

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

FAIRMONT GENERAL HOSPITAL

and

Case 06-CA-099791

**SEIU/DISTRICT 1199, WV/KY/OH, THE HEALTH
CARE AND SOCIAL SERVICE UNION, CTW, CLC**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION
TO RESPONDENT FAIRMONT GENERAL HOSPITAL'S MOTION TO DISMISS,
OR IN THE ALTERNATIVE FOR A STAY**

Now comes Counsel for the Acting General Counsel, pursuant to Sections 102.24 and 102.26 of the Board's Rules and Regulations, Series 8, as amended, and states the following:

1. On June 5, 2013, Respondent Fairmont General Hospital filed a Motion to Dismiss or in the Alternative, for a Stay. Specifically, Respondent contends, primarily based on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) and *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), that current Board Members Block and Griffin hold invalid recess appointments and the Board is presently not comprised of a quorum because of violations of the Recess Appointments Clause. Respondent further states that the Board's issuance of the complaint, and any further proceedings, are *ultra vires*. For the reasons below, Respondent's contentions are without merit.

2. As an initial matter, the authority to issue complaint lies with the General Counsel—an independent officer appointed by the President and confirmed by the Senate to whom staffs engaged in prosecution and enforcement are directly accountable. See *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987) (“*UFCW*”);

NLRB v. FLRA, 613 F.3d 275, 278 (D.C. Cir. 2010). Thus, Regional Directors, who are members of the General Counsel's staffs engaged in prosecution or enforcement, derive their authority to issue complaints from the authority of the General Counsel. See *United Elec. Contractors Ass'n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965) ("[t]he General Counsel has delegated authority to the Regional Directors for issuing [] complaints."). 29 C.F.R. §102.15.

3. Moreover, the authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any "power delegated" by the Board, but rather directly from the text of the NLRA. Section 3(d) of the NLRA states, among other things, that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d). In enacting this provision, "Congress intended to create an officer independent of the Board to handle prosecutions, not merely the filing of complaints." *UFCW*, 484 U.S. at 127. It does not detract from the General Counsel's independence that Congress included in Section 3(d) language "on behalf of the Board" to make it clear that the General Counsel acts within the agency. As the Supreme Court has found, the legislative history of the NLRA shows that the acts of the General Counsel were not to be considered acts of the Board. *UFCW*, 484 U.S. at 128-129. Accordingly, the authority of the Acting General Counsel and Regional Director to issue complaints is unaffected by any issue concerning the composition of the Board.

4. In any event, although Members Griffin and Block, current Board Members serving alongside Chairman Pearce, were appointed during an intrasession recess contrary to the D.C. Circuit's decision in *Noel Canning*, the Board has filed a petition for certiorari with the United States Supreme Court seeking review of the D.C. Circuit's decision. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions

concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, 705 F.3d 490, 509-510 (D.C. Cir. 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus in *Belgrove*, the Board concluded that because the “question [of the validity of the recess appointments] remains in litigation,” until such time as it is ultimately resolved, “the Board is charged to fulfill its responsibilities under the Act.”¹ See also, *Stamford Plaza Hotel & Conference Center*, 359 NLRB No. 119 (May 9, 2013) and *Bloomingtondale’s Inc.*, 359 NLRB No. 113 (April 30, 2013).

5. Finally, contrary to Respondent’s bald assertions about Board proceedings in the wake of *New Process*, the Board’s actual experience supports the Board’s judgment that it should continue to adjudicate pending cases while the challenges to its authority are being adjudicated. Indeed, of some 550 decisions issued by the two-member Board prior to issuance of the Supreme Court’s decision in *New Process*, only about 100 were impacted by that decision. And in none of those cases did a reviewing court find that the administrative hearing was flawed because it was conducted at a time there was only a two-member Board. Further, approximately 70 percent of the remaining matters decided by the two-member Board were closed under the Board’s processes with no review required. See Background Materials on Two-Member Board Decisions, <http://www.nlr.gov/news-outreach/backgrounders/background-materials-two-member-board-decisions> (last visited June 11, 2013). Accordingly, there are no grounds to dismiss or to stay further action in this matter, and Respondent’s motion seeking such relief should be denied.

¹ The Third Circuit’s decision in *NLRB v. New Vista Nursing and Rehabilitation*, --F.3d --, 2013 WL 2099742 (3d Cir. May 16, 2013), should not change this result. As noted above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.

WHEREFORE, for the reasons stated above, Respondent's Motion to Dismiss, or in the Alternative, for a Stay, should be denied in its entirety.

Dated at Pittsburgh, Pennsylvania, this 12th day of June 2013.



Clifford E. Spungen
Counsel for the Acting General Counsel

NATIONAL LABOR RELATIONS BOARD
REGION SIX
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222