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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

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<http://help.senate.gov>

October 24, 2019

The Honorable John F. Ring
Chairman
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570

Dear Chairman Ring,

I write to request information regarding the decision by the National Labor Relations Board (NLRB or “Board”) to engage in certain rulemakings, as well as the process of those rulemakings. Specifically, I am requesting information on the rulemakings addressing access to an employer’s private property; the statutory employee status of students performing services at private colleges or universities (“Jurisdiction NPRM”);¹ and the rules governing blocking charges, voluntary recognition, and the formation of representative status in the construction industry (“Representation NPRM”).² I will have more to say on the harm each of the Board’s proposed rules would cause for workers, but I write today to raise my significant concerns regarding the unprecedented nature of the NLRB’s rulemaking agenda and its deleterious effect on the public’s confidence in the integrity of the NLRB. Workers count on the NLRB to protect their rights and they need to know the NLRB is operating in a thorough, deliberate, and impartial way.

Historically, the NLRB has used case-by-case adjudication to set policy. This is in keeping with the NLRB’s tradition of not issuing advisory opinions and instead limiting itself to deciding live controversies presented by impacted parties. In addition, the NLRB historically has limited itself to rulemaking regarding subjects of general applicability³ or in response to legislative changes to the National Labor Relations Act (NLRA).⁴ The NLRB’s present rulemaking agenda constitutes a stark and unprecedented break from both its traditional adjudication-focused practice and its previous rulemaking efforts. Never before has the NLRB used rulemaking to address issues with this level of specificity. Furthermore, it appears the NLRB may be engaging in rulemaking on some subjects, in part, because employees and unions have avoided bringing cases to the NLRB on these particular subjects because of their doubts regarding the NLRB’s impartiality.⁵ It is

¹ Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed. Reg. 49691 (proposed Sept. 23, 2019) (to be codified at 29 C.F.R. pt. 103).

² Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 84 Fed. Reg. 39930 (proposed Aug. 12, 2019) (to be codified at 29 C.F.R. pt. 103).

³ See, e.g. the Board’s jurisdictional standards, 29 C.F.R. § 103.1 (1988), 29 C.F.R. § 103.2 (1975), and the Board’s Representation-Case Procedures, 29 C.F.R. §§ 101, 102, and 103 (2014).

⁴ See the 1974 Health Care Amendments to the NLRA, 29 U.S.C. §§ 151-168 (1974), and 29 C.F.R. § 103 (1989).

⁵ Andrew Wallender and Hassan A. Kanu, *Trump’s Labor Board Has Unions Shelving Complaints*, Bloomberg BNA Daily Labor Report, May 10, 2019, available at <https://news.bloomberglaw.com/daily-labor-report/do-not-publish-trumps-labor-board-scaring-away-union-complaints-9-10>, and Colleen Flaherty, *Realities of Trump-Era*

deeply troubling that the very people whose rights the NLRB is charged with protecting no longer see the NLRB as fulfilling its role.

While the decision to engage in rulemaking lies within the NLRB's discretion,⁶ the circumstances in which the NLRB has chosen to exercise that discretion under your direction as Chairman are troubling. As my colleagues have expressed to you before, there are serious concerns that the NLRB is using rulemaking in some cases as an attempt to avoid compliance with NLRB Members' individual ethics obligations.⁷ As mentioned above, in other cases, it may be using rulemaking to counter the fact that unions and workers have chosen to avoid filing cases with the NLRB. Both situations serve to erode the public's trust in the NLRB as an institution, which is deeply concerning and growing more serious by the day.⁸

Member Lauren McFerran's dissent to the Representation NPRM raises concerns with the integrity of the NLRB process. First, she argues the statistical data the NLRB is using is inaccurate and, therefore, the NLRB is basing the rulemaking on information that does not accurately reflect the factual circumstances at issue.⁹ Second, she argues she was not allowed sufficient time to review the data for fiscal year 2018, which raises substantial doubt as to the NLRB's commitment to hearing out all views.¹⁰ Both of Member McFerran's concerns point to a process that is rushed and lacking in appropriate analysis and input. Unfortunately, rather than take these concerns seriously, the Majority's cursory dismissal raises questions regarding the NLRB's commitment to meaningful analysis and an open-minded process. In addition, in her dissent to the NLRB's Jurisdiction NPRM, Member McFerran urged the Board to hold public hearings "so that the Board can hear directly from the student employees affected by today's proposal"¹¹—but that recommendation has seemingly gone unheeded as well.

NLRB, Inside Higher Ed, Feb. 15, 2018, available at <https://www.insidehighered.com/news/2018/02/15/blow-graduate-student-union-movement-private-campuses-three-would-be-unions-withdraw>.

⁶ 29 U.S.C. § 156, (1947).

⁷ Congress of the United States, Letter to the Honorable John Ring from Senators Elizabeth Warren, Kirsten Gillibrand, and Bernard Sanders, May 29, 2018, available at <https://www.warren.senate.gov/imo/media/doc/2018.05.29%20Letter%20to%20NLRB%20on%20Joint%20Employer%20Rulemaking.pdf>.

⁸ Celine McNicholas, Margaret Poydock, and Lynn Rhinehart, *Unprecedented: The Trump NLRB's Attack on Workers' Rights*, Oct. 16, 2019, available at <https://www.epi.org/files/pdf/177387.pdf>, Ben Penn, Chris Opfer, and Jaclyn Diaz, *Punching In: Rolling Out the Red Carpet for Labor Pick Scalia*, Bloomberg BNA Daily Labor Report, Sept. 23, 2019, available at <https://news.bloomberglaw.com/daily-labor-report/punching-in-rolling-out-the-red-carpet-for-labor-pick-scalia>, Hassan A. Kanu, *NLRB's Emanuel Should Sit Out McDonald's Case, Leaked Records Say*, Bloomberg BNA Daily Labor Report, July 9, 2019, available at <https://news.bloomberglaw.com/daily-labor-report/nlrbs-emanuel-should-sit-out-mcdonalds-case-leaked-records-say>, and Hassan A. Kanu, *Trump Labor Board Chief Targets Agency Watchdog in Complaint*, Bloomberg BNA Daily Labor Report, June 26, 2019, available at <https://news.bloomberglaw.com/daily-labor-report/trump-labor-board-chief-targets-agency-watchdog-in-complaint>. See also Robert Iafolla, *Labor Board Repeatedly Topples Precedent Without Public Input*, Bloomberg BNA Daily Labor Report, July 12, 2019, available at <https://news.bloomberglaw.com/daily-labor-report/labor-board-repeatedly-topples-precedent-without-public-input>.

⁹ 84 Fed. Reg. at 39945-39947.

¹⁰ *Id.* at 39947 fn. 74.

¹¹ 84 Fed. Reg. at 49698.

“The rule-making provisions of [the Administrative Procedure] Act ... were designed to assure fairness and mature consideration of rules of general application.”¹² To that end, NLRB decision makers must remain sufficiently open-minded in their deliberations.¹³ You have previously assured my colleagues that while you were not “devoid of opinions on the subject of the joint-employer standard,” you would nonetheless approach the issue with an open mind.¹⁴ I hope that remains the case in all issues before the Board.

To address these matters, I request the following information on the NLRB’s rulemaking addressing access to an employer’s private property, the Jurisdiction NPRM, and the Representation NRPM no later than November 7, 2019:

1. How did the NLRB decide to engage in rulemaking on these specific subjects? Please provide any memoranda produced relating to this matter.
2. Please provide any communications between NLRB Members and non-NLRB entities or individuals regarding the decision to engage in rulemaking.
3. Please provide an explanation of the NLRB’s legal basis for providing for a bifurcated comment period; the number of requests for comment period extensions the NLRB has received for the Representation NPRM, the Jurisdiction NPRM, or the Joint Employer NPRM; and an explanation of the decision to grant or deny those requests.
4. Does the NLRB plan to hold public hearings on the current NPRMs? If not, please provide an explanation of why the agency feels public hearings are not in the best interest of workers and the integrity of the NLRB’s rulemaking process.
5. Please provide a detailed description of the methods used to compile the data used to justify the Representation NPRM’s proposal regarding the blocking charge policy and an explanation of why the Majority did not provide a detailed response to Member McFerran’s claims to the public with respect to the NLRB’s statistical analysis in the NPRM. In addition, please provide a detailed response to Member McFerran’s assertion that she was not afforded sufficient time to review the data for fiscal year 2018 and an explanation of what measures the NLRB has taken, is taking, or will take to remedy that deficiency in the rulemaking process.

Please contact my staff at Joseph_Shantz@help.senate.gov if you have any questions about this request. Thank you for your attention to this matter and I look forward to your response.

¹² *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969).

¹³ See *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d. Cir. 2011), cert. denied 567 U.S. 951 (2012).

¹⁴ National Labor Relations Board, Letter from Chairman John Ring to Senators Warren, Gillibrand, and Sanders, June 5, 2018, available at https://www.nlr.gov/sites/default/files/attachments/news-story/node-6695/nlr_chairman_provides_response_to_senators_regarding_joint_employer_inquiry.pdf.

Sincerely,



Patty Murray
Ranking Member

Cc: The Honorable Lauren McFerran, Member
The Honorable Marvin E. Kaplan, Member
The Honorable William J. Emanuel, Member
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570