Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., as a single employer and/or Joint Employers *and* Dakota Upshaw *and* David Newcomb *and* Ron Senteras *and* Austin Hovendon *and* Nicole Pinnick. Cases 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, and 25–CA–164945

June 6, 2018

ORDER DENYING MOTION FOR RECONSIDERATION

BY CHAIRMAN RING AND MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On February 26, 2018, the National Labor Relations Board issued an Order Vacating Decision and Order and Granting Motion for Reconsideration in Part in this proceeding. 366 NLRB No. 26 (*Hy-Brand II*). That order partially granted the Charging Parties' motion for reconsideration and vacated the Board's Decision and Order of December 14, 2017, reported at 365 NLRB No. 156 (*Hy-Brand I*). Respondents Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co. have filed a motion for reconsideration of *Hy-Brand II*. The Charging Parties filed an opposition to the Respondents' motion. The General Counsel filed a response to the Respondents' motion, agreeing with the Respondents that *Hy-Brand II* should be set aside.

The National Labor Relations Board has delegated its authority in this matter to a four-member panel.

Having carefully considered the matter, the National Labor Relations Board denies the Respondents' motion.[1] The Respondents have not identified any material error or extraordinary circumstances warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.

The Respondents contend that the Board failed to comply with the Government in the Sunshine Act in connection with *Hy-Brand II*. Their contention is mistaken. The Board issued a timely and proper Sunshine Act notice. See 83 FR 7239 (Feb. 20, 2018).

The Respondents are also mistaken in contending that the delegation of authority to a three-member panel in *Hy-Brand II* was invalid because Member Emanuel did not participate in the delegation. As the Board explained in *Hy-Brand II*, the "Board's Designated Agency Ethics Official (DAEO) has determined that Member Emanuel is, and should have been, disqualified from participating in this proceeding." 366 NLRB No. 26, slip op. at 1. The Board noted that "5 C.F.R. § 2635.502(c) gives the Agency's Designated Agency Ethics Official authority to 'make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter.'" Id., slip op. at 1 fn. 3. That same provision of the Code of Federal Regulations goes on to state as follows:

> If the agency designee determines that the employee's impartiality is likely to be questioned, he shall then determine . . . whether the employee should be authorized to participate in the matter. Where the agency designee determines that the employee's participation should not be authorized, the employee will be disqualified from participation in the matter . . . .[2]

Based on this authority, the DAEO issued a determination of disqualification. Accordingly, Member Emanuel was and is disqualified from participating in *Hy-Brand*, and the delegation of authority to a three-member panel in *Hy-Brand II* was made by all Board members who were qualified to participate. The Respondents cite no authority—and we are aware of none—that calls into question the validity of the delegation in *Hy-Brand II* in circumstances such as these.[3]

[1] Member Emanuel has been disqualified from participation in this case and did not participate in either the delegation to the panel or the decision here. We note that since the issuance of *Hy-Brand II*, the Board—pursuant to the Freedom of Information Act—has made public portions of the written rationale of the Board's Designated Agency Ethics Official, in support of her determination with respect to Member Emanuel's disqualification and other related information.

The Respondents have argued that Member Pearce should recuse himself from participating in this case pending investigation of an allegation that he disclosed confidential, deliberative information concerning the case. The Board's Inspector General has thoroughly investigated the matter. He has found no factual support for that allegation and has closed the investigation.

[2] 5 C.F.R. § 2635.502(c) was promulgated by the Director of the Office of Government Ethics pursuant to the authority granted to the Director by Congress under Title IV of the Ethics in Government Act of 1978, as amended, 5 U.S.C. App. 4 § 401 et. seq.

[3] The Respondents cite an unpublished order in *New Vista Nursing & Rehabilitation, LLC*, 22–CA–029988 (Jan. 5, 2016), in which then-Chairman Pearce recused himself but participated in the delegation of authority to the panel. The differences between that case and this one are apparent. Then-Chairman Pearce recused himself from *New Vista*, and he did so in the *New Vista* order itself. Here, Member Emanuel had been disqualified from participating in *Hy-Brand* by the Agency official vested with regulatory authority to do so, and this disqualification occurred *before* the Board issued *Hy-Brand II*.

The remainder of the Respondents' motion is almost entirely devoted to criticism of the report issued by the Board's Inspector General on February 9, 2018. This criticism is immaterial. As *Hy-Brand II* made clear, and as we have reiterated above, Member Emanuel was disqualified from participating in *Hy-Brand* by the Agency's DAEO, not by its Inspector General. Although the Board noted the Inspector General's report in *Hy-Brand II*, it relied on the DAEO's decision to vacate *Hy-Brand I*. The Respondents having failed to identify any material error in *Hy-Brand II* or to otherwise demonstrate extraordinary circumstances warranting reconsideration of that decision, their motion for reconsideration is denied.

Dated, Washington, D.C. June 6, 2018

John F. Ring,	Chairman
Mark Gaston Pearce,	Member
Lauren McFerran,	Member
Marvin E. Kaplan,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN RING and MEMBER KAPLAN, concurring.

> It is not enough that your designs, nay that your actions, are intrinsically good, you must take care they shall appear so.
>
> Henry Fielding, *Tom Jones* (1749)

The National Labor Relations Board prosecutes cases, conducts elections, issues decisions, and promulgates rules. This is what the public sees when it looks at the work we do. What goes unremarked are the ethical underpinnings of this work—unless and until they are called into question. If and when that occurs, the Board must act promptly and decisively to ensure that in carrying out its work, it not only adheres to exacting standards of integrity and impartiality—as, indeed, we believe the Board did when it decided *Hy-Brand I*—but that it is perceived by the public as adhering to such standards. As the individuals presently entrusted with stewardship of the Agency's mission, the Board's members can do no less.

Here, after consulting with the Office of Government Ethics, the Board's DAEO invoked the regulatory authority cited above and expressly forbid the Board from allowing Member Emanuel to participate in this case. There are some who might disagree with the merits of the DAEO's determination. And reasonable people can debate whether the DAEO has the statutory authority to disqualify a Board Member from a matter. Such a debate may be carried on outside the Board in the press, at professional conferences, perhaps over dinner. But for the Board as a whole or an individual member to defy what appears to be clear regulatory authority by refusing to comply with the DAEO's determination at best would have sidetracked the Agency from its mission, and at worst would have plunged the Board into litigation. Faced with these circumstances, the Board had no room in the context of this case to question the DAEO's determination or her authority to make it.

Stated another way, had the Board's DAEO merely advised the Board, as has been done in the past, that in her opinion, a reasonable person with knowledge of the relevant facts would question Member Emanuel's participation in *Hy-Brand I*, the Board's traditional recusal practices would have been followed. When the DAEO, pursuant to the authority she invoked under federal law, took the unprecedented step of disqualifying Member Emanuel from participating in *Hy-Brand II* (and subsequent proceedings in the case), the Board had no alternative but to comply with her directive. To do otherwise—if that was even possible—would have meant protracted legal challenges and, more troubling, lasting injury to the Board's reputation.

The General Counsel has requested, as alternate relief, that the Board publish the DAEO's decision, unredacted, and grant the motion for reconsideration to permit the parties to address it. In the General Counsel's view, the Board should have given the parties the opportunity to be heard about the DAEO's determination in advance of vacating the Board's original decision in *Hy-Brand I*. Like the General Counsel, we would have been interested in hearing whether the parties believe that any legal grounds exist upon which the Board could have rejected the DAEO's determination. We have been unable to locate authority to support such a position. Moreover, nothing the General Counsel says in his brief suggests that the DAEO does not have that authority. We agree with the General Counsel that the alternative procedure he proposes might afford parties a greater opportunity to

demonstrate otherwise.[1] However, we do not regard this argument as showing there was material error in the *Hy-Brand II* decision or that "extraordinary circumstances" warrant granting the motion for reconsideration of that decision.

Meanwhile, let's put this matter in perspective. If the Board erred in any way in *Hy-Brand II*, it erred on the side of protecting its reputation for integrity and impartiality. The Board *should* err on that side, and the reputation of government would benefit were all its errors similarly well-intentioned. Moreover, while *Hy-Brand II* was necessitated by the unusual and unfortunate circumstances here, the real injustice is that done to the Board's stakeholders, who deserve "certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice" due to misapprehension of the standard for determining joint-employer status under the Act.[2] We could continue to litigate the unique ethics issues raised by this case for years while America's workplaces—not to mention the seven employees whose discharges are at issue in this case—remain in limbo waiting for us to do our job, or we can move forward. We choose to move forward.

[1] It is worth noting the extraordinary circumstances surrounding the DAEO's actions. The ethics pledge taken by Board members requires that each member be recused for 2 years from any particular matter in which his or her former law firm represents a party and for 2 years from any matter involving a client for which the member performed work. For Member Emanuel, neither of these applied in *Hy-Brand*, and it is undisputed that Member Emanuel had no recusal obligation at the outset of the case. However, after reviewing the manner and form of the Board's deliberations in *Hy-Brand I*, the DAEO concluded that *Hy-Brand* should be considered the same particular matter as *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015), a case that was then pending before the District of Columbia Circuit and from which Member Emanuel is recused. This unprecedented recusal determination seems to go far beyond the stated ethical rules, and it extends the recusal determination from one that is made based on objective facts and standards *before* the member decides whether he or she may participate in a case to one that must be continually revisited and may be revised depending on the way the case proceeds through the deliberative process. And despite no violation of existing ethics requirements at the outset of Member Emanuel's participation in *Hy-Brand I*, the DAEO concluded that the totality of the circumstances as they unfolded in the making of the decision in *Hy-Brand I* created an appearance of partiality. Based on this extraordinary conclusion, the DAEO took the equally extraordinary action of disqualifying the Board member from participating in the case. Undoubtedly, the events of this case are unusual, to say the least. Nevertheless, the DAEO's actions in *Hy-Brand* could have a lasting effect on the members' recusal requirements, and they have the potential to be used as a weapon to tie up important cases. To ensure clarity going forward for all concerned, we believe the Board should undertake a thorough internal review of its recusal practices and procedures.

[2] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679 (1981).

Dated, Washington, D.C. June 6, 2018

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

MEMBERS PEARCE and MCFERRAN, concurring.

Having joined our colleagues in a unanimous decision rejecting the Respondents' arguments for reconsideration of *Hy-Brand II*, we write separately mainly to address the surprising decision by the General Counsel to attack the Board's reliance on a disqualification determination of the Designated Agency Ethics Official (DAEO).

Initially, we note that the instant motion for reconsideration comes before the Board in a highly unusual posture. On December 14, 2017, *Hy-Brand I*, 365 NLRB No. 156, overruled *BFI Newby Island Recyclery (Browning-Ferris)*, 362 NLRB No. 186 (2015), and reverted to a prior legal standard for determining whether two employers are joint employers under the National Labor Relations Act. Applying that standard, the Board found that the Respondents were joint employers and accordingly imposed liability on them for discharging seven employees in violation of Section 8(a)(1) of the Act.

The Respondents do not challenge that unfair labor practice finding now. Instead, they seek reconsideration of the February 26, 2018 order *vacating* the finding—an order from which the Respondents arguably *benefitted*because it provided that as a result of the vacatur of *Hy-Brand I*, the "overruling of the *Browning-Ferris* decision is of no force or effect." *Hy-Brand II*, 366 NLRB No. 26, slip op. at 1. The Respondents' present focus, then, is *not* with the imposition of joint-employer liability on them, but rather with the restoration of the *Browning-Ferris* standard, *which has had no legal consequences for the Respondents.*

But perhaps even more unusual than the Respondents' approach to this litigation is the manner and means by which the General Counsel has chosen to engage in this proceeding. While the General Counsel's duty in this case would presumably be to defend the interests of the seven discharged parties whose rights were allegedly violated, instead the General Counsel's belated participation in the litigation of this motion is inexplicably focused on questioning the authority of the Board's Desig-

nated Agency Ethics Official, and the Board Members' obligation to comply with the Standards of Ethical Conduct for Executive Branch Employees, the President's Ethics Pledge, and the DAEO's authoritative, regulatory determinations. These propositions should not be controversial.

We believe it is beyond question that the DAEO had independent authority to disqualify Member Emanuel and that the Board, in turn, appropriately vacated *Hy-Brand I* based on the DAEO's determination that Member Emanuel should not have participated in that decision.

We begin by noting that the National Labor Relations Board, comprising the Board and the General Counsel, is one agency with a single government-ethics regime, applicable to Board and General Counsel alike and administered by the DAEO. The DAEO's determination, one would hope, would be entitled to the same deference from the General Counsel as it has received from the Board. Certainly, the DAEO's determination is not a matter to be litigated by the General Counsel and adjudicated by the Board.

In our view, there is no basis for the General Counsel's claim that the Board's reliance on the DAEO's determination violated due process. A litigant has no due-process right to the participation of a particular Board member—much less a disqualified Board member—where a case can be decided by a lawful quorum of Board members who are themselves eligible to participate. Cf. *Hampton v. City of Chicago*, 643 F.2d 478, 479 (7th Cir. 1981) (rejecting challenge to district judge's recusal order) ("While plaintiffs have a right to have their claim heard by the district court, they have no protectable interest in the continued exercise of jurisdiction by a particular judge."). Here, the Charging Parties filed a timely motion for reconsideration of the Board's original *Hy-Brand* decision, citing Member Emanuel's participation. Both the Respondents and the General Counsel had the full and fair opportunity to respond to the motion, which they did. The General Counsel explicitly took no position in his filing with the Board.

The General Counsel insists now that he was entitled to "timely notice of the Board's intention to involve the DAEO in this matter," echoing the Respondents' mistaken contention that in the circumstances of this case the "recusal issue [was] committed to the discretion of Member Emanuel."[1] However, *Hy-Brand II* was decided after the DAEO's determination of disqualification. Member Emanuel had no discretion with respect to recusal, once the DAEO, exercising her proper authority, determined that he was disqualified, and the Board had no duty to permit his participation in the wake of his disqualification, even if Member Emanuel had sought to participate. Indeed, the Board's duty was quite the contrary. As the General Counsel—who notes that he "is a Presidential appointee himself"—is well aware, the Board was required to act in accordance with the DAEO's determination.[2]

We also reject the argument advanced by the General Counsel that some "rule of necessity" required Member Emanuel to participate in the original *Hy-Brand* decision. At the time the decision issued, the Board had five members. Three members constitute a lawful quorum of the Board under Section 3(b) of the Act, which provides that 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" and that "three members of the Board shall, at all times, constitute a quorum of the Board." 29 U.S.C. §153(b). The General Counsel reasons that because the original *Hy-Brand* decision overruled prior Board precedent by a 3–2 vote, and because Board custom is to overrule precedent only with three votes (or more) in favor, Member Emanuel could not have recused himself if the case were to be decided. The Board would have had a lawful quorum to decide *Hy-Brand* even without Member Emanuel's participation—any three, or all four remaining Members could have participated—and the Board could even have reversed precedent, had three members agreed to do so.

Finally, there is no basis for the contention (made by the Respondents and echoed by the General Counsel) that Member Emanuel had some right to rule on the recusal issue—and that the Board had a corresponding duty to defer to his ruling—in the wake of the DAEO's determination. The Board's Designated Agency Ethics Official, exercising her regulatory authority under 5 C.F.R. §2635.502(c), determined that Member Emanuel was disqualified from participating in the matter, and the Board subsequently acted in accordance with the DAEO's determination. Member Emanuel, who is subject to the President's Ethics Pledge and to the Standards of Ethical Conduct for Executive Branch Employees, is required to abide by the DAEO's determination. While the Respondents cite cases where Board Members addressed motions regarding their own recusal, in no case

[1] The General Counsel's Response to the Respondent's [sic] motion for reconsideration of the Board's Order Vacating Decision and Order at p. 7.

[2] We also reject the General Counsel's suggestion that because it vacated a full-Board decision, *Hy-Brand II* required full-Board participation—including Member Emanuel. That suggestion begs the question of Member Emanuel's disqualification and ignores the fact that three Board members (all members eligible to participate) voted unanimously to vacate the original *Hy-Brand* decision.

cited by the Respondents was there a prior determination by the Agency's DAEO *disqualifying* the member from participating in the matter.[3] In those circumstances, the Board is precluded from including the disqualified Board member in deliberations. Permitting participation by a disqualified member would have ethical implications for the remaining Board members and would risk invalidating the Board's substantive decision on judicial review.[4]

Dated, Washington, D.C. June 6, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[3] Indeed, in one case cited by the Respondents, Member Becker's statement addressing recusal explained that he had consulted the DAEO and, in declining to recuse himself, he was acting consistently with the guidance that he had received. *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, 243 (2010) (statement of Member Becker). It is reasonable to infer that in other cases in which Board members have explained why they were not recused, the member's decision to participate was informed by prior consultation with the DAEO, even if no reference to the DAEO was made.

[4] See *Berkshire Employees Assn. of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235 (3rd Cir. 1941) (remanding case in light of allegation that Board member was not impartial). See generally Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1196 (2000). Breger and Edles observe that "[i]t is not entirely clear if multi-member agencies have a collegial obligation to evaluate one of their members to determine if he or she should be disqualified from a proceeding," but they note that "permitting a 'biased' agency member to participate in a case can clearly call the agency's substantive decision into question." Id. We note that some independent multi-member agencies, such as the Federal Trade Commission, have promulgated rules explicitly providing that the agency—not simply the individual member—will address motions to disqualify a member. See 16 C.F.R. §4.17 (FTC rule). See, e.g., *Intel Corp.*, 149 FTC 1548 (2009) (opinion and order denying motion for disqualification).

The Board's own rules do not seem to address the question of disqualification of a Board Member, as opposed to an administrative law judge. See Board's Rules and Regulations Sec. 102.37 (disqualification of administrative law judges). There are older Board cases where the Board itself has addressed a Member-disqualification motion, sometimes after the Member had addressed it. See, e.g., *Greater Bakersfield Memorial Hospital*, 226 NLRB 971, 971 fn. 2 (1976); *St. Joseph Hospital*, 224 NLRB 270, 270 fn. 1 (1976); *West India Fruit & Steamship Co., Inc.*, 130 NLRB 343, 345 fn. 6 (1961); *Columbia Pictures Corp.*, 85 NLRB 1085, 1086 fn. 6 (1949). The Board has also referred a disqualification motion to the Member in question and permitted him to address it, without itself doing so. See, e.g., *Robbins Motor Transportation*, 225 NLRB 761, 761 fn. 1 (1975). In other, mainly more recent cases, only the individual Member has addressed the disqualification motion, with no indication that the Board itself considered the matter or took other action. See, e.g., *Regency Heritage Nursing & Rehabilitation Center*, 360 NLRB 794, 794 fn. 1 (2014) (Member Hirozawa, ruling on request); *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, 238–246 (2010) (Member Becker, ruling on motions); *Overnite Transportation Co.*, 329 NLRB 990, 998 (1999) (statement of Member Liebman); *Caterpillar, Inc.*, 321 NLRB 1130, 1132 (1996) (statement of Chairman Gould); *Cedars-Sinai Medical Center*, 224 NLRB 626, 626 (1976) (Member Walther, concurring). Finally, the Board has sometimes denied a disqualification motion based on an individual Member's prior decision not to recuse himself. See, e.g., *Los Angeles Times Communications*, 357 NLRB 645, 645 fn. 2 (2011); *Regency Grande Nursing & Rehabilitation Center*, 355 NLRB 577, 577 fn. 2 (2010).