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March 28, 2018

David P. Berry, Inspector General
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Dear Inspector General Berry:

The Competitive Enterprise Institute respectfully requests the National Labor Relations Board Office of Inspector General to investigate National Labor Relations Board member Mark Gaston Pearce for improperly disclosing internal Board deliberations, as media reports allege.

On February 25, 2018, Board member Pearce, at the American Bar Association Section on Employment and Labor's Mid-Winter meeting in Puerto Rico, allegedly discussed information from documents involving internal Board deliberations. At the meeting, Board member Pearce reportedly provided advance notice of an NLRB decision to issue an order to vacate the Board's decision in *Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co.*, 366 NLRB No. 26 (2017).

On March 1, 2018, the *Wall Street Journal* reported:

Democratic board member Mark Pearce let slip at an American Bar Association meeting Sunday night [February 25] that an important decision on the *Hy-Brand* case would be issued the next day.¹

On February 26th, as Mark Pearce had said would happen, the NLRB vacated the decision in *Hy-Brand*.²

According to Board's regulations, 29 C.F.R. 102.118(a), "no present or former employee or specially designated agent of the Agency will produce or present any files, documents, reports, memoranda, or records of the Board or of the General Counsel... without the written consent of the Board or the Chairman of the Board."³

Information protected from disclosure under Board Rules and Regulations has been interpreted to include Board internal deliberations, as determined by NLRB Inspector General report OIG-I-468.⁴ Such report states that information about the status of a case is protected and "unauthorized disclosure of information either before or after a case is issued is grounds for discharge."⁵

To protect the integrity of Board proceedings in the ongoing *Hy-Brand* case, an investigation is required to understand the conditions, and if any violations occurred, surrounding Board member

Pearce's public disclosure of Board internal deliberations. The investigation should focus on these questions:

- Whether Board member Pearce received written consent from the Board or the Board or the Chairman of the Board to reveal the forthcoming NLRB action?
- Who Board member Pearce revealed confidential information to regarding the *Hy-Brand* case in his speech at the ABA meeting?
- Did Board member Pearce improperly disclose to the public other confidential documents or information related to the Board's decision to vacate the *Hy-Brand* decision?

Respectfully,
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cc:

Health, Education, Labor, and Pension Committee Chairman Lamar Alexander
Committee on Education and the Workforce Chairman Virginia Foxx
National Labor Relations Board General Counsel Peter Robb

¹ *Wall Street Journal*, "A Shady Joint-Employer Ambush," Last updated on March 2, 2018, <https://www.wsj.com/articles/a-shady-joint-employer-ambush-1519950174>.

² NLRB, *Board Vacates Hy-Brand Decision* (February 26, 2018), <https://www.nlr.gov/news-outreach/news-story/board-vacates-hy-brand-decision>.

³ 29 C.F.R. 201.118, <https://www.law.cornell.edu/cfr/text/29/102.118>.

⁴ National Labor Relations Board Office of Inspector General, David P. Berry, Report of Investigation OIG-I-468, <http://pdfserver.amlaw.com/cc/BerryReport.pdf>.

⁵ *Id.* at 10.