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September 1, 2020

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The Honorable John Ring
Chairman
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dear Chairman Ring:

I write in response to our telephone conversation on May 14, 2020, and with reference to the National Labor Relations Board's (NLRB) letters to the Committee on September 5 and October 4, 2019. Throughout the approximately 18 months that I have been Chairman of the Committee, I have sought information from the NLRB on its handling of conflicts of interest and recusal obligations to better understand how the NLRB rectified the deficient process that permitted an NLRB Member to participate in the consideration of the *Hy-Brand*¹ case in violation of his ethics pledge.² Regrettably, the NLRB has refused to fully comply with key oversight requests from the Committee to confirm that the NLRB is, in fact, protecting the NLRB's deliberative process from actual conflicts of interest and the appearance of such. I have also sought information regarding the NLRB's decision to contract out work related to its rulemaking on the agency's joint employer standard to verify that the contracted assignment did not violate federal laws and regulations designed to protect the public interest.³ However, the NLRB has refused to produce the list of categories into which the contractor sorted public comments, as well as the instructions provided to the contractors tasked with categorizing comments.

Throughout this oversight process, the Committee has accommodated the NLRB's requests by arranging for Committee staff to review requested documents *in camera* without waiving the right to full production, and by postponing the review of requested documents involving pending

¹ 365 NLRB No. 156 (2017), *vacated* by 366 NLRB No. 26 (relying on findings by the Designated Agency Ethics Official that Member Emanuel violated his ethics pledge by participating in this case which involved his former law firm).

² Ian MacDougall, *NLRB Member is Under Investigation for a Conflict of Interest*, ProPublica (Feb. 1, 2018 11:40 AM), <https://www.propublica.org/article/william-emanuel-nlr-member-is-under-investigation-for-a-conflict-of-interest>.

³ 5 U.S.C. § 706; 31 U.S.C. § 501 note, at § 5(2)(A); OMB Circular A-76, Attachment A, at §(B)(1)(a).

cases until the resolution of those cases. However, on our May 14 phone call, you announced a change in position by refusing to cooperate with congressional oversight even once cases are completed. The NLRB's failure to produce the requested documents is an obstruction of the Committee's constitutional authority and duty to conduct oversight of the NLRB's expenditures and activities. Furthermore, this change in position and the continued refusal to give the Committee certain documents indicate that the NLRB has something to hide regarding decisions that are likely tainted by a defective process, such as the *McDonald's* case⁴ and the joint employer rulemaking.⁵

Without production from the NLRB, the Committee is left to conclude that the NLRB will not produce documents because they substantiate allegations of misconduct.

The Committee is left to conclude that the NLRB's sole motivation for refusing to produce requested documents is to cover up misconduct.⁶ The only facts the Committee has to consider, at this point, are those that are publicly available, which reveal processes tainted with conflicts of interest and prejudicial error.

With respect to the *McDonald's* case, it is a matter of public record that Member William Emanuel—who was previously embroiled in the *Hy-Brand* ethics scandal—participated in the *McDonald's* decision⁷ despite the fact that McDonald's paid Member Emanuel's former law firm, Littler Mendelson, to establish a hotline for franchisees regarding the legal issues before the agency.⁸ This hotline is still operational, and had been the entire time the *McDonald's* case was pending before the Board. Member Emanuel participated in the *McDonald's* case as early as January 2018, more than one year before the completion of any memorandum by the Designated Agency Ethics Official (DAEO) evaluating Member Emanuel's conflict of interest.⁹ The Committee is also aware that the DAEO's memorandum on the *McDonald's* case was addressed to you in addition to Member Emanuel, raising questions about whether you were assigned to this case and recused yourself, despite your previous statements that you were never assigned to this panel.¹⁰ On November 19, 2019, one month prior to issuing the *McDonald's* decision, the

⁴ 368 NLRB No. 134 (2019).

⁵ *Joint Employment Status Under the National Labor Relations Act*, 85 Fed. Reg. 11,184 (Feb. 26, 2020) (to be codified at 29 C.F.R. pt. 103).

⁶ Emily Bazelon, *Why Are Workers Struggling? Because Labor Law Is Broken*, New York Times (Feb. 19, 2020), <https://www.nytimes.com/interactive/2020/02/19/magazine/labor-law-unions.html> (detailing Member Emanuel's participation in *McDonald's* despite the fact that McDonald's hired his former law firm to provide legal advice to franchisees on the NLRA issues that were before the agency).

⁷ 368 NLRB No. 134 (2019).

⁸ Hassan A. Kanu, *McDonald's Versus 'Fight for \$15: Documents Reveal Strategy*, Bloomberg Law (Sept. 11, 2018 12:27PM), <https://news.bloomberglaw.com/daily-labor-report/mcdonalds-versus-fight-for-15-documents-reveal-strategy>.

⁹ *McDonald's USA, LLC*, 02-CA-093893 et al. (Jan. 16, 2018) (not reported in Board volumes).

¹⁰ *Compare* Privilege Log provided by the NLRB to Committee staff (May 6, 2019) (describing memorandum issued by the DAEO to both Member Emanuel and Chairman Ring on April 29, 2019) with Subcomm. on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the H. Comm. on Appropriations, *National Labor Relations Board Budget Request for FY 2021* (May 11, 2020), <https://appropriations.house.gov/events/hearings/national-labor-relations-board-budget-request-for-fy-2021> (statement of Chairman John Ring).

NLRB issued its report on ethics and recusal standards that authorized Members to “insist on participating” in a case even if the DAEO “disqualifies” a Member from participating.¹¹ In light of the NLRB’s refusal to produce the DAEO memorandum, the Committee can logically conclude from these facts that one or more of the below may be true:

- You and/or Member Emanuel failed to disclose all relevant facts to the DAEO;
- The DAEO advised you and/or Member Emanuel to recuse yourselves from the case, and Member Emanuel insisted on participating; and
- You and/or Member Emanuel have taken steps to undermine the independence of the DAEO.

By refusing to produce all relevant DAEO guidance or memoranda related to this case, you have failed to answer these questions and rebut the inference that there is something to hide.

Without the requested documents, the Committee is also left to conclude that the NLRB acted unlawfully when it hired Ardelle Associates to categorize comments filed in the joint employer rulemaking. The Committee articulated its concern on March 14, 2019,¹² that the NLRB could be violating the Federal Activities Inventory Reform Act of 1998, by contracting out “inherently governmental functions” in violation of the public trust.¹³ In response, on March 22, 2019, the NLRB stated it “would share [the Committee’s] concern about a private contractor performing the substantive review of comments” and that the contracted work would “not involve any substantive, deliberative review of the comments.”¹⁴ The NLRB then contradicted that statement by asserting that the categories “are attorney work product and constitute an integral part of the Board’s deliberative process.”¹⁵ The NLRB also failed to alleviate concerns that it committed a prejudicial error in its supervision of the contract, and concerns that it violated the Federal Acquisition Regulation’s “impeccable standard of conduct” when it entered into a contract with Ardelle, despite Ardelle’s statement that it was a member of two organizations that filed comments in the rulemaking.¹⁶ The NLRB’s refusal to provide the comment categories and accompanying instructions indicates that it is hiding information that fuels these concerns.

¹¹ Compare NLRB’s Ethics and Recusal Report (Nov. 19, 2019), <https://www.nlr.gov/reports/regulatory-reports-and-notice/ethics-recusal-report> (stating that a Board Member can “insist on participating in” a matter despite a DAEO’s determination that the Member cannot participate) with 5 CFR § 2635.502(c)(1) (“Where the agency designee determines that the employee’s participation should not be authorized, the employee will be disqualified from participation in the matter...”).

¹² Letter from Robert C. “Bobby” Scott, U.S. Representative, and Frederica Wilson, U.S. Representative, to John Ring, NLRB Chairman (Mar. 14, 2019), <https://edlabor.house.gov/imo/media/doc/2019-03-14%20Letter%20to%20NLRB%20about%20Contracting%20Review%20of%20Joint%20Employer%20Rule.pdf>.

¹³ 31 U.S.C. § 501 note, at § 5(2)(A).

¹⁴ Letter from Chairman John Ring, National Labor Relations Board, to Chairman Robert C. “Bobby” Scott and Chairwoman Frederica S. Wilson, Committee on Education and Labor and Subcommittee on Health, Employment, Labor and Pensions (Mar. 22, 2019).

¹⁵ Letter from Chairman John Ring, National Labor Relations Board, to Chairman Robert C. “Bobby” Scott and Chairwoman Frederica S. Wilson, Committee on Education and Labor and Subcommittee on Health, Employment, Labor and Pensions (Oct. 4, 2019).

¹⁶ Letter from Chairman Robert C. “Bobby” Scott and Chairwoman Frederica S. Wilson, Committee on Education and Labor and Subcommittee on Health, Employment, Labor and Pensions, to Chairman John Ring, National Labor Relations Board (Sept. 10, 2019) (citing 48 C.F.R. § 3.101-1).

The NLRB has failed to cite a privilege that justifies withholding documents responsive to the Committee's oversight requests.

On May 6, 2019, the Committee requested documents related to the NLRB's handling of ethics and recusal matters, including memoranda produced by the DAEO regarding whether a Board Member may participate in a specific case. After the NLRB refused to produce these memoranda on May 23, 2019, I noted in a letter on August 15, 2019, that this refusal is inconsistent with the agency's stated position in favor of disclosure, which has been expressed to the Committee on multiple occasions.

In the NLRB's September 4, 2019, reply, the agency claimed that the DAEO's memoranda were deliberative, and in a privilege log the agency claimed that these documents were subject to attorney-client privilege. None of these are sufficient to justify obstructing congressional oversight, as the Committee is not bound by common law legal privileges as a basis for withholding responsive documents. In any event, the Committee's request for DAEO determinations are limited to those that have already been made by the DAEO, and are thus not pre-decisional.¹⁷ Moreover, communications between a federal government employee and a DAEO are not protected by attorney-client privilege;¹⁸ even if they were privileged, the Board waived that privilege by permitting other DAEO memoranda to be viewed *in camera*.

Similarly, on March 14, 2019, the Committee requested information relating to the NLRB's outsourcing of work related to its rulemaking on the standard for determining joint employer status.¹⁹ After the NLRB refused to provide the categories into which the contracted staff would sort public comments and accompanying instructions on how to categorize comments, the Committee followed up on September 10, 2019, raising concerns that, among other issues, the agency committed a prejudicial error in its rulemaking based on the NLRB's characterization of the comment categories.²⁰ The NLRB's response on October 4, 2019, did not claim any privilege, and yet did not comply with the oversight request.²¹ Although the NLRB claimed in

¹⁷ For this reason, the NLRB cannot compare this oversight request to its 2011 response to a request for "[a]ll documents and communications referring or relating to the *Specialty Healthcare*...notice and invitation to file briefs," including internal agency deliberations in that case. See Letter from Chairman John Ring, National Labor Relations Board, to Chairman Robert C. "Bobby" Scott, Committee on Education and Labor (Sept. 4, 2019) (citing Letter from Solicitor William B. Cowan, National Labor Relations Board, to Chairman John Kline, Committee on Education and the Workforce (May 25, 2011)). Unlike the 2011 request, which did not limit its oversight request to documents related to the scope of its investigation, the Committee's current request has sought DAEO guidance unrelated to the merits of any particular adjudication or rulemaking.

¹⁸ 5 C.F.R. § 2635.107(b).

¹⁹ Letter from Robert C. "Bobby" Scott, U.S. Representative, and Frederica Wilson, U.S. Representative, to John Ring, NLRB Chairman (Mar. 14, 2019), <https://edlabor.house.gov/imo/media/doc/2019-03-14%20Letter%20to%20NLRB%20about%20Contracting%20Review%20of%20Joint%20Employer%20Rule.pdf>.

²⁰ Letter from Chairman Robert C. "Bobby" Scott and Chairwoman Frederica S. Wilson, Committee on Education and Labor and Subcommittee on Health, Employment, Labor and Pensions, to Chairman John Ring, National Labor Relations Board (Sept. 10, 2019).

²¹ Letter from Chairman John Ring, National Labor Relations Board, to Chairman Robert C. "Bobby" Scott and Chairwoman Frederica S. Wilson, Committee on Education and Labor and Subcommittee on Health, Employment, Labor and Pensions (Oct. 4, 2019).

its October 4 reply that the list of categories is deliberative, it drafted those categories prior to conducting any review of the comments, and the NLRB has repeatedly stated that the outsourced work was not substantive in nature.²²

The NLRB has changed its position regarding its compliance with congressional oversight, raising serious concerns that the agency has something to hide.

Throughout the oversight process, the Committee has consistently acted to accommodate the NLRB by agreeing to *in camera* reviews, without ever waiving its right to full production of the requested documents. Although the NLRB previously permitted Committee staff to conduct *in camera* reviews of DAEO memoranda involving pending cases, it changed its position to refuse those reviews, claiming that its previous compliance was “made in error.”²³ In accordance with its new policy, the NLRB emailed Committee staff on December 4, 2019, stating: “We will be happy to allow you access to the *McDonald’s* memo as soon as the case has been issued.” The NLRB then issued the *McDonald’s* decision on December 12, 2019.

Based on this change in the agency’s position, I expected the NLRB to comply with congressional oversight after it issued the *McDonald’s* decision on December 12, 2019, and after it issued the final rule in the joint employer rulemaking on February 26, 2020. When Committee staff again requested production of both the DAEO memorandum in *McDonald’s* and the comment categories in the joint employer rulemaking over email on March 18, 2020, the NLRB’s Director of Congressional and Public Affairs responded on March 23, 2020, stating: “We are happy to work with you on this request,” and that “we are happy to provide you opportunity for an in-camera review of the document once Headquarters is safely reopened.”²⁴

As you know, the COVID-19 pandemic has made accommodation through *in camera* review, rather than production of the requested documents, impossible. When we discussed this matter during our telephone call on May 14, you again changed your position by abandoning any effort to comply with congressional oversight during the pandemic and instead stated that the NLRB would not comply with congressional requests for these documents short of a court order. Yet again, no privilege that would justify refusing to comply with congressional oversight was provided for this new position.

²² Letter from Chairman John Ring, National Labor Relations Board, to Chairman Robert C. “Bobby” Scott and Chairwoman Frederica S. Wilson, Committee on Education and Labor and Subcommittee on Health, Employment, Labor and Pensions (Mar. 22, 2019); Letter from Chairman John Ring, National Labor Relations Board, to Chairman Robert C. “Bobby” Scott and Chairwoman Frederica S. Wilson, Committee on Education and Labor and Subcommittee on Health, Employment, Labor and Pensions (Oct. 4, 2019).

²³ See email from National Labor Relations Board Office of Congressional and Public Affairs to Committee on Education and Labor staff (Dec. 4, 2019) (explaining inconsistency between NLRB permitting *in camera* review of DAEO memoranda regarding Member William Emanuel’s participation in *Caesars Entertainment* and the joint employer rulemaking, and its new refusal to permit *in camera* review of DAEO memoranda in other pending cases).

²⁴ The Committee’s request over email also included a reiteration of the Committee’s request for production of the DAEO memorandum regarding Member Emanuel’s participation in the joint employer rulemaking, of which Committee staff has previously conducted an *in camera* review.

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It can only be presumed that the continued refusal, paired with the change of position, is indication that the NLRB is attempting to cover up malfeasance or misfeasance in the *McDonald's* adjudication, the joint employer rulemaking, or both. While the Committee would prefer to resolve this matter voluntarily, the Committee is prepared to exercise its subpoena authority if needed.²⁵ Accordingly, please let Committee staff know by 5:00 PM on September 4, 2020, if the NLRB will be complying with the Committee's request.

If you have any questions, please contact Cathy Yu at Cathy.Yu@mail.house.gov. Please direct all official correspondence to the Committee's Chief Clerk at Tylease.Alli@mail.house.gov. Thank you for your attention to this matter, and I look forward to reviewing the documents.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Chairman

CC: The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor

²⁵ See Rules of the Committee on Education and Labor, https://edlabor.house.gov/imo/media/doc/116th_Ed_and_Labor_Committee_Rules.pdf. The Committee's rule further provides that "to the extent practicable, the Chair shall consult with the Ranking Member at least 24 hours in advance of a subpoena being issued under such authority."