

United States Senate

WASHINGTON, DC 20510

May 29, 2018

The Honorable John Ring
Chairman
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dear Chairman Ring:

We write to express strong concerns with your announcement that the National Labor Relations Board (“the Board”) may issue a regulation that would undermine labor rights clarified by the Board in its 2015 *Browning-Ferris* decision.¹ This 2015 ruling reaffirmed that, under the National Labor Relations Act (NLRA), corporations with indirect control or reserved authority over workers can be held accountable for violating their rights.² Last year, the Board tried to reverse this ruling through a rushed adjudication process, but later vacated the reversal because the Inspector General and the Board’s Designated Agency Ethics Official both determined that Member William Emanuel’s participation violated federal ethics rules.³ We are concerned that you will attempt to overturn *Browning-Ferris*—the subject of ongoing litigation in a federal appeals court—by rulemaking, in order to evade the ethical restrictions that apply to adjudications.

The trust that the public places in the Board’s impartiality has been substantially tarnished over the past year, largely due to the Board’s rushed reversals of several significant precedents churned out without public notice or input in the week prior to the expiration of former-Chairman Miscimarra’s term.⁴ The *Hy-Brand* decision—intended to overturn the joint-employer standard that the Board articulated in *Browning-Ferris*—was vacated after the Board’s Inspector General determined that there was a “serious and flagrant problem and/or deficiency in the

¹ See *Browning-Ferris Industries*, 362 NLRB No. 186 (Aug. 27, 2015).

² *Id.*

³ See *Hy-Brand Industrial Contractors*, 366 NLRB No. 26 (Feb. 26, 2018); *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (Dec. 14, 2017); National Labor Relations Board, Office of Inspector General, “Notification of a Serious and Flagrant Problem and/or Deficiency in the Board’s Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter,” February 9, 2018, available at https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1535/OIG%20Report%20Regarding%20Hy_Brand%20Deliberations.pdf; Bloomberg BNA, “Appointee Violated Trump Ethics Pledge, Second Official Says,” Hassan A. Kanu, April 26, 2018, <https://www.bna.com/appointee-violated-trump-n57982091556/>.

⁴ See *UPMC*, 365 NLRB No. 153 (Dec. 11, 2017); *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (Dec. 14, 2017); *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017); *PCC Structural*, 365 NLRB No. 160 (Dec. 15, 2017); *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017).

Board's administration of its deliberative process"—specifically, that Board Member William Emanuel's participation tainted the resulting decision because his former employer represents a party in *Browning-Ferris*.⁵ The Board's designated agency ethics official agreed with the Inspector General that Emanuel violated federal ethics rules.⁶

Since these revelations, you and the Board's other members have expressed interest in rectifying the Board's ethical lapses. In their unanimous decision to vacate the Board's decision to overrule *Browning-Ferris*, then-Chairman Marvin Kaplan and Members Mark Gaston Pearce and Lauren McFerran expressly pointed to the Inspector General's determination that Emanuel should have recused himself but did not.⁷ And when asked about the importance of observing ethics requirements that prevent Board members from participating in matters that affect former employers and clients during your confirmation hearing, you affirmatively stated, "I take this issue very seriously," and "I don't want to be in the situation Member Emanuel is in and I don't want to put another cloud over the NLRB."⁸

Yet, now you are proposing that the Board change the joint-employer standard by employing the rulemaking process. While there is nothing inherently suspect about an agency proceeding by rulemaking, it is impossible to ignore the timing of this announcement, which comes just a few months after the Board tried and failed to overturn *Browning-Ferris*, and appears designed to evade the ethical constraints that federal law imposes on Members in adjudications. The Board's sudden announcement of rulemaking on the exact same topic suggests that it is driven to obtain the same outcome sought by Member Emanuel's former employer and its clients, which the Board failed to secure by adjudication.

Further, your public statements indicate that you have prejudged this issue. In the announcement that the Board is considering this rulemaking, you said that "the current uncertainty over the standard to be applied in determining joint-employer status under the Act undermines employers' willingness to create jobs and expand business opportunities."⁹ You tweeted that "uncertainty over the standard undermines job creation & economic expansion"¹⁰ Given that federal law prohibits the Board from engaging in economic analysis, these statements must reflect either 1) anecdotal characterizations of current law not rooted in empirical analysis or a solicitation of input from the full range of stakeholders (as the Board failed to solicit amicus briefs before considering *Hy-Brand*), or 2) analysis conducted in violation of federal law.¹¹

⁵ See "Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter," *supra* note 3.

⁶ See Kanu, *supra* note 3.

⁷ See *Hy-Brand*, 366 NLRB No. 26 (Feb. 26, 2018).

⁸ Bloomberg BNA, "Labor Nominee John Ring Makes Ethics Promises," Hassan A. Kanu, May 14, 2018, <https://www.bna.com/labor-board-nominee-n57982089396/>.

⁹ National Labor Relations Board, "NLRB Considering Rulemaking to Address Joint-Employer Standard," press release, May 9, 2018, <https://www.nlr.gov/news-outreach/news-story/nlr-considering-rulemaking-address-joint-employer-standard>.

¹⁰ Tweet by John F. Ring, May 9, 2018, <https://twitter.com/NLRBChairman/status/994287315509022720>.

¹¹ See 29 U.S.C. § 154(a).

You also stated that the Board majority “intends to get the job done.”¹² This of course presumes that there is a “job” to be “done,” i.e., that current law is deficient in some way and must be changed. This alone demonstrates that you have prejudged the issue. Further, the “uncertainty” rationale may be easily dismissed as pretextual. If the Board were to promulgate a regulation changing the joint-employer standard, it would be the third time the standard has changed during this Administration. A rulemaking would take years and lead to further legal action, which is certain to *prolong* uncertainty.

While it is hard to see how such an action could reduce uncertainty, it is very easy to understand how it appeases corporate interests desperately seeking to escape liability under *Browning-Ferris* and suppress their workers’ efforts to organize. It is obvious to all rational observers that it is the *substance* of the Board’s current standard—not any “uncertainty” about what it means—that troubles the new Board majority. Reinstating the tainted *Hy-Brand* standard through rulemaking would sweep significant conflict-of-interest concerns raised by multiple independent, non-partisan officials under the rug and further damage the Board’s reputation. We therefore urge you to reconsider this decision and refrain from initiating a rulemaking process on the joint-employer standard.

Sincerely,


Elizabeth Warren
United States Senator
Kirsten Gillibrand
United States Senator
Bernard Sanders
United States Senator

¹² See Tweet by John F. Ring, *supra* note 10.