UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXXONMOBIL RESEARCH & ENGINEERING COMPANY, INC.

and

INDEPENDENT LABORATORY EMPLOYEES UNION, INC.

Cases 22-CA-218903
22-CA-223073
22-CA-232016

NOTICE TO SHOW CAUSE

On September 28, 2020, the National Labor Relations Board issued a Decision and Order in this proceeding. 370 NLRB No. 23. Then-Chairman Ring and Members Kaplan and Emanuel participated in the case. Subsequently, the Board's Designated Agency Ethics Official (DAEO) determined that Member Emanuel (whose term on the Board has since ended) should have been disqualified from participating in this proceeding, based on an investigation conducted by the Board's Inspector General.[1] The Inspector General concluded that Member Emanuel's participation violated a criminal statute, 18 U.S.C. § 208(a), and its implementing regulations, 5 C.F.R. §2640.201(b)(2)(i), because of his ownership of a conflicting financial interest in a sector mutual fund.[2]

The Board has accepted the DAEO's determination that Member Emanuel should have been disqualified. The presumptively appropriate remedy for Member Emanuel's

[1] The results of the Inspector General's investigation are reflected in an August 26, 2021 memorandum to the DAEO. As appropriately redacted, the memorandum with relevant attachment is appended to this notice to show cause.

[2] At relevant times, Member Emanuel owned more than $50,000 in shares of the Energy Select Sector SPDR Fund ETF (XLE), which in turn owned Exxon Mobil Corporation common stock. Member Emanuel did not timely disclose his ownership of this sector mutual fund, which prevented a disqualification determination from being made before Member Emanuel participated in this case and before the Board's decision and order was issued.

unlawful participation in this case is to vacate the Board's Decision and Order and to re-adjudicate the exceptions to the administrative law judge's decision *de novo*. See e.g., *Berkshire Employees Assn. of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970).[3]

NOTICE IS GIVEN that any party seeking to show cause why the Board's Decision and Order should not be vacated, and why the Board should not re-adjudicate this case, must do so in writing, filed with the Board in Washington, D.C., on or before **January 28, 2022** (with affidavit of service on the parties to this proceeding).[4] If a response to this Notice to Show Cause is filed, a party may file a reply to the response within 14 days of receipt of the response (with affidavit of service on the parties to this proceeding), but further responses will not be permitted except where there are special circumstances warranting leave to file such a response.

[3] Our dissenting colleague acknowledges, as he must, that Member Emanuel should not have participated in this case and that soliciting the views of the parties as to the appropriate remedy here is proper. We reject our colleague's assertion that in describing vacatur of the earlier decision as presumptively appropriate we have somehow prejudged matters or "slanted the playing field." We have not. The conduct compelling this notice to show cause involves the Board's interests and reflects on the Board and its integrity as an institution. For this reason, we believe the federal appellate decisions involving possible bias by federal administrative-agency adjudicators (including a prior Board member) that we cite above provide more relevant guidance than the cases construing the disqualification requirement for individual judges that our colleague cites. Because the Board's institutional interests are at stake—and at risk—it is entirely appropriate that we convey our belief to the parties that, presumptively, vacatur is the right response to the events uncovered by the Inspector General. As today's notice is a procedural step, not a decision on the merits, we do not otherwise engage with our colleague's arguments. Nor do we suggest that our colleague himself has prejudged the issue of whether a Board decision can stand, despite the fact that a Board member's participation in the case violated a federal criminal statute applicable to employees of the Executive Branch.

[4] Member Kaplan concurs in providing the parties an opportunity to brief the issue of an appropriate remedy for Member Emanuel's disqualification from participation. Pending review of arguments made in response to this notice, he reserves judgment as to whether vacatur is appropriate, presumptively or otherwise, in the particular circumstances of this case.

Dated, Washington, D.C., January 7, 2022

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Member Ring, dissenting in part:

The right to an impartial decisionmaker is one of the core principles of American law. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009). Like my colleagues, I believe that the Board must ensure that it adheres to exacting standards of integrity and impartiality. Unfortunately, the high standards applicable to federal employees were not complied with in this case. My colleagues and I agree that Member Emanuel should not have participated in this case, based on a conflicting financial interest. I also agree that the parties are entitled to an opportunity to be heard before the Board decides whether to vacate its prior decision in this case, *ExxonMobil Research & Engineering Company, Inc.*, 370 NLRB No. 23 (2020). But my agreement with the majority must end there.

The majority has concluded that the "presumptively appropriate" remedy for Member Emanuel's participation in this case is to vacate the Board's Decision and Order and to re-adjudicate the case *de novo*. I cannot agree, and I am wholly unpersuaded by the inapposite caselaw upon which the majority relies in this matter of first impression for the Board. In

addition, I strongly disagree with the majority's unprecedented decision to hold that vacatur is presumptively appropriate even *before* the parties have had an opportunity to brief that very question. The Board should not presume that vacatur is warranted and issue a Notice to Show Cause why it is not. It should provide the parties an opportunity to be heard through an open-ended invitation for briefing. The question posed by Member Emanuel's participation in this case has no obvious answer, as no controlling statute or legal precedent directly answers it. For these reasons, the Board should decide what standard to apply in determining whether the prior decision in this case should be vacated *after* the parties have briefed the issue, not before.

DISCUSSION

The Board's Designated Agency Ethics Official (DAEO) has determined that Member Emanuel should not have participated in the adjudication of this case because at the relevant time, he held a greater-than-$50,000 interest in the Energy Select Sector SPDR Fund ETF (XLE) (the "Fund"), which in turn held shares in ExxonMobil. The Board's Inspector General determined that Member Emanuel's participation in this case under those circumstances violated 18 U.S.C. § 208(a) and one of its implementing regulations, 5 C.F.R. § 2640.201(b)(2)(i). The Inspector General's memorandum to the DAEO concerning this matter discloses the following additional information: (1) Member Emanuel received statements from his investment advisor disclosing his investment in the Fund, but those statements did not disclose the Fund's underlying holdings; (2) there has been no finding that Member Emanuel had actual knowledge of the Fund's underlying holdings at the time he participated in this case.[1]

[1] As discussed below, no one disagrees there was a violation. The issue presented now, however, is the appropriate remedy for that violation. Accordingly, it is irrelevant to this case that "[t]he Inspector General concluded that Member Emanuel's participation violated a criminal statute," as the majority notes. In any event, as the IG report explains, upon referral by the IG, the U.S. Attorney's Office declined criminal prosecution in this matter.

Member Emanuel should have disqualified himself under the circumstances described above, and his participation in this case was an ethics violation. There is no question about this. The issue presented here, however, is what the Board should do about that violation now. This is indisputably an issue of first impression *for the Board*. Diligent research has not unearthed any prior case in which the Board has specified the standard to be applied in determining whether to vacate a decision because a participating member should have disqualified him- or herself based on a conflicting financial interest. This does not deter the majority from peremptorily announcing that vacatur is the presumptively appropriate remedy, and doing so without first affording the parties a meaningful opportunity to brief that issue. The majority's approach both deprives the parties of the opportunity to dispute whether vacatur *is* presumptively appropriate here and puts any party that might oppose vacatur to the uphill task of overcoming an adverse presumption. The Board should give the parties a level, presumption-free playing field by inviting them to brief the issue of what standard should apply here and, when applied, what outcome should be reached, rather than compelling them to prove that the Board's prior decision should not be vacated and the case re-adjudicated.[2]

Moreover, the cases cited by the majority provide no support for the proposition that vacatur is presumptively appropriate in the circumstances presented here. To the contrary, the courts that decided *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970), and *Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235 (3d Cir. 1941), cited by the majority in support of this proposition, determined that vacatur was appropriate where an agency decisionmaker should have been disqualified based on actual bias

[2] The Board's undisputed interest in protecting the integrity of its processes will be vindicated by its decision on whether or not to vacate the prior decision. Accordingly, there is no merit to the majority's view that those concerns justify holding vacatur "presumptively appropriate" now, before the parties have briefed the issue.

or prejudgment.[3] Those cases did not deal with disqualifications based on a conflicting financial interest, as is the case here. Nor is it at all clear how actual bias or prejudgment can be found in this instance, absent any basis for concluding that Member Emanuel was aware, at the time he participated in the decision in this case, that the Fund held shares of ExxonMobil stock.[4]

The issue of conflicting financial interests *is* addressed in 28 U.S.C. § 455. Although Section 455 applies by its terms to federal judges, several Board members have taken it into consideration when addressing recusal motions.[5] That statute relevantly states:

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[3] In *Cinderella Career & Finishing Sch., Inc. v. FTC*, the court held that the Chairman of the Federal Trade Commission should have recused himself from the case after he gave a public speech that either demonstrated actual prejudgment or created "the appearance that the case ha[d] been prejudged." 425 F.2d at 590. In *Berkshire Employees Ass'n of Berkshire Knitting Mills,* the court addressed an allegation that, prior to his participation in the case, a member of the Board had written a letter to a customer of the respondent employer that in substance urged the customer to boycott the respondent in order to pressure it into acceding to union contract demands. The court held that "[i]f the circumstances alleged are proved Berkshire did not have a hearing before an impartial tribunal, but one in which one member of the body which made exceedingly important findings of fact had already thrown his weight on the other side." 121 F.2d at 239. Member Emanuel's situation does not remotely resemble either case.

[4] The Administrative Procedure Act (APA) also provides no clear guidance here. It specifies procedures administrative agencies must follow when adjudicating cases, including a provision regarding impartiality, but does not specify the remedy for violations of this requirement. See 5 U.S.C. § 556(b)(3).

[5] See *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, 238-246 (2010) (recusal ruling of Member Becker); *Overnite Transportation Co.*, 329 NLRB 990, 998-1000 (1999) (recusal statement of Member Liebman); *Detroit Newspapers*, 326 NLRB 700, 710-713 (1998) (recusal opinion of Chairman Gould); *Cedars-Sinai Medical Center*, 224 NLRB 626, 626-627 (1976) (opinion of Member Walther). Member Becker observed that although he was not bound by Sec. 455, "the standards set forth therein as well as their construction by the courts offer useful guidance in the application of the . . . standards applicable to executive branch employees." 355 NLRB at 239. Chairman Gould observed that Sec. 455 includes both "actual bias" and "appearance of impropriety" standards, and he agreed with the holding of the Second Circuit that the "appearance of impropriety" standard does not apply to administrative officials. 326 NLRB at 710-711 (citing *Greenberg v. Board of Governors of the Federal Reserve*, 968 F.2d 164, 167 (2d Cir. 1992)). Nevertheless, Chairman Gould stated that he took "the standards applicable to judges seriously," and he expressed confidence that he was acting in conformity with those standards. Id. at 711. In contrast, Member Liebman concluded that both standards set forth in Sec. 455—actual bias and appearance of impropriety—"should apply . . . to officials of administrative agencies, such as Members of the National Labor

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
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> (b) He shall also disqualify himself in the following circumstances:
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> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

As this provision makes clear, scienter is not required for disqualification under Section 455(a), but *is* required for disqualification under Section 455(b)(4), where a conflicting financial interest is involved, as is the case here.

As with the APA, Congress did not prescribe a remedy for violations of the 28 U.S.C. § 455 disqualification requirement. And the Supreme Court has plainly held that vacatur is not automatically required whenever 28 U.S.C. § 455 is violated, even for disqualifications under § 455(a). Rather, "[a]s in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a). It would be equally wrong, however, to adopt an absolute prohibition against any relief in cases involving forgetful judges." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988).

In determining whether a judgment *should* be vacated for a violation of § 455(a), the Court did not say that vacatur was presumptively appropriate. Instead, the Court held that

> it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133,

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Relations Board." 329 NLRB at 998. Member Walther's views were similar to Member Liebman's. See 224 NLRB at 626.

136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (citation omitted).

Liljeberg, supra, 486 U.S at 864. See also *Shell Oil Co. v. United States*, 672 F.3d 1283, 1292-1293 (Fed. Cir. 2012) (recognizing rule, and holding that "mandatory recusal does not require mandatory vacatur"); *Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1420 (Fed. Cir. 1989) (finding vacatur inappropriate).

In the current posture of this case, I need not, and do not, decide whether the *Liljeberg* standard should apply, or whether vacatur would be warranted under that standard if it did apply. For present purposes, it suffices to say that it is far from obvious that the Board should vacate a decision in circumstances under which vacatur would not be required for a decision by a federal judge. If there is room for consideration of "harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance," it is not clear why the same standard would not apply to—or at least be considered for—members of the National Labor Relations Board as well. *Liljeberg*, supra, 486 U.S at 864.[6] Nor is it clear why the Board should, or may, disregard the factors identified by the Supreme Court in *Liljeberg* before invoking "the draconian remedy" of vacatur in this case. *Liljeberg*, supra at 861. The majority's peremptory conclusion that vacatur is "presumptively appropriate," without grappling with these considerations, is wholly unjustified.

CONCLUSION

My colleagues and I agree that safeguarding the integrity of the Board's processes is a

[6] The majority says they choose not to engage with my argument that Sec. 455 may furnish useful guidance here, but in reality they choose to ignore Sec. 455 and precedent applying it altogether. This is despite the fact that Sec. 455 has been applied in cases involving financial conflicts of interest, which this is, and the further fact that it has been invoked by a number of former Board members. They instead declare, without analysis, that the two cases they cite are more relevant. One might wonder: if a presumption in favor of vacatur is not required in order to protect the integrity of the judicial process, it is not clear why such a presumption is required in order to protect the integrity of the Board's processes.

paramount consideration. I disagree, however, with the majority's decision to make vacatur the presumptively appropriate remedy here, and with their unprecedented adoption of this standard in a Notice to Show Cause. This is an issue the Board should decide after the parties have had a chance to brief it, not before. While I join the majority in giving the parties an opportunity to be heard, I cannot agree with their decision to prejudge the standard to be applied, slanting the playing field in advance by making vacatur the presumptively appropriate remedy. Accordingly, in this regard, I respectfully dissent.

Dated, Washington, D.C., January 7, 2022

John F. Ring, Member

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