

United States Senate
WASHINGTON, DC 20510

February 26, 2018

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

Dear Chairman Kaplan:

Last week, the National Labor Relations Board's Inspector General (IG) released a report finding "a serious and flagrant problem and/or deficiency in the Board's administration of its deliberative process and the National Labor Relations Act..." related to the Board's consequential December 2017 decision in *Hy-Brand Industrial Contractors*.¹ We write to express our serious concerns with the problems identified by the IG and to inquire about your plans for rectifying these problems and restoring public confidence in the integrity of the Board's decisions and deliberative process.

In December, the Board's *Hy-Brand* decision purported to reverse *Browning-Ferris Industries (BFI)*, an important 2015 decision ensuring that workers could bargain with employers that have indirect control over their working conditions.² The *BFI* decision was important because it helped prevent large employers from avoiding their legal obligation to negotiate in good faith with their workers over subjects including fair pay and good working conditions. Large corporations have attempted to evade their responsibility to respect workers' statutory rights by contracting out work while maintaining significant control over those employees. In *BFI*, the Board made clear that companies cannot benefit from work they control while evading their legal obligations to the people doing that work. Industry groups and other special interests strongly opposed the *BFI* ruling, and the Board moved to overturn it as soon as it obtained a Republican majority in 2017.

The facts indicate that the Board rushed to issue this decision with little regard for the facts of the *Hy-Brand* case itself in order to effectuate the majority's pre-existing determination to overrule *BFI*. In so doing, the Board failed to conduct the "reasoned decision-making"

¹ Office of the Inspector General, National Labor Relations Board, *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* 3-4 (Feb. 9, 2018) available at <https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1535/OIG%20Report%20Regarding%20Hy-Brand%20Deliberations.pdf> (emphasis added).

² See *Hy-Brand Indus. Contractors*, 365 NLRB No. 156 (Dec. 14, 2017); *Browning-Ferris Indus.*, 362 NLRB No. 186 (Aug. 27, 2015).

required by the Administrative Procedure Act.³ For example, in a break with long-established precedent, the Board did not accept public comments on this decision, and it issued the decision despite the fact that no party in the *Hy-Brand* case urged the Board to overturn BFI. The Board's majority abandoned its obligation to decide *Hy-Brand* on its own facts, and chose instead to use it as a vehicle to reach its preferred result: overturning BFI. It is no surprise then, that the Board's independent watchdog found that "*Hy-Brand* was merely the vehicle to continue the deliberations of *Browning-Ferris*" and "[t]he wholesale incorporation of the dissent in *Browning-Ferris* into the *Hy-Brand* majority decision consolidated the two cases into the same 'particular matter involving specific parties.'"⁴

Perhaps most concerning, the law firm Littler Mendelson P.C.—which employed the Board's newest member, William Emanuel, just a few months ago—represents a party in the BFI case.⁵ This presented an egregious conflict of interest for Mr. Emanuel, who voted on a case in a manner benefitting his recent employer. We raised concerns about this in letters to Mr. Emanuel on December 21, 2017⁶ and February 6, 2018.⁷

The IG's findings confirm that Mr. Emanuel should not have participated in the *Hy-Brand* or BFI cases, finding that the two matters are in fact the same "particular matter involving specific parties," from which federal ethics regulation required Mr. Emanuel to recuse himself. The fact that Mr. Emanuel did not do so, according to the IG, "exposes a serious and flagrant problem and/or deficiency" with the Board's decision-making process.

The IG concluded that, "the Board's decisions must be issued in a manner consistent with due process," and that when "the Board falls short of that standard" due to its failure to deliberate free from conflicts of interest, "the whole of the Board's deliberative process is called into question."⁸ As Chairman, it is your responsibility to take any all actions necessary to restore the public's confidence in the integrity of the Board's decision-making process. The first and most obvious step you should take is reconsidering the tainted *Hy-Brand* decision with Mr. Emanuel

³ See *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of 'reasoned decisionmaking.' Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.") (internal citations omitted); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (administrative agencies "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962))).

⁴ See Report, Office of Inspector General, *supra* note 1

⁵ Ian MacDougall, ProPublica, *NLRB Member is Under Investigation for a Conflict of Interest* (Feb. 1, 2018) available at <https://www.propublica.org/article/william-emanuel-nlr-member-is-under-investigation-for-a-conflict-of-interest>

⁶ Congress of the United States, [letter to NLRB Member Emanuel from Members of Congress] (Dec. 21, 2017) available at <https://www.help.senate.gov/imo/media/doc/12.21.17%20Letter%20from%20Members%20of%20Congress%20to%20NLRB%20Member%20Emanuel.pdf>

⁷ *Id.*

⁸ See Report, Office of Inspector General, *supra* note 1

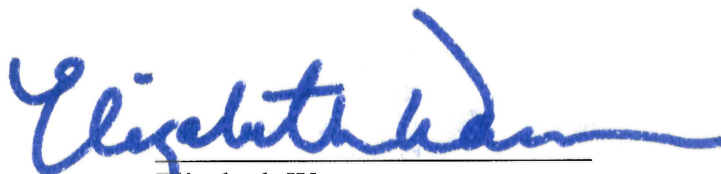
recused, as it is now clear he should have been in the first place. In addition to addressing the legitimacy of the *Hy-Brand* decision, you will need to make sure that the Board's deliberative processes are not contaminated by Members' conflicts of interest in the future. Also, you will need to demonstrate to affected stakeholders and the public at large that the Board's deliberative process will not be compromised by any predetermined, results-oriented approach to adjudication, but rather will be guided only by the facts of the cases the Board is called upon to decide.

In order to ensure that the Board is acting to restore confidence in its processes and addressing the serious concerns raised by the IG's findings, we request that you provide answers to the following questions by March 12, 2018.

1. Will you reconsider the Board's *Hy-Brand* decision without Member Emanuel's participation? If not, how will you address the fact that Member Emanuel's improper involvement tainted the decision's validity and the process by which the Board reached the decision?
2. If you do plan to reconsider the *Hy-Brand* matter, please describe your intended process for doing so.
 - a. Will you require Member Emanuel's recusal?
 - b. Will you invite and consider briefs from the public before issuing a decision?
3. What will the Board do to address the fact that Mr. Emanuel's involvement in ordering Mr. Robb to seek a remand in the *BFI* case itself appears to be a clear violation of federal ethics regulation and Mr. Emanuel's ethics pledge?
4. Have you attempted to determine how Mr. Emanuel was allowed to participate in the *Hy-Brand* case despite his obvious conflicts of interest?
5. What specific steps will you take to ensure that public confidence in the Board's decision-making process is not undermined by conflicts of interest in the future?

Thank you for your attention to this important matter.

Sincerely,



Elizabeth Warren
United States Senator



Patty Murray
United States Senator