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COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

September 15, 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 to follow up on the Committee's letter dated September 1, 2020 regarding the Committee's outstanding document requests regarding the Designated Agency Ethics Official's (DAEO) determination in the *McDonald's* decision,¹ the DAEO's determination in the rulemaking on joint employer status,² the categories for public comments in the joint employer rulemaking,³ and the instructions provided to the individuals on categorizing comments.⁴

Unfortunately, the NLRB declined to provide a formal response to that letter. The NLRB's position has been that the DAEO's determinations and the comment categories are deliberative and/or protected by attorney-client privilege is without merit.⁵ As the Committee has communicated to you on numerous occasions, it is not obligated to accept the assertion of common law legal privileges.

¹ 368 NLRB No. 134 (2019).

² *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).

³ *Id.*

⁴ *Id.*

⁵ See Letter from John Ring, Chairman, National Labor Relations Board to Robert C. "Bobby" Scott, Chairman, U.S. House of Representatives Education and Labor Committee, and Frederica S. Wilson, Chairwoman, Subcommittee on Health, Employment, Labor, and Pensions (Oct. 4, 2019); Letter from John Ring, Chairman, National Labor Relations Board to Robert C. "Bobby" Scott, Chairman, U.S. House of Representatives Education and Labor Committee, and Frederica S. Wilson, Chairwoman, Subcommittee on Health, Employment, Labor, and Pensions (Sept. 10, 2019).

The Hon. John Ring
September 15, 2020
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Moreover, although the NLRB has claimed that it did not provide any accompanying instructions regarding how to categorize comments,⁶ the Committee has since learned, through the course of its investigation, that an instruction manual was indeed provided by the NLRB to the individuals contracted to categorize comments to the joint employer rulemaking.

The Committee would have preferred to have resolved these issues voluntarily. Committee staff first reached out to the NLRB on March 14, 2019, regarding the NLRB's contract with a private entity to assist in the joint employer rulemaking,⁷ and on May 6, 2019, regarding the DAEO's memoranda regarding Members' conflicts of interest.⁸ Since then, the NLRB has refused to produce the requested documents. As I noted in my September 1, 2020 letter, the Committee is left to conclude that the NLRB's sole motivation for refusing to produce the requested documents is to cover up misconduct. In a telephone call on May 14, 2020, the NLRB stated that it would not comply with congressional oversight short of a court order. Yet again, no privilege that would justify refusing to comply with congressional oversight was provided for this new position.

The requested information is necessary for the Committee to conduct thorough and necessary oversight of the *McDonald's* case and the NLRB's process for responding to comments in the joint employer rulemaking. Accordingly, the Committee hereby issues the attached subpoena. The compelled documents are detailed in the attached Schedule A, and are required to be produced by no later than September 22, 2020.

If you have any questions, please contact Cathy Yu at Cathy.Yu@mail.house.gov. Please direct all official correspondence to the Committee's Clerk and Special Assistant to the Staff Director, Jaria Martin, at Jaria.Martin@mail.house.gov.

Thank you for your attention to this matter, and I look forward to your response.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Chairman

⁶ See Letter from John Ring, Chairman, National Labor Relations Board to Robert C. "Bobby" Scott, Chairman, U.S. House of Representatives Education and Labor Committee, and Frederica S. Wilson, Chairwoman, Subcommittee on Health, Employment, Labor, and Pensions (May 6, 2019).

⁷ See Letter from Robert C. "Bobby" Scott, Chairman, U.S. House of Representatives Education and Labor Committee, and Frederica S. Wilson, Chairwoman, Subcommittee on Health, Employment, Labor, and Pensions to John Ring, Chairman, National Labor Relations Board (May 6, 2019).

⁸ See Letter from Robert C. "Bobby" Scott, Chairman, U.S. House of Representatives Education and Labor Committee, and Frederica S. Wilson, Chairwoman, Subcommittee on Health, Employment, Labor, and Pensions to John Ring, Chairman, National Labor Relations Board (Mar. 14, 2019).

SUBPOENA

**BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE
CONGRESS OF THE UNITED STATES OF AMERICA**

The Honorable John Ring, Chairman, National Labor Relations Board

To _____

You are hereby commanded to be and appear before the
Committee on Education and Labor

_____ of the House of Representatives of the United States at the place, date, and time specified below.

- to produce the things identified on the attached schedule touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2176 Rayburn House Office Building, Washington, DC 20515

Date: 9/22/2020

Time: 5:00 P.M.

- to testify at a deposition touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____

Time: _____

- to testify at a hearing touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____

Time: _____

To any authorized staff member or the U.S. Marshals Service

_____ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at
the city of Washington, D.C. this 15th day of September, 2020.

Attest:

Glenn J. Lott, Deputy Clerk
Clerk



Chairman or Authorized Member

PROOF OF SERVICE

Subpoena for The Honorable John Ring, Chairman, National Labor Relations Board

Address National Labor Relations Board

1015 Half Street S.E., Washington, DC 20570

before the Committee on Education and Labor

*U.S. House of Representatives
116th Congress*

Served by (print name) Jaria Martin

Title Clerk & Special Assistant to the Staff Director, Committee on Education and Labor

Manner of service Email

Date _____

Signature of Server _____

Address _____

SCHEDULE A

In accordance with the attached instructions, you, John Ring, Chairman of the National Labor Relations Board (NLRB), are required to produce complete and unredacted versions of the following:

1. Documents sufficient to show the categories into which individuals referred by Ardelle Associates sorted public comments in the rulemaking *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11,184 (Feb. 26, 2020) (*to be codified at 29 C.F.R. Part 103*).
2. All documents provided by the NLRB to Ardelle Associates or any individuals referred by Ardelle Associates containing instructions on how to categorize public comments in the rulemaking *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11,184 (Feb. 26, 2020) (*to be codified at 29 C.F.R. Part 103*).
3. All documents and communications, including all memoranda and other written guidance, issued by the Designated Agency Ethics Official (DAEO) referring or relating to Member William Emanuel's and Chairman John Ring's potential conflict of interest in *McDonald's*, Cases 02-CA-093893 et al.
4. All documents and communications, including all memoranda and other written guidance, issued by the DAEO referring or relating to any Member's potential conflict of interest in the rulemaking *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11,184 (Feb. 26, 2020) (*to be codified at 29 C.F.R. Part 103*).

RESPONDING TO COMMITTEE SUBPOEANS

In responding to the document request, please apply the instructions and definitions set forth below:

INSTRUCTIONS

1. In complying with this request, you should produce all responsive documents in unredacted form that are in your possession, custody, or control or otherwise available to you, regardless of whether the documents are possessed directly by you.
2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that any entity, organization, or individual named in the request has been, or is currently, known by any other name, the request should be read also to include such other names under that alternative identification.
4. Each document should be produced in a form that may be copied by standard copying machines.
5. When you produce documents, you should identify the paragraph(s) and/or clause(s) in the Committee's request to which the document responds.
6. Documents produced pursuant to this request should be produced in the order in which they appear in your files and should not be rearranged. Any documents that are stapled, clipped, or otherwise fastened together should not be separated. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. Indicate the office or division and person from whose files each document was produced.
7. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph(s) and/or clause(s) of the request to which the documents are responsive, should be provided in an accompanying index.
8. Responsive documents must be produced regardless of whether any other person or entity possesses non-identical or identical copies of the same document.
9. The Committee requests electronic documents in addition to paper productions. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, back up tape, or removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), you should immediately consult with Committee staff to determine the appropriate format in which to produce the information. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (6) and (7) above.

10. If any document responsive to this request was, but no longer is, in your possession, custody, or control, or has been placed into the possession, custody, or control of any third party and cannot be provided in response to this request, you should identify the document (stating its date, author, subject and recipients), identify any and all third parties in possession, custody, or control of the document, and explain the circumstances under which the document ceased to be in your possession, custody, or control, or was placed in the possession, custody, or control of any third party.

11. If any document responsive to this request was, but no longer is, in your possession, custody or control, state:

- a. how the document was disposed of;
- b. the name, current address, and telephone number of the person who currently has possession, custody or control over the document;
- c. the date of disposition;
- d. the name, current address, and telephone number of each person who authorized said disposition or who had or has knowledge of said disposition.

12. If any document responsive to this request cannot be located, describe with particularity the efforts made to locate the document and the specific reason for its disappearance, destruction or unavailability.

13. If a date or other descriptive detail set forth in this request referring to a document, communication, meeting, or other event is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents that would be responsive as if the date or other descriptive detail were correct.

14. The request is continuing in nature and applies to any newly discovered document, regardless of the date of its creation. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.

15. All documents should be Bates-stamped sequentially and produced sequentially. In a cover letter to accompany your response, you should include a total page count for the entire production, including both hard copy and electronic documents.

16. Two sets of the documents should be delivered to the Committee, one set to the majority staff and one set to the minority staff. You should consult with Committee majority staff regarding the method of delivery prior to sending any materials.

17. In the event that a responsive document is withheld on any basis, including a claim of privilege, you should provide a log containing the following information concerning every such document: (i) the reason the document is not being produced; (ii) the type of document; (iii) the general subject matter; (iv) the date, author and addressee; (v) the relationship of the author and addressee to each other; and (vi) any other description necessary to identify the

document and to explain the basis for not producing the document. If a claimed privilege applies to only a portion of any document, that portion only should be withheld and the remainder of the document should be produced. As used herein, “claim of privilege” includes, but is not limited to, any claim that a document either may or must be withheld from production pursuant to any statute, rule, or regulation.

- (a) Any objections or claims of privilege are waived if you fail to provide an explanation of why full compliance is not possible and a log identifying with specificity the ground(s) for withholding each withheld document prior to the request compliance date.
- (b) In complying with the request, be apprised that (unless otherwise determined by the Committee) the Committee does not recognize: any purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative-process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.
- (c) Any assertion by a request recipient of any such non-constitutional legal bases for withholding documents or other materials, for refusing to answer any deposition question, or for refusing to provide hearing testimony, shall be of no legal force and effect and shall not provide a justification for such withholding or refusal, unless and only to the extent that the Committee (or the chair of the Committee, if authorized) has consented to recognize the assertion as valid.

18. If the request cannot be complied with in full, it should be complied with to the extent possible, which should include an explanation of why full compliance is not possible.

19. Upon completion of the document production, you must submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the request have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee’s request or in anticipation of receiving the Committee’s request, and (3) all documents identified during the search that are responsive have been produced to the Committee, identified in a log provided to the Committee, as described in (17) above, or identified as provided in (10), (11) or (12) above.

20. When representing a witness or entity before the Committee in response to a document request or request for transcribed interview, counsel for the witness or entity must promptly submit to the Committee a notice of appearance specifying the following: (a) counsel’s name, firm or organization, and contact information; and (b) each client represented by the counsel in connection with the proceeding. Submission of a notice of appearance constitutes acknowledgement that counsel is authorized to accept service of process by the Committee on

behalf of such client(s), and that counsel is bound by and agrees to comply with all applicable House and Committee rules and regulations.

DEFINITIONS

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail (“e-mail”), instant messages, calendars, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, power point presentations, spreadsheets, and work sheets. The term “document” includes all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments to the foregoing, as well as any attachments or appendices thereto.
2. The term “documents in your possession, custody or control” means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party.
3. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in an in-person meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
4. The terms “and” and “or” should be construed broadly and either conjunctively or disjunctively as necessary to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders.
5. The terms “person” or “persons” or “individuals” mean natural persons, firms, partnerships, associations, limited liability corporations and companies, limited liability partnerships, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, other legal, business or government entities, or any other organization or group of persons, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

6. The terms “referring” or “relating,” with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.

7. The term “employee” means agent, borrowed employee, casual employee, consultant, de facto employee, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, contract employee, contractor, or any other type of service provider.

8. “You” or “your” means and refers to you as a natural person and the United States and any of its agencies, offices, subdivisions, entities, officials, administrators, Board Members, General Counsel, employees, attorneys, agents, advisors, consultants, staff, contractors, or any other persons acting on your, the Board Members’, or the General Counsel’s behalf or under your, the Board Members’, or the General Counsel’s control or direction; and includes any other person(s) defined in the document request letter.