United States Senate
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS
WASHINGTON, DC 20510–6300

June 21, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Bernie Sanders
Chair
U.S. Senate Committee on Health, Education, Labor, and Pensions
Washington, D.C. 20510

Dear Chair Sanders:

I write to request that you hold hearings for President Joe Biden's nominees to the National Labor Relations Board (NLRB or Board): current NLRB Chair Lauren McFerran and Joshua Ditelberg. The NLRB is charged with enforcing federal labor laws without favor to unions, employers, or workers. Under President Biden, however, the NLRB has issued a number of decisions overturning decades of labor law that have tipped the scales exclusively in favor of unions. The Biden administration's strategy of promoting unionization at every turn is deeply concerning. Therefore, it is critical that this Committee exercise its responsibility to hold hearings for Chair McFerran and Mr. Ditelberg before voting on their nominations so that members of this Committee may examine their records. In particular, because Chair McFerran has an extensive NLRB record of pro-union bias and anti-worker opinions, this Committee must give close attention to the consequences of her continued membership on the NLRB.

The National Labor Relations Act of 1935 (NLRA) is clear: employees have the right to "bargain collectively [with their employer] through representatives of their own choosing," to "engage in protected concerted activity for their mutual aid or protection," and "to refrain from any or all such activities" if they so choose.[1] Under Chair McFerran's leadership, the NLRB has strayed from this worker-focused mandate by overturning decades of federal labor law and implementing far-reaching rules singularly focused on advancing the interests and lining the pockets of big labor unions. Instead of advocating for ***all*** workers—regardless of their desire to join a union or to refrain from doing so—this NLRB has shown that its true goal is only protecting unions and the workers who actively wish to join them. Among other things, this Board has deprived workers of relevant information to help them make fully-informed decisions about their representation, villainized and silenced employers during unionization campaigns, and deprived workers of their voice when they decide they no longer wish to give their hard-earned money to an ineffective union. This biased and lopsided enforcement is adverse to the statutory mandate of the NLRA, and this Committee

[1] 29 U.S.C. § 157.

should take seriously its obligations to appropriately and fully vet all Board nominees that may continue this unacceptable trend.

The Democrat Board's Bias In Favor of Unions

Chair McFerran has taken every opportunity to give an advantage to labor unions at each stage of the relationship between unions, workers, and employers. For example, this NLRB has drastically changed the process by which a union can obtain power within a workplace with or without workers being given the opportunity to cast a secret ballot. In *Cemex Construction Materials Pacific*, the Board reversed over 50 years of precedent by creating a structure to impose a union without the need for an election or in contravention of an election in which the union lost.[2] Historically, a showing of union support outside of an election was used only as a threshold to hold an election in the first place. Now, the Board has created an avenue by which unions can contrive the appearance of an unfair election—even before an election is conducted—and persuade the Board to impose the union without giving all employees a chance to have their voices heard at the ballot box.[3] Perhaps more egregiously, *Cemex* also allows the Board to set aside an election in which the union lost, and to act as if the union won based on just one allegation of misconduct during the election.[4] This extra-statutory procedure to force unionization stands in direct contravention to the will of Congress and decades of labor law,[5] and actively exposes workers to unions' various and unchecked intimidation tactics designed to deprive workers of their voice.

Even when an employer petitions for an election, Chair McFerran's Board has made it increasingly difficult for workers to receive all the relevant information they need to make such an important choice. Since assuming a majority on the NLRB, this Board has (1) dramatically decreased the amount of time between when a petition is filed and an election is held,[6] and (2) silenced employers that speak out against the need for a union in the first place.[7] The decrease in campaign time deprives employees of the opportunity to hear from both the union and employer about the potential benefits and pitfalls of unionization, which is exacerbated the Board's decision to muzzle employers during the little campaigning they are permitted to do.[8]

Finally, the NLRB is currently taking steps to make it impossible for workers to ever leave a union that may have proven ineffective or costly without also leaving their job. Chair McFerran's NLRB has proposed a rule that would make it infinitely harder for workers who are not satisfied with

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[2] *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023).
[3] *Id.* at 43 ("[W]hen a union has a card majority and the employer commits a critical-period unfair labor practice that would require the results of an election to be set aside, a bargaining order is the first and only option. If the election has not yet been held, it will not be held; if it has, there will be no rerun election. . . depriving employees of a final say in a secret-ballot election and increasing the likelihood that union representation will be forced on employees against the will of the unit majority.")
[4] *Id.*
[5] *See id.* at 42 (Kaplan dissenting) ("Moreover, although Congress, in 1947, decided not to do away with card-based recognition altogether, it expressed a policy in favor of Board-conducted elections by incentivizing unions to choose that option by reserving certain benefits for unions that 'survive[] the crucible of a secret ballot election.'")
[6] 29 C.F.R. pt. 102 (2023)
[7] *See Amazon.com Srvs. LLC*, 2024 NLRB LEXIS 193 (NLRB ALJ May 1, 2024).
[8] *See Excelsior Underwear Inc.*, 156 NLRB 1236, 1240 (1966) ("[A]n employee who has had an effective opportunity [**209] to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice."); *Amazon.com Srvs. LLC*, 2024 NLRB LEXIS 193 (NLRB ALJ May 1, 2024).

their union to remove that union as their bargaining representative.[9] Instead, the Board's proposed rule would allow unions to avoid being fired by the workers they represent simply by filing frivolous unfair labor charges to block workers from ever having the opportunity to vote on removal. Workers, however, have a statutory right to "refrain" from being a part of any union if they so choose, which makes this proposed rule directly contrary to the text and spirit of the NLRA.[10]

Overturning Precedent That Maintained a Harassment-Free Workplace

Under Chair McFerran's leadership, the NLRB has also made it harder for employers to maintain civil and orderly workplaces through their rules and policies. In *Stericycle Inc.*, the Democrat Board majority set out a new standard for determining whether a workplace rule is lawful under the NLRA, and decreed that an employer's rule is presumably unlawful if it ***could*** be interpreted to limit an employee's rights.[11] In other words, even when a rule is neither explicitly intended to nor would actually discourage protected conduct, the NLRB may still consider the rule unlawful because a unionizing employee ***might*** perceive it that way. Previous Board decisions show clear evidence of what the fallout of this decision will be. In various egregious decisions, the NLRB—including Chair McFerran—have required that employers stand blithely by while employees on the picket line use vile, racist, and hostile language against other employees and managers.[12] This Committee should be given the opportunity to question Chair McFerran about whether and why she believes unlawfully harassing conduct is acceptable at work simply because the speaker expresses pro-union sentiments.

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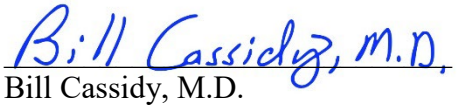
Chair McFerran's tenure on the Board, including her time as chair, has predictably been devoid of the consistent and fair treatment toward all parties required under the law. Her clear preference for unions, bias against employers, and glaring indifference toward the rights of workers who do not actively want a labor union to represent them requires accountability. This Committee should come together to question Chair McFerran about her tenure on the Board, as well as to question Mr. Ditelberg about his qualifications and his beliefs about the role and purpose of the NLRB.

For these reasons, I strongly urge you to hold hearings for Chair McFerran's and Mr. Ditelberg's nominations to the NLRB so that members of this Committee can question them about these issues and others. Thank you for your prompt attention to this matter.

[9] Representation-Case Procedures, 88 Fed. Reg. 58076 (Dec. 26, 2023) (to be codified at 29 C.F.R. pt. 103).
[10] 29 U.S.C. § 157.
[11] *Stericycle, Inc.*, 372 NLRB No. 113 (2023).
[12] *See e.g.*, *Plaza Auto Center, Inc.*, 360 NLRB 972, 977-980 (2014); *Pier Sixty, LLC*, 362 NLRB 505, 506-508 (2015); *Airo Die Casting, Inc.*, 347 NLRB 810, 812 (2006); *Cooper Tire & Rubber Co.*, 363 NLRB 1952 (2016).

Sincerely,



Bill Cassidy, M.D.
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