UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

June 5, 2018

The Honorable Elizabeth Warren
U.S. Senate
317 Hart Senate Office Building
Washington, DC 20510

The Honorable Kirsten Gillibrand
U.S. Senate
478 Russell Senate Office Building
Washington, DC 20510

The Honorable Bernard Sanders
U.S. Senate
332 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Warren, Gillibrand, and Sanders:

I write in response to your letter dated May 29, 2018, in which you express strong concerns over the National Labor Relations Board's announcement regarding joint-employer rulemaking. I appreciate the concerns raised in your letter, and I welcome this opportunity to respond to them.

At the outset, let me assure you that any notice-and-comment rulemaking undertaken by the NLRB will never be for the purpose of evading ethical restrictions. As you note, I said during my confirmation hearing that I would take my ethical obligations very seriously, and I do. Additionally, as NLRB Chairman, I view it as my responsibility to ensure the Agency upholds the highest ethical standards in everything we do. To that end, we will be announcing in the near future a comprehensive internal ethics and recusal review to ensure that the Agency has appropriate policies and procedures in place to ensure full compliance with all ethical obligations and recusal requirements.

Your letter references that the NLRB may engage in rulemaking on the joint-employer subject. Candor requires me to inform you that the NLRB is no longer merely considering joint-employer rulemaking. A majority of the Board is committed to engage in rulemaking, and the NLRB will do so. Internal preparations are underway, and we are working toward issuance of a Notice of Proposed Rulemaking (NPRM) as soon as possible, but certainly by this summer.

As I stated in the NLRB's May 9, 2018 press release, a majority of the Board believes that "notice-and-comment rulemaking offers the best vehicle to fully consider all views on what the [joint-employer] standard ought to be." Although we could have invited briefing in connection with our traditional case-by-case adjudication, rulemaking on this topic opens an avenue of communication with the Board for – we hope – thousands of commenters. I look forward to hearing from all interested parties, including individuals and small businesses that may not be able to afford to hire a law firm to write a brief for them, yet have valuable insight to share from hard-won experience.

Rulemaking is appropriate for the joint-employer subject because it will permit the Board to consider and address the issues in a comprehensive manner and to provide the greatest guidance. Although legal standards of general applicability can be announced in a decision of a specific case, case decisions are often limited to their facts. With rulemaking, by contrast, the Board will be able to consider and apply whatever standard it ultimately adopts to selected factual scenarios in the final rule itself. In this way, rulemaking on the joint-employer standard will enable the Board to provide unions and employers greater "certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice," as the Supreme Court has instructed us to do.[1]

In addition, whereas standards adopted through case adjudication may apply either retroactively or prospectively, final rules issued through notice-and-comment rulemaking are required by law to apply prospectively only. Thus, by establishing the standard for determining joint-employer status through rulemaking, the Board immediately frees its stakeholders from any concern that actions they take today may wind up being evaluated under a new legal standard announced months or years from now.

I should note as well that this prospective application of rulemaking also should eliminate any concerns about ethical restrictions or recusals with respect to pending cases. Because any rule developed will apply prospectively only, its application will not affect any case pending before the Board or one of its regional offices on the effective date of the final rule, and thus it will not affect any parties to pending cases.

Finally, I want to address your concerns that there has been any prejudgment of the joint-employer issue. Contrary to what your letter declares my public statements "must reflect," my reference to "the current uncertainty" in my public statements regarding the joint-employer standard reflects fact. The standard for determining joint-employer status under the NLRA has been and continues to be a hotly debated subject, as everyone in the labor-law community is acutely aware. Additionally, regardless of your position on the standard it announced, the 2015 *Browning-Ferris* decision[2] left employers and unions almost completely in the dark so far as predicting outcomes in specific cases and planning accordingly is concerned, as the *Browning-Ferris* majority candidly acknowledged.[3] Whatever standard the Board ultimately adopts at the

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[1] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981).

[2] *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) ("*Browning-Ferris*").

[3] See id., slip op. at 16: "[W]e do not and cannot attempt today to articulate every fact and circumstance that could define the contours of a joint employment relationship. Issues related to the nature and extent of a putative joint-employer's control over particular terms and conditions of employment will undoubtedly arise in future cases—just as they do under the current test—and those issues are best examined and resolved in the context of specific factual circumstances." As stated above, rulemaking will enable the Board to address "specific factual circumstances" hypothetically and thus to furnish unions and employers the guidance that *Browning-Ferris* conspicuously failed to provide.

conclusion of the rulemaking process, my hope is that the final rule will bring far greater certainty and stability to this key area of labor law, consistent with congressional intent.[4]

Likewise, my statement that the Board "intends to get the job done" does not "presume[]" any particular outcome, as your letter suggests. It shows only that the Board is determined—after gathering and considering input from all interested parties—to provide clear and useful guidance to its stakeholders regarding "the contours of a joint employment relationship,"[5] which many believe *Browning-Ferris* expressly left undefined. I trust these explanations put to rest any claim that my previous public statements demonstrate prejudgment on my part.

Although I have an open mind and will consider all comments we receive from interested parties, I will not pretend that I am devoid of opinions on the subject of the joint-employer standard, any more than my predecessors, then-Chairman Wilma Liebman and then-Members Mark Gaston Pearce and Craig Becker, were devoid of opinions when they embarked on rulemaking to change the Board's representation-case procedures in 2011, or than then-Chairman Mark Gaston Pearce and then-Members Kent Hirozawa and Nancy Schiffer were when they repeated that enterprise in 2014. As I am sure you are aware, it is well settled that holding opinions or embarking on notice-and-comment rulemaking does not disqualify an agency administrator from undertaking such rulemaking. Indeed, the Court of Appeals for the District of Columbia Circuit has observed that "to disqualify administrators because of opinions they expressed or developed" would mean that "'experience acquired from their work would be a handicap instead of an advantage.'"[6] It "would eviscerate the proper evolution of policymaking were [a court] to disqualify every administrator who has opinions on the correct course of his agency's future actions."[7] For these reasons, the D.C. Circuit has held that "an individual should be disqualified from rulemaking only when there has been a clear and convincing showing" that the agency official "has an unalterably closed mind on matters critical to the disposition of the proceeding."[8] I assure you, Senators, that absolutely is not the case with me.

Sincerely,

John F. Ring
Chairman

[4] See *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-63 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.").
[5] *Browning-Ferris*, above, slip op. at 16.
[6] *United Steelworkers of America v. Marshall,* 647 F.2d 1189, 1209 (D.C. Cir. 1980) (quoting *FTC v. Cement Institute*, 333 U.S. 683, 702-703 (1948)).
[7] *Air Transport Association of America, Inc. v. NMB*, 663 F.3d 476, 488 (D.C. Cir. 2011).
[8] Id. at 487.