expressly incorporated or are reflected in the whistleblower provisions of numerous statutes administered by the Department of Labor ("Department" or "DOL"). *See* 49 U.S.C. 20109(d)(2).

An employee who believes that he or she has been retaliated against in violation of FRSA may file a complaint alleging such retaliation with the Occupational Safety and Health Administration ("OSHA"). *See* 49 U.S.C. 20109(d)(1); 29 C.F.R. 1982.103. After an

[1] In this brief, the Solicitor seeks only to express her views on whether the Appointments Clause challenge is properly before the Board and whether the Secretary's ratification was valid. Accordingly, the brief does not discuss the merits of the underlying Federal Railroad Safety Act ("FRSA") claim.

investigation, OSHA either dismisses the complaint or finds reasonable cause to believe that retaliation occurred and orders appropriate relief. *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.105. Either the employer or the employee may object to OSHA's findings and request a hearing before an ALJ. 29 C.F.R. 1982.106, 1982.107. The ALJ's decision is subject to review by the ARB and either party may seek the Board's review by filing a timely petition for review. 29 C.F.R. 1982.110(a). The ARB has authority to issue final agency decisions on FRSA whistleblower complaints. 29 C.F.R. 1982.110; Sec'y of Labor's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. at 69, 378 (Nov. 16, 2012).

B. Procedural History

In March 2013, Brad Riddell ("Riddell") made multiple calls to CSXT's ethics hotline to report his co-worker's on-the-job drug use. ALJ Decision and Order, Case No. 2014-FRS-00054 (OALJ Dec. 12, 2018) ("ALJ Decision and Order") at 23. After rumors circulated that Riddell called the ethics line and auditors were sent out to investigate, Riddell was told by CSXT that he would be removed from service without pay, pending an internal hearing to investigate allegations that Riddell made threats against his supervisor. *Id.* at 24. An internal hearing was held and CSXT eventually withdrew its charges against Riddell. *Id.* Respondent then paid Riddell for his time out of work and he returned to work in a different position. *Id.*

Riddell filed a timely FRSA complaint with OSHA against CSXT on April 25, 2013. Pet'r's Br. 9. OSHA dismissed the complaint and on February 7, 2014, Riddell filed objections to OSHA's findings and requested a hearing before an ALJ. ALJ Decision and Order at 24. The case was assigned to ALJ Almanza on March 5, 2014. *Id.* On September 4, 2015, CSXT submitted a Motion for Summary Decision, which did not include any challenge to ALJ

Almanza's appointment. *Id.* ALJ Almanza denied CSXT's Motion for Summary Decision and in January 2017 a full hearing was held in front of ALJ Almanza. *Id.* On May 10, 2017, CSXT submitted its post-hearing brief, which did not include any challenge to ALJ Almanza's appointment.

On December 21, 2017, the Secretary of Labor ("Secretary") ratified ALJ Almanza's appointment and the ratification was publically reported in the legal press with a link to the Secretary's letter to each ALJ ratifying the ALJ's appointment. *See* National Law Journal, *U.S. Labor Department, Eyeing SCOTUS Case, Moves to Shield In-House Judges* (Jan. 22, 2018), *available at* https://www.law.com/nationallawjournal/2018/01/22/us-labor-department-eyeing-scotus-case-moves-to-shield-in-house-judges/?slreturn=20190221111928. On June 21, 2018, the Supreme Court issued its decision in *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018), holding that SEC ALJs are "officers of the United States," and therefore must be appointed in accordance with the requirements of the Appointments Clause of the Constitution. On December 12, 2018, ALJ Almanza issued his decision, holding that CSXT violated the FRSA and awarding damages, including lost pay and benefits, emotional distress damages, punitive damages, and attorney's fees. *See Riddell v. CSX Trans., Inc.*, 2014-FRS-00054 (Dec. 12, 2018). At no point between May 2017, when post-hearing briefs were due, and December 2018, when ALJ Almanza issued his decision, did CSXT challenge the appointment of ALJ Almanza or the Secretary's ratification of that appointment.

On December 21, 2018, CSXT filed its petition for review with the ARB. In its petition for review, CSXT included a brief argument in the alternative, arguing for the first time that "the ALJ who heard this matter was not constitutionally appointed under the Supreme Court's

holding in *Lucia v. SEC*, 138 S. Ct. 2044 (June 21, 2018), either at the time of the hearing or thereafter," and therefore CSXT is entitled to "a new hearing before a different, constitutionally appointed officer." Pet. for Rev. 8. CSXT repeated this argument in its February 15, 2019 opening brief. Pet'r's Br. 30.

ARGUMENT

I. CSXT's Appointments Clause Challenge is not Properly Before the Board

A. CSXT waived its argument under the Appointments Clause by failing to raise it in a timely manner.

In its petition for review, in just two sentences, CSXT argued for the first time that ALJ Almanza, who presided over the administrative hearing and issued the decision finding that CSXT violated the FRSA, was invalidly appointed. Pet. for Rev. 8. In its opening brief, CSXT again presents a brief argument that ALJ Almanza was invalidly appointed and thus, this case should be remanded for a new hearing. Pet'r's Br. 29-30. CSXT did not raise this argument previously in this proceeding. Instead, citing to the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), CSXT seeks to raise it now. CSXT offers no explanation for not raising this issue before the ALJ or for why this argument is timely. As discussed below, the argument is not timely under the Department's applicable rules and case law. Because this argument was not raised in front of the ALJ, CSXT has waived its Appointments Clause challenge and the Board should reject its request for remand.

In *Lucia*, the Court held that the SEC ALJs are inferior officers that must be appointed pursuant to the Appointments Clause. *Lucia*, 138 S. Ct. at 2055. The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Heads of Departments," or the "Courts of Law." U.S. Const. Art. II, sec. 2 cl. 2; *see Freytag v. Comm'r*,

501 U.S. 868, 885 (1991); *Ryder v. United States*, 515 U.S. 177, 180 n. 2 (1995). Citing *Lucia*, CSXT argues that ALJ Almanza was not validly appointed, entitling CSXT to a new hearing, presumably before a different ALJ.[2] But *Lucia*, consistent with well-established waiver principles, explicitly limits such relief to Appointments Clause challenges that were timely raised and provides that such challenges are subject to forfeiture if not properly preserved. 138 S. Ct. at 2055 ("One who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief.") (emphasis added).

The ordinary rules of waiver and forfeiture apply to Appointments Clause challenges. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009); *see also Lucia*, 138 S. Ct. at 2055 (Appointment Clause challenges must be timely). Under those rules, the Board typically will not consider an issue raised for the first time on appeal to the ARB when that issue could have been raised before the ALJ. *See Nagle v. Unified Turbines, Inc.*, ARB No. 13-010, 2013 WL 4928254, at *3 (ARB Aug. 8, 2013), *aff'd*, *Unified Turbines, Inc. v. U.S. Dep't of Labor*, 581 Fed.Appx. 16 (2d Cir. 2014) ("[W]e will not consider arguments a party did not, but could have, presented to the ALJ."); *Mancinelli v. Eastern Air Center, Inc.*, ARB No. 06-085, 2008 WL 592807, at *3 (ARB Feb. 29, 2008) (arguments not raised below are waived on appeal); *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, 2004 WL 1004875, at *6 (ARB Apr. 30, 2004) (same). Accordingly, the Board should find CSXT's Appointments Clause

[2] CSXT's opening brief only states that "this case should be remanded for a new hearing." Pet'r's Br. 30. CSXT's petition for review asks for a new hearing before a "different, constitutionally appointed officer." Pet. for Rev. 8. As discussed *infra*, all DOL ALJs are now constitutionally appointed so a hearing before any of them (other than ALJ Almanza) would be proper.

argument waived under the normal rules of waiver and forfeiture after CSXT failed to raise the argument before the ALJ.

B. The Board should decline to exercise its discretion to consider waived arguments.

While an appellate tribunal has the discretion to consider nonjurisdictional constitutional claims—such as an Appointments Clause challenge—that were not raised at trial, such discretion should be exercised only in "rare" or "exceptional" cases. *Freytag*, 501 U.S. at 879; *In re DBC*, 545 F.3d 1373, 1379-80 (Fed. Cir. 2008). For example, the ARB has held that it "can exercise discretion to consider waived arguments when it is necessary to avoid manifest injustice or where the argument presents a question of law and there is no need for additional fact finding." *See, e.g.*, *Avlon v. Am. Express Co.*, ARB No. 09-089, 2011 WL 4915756, at *5 (ARB Sept. 14, 2011) (citations and internal quotation marks omitted). The ARB exercises its discretion sparingly and has most often exercised it where refusal to consider an argument would result in a manifest injustice, for example, by prejudicing a *pro se* party who was diligent in pursuing the argument in litigation before the ALJ. *See id.* at 4 (exercising discretion to consider timeliness issue that *pro se* complainant had not preserved in petition for review where failure to do so would lead to manifest injustice, issue was central to ALJ's decision, and no additional fact finding was required because parties fully litigated the issue before the ALJ); *see also Gonzalez v. J.C. Penny Corp., Inc.*, ARB No. 10-148, 2010 WL 4753923, at * 5 (ARB Sept. 28, 2012) (considering whether redaction of monetary amount in Sarbanes-Oxley Act whistleblower settlement invalidated OSHA's approval of the agreement because "[w]hile Gonzales does not raise this issue on appeal in her brief, this issue, which was addressed by the ALJ in his decision

below, raises legitimate concerns as to OSHA's approval process that could invalidate the finality of the Secretary's Order.").

Such a situation does not exist here. In this case, CSXT, represented by experienced counsel before both the ALJ and the ARB, never raised its Appointments Clause challenge prior to its petition for review to the Board, even though all of the information necessary to make its argument was readily available. Moreover, permitting CSXT to raise an Appointments Clause challenge for the first time at this stage of the litigation would encourage what courts have described as "sandbagging"—"suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error." *In re DBC*, 545 F.3d at 1378 (quoting *Freytag*, 501 U.S. at 895 (Scalia, J. concurring in part and concurring in judgment)). Indeed, as the Supreme Court has explained in another context, the Court has "recognized the value of waiver and forfeiture rules in complex cases [because] the consequences of a litigant sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor—can be particularly severe." *Stern v. Marshall*, 564 U.S. 462, 481-82 (2011) (internal quotation marks, alterations, and citation omitted).

Although the Supreme Court issued its decision in *Lucia* after the ALJ hearing was held and after CSXT submitted its post-hearing brief, it was by no means the first court to consider the question. The first Appointments Clause challenge to an agency ALJ was raised almost 20 years ago in *Landry v. FDIC*, 204 F.3d 1125, 1130 (D.C. Cir. 2000). *Lucia* itself relied on the Supreme Court's quarter-century old Appointments Clause decision in *Freytag v. Commissioner*, 501 U.S. 868 (1991); *see Lucia*, 138 S. Ct. at 2053. Furthermore, in 2016, before ALJ Almanza

held a hearing in this case, the courts of appeals issued conflicting decisions on Appointments Clause challenges to ALJs. *Compare Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *with Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016) (holding that ALJs are employees). In February 2017, the D.C. Circuit granted rehearing *en banc* of its 2016 *Lucia* decision and the government's brief in that case was filed with the D.C. Circuit in late March 2017—more than a month before CSXT's post-hearing brief was due to the ALJ. Clearly, nothing prevented CSXT from raising its Appointments Clause challenge to the ALJ in its post-hearing brief or earlier in the proceeding. Yet, it was only after receiving an adverse decision that CSXT challenged the ALJ's authority. Under the circumstances, the ARB should not encourage "sandbagging" by exercising its discretion to consider arguments that have been waived.

II. If the Board Considers the *Lucia* Argument, It Should Hold that the Secretary's Ratification of the ALJs is Valid and Remand the Case

A. The ALJs are properly appointed.

If the Board determines that the Appointments Clause challenge is properly before it, it should hold, as a matter of law, that the Secretary's ratification was valid. It should then remand the case for new proceedings in front of an ALJ other than ALJ Almanza.[3]

On December 15 and 21, 2017, in conformance with the Appointments Clause, the Secretary of Labor ratified DOL's prior appointment of all of its ALJs. *See* https://www.oalj.dol.gov/Proactive_disclosures_ALJ_appointments.html. In effect, as of December 21, 2017, all the ALJs have been appointed as inferior officers under the Constitution.

[3] If this case is remanded, the new ALJ could request the views of the parties regarding whether a full de novo evidentiary hearing is necessary or whether the case may be decided based on the existing record in whole or in part.

Nonetheless, CSXT appears to imply in its petition for review and opening brief that the Secretary's ratification of the appointments of DOL's ALJs may not comply with the Appointments Clause. To the extent that CSXT is arguing this, it is wholly without merit and should be rejected.

As the Supreme Court stated over 200 years ago, the appointment of an officer need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 n.13 (2010) ("We have previously found that the department head's approval satisfies the Appointments Clause); *United States v. Hartwell*, 73 U.S. 385, 388 (1867) (finding that valid appointment occurred when an inferior officer was hired by an assistant treasurer "with the approbation" of the Department Head). The Secretary has acted openly and unequivocally here by issuing signed letters memorializing the appointment of DOL ALJs, which are available on the Office of Administrative Law Judges website. *See* https://www.oalj.dol.gov/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Secretarys_Ratification_of_ALJ_Appointments_12_21_2017.pdf. The Secretary's ratification of the ALJ's appointment is presumptively valid. *See Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 604 (3d Cir. 2016) (agency action presumed valid under presumption of regularity; burden on challenger to demonstrate contrary.) This precedent, taken together with *Lucia*, establishes that any DOL ALJ other than ALJ Almanza can properly hear this case on remand.

B. <u>If the Board reaches the question, it should remand the case for a new hearing in front of a different ALJ.</u>

As explained above, the Solicitor believes that CSXT has waived its Appointments Clause argument in this case and that the Board should not exercise discretion to consider that

argument. However, if the Board considers CSXT's Appointments Clause argument, it should remand the case. All the DOL ALJs' appointments now satisfy the Appointments Clause of the Constitution. Thus, under *Lucia*, the proper remedy is remand for a new hearing in front of an ALJ other than ALJ Almanza.[4] *Lucia*, 138 S. Ct. at 2055 (holding that "the appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official…To cure the Constitutional error, another ALJ (or the Commission itself) must hold the new hearing.").

[4] CSXT appears to agree, arguing that "this case should be remanded for a new hearing." Pet'r's Br. 30.

CONCLUSION

The Board should hold that CSXT has waived its Appointments Clause challenge by failing to timely raise it. If the Board reaches that question, the Board should remand this case for a new hearing before a different ALJ.

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CERTIFICATE OF SERVICE

I certify that on this 8th day of April, 2019 a copy of this Brief for the Solicitor of Labor as Amicus Curiae was sent by first class United States mail to:

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