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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

February 26, 2018

ORDER VACATING DECISION AND ORDER AND GRANTING MOTION FOR RECONSIDERATION IN PART

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND MCFERRAN

On December 14, 2017, the National Labor Relations Board issued a Decision and Order in this proceeding. 365 NLRB No. 156 (2017). The Board’s Decision and Order overruled *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (Browning-Ferris)*, 362 NLRB No. 186 (2015), which had established a new legal standard for determining whether two employers are joint employers under the National Labor Relations Act.

Thereafter, the Charging Parties filed a motion for “reconsideration, recusal, and to strike,” asking the Board to reconsider its earlier Decision and Order and seeking the recusal of Board Member Emanuel. The Respondents filed an opposition to the motion. The General Counsel filed a response to the motion, taking no position.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

¹ On February 9, 2018, the Board’s Inspector General issued a report concerning Member Emanuel’s participation in the Board’s December 14, 2017 Decision and Order, which is posted on the Board’s website (“[OIG Report Regarding Hy-Brand Deliberations](#)” available at [www.nlr.gov](#)).

² Member Emanuel took no part in the delegation of authority to the present panel.

The Board’s Designated Agency Ethics Official has determined that Member Emanuel is, and should have been, disqualified from participating in this proceeding.³ After careful consideration, and exercising the Board’s authority under Section 102.48(c) of the Board’s Rules and Regulations and Section 10(d) of the Act, we have decided to grant the Charging Parties’ motion in part and to vacate and set aside the Board’s December 14, 2017 Decision and Order.⁴

Because we vacate the Board’s earlier Decision and Order, the overruling of the *Browning-Ferris* decision is of no force or effect.

ORDER

The Charging Parties’ motion for reconsideration, recusal, and to strike is granted in part. The Board’s Decision and Order of December 14, 2017, reported at 365 NLRB No. 156, is vacated and set aside for the purpose of further proceedings before the Board.

Dated, Washington, D.C. February 26, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

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³ 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.”

⁴ Member Emanuel took no part in the consideration of the present Order.