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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

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July 15, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Lauren McFerran
Chair
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

Dear Chair McFerran:

Over the past three years, the National Labor Relations Board (NLRB or Board) has shown a troubling pattern of politically-motivated decision making that not only tip the scales in favor of unions, but undermine the legitimacy and fairness of the NLRB's election system. I write to express my concerns about this trend, and to demand answers regarding the Board's failure to carry out apolitical, fair, and consistent elections during your tenure as Chair of the NLRB.

Since you became Chair in 2021, the NLRB has routinely ignored reports and findings that its election processes are tainted by political interference, inconsistent administration, and nonsensical decisions in light of existing law. For example, in 2023, the NLRB's Office of Inspector General (OIG) issued a report detailing "gross mismanagement" and biased enforcement in mail ballot elections in Region 14 (St. Louis, Missouri).¹ Information provided to the OIG by a whistleblower showed that the Board conducted representation elections with an eye toward ensuring union victories in 33 elections in 15 different regions.² Most egregious among these was a substantiated allegation that NLRB regional employees communicated directly with union officials during the course of a mail ballot election and made every effort to ensure the union's preferred voters received duplicate and triplicate ballots, and that they returned those ballots to be counted for the union.³

¹ See Memorandum from David Berry, NLRB Inspector General, to Jennifer Abruzzo, NLRB General Counsel, on the Report of Investigation – OIG-I-596, at 10 (July 8, 2023); *Starbucks Corp.*, Case 03-RC-285929 (NLRB May 18, 2022) (Region 3 report on objections, order setting aside election and order directing rerun election); *Starbucks Corp.*, No. 14-RC-289926, at 9 (NLRB Feb. 24, 2023) (hearing officer's report and recommendations on objections).

² Letter from Virginia Foxx, Chair, U.S. House Committee on Education and the Workforce, to Lauren McFerran, Chair, National Labor Relations Board, and Jennifer A. Abruzzo, General Counsel, National Labor Relations Board (Aug. 14, 2023),

https://edworkforce.house.gov/uploadedfiles/08.14.23_letter_to_nlr_re_nlr_personnel_misconduct.pdf.

³ See Memorandum from David Berry, NLRB Inspector General, to Jennifer Abruzzo, NLRB General Counsel, on the Report of Investigation – OIG-I-596 (July 8, 2023).

After learning of the OIG's report, I sent a letter to NLRB General Counsel Jennifer Abruzzo asking for information on any and all steps the Board is taking to ensure its elections were being run in a fair, apolitical manner. General Counsel Abruzzo was not forthcoming about any steps taken to remedy this unacceptable conduct. Even more disappointing is that the Board does not appear to have taken any steps to shore up its election processes to ensure its elections are not only fair in practice, but also in perception.

On June 6, the NLRB OIG released yet another report detailing deficiencies in the NLRB's mail ballot election system, this time highlighting the Board's incompetence in making sure all voters are able to vote.⁴ The OIG made three primary findings: (1) the NLRB does not consistently comply with its own mail ballot election procedures, (2) the Board lacks sufficient internal controls over the mail ballot process, and (3) the NLRB fails to ensure that all voters receive and timely return their ballots. In other words, because the rules are inconsistently applied and there is no guarantee that all voters have the opportunity to vote, the NLRB is failing to properly administer mail ballot elections.

In support of its conclusion, the OIG makes several key findings. First, NLRB employees routinely neglect to properly document important information in the record—if they document it at all—which makes objections or appeals futile when based on specific conduct during the course of the election. Second, the OIG found that a staggering 49 percent of cases audited had instances of at least one voter not receiving a ballot.⁵ In fact, in three-quarters of the cases in which a ballot was returned as “undeliverable,” there was no documentation to show that the Board made any effort to get a duplicate ballot to that voter.⁶ This overt indifference to one of the NLRB's core functions is wholly unacceptable and reflects poorly on your leadership of the Board. If voters cannot be assured an opportunity to make their voice heard in something as important as whether to join—and give their hard-earned money to—a union, the NLRB is failing at its job.

The NLRB's refusal to take these reports and allegations of mismanagement seriously under your leadership is a miscarriage of justice. Instead, the Board has chosen to either downplay the OIG's adverse findings as inconsequential, or decided that its own mistakes during an election are not material to the fairness of that election.⁷ In *The Healing Healthcare 3 Inc.*—involving the same marijuana company for which a D.C. Circuit judge separately condemned the Board for forcing a “criminal enterprise . . . to pay a drug dealer to sell illegal drugs”⁸—the Board abused its own election rules by failing to notify employees of the date on which the election ended in the Notice

⁴ NLRB OIG, *Mail Ballot Elections*, Report No. OIG-AMR-101-24-03 (June 6, 2024), <https://www.nlr.gov/sites/default/files/attachments/pages/node-85/mail-balot-elections-oig-amr-101-24-03.pdf>.

⁵ *Id.* at 22 (“After reviewing the case files in NxGen, we found that there were 38 cases (49 percent) with instances of issues with ballots not being received by voters.”).

⁶ *Id.* (“For the 20 cases with ballots returned undeliverable, we found 26 instances in 15 cases that lacked documentation of a duplicate ballot being sent.”).

⁷ See *The Healing Healthcare 3, Inc. d/b/a Curaleaf Camelback Dispensary*, Board Decision, Case No. 28-RC-296310 (July 27, 2023), <https://apps.nlr.gov/link/document.aspx/09031d4583af5c1e>.

⁸ *Absolute Healthcare, d/b/a Curaleaf Arizona v. N.L.R.B.*, Case Nos. 22-1320, 23-1009, 2024 U.S. App. LEXIS 13072 (D.C. Cir. May 31, 2024) (Walker, J. concurring) (Consider the facts of this case. The NLRB ordered a criminal enterprise called Curaleaf Gilbert to pay a drug dealer to sell illegal drugs. That is a curious order from the branch of government tasked with faithfully executing federal law.).

of Election, the primary tool “used to inform eligible voters of the balloting details.”⁹ The Board ultimately counted less than half of the voting-eligible employees’ ballots in this election, and the employer’s objections give reason to believe that the Board’s error, and potential mailing irregularities, resulted in some of those voters being disenfranchised.¹⁰ Nonetheless, the Board refused to correct this mistake, and instead insisted that the employer bargain with the union.¹¹

These reports and allegations of repeated impropriety within NLRB elections are deeply concerning. The NLRB is statutorily charged with enforcing the National Labor Relations Act without favor to unions, employers, or workers. This Board, however, is uninterested in neutrality; instead, it has spent three years issuing decisions and conducting elections in a way that ensure big labor unions get a leg up in the process. This trend of politicized mismanagement and lopsided enforcement is unacceptable, and requires your prompt and thoughtful attention to ensure that all parties before the Board—workers, unions, and employers alike—receive the benefit of unbiased and fair enforcement. Accordingly, in an effort to confirm that necessary changes are made, I request that you answer the following questions, on a question-by-question basis, by July 30, 2024:

1. What actions have you or the NLRB taken to ensure all of the NLRB’s election processes, including the mail ballot election process, are administered so that all voters receive and are able to timely return their ballot?
2. Detail all training provided to regional staff to ensure they are aware of, and are required to follow, all internal rules and regulations to make certain no voters are disenfranchised?
 - a. If the NLRB uses documents as part of this training, produce a copy of all training documents provided to regional staff related to voter enfranchisement and communications with voters during the election period.
3. Will the Board require employees working in the regions found by the OIG to have not performed all of their required tasks during the course of an election to receive additional training on manual, mail ballot, and/or hybrid election protocols?
 - a. If so, provide a list of all regions in which you have conducted or plan to conduct these retrainings and a copy of all training documents provided to those employees.
 - b. If not, why does the Board not feel additional training is necessary in light of the OIG’s report on the pervasiveness of employees who do not follow the NLRB’s election procedures?

⁹ See *The Healing Healthcare 3, Inc. d/b/a Curaleaf Camelback Dispensary*, Request for Review of Decision and Direction of Election, Case No. 28-RC-296310 (June 8, 2023), <https://apps.nlr.gov/link/document.aspx/09031d4583a9d8ee>; NLRB Casehandling Manual (Part 2), § 11314.

¹⁰ See *The Healing Healthcare 3, Inc. d/b/a Curaleaf Camelback Dispensary*, Request for Review of Decision and Direction of Election, at 16, Case No. 28-RC-296310 (June 8, 2023), <https://apps.nlr.gov/link/document.aspx/09031d4583a9d8ee>.

¹¹ See *The Healing Healthcare 3, Inc. d/b/a Curaleaf Camelback Dispensary*, Board Decision, Case No. 28-RC-296310 (July 27, 2023), <https://apps.nlr.gov/link/document.aspx/09031d4583af5c1e>.

4. Does the NLRB plan to investigate whether the practices detailed in the OIG's June 6 report pervade all NLRB regions? If so, what form will that investigation take, and how long do you expect it will last?
5. Provide all communications between you or your office and either the NLRB General Counsel or her office, or any NLRB regional office regarding:
 - a. The OIG's findings of inconsistent application of election rules,
 - b. Changes to the Board's protocol for administering manual, mail ballot, or hybrid elections, or
 - c. The broad politicization of unionization elections as identified in the OIG's July 8, 2023 report.

Thank you for your prompt attention to this important matter.

Sincerely,



Bill Cassidy, M.D.

Ranking Member

U.S. Senate Committee on Health,
Education, Labor, and Pensions