

United States Senate
WASHINGTON, DC 20510

March 7, 2018

Hon. Peter B. Robb
General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Dear Mr. Robb:

As you are aware, the National Labor Relations Board (NLRB) vacated its decision in *Hy-Brand Indus. Contractors* on February 26, 2018, after a report by the NLRB Inspector General determined that Member Emanuel's participation "calls into question the validity of that decision."¹

Consequently, the 2015 *Browning-Ferris* standard once again controls joint employment determinations in Board cases.² This standard recognizes workers' right to bargain collectively with employers that indirectly control their pay and working conditions, and it prevents large corporations from shirking their collective bargaining obligations by, for example, contracting out work while maintaining substantial control over workers.

One large case affected by this decision is *McDonald's*, which involves hundreds of allegations that the company unlawfully harassed and fired workers organizing for higher wages. This significant joint employer case affecting the Section 7 rights of millions of workers has been the subject of a trial before an Administrative Law Judge since 2015. However, beginning this January, you have engaged in "global settlement" discussions at McDonald's instigation.³ You successfully obtained a stay in proceedings before the ALJ, despite the considerable resources the Board has already invested into the case, the significant public interests at stake,

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* (Feb. 9, 2018) available at https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1535/OIG%20Report%20Regarding%20Hy_Brand%20Deliberations.pdf (emphasis added).

² See *Hy-Brand Indus. Contractors*, 366 NLRB No. 26 (Feb. 26, 2018) ("Because we vacate the Board's earlier Decision and Order, the overruling of the *Browning-Ferris* decision is of no force or effect.").

³ See Order Granting General Counsel's Motion to Stay Proceedings, *McDonald's USA*, Case 02-CA-093893, et al. (Jan. 19, 2018).

and the fact that the trial was a mere two witnesses from closing.⁴ You expressly invoked *Hy-Brand* as a key justification for doing so.⁵ Now that the Board has vacated *Hy-Brand* and returned to the 2015 joint employer standard, it is imperative that you swiftly resume and finish the trial and allow the ALJ to issue a decision in this critically important case.

In response to our previous inquiries, you have asserted that the uncertainty allegedly engendered by your predecessors is among the most significant difficulties facing workers and employers in the modern workplace. You expressed concern that, in the past, “issues involving the Board have created uncertainty in the workplace” and your belief that “it is incumbent upon the General Counsel to provide guidance...[that] promotes our mission of supporting industrial stability nationwide.”⁶ You now have an opportunity to create certainty for all workers, unions, and employers by allowing an ALJ to thoughtfully consider a fully developed record involving a multifaceted fact pattern and apply the Board’s controlling precedent articulated in *Browning-Ferris*. Such a ruling would enable the stakeholder community to understand with certainty how governing Board law applies to a complex set of facts. Further, doing so would demonstrate a commitment on your part to the fair enforcement of the law and a sense of fair play: no entity should be permitted to skirt its legal obligations or hide the uncomfortable realities of a full factual record simply by prevailing on what it considers to be a more sympathetic ear upon a change in the Administration. Forcing such a resolution would further erode public trust in the decision-making processes of the Board, already marred by its initial decision in *Hy-Brand* and the improper participation of Member William Emanuel, who should have been recused from the case.

The Board’s abandoning of *Hy-Brand* eliminates whatever support may have existed for your efforts to settle the *McDonald’s* case so near to the trial’s close. Because this matter affects the rights of millions of workers and has implications far beyond the scope of the case, we will closely follow how you proceed. We also request that you provide the following information by March 21, 2018.

1. Do you intend to cease settlement efforts and resume the trial in *McDonald’s* in light of the Board’s Order vacating *Hy-Brand*? If not, why not?
2. If the *McDonald’s* trial were to continue, approximately how many hearing days would it take to conclude?
3. Prior to your confirmation as General Counsel, did you discuss the *McDonald’s* case with any person or entity not employed by the National Labor Relations Board, including employees of the White House or industry associations? If so, please provide any such communications.
4. Please list all of the pending cases in which your office is considering or engaging in settlement efforts based in whole or in part on the now ineffective *Hy-Brand* decision.


⁴ It should also be noted that the initial complaints and subpoenas in this case were issued by your office under pre-*Browning-Ferris* Board law which *Hy-Brand* purported to reinstate.

⁵ See Order, *supra* note 2.


⁶ See Letter from NLRB General Counsel Peter Robb to Senators Murray and Warren (Jan. 3, 2018).

We look forward to hearing from you. If you have any questions, please contact Sam Weinstock in Senator Warren's office at Samuel_Weinstock@warren.senate.gov.


Sincerely,



Elizabeth Warren
United States Senator



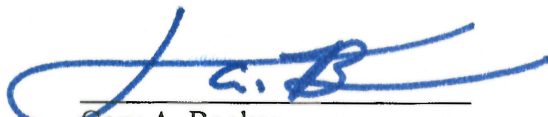
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