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
DAKOTA UPSHAW, DAVID NEWCOMB, RON SENTERAS, AUSTIN HOVENDON, and NICOLE PINNICK	)	25-CA-163373, 25-CA-163376
	)	25-CA-163398, 25-CA-163414
	)	25-CA-164941, 25-CA-164945

THE GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION OF THE BOARD'S ORDER VACATING DECISION AND ORDER

A. STATEMENT OF THE CASE

On December 14, 2017, the Board issued a Decision and Order in *Hy-Brand Industrial Contractors, Ltd.* (*Hy-Brand I*), 365 NLRB No. 156 (2017). At the time of its consideration of that case, the Board consisted of five members.[1] Under the Agency's longstanding policy and practice, any decision intending to establish new precedent or to overrule existing precedent—as happened in *Hy-Brand I*—required a majority consisting of three members. As is evident from the content of the Decision and Order, it was the considered judgment of three Members (Chairman Miscimarra, and Members Kaplan and Emanuel), that the Respondent was entitled

[1] Chairman Miscimarra and Members Pearce, McFerran, Kaplan, and Emanuel.

to adjudication of its claim that it was not a joint employer of the employees at issue in the litigation, and that the proper standard under which that claim was to be analyzed was that consistent with the Board law predating *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery* (*Browning-Ferris*), 362 NLRB No. 186 (Aug. 27, 2015), which was then pending in the United States Court of Appeals for the District of Columbia Circuit.

In accordance with their view, the majority determined to overrule the *Browning-Ferris* standard, and ultimately articulated and applied a standard deriving from the pre-*Browning-Ferris* cases. *See Hy-Brand I*, slip op. at 1 n.4 and cases cited. Applying what the majority viewed to be the correct joint-employer standard, it nevertheless concluded on the record facts that the Respondent was a joint employer under the Act, liable for the unfair labor practices at issue. *Id*. at 31.

Following the issuance of *Hy-Brand I*, the Charging Parties filed a Motion To For (Sic) Reconsideration, Recusal and to Strike (herein "Motion for Recusal"). As the principal ground of their Motion for Recusal, the Charging Parties contended that Member Emanuel had improperly discussed and purported to review the evidence, apply the law and extensively analyze the logic of *Browning-Ferris*, a case from which he was recused by virtue of Executive Order 13770, (the "Trump Ethics Code.") *See* Motion for Recusal at 10-16. Anticipating that the

Board would follow its standard practice and procedure of referring the Motion to Recuse to Member Emanuel—discussed in more detail below—the General Counsel filed a response taking no position on the Motion.

The Board, using language unprecedented in the Board's history, then issued an "Order Vacating Decision and Granting Motion for Reconsideration in Part." *Hy-Brand Industrial Contractors, Ltd.* (*Hy-Brand II*), 366 NLRB No. 26 (Feb. 26, 2018. The Order was based on an unforeseen and sua sponte determination by "[t]he Board's Designated Agency Ethics Official" ("DAEO") otherwise unnamed[2] indicating that Member Emanuel "is and should have been disqualified from participating in this proceeding." *Id.* at 1. The comment was followed by a footnote referencing 5 C.F.R. § 2635.502(c), a provision in the regulations published by the Office of Government Ethics that vests discretion in the DAEO to make an independent determination on the issue of impartiality when viewed

[2] There is some question in the Board's regulations as to the identity of the Board's DAEO for this purpose. Although the Office of Government Ethics regulations vest wide discretion in the Board to designate multiple, authoritative "Agency Designees" for purposes of administering the ethics regulations and advising employees, *see* 5 C.F.R. § 2635.102(b), that same provision is more restrictive concerning matters that affect the "Agency head." A close examination of the Board's regulations and Federal Register publications reveals that its Supplemental Ethics regulations designate the "Director of Administration" as the DAEO for this purpose, whereas the more recent Federal Register publications bearing on Agency internal reorganizations in 2013 and 2016, F.R. Doc. 293-17817 (07/21/13); Doc. 2016-01322 (01/22/16), detail the creation of an Ethics Office and designation of the SES head of that office as the DAEO—a position confirmed by the OGE website. In this response, the General Counsel assumes the report relied on by the Board in issuing *Hy-Brand II* was constructed by the legally designated DAEO.

objectively from a position of knowledge. The Board Order did not attach or otherwise disclose the basis of the DAEO's analysis and recommendations.

On March 9, 2018, the Respondent filed a Motion for Reconsideration of the Board's Order Vacating Decision and Order. In its Motion, the Respondent contended, inter alia, that the panel in *Hy-Brand II* had usurped the four-member Board's authority under the Act, and that Member Emanuel should not have been recused from the case. For the reasons that follow, and without endorsing the Respondent's remaining contentions or any analysis inconsistent herewith, the General Counsel agrees that the Board should reconsider and set aside *Hy-Brand II*.

B. ARGUMENT

I. *HY-BRAND II* VIOLATED THE PARTIES' RIGHTS TO DUE PROCESS OF LAW AND WAS INCONSISTENT WITH MEMBER EMANUEL'S ARGUABLE DUTY TO SIT ON THE *HY-BRAND I* CASE.

1. The Applicable Due Process Standards.

Administrative due process requires both that: "persons entitled to notice of an agency hearing shall be timely informed of — (3) the matters of fact and law asserted," and that the agency give all interested parties "opportunity for . . . the submission and consideration of facts [and] arguments . . . when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(b)(3) and (c).

The Board has indicated that "[t]o satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. . . . Additionally, an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Lamar Advertising of Hartford,* 343 NLRB 261, 265 (2004) (citations and internal quotation marks omitted); *cf. National Medical Hosp. of Compton*, 907 F.2d 905, 910 (9th Cir. 1990) (where issue had been raised sua sponte by the administrative law judge, Board was able to cure the resulting due-process failure by reopening the record). Of equal import is the requirement that the Board adjudicate novel theories or questions as part of the "regular adjudicative process, and not as an after-thought imposed by the Board on review." *Independent Electrical Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 554 (5th Cir. 2013).

2. The Board's Handling Of The Charging Parties' Motion for Recusal In *Hy-Brand II* Constituted An Improper Afterthought, Denying The Case Participants An Opportunity To Understand And Consider The Facts And Law On Which Its Order Would Ultimately Rest.

Nothing in the Charging Parties' Motion for Reconsideration of *Hy-Brand I* suggested that Member Emanuel, consistent with the longstanding practice of the agency, would not rule personally on the recusal motion, or that the Board would

seek or rely on the extra-record involvement of the Agency's DAEO.[3] Moreover, the Board has failed to release the DAEO's report to the parties. The Board's conduct, in keeping the parties in the dark on the scope of its eleventh-hour reasoning, is not consistent with its obligations under the Act or the Administrative Procedures Act.

The General Counsel, as the public interest prosecutor that is a party to this case, has a direct interest in the integrity and soundness of the process followed by the Board Members adjudicating its arguments. Moreover, like any other litigant, the General Counsel, who is a Presidential appointee himself, has the right to have all Board Members who are qualified to sit participate in the adjudication of the cases before the Agency. Indeed, all litigants are entitled to have as many Presidentially-appointed Board Members who are qualified to sit participate in the adjudication of the cases before the agency. *Cf. SEIU, Local 121 RN (Pomona*

[3] As an initial matter, the General Counsel did not have any indication from the Board that on its reconsideration of the *Hy-Brand I* decision, the Board would rely on an extra-record determination from the DAEO to disqualify Member Emanuel rather than first allowing Member Emanuel to address the recusal issue himself. The Charging Parties' motion for reconsideration of *Hy-Brand I* did not request an independent evaluation by the DAEO. To the contrary, that motion repeatedly requested only that Member Emanuel should "recuse himself." January 11, 2018 Mtn. for Reconsideration at 3, 10, 12, 19. This lack of notice violated due process by depriving the General Counsel of the opportunity to address the very issue that the Board relied on in its decision to reverse *Hy-Brand I*. *Cf. Factor Sales, Inc. & United Food & Commercial Workers Union, Local 99*, 347 NLRB 747, 748 (2006) (emphasizing importance of giving party notice and full-and-fair opportunity to litigate).

Valley Hosp. Med. Ctr.), 355 NLRB 234, 241 (2010) ("[T]he President is entitled to appoint individuals . . . who share his or her views on the proper administration of the Act . . . .") (Member Becker ruling on and denying motions to recuse).

Despite the obvious interests of the General Counsel and the Respondent in receiving timely notice of the Board's intention to involve the DAEO in this matter, and their related interest in understanding the role that the DAEO or the Board would play in developing and assessing a recusal issue committed to the discretion of Member Emanuel, the panel chose instead to issue an extraordinary three-member ruling without precedent in the annals of Board law. Its actions were inconsistent with its due-process obligations to the parties before it.[4]

[4] The Charging Party's motion for reconsideration of the original *Hy-Brand* decision may also have been untimely. The Charging Party knew or reasonably should have known that Member Emanuel might participate in the original *Hy-Brand* decision, s*ee, e.g.*, *Loyalhanna Care Center*, 355 NLRB No. 102, slip op. at 1 n.2 (2010) (explaining that all Board Members, even those not initially assigned to a panel, may participate in adjudication of the case), yet failed to seek recusal of Member Emanuel prior to receiving an adverse decision. *Santiago v. Ford Motor Co.*, 206 F. Supp. 2d 294, 298 (D.P.R. 2002) (requiring filing of recusal motion "at the earliest moment after acquiring knowledge of the facts providing a basis for disqualification"). Because the Board has not released or otherwise published the reasoning of the DAEO's determination of disqualification, the question of timeliness may yet be implicated by that analysis.

3. Notwithstanding Any Claim Of Disqualification, Member Emanuel May Have Had A Duty To Sit On *Hy-Brand I*, Such That He Would Have Properly Exercised His Discretion In Denying The Charging Parties' After-the-Fact Motion to Recuse.

The Board's reversal of *Hy-Brand I* compounded the due-process problem in this matter by not only relying on the extra-record DAEO determination to disqualify Member Emanuel, but also failing to articulate any basis for that determination. Under well-established legal doctrine, Member Emanuel may have had a "duty to sit" that would have required his participation in *Hy-Brand I*, notwithstanding the DAEO's "disqualification" decision, which is not self-enforcing.

Indeed, both as a matter of established case law and as a matter of government ethics regulations, a member of an adjudicatory body of final resort may often have a responsibility to decline recusal where necessary to the due-process rights of the parties. Discussing the related doctrine of necessity in the federal courts, for example, the Supreme Court in *United States v. Will*, 449 U.S. 200 (1980), noted that even a disqualified jurist's participation may be necessary in a case where the body would otherwise be unable to render a final determination. In language remarkable for its breadth, the Court quoted approvingly from an opinion of the Supreme Court of Kansas, stating "It is well established that actual disqualification of a member of a court will not excuse such member from performing his official duty if failure to do so would result in the denial of a

litigant's constitutional right to have a question properly presented to such court adjudicated." *State ex rel. v. Mitchell*, 157 Kan. 622, 629, 143 P.2d 652, 656 (1943). Indeed, the Supreme Court recusal cases have repeatedly emphasized the importance of judicial participation.

The rule-of-necessity doctrine advanced in *Will* was adopted by the U.S. Office of Government Ethics (OGE), where the office examined the question of whether a commissioner should be disqualified from a case in which his son's law firm was representing a party. OGE Informal Advisory Letter 83 X 18 (O.G.E.), 1983 WL 31721, at *1 (Nov. 16, 1983). The OGE noted that in situations in which "an individual's participation is essential for the presence of a quorum, *or because no other decision maker is available*," the doctrine in *Will* "operates to authorize, *or perhaps to require*, participation where recusal would otherwise be mandated." *Id.* at *3 (emphasis added).

Here, of course, as we discuss below, Member Emanuel's participation in *Hy-Brand I* was required by the Board's longstanding rule that establishment of new law or the overruling of existing cases or legal standards require the votes of at least three members. In *Hy-Brand I*, therefore, Member Emanuel's vote was necessary for determination of the case and for the parties to receive due process.

Indeed, despite the contrary claims that due process requires recusal, the "duty to sit" doctrine provides that "[t]here is as much obligation for a judge not to

recuse when there is no occasion for him to do so as there is for him to do so when there is." *Hinman v Rogers*, 831 F.2d 937, 939-940 (10th Cir. 1987) (citing cases). And, "[a] judge should not recuse himself on unsupported, irrational, or highly tenuous speculation."[5] *Id*. at 939. In order to assess whether the duty to sit applies, there must be an objective assessment of the facts and circumstances surrounding the question of recusal. *See U.S. v. DeTemple*, 162 F.3d 279, 286-287 (4th Cir. 1998) (duty depends on whether a "reasonable outside observer, aware of all facts and circumstances of [the] case" would object to judge hearing case).[6] Here, there is no basis on which to assess the propriety of Member Emanuel's

[5] Consistent with that broad principle, the Office of Government Ethics (OGE) has held that 5 C.F.R. § 2635, which governs ethical conduct in the executive branch, "was intended to provide agencies with a 'flexible standard' and 'broad discretion,' rather than an inflexible prohibition that might unreasonably interfere with agency operation." OGE Informal Advisory Letter 01 x 5 (O.G.E.), 2001 WL 34091914, at *2 (July 9, 2001) (quoting 56 Fed. Reg. 33778, 33786 (July 23, 1991)). Here, while the Board stated in passing that the DAEO's authority stems from § 2635.502(c), its decision fails to demonstrate that the DAEO took into account the interest in avoiding unreasonable interference with agency operations.

[6] In the administrative (non-judicial) context, courts have applied a standard of recusal lower than the "high standard of propriety" applied to federal judges. *See, e.g.*, *Caterpillar, Inc.*, 321 NLRB 1130, 1133 (1996) (statement of Chairman Gould), *remanded and vacated pursuant to settlement*, 138 F.3d 1105 (7th Cir. 1998).

participation because the Board failed to articulate the reasons for the DAEO's determination.[7]

II. MEMBER EMANUEL HAD THE RIGHT UNDER WELL-ESTABLISHED BOARD PRACTICE AND PROCEDURE TO RULE ON THE MOTION FOR HIS RECUSAL

Exacerbating the due process problem here, the Board did not follow its own, consistent policy by first referring the Charging Parties' recusal request to Member Emanuel, as it has routinely done in other cases. *See e.g.*, *1621 Route 22 W. Operating Co., LLC v. NLRB*, 2018 WL 1312809, at *4 n.7 (3d Cir. 2018) (stating that Chairman Pearce "recused himself" from consideration of the underlying case); *Regency Heritage Nursing & Rehabilitation Center*, 360 NLRB 794, 795 (2014) (Member Hirozawa "determined not to recuse himself from participating in this case," despite respondent's request that he do so), *enforced*, 657 F. App'x 129 (3d Cir. 2016); *Service Employees Local 121RN* (*Pomona Valley Hospital Medical Center*), 355 NLRB 234, 238-46 (2010) (Member Becker ruling on and denying motion for his recusal), *enforced*, 440 F. App'x 524 (9th Cir. 2011); *Caterpillar, Inc.*, 321 NLRB at 1132-1135 (Chairman Gould and Member Browning each ruling on and denying motion for their recusals). Indeed, the

[7] The Board makes passing reference to a February 9, 2018 Inspector General (IG) report, but does not purport to rely on it. *See Hy-Brand II*, slip op. at 1 n.1. The General Counsel notes, in any event, that he does not agree with the conclusions reached in the IG report.

Board's regular practice is consistent with the recusal practices of other independent agencies. *See, e.g.*, *Ctr. for Auto Safety v. Fed. Trade Comm'n.*, 586 F. Supp. 1245, 1251 (D.D.C. 1984) ("[I]t is appropriate that discretion should be vested [at the FTC] in the first instance in the individual whose recusal is at issue . . . . "); *Sec'y of Labor v. Nat'l Mfg. Co.*, 1980 WL 10608, at *1 (O.S.H.R.C. May 30, 1980) ("While the [Occupational Safety and Health Review Commission] acts as a body," each commissioner "has a separate and equal mandate from the President, with the advice and consent of the Senate," and therefore "the question of disqualification is primarily a matter left to the sound discretion of the member concerned."); *see also Vulcan Arbor Hill Corp. v. Sec'y of Labor*, 1995 WL 774603, at *3 (D.D.C. Mar. 31, 1995) (initial decision by Wage Appeals Board member not to recuse himself "lies within his sole discretion"), *aff'd,* 81 F.3d 1110 (D.C. Cir. 1996).

Here, by contrast, the three other Board Members appear not to have referred the recusal motion to Member Emanuel. They instead decided on their own to disqualify him from participating in the case—a seemingly unique event in Board history.

The Board's process in the instant case also departs from its general policy that "cases which present novel or unusual issues or require an interpretation for which there is no precedent, or involve questions of policy, are decided by the full

five member Board." *How to Take a Case Before the NLRB*, Eighth Edition (2008), Appx. E, p. 1140 (citing text of "Statement Submitted to House Government Operations Subcommittee on Manpower and Housing, November 2, 1983"); *see also Teamsters Local 75* (*Schreiber Foods*), 349 NLRB 77, 97 (2007) (Member Liebman, dissenting, in part) (noting the Board's well known reluctance to overrule precedent when at less than full strength (five members)). Here, however, the Board overruled a five-member decision that reversed precedent without even including all four members on the Board at the time. Instead, a three-member panel of the Board delegated authority to itself to overrule its earlier decision, without the participation of Member Emanuel.[8] In doing so, the Board used language describing the exclusion of Member Emanuel that it has never used before, stating that he "took no part in the delegation of authority to the present panel," *Hy-Brand II*, slip op. at 1 n.2, before using its more typical language that he also did not participate in "the consideration of the present Order," *id*. at n.4.

The General Counsel understands, of course that the Board remains free to reconsider a Decision as to which the Agency or a party has not requested appellate review, or when review has been sought but the transcript has not yet

[8] To be sure, "[d]uring those relatively rare periods when it has had only three members, the Board has not hesitated to reverse prior decisions, where there was a unanimous vote to do so." *Hacienda Resort Hotel*, 355 NLRB at 743 & n.1 (Chairman Liebman and Member Pearce, concurring) (2010), *vacated and remanded*, 657 F.3d 865 (9th Cir. 2011). But at the time of the instant decision, the Board had four members.

been filed. But that concept is of no moment given the manner in which the Charging Parties' motion was adjudicated here. The initial determination of recusal was Member Emanuel's alone. Had he decided that he would or would not recuse himself—with or without the further involvement of the DAEO in his consideration of the issues—the parties would have had fair opportunity to understand and comment on his decision. But there is no indication that Member Emanuel ruled on this Motion; indeed the opposite appears from the record.

In these circumstances, Member Emanuel's failure to participate cannot be deemed harmless because the deliberative decision-making process entails more than a head count of votes. *See Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."); *see also Nguyen v. United States*, 539 U.S. 69, 82 (2003) (vacating decision of Ninth Circuit Court of Appeals because one of the three panel members was not an Article III judge, even though the outcome had garnered the required two votes without the disqualified judge).

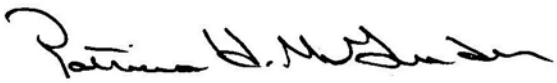
Moreover, had Member Emanuel been given the opportunity to address the recusal motion, in the first instance, he might have convinced one or more of his colleagues that *Hy-Brand I* was properly decided and should not be (or now should

not have been) vacated. According, the Board's failure to allow Member Emanuel to deal in the first instance with the recusal motion was a further, fundamental denial of the parties' due process rights.

C. CONCLUSION.

In the unique circumstances here, the General Counsel requests that the Board vacate its *Hy-Brand II* decision and allow Member Emanuel to make his own recusal determination in the first instance. In the alternative, the General Counsel requests that the Board make public the DAEO's determination and allow the parties to comment on it prior to issuing any further decision on the case.

Respectfully submitted,



Patricia H. McGruder
Counsel for the General Counsel
National Labor Relations Board
Region Twenty-Five
Minton-Capehart Federal Building, Room 238
575 North Pennsylvania Street
Indianapolis, Indiana 46204
Phone: (317) 991-7623
Fax: (317) 226-5103
E-mail: patricia.mcgruder@nlrb.gov

April 5, 2018

CERTIFICATE OF SERVICE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

CERTIFIED & REGULAR MAIL
JAMES P. FAUL, ATTORNEY
HARTNETT, GLADNEY, HETTERMAN, L.L.C
4399 LACLEDE AVENUE
SAINT LOUIS, MO 63108-2248

REGULAR MAIL
DAKOTA UPSHAW
C/O
JAMES P. FAUL, ATTORNEY
HARTNETT, GLADNEY, HETTERMAN, L.L.C
4399 LACLEDE AVENUE
SAINT LOUIS, MO 63108-2248

REGULAR MAIL
DAVID A. NEWCOMB
37 DEBBIE AVE
MUSCATINE, IA 52761-5953

REGULAR MAIL
RON SENTERAS
506 GREEN CT
COLONA, IL 61241-9619

REGULAR MAIL
AUSTIN HOVENDON
C/O
JAMES P. FAUL, ATTORNEY
HARTNETT, GLADNEY, HETTERMAN, L.L.C
4399 LACLEDE AVENUE
SAINT LOUIS, MO 63108-2248

REGULAR MAIL
NICOLE PINNICK
8645 E 2850TH ST
KEWANEE, IL 61443-8856

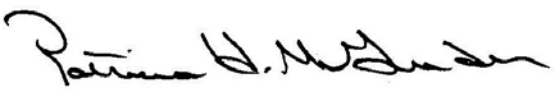
CERTIFIED & REGULAR MAIL
STANLEY E. NIEW, ATTORNEY
LAW OFFICES OF STANLEY E. NIEW, P.C.
1000 JORIE BOULEVARD, SUITE 206
OAK BROOK, IL 60523

CERTIFIED & REGULAR MAIL
MICHAEL AVAKIAN, ESQ., ATTORNEY
WIMBERLY, LAWSON & AVAKIAN
1200 G ST NW STE 800
WASHINGTON, DC 20005-6705

REGULAR MAIL
TERRY L. BRANDT
BRANDT CONSTRUCTION CO.
700 4TH ST W
MILAN, IL 61264-2700

E-SERVICE
REGION 25, INDIANAPOLIS, INDIANA
NATIONAL LABOR RELATIONS BOARD
575 N PENNSYLVANIA ST STE 238
INDIANAPOLIS, IN 46204-1520

REGULAR MAIL
TERRY L. BRANDT
HY-BRAND INDUSTRIAL CONTRACTORS, LTD.
2641 33RD STREET S
MUSCATINE, IA 52761-8605

Subscribed and sworn before me this 5th day of April 2018.	DESIGNATED AGENT  NATIONAL LABOR RELATIONS BOARD