

Bloomingtondale's, Inc. and Fatemeh Johnmohammadi.

Case 31–CA–071281

April 30, 2013

ORDER DENYING MOTION

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

Upon a charge and amended charges filed by Fatemeh Johnmohammadi, an individual, the Acting General Counsel issued a complaint in this proceeding on October 31, 2012, against Bloomingtondale's Inc., the Respondent, alleging that it violated Section 8(a)(1) of the National Labor Relations Act.

The Respondent moves to dismiss the complaint on the ground that it is barred by the National Labor Relations Board's alleged lack of a quorum under *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). Specifically, the Respondent contends that under the Act, all actions of the Board, including those of its appointees, agents, and delegates, are void ab initio when the Board acts in the absence of three validly appointed members. We reject these arguments.

We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, supra. However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Ste-*

phens, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB 633, 633 fn. 1 (2013).

Moreover, to the extent that the Respondent suggests that the Acting General Counsel lacks the power to investigate and prosecute charges of unfair labor practices in the absence of a Board quorum, the Respondent's argument is meritless. Under the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel. See 29 U.S.C. §153(d); *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112, 127–128 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010). 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 language of the NLRA.

Accordingly, we deny the Respondent's motion to dismiss the complaint due to the National Labor Relations Board's lack of a proper quorum. The Respondent has failed to establish that it is entitled to judgment as a matter of law.