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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

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March 7, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Lauren M. McFerran
Chairman
National Labor Relations Board

The Honorable Jennifer A. Abruzzo
General Counsel
Office of the General Counsel
National Labor Relations Board

Dear Chairman McFerran and General Counsel Abruzzo:

I write regarding the National Labor Relations Board's (NLRB or "the Board") possible misconduct and lack of neutrality in litigation against prominent employers. While no company is exempt from the National Labor Relations Act's (NLRA) obligations, nor should any company be unfairly targeted and intimidated by a regulatory board. The Board's recent actions in representation cases, to say nothing of the sheer volume of litigation currently directed at fewer than a handful of employers, indicates a disturbing pattern of politicized targeting that poses a direct affront to principles of procedural due process and impartial enforcement.

I have received alarming reports of Board personnel and employees coordinating with agents of Starbucks Workers United (SWU) to tip representation elections in favor of SWU and Service Employee International Union (SEIU) activists in Region 14 and elsewhere. These include Board employees making secret arrangements with union representatives to vote in-person in what all parties agreed would be a mail-ballot election; providing union agents with confidential, non-public information regarding vote counts in order to enable SWU to target and intimidate employees; providing unions duplicate and triple ballots; and individualizing voting arrangements for voters hand-picked by SWU.¹ If proven true, these allegations represent blatant violations of the integrity and neutrality requirements for representation elections across multiple Regions. It is important to note that, on August 24, 2022, these allegations prompted a bicameral letter to the

¹ Letter from Zarina Jenkins, Acting Exec. Vice President and Gen. Couns., Starbucks Corp., & Kimberly J. Doud, Couns. for Starbucks Corp., to Lauren M. McFerran, Chairman, National Labor Relations Board, & Jennifer A. Abruzzo, Gen. Couns., National Labor Relations Board (Aug. 15, 2022).

NLRB Office of Inspector General (OIG), led by then-Ranking Member Virginia Foxx and then-Ranking Member Richard Burr, requesting that the OIG open an investigation into the matter.²

Furthermore, through a series of decisions and initiatives from the general counsel's office, the Board has weaponized its enforcement powers to target prominent employers. For example, the Board recently issued a decision against Tesla holding that dress codes and uniform policies interfering "in any way" with an employee's right to display union insignia are unlawful.³ Such a broad pronouncement directly contradicts Board and Second Circuit precedent holding that employers may restrict "union insignia or apparel [on work uniforms] when their display may . . . unreasonably interfere with a public image that the employer has established."⁴ The NLRB is also pursuing similar litigation against Starbucks' uniform policy.⁵

The Board also has active litigation against Starbucks in over 25 Regional Directorates.⁶ In one of these cases, Region 14's Regional Director has filed a complaint in consolidated litigation against Starbucks urging the revival of the *Joy Silk* standard for issuing bargaining orders.⁷ This standard, in which an employer is required to recognize a union as the sole bargaining unit of a workforce once a union furnishes cards signed by a majority of their employees, has long since been discarded by the Board.⁸ A wide array of stakeholders have warned that the revival of the *Joy Silk* standard, and thus the revival of card-check and elimination of the secret ballot, will destroy the integrity of representation elections and lead to an even greater proliferation of union intimidation in the workplace.⁹

NLRB Regional Directors have also been requesting nationwide cease and desist orders without substantive evidence of corporate-wide anti-union policies.¹⁰ In addition to targeting Starbucks, the Board recently filed a frivolous complaint against Amazon CEO Andy Jassy for expressing an

² Bicameral letter from Rep. Virginia Foxx, Rep. Rick W. Allen, Sen. Richard Burr & Sen. Mike Braun, to David P. Berry, Inspector Gen., National Labor Relations Board (Aug. 24, 2022), https://edworkforce.house.gov/uploadedfiles/08.24.22_-_letter_to_nlrb_ig_re_nlrb_interference_in_starbucks_elections.pdf.

³ *Tesla, Inc.*, 371 N.L.R.B. No. 131 (2022)(emphasis in the original).

⁴ *N.L.R.B. v. Starbucks Corp.*, 679 F.3d 70, 78 (2nd Cir. 2012) (quoting *Starwood Hotels & Resorts Worldwide, Inc.*, 348 N.L.R.B. 372, 373 (2006)).

⁵ Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, *Starbucks Corp.*, N.L.R.B. Case 19-CA-290162 et al., ¶ 5(a)(2).

⁶ *Case Search*, NLRB, [https://www.nlr.gov/search/case/starbucks?s\[0\]=Open](https://www.nlr.gov/search/case/starbucks?s[0]=Open) (last visited Feb. 22, 2023); see also Robert Iafolla and Ian Kullgren, *Starbucks Litigation, Work Stoppages Heat Up Organizing Efforts*, BLOOMBERG LAW (June 2, 2022), <https://news.bloomberglaw.com/daily-labor-report/starbucks-litigation-work-stoppages-heat-up-organizing-efforts>.

⁷ Order Further Consolidating Cases, Third Consolidated Complaint and Notice of Hearing, *Starbucks Corp.*, N.L.R.B. Case 14-CA-290968 et al., ¶ 41(a).

⁸ See *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 594 (1969) (noting that "the Board announced at oral argument that it had virtually abandoned the *Joy Silk* doctrine altogether").

⁹ Brief for Associate Builders and Contractors, Chamber of Commerce of the United States of America, Coalition for a Democratic Workforce, Independent Electrical Contractors, International Food Service Distributors Association, National Wholesaler Distributors & National Retail Federation as Amici Curiae Supporting Respondents, *Starbucks Corp.*, N.L.R.B. Case 14-CA-290968 et al.

¹⁰ See *Kerwin v. Starbucks Corp.*, No. 22-cv-12761, 2023 WL 2186563 (E.D. Mich. Feb. 23, 2023).

opinion regarding employees' right to organize in a televised interview.¹¹ The Unfair Labor Practice (ULP) complaint directly contravenes relevant provisions of the *Taft-Hartley Act* that permit employers to speak freely on the merits of unionization so long as such sentiments are free of coercion and intimidation.¹² That the ULP was issued three months after the NLRB's Office of General Counsel issued a memorandum prohibiting employers from exercising their First Amendment rights, contrary to precedent, seems to be coincidence.¹³ Similar to Starbucks, Amazon has also been on the receiving end of a barrage of litigation unsurpassed in the Board's history, with active cases across 25 Regional Directorates.¹⁴

The actions by the NLRB appear to contradict the Supreme Court's admonition that the NLRA "is not intended to serve [either labor or business'] individual interest, but to foster in a neutral manner a system in which the conflict between [employer and employee] interests may be resolved."¹⁵ Given the recent onslaught of unprecedented actions taken by the Board, I request that you answer the following questions, on a question-by-question basis, by March 21, 2023:

1. What processes and procedures does the Board and/or its Regional Directorates have in place to investigate allegations of Board employee misconduct or interference in representation elections?
2. Since 2020, has the Board become aware of any actions by Board employees to interfere, or attempt to interfere, in representation elections? If so, please produce the following information:
 - a. A brief narrative of the alleged misconduct.
 - b. The date the Board became aware of the alleged misconduct.
 - c. The status of the Board's investigation, including whether the Board has held a hearing to better understand the facts at issue.
 - d. The outcome of the Board's investigation, including whether any disciplinary actions has been taken against Board employees.
3. With regards to the long-abandoned *Joy Silk* doctrine, has any attention been paid to the concerns of stakeholders regarding the revival of card-check, including the prospect of

¹¹ Annie Palmer, *Amazon CEO Andy Jassy violated labor laws with union remarks, federal agency alleges*, CNBC (Oct. 27, 2022), <https://www.cnbc.com/2022/10/27/nlrb-says-amazon-ceo-andy-jassy-violated-labor-laws.html>.

¹² 29 U.S.C. § 158(c) ("The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit.").

¹³ See *N.L.R.B. v. Prescott Indus. Prod. Co.*, 500 F.2d 6, 8, 10-11 (8th Cir. 1974) (holding that a discharge of an employee was lawful when employee's pro-union activity interfered with management's "right to deliver an anti-union speech"); *Litton Sys., Inc.*, 173 N.L.R.B. 1024, 1030 (1968) (holding that "[a]n employee has no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management's noncoercive antiunion speech"); *Hicks Ponder Co.*, 168 N.L.R.B. 806, 811-12, 815 (1967); *In Re of Babcock & Wilcox Co.*, 77 N.L.R.B. 577, 578 (1948).

¹⁴ *Case Search*, NLRB, <https://www.nlrb.gov/search/case/amazon> (last visited Feb. 22, 2023).

¹⁵ *First Nat'l. Maint. Corp. v. N.L.R.B.*, 452 U.S. 666, 680-81 (1981).

increased union coercion and intimidation of employees? If so, how have those concerns been addressed?

4. Please produce a list of all pending nationwide cease-and-desist petitions filed in all Regional Directorates.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Bill Cassidy, M.D." followed by a vertical line.

William M. Cassidy, M.D.

Ranking Member

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