UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HY-BRAND INDUSTRIAL CONTRACTORS, LTD and BRANDT CONSTRUCTION CO.,	)	
Respondents,	)	
and	)	Nos: 25-CA-163189, 25-CA-163208 25-CA-163297, 25-CA-163317 25-CA-163373, 25-CA-163376 25-CA-163398, 25-CA-163414 25-CA-164941, 25-CA-164945
DAKOTA UPSHAW, DAVID A. NEWCOMB RON SENTERAS, AUSTIN HOEVENDON, and NICOLE PINNICK,	)	
Charging Parties.	)	

RESPONDENTS' MOTION FOR RECONSIDERATION
OF THE BOARD'S ORDER VACATING DECISION AND ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REGULATIONS & STATUTES

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Pursuant to Section 102.48(c)(1) of the Board's Rules and Regulations, Respondents Hy-Brand Industrial Contractors, Ltd. ("Hy-Brand") and Brandt Construction Co. ("Brandt") move for reconsideration of the Board's Decision and Order issued on February 26, 2018, Hy-Brand Ind. Contractors, 366 N.L.R.B. No. 26 (Feb. 26, 2018), that vacated the Decision and Order in Hy-Brand Ind. Contractors, Ltd., et al., 365 N.L.R.B. No. 156 (Dec. 14, 2017) ("Hy-Brand"). That vacatur has infringed their rights to due process after issuance of both the December 2017 and February Decisions and consideration ruled upon by the full Board.

The Panel's creation and its reliance on various non-record considerations is fundamentally flawed. This begins with the Panel's flawed creation and exercise of Board authority, an Inspector General ("IG") Report that contains no legal analysis, the IG's lack of authority to issue an ethics decision involving a Presidential

Executive Order, the IG's revelation of confidential deliberative processes involving Respondents' interests, Member Emanuel's improper exclusion from participating in the vacatur Decision of the Panel, the taint by Member Pearce's alleged misconduct in revealing in advance, the issuance of the vacatur Decision before the ABA Section on Employment and Labor's Mid-Winter meeting in Puerto Rico on February 25, 2018, and the Panel's obliteration of Respondents' right to due process when U.S. Senator Murray reports that another IG report is pending publication, information obtained through leaks or other improper communications with Board employees.

Therefore, the Panel's Decision should be vacated, the December 14, 2017, reinstated, investigation of unlawful disclosures initiated, and reopening of the record to take additional evidence.

I. INTRODUCTION

The basis for the 3-Member Panel's February 26, 2018, Decision to vacate a majority Decision of the 5-Member Board in December 2017 is the Board's Ethics officer "determinated that Member Emanuel is, and should have been, disqualified from participating *in this proceeding*." Hy-Brand Ind. Contractors, Ltd., et al., 366 N.L.R.B. No. 26 (Feb. 26, 2018) (emphasis added). The purported ethics officer's determination, if in a writing, has not been made public.

On that basis, three Board members, acting without the participation of Member Emanuel, id n.2, assumed and "exercised the Board's authority under Section 102.48(c)" of its Rules and Regulations as a delegated Panel (for consideration of the Charging Parties' motion for reconsideration) and Section 10(d)

of the Act (allowing for modification of order before a case is filed in a court of appeals). The Panel set aside and vacated the December 2017 5-Member Board Decision which overruled the joint employer standard adopted in Browning Ferris Ind. of Cal., Inc., 363 N.L.R.B. No. 95 (2016) ("BFI"), and "set [Hy-Brand] aside for the purpose of further proceedings before the Board."

II. ARGUMENT

A. The Panel's Decision Should Be Reconsidered Because its Construction of the Act is Erroneous, the Panel Usurped Authority Under Both the Act and the Executive Order's Standards of Conduct, and Because Outside Interference Deprived Respondents of Their Right to Due Process, Fair Hearing, and Participation of All Board Members in Decision Making.

1. The Panel Usurped the Board's Authority Under the Act.

Section 3(a) of the Act, 29 U.S.C. §153(a) states the Board is constituted by its Members:

> The National Labor Relations Board (hereinafter called the "Board") created by this Act [subchapter] prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. §§ 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate.

The Panel's February Decision claims "the Board has delegated its authority in this proceeding to a three-member panel." In footnote 2, it admits that "Member Emanuel took no part in the delegation of authority to the present panel." This unilateral action to deny a sitting Board Member the right to participate in Board delegations of authority is an extraordinary independent ground to grant this reconsideration Motion under the Board's Rules and Regulations.

In NLRB v. Noel Canning, 560 U.S. 674, 679 (2010), the Supreme Court established that Section 3(b) of the Act, 29 U.S.C. §153(b), means what it says: "It is undisputed that the first sentence of this provision authorized the Board to delegate its powers to a three-member group...." Section 3(b) provides: "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise."

By its very terms, all sitting members (constituting "the Board") must vote to authorize delegation of authority to a three-member panel to act and decide on its behalf. Nothing in the Act allows three Board members of four or five sitting Board members to prevent other members to vote on delegation of the "Board's" authority to a panel. Section 3(b) states "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board...." As the Supreme Court discussed, "[t]he vacancy clause still operates to provide that vacancies do not impair the ability of the Board to take action, so long as the quorum is satisfied." 560 U.S. at 681.

On February 26, 2018, the "Board" as defined in Section 3(a) was statutorily comprised of four Members. There can be no delegation of the Section 3(a) "Board's" authority to a three-member panel if all members of the "Board" do not engage in the delegation under Section 3(b) of the Act. To claim otherwise, is to allow any three members of the Board to highjack the authority of the other members to participate in the decision to delegate or not to delegate decisionmaking to a panel.[1]

[1]This is confirmed by POLITICO's Morning Shift which on February 27, 2018, report that "Emanuel, removed from deliberations, appears to have been

(continued...)

In addition, there was no Government in the Sunshine Act notice of any deliberative meetings regarding Hy-Brand or Brandt. "Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation." 5 U.S.C. § 552b.

There was no calendared session in this case after the December 14, 2017 5-Member Decision. Because the Panel met in some secret fashion to issue a decision by its three members, a violation of the Act is apparent.

> The Board is required to follow particular steps to notify the public when it plans to hold a meeting during which members might determine or dispose of official agency business. The Sunshine Act requires that, at least one week before holding a "meeting," an agency "make [a] public announcement ... of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting." 5 U.S.C. § 552b(e)(1).

12 Percent Logistics, Inc. v. Unified Carrier Registration Plan Board, 2017 WL 4736709 *3 (D.D.C. Oct. 18, 2017) ("the appropriate remedy for the Board's violation of the Sunshine Act is to compel the Board to release to the public any draft minutes, transcripts or recordings of the September 14th meeting." Id. *5).

The Panel's process is contrary to prior precedent. In New Vista Nursing & Rehabilitation, LLC, 22-CA-029988 (Jan. 5, 2016), a 4-Member Board delegated its

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[1](...continued)
blindsided by Monday's decision. He was attending an American Bar Association labor law conference in San Juan, Puerto Rico, when another attendee pulled up the decision via cell phone, according to a source in the room. 'You should have seen the look on his face,' the conference attendee said. 'He had no knowledge of it in advance. He was totally floored.' The source griped that Emanuel 'didn't even get a call as a courtesy' to warn him of the decision."

authority to a 3-Member Panel. There, Chairman Pearce recused himself from hearing the case because his former law firm was involved, but he voted on delegation of authority to the panel. New Vista moved to recuse Member Hirozawa for the same reason. Member Hirozawa decided not to recuse, explaining he had no involvement with his former firm for years and "did not participate in the consideration of this matter at any time." Therefore, under 5 C.F.R. §2635.502, he did not have a "covered relationship...with any party or representative in this matter." Member Hirozawa also decided for himself whether there was cause for a reasonable person to question his impartiality. Slip op. at 3-4.

Here, the 3-Member Hy-Brand Panel acted as if there were two vacancies on the full Board. Member Emanuel was provided neither an opportunity to vote on the panel delegation nor an opportunity to recuse himself thereafter. See NLRB v. New Vista Nursing, 870 F.3d 113, 128 (2017). Therefore, the February 26, 2018, Panel Decision issued with improper assumption of Section 3(a) authority from the Board rendering the Panel's action *ultra vires* and of no force or effect.

2. The Inspector General Report on the Incorporation of Evidence into the Deliberative Process is Baseless.

The episodic pathway to the February 26, 2018, Panel Decision begins with leakage of an in-progress investigation by Inspector General ("IG") David F. Berry regarding Member Emanuel's participation in the 5-Member Board's December 2017 Decision in Hy-Brand.[2]

[2] E.g., https://www.propublica.org/article/william-emanuel-nlrb-member-is-under-investigation-for-a-conflict-of-interest. (Feb. 1, 2018).

The February 19, 2018, IG Report as ultimately released fails first year law school scrutiny. The report contains numerous omissions and misconstructions of fact, obscured by its incompleteness. If a party to any Board proceeding presented an unsupported argument, or any Board Member's 18-20 attorneys would present an argument in such fashion, it would be promptly disregarded.

The IG Report cites no authority for why "it was necessary" to investigate the decision in Hy-Brand while investigating OIG-I-541, what authority he has to interpret any principles of the President's Executive Order 13770, whether he consulted the Office of Governmental Ethics ("OGE") for any guidance before issuing his report, what OGE rulings he considered and chose not to apply, whether he considered any prior cases where recusal matters were handled by NLRB Members, whether he considered any prior recusal decisions in other federal Agencies involving similar matters, what case determinations under the Executive Order relevant to recusal exist, and what judicial decisions regarding the Executive Order rulings exist.[3]

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[3]The IG cites no cases regarding current federal employee restrictions. Rather, he cites to one case barring post-federal employment under other statutes, including an unpublished case disqualifying an attorney from representing a client in a criminal case under federal law and Georgia's Rules of Professional Conduct, United States v. Montemayor, 2017 WL 2493906 (N.D. Ga. April 6, 2017), and 5 C.F.R. §2641.201(h)(5). Montemayor did not involve the Executive Order or refer to any OGE consideration of a current federal employee. Rather, it involved whether a former Assistant U.S. Attorney who shared in information involving two criminal investigations for the federal government prior to indictment and "participated personally and substantially" in the matters, id. *10, could represent the criminal defendant after he left federal employment under 18 U.S.C. §207(a)(1) (titled "Permanent restriction on any former employee's representations to United States concerning particular matter in which the employee participated personally and substantially").

Armed with no authorities, the IG undertook an "Analysis" of Hy-Brand with a rudimentary level of scrutiny. He not only failed to discuss the obvious legitimate reason why Member Emmanuel did not recuse himself in Hy-Brand—because Emanuel and his firm represented none of the parties in the case. Worse, the IG claimed that the 2017 Board's analysis of BFI's drastic 2015 policy reversal was somehow a continuation of the "same particular matter." But, that conclusion is directly contrary to the very precedent the IG claims as guidance, 29 C.F.R. §2641.201(h)(5)(1). That Regulation's "Basic Concept" applies to:

> only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

Further, the Regulation in 29 C.F.R. §2641.201(h)(5)(1), "Matters of general applicability not covered," specifically establishes that the:

> Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties.

Here, Member Emanuel's participation in Hy-Brand does not violate the very Regulations cited in the IG report, because the Regulations specifically exempt situations like that here. Subsection 3 requires that post-employment, "[t]he particular matter must involve specific parties both at the time the individual participated as a Government employee and at the time the former employee makes the communication or appearance, although the parties need not be identical at both times." 5 C.F.R.§2641.201(h)(3). The IG's claim that the Hy-Brand majority's

"formulation of federal policies and standards" by reaching the same conclusion as to those "general policies and standards" as did the BFI dissent merged the two cases, when the parties and lawyers in the two cases were entirely different is egregious error. Notably, the IG ignored the full text of the Regulation on which he relied upon. No effort was made to demonstrate circumstances where his broad claim under the Regulation or Executive Order would be incorrect.

The IG also ignored how Executive Order 13770 limits "particular matter" when applied to financial interests. The definition of "particular matter" in Section 2® of Executive Order 13770, states it is to have the same meaning as in 5 U.S.C. §2635.402(b)(3), which the IG does not cite or apply. But, Section 2635.402(b)(3), also provides: "The term particular matter, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons."[4]

There is no need to delve deeply into the IG's misplaced "analysis" because he failed to follow the guidance of the Executive Order he purports to follow:

> In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

First, the IG failed to consider the obvious, whether "the same basic facts, related issues, the same or related parties" were in play as the Executive Order states. The Hy-Brand ALJ's two pages of facts in his 5 page Hy-Brand, ruling, Slip

[4]The definition of "particular matter" in Section 2(r) of Executive Order 13770, states it is to have the same meaning as in 5 U.S.C. §2635.402(b)(3), which the IG does not cite.

op. at 49-50, is starkly different from the Regional Director's 12 pages of facts in the 23 page Decision and Direction of Election in BFI. Second, Hy-Brand involved an unfair labor practice in the construction industry, not a representation decision in the service industry. The policy considerations in the latter, i.e., the representative status and bargaining unit of a petitioning labor organization, were not in the record in Hy-Brand. Third, not a single party in Hy-Brand was involved with BFI.[5]

Remarkable for its erroneous observations, the IG's single paragraph "analysis" on page 3, claims the "wholesale incorporation" of the BFI dissent into Hy-Brand, which is not true. What is alleged to be a "level of consolidation" is unsupported because the facts in BFI were not considered in Hy-Brand. The ALJD in Hy-Brand fleetingly cited two cases, one of which is BFI and he considered no facts found in BFI applicable to Hy-Brand or Brandt Construction Co.—facts which the 5-Member Board adopted wholesale. Hy-Brand, 365 N.L.R.B. No. 156 p.1.

The key facts the ALJ identified in Hy-Brand, i.e., "joint governance," and shared workplace policies, Hy-Brand at 51, are foreign to the facts in BFI between Browning Ferris Industries and Leadpoint.

Other erroneous claims are presented by the IG, including:

> "the adjudication of the facts and determination of law at the Regional level and submission of brief by the parties, including Member Emanuel's former law firm, and amici providing legal arguments for

[5]The concept of who is a "party" is not a trivial matter. A party is accorded all "vital rights" and interests in Board proceedings, and to file and participate in judicial proceedings. International Union, Local 283 v. Scofield, 382 U.S. 205, 219-221 (1965); In re Vargas, 723 F.2d 1461, 1464 (10th Cir. 1983) (intervenor "entitled to appeal from any appealable decision or order"). Under the IG's scenario, the Respondents in Hy-Brand now apparently (and illogically) have a right to participate in BFI.

consideration," makes it "impossible to separate the two deliberative processes."

These remarks are groundless and wrong. A review of the Board's public record shows this. First, the incidental employer in BFI is Leadpoint Business Services, a labor supply firm represented by Littler Mendelson. Second, Leadpoint filed briefs at the regional level, but did not challenge Teamsters Local 350's certification by the Board as BFI did or participate in the BFI case before the District of Columbia Circuit. Third, no amici or other persons filed briefs in Hy-Brand.

Fourth, there is no finding Member Emmanuel himself represented Leadpoint. Fifth, the IG provided Hy-Brand Industrial Contractors and Brandt Construction Co. no opportunity to present their positions on Member Emanuel's participation in their case.

The IG's identification of pages 18-19 in Hy-Brand, illustrates his confusion. On those pages, the Board identifies facts brought to the Regional Director's attention in BFI stating: "That is all there was, and the Regional Director correctly decided under then-extant law that it was not enough to show BFI was the joint employer of Leadpoint's employees." Hy-Brand at 19.

Although the IG supposes this statement by the Hy-Brand majority "considered the facts and arguments" made *by* BFI or Leadpoint, the Hy-Brand majority does not refer to any "facts and arguments" made by BFI or Leadpoint, but rather to considerations identified by Regional Director and used by the BFI Board majority to support the 2015 policy reversal.

To the extent facts involving BFI and Leadpoint from the Regional Director's decision could have been under consideration, the Hy-Brand majority explained the BFI "majority focused on facts limited to a particular business model—the user/supplier relationship involving the use of contingent employees...to justify a change in the statutory definition of employer, or joint employer, for *all* types of business relationships between two or more entities." Id (emphasis in original).

The Hy-Brand case had nothing to do with supplier-employee business relationships which required distinguishment. The IG's error is misunderstanding the Board's practice for "announcing new principles in an adjudicative proceeding" in a "case-by-case manner" that is well-established and approved by the Supreme Court. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).[6]

The IG's position undermines this adjudicative precedent. If the ruling is allowed, Board Members would be barred from studying facts and legal processes from prior cases. The Board's duty under the Administrative Procedure Act to employ substantial evidence "on the record of an agency hearing provided by statute," Universal Camera v. NLRB, 340 U.S. 474, 482 (1951); 29 U.S.C. §160(e)

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[6]The IG's observation is incorrect as the Board has stated it is not limited by arguments of law from the parties:

> "We likewise reject any suggestion that the Board lacks authority to resolve issues based on a legal standard that has not been expressly raised the parties. When the Board decides cases, it performs an appellate function. And the Supreme Court has instructed that 'when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.' Kamen v. Kemper Financial Services, 500 U.S. 90, 99 (1991)."

The Boeing Co., 365 N.L.R.B. No. 154 (2017).

(enforcement of Board Order based on "the record in the proceedings"), would be undermined.

It appears the Panel accepted the IG's Report at face value with no attempt to validate the "findings" and "analysis" by providing comments to the Congressional oversight committees. Section 5(d) of the IG Act of 1978, 5 U.S.C. App. §5, states:

> (d) Each Inspector General shall report immediately to the head of the establishment involved whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment. The head of the establishment shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, *together with a report by the head of the establishment containing any comments such head deems appropriate.* [Emphasis added].

The Panel abrogated its responsibility to consider whether the IG Report was erroneous, valid, or should be returned for further investigation. The Panel also failed to consider the position of the parties in Hy-Brand who are affected by its consideration and the Panel's embracement of the IG Report.

What is left is the IG's unfounded allegation that the deliberative processes of the two cases were consolidated, Report at 4, suggesting Hy-Brand or Brandt did not contest application of BFI to them. To the contrary, Hy-Brand's and Brandt's Exceptions Brief at 11 argued they were not joint employers under the common law test or the decision in BFI.

And, the IG makes the extraordinary finding that a one sentence statement in Hy-Brand at page 32, that "the issue decided today was the subject of amicus briefing" in BFI, "was included to specifically address the issue of whether the prior

deliberative material was available to the majority Members who were not Members" when BFI issued. In the IG's opinion, this statement "was necessary" to show the majority was not deciding Hy-Brand on the merits, but continuing the deliberations in BFI. That is not what the majority opinion states. Nor is the language unique to this case.[7]

The Hy-Brand decision contains no consideration by the majority or dissent of any BFI briefs in their deliberations. The majority states this point only to refute the dissent's request for additional briefs from the public.[8]

The IG's misrepresentation of Hy-Brand is palpable. The majority made the point of no need for even amicus briefing to assist in deciding Hy-Brand because,

> there is no merit in our dissenting colleagues' protest that we cannot or should not overrule *Browning-Ferris* in this case without inviting *amicus* briefing. The Board has broad discretion with respect to whether to invite briefing prior to adjudicating a major issue.

Finally, the IG suggests he reviewed the totality of "very specific facts" to law "in the deliberative process of Hy-Brand." This is precisely the process the IG failed to undertake, i.e., no review of established law, no review of the process resulting in

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[7]The demand for amicus briefing and its rejection is boilerplate language and unremarkable in 5-Member decisions made by the majority in "Response to the Dissents." See The Boeing Co., 365 N.L.R.B. No. 154 at 20, 21 (same language and cases cited by both sides).

[8]Footnote 1 in Hy-Brand shows no BFI briefs were considered. The Decision states: "Respondent Hy-Brand Industrial Contractors, Limited (Hy-Brand) and Respondent Brandt Construction Company (Brandt) (collectively the Respondents) jointly filed exceptions and supporting, answering, and reply briefs. The General Counsel filed a limited cross-exception and supporting and answering briefs. The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exception, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified below."

Member voting, and spotty review of the decision itself. On these shaky foundations, the IG report should have merited no consideration for invoking Panel action.

B. MEMBER EMANUEL SHOULD NOT RECUSE AND THE IG'S INTERPRETATIONS ARE ERRONEOUS.

Recusal is based on objective, not subjective, analysis. Liteky v. Untied States, 510 U.S. 540, 547 (1994). The IG fails to explain what considerations he examined to explain and support any recommendation that Member Emanuel should have recused himself, that the Board "should have" or could forcibly recuse a sitting member, or there existed a "serious and flagrant problem." Report at 5. Rather, he states conclusions from no legal facts.[9]

Board decisions "must be issued in a manner consistent with due process." IG Report at 5. As shown above, the IG cannot explain why the voices of Hy-Brand and Brandt voices were excluded from consideration before all members of the sitting Board, when the IG unilaterally suggested to only Chairman Kaplan and Members Pearce and McFerren, but not Member Emanuel, that Member Emanuel should have recused himself while providing no supporting case precedent, no prior ethics ruling, and no other precedent for his contentions.

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[9]In contrast to judicial recusal under 28 U.S.C. §455(a), to which the Board is not subject, the Supreme Court has held that "[i]f it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860 (1988). Here, Member Emanuel had no such knowledge alerting him to any potential partiality on the papers filed by the parties. No party requested his recusal in the case before the December 2017 Decision.

Member Emanuel had no duty to recuse himself because there is no allegation he or his firm ever represented the Charging Parties or Respondents in Hy-Brand. Executive Orders 13490 and 13770 §2(i)& (j), apply to former employers or former clients, neither of which apply to Member Emanuel in Hy-Brand.

The claim that Member Emanuel's former law firm represented Leadpoint in BFI and therefore, overruling the BFI case in Hy-Brand involves an ethical quandary, is an unprecedented claim. No specific case or rulings under the Executive Order, OGE, or from the courts import the purported rule the IG applies in these circumstances. There is no familial interest alleged with any of the parties in Hy-Brand and certainly no concrete or indirect connection with any of them.

The lack of supporting legal support, even illustrations from the various ethical statutes, shows the baseless nature of the IG Report to each Panel Member (purposely excluding any copy to Member Emanuel). The concept of recusal is well established. No case supports the IG's recommendation. If there was one, he could have cited it.

First, in Microsoft v. New York, 530 U.S. 1301, 1303 (2000), Justice Rehnquist took the occasion to explain his decision not to recuse himself because his son was a partner in the firm representing Microsoft. If he did so, it could cause a 4-4 split in the Court. In that situation, as here, there was no way to replace a recused Justice (as could be done with another member of a district court or court of appeals bench). The Board is no different—there are only five members and no substitutes. For this reason alone, there is no one to replace Member Emanuel to give Respondents a decision by a full Board on their claim to the traditional joint

employer test.

More disturbing is the IG's failure to distinguish the notably higher standard for Board Members claimed by former Board Member Craig Becker in response to recusal motions due to his former representation of the AFL-CIO and other national labor organizations in cases presenting the same issue as the cases in which he was asked to recuse. In SEIU, Local 122RN, 355 N.L.R.B. 234, 246 (2010), and other cases, Member Becker concluded recusal is a personal decision:

> The law requires analysis from the "perspective of a reasonable person with knowledge of the relevant facts." 5 CFR § 2635.101(b)(14). Such a "reasonable person" appearing before the Board will distinguish between the roles I played as an advocate and a scholar in the past and the position I now hold as a Member of the NLRB. I take this opportunity to assure the Moving Parties in these cases, as well as all other parties to cases that may come before me, that I too understand that difference and can and will, in the words of the oath I took upon assuming this position, "well and faithfully discharge the duties of the office on which I am about to enter."
>
> For the reasons explained above, I decline to recuse myself from participation in all cases subject to these motions with the exception of *Dana Corp*., Case 7–CA–46965, *et al.*

Importantly, Member Becker's determination to recuse himself only in limited circumstances was based on the fact that he had represented the particular clients involved, such as the SEIU, not the imposition of a blanket recusal whenever a national union he indirectly represented was involved or the issue involved was the same.[10] Member Becker's interpretation of judicial standards and ethical rules

[10]"In the pledge I took pursuant to Executive Order 13490, I pledged to recuse myself for a period of 2 years from participation in any specific matter in which a (continued...)

applies with even more reason to Member Emanuel, who unlike Member Becker, was not even involved in the earlier case alleged as the reason that recusal was required. See Lamons Gasket Co., 357 N.L.R.B. 739, 740 n.3 (2010); SEIU, Local 121RN, supra at 240 n.3.

One of Member Becker's stated principles in SEIU Local 121RN is,

> under Federal labor law, the President is entitled to appoint individuals to be Members of the Board who share his or her views on the proper administration of the Act and on questions of labor law policy left open by Congress. That process would be frustrated if the expression of views on such questions were considered disqualifying or grounds for recusal when cases raising those questions arose before the Board.

Id. at 241.

In New Vista Nursing & Rehabilitation, LLC, 22-CA-029988 (Jan. 5, 2016), the 4-Member Board delegated authority to a 3-Member Panel and Member Hirozawa issued an opinion on a motion by respondent explaining why he would not recuse himself. One reason he cited is "my participation under the present circumstances would not 'cause a reasonable person with knowledge of the relevant facts to question [my] impartiality.' 5 C.F.R. §2635.502(a)."

With these precedents, recusal is a personal determination. Mr. Emanuel had no reason to recuse himself. The other Board members had no authority to make that decision for another member.

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[10](...continued)
former client that I represented during the 2 years prior to becoming a Board Member is a party, including cases in which a local labor union affiliated with SEIU that I represented during the 2 years prior to becoming a Board Member is a party." Id. at 243.

Hy-Brand and Brandt are entitled to a hearing before Members appointed by the President, unless the Board Member's personal ethics pledge to the President is implicated. The IG may question whether a Member should recuse. The IG has no authority to decide recusal for a Member when, as here, he can identify no precedent establishing that a specific provision of the relevant Executive Order was violated.

C. MEMBER PEARCE SHOULD RECUSE FROM FURTHER CONSIDERATION IN THIS CASE PENDING INVESTIGATION OF THE CIRCUMSTANCES OF HIS REVEALING DELIBERATIVE MATTERS OF THE BOARD.

Respondents' right to complete integrity of the Board's deliberations and issuance of decisions was invaded, if as reported, Member Pearce improperly revealed on February 25, 2018, the imminent issuance of the vacatur Decision before the opening of the ABA Section on Employment and Labor's Mid-Winter meeting in Puerto Rico. The Wall Street Journal reported on March 1, 2018:

> Democratic board member Mark Pearce let slip at an American Bar Association meeting Sunday night [February 25, 2018] that an important decision on the *Hy-Brand* case would be issued the next day.[11]

Advance notice of issuance of the Board decision by Member Pearce is an egregious breach of confidentiality and the Board's deliberative process.

Under the Board's Rules and Regulations, present and former employees of the Board are prohibited from producing "documents, reports, memoranda, or records of the Board . . . without the written consent of the Board or the Chairman

[11]"A Shady Joint-Employer Ambush," (W.S.J. March 1, 2018); https://www.wsj.com/articles/a-shady-joint-employer-ambush-1519950174.

of the Board if the document is in Washington, D.C." 29 C.F.R. § 102.118. This Regulation has been interpreted to include the internal deliberations of Board Members. See David Berry, Office of Inspector General, Report of Investigation – OIG-I-468 10-11 (2012).

Under 18 U.S.C. §1905, a government officer or employee who makes known confidential information to any extent not authorized by law, shall be fined or imprisoned for not more than one year, and shall be removed from office or employment. "To establish a violation of this section, the government must prove that: (1) the defendant was an officer or employee of the United States; (2) the defendant disclosed confidential information; and (3) the defendant knew that the information so disclosed was confidential "in the sense that its disclosure is forbidden by agency official policy (or by regulation or law). United States v. Wallington, 889 F.2d 573, 578 (5th Cir. 1989)." United States Attorneys Manual § 1665.

Respondents are entitled to an investigation of the circumstances surrounding this breach of confidential information and public disclosure by Member Pearce of what he revealed and to whom. Until then, Member Pearce should recuse himself from further consideration of this case. The Board should request an OGE investigation of Member Pearce.

D. THE REVELATION OF IG INVESTIGATIONS TO MEMBERS OF THE SENATE DENIES RESPONDENTS DUE PROCESS.

The Panel's denial of Respondents' right to due process occurred when the IG's investigation of Member Emanuel's involvement in this case was made public

by the press and by United States Senators. These revelations interfered with Respondents' right to a fair hearing on the facts on law, rather than political considerations and Congressional pressures.

Two investigations by IG Berry have been revealed. The first was publicized on February 1, 2018, by ProPublica, reporting:

> The inspector general for the National Labor Relations Board is investigating whether a Trump appointee to the board breached government ethics rules, according to two congressional officials with knowledge of the investigation.[12]

The second in appropriate disclosure was by Senators Elizabeth Warren and Patty Murray. The Wall Street Journal, "A Shady Joint-Employer Ambush," on March 1 reports:

> Senators Elizabeth Warren and Patty Murray also announced this week that another ethics report into Mr. Emanuel's misconduct was forthcoming. Mr. Berry, how did they know?

Knowledge of a second investigation was revealed by Senator Murray during the March 1, 2018, Senate Health, Education, Labor and Pensions Committee confirmation hearing concerning the nomination of John Ring to the Board.

In both reports, "congressional officials" admit to knowing about the NLRB IG's investigations. Regarding Senator Murray's knowledge, she admitted knowledge of the second IG investigation in actual remarks during the Congressional hearing without any reservation.

Inspector generals must keep confidential and privileged information, such as

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[12] https://www.propublica.org/article/william-emanuel-nlrb-member-is-under-investigation-for-a-conflict-of-interest

the internal deliberations of administrative law judges, protected from public disclosure. Although inspectors general have broad access to the "records, reports, audits, reviews, documents, papers, recommendations, or other materials" of the agency or establishment to which they are assigned, they may not "publicly disclose information otherwise prohibited from disclosure by law." 5 U.S.C. App. 3 § 6(a)-(b).

Inspectors general are required to protect sensitive data during their investigations: "Investigative data must be stored in a manner that allows effective retrieval, reference, and analysis, while ensuring the protection of sensitive data (i.e., personally identifiable, confidential, proprietary, or privileged information or materials)." Council of the Inspectors General on Integrity and Efficiency, Quality Standards for Investigations 14 (2011). Also, when drafting reports inspectors general should "[c]onsider issues such as confidentiality . . . and security classification." Id. at A-2.

Because inspector generals are subject to these guidelines, it should be apparent to the Board that its Inspector General failed to prevent public disclosure of privileged and confidential materials, such as the content of any investigation undertaken. In the alternative, someone other than the NLRB IG with knowledge of the IG's investigations has illegally revealed this information to third parties with relationships with "congressional officials."

In these circumstances, an investigation should be undertaken of the Board's IG's leaks and the responsible individuals disciplined, including the IG if he is found to have revealed any confidential or deliberative information of the Board for dissemination to the public or Congress.

The IG's disclosure of open investigations interferes with the independence of the Board and has undermined Respondents' right to a fair and deliberate consideration of their rights and legal obligations under the Act.

III. CONCLUSION

The Board should grant Respondents' Motion for Reconsideration and reinstate its December 2017 decision in Hy-Brand, initiate further proceedings to investigate the unlawfully delegated authority arrogated by the Panel to reconsider the 5-Member Decision, and reopen the record for further proceedings to take additional evidence, including evidence concerning the IG's misconduct.

Respectfully submitted,

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March 9, 2018

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

HY-BRAND INDUSTRIAL CONTRACTORS, LTD and BRANDT CONSTRUCTION CO.,	)	
Respondents,	)	
and	)	Nos: 25-CA-163189, 25-CA-163208 25-CA-163297, 25-CA-163317 25-CA-163373, 25-CA-163376 25-CA-163398, 25-CA-163414 25-CA-164941, 25-CA-164945
DAKOTA UPSHAW, DAVID A. NEWCOMB RON SENTERAS, AUSTIN HOEVENDON, and NICOLE PINNICK,	)	
Charging Parties.	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Respondent's MOTION FOR RECONSIDERATION was efiled to the Executive Secretary's Office and emailed to the following persons on this the 9th day of March 2018:

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