

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General



Memorandum

February 9, 2018

To: Chairman Marvin E. Kaplan
Member Lauren McFerran
Member Mark Gaston Pearce

From: David P. Berry
Inspector General

A handwritten signature in black ink, appearing to read "D. Berry", written over the printed name "David P. Berry".

Subject: 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

I have determined that there is 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 involving specific parties. In accordance with section 5(d) of the Inspector General Act, as amended, I am immediately providing this report to the Board. Section 5(d) requires that within seven calendar days of the date of this report, the Board shall transmit it to National Labor Relations Board's Congressional oversight committees, together with any report by the Board containing any comments that the Board deems appropriate.

Issue

During the course of investigating OIG-I-541, a matter involving the President's ethics pledge found in Executive Order 13770, it was necessary to determine if the Board's decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (*Hy-Brand*), is the same "particular matter" as the "particular matter" in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No 186 (*Browning-Ferris* or *BFI*). The necessity arises because Leadpoint, a party in *Browning-Ferris*, is represented by Member Emanuel's former law firm.

Executive Order 13770, the President's ethics pledge, prohibits an appointee from participating in a "particular matter involving specific parties" when the appointee's former employer or client is a party or represents a party. The ethics pledge defines "particular matter involving specific parties" as having the same definition found in 5 C.F.R. 2641.201(h)(1). That regulation is part of the regulatory guidance regarding post-employment restrictions found in 18 U.S.C. § 207. The pertinent part of the definition is as follows:

Particular Matter involving a specific party or parties . . . include[s] any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest or judicial or other proceedings, . . . only those particular matters that involve a specific party or parties fall within the prohibition . . . Such a matter typically includes a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

The U.S. Office of Government Ethics provided guidance for the determination of whether two proceedings are in fact the same “particular matter:”

The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

This guidance is also found in 5 C.F.R. 2641.201(h)(5) and is used by the courts in analyzing facts when determining if 18 U.S.C. § 207 was violated. *See United States v. Montemayor*, 2017 WL 2493906 (U.S. District Court, N.D. Georgia, Atlanta Division).

Analysis

Using the guidance provided by the U.S. Office of Government Ethics and the courts, I determined that, given the totality of the circumstances, the *Hy-Brand* and *Browning-Ferris* matters are the same “particular matter involving specific parties.”

Although the two cases started out as two distinct and separate matters, the manner in which the former Chairman marshaled *Hy-Brand* through the Board’s deliberative process effectively resulted in a consolidation of the two matters into one “particular matter involving specific parties.” In short, the practical effect of the *Hy-Brand* deliberative process was a “do over” for the *Browning-Ferris* parties.

On October 18, 2017, the former Chairman sent an email message with an attached majority decision draft to the Members who joined in the decision stating the following:¹

Redacted
pursuant
to FOIA
Exemption

(b) (5) [Redacted text block]

¹ The email text is deliberative information. I am including a summarization of the text because I determined that it is essential to show how the consolidation of the deliberative process occurred at the inception of the *Hy-Brand* deliberations and the tone that was set.

(b) (5) [redacted];

(b) (5) [redacted];

(b) (5) [redacted];

(b) (5) [redacted]; and

(b) (5) [redacted].

The 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.” The dissent in *Browning-Ferris* resulted from the Board’s deliberative process following the adjudication of the facts and determination of law at the Regional level and the submission of briefs by the parties, including Member Emanuel’s former law firm, and amici providing legal arguments for the Board’s consideration. Because of the level of the incorporation of the *Browning-Ferris* dissent into what became the Board’s decision in *Hy-Brand*, it is now impossible to separate the two deliberative processes. Rather, the Board’s deliberation in *Hy-Brand*, for all intents and purposes, was a continuation of the Board’s deliberative process in *Browning-Ferris*.

Because of this level of consolidation and the fact that the *Browning-Ferris* parties were engaged in an enforcement proceeding, the deliberations of the *Hy-Brand* case involved and affected the legal rights of the parties of *Browning-Ferris*. This is illustrated by the majority decision’s factual analysis and application of the law found at pages 18 and 19 of the *Hy-Brand* decision that included the following statements:

The evidence relied on by the *Browning-Ferris* majority amounted to a collection of general contract terms and business practices common to most contracting entities . . . , plus a few actions by BFI that had some routine impact on Leadpoint employees;

Browning-Ferris effected a sweeping change in the law without any substantive discussion of significant adverse consequences raised by the parties and amici in the case;

The *Browning-Ferris* majority nevertheless attempted to distinguish the facts of *Browning-Ferris* based on an “apparent requirement of BFI approval over . . . pay increases” for the supplier employer’s employees;

The expansive nature of the *Browning-Ferris* test was demonstrated by the evidence the *Browning-Ferris* majority relied on to find joint-employer status in that case, which involved a “cost-plus” arrangement common in user-supplier contracts [followed by a list of nine factual statements regarding the *Browning-Ferris* parties]; and

[T]he Regional Director correctly decided under then-extant law that it was not enough to show BFI was the joint employer of Leadpoint's employees.

When analysis at pages 18 and 19 of the *Hy-Brand* decision is paired with the statement “we overrule *Browning-Ferris* and return to the principles governing joint-employer status that existed prior to that decision” at page 2, it is apparent that the majority considered the facts and arguments of the *Browning-Ferris* parties and amici and used those facts and arguments to reissue a *Browning-Ferris* majority decision that stated a new outcome for the parties of *Browning-Ferris* under the re-established principles governing joint-employer status. Additionally, there is no material discussion of the *Hy-Brand* matter in the part of the decision that overrules *Browning-Ferris*. For all intents and purposes, *Hy-Brand* was merely the vehicle to continue the deliberations of *Browning-Ferris*.

After the Board issued the decision, the majority Members immediately directed the General Counsel to request that the circuit court remand the *Browning-Ferris* case. The direction was later rescinded after the Board was informed that the General Counsel had an ethical obligation to notify the court that the *Browning-Ferris* decision was overruled by *Hy-Brand*. Thereafter, the court did in fact remand the case and then denied a motion for reconsideration of the remand. Now that the *Browning-Ferris* matter has been remanded to the Board, there is literally no reason for further deliberations before issuing a decision because the law is settled and a determination of the law to facts for the *Browning-Ferris* parties was established in the *Hy-Brand* decision. Alternatively, if the court had not granted the request for remand, the General Counsel would have been precluded from taking a position before the court in the *Browning-Ferris* enforcement proceeding that was contrary to *Hy-Brand* decision.

The *Hy-Brand* majority decision also acknowledges that the two deliberative processes are consolidated. In response to the dissent's criticism of not seeking amicus briefing, the majority included the following:

Additionally, the issue we decided today was the subject of amicus briefing when the Board decided *Browning-Ferris*.

That sentence was included to specifically address the issue of whether the prior deliberative material was available to the majority Members who were not Members when the *Browning-Ferris* decision was issued. This was necessary because the *Hy-Brand* parties did not seek to overturn *Browning-Ferris*, a further illustration that the Board was in fact not deciding *Hy-Brand* on the merits of that case, but was continuing the deliberative proceedings of the *Browning-Ferris* decision.

Because the *Hy-Brand* deliberation was a continuation of the *Browning-Ferris* deliberative proceedings and involved the application of the *Browning-Ferris* facts to the law for the *Browning-Ferris* parties, Member Emanuel should have been recused from participation in deliberations leading to the decision to overturn *Browning-Ferris*. This determination is limited to very specific facts as to what actually occurred in the deliberative process of *Hy-Brand*, and it is the totality of those specific facts that drives the decision.

Our determination that the *Hy-Brand* and *Browning-Ferris* matters are the same “particular matter involving specific parties” for the purpose of Executive Order 13770 is not a determination that Member Emanuel engaged in misconduct.² The issue of whether misconduct occurred involves a number of considerations, and the resolution of those issues is not appropriate in this type of notification.

Effect

Member Emanuel’s participation in the *Hy-Brand/Browning-Ferris* matter when he otherwise should have been recused exposes 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 that should be immediately brought to the attention of Congress and addressed by the Board.

In order to maintain industrial peace, the Board’s decisions must be issued in a manner consistent with due process that ensures that those engaged in interstate commerce can rely upon them. In part, that reliance is obtained when the Members perform their duties in a manner that is free of conflicts of interest or the appearance of such, and is accomplished in accordance with all of the Government’s ethics requirements. When the Board falls short of that standard, the whole of the Board’s deliberative process is called into question.

Corrective Action

To remedy the 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, I recommend the following corrective action:

Member Emanuel’s participation in the *Hy-Brand* decision, when he otherwise should have been recused as outlined above, calls into question the validity of that decision and the confidence that the Board is performing its statutory duties. I recommend that the Board consult with the Designated Agency Ethics Official to determine the appropriate action to take to resolve that issue and restore confidence in the Board’s deliberative process; and

Member Emanuel’s participation in the *Hy-Brand* decision demonstrates that the Board’s current practice of highlighting and addressing recusal issues should be reviewed to determine if it is adequate to protect the Board’s deliberative process from actual conflicts of interest and the appearance of such. I recommend that the Board consult with the Designated Agency Ethics Official to conduct that review and resolve any issues.

² In reaching that determination we have taken into account Member Emanuel’s response to a Congressional inquiry that is related to his participation in the *Hy-Brand* decision and other written matters that he provided to the Office of Inspector General. We have also consulted with the Board’s Designated Agency Ethics Official.