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The Honorable John Kline, Chairman
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515-6100

November 18, 2011

Dear Chairman Kline:

I am in receipt of your letter to the National Labor Relations Board dated October 27, 2011, in which you requested information regarding the Board's current rule-making activity. Specifically, your letter sought information regarding the posture of the Board's current proposed rule that would implement sweeping changes to the NLRB's Representation Case Procedures. Those proposed changes were contained in a Notice of Proposed Rule-Making published in the Federal Register on June 22, 2011.¹

The Board's Solicitor answered your correspondence in a letter dated November 10. As I did not believe the November 10 correspondence to be fully responsive, and believed it to be misleading, I declined to approve its content.

The central fact omitted from the November 10 response letter is that *there is a timeline for anticipated actions*. My colleagues are committed to issuing a final R Case Rule before Member Becker's recess appointment expires at the end of the current Congressional session. Indeed, I was advised of this fact by the Board's Chairman on the very day that the response letter was forwarded to your office. I was further advised that in the event I did not agree with the final R Case Rule, it would, nonetheless, be approved and published based on their two-member vote. Moreover, if, as will necessarily be the case, I am not afforded the requisite opportunity to review and draft a dissent to the rule, I was advised that I would be limited to doing so after publication of the rule. As more fully explicated below, these actions would contravene long-standing Board tradition and the Board's own internal operating rules. These rules and traditions have been established to protect the legitimacy of the Board. They cannot, in

¹ 76 FR 36812.

my view, simply be cast aside in pursuit of a singular policy agenda without doing irreparable harm to the Board's legitimacy. Further, absent my agreement to delegate decisional authority on this matter to a group of three Board members, I have substantial doubts about the legal viability of my colleagues' proposed course of action in light of the Supreme Court's *New Process* decision² and the representations made by the Board to the Court during the course of that litigation.³

Let me briefly outline the specifics of my concern. As you are aware, prior to the expiration of former Chairman Liebman's term, the 3-member Democratic majority took a number of actions to which I dissented. Among those actions was the June 22 Notice of Proposed Rulemaking that contemplates an unprecedented and sweeping series of changes to the Board's representation election procedures.⁴ The period for written comments and replies to comments closed on September 6. The website source for reporting such comments indicates that 65,957 comments were filed.

In my dissent to the Notice of Proposed Rulemaking, I criticized the majority's use of "a rulemaking process that is opaque, exclusionary, and adversarial," in contravention of the spirit of the Administrative Procedure Act, the Government in Sunshine Act, and President Obama's January 21, 2009, Memorandum on Transparency and Open Government, and in sharp contrast to the Board's procedural practice during the 1987 – 1989 rulemaking for appropriate bargaining units in the health care industry. That criticism apparently made no impression on my colleagues, who have continued this process in the same manner, and without my participation; and, who have now made it unequivocally clear that they intend to publish a final rule before the expiration of Member Becker's appointment without regard to Board tradition or rule. Utilizing a team of attorneys and examiners from their own staffs, the office of the Executive Secretary, various offices of the Acting General Counsel, and regional offices, quite possibly in violation of Section 4(a) of the Act, they are drafting a final rule with responses to comments filed without my participation or input.⁵ Until this week, my colleagues and the team of attorneys that they have enlisted from throughout the Agency have shared absolutely nothing with me or my staff save for a single CD which merely sorts or "codes" the over 65,000 public comments in differing degrees of support or opposition to the rule. There have been no comprehensive summaries of

² 130 S.Ct. 2635 (2010).

³ Brief of NLRB p. 21 n. 16, citing, inter alia, *G. Heileman Brewing Co.*, 290 N.L.R.B. 991, 991 & n.1 (1988), enforced, 879 F.2d 1526 (7th Cir. 1989) 2010 WL 383618.

⁴ 76 FR 36812.

⁵ I note that my colleagues did not provide you with a requested list of Board staff involved in this process, although that information is available to them, but not to me. I note as well the amount of time spent by Board staff on rulemaking to expedite the conduct of representation elections has had a serious adverse impact on the Board's ability to process pending unfair labor practice and representation cases. The number of final decisions issued in September was far below the norm for that month, and current figures for October indicate a continuing diminution in productivity. My colleagues have attempted to disguise this fact by providing you with their Exhibit 3, inflating the number of monthly Board decisions by adding actions that are not traditionally included in Board productivity reports, such as the November 8, 2011 press release for case production in FY 2011. See <http://www.nlr.gov>. Still, even by these misleadingly inflated numbers, the adverse impact of the use of staff on rulemaking is demonstrable.

the over 65,000 public comments circulated or shared with my staff, no drafts of the proposed responses to the comments circulated or shared, and, with one exception, no indication of what portions of the 185 page proposed rule my colleagues intend to include, exclude, modify or add to their draft of the final rule. That exception involved a take-it-or-leave it “compromise proposal” presented to me Tuesday, with a deadline for acceptance by noon today. Apart from compelling my agreement to the compromise rule itself, my colleagues’ proposal would also have bound me 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. In effect, the “emergency” procedures would deprive me of any meaningful opportunity to consider the majority position, much less prepare a response, in any number of cases. This process, or, more accurately, lack of process, is so diametrically at odds with traditional decisional processes of the Board that it quite frankly defies description.

My colleagues’ procedural preferences bear an unfortunate resemblance to those of the Democratic majority at the National Mediation Board in changing the majority vote requirement for elections conducted by that agency. Indeed, NMB Chairman Elizabeth Dougherty sent a letter to Republican Senators on the Health, Education, Labor, and Pensions Committee objecting to her two colleagues’ resort to an arbitrary, exclusionary, and rushed rulemaking process.⁶ Like Chairman Dougherty, I would under normal circumstances prefer not to discuss Board process so publicly. However, the circumstances of the present NLRB internal process are even more egregious than in the NMB situation and compel my public protest.

First, and perhaps of greatest institutional significance, is the fact that if my colleagues’ final rule resembles the proposed rule---and I reasonably expect that it will---they will be overruling Board rules and precedent, including precedent established in case-by-case adjudication. For decades, it has been the Board’s unwavering practice not to overrule extant law without the affirmative votes of 3 Board members, regardless of the total number of sitting members. That practice was recently reaffirmed both in decisional law⁷ and in on-the-record representations to Congress by former Chairman Liebman.⁸ Now, however, present Chairman Pearce has made clear to me that he intends to issue a final rule even if it is approved by only 2 Board members. To the extent that the Chairman believes the undisputed consistent practice of requiring 3 votes to change Board law somehow should not apply to rulemaking, I strongly believe he is mistaken. There is no basis whatsoever for distinguishing the Board’s practice of requiring 3 affirmative votes on a matter of such magnitude on the pretext that this practice has developed in adjudicatory proceedings. The notion that we would not change precedent in the absence of three affirmative votes to do so in a case that may potentially affect only a handful litigants, but would freely do so in a matter affecting every single employer, employee and labor organization that utilizes our representation case procedures cannot be seriously countenanced

⁶ November 2, 2009, Letter from NMB Chairman Dougherty to Republican Members of the Senate Health, Education, Labor, and Pensions Committee.

⁷ Hacienda Resort Hotel and Casino, 355 NLRB No. 154 (Aug. 27, 2010).

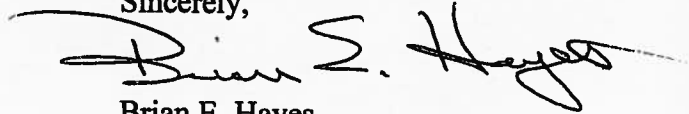
⁸ February 25, 2011, Letter from NLRB Chairman Liebman to The Honorable Phil Roe, Chairman, House Subcommittee on Health, Education, Labor, and Pensions.

Second, beyond my colleagues' intent to ignore the Board's decades-old majoritarian requirement, they also plainly intend to contravene the Board's own internal rules regarding the circulation and issuance of majority and dissenting opinions. The most recent expression of that rule, approved by Board vote, is set forth in Executive Secretary Memorandum No. 01-01. That rule provides that when a circulating draft has been approved by two Members of a panel, the remaining Member will act on the matter within 90 days. Only if the minority Member fails to circulate a dissent within the 90 day period can the majority publish and issue without a dissent. Again, while the rule references "cases," there is no rational basis for not applying it to substantive rulemaking as well. Further, the rule has never been enforced, even in circumstances where individual Board members took over a year to circulate a response to a consensus majority opinion. Since no draft of the final rule has circulated as of yet, and since Member Becker's recess appointment will expire in less than 90 days, it is quite clear that the two Board members nevertheless intend to breach the Board's internal operating rule and, for the first time in the history of this agency, not allow the requisite time for preparing or circulating a dissent. Indeed, as noted above, I have been specifically advised of this fact both with respect to publication of a final rule and with respect to a number of significant cases currently pending before the Board.

Finally, I note that my colleagues' rush to final rulemaking judgment is taken in the face of active consideration of H.R. 3094, provisions of which are in direct conflict with the Board's proposed rule. Although I make no comment concerning the merits of this legislative proposal, I believe its pendency provides yet another reason why my two colleagues should suspend their rulemaking efforts.

Thank you for your consideration of my comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian E. Hayes". The signature is fluid and cursive, with a long horizontal stroke at the end.

Brian E. Hayes
NLRB Board Member

Cc: The Honorable George Miller, Ranking Member, House Education and the Workforce Committee