Morgan Lewis

NLRB Recusal Issues – The Importance of Fairness, Transparency, and Stability

Philip A. Miscimarra
Lauren M. Emery
Morgan Lewis & Bockius LLP

American Bar Association
Section of Labor & Employment Law
Committee on Practice and Procedure Under the National Labor Relations Act
Midwinter Meeting
Santa Monica, California

March 1, 2019

Morgan Lewis

NLRB Recusal Issues – The Importance of Fairness, Transparency, and Stability

Philip A. Miscimarra[1]
Lauren M. Emery[2]
Morgan Lewis & Bockius LLP

"First they ignore you. Then they ridicule you. And then they attack you and want to burn you. And then they build monuments to you."

– Nicholas Klein, from his famous 1918 address to the Biennial Convention of the Amalgamated Clothing Workers of America

---

The National Labor Relations Board ("NLRB" or "Board") has long been the subject of controversy and legal challenges. The NLRB addresses important issues affecting most private sector employers, employees and unions in the United States, as to which parties, their advocates, politicians, and the public often have strong opinions and divergent views.

Not much has changed since Professor Clyde W. Summers made the following observation about the Board more than 60 years ago:

> The labor lawyer's world is not a secure one, for [the lawyer] walks on a thin crust of precedents. The body of Board decisions in many areas often gives an appearance of firmness only to have tremors beneath the surface open unexpected fissures or raise new ranges of decisions. In our primitiveness we may see these faults and upheavals in the crust of precedents as acts of God or Satan, crediting angels or devils incarnate in the bodies of Board members. With the appointment of new members the warning rumblings become more noticeable, and we spur our efforts to seek out the spirits and identify them as good or evil.[3]

The "rumblings" associated with the most recent changes in the NLRB's composition have perhaps been no different from what has characterized the Board's long history.

---

[1] Philip A. Miscimarra is a Partner in the labor and employment practice of Morgan Lewis & Bockius LLP, resident in Washington DC and Chicago. He is also the former Chairman of the National Labor Relations Board.

[2] Lauren M. Emery is an Associate with Morgan Lewis & Bockius, LLP. She also served as a staff attorney at the National Labor Relations Board in Washington DC from May 2015 through December 2018.

[3] Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 Syracuse L. Rev. 93 (1955) (hereinafter "Summers").

However, the treatment of Board member recusal issues in the past 18 months has been exceptional in several respects:

- In the *Hy-Brand* litigation – consisting of four successive Board decisions issued over a six-month period – a three-member Board panel rescinded a previously-issued full-Board decision, followed by a four-member decision in which the Board members appeared to be evenly divided as to the appropriateness of the recusal determination.[4]

- It appears that – for the first time in the Board's history – the post-issuance decision about recusal in *Hy-Brand* was not made by the Board member; instead, the decision

---

[4] See *Hy-Brand Industrial Contractors, Ltd. ("Hy-Brand I")*, 365 NLRB No. 156 (Dec. 14, 2017) (five-member Board decision finds that employer entities were "joint employers, but overrules *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015) (*"BFI"* or *"Browning-Ferris"*), *affirmed in part and remanded in part*, 911 F.3d 1195 (D.C. Cir. 2018)); *Hy-Brand Industrial Contractors, Ltd. ("Hy-Brand II")*, 366 NLRB No. 26 (Feb. 26, 2018) (three-member Board panel, excluding Member Emanuel, rescinds *Hy-Brand I* based on observation that "The Board's Designated Agency Ethics Official has determined that Member Emanuel is, and should have been, disqualified from participating in this proceeding," citing 5 C.F.R. § 2635.502(c), which reportedly "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"); *Hy-Brand Industrial Contractors, Ltd. ("Hy-Brand III")*, 366 NLRB No. 93 (June 6, 2018) (four-member Board panel, excluding Member Emanuel, denies motion for reconsideration, thereby leaving intact *Hy-Brand II*'s rescission of *Hy-Brand I*, but with the Board members seemingly evenly divided, reflected in two different concurring opinions, about the appropriateness of the recusal determination regarding Member Emanuel's participation in *Hy-Brand I*); *Hy-Brand Industrial Contractors, Ltd. ("Hy-Brand IV")*, 366 NLRB No. 94 (June 6, 2018) (three-member Board panel, excluding Member Emanuel, redecides *Hy-Brand* on the merits, and finds that the employer entities were a "single employer," and panel finds it is "unnecessary" to reach the joint-employer issue).

In the interest of full disclosure, one of this paper's coauthors, Philip A. Miscimarra, participated in *Hy-Brand I*, which was decided while he was Chairman of the NLRB. Former Chairman Miscimarra notes that no party moved for Member Emanuel's recusal when the Board decided *Hy-Brand I*, nor did either of the dissenting Board members in *Hy-Brand I* suggest that Board Member Emanuel had an obligation to recuse himself in the case (*see Hy-Brand I, supra*); and neither Member Emanuel nor his former law firm represented any party in the *Hy-Brand* litigation. Letter from Dwight P. Bostwick to David P. Berry ("Member Emanuel's Response to Office of Inspector General Reports), at 3 (March 22, 2018) ("Bostwick letter"). Although Member Emanuel's law firm represented a party in the *BFI* litigation when it was before the Board, and *Hy-Brand* overruled the more expansive joint-employer standard adopted by a divided Board in *BFI*, the Board's resolution of the *BFI* case (on Aug. 15, 2015) occurred more than two years before Member Emanuel was sworn in as a Board member (on Sept. 26, 2017). In fact, there is unanimity among everyone who has addressed this issue that Member Emanuel had no obligation to recuse himself in *Hy-Brand I* at the time that the Board commenced its consideration of *Hy-Brand*. See *Hy-Brand III*, slip op. at 3 n.1 (Chairman Ring and Member Kaplan, concurring) ("it is undisputed that Member Emanuel had no recusal obligation at the outset of the case").

was made by the designated agency ethics official,[5] seemingly over the objection of the recused Board member, and whose rationale was not made part of any opinion, and as to which the parties had no opportunity to provide input.

- Unsurprisingly, other parties have filed many subsequent recusal motions in other cases, including one motion seeking that all Republican Board members "immediately cease deciding *any* Board cases. . . ."[6]

- The Board's current joint employer rulemaking involves recusal arguments raised by parties and, possibly, by one dissenting Board member based on contentions that the rulemaking constitutes an improper effort to bypass case-related recusal standards.[7]

In this paper, we resist the temptation to address the merits of the recusal issues presented above. Instead, we deal with the overriding importance – for employees, unions, employers and labor law policy on the whole – of having recusal issues addressed by the Board in a manner that fosters fairness, transparency and stability in the Board's decision-making.

In Part A, we describe reasons that uncertainty about the treatment of recusal issues may be extremely damaging to the Board as an institution: great controversy has always

---

[5] In this paper, apart from questioning the interpretation and application of regulations promulgated by the Office of Government Ethics ("OGE") and the recusal determinations made in the *Hy-Brand* litigation, we do not criticize the Board's designated agency ethics official and her staff, who have the extremely difficult job of addressing important issues and providing near-constant guidance to Board members and others throughout the Agency.

[6] Motion for Recusal of Chairman and Certain Members of the NLRB, filed by Int'l Union of Painters Dist. Council 15, Local 159, in *The Boeing Co*., 19-CA-090932 et al., at 1-2 (April 24, 2018) (emphasis added), which stated that an NLRB press release "makes it clear that the Board is now completely biased in favor of employers and against unions . . . ," and stating that "Chairman Ring and Members Emanuel and Kaplan should immediately cease deciding any Board cases including this case," and stating that the recusal motion was not filed against Members Pearce or McFerran "because we believe they will not put up with this self-expressed prejudice." The Board denied this motion in *The Boeing Co*., 366 NLRB No. 128, slip op. at 1 n.1, ¶ 3 (July 17, 2018).

[7] See description of comments submitted during the NLRB's pending joint-employer rulemaking, contained in the paper written by Nancy Schiffer, *Board Member Conflicts of Interest and Recusal Determinations*, at 11-12 (ABA Committee on Practice and Procedure Under the NLRA, March 1, 2019) (hereinafter "Schiffer paper"). *See also* NLRB, Notice of Proposed Rulemaking, *The Standard for Determining Joint-Employer Status*, 83 FED. REG. 46,681, 46,687 (Sept. 14, 2018) ("Proposed Joint-Employer Rule"), where Member McFerran's dissenting views, after referencing the *Hy-Brand* recusal controversy, state that "[r]easonable minds might question why the majority is pursuing rulemaking here and now," and cites a "concern" expressed by Senators Elizabeth Warren, Kirsten Gillibrand and Bernie Sanders "that the rulemaking effort could be an attempt 'to evade the ethical restrictions that apply to adjudications.'"

characterized the Board's functioning, which is inherent in the Board's resolution of important issues as to which parties, and often Board members, may have strong, divergent views.

In Part B, we describe the traditional manner in which the Board, and the courts, have generally treated recusal issues, which appears to have never garnered the type of controversy over recusal issues that has emerged in the past 18 months. This differs greatly from the manner in which recusal issues were addressed in the *Hy-Brand* litigation.

Finally, in Part C, we identify standards that, in our view, would facilitate the even-handed resolution of recusal issues which, if adopted by the NLRB, would promote greater fairness to the parties, enhance efficiency and stability within the Agency, and provide transparency that is important to employees, unions and employers throughout the country, which are so dependent on the Board for the resolution of representation and unfair labor practice cases.

A. <u>Prologue: Controversy is No Stranger to the NLRB</u>

The job of an NLRB member requires neutrality, and amendments to the National Labor Relations Act ("NLRA" or "Act") reflected a view that Congress "intended the Board to function like a court."[8] Nonetheless, as illustrated by Professor Summer's observations back in the 1950s – which were quoted in this paper's introduction – the Board and Board members have long been the object of scrutiny, speculation, and criticism.[9] One example is recounted by Professor Matthew M. Bodah:

> Not long after passage of the [NLRA] . . . a congressional committee attacked the Board for the presence of communists in its staff and its allegedly pro-CIO leanings. . . . Again, in 1953, both the House and Senate labor committees held hearings critical of the Truman Board. And in 1961, the Pucinski committee criticized the work of the Eisenhower Board, while in 1968 the Ervin committee did the same for the Kennedy/Johnson Board. . . .[10]

---

[8] S. Rep. 80-105, 80th Cong. at 9, *reprinted in* 1 Legislative History of the Labor Management Relations Act, 1947 (hereinafter "LMRA Hist.") at 415.

[9] Material in this section was derived in part from a paper previously presented at an ABA Practice & Procedure Committee's 2012 midwinter meeting. See Philip A. Miscimarra, *Angels, Demons and the NLRB – Perspectives on Congressional Oversight* (ABA Committee on Practice and Procedure Under the NLRA, Feb. 2012).

[10] Matthew M. Bodah, *Congress and the National Labor Relations Board: A Review of the Recent Past*, 22 J. Lab. Res. 699 (Fall 2001) (hereinafter "Bodah, *Congress and the NLRB*"), *citing* James A. Gross, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD (1981); James A. Gross, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994 (1995); and Seymour Scher, *Congressional Committee Members As Independent Agency Overseers: A Case Study*, 54 AM. POL. SCIENCE REV. at 911-920 (Fall 1960).

Ironically, even *before* the NLRA's enactment, Senator Wagner was among the first legislators in Congress to comment critically on the NLRB, which was created pursuant to a joint resolution (Public Resolution 44),[11] and Senator Wagner's criticisms focused on the pre-Wagner Act NLRB's deficiencies under then-existing law.[12]

Subsequently, there have been occasional periods of relative tranquility,[13] but equally common have been criticisms like those that occurred when Republican Donald Dotson was

---

[11] The NLRB was created pursuant to Public Resolution 44, which was adopted by the 73d Congress in 1934, after it became clear the broader Wagner Act legislation would require further consideration (by the 74th Congress) in 1935. *See* Pub. Res. 44 (H.R.J. Res. 375), 73d Cong. (1934, as passed and signed by the President), captioned "To effectuate further the policy of the National Industrial Recovery Act" ("NIRA"), which authorized the President "to establish a board or boards authorized and directed to investigate issues, facts, practices, or activities of employers or employees arising under NIRA section 7a" and which would be "empowered . . . to order and conduct an election by a secret ballot of any of the employees of any employer, to determine by what person or persons or organization they desire to be represented. . . ." *Id.* §§ 1, 2. *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (hereinafter "NLRA Hist.") at 1255B (1949). *See also* 78 Cong. Rec. 12016-17 (June 16, 1934), *reprinted in* 1 NLRA Hist. 1177-79 (explanation by Senator Robinson of purpose underlying joint resolution).

[12] Regarding the pre-Wagner Act NLRB (created by President Roosevelt based on authority conferred in Public Resolution 44, *supra* note 11), Senator Wagner stated:

> The Board . . . was handicapped from the beginning, and it is gradually but surely losing its effectiveness, because of the practical inability to enforce its decisions. . . . [T]he Board may refer a case to the Department of Justice. But since the Board has no power to subpena [sic] records or witnesses, its hearings are largely *ex parte* and its records so infirm that the Department of Justice is usually unable to act.

79 Cong. Rec. 2371 (Feb. 21, 1935), *reprinted in* 1 NLRA Hist. 1311-12 (Senator Wagner's statement regarding National Labor Relations Bill).

[13] *See*, *e.g.*, Terry Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 ANN. REV. POL. SCIENCE 1094-1116 (1985), *quoted in* Bodah, *Congress and the NLRB, supra* note 10, at 699, which described the following state of affairs as of 1985:

> The political controversy and passionate disputes that surrounded the NLRB in its early years have subsided dramatically, and for the last two decades it has rarely been the focus of partisan politics. Indeed it has come to be regarded by both sides of the political fence as one of the most professional, efficient, and successful government agencies, processing with fairness and dispatch untold thousands of cases every year.

In 2000, current Republican House Speaker John Boehner (then Chairman of the House Subcommittee on Employer-Employee Relations) commented on the "improved 'tone' at the NLRB since the arrival of Chairman Truesdale and General Counsel Page. " U.S. House of Rep., *The National Labor Relations Board: Recent Trends and Their Implications*, Hearing before the Subcommittee on Employer-Employee Relations, Education and the Workforce Committee (Sept. 19, 2000), *quoted in* Bodah, *Congress and the NLRB*, *supra* note 10, at 709.

Board Chairman (in 1983-87) and when Democrat William B. Gould IV was Board Chairman (in 1994-98). As described by Professor Bodah:

> During the Dotson years, Democratic members of Congress and a steady stream of witnesses representing unions and workers aggrieved by employer actions accused the Board of being a tool of big business. During the Gould years, congressional Republicans, business owners, and workers aggrieved by union actions slammed the Board as pro-labor.[14]

Nor has there been any shortage of sharp rhetoric regarding NLRB members. Board Member Dennis Devaney stated in 1993 that "overheated rhetoric has become part and parcel of the nomination process for the NLRB."[15] The Board under Chairman Dotson was referred to as consisting of "anti-labor ideologues" and advocates of "the most narrow, retrograde employer interests," who had "no intention of enforcing the national labor policy with an even hand," and who espoused a "legal theory . . . that employers . . . should be able to do whatever they want whenever they want. . . ."[16] The academic work of Chairman Gould was described as a "battle cry" for organized labor – "institutional unionism's *Mein Kampf*."[17] Along similar lines, other Board members – and the Board generally – have faced sharp criticism at different times from Congressional Democrats and Republicans alike:

- A 1947 Senate report regarding the Taft-Hartley amendments stated: "The need for such legislation is urgent. . . . [T]he administration of the National Labor Relations Act itself has tended to destroy the equality of bargaining power necessary to maintain industrial peace. . . . Moreover, as a result of certain administrative practices . . . the Board has acquired a reputation for partisanship, which the committee bill seeks to overcome, by insisting on certain procedural reforms."[18]
- A 1984 report of the House Labor and Education Committee's Subcommittee on Labor-Management Relations, entitled "The Failure of American Labor Law – A Betrayal of American Workers," quoted a statement (by United Electrical Workers President James Kane) that the Board was "dominated by anti-labor zealots," and the report indicated there was a "collapse of confidence in the objectivity of the current

---

[14] Bodah, *Congress and the NLRB, supra* note 10, at 709 (citations omitted).

[15] Dennis Devaney, *The Times They Are A-Changin': The NLRB in Transition*, 44 LAB. L. J. 723-26 (1993).

[16] BNA, *Criticism of Labor Department*, 115 LAB. REL. REP. (BNA) 195 (Mar. 5, 1984) (statement of AFL-CIO President Lane Kirkland), *quoted in* David P. Gregory, *The NLRB and the Politics of Labor Law*, 27 BOSTON COLLEGE L. REV. 39, 47 (1985) (hereinafter "Gregory, *NLRB and Politics*"); BNA, *AFL-CIO Views on NLRB Actions*, 116 LAB. REL. REP. (BNA) 46 (May 21, 1984) (statement released by AFL-CIO Executive Council), *quoted in* Gregory, *NLRB and Politics*, at 47.

[17] Mike Weiss, *The Prey*, MOTHER JONES at 50-58(July/August 1994), *quoted in* Bodah, *Congress and the NLRB, supra* note 10, at 702.

[18] S. Rep. 80-105 (1947), *reprinted in* 1 LMRA Hist. 408.

Board," because the Board "altered the substance of the law in a manner contrary to the objectives of the Act."[19]

- In 1998, House Republicans conducted an appropriations hearing in which then General Counsel Fred Feinstein was called "the most biased General Counsel in history," who was questioned regarding "the frequency of [his] contact with union attorneys," and accused of extravagance relating to "private showers for Board Members, chauffeur-driven limousines, private libraries for Board members, and a kitchen and cooks at Board headquarters."[20]
- In 2007, a joint hearing was conducted by the House and Senate labor committees regarding the NLRB in which Democratic House Labor Committee Chairman George Miller stated that "brick by brick, the NLRB has worked to dismantle the foundation of workers ' rights in this country."[21] Democratic Senate Labor Committee Chairman Edward Kennedy likewise stated: "This board has undermined collective bargaining at every turn, putting the power of the law on the side of lawbreakers, not victims, on the side of a minority of workers who want to get rid of a union, not the majority who want one and on the side of employers who refuse to hire union supporters, not the hard-working union members who want to exercise their democratic rights."[22]
- In 2011, the House Education and Workforce's Subcommittee on Health, Employment, Labor and Pensions held a hearing, entitled "Emerging Trends at the National Labor Relations Board," where Republican Subcommittee Chairman Phil Roe stated the Board "the Board has abandoned its traditional sense of fairness and neutrality and instead embraced a far more activist approach," and that "[n]umerous actions by the Board suggest it is eager to tilt the playing field in favor of powerful special interests against the interests of rank and file workers."[23]

In short, in the 83-year history of the NLRB, the Agency has always dealt with controversy, and parties – whose cases depend on the Board for resolution – have always had

---

[19] H.R. Rep., 98th Cong., Committee on Education and Labor, Subcommittee on Labor-Management Relations 14-16 (Oct. 1984) (citations omitted).

[20] U.S. House of Representatives. Hearings of the House Appropriations Committee, Appropriations for the Departments of Health and Human Services, Labor and Related Agencies, Fiscal Year 1998, at 725, 730 (1997), *quoted in* Bodah, *Congress and the NLRB, supra* note 10, at 706.

[21] Joint Hearing, House Committee on Education and Labor, Subcommittee on Labor-Management Relations, and Senate Committee on Health, Education, Labor and Pensions, Subcommittee on Health, Employment, Labor and Pensions, 110th Cong. 2-3 (Dec. 13, 2007) (hereinafter "JOINT HEARING, 110th Cong.") (prepared statement of House Committee Chairman Miller).

[22] JOINT HEARING, 110th Cong., *supra* note 21, at 15.

[23] HEARING, HOUSE COMMITTEE ON EDUCATION AND LABOR, SUBCOMMITTEE ON LABOR-MANAGEMENT RELATIONS, 112th Cong., at 2, 3 (Feb. 11, 2011).

an incentive to influence the adjudication process in whatever way might make a favorable outcome more likely. To this effect, former Board Chairman John Fanning, who served on the Board for nearly 25 years, made the following observation:

> Labor relations has always been a field that arouses strong emotions – sometimes more emotion than reason. . . . As someone who has participated in some 25,000 decisions of the Board, I can assure you that the *one factor every case has in common . . . is the presence of at least two people who see things completely different*.[24]

B. <u>Recusal Issues – How They Have Been Handled, and What Changed in *Hy-Brand*?</u>

Prior to the *Hy-Brand* cases, the Board's handling of recusal issues was relatively routine, and the two most widely applied recusal rules (in recent years reflected in an "ethics pledge" entered into by Board members as part of the appointment process) were understood throughout and outside the NLRB. These rules were described in *Hy-Brand III* as follows:

> 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*.[25]

The Board's traditional application of recusal issues in recent years has been relatively unexceptional. For example, prior to his appointment to the NLRB, former Board Member Craig Becker served as Associate General Counsel to the Service Employees International Union ("SEIU"). In *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, 238-246 (2010) (Member Becker, ruling on motions) – and in twelve other cases – motions to recuse Member Becker were filed where either (i) one or more parties were a local union affiliated with the SEIU, (ii) Member Becker had previously filed one or more briefs on behalf of a party or amicus curiae, (iii) it was argued that his prior publication(s) meant he had "effectively pre-judged the law," (iv) it was argued that Member Becker in two cases "had a close association with the union party's counsel," and (v) it was argued that Member Becker had previously litigated cases in which the opposing counsel was a lawyer on the staff of the National Right to Work Legal Defense Foundation ("NRW Foundation"), which was one of the moving parties seeking Member Becker's recusal.

In *Pomona Valley*, Member Becker addressed – in a lengthy opinion captioned "ruling on motions" – the recusal contentions raised in all thirteen cases. Member Becker determined that

---

[24] Fanning, John. "The National Labor Relations Act: Its Past and Its Future," in William Dolson and Kent Lollis, eds., FIRST ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE 59-70 (1954) (emphasis added), *quoted in* Bodah, *Congress and the NLRB, supra* note 10, at 713. Former Chairman Fanning became a Board member on December 20, 1957 and remained on the Board until December 16, 1982. *See* http://www.nlrb.gov/who-we-are/board/board-members-1935.

[25] *Hy-Brand III*, supra n. 4, slip op. at 3 n.1 (Chairman Ring and Member Kaplan, concurring). Other sources of potential recusal obligations are summarized in the Schiffer paper, supra note 7.

his recusal was appropriate in one case, based on Member Becker's submission of a joint brief on behalf a party (the UAW International Union) and an *amicus curiae* (the AFL-CIO). *Id.* at 239. However, Member Becker determined that his recusal was not warranted in any of the other cases.

Yet, the recusal issues addressed by Member Becker in Pomona Valley had several things in common:

- each motion seeking Member Becker's recusal was raised *prior* to the time that the Board decided the case;
- Member Becker's opinion reveals that he had the *opportunity to consult with the Agency's designated agency ethics official ("DAEO")*,[26] but (i) *he alone made the determination* regarding whether recusal was appropriate, and (ii) his determination *was made part of the Board's decision on the merits;*[27] and
- Member Becker's decision not to recuse himself in 12 of the 13 cases in which his recusal had been sought – and his decision to recuse himself in the 13th case – was explained in a *detailed published opinion* setting out the *relevant standards* and his *detailed reasons* for determining that his recusal was unwarranted.

As explained in *Pomona Valley*, although Member Becker was employed by and served as counsel to the SEIU before he became an NLRB member, he determined that he could appropriately participate in cases where SEIU-affiliated *local unions* were parties. Member Becker reasoned that, although he was obligated to recuse himself for a two-year period from all cases in which the SEIU was a party, that "does not require me to recuse myself from all cases in which local unions affiliated with the SEIU are parties." *Id.* at 242. Member Becker reasoned that the SEIU was a "separate and distinct legal entity from the many local labor organizations affiliated with SEIU," "the Federal courts and the NLRB have recognized that the locals and the internationals 'are separate "labor organizations" within the meaning of . . . the National Labor Relations Act.'" *Id.*, *quoting U.S. v. Petroleum Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989). Member Becker also indicated: "over 150 local labor organizations are affiliated with SEIU. In the course of my service as Associate General Counsel to SEIU, I had no dealings whatsoever with all but a small handful of those local organizations." *Id.* He concluded that his recusal obligations would encompass "*some*" cases in which an SEIU local union was a party, but his recusal was not warranted in *all* such cases.

---

[26] *Id.* at 243 ("After I was nominated to serve as a Member of the NLRB, I consulted the designated agency ethics official pursuant to 5 CFR §2635.107(b) in order to determine what the scope of my recusal obligation would be in relation to local unions affiliated with SEIU, should I be confirmed or otherwise serve on the Board").

[27] *Id.* at 238 ("I have taken the occasion of the issuance of our Decision in this case to announce my ruling on all 13 motions").

Interestingly, in *Pomona Valley*, Member Becker's recusal decision implicated the issue of whether the Board should reverse a prior case – in which Member Becker himself participated personally – and Member Becker determined that his recusal was not warranted. Thus, *AT&T Mobility*, Case 19-RD-3854, was one of the cases in which Member Becker's recusal was sought, and a central question was whether the Board should overrule a prior case, *Dana/Metaldyne*, 351 NLRB 434 (2007), in which the Board overruled (in part) *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). However, before Member Becker became a Board member, he signed a brief in that prior case, *Dana/Metaldyne*,[28] arguing that *Keller Plastics* should *not* be overruled. Thus, in *AT&T Mobility*, the recusal question was whether Member Becker could appropriately evaluate *whether* the Board should overrule a prior case (*Dana/Metaldyne*), when (i) Member Becker *participated personally in the prior case* (representing the AFL-CIO as *amicus curiae*), and (ii) the Board in the prior case had *rejected the position argued by Member Becker*.

On these facts, Member Becker determined that his recusal in *AT&T Mobility* was not warranted, and he reasoned in part as follows:

> [A]s counsel to *amicus curiae* AFL–CIO, I signed a brief filed in July 2004, in *Dana Corp.*, 351 NLRB 434 (2007), which argued that the Board should not overrule *Keller Plastics*. . . . The Supreme Court has clearly held, however, "Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"
>
> * * *
>
> Under our Constitution, the President has authority to appoint executive branch officials to positions, such as those on the NLRB, *whose views coincide with those of the President on matters of policy left open by controlling statutes*. . . .
>
> Thus, under Federal labor law, the President is entitled to appoint individuals to be Members of the Board who share his or her views on the proper administration of the Act and on questions of labor law policy left open by Congress. *That process would be frustrated if the expression of views on such questions were considered disqualifying or grounds for recusal when cases raising those questions arose before the Board*.[29]

Former Board Member Kent Hirozawa addressed a recusal motion in *New Vista Nursing and Rehabilitation, LLC*, Case 22-CA-029988 (Jan. 5, 2016),[30] where Chairman Pearce was recused, and the employer contended that Member Hirozawa's recusal was also warranted because,

---

[28] In *Dana/Metaldyne*, Member Becker was representing the AFL-CIO as amicus curiae.

[29] *Pomona Valley*, *supra*, 355 NLRB at 240, 241 (emphasis added), *quoting Hortonville Joint School District No. 1 v. Hortonville Ed. Assn.*, 426 U.S. 482, 493 (1976) (other citations omitted).

[30] Available at https://apps.nlrb.gov/link/document.aspx/09031d4581f65eae.

among other things, "Member Hirozawa was partner in the law firm that represents the charging party in this matter prior to becoming chief counsel to then-Member Pearce in April 2010, and he should be recused for that reason and for 'whatever considerations caused recusal of Member Pearce.'" *Id.*, slip op. at 3. Again, as part of the Board's decision on the merits (which involved a motion for reconsideration), Member Hirozawa wrote a separate opinion addressing the recusal motion, and Member Hirozawa made his own determination that recusal was not warranted. Member Hirozawa describe the "relevant facts" as follows:

> I was a member of the firm of Gladstein, Reif & Meginniss LLP, counsel for the charging party in this matter, for over twenty years. I withdrew from the firm in April 2010, prior to becoming chief counsel to then-Member Mark Gaston Pearce that month. I served as chief counsel to Member, and subsequently Chairman Pearce continuously until I was sworn in as a Board member in August 2013. During my time with the firm, I had no involvement with this matter or any other matter concerning the Respondent. During my service as chief counsel, I did not participate in the consideration of this matter at any time. My first involvement in the consideration of this matter concerned the Board's vote to file the December 2, 2015, motion for limited remand of the administrative record to allow the current Board to address the Respondent's second, third and fourth motions for reconsideration. That was more than five years after I had severed my relationship with my former firm.
>
> In view of the foregoing, *I have determined not to recuse myself from participation in this matter*.[31]

In McKenzie-Willamette Medical Center, 361 NLRB 54, 57 (2014), Member Hirozawa determined it was not appropriate to recuse himself based on his participation in prior litigation involving one of the party's attorneys – 17 years earlier – that was characterized as "acrimonious." Here as well, Member Hirozawa wrote an *opinion* that set forth the relevant standards and facts, and Member Hirozawa *made his own determination* about the appropriateness of recusal. In support of his decision that recusal was not warranted, Member Hirozawa reasoned in part:

> The Respondent . . . contends that 5 C.F.R. § 2635.101 requires recusal, in particular, the provisions stating that executive branch employees "shall act impartially and not give preferential treatment" to anyone and "shall endeavor to avoid actions creating the appearance that they are violating . . . the ethical standards set forth in this part." The regulations provide that whether particular circumstances create such an appearance "shall be determined from the perspective of a reasonable person with knowledge of the relevant facts." *Id.*; see also 5 C.F.R. § 2635.501. In the present case, the Respondent baselessly speculates that I "would give preferential treatment to the General Counsel and/or the Union due to the prior litigation that featured the [Respondent's counsel]

[31] *Id.*, slip op. at 5 (emphasis added).

> squaring off against Member Hirozawa." . . . I have no recollection of any acrimonious interactions with [the attorney], and any such events would have occurred approximately 17 years ago. Under these circumstances, no reasonable person would conclude that my participation in this case violated ethical guidelines

Id. at 57.

In *Somerset Valley Rehabilitation & Nursing Center*, 362 NLRB 961, 961 n.1 (2015), *affirmed*, 825 F.3d 128, 144 (3d Cir. 2016), the employer filed a motion that Chairman Pearce should recuse himself because his chief counsel participated in the case before the NLRB (up to the exceptions stage, and the motion was denied on the basis that the chief counsel "no part in the Board's consideration of [the] case." *Id.* Again, the rationale underlying the recusal determination *was laid out in the decision on the merits*, and this *made the recusal issue available for court review on appeal*.

Significantly, when the Court of Appeals for the Third Circuit considered the recusal issues in *Somerset Valley*, the court of appeals *afforded deference* to the "agency member's decision not to recuse himself."[32] Thus, the court upheld then-Chairman Pearce's failure to be recused, and the court reasoned:

> "We review *an agency member's decision not to recuse himself* from a proceeding under a deferential, abuse of discretion standard." *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164 (D.C. Cir. 1995); *see also Mayberry v. Maroney*, 558 F.2d 1159, 1162 (3d Cir. 1977) (applying the same standard to recusal of district judges). That standard is premised on the principle that "'deferential review is used when the matter under review was decided by someone who is thought to have a better vantage point than we on the Court of Appeals to assess the matter.'" *United States v. Tomko*, 562 F.3d 558, 565 (3d Cir. 2009) (en banc) (quoting *United States v. Mitchell*, 365 F.3d 215, 234 (3d Cir. 2004)).
>
> We therefore do not put ourselves in the position of Chairman Pearce or the Board and make the recusal decision anew; *rather, we simply review whether the decision was arbitrary or unreasonable*. *Id.* at 565. Given that there is no evidence that Dichner played any role in the consideration of this case, or that Chairman Pearce was less than diligent in screening her from the proceedings, and given further that the assertions about Dichner's indirect influence are based on speculation, we cannot say that the Board abused its discretion by maintaining the Chairman on the three-member panel.[33]

In this paper, we do not address the merits of the recusal determinations reflected in the above cases. However, it is clear that Board members – making their own determinations about

---

[32] 825 F.3d at 143.

[33] 825 F.3d at 143-144 (emphasis added).

recusal, in consultation with ethics advisors – have always addressed recusal issues, and have recused themselves in many cases. In making these determinations, Board members have received assistance from the Board's Executive Secretary, from staff attorneys who assist in the Agency's efforts to apply established recusal standards in a consistent, even-handed manner, and from the Agency's hard-working ethics officials. *See, e.g.*, *New Vista Nursing and Rehabilitation, LLC*, Case 22-CA-029988 (Jan. 5, 2016) (available in link reproduced in note 30 above) (noting recusal of Chairman Pearce); *Covenant Care California, LLC*, Case 21-CA-090894 (Oct. 15, 2014) (available at https://apps.nlrb.gov/link/document.aspx/09031d458192c516) ("Member Miscimarra recused himself and took no part in the consideration of this case"); *Southcoast Hospitals Group, Inc.*, 365 NLRB No. 140 (Oct. 6, 2017) (noting recusal of Member Emanuel); *Columbia University*, 365 NLRB No. 136 (Dec. 16, 2017) (noting recusal of Member Kaplan); *Amex Card Services Co.*, Case 28-CA-123865 ("Member Miscimarra recused himself and took no part in the consideration of this case"); *ConAgra Foods, Inc.*, 361 NLRB No. 113 (Nov. 21, 2014) (noting recusal of Member Johnson); *Hacienda Resort Hotel & Casino*, 355 NLRB 742 (2010) (noting recusal of Member Becker).

The courts – including the Supreme Court – provide additional helpful guidance regarding the manner in which recusal issues can constructively be addressed. Courts obviously address important substantive rights, and they have also managed to handle recusal issues – with judges making their own determinations, based on established standards, with explanations set forth in written opinions – without the type of confusion, discord and disorder that has emerged at the NLRB. In *Cheney v. U.S. District Court for the District of Columbia*, 541 U.S. 913 (2004), Justice Scalia authored a lengthy opinion explaining his determination that recusal was unwarranted, notwithstanding a hunting trip in Louisiana where he accompanied Vice President Dick Cheney, a named party in the case. Indeed, even the Supreme Court does not have a perfect track record when it comes to recusal issues, which is reflected in numerous cases where recusal issues have reportedly escaped attention. See "Recent Times in Which a Justice Failed to Recuse Himself or Herself Despite a Conflict of Interest," https://fixthecourt.com/2018/05/recent-times-justice-failed-recuse-despite-clear-conflict-interest/ (May 4, 2018) (listing examples, with links to letters and other references, where recusal issues were detected after-the-fact).

Equally significant is the fact that the courts have placed weight on the importance of avoiding *unwarranted* recusals because they can do damage to orderly case adjudication, which operates to the detriment of all parties. In the *Cheney* case, Justice Scalia noted that recusing himself – based on a single social outing with no discussion of the litigation – would impede the Court's ability to decide cases. Justice Scalia noted that needlessly recusing himself raised the possibility of a "tie vote" among remaining Justices, rendering the Court "unable to resolve the significant legal issue presented by the case." Justice Scalia continued:

> [A]s Justices stated in their 1993 Statement of Recusal Policy: "We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before

> us or acted as a lawyer at an earlier stage. *Even one unnecessary recusal impairs the functioning of the Court*." (Available in Clerk of Court's case file.) Moreover, *granting the motion is . . . effectively the same as casting a vote against the petitioner. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all*.[34]

This same focus on the importance preserving orderly case-adjudication – by avoiding inappropriate recusal determinations – is reflected in other court cases regarding recusal motions. In *Owens v. American Cyanamid*, 2010 WL 597394 (E.D. Wis. Feb. 17, 2010), *affirmed sub nom. In re Sherwin-Williams Co*., 607 F.3d 474 (7th Cir. 2010), the judge determined that recusal was unwarranted, and noted that "*needless recusals exact a significant toll*" and "[a]utomatic disqualification *allows the party to manipulate the identity of the decisionmaker and may be no more healthy for the judicial system than the denial of a borderline motion*."[35]

Likewise, in *White v. NFL*, 2008 WL 1827423, at *3 (D. Minn. April 22, 2008), *affirmed*, 585 F.3d 1129 (8th Cir. 2009), the judge denied a motion to vacate a previously issued decision, notwithstanding allegations of bias and prejudice related to public statements and some informal meetings in the judge's chambers (to which both parties were invited but only one party attended). The judge observed it was relevant to consider "the risk of injustice to the parties, the risk that denial of relief will cause injustice in other cases and the risk of undermining public confidence in the judicial process." *Id.*

Significantly, the judge's decision against recusal in *White v. NFL* was upheld by the Court of Appeals for the Eighth Circuit, which was especially troubled by the risk that granting a recusal motion, after-the-fact, would encourage manipulation by the parties. The court of appeals stated:

> A motion to recuse . . . "is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice." . . . We have also held that a motion to recuse will be denied if it is not timely made. . . . "Timeliness requires a party to raise a claim at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim."[36]

The court of appeals stated it was troubled by the "long delay" associated with the NFL's efforts to seek recusal only after it received an unfavorable decision on the merits. *Id.* at 1141. The

---

[34] 541 U.S. 915-16 (emphasis added).

[35] *Id.* at *4 (emphasis added), *quoting In re United States*, 572 F.3d 301, 308 (7th Cir.2009); *New York City Dev. Corp. v. Hart*, 796 F.2d 976, 981 (7th Cir.1986) (quoting *Suson v. Zenith Radio Corp*., 763 F.2d 304, 308– 09 n. 2 (7th Cir. 1985)).

[36] 585 F.3d at 1138, quoting *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir.1993); *United States v. Denton*, 434 F.3d 1104, 1111 (8th Cir.2006); *Holloway v. United States*, 960 F.2d 1348, 1355 (8th Cir.1992); *Fletcher v. Conoco Pipe Line Co*., 323 F.3d 661, 664 (8th Cir.2003) (quotation omitted).

court reasoned: "the League voiced a complaint only after receiving an adverse decision with which it strongly disagrees. *A motion to recuse should not be withheld as a fallback position to be asserted only after an adverse ruling*." *Id.* (emphasis added).

C. <u>The Path Forward: The Need to Foster Fairness, Transparency, and Stability</u>

The Board plays a critical role in deciding representation election and unfair labor practice cases. In fact, the Board's role is indispensable: it is the only place where employees, unions and employers can have these disputes resolved. The great majority of NLRB decisions are unanimous, but the Board always addresses a significant number of controversial cases in which parties – and often Board members – will have divergent views. Regardless of how one views the merits of *Browning-Ferris Industries* and the various *Hy-Brand* cases, there can be little dispute about the instability, uncertainty and confusion that has resulted from the manner in which the *Hy-Brand* recusal issues have been raised and addressed. Indeed, there is still no definitive ruling about the correctness of incorrectness of the recusal determination that caused the invalidation of *Hy-Brand*, because the rationale is not part of any opinion, and – when a non-Board member makes a recusal determination that dictates the outcome of a case – it is unclear what path for potential appeal exists.

On June 8, 2018, the Board has announced plans to undertake a comprehensive review of its policies and procedures governing Board member ethics and recusal requirements.[37] According to the NLRB's press release, this review

> would examine every aspect of the Board's current recusal practices in light of the statutory, regulatory, and presidential requirements governing those practices. Among other things, the Board would review and evaluate all existing procedures for determining when recusals are required, as well as the roles and responsibilities of Agency personnel in connection with making such determinations. To more fully inform its review, the Board would seek outside guidance, including gathering information regarding the recusal practices of other independent agencies with adjudicatory functions. Under the Chairman's proposal, the review would culminate with the issuance of a report that sets forth the Board's findings and establishes clear procedures to ensure compliance with all ethical and recusal obligations.[38]

---

[37] See <u>https://www.nlrb.gov/news-outreach/news-story/nlrb-undertake-comprehensive-internal-ethics-and-recusal-review</u>.

[38] The ethics review reportedly has commenced with an evaluation of the Board's existing policies and procedures, and the Board is also working with the Office of Government Ethics, as well as "agencies that support federal agencies on administrative issues." Hassan A. Kanu, "NLRB Ethics Review to Remain Under Wraps for Now, Chairman Says," Bloomberg Law, Oct. 25, 2018 (available at <u>https://news.bloomberglaw.com/daily-labor-report/labor-board-member-cleared-on-ethics-question</u>).

Consistent with the Board's relatively uneventful treatment of recusal issues in the past, and court cases that have addressed similar issues, the following guidelines would substantially improve the extent to which recusal issues could be addressed in a manner that promotes fairness, transparency and stability.

1. **Timeliness and Waiver**. Recusal questions should be addressed by the parties in a timely manner, and the Board should strongly disfavor or preclude any after-the-fact consideration of recusal issues, except in truly extraordinary and exceptional cases.

This principle is recognized in the courts, and it is consistent with standard practice regarding nearly all arguments and motions entertained by the Board. Regardless of whether one agrees or disagrees with the recusal determination in the *Hy-Brand* cases – or the merits of *Browning-Ferris Industries* (which was overruled by *Hy-Brand I*) – it has been extremely difficult to have an even-handed appraisal of the *Hy-Brand* recusal issues because (i) the *BFI* joint-employer issue was itself been extremely controversial since *BFI* was decided, and (ii) everyone knew the after-the-fact recusal of Member Emanuel meant, at least in the short run, that expanded joint-employer standard adopted in *Browning-Ferris Industries* would remain intact.

2. **Due Process and Party Participation**. Parties should receive notice and the opportunity to engage in briefing regarding Board member recusal questions, except for recusals initiated by the Board member based existing standards.

The importance of notice and the opportunity for briefing consistent with the Board's existing rules is standard practice at the Board and the courts. The Board has no obligation to provide the opportunity for supplemental briefing regarding matters not addressed by the parties (e.g., the Board has often issued decisions that modify or overrule precedent without supplemental briefing). However, disputed questions regarding Board member recusals are important enough to warrant notice to the parties and the opportunity for briefing *before* such an important issue is resolved. By comparison, in the *Hy-Brand* cases, parties were unaware of any recusal issues until after *Hy-Brand I* was decided, and the recusal issues were the subject of briefing only in motions for reconsideration.

3. **Recusal Determinations Should Be Made by Board Members**. All disputed issues in NLRB cases should be decided by Board members, based on authority that the NLRA confers on Board members, and each Board member's evaluation of applicable ethics rules and requirements.

We have not discovered a single case in the Board's 83-year history where questions regarding a Board member's recusal were determined by anyone other than the Board member himself or herself. In the NLRA, Congress obviously intended that Board members – and *only* Board members – would resolve all disputed issues in every case that is brought before the Agency. This exclusive authority accounts for the extensive selection, vetting, nomination and confirmation process associated with every Board member's appointment. Furthermore, Board

member (who are nearly always attorneys) are themselves subject to laws, regulations and rules of professional conduct, including those pertaining to recusal. These considerations make it incongruous to suggest that Board members lack sufficient judgment to resolve recusal issues. Indeed, as noted above, in *Somerset Valley Rehabilitation & Nursing Center*, 362 NLRB 961, 961 n.1 (2015), *affirmed*, 825 F.3d 128, 144 (3d Cir. 2016), the court of appeals *afforded deference* to the "*agency member's decision* not to recuse himself."[39]

It also profoundly undermines the orderly functioning of the Board – and it risks great damage to collegiality among Board members – to permit the forced exclusion of a Board member on disputed recusal grounds in a pending case. This places participating Board members in the position of authoring opinions that may address the propriety of the absent member's recusal, and the excluded member (based on his or her forced exclusion) is barred from participating in or responding to the recusal determination in the written decision issued by the Agency.

In short, it is difficult to justify a departure from the uniform practice that has characterized Board decision-making for the past 83 years, which has been to permit Board members themselves to determine recusal issues. One can reasonably expect that Board member determinations about their own recusals – which invariably include consultation with Agency ethics officials – will rarely be different from recusal decisions by ethics officials. In the infrequent case where a Board member and ethics official reach different conclusions about recusal, it is reasonable to question why the ethics official's determination should supplant a Board member's contrary view:

- If the Board member makes an incorrect recusal decision, this would be subject to review just like any other decided issue; the NLRA authorizes the Board member to decide issues brought before the Board (with no exclusion applicable to recusal determinations); the Board member is responsible for his or her own compliance with relevant ethics standards; and the Act even makes the Board member subject to removal (but only after "notice and hearing") to the extent that his or her actions constitute "malfeasance in office."[40]

- Conversely, if the ethics official makes an incorrect recusal decision (imposed on the Board member over his or her objection), there appears to be no available recourse by the Board member of the parties; there is no obvious path by which the incorrect determination can be reviewed; and there appears to be no readily available remedy.

- Indeed, if a difference of opinion arises, it is possible that multiple Board members – or even *all* Board members – may uniformly disagree with an ethics official's recusal determination affecting one or more Board members in a particular case. Here as

[39] 825 F.3d at 143 (emphasis added).

[40] NLRA § 3(a), 29 U.S.C. § 153(a).

> well, it is hard to envision a path that would be more predictable and certain then permitting the Board members – consistent with their statutory authority – to address the recusal issue(s), which would be part of the decided case. One cannot imagine what alternative path would be available to deal with situations where, for example, the *entire* Board disagreed with an ethics officer's contrary determination about one or more member recusals in a particular case.

In *Hy-Brand II*, the Board relied on the recusal determination made by the designated agency ethics official which invoked a regulation (5 C.F.R. § 2635.502(c)) that ostensibly authorizes the ethics official 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."[41] One can question the application of this regulation to an independent regulatory agency like the NLRB, where a federal statute – the National Labor Relations Act – exclusively vests in Board members the authority to decide the issues presented in cases that come before the Agency.[42] Moreover, this regulation does not impose an absolute "disqualification" when it is determined that a reasonable person might question an employee's impartiality. The regulation states that the designated ethics official may conclude that "the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(c). Two of the factors to be considered as part of this determination are "[t]he nature and importance of the employee's role in the matter" and the "difficulty of reassigning the matter to another employee." *Id.*

---

[41] *Hy-Brand II*, supra note 4, slip op. at 1 n.3.

[42] The regulations included within 5 C.F.R. § 2635.502 make reference to an "employee" of a federal agency, and indicate that the designated agency ethics official may determine whether an employee must be "disqualified" from participating in particular business of the agency, and state the designated ethics official "may make this determination on his own initiative or when requested by the employee's supervisor or any other person responsible for the employee's assignment." There are five examples set forth in 5 C.F.R. § 2635.502(b), which involve (1) an employee of the General Services Administration who might evaluate a developer's lease proposal, (2) an employee of the Department of Labor who might provide "technical assistance" in the drafting of legislation relating to safety issues, (3) an employee of the Defense Logistics Agency involved in testing avionics produced by an Air Force contractor, (4) a new employee of the Federal Aviation Administration who might participate in administering a contract involving the employee's prior firm, and (5) an employee of the Internal Revenue Service who might be involved in determining the tax-exempt status of an organization of which she was a member. Obviously, none of these examples bears any resemblance to an independent regulatory agency like the NLRB, where Board members are vested with exclusive authority to decide all issues in cases that come before the Agency.

4. **Published Decisions and Appeals**. All recusal determinations, with detailed opinions addressing disputed recusal issues, should be included or issued in published Board opinions, which would make them subject to review on appeal.

Consistent with the Board's traditional treatment of recusal issues, and the manner in which recusal determinations are made by courts, all Board recusals should be identified in published Board decisions, which would make those determinations subject to potential review on appeal. Among the most conspicuous features in the *Hy-Brand* litigation has been the absence of any concrete analysis regarding the recusal determination(s) in the published Board decisions. This is unsurprising because the actual recusal determination(s) – and the reasons, rationale and authorities relevant to that determination – were apparently made exclusively by the Agency's designated ethics official who is *precluded*, under the NLRA, from writing or contributing to Board decisions.[43]

There can be no transparency regarding Board recusal determinations when recusal determinations are not fully explained in published Board decisions. At present, however, it remains unclear – to the extent future recusal determinations are made by the Agency's designated ethics official – how these determinations will be communicated and to whom, whether such determinations can be made part of a Board decision, and whether or how parties or Board members can obtain court review (or any review) of such determinations.

5. **Internal NLRB Procedures**. The Board's internal procedures regarding recusal issues must conform to whatever new or different standards and procedures are adopted regarding the future treatment of recusal issues.

As noted in Part A above, Board members have generally been vigilant regarding cases where recusal is appropriate, and Board member determinations – though sometimes considered controversial – have been subject to court review, since the Board's decisions have

---

[43] Based on a view that Congress "intended the Board to function like a court," S. Rep. 80-105, 80th Cong. at 9, *reprinted in* 1 LMRA Hist. at 415, language was added to Section 4(a) of the Act in 1947 which prohibits the Board from employing attorneys for the purpose of "reviewing transcripts of hearings or preparing drafts of opinions" except for the immediate "legal assistant[s] to any Board member." 29 U.S.C. § 154(a). This was considered consistent with the Board's "performance of quasi-judicial functions."[43] H.R. Rep. 80-510, 80th Cong. at 37-38 (1947), *reprinted in* 1 LMRA Hist. at 541-42. *See also* S. Rep. 80-105, 80th Cong. at 9 (1947), *reprinted in* 1 LMRA Hist. at 415 ("Since the Board's function is largely a judicial one, conformance with the practices of appellate courts [regarding personal review of the record and preparation of opinions] should make for decisions which will truly represent the considered opinions of the Board members"). Congress adopted these provisions to ensure that Board members "do their own deciding." H.R. Rep. No. 80-245, at 316 (1947), *reprinted in* 1 LMRA Hist. 316. *See also* S. Rep. No. 80-105, at 3 (1947), *reprinted in* 1 LMRA Hist. 409 (the amendments reorganize the Board's structure "by placing upon the members individual responsibility in performing their judicial functions").

included Board member opinions about disputed recusal issues. It is also clear that the Board's traditional approach to recusal determinations involved regular consultation between Board members, the Agency's designated ethics official, and the Agency's ethics staff on the whole. Therefore, it is premature to announce the demolition of preexisting Board standards and procedures regarding recusal issues, which appeared to work well for decades. In this regard, the views about the recusal issues in *Hy-Brand* appear to be closely aligned with whether particular parties and advocates favor or disfavor the merits of *Browning-Ferris Industries*, on the one hand, or *Hy-Brand I*, on the other (which, during its short-lived existence, overruled *BFI*).

Nonetheless, the Board's internal procedures regarding recusal issues warrant careful review, and they should reflect whatever new or different standards and procedures are adopted regarding the future treatment of recusal issues. The Board's Executive Secretary plays an extremely important role in the identification of recusal issues, in coordination with Board members and their staffs, along with the Agency's ethics officials. This important work should continue to be augmented – as it has in the past – by all other staff attorneys who work in the Board-side of the Agency. The Board's information systems can undoubtedly also make a significant contribution regarding these issues.

6. **Avoiding Instability and Manipulation**. The Board should pay equal attention to need to avoid needless recusals and to discourage efforts by parties to manipulate the Board member participation, which will undermine public confidence and undermine the Board's ability to decide cases as promptly as possible.

The Board's most important function is to decide cases, and advocates on all sides have long recognized the difficulty that has confronted the Board in getting cases decided as quickly as they need to be. As recognized by many courts in their consideration of recusal issues, needless recusals are as potentially damaging as recusals that should – and do not – occur. As the court of appeals recognized in *White v. NFL*, 585 F.3d 1129 (8th Cir. 2009), "[a] motion to recuse . . . '*is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice*,'" and it "*should not be withheld as a fallback position to be asserted only after an adverse ruling*."[44]

The Board must strike a balance that provides sufficient guidance that prompts Board members to avoid conflicts-of-interest and, when appropriate to recuse themselves from participating in cases where one can reasonably conclude that real or perceived conflicts exist, while permitting the Board to faithfully – and efficiently – to the most important business of the Agency, which is to enforce the National Labor Relations Act.

There is an equally important nonpartisan role for parties to play in this process. Whatever standards the Board adopts – and whatever tactics might be developed by parties in

[44] *Id.* at 1138 (emphasis added).

this area – are likely to have equal application regardless of the Board's composition at a given time.

D. Concluding Remarks

It is helpful to remind everyone that the overwhelming majority of Board decisions are decided unanimously. Therefore, notwithstanding the prominence of cases that are considered controversial, the NLRB serves the interests of employees, unions and employers in countless other cases, where the extent of controversy – though no less important – is often limited to the parties themselves.

Other useful suggestions may undoubtedly assist the Board in doing the hard work of reviewing and reevaluating the Agency's current recusal standards. Everyone who depends on the Agency will benefit from recusal procedures that foster fairness, transparency and stability.