IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Nos. 17-70948 17-71062 17-71276
PURPLE COMMUNICATIONS, INC., Petitioner/Cross-Respondent, v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner. and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Intervenor.	Board Case No. 21-CA-095151

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S OPPOSITION TO MOTION TO REMAND

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1. Petitioner, Communication Workers of America, AFL-CIO, opposes the National Labor Relation Board's Motion to Remand. It does so because of the unique but egregious circumstances under which this remand is sought.

2. There are two separate, to some degree, related reasons why remand should not be granted. First, in violation of clear ethical rules, Board Member Emanuel sat on the four Member Board which decided *Caesars Entertainment Corp.*, 368 N.L.R.B. No. 143 (Dec. 16, 2019) ("*Caesars*").[1] This violated his ethical obligation to refrain from participating in cases where his former firm, Littler Mendelson, is counsel of record, as it is in this case involving Purple Communications ("Purple Communications"). Second, as a result of his participation where he should have recused himself, a remand would be to a two person Board since there are currently only three members of the Board (Member Emanuel and two others), and a two person Board could not decide this case. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

Third, in this case, the Board purported to decide in *Caesars* that the underlying Board Decision in this case was expressly overruled. It did so without giving Communications Workers of America, the Petitioner in this case and the Charging Party below, an opportunity to participate as a party. In effect, the Board ruled in *Caesars* that the Decision in this case should be overruled without giving the Petitioner, Communications Workers of America, due process to resist and argue against their ruling of this case.

3. The facts concerning Member Emanuel's conflicted participation in the *Caesars* case and his unethical participation in this case are demonstrated by the following facts:

[1] December 16 was the final day of the term of Board member McFerran, who dissented. Upon the expiration of her term, the Board was reduced to just three members.

Member Emanuel was nominated by President Trump to serve on the Board on June 27, 2017, while *Purple Communications* was pending in this Court on Petitions for Review and a Cross-Petition for Enforcement. Ninth Circuit Case Nos. 17-70948, 71062 and 71276. At that time, Member Emanuel's then current law firm, Littler Mendelsohn, was representing Purple Communications in this case. His firm had initially filed a Petition for Review in the D.C. Circuit on April 3, 2017, before his nomination. *See* D.C. Circuit Case No. 17-1109. That case was transferred to the Ninth Circuit and consolidated with a Petition for Review filed by the Union pursuant to 28 U.S.C § 2112. A subsequent Cross-Petition for Enforcement was consolidated with the earlier cases. In all three cases, Member Emanuel's former firm represents Purple Communications and did so before he became a member of the Board.

Member Emanuel's firm, Littler Mendelson, began representing Purple Communications before his nomination, continued to represent Purple Communications while his nomination was pending and before he took a seat on the Board and continues to represent Purple Communications. It represents Purple Communications to this day.

Member Emanuel was confirmed and became a member of the Board on September 26, 2017. At the time he became a member, the *Purple Communication*s case was still pending, and his firm represented Purple Communications and had represented Purple Communications since at least April of 2017.

Littler Mendelson then filed the Briefs on behalf of Purple Communications in this Court. *Purple Communications* was set for oral argument in Seattle before this Court on October 9, 2018.

In the meantime, the General Counsel of the National Labor Relations Board, acting on behalf of the Board, including Member Emanuel, filed a motion

to stay the oral argument and stay the proceedings pending a decision of the Board, of which Member Emanuel is a member in *Caesars*. *See* DktEntry 75. This Court then granted the order "to stay and abey." DktEntry 79.

That motion to stay this proceeding was on behalf of the Board, including Member Emanuel. The Motion directly assisted his former law firm with respect to a matter that was pending before he joined the Board. Purple Communications joined in the motion to stay because it benefited them. DktEntry 77.

Member Emanuel then heightened the conflict by participating in the Board's decision to invite briefs to specifically overrule *Purple Communications*, the case pending in this Court. *See* NLRB, *Board Invites Briefs Regarding Employee Use of Employer Email* (Aug. 1, 2019), https://www.nlrb.gov/news-outreach/news-story/board-invites-briefs-regarding-employee-use-employer-email. Member Emanuel again participated in a Board decision to seek briefing to overrule a case still handled by his former law firm. The request for briefing specifically noted the Board was considering overruling *Purple Communications*.

Finally, after receiving briefs, the Board issued its Decision in *Caesars* on December 16, 2019. Member Emanuel participated in that Decision, a Decision that expressly overrules *Purple Communications*, the case in this Court in which Purple Communications is still represented by Littler Mendelson, Board Member Emanuel's former law firm.

4. On December 20, the Board then filed this Motion to Remand. *See* Dkt Entry 83. Member McFerran, who had dissented in *Caesars* had, by that time, vacated her seat on the Board on the same day *Caesars* issued. This left only three remaining Board members: Members Emanuel and Kaplan and Chairman Ring.

It was the Board of which Member Emanuel was one of the members who authorized the General Counsel to file the Motion to Remand, again in a case where his former law firm continued to represent Purple Communications.

5. The Board has previously confronted this issue where Member Emanuel participated in a case that directly benefited his former law firm. *See Hy-Brand Industrial Contractors Ltd.*, 366 N.L.R.B. No. 26 (Feb. 26, 2018). In the underlying *Hy-Brand* case, 365 N.L.R.B. No. 156 (2017) Member Emanuel had participated, which effectively overruled *Browning-Ferris Industries*, 362 N.L.R.B. 1599 (2015). Member Emanuel's participation in the *Hy-Brand* case once again benefited a client of his former office, and his participation was held to be unethical and improper. As a result, the *Hy-Brand* decision was vacated.

6. Member Emanuel has engaged in the same type of conflict here, but the conflict is worse. His law firm has consistently represented Purple Communications in this case in this Court. It began that representation before Mr. Emanuel's nomination and after he took his position on the Board. Nonetheless, Member Emanuel continued to participate in Board proceedings seeking to overrule *Purple Communications*, thus directly benefiting a client of his former law firm. He has done so knowing that his conduct was held unethical in *Hy-Brand*.

7. The Charging Parties in *Hy-Brand* made the following argument to the Board in its Motion For Reconsideration, Recusal, And To Strike:

> NLRB members are executive branch employees bound by two sets of ethical standards: the Standards of Ethical Conduct for Employees of the Executive Branch established in Title 5 of the Code of Federal Regulations, and the Ethics Commitments by Executive Branch Appointees set forth by Executive Order 13770. Executive Branch employees are also regulated by certain restrictions found in 18 U.S.C. § 208.
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> Executive Order 13770 specifically prohibits Executive Branch employees, for a period of two years from the date of appointment, from "participat[ing] in any particular matter involving specific parties that is directly and substantially related to [her or his] former employer." Ex. Order 13770, 82 Fed. Reg. 9333 (Jan. 28, 2017). A

matter is "[d]irectly and substantially related" if "the appointee's former employer or a former client is a party or represents a party." Id. "Former employer" is any person "for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner." Id. The Code imposes the same restriction for a one-year period.

The Code and the Executive Order required that Member Emanuel recuse himself from BFI on the grounds that Littler serves as counsel to a party and Emanuel was a shareholder with Littler within the past two years.

The Board's *Hy-Brand* decision purports to overturn *BFI*, a decision in a pending case in which Member Emanuel is ineligible to participate. The impact of the decision in *Hy-Brand*, if it is permitted to stand, is no different than if Member Emanuel had directly participated in *BFI*, where his former firm represents a party. The Executive Order and Code's provisions cited above thus bar Member Emanuel from participating in *Hy-Brand's* purported overruling of *BFI* as well as in any reconsideration in this case.

Moreover, the Code requires government employees to "endeavor to avoid any actions creating the appearance of violating the law or the ethical standards set forth in this part." 5 C.F.R. § 2635.101(b)(14). An employee "should not participate" in any matter where "the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter," unless a designated agency official is informed of the appearance problem and gives his or her authorization. Id. § 2645.502. A reasonable person with knowledge of the facts would conclude that Member Emanuel's impartiality is compromised in *Hy-Brand* to the extent it is used as a vehicle to overturn *BFI* such that his participation violates 5 C.F.R. § 2635.101(b).

Member Emanuel's obligation to recuse himself from *Hy-Brand* is made clear by review of the original decision. This is not a case where Member Emanuel participated in a decision that simply altered a prior Board construction that might affect the outcome in *BFI*.

Rather, here, Member Emanuel participated in a decision that directly and expressly overrules the decision in BFI. "[W]e overrule Browning-Ferris." *Hy-Brand*, 365 NLRB No. 156 at 2. Here, Member Emanuel participated in a decision that extensively discusses and expressly rejects *BFI*'s holding. Indeed, 31 pages of the 35-page opinion in *Hy-Brand* concerns BFI, not the Charging Parties or Respondents. *Hy-Brand*, 365 NLRB No. 156 at 1-30. This is not a case where the Board simply disagrees with the legal standard applied in an earlier case. Here, the *Hy-Brand* decision extensively discusses the facts in *BFI* and applies the law to those facts. The decision purports to summarize "the evidence the *BFI* majority relied on to find joint-employer status in that case":

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The rules of ethics do not permit such evasion. Federal courts have so ruled in cases involving similar fact patterns under the judicial recusal statute. Numerous cases establish the commonsense principle that when an ethical standard requires recusal in Case X, that same ethical standard necessarily requires recusal in a case where an official overrules a prior decision in still pending Case X. For example, in *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136 (6th Cir. 1990), seven separate cases filed by the FDIC against Aetna were consolidated and assigned to Judge Hull. Id. at 1138. Aetna sought a writ of mandamus ordering Judge Hull to recuse himself from those cases, because the judge's daughter had been counsel in four of them. Judge Hull initially recused himself from all seven cases, which were reassigned to another judge, but Judge Hull later reassigned back to himself the three cases in which his daughter had not been counsel. The Sixth Circuit held that recusal from those three cases was also required, because of their potentially controlling effect on the other four cases:

. . . . A decision on the merits of any important issue in any of the seven cases, moreover, could or might constitute the law of the case in all of them, or involve collateral estoppel, or might be highly persuasive as a precedent. Thus, even if the [daughter's] firm were not counsel of record for FDIC in all of the seven cases but only some of them, and was not of counsel in the three cases reassigned by Judge Hull to himself, we would find

that the circumstances would indicate to a reasonable party, such as Aetna, that his partiality might be implicated, and/or that § 455 would apply.

Id. at 1143. The Sixth Circuit based its order on a finding that the seven cases involved "substantially similar issues and similar controlling questions of law." *Id*.

Here, the Sixth Circuit's concerns are even more justified. *Hy-Brand* and *BFI* do not simply involve "similar controlling questions of law," *Hy-Brand* purports to overrule *BFI*.

Similarly, in *Shell Oil Co. v. United States*, 672 F.3d 1283, 1285 (Fed. Cir. 2012), Judge Smith of the Federal Court of Claims initially entered a judgment in favor of four plaintiffs – Shell Oil, Arco, Texaco and Union Oil – but then recused himself and vacated the judgments as to Union Oil and Texaco (but not Shell Oil and Arco) after realizing that his wife had a financial interest in those two companies. The Federal Circuit held that Judge Smith should have recused himself and vacated the judgments as to all four plaintiffs:

[G]iven the identity of issues involved, the parties do not dispute that a decision in this case will control the outcome in the severed case involving Texaco and Union Oil . . . . The government argues that, if judge's opinions [*sic*] with respect to Shell Oil and Arco are allowed to stand, the government would be precluded from challenging the court's determinations under the doctrine of collateral estoppel because the issues would have already been decided adversely to the government. We agree. Because the Oil Companies' . . . contracts contain substantially similar language and the facts relating to dumping waste at the McColl site are nearly identical as to all four companies, the judgment here could have a preclusive or prejudicial effect in the severed case.

Id. at 1293 (internal citation omitted).

Likewise, here there is no dispute the *Hy-Brand* ruling purports to "control the outcome" in *BFI*.

Finally, in *Matter of Hatcher*, 150 F.3d 631, 632 (7th Cir. 1998), Judge Kocoras presided over three related gang trials. Defendant Hatcher was a named co-conspirator in

> two of those cases and the defendant in a third (the *Hatcher* case), while Defendant Hoover was a named co-conspirator in two cases (one being the *Hatcher* case) and the defendant in a third (the *Hoover* case). *Id*. Hatcher moved to have Judge Kocoras recused from the *Hatcher* case because the judge's son worked for the prosecution in the *Hoover* case. *Id*. at 633. The Seventh Circuit found that "the circumstances of this case required [the judge] to recuse himself under § 455(a) because of the significant risk of an appearance of impropriety." *Id*. The appellate court recognized that the *Hatcher* and *Hoover* "cases are formally separate proceedings" and that it was not holding that "any connection, however tenuous, between two cases would require recusal." *Id*. at 638. Nevertheless, because of the relationship between the cases, the Seventh Circuit concluded that Judge Kocoras's "impartiality might reasonably be questioned" such that recusal was required. *Id*. at 637.
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> Similarly, here recusal is required on reconsideration because the initial *Hy-Brand* ruling purports to have a controlling and fully dispositive effect on *BFI*. The connection between *BFI* and *Hy-Brand* is far from "tenuous."
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> The ethical principle is thus both a matter of common sense and established jurisprudence: if a public official is ineligible from participating in Case X, that official must also be recused from Case Y where the tribunal is contemplating reversing a prior holding in still pending Case X, even if those cases are wholly separate. Member Emanuel should have been ineligible from participating in the original *Hy-Brand* decision and therefore should not participate in its reconsideration. (footnotes omitted)

Those arguments with which the Board ultimately had to agree apply here with more force. One ethical lapse is not excusable. The second one requires strict and deliberate action by this Court since the Board cannot control the ethical conduct of Member Emanuel.

8. We recognize that the Board dealt with an ethical issue in *Caesars*. See *Caesars*, 368 N.L.R.B. No. 143, slip op. at 3, n.11. The ethical issue, however, with which the Board dealt, was whether Member Emanuel's

participation in the Board's Notice and Invitation to File Briefs was permissible. The Board's footnote offers no explanation why Member Emanuel's conduct was ethical given that the Notice dealt directly with overruling the case in which his former firm was counsel. Now that the decision has been made to overrule *Purple Communications* and directly benefit Member Emanuel's former law firm client, his conduct is clearly unethical and in violation of Executive Order 13770, 18 U.S.C.§ 208, 5 C.F.R. 2635, and all other applicable ethics provisions described above. In any case, participating in the decision to invite briefing to overrule *Purple Communications* benefitted Purple Communications and his law firm and was unethical.

The Board's footnote expressly says "The Respondent [Caesars] is not Member Emanuel's former client, and Littler Mendelson does not represent any party to this case." That is correct, but Littler Mendelson does represent Purple Communications in this case. Thus, the conflict is clear. Even in the footnote, the Board never dealt with whether Member Emanuel's participation in the Decision issued on December 16, 2019 was unethical where the Board expressly overruled *Purple Communications*, benefiting Purple Communications, a client of Member Emanuel's former law firm.

In summary, then, Member Emanuel's participation in the Notice and Invitation to File Briefs, the Decision to Stay the Proceedings in this Court and now the Board's Decision expressly overruling *Purple Communications* is unethical. *See Hy-Brand* and authorities cited above.

9. Given the fact that Member Emanuel should not have participated, it would be improper for this Court to now remand this case back to the Board, which consists of three members, Emanuel, Kaplan and Ring, in part at Member Emanuel's request. A remand would only benefit and reward the unethical conduct of Member Emanuel.

10. The Board's Motion to Remand was improper because Member Emanuel must have participated in the decision to seek remand. The Motion to Remand was filed on December 20 on behalf of the Board. By that time, Member McFerran had left the Board. Thus, the Board was left with three members, again, Members Emanuel, Kaplan and Chairman Ring. The Board lawyer, in filing the Motion to Remand, was acting on behalf of the Board as it is the Board's own order that is before this Court to be enforced or not. On its face, this is a motion on behalf of all three Board members. There is no suggestion that Member Emanuel recused himself from the Decision. The motion itself further exacerbates the unethical conduct of Member Emanuel.

11. The Motion to Remand is also improper because Member Emanuel should have recused himself, leaving only a two member Board. Nine years ago, the Supreme Court made it clear that a two member Board could not take action. *See New Process Steel*, 560 U.S. 674. Given the fact that Member Emanuel should have recused himself, the Board's Motion, which could only have come from a two member Board, is improper under *New Process Steel* and must be rejected. There is simply no panel of Board members that can act, as long as Member Emanuel is recused from action on any panel affecting this case.

12. This Court should not remand this matter to a Board that statutorily cannot act. Because *New Process Steel* holds that a two-member Board cannot act, a remand to this Board, so long as Member Emanuel is one of the three members, would be improper. It should furthermore not remand this matter to the Board at least until there are assurances that Member Emanuel will recuse himself on all matters concerning Purple Communications. Should President Trump appoint and the Senate confirm a new member, that obstacle might be removed. So far, that has not happened.

13. Finally, there is a serious due process issue, as noted by Board counsel. *Caesars*, in the Board's view, directly overruled *Purple Communications*. *See* DktEntry 83, p. 2. This is clear from *Caesars*, that the Board outright overruled the underlying decision in this case. Communications Workers of America was not allowed to participate in *Caesars*.[2] It did not have the benefit of being a party and arguing its position, presenting facts and otherwise litigating the issue of whether the rules that are at issue in this case violated the Act. Plainly, an administrative agency like the National Labor Relations Board cannot act to deprive a party in another case the right to litigate an issue without giving that party an opportunity to participate in a full Board proceeding.

14. We recognize that the Board, as an administrative agency, historically has overruled precedent. In those cases, there are no outstanding issues between the parties, and the overruling of precedent has no effect upon the parties to that proceeding.

Here, however, the contrary situation exists. Communications Workers of America and Purple Communications continue to litigate the issue with the Board as to the validity of the email policy. The case is very much alive. Given the fact that the case is very much alive and, indeed, before this Court, the Board lacks the power under the due process clause, the Administrative Procedures Act, as well as the Board's own Rules and Regulations, to act to overrule a case that was not before it.

15. In sum, there are three separate lines of reasoning why this case should not be remanded. First, there is the participation of Member Emanuel all throughout the *Caesars* case, which effectively overruled *Purple Communications*, represented by his former law firm. The second issue is this creates an

[2] The Union is concurrently moving to intervene in the *Caesars* case and asking for reconsideration.

irreconcilable two-person Board problem. Third, there is a due process issue, which cannot be overcome by making a decision in *Caesars*, which effectively overrules the Board's decision in this case before this Court without allowing the participation of Communications Workers of America.

16. For the reasons argued above, this Court should deny the Motion to Remand. Because the Board has issued a Decision that it cannot rely upon in this case, the Court should vacate the stay and set this matter for oral argument. Alternatively, the Court should issue an Order to Show Cause to the Board to explain its ethical lapses and those of Member Emanuel. It should not remand to an agency that cannot act ethically in this case.

17. Should the Board, properly constituted, decide in another case in which Member Emanuel does not participate, the Board could theoretically move to remand the case again. So long as Member Emanuel participates, he violates his ethical duty and taints the entire process. This Court should not sanction such unethical conduct by a sitting member of the National Labor Relations Board who participates fully in a decision to benefit his former law firm in a matter that was pending before he was even nominated and long before he ever took his seat on the Board.

Dated: January 9, 2020

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
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By: */s/ David A. Rosenfeld*
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COMMUNICATION WORKERS OF AMERICA

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), Petitioner and Intervenor certifies that its **COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S OPPOSITION TO MOTION TO REMAND** contains 3,795 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

Date: January 9, 2020

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: */s/ David A. Rosenfeld*
David A. Rosenfeld
Attorneys for Petitioner and Intervenor
COMMUNICATIONS WORKERS OF AMERICA

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on January 9, 2020, I electronically filed and served the forgoing **COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S OPPOSITION TO MOTION TO REMAND** with the United States Court of Appeals For the Ninth Circuit by using the Court's CM/ECF system.

I further certify that counsel for parties listed below are registered users who have been served through the CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on January 9, 2020.

/s/ Karen Kempler
Karen Kempler