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November 18, 2011

The Honorable Mark G. Pearce
Chairman
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Dear Chairman Pearce:

I am troubled by new information which has come to light regarding your response to a legitimate oversight inquiry into the development and current status of the Board's proposed changes to the union election process. This new information calls into question the validity of your response to this committee and your regard for the oversight authority of Congress.

On June 22, 2011, the National Labor Relations Board (NLRB) published a proposed regulation that could substantially shorten the time between the filing of the petition for an election and the election, as well as limit the opportunity for a full evidentiary hearing or Board review of contested issues, including the composition of the bargaining unit.¹ At the close of the comment period, more than 65,000 public submissions had been received on the proposed rule.²

To better understand the process and timeline for the issuance of the final rule, on October 27, 2011, I asked that you produce information on the Board's process, a timeline of past and planned Board actions on the final rule, information on NLRB staff working on the rule and restrictions on staff allocation, and a breakdown of decisions issued by the board from January 2010 to October 2011.³

Your response, dated November 10, 2011, was grossly incomplete and, apparently, misleading. It failed to provide the list of NLRB staff who were or are currently working on the final rule. You

¹ 76 FR 36812.

² Regulations.gov, NLRB-2011-0002, RIN 3142-AA08, available at <http://www.regulations.gov/#!docketDetail;dt=FR%252BPR%252BN%252BO%252BSR;pp=10;po=0;D=NLRB-2011-0002> (last visited, 10/27/11).

³ October 27, 2011, Letter from the Honorable John Kline, Chairman, House Education and the Workforce Committee to the Honorable Mark G. Pearce, Chairman, National Labor Relations Board.

also failed to provide the dates upon which the Board plans to take future actions regarding the rulemaking.

More troubling, though, is the way you avoided answering our request. The November 10, 2011, letter stated that “no specific timetable has been established at this time” with respect to completion of the final rule.⁴ The letter also states that the dates upon which the Board will vote on how to proceed on final rule, circulation of the draft final rule to Board Members, and the final rule will be published in Federal Register are “unknown.”⁵ Omitted from the November 10 response is the fact that there is indeed a timeline for anticipated actions.⁶ According to Member Hayes, you intend to issue the final rule “before Member Becker’s recess appointment expires at the end of the current Congressional session.”⁷ Further, according to Member Hayes, you expressed this fact to him on November 10, the same day the committee received your response.⁸ Needless to say, Member Hayes’s assertions are extremely troubling, as they would suggest you deliberately withheld information from the committee, if not knowingly provided the committee with misleading information.

Additionally, you stated that “neither the National Labor Relations Board nor the Board’s own rules and Regulations and Statement of Procedure establish any procedures or timetables for rulemaking by the Board.”⁹ However, according to Member Hayes, you have abandoned normal procedures in the drafting of the rule and intend to ignore precedent when you issue the final rule.¹⁰ According to Member Hayes, you have excluded him from the rulemaking process. The sole exception being a “take-it-or-leave it compromise” with a 72 hour deadline for a response.¹¹ Given the time left in Member Becker’s term, we must agree with Member Hayes that you intend to ignore Executive Secretary Memorandum No. 01-01, which gives the minority Member 90 days to draft a dissent.¹² In addition, you apparently have decided to ignore tradition and overrule precedent without a three-member majority of the Board votes to take this action.¹³ Clearly, you and Member Becker are intent on moving this rule regardless of the long-standing rules and traditions of the NLRB.

Finally, it appears your actions have not been limited to the June 22, 2011, proposed rulemaking. According to Member Hayes, you have also bound him to an “unprecedented ‘emergency’ revision of the ordinary internal rules for processing all pending cases from now until the end of Member Becker’s term.”¹⁴ It is Member Hayes’s opinion that this will deprive him of “any meaningful opportunity to consider the majority position, much less prepare a response, in any number of cases,” denying the public an opportunity to receive an informed dissent.¹⁵

⁴ November 10, 2011, Letter from William B. Cowen to the Honorable John Kline, Chairman, House Committee on Education and the Workforce.

⁵ *Id.*

⁶ November 18, 2011, Letter from the Honorable Brian E. Hayes to the Honorable John Kline, Chairman, House Committee on Education and the Workforce.

⁷ *Id.*

⁸ *Id.*

⁹ November 10, 2011, Letter from William B. Cowen to the Honorable John Kline, Chairman, House Committee on Education and the Workforce.

¹⁰ November 18, 2011, Letter from the Honorable Brian E. Hayes to the Honorable John Kline, Chairman, House Committee on Education and the Workforce.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

To ensure the ongoing integrity of rulemaking and future actions by the Board, provide the following no later than November 29, 2011:

1. A list of NLRB staff who were or are currently working on the final rule, including the dates of their participation, the office in which they work, their general duties, the dates of their participation, and the work they are doing or did on the rule.
2. All documents and communications relating to the timing of the proposed and final regulation proposed on June 22, 2011.
3. All documents and communications addressing Executive Secretary Memorandum No. 01-01's application to rulemakings.
4. Your position as to whether Executive Secretary Memorandum No. 01-01 applies to the June 22, 2011 rulemaking and why it does or does not.
5. All documents and communications addressing the Board's practice not to overrule extant law without the affirmative votes of 3 Board members.
6. Your position as to whether the Board's practice not to overrule extant law without the affirmative votes of 3 Board members applies to the June 22, 2011 rulemaking and why it does or does not.
7. All documents and communications relating to the "emergency" revision of the ordinary internal rules for processing all pending cases, identify any other circumstances in which similar procedures have been implemented, and the legal basis for this revision.

If you have any questions regarding this request, please contact Marvin Kaplan, House Education and the Workforce Committee, at (202) 225-7101.

Sincerely,



JOHN KLINE

Chairman

Committee on Education and the Workforce

cc: The Honorable George Miller, Senior Democratic Member, Education and the Workforce Committee

cc: The Honorable Brian Hayes, National Labor Relations Board Member

cc: Mr. Craig Becker, National Labor Relations Board Member

cc: Mr. Lafe Solomon, Acting National Labor Relations Board General Counsel