United States Government
NATIONAL LABOR RELATIONS BOARD
Office of the Chairman
1015 Half Street, SE
Washington, DC 20570

November 8, 2019

The Honorable Patty Murray
Ranking Member
U.S. Senate Committee on Health, Education, Labor, and Pensions
154 Russell Senate Office Building
Washington, DC 20510

Dear Ranking Member Murray:

I write in response to your letter dated October 24, 2019, regarding ongoing rulemakings at the National Labor Relations Board (NLRB or Board). The Board's majority is energized and enthusiastic about its rulemaking agenda. As I have explained to the Committee and staff previously, we believe rulemaking provides an opportunity to enforce the National Labor Relations Act (NLRA) in a clear, predictable and efficient manner.

Your letter raises concerns about the Board's rulemaking, which Section 6 of the NLRA authorizes the Board to conduct, and which has been conducted pursuant to the requirements of the Administrative Procedure Act (APA). You state that you have concerns about the unprecedented nature of the NLRB's rulemaking agenda. If I understand your letter correctly, you are troubled by the subjects of the Board's rulemaking as well as the process being utilized, and you believe rulemaking is having a deleterious effect on the public's confidence in the NLRB. Specifically, you express concern that the NLRB's rulemaking is not being conducted in a thorough, deliberate, and impartial manner. I agree that the manner in which rulemaking is conducted is a serious issue, and if rulemaking is conducted in a manner that is not thorough, deliberate, and impartial, it could undermine confidence in the NLRB. You also refer to concerns that rulemaking represents an attempt by individual Board members to avoid compliance with ethics obligations. I appreciate the opportunity to respond to each of these concerns.

The questions you raise regarding impartiality are critically important, since it goes without saying that our stakeholders must have confidence in the Board and its processes. However, I categorically reject any suggestion that there are ethics problems at the NLRB or that the Board has undertaken rulemaking to enable individual members to avoid compliance with their ethical obligations. These are baseless claims, which I have already addressed,[1] and the partisan press reports cited in your letter, based as they are on incomplete information, do not make them any more valid. To the contrary, the NLRB maintains and follows a rigorous process to ensure there

[1] See, e.g., Chairman Ring letter to Senators Gillibrand, Sanders, and Warren, June 5, 2018; Chairman Ring letter to Senator Murray and Representative Scott, Oct. 23, 2018; Chairman Ring letter to Representatives DeLauro and Scott, January 17, 2019.

are no conflicts of interest, and I, my colleagues, and our staffs strictly adhere to all ethics requirements. As you know, the Board has conducted a comprehensive internal review of its ethics and recusal processes, the final report of which will issue in the coming weeks. The review, which included benchmarking against the standards and practices of other federal agencies, confirmed that the Board's internal ethics and recusal safeguards are strong. We also identified particular areas for improvement. I am confident the report will assist in maintaining confidence in the Board's impartiality.

With respect to the other impartiality concerns raised in your letter, you also assert that the Board's rulemaking agenda represents a break with historical practice. I acknowledge that the current Board majority is engaging in more rulemaking than have past Board majorities. We have been transparent about our reasons for doing so, and I will not repeat those reasons here. I must disagree, however, with your statement that the Board has never engaged in rulemaking to address issues with "this level of specificity." In 2011, for instance, the Board engaged in rulemaking that would have required all private-sector employers to post an "employee rights notice."[2] That proposed rule would have imposed a very specific duty on approximately six million employers. In and of itself, however, the level of specificity in the subject addressed in a rulemaking is immaterial. As you acknowledge, and as the Supreme Court held 45 years ago, the NLRB has broad discretion to engage in rulemaking.[3]

Rather, the concern you express regarding the subjects addressed in recent rulemakings appears to be related to another concern you raise: that the NLRB may be engaging in rulemaking because unions and employees are not bringing cases "because of their doubts regarding the NLRB's impartiality." That is one way to put it. Another would be that some parties may be choosing not to bring cases out of concern that an impartial assessment might not be to their liking. I cannot control parties' decisions about whether to pursue a case before the Board or how parties may perceive the merits of their particular matter. I can only assure you that Board members take their responsibility to consider each case with an open mind based on the facts presented with the utmost seriousness, and that the Board's rulemaking is based on the topics that the Board believes best suited for rulemaking. Again, as the Supreme Court concluded in 1974, "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."[4]

Regarding your concerns about the thoroughness of the NLRB's rulemaking process, the Board has worked and is working diligently to ensure that the views of all interested parties are carefully considered. As we have previously reported, the NLRB received nearly 29,000 comments for the rulemaking on the joint-employer standard. To ensure that the maximum

[2] See 76 Fed. Reg. 54006.
[3] See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (holding that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion").
[4] Id.

number of people had an opportunity to participate in this rulemaking, we extended the comment period three times for a total of 76 additional days. This includes an extension the Board granted following the D.C. Circuit's decision in *Browning-Ferris*[5] in order to permit the public an opportunity to address that decision. Likewise, the Board has liberally granted extensions to ensure thorough participation in other rulemaking efforts. This includes an additional 60 days for comments to be submitted regarding the proposed Election Protection rule.

The NLRB has taken additional steps to ensure full consideration of all views in rulemaking. As your letter notes, the Board has allowed for a bifurcated comment period, which affords interested parties an opportunity to reply to comments submitted by other commenters. Although the APA does not require this reply period, the Board has adopted this bifurcated process to give itself the best opportunity to gain all information necessary to make an informed decision. Your letter also notes the dissenting opinions contained in our rulemaking. Permitting dissenting opinions in rulemaking is also not required by the APA, but the Board has long done so to ensure consideration of contrary viewpoints. Responding to a dissenting opinion is not necessary in order to consider the dissenter's views in the rulemaking, and the lack of a response or making only a brief response should not be viewed as a lack of commitment to meaningful analysis or an open-minded process. Additionally, I can assure you that our dissenting colleague, Member Lauren McFerran, was provided the time and data she agreed to in connection with the Election Protection rulemaking. It would be inappropriate to comment further about the internal deliberations of an ongoing rulemaking. I will point out that any of the concerns you raise about any of the rulemakings can (and should) be addressed by commenters in connection with that particular proposed rule, and the APA provides for a legal challenge in the event there is a perceived violation.

You also raised the question of public hearings for rulemakings. As you may know, the APA does not require public hearings. Nevertheless, the Board understands the value of public hearings and would welcome the opportunity for hearings in appropriate circumstances. In its experience, however, the Board has seen public hearings often devolve into nothing more than individuals reading their already-submitted written public comments. In those circumstances, the Board gains little additional information from a public hearing while expending significant time and resources to hold it.

Finally, addressing the concern over whether the NLRB's rulemaking is operating in a deliberate manner, I can assure you that the Board is conducting all of its rulemaking pursuant to the strict requirements of the APA, which governs how administrative agencies of the federal government may propose and establish regulations. As you know, the APA creates rigorous procedures that federal agencies must follow, and it vests oversight of agency actions in the federal courts. In addition to ensuring maximum consideration of all viewpoints, including a dissenting

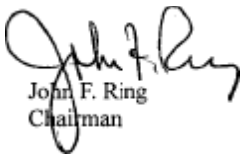
[5] *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

colleague's, strict adherence to the APA's requirements ensures that our rulemaking is conducted in a deliberate manner.

We are compiling the information that you have requested and expect to have it to you within two weeks. In the meantime, I trust this response addresses your concerns on this important subject.

If you or your staff have any further questions or concerns, please do not hesitate to contact me or Edwin Egee in the Office of Congressional and Public Affairs at (202) 273-1991.

Sincerely,



John F. Ring
Chairman