UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC. D/B/A BFI NEWBY ISLAND RECYCLING	)	
Petitioner/Cross-Respondent	)	
v.	)	Nos. 16-1028, 16-1063, 16-1064
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	**Argued on March 9, 2017**
and	)	
TEAMSTERS LOCAL 350	)	
Intervenor	)	

MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO RECALL MANDATE BASED ON EXCEPTIONAL CIRCUMSTANCES

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board respectfully moves the Court to recall mandate and continue processing this case. As shown below, Board action since the Court's remand provides exceptional circumstances for recall of the mandate in this case, which had been fully briefed and argued, but not decided, prior to remand and mandate. In support, the Board shows:

1. In *Browning-Ferris Industries of California, Inc.*, the Board announced a revised standard for determining joint-employer status, and applied that standard to find that Browning-Ferris and Leadpoint Business Services were joint employers. 362 NLRB No. 186 (2015). Based on that finding, the Board concluded that Browning-Ferris violated the National Labor Relations Act by refusing to bargain with the employees' representative. 363 NLRB No. 95 (2016). Browning-Ferris petitioned for review, and the Board cross-applied for enforcement of its order. The case was fully briefed, and was argued and submitted on March 9, 2017, but no decision on the merits issued.

2. On December 19, the Board asked the Court to remand the case in light of the Board's subsequent decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017). The basis of the Board's motion was that *Hy-Brand* had expressly overruled its *Browning-Ferris* decision—the decision under review in this case—and announced a different joint-employer standard. The Court granted the Board's motion on December 22, remanding the case "for further consideration in light of *Hy-Brand*." It issued mandate the same day. On February 2, 2018, the Court denied a motion filed by Intervenor Teamsters Local 350 to reconsider the remand order.

3. On February 26, 2018, the Board vacated its decision in *Hy-Brand*. 366 NLRB No. 26 (copy attached). The Board explained that, because of that vacatur, "the overruling of the *Browning-Ferris* decision is of no force or effect." *Id.*

4. This case presents unique circumstances that warrant recall of the mandate under the Court's stringent standards for such action. *See generally Dilley v. Alexander*, 627 F.2d 407, 410 (D.C. Cir. 1980) (mandate can be recalled for "good cause," "special reason," or "exceptional circumstances" (internal quotations omitted)). The *Hy-Brand* decision overruling *Browning-Ferris* was the sole basis for the Board's motion to remand and the Court's grant of that motion. The Board has now vacated *Hy-Brand* and stated that *Browning-Ferris* is not overruled. *Browning-Ferris*'s joint-employer analysis, therefore, states current Board law. Accordingly, the grounds on which remand was requested and granted no longer exist, and the issue as to enforcement of the Board's order in *Browning-Ferris* is exactly as it was prior to the remand.[1]

Moreover, because the Court never ruled on the merits, there is no countervailing interest in finality or repose weighing against recall. *Cf. Am. Iron &*

[1] By way of comparison, the Court "ha[s] long treated motions to recall mandates as the equivalent of Rule 60(b) motions," *N. Cal. Power Agency v. NRC*, 393 F.3d 223, 225 (D.C. Cir. 2004), and Rule 60(b) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding" where, as here, "it is based on an earlier judgment that has been reversed or vacated," Fed. R. Civ. P. 60(b)(5).

Steel Inst. v. EPA, 560 F.2d 589, 599 (3d Cir. 1977) (where court's decision did not "constitute[] a final adjudication of the dispute … , recall of the mandate … is not especially disruptive of the interests in finality of judgments").

Although the facts here are unusual, the Court has recognized generally that post-mandate legal developments can serve as the basis for recalling mandate. *See, e.g.*, *Cal. Cartage Co. v. NLRB*, 822 F.2d 1203, 1205 (D.C. Cir. 1987). In the administrative-law context, it also has identified deference and the need for agency flexibility as factors in the analysis of whether to recall mandate in light of agency action. *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 280-82 (D.C. Cir. 1971). Both considerations are present, and support recall, in this case.

5. If the Court recalls the mandate, the Board further asks that the Court continue processing this case as it deems appropriate.

WHEREFORE, the Board respectfully requests that the Court recall the mandate and continue processing the case.

Respectfully submitted,

/s/ Linda Dreeben
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Dated at Washington, DC
this 1st day of March 2018

UNITED STATES COURT OF APPEALS
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and	)	
TEAMSTERS LOCAL 350	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2), the Board certifies that this motion contains 712 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2010.

s/Linda Dreeben

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Dated at Washington, DC
this 1st day of March 2018

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TEAMSTERS LOCAL 350	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. The following participants will be served by first-class mail:

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Dated at Washington, DC
this 1st day of March 2018

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

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]

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

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[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.nlrb.gov).

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

[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.