

United States Senate

WASHINGTON, DC 20510

February 26, 2018

The Honorable William Emanuel
Member
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570

Dear Member Emanuel:

Last week, the National Labor Relations Board's Inspector General released a report finding "a serious and flagrant problem and/or deficiency in the Board's administration of its deliberative processes and the National Labor Relations Act..." related to your involvement in the Board's consequential December 2017 decision in *Hy-Brand Industrial Contractors, Ltd.*⁹ We write to express our serious concerns with your involvement in this case, and to inquire about your knowledge of the *Hy-Brand* case's readily apparent ties to the *Browning-Ferris Industries (BFI)* case, a matter in which your former law firm's involvement mandates your recusal.

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.¹⁰ 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.

Because your former law firm, Littler Mendelson P.C., represents a party in the *BFI* case, which was before the U.S. Court of Appeals for the D.C. Circuit before the Board issued its decision in *Hy-Brand*, federal ethics regulations and the Ethics Pledge you signed require your

⁹ 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.nlr.gov/sites/default/files/attachments/basic-page/node-1535/OIG%20Report%20Regarding%20Hy-Brand%20Deliberations.pdf> (emphasis added).

¹⁰ See *Hy-Brand Indus. Contractors*, 365 NLRB No. 156 (Dec. 14, 2017); *Browning-Ferris Indus.*, 362 NLRB No. 186 (Aug. 27, 2015).

recusal from the *BFI* matter. As we noted in our February 6 letter, you appear to have violated those rules by participating in a decision to ask the Board's General Counsel to seek a remand of the *BFI* case from the Court of Appeals. As we also noted, it is clear that you were aware that Littler Mendelson represented a party in the *BFI* case, because you listed that case among those in which Littler Mendelson represents in responses to questions from Sen. Murray following your confirmation hearing in July 2017.¹¹

The IG's analysis found that you should also have recused yourself from the entirety of the *Hy-Brand* decision-making process, but you did not. He found that because former Chairman Philip Miscimarra effectively consolidated the *Hy-Brand* and *BFI* matters, they formed the same "particular matter involving specific parties" requiring your recusal. The IG concluded that the Board's *Hy-Brand* decision, which you participated in, was "merely the vehicle to continue the deliberations of *Browning-Ferris*."¹²

These findings by the Inspector General are extremely concerning. They indicate that you directly participated in an extraordinarily consequential decision from which the law required your recusal. Though the IG's report does not contain a determination that you engaged in misconduct (that will be the subject of a separate, forthcoming report from the IG), it does make clear that your actions created a serious flaw in the *Hy-Brand* decision-making process, tainted the outcome of that process, and undermined the ability of the public to trust in the integrity of the Board's decision-making processes.

In order to better understand why and how you participated in matters from which you should have been recused, we request that you provide answers to the following information no later than March 12, 2018.

1. Were you personally involved in authoring the majority opinion in the *Hy-Brand* case?
2. Why did you sign an opinion overturning the *BFI* case despite the fact that no party in the *Hy-Brand* case requested such a result? In light of this fact, do you agree with the IG's assertion that "the Board was in fact not deciding *Hy-Brand* on the merits of that case, but was continuing the deliberative proceedings of the *BFI* decision?"¹³
3. When you signed the *Hy-Brand* decision, were you aware that it overturned *BFI*?
4. Do you agree with the IG that because of the *Hy-Brand* decision, now that *BFI* has been remanded for the Board, "there is literally no reason for further

¹¹ 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>

¹² See Report, Office of Inspector General, *supra* note 1

¹³ *Id.*

deliberations...and a determination of the law to facts for the *Browning-Ferris* parties was established in the *Hy-Brand* decision?”¹⁴


5. When you signed the majority *Hy-Brand* decision, were you aware that it incorporated “wholesale” the dissent from the *BFI* case?¹⁵
6. When you signed the majority *Hy-Brand* decision, were you aware that its response to the dissent included the sentence, “the issue we decided today was the subject of amicus briefing when the Board decided *Browning-Ferris*?”¹⁶
7. Please provide all communications with, between you and the Board’s Designated Agency Official (or any other official from whom you sought advice on recusal) related to the *Hy-Brand* or *BFI* cases.
8. If the Board revisits the *Hy-Brand* case, will you commit to recusing yourself from the entirety of that process? Even if subsequent events could make your participation in *Hy-Brand* or *BFI* consistent with the Ethics Pledge (e.g., the expiration of the two-year time bar), given the pall of impropriety your participation has cast over the Board’s deliberative process in these matters, will you continue to recuse yourself from all participation going forward in order to dispel any *appearance* of impartiality?

Thank you for your attention to this important matter.

Sincerely,



Elizabeth Warren
United States Senator



Patty Murray
United States Senator

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*