

July 30, 2024

Dear Members of the Senate Committee on Health, Education, Labor, and Pensions,

On behalf of our organizations and the millions of American workers we represent, we are greatly disappointed that your committee has failed to hold a hearing on the renomination of Lauren McFerran and are rushing to a committee vote. Under Chair McFerran's leadership, the NLRB has demonstrated that its priority is not to carry out the responsibilities assigned to it by the *National Labor Relations Act* (NLRA) in an unbiased manner as required by the law, but rather to advance the political agenda and financial incentives of a special interest group by any means necessary, even when it's at the expense of workers' rights and the proper interpretation of the law.

Since Chair McFerran became Board Chair in January 2021, the NLRB has made several politicized decisions that twist the intent of the NLRA and harm the rights of American workers. None is more notable than its decision in *Cemex Construction Materials Pacific* ("Cemex"), NLRB Case No. 28-CA-230115, in which the Board cast aside more than a half-century of Supreme Court precedent in order to institute "card check" union certification by another name. Just like when Americans vote on their representation in Congress, secret ballot elections are vital when Americans vote on their representation in the workplace. The Supreme Court has long recognized secret ballot elections as the preferred method of voting on the question of union representation, yet *Cemex* made these elections functionally useless by making it much easier for unions to discard the results when they lose and enable the Board to certify the union as workers' representative anyway.

Over the years, this Committee has heard countless real-world examples of workers being harassed and intimidated into signing authorization cards. These testimonies make clear that the cards are not sufficient evidence of support of the union. Less than a month ago, after roughly 70 percent of workers signed cards at the Mercedes-Benz plant in Tuscaloosa, Alabama, the workers then rejected the union in a secret ballot election. However, the union has asked the Board to invalidate those election results, citing *Cemex*, and is asking for a new election.

Cemex is not just a travesty of justice and a perverted interpretation of federal law. It is the Board's attempt to force onto the American people a policy that their representatives in Congress have rejected multiple times over the past two decades by declining to enact the *Employee Free Choice Act*, the *Protecting the Right to Organize Act*, and other legislation that would codify card check union certification. *Cemex* is one example of many in which the Board under Chair McFerran has ignored the law and the will of workers in order to advance a harmful political agenda.

Notably, the Board's efforts under Chair McFerran prevent employers from protecting their employees from harassment, including racial and sexual insults at the workplace. It may also put employers at odds with other federal protections such as Title VII of the Civil Rights Act of 1964 which protect employees from this type of harassment at the workplace. Federal courts have been clear for decades that employers have a legal responsibility to prevent harassment and discrimination in the workplace – yet under Chair McFerran, the Board reimposed outdated rules that permit such ugly behavior as long as it occurs in the course of union activity, leaving employers unable to maintain a workplace free of harassment and discrimination.

This carveout was established in *Lion Elastomers LLC*, 372 N.L.R.B. No. 83. As the Institute for the American Worker details in their new report, "Battle of the 7s," this decision marked the *second* time that Chair McFerran sought to excuse discriminatory conduct in the context of union activity. Obviously to most, racial and sexual harassment and discrimination are wrong in any setting regardless of the context. Yet Chair McFerran has shown to be an unfair arbiter, giving favor to awful workplace conduct at the expense of those targeted by such language.

The politicization of the Board even extends beyond its headquarters in the nation's capital. The Board's "gross mismanagement" of union elections in order to tilt the playing field in favor of organized labor has been documented at great length by an internal whistleblower; the Office of the Inspector General (OIG); the Senate Committee on Health, Education, Labor, and Pensions; and by the Chair of this Committee, among others. According to the OIG report, officials at the Board's Region 14, during Chair McFerran's leadership, acted not as a neutral party but instead assisted the union in advancing its cause by directly discussing the status of individual workers' ballots, turned a blind eye rather than addressing and correcting these concerns, and then displayed an unwillingness to cooperate with the OIG's investigation.

Given the improper priorities of Chair McFerran's leadership, it should come as no surprise that other employees at the Board felt it acceptable to act in this manner and advance the interests of organized labor rather than conduct their responsibilities properly.

The NLRB under Chair McFerran is a stark example of an unaccountable bureaucracy that has overstepped its authority to advance an ideological agenda rather than the interests of the American people. It is a shame that your committee has failed to hold a hearing to examine McFerran's record prior to this rushed vote. American workers deserve an NLRB that exercises appropriate limitations on its authority, properly upholds the law, and functions as a neutral arbiter. Unfortunately, the Board under Chair McFerran has failed at all of these, and we urge the Committee to continue to demand answers and expose wrongdoing at the agency.

Sincerely,

Akash Chougule
Vice President
Americans for Prosperity

Grover Norquist
President
Americans for Tax Reform

Will Swaim
President
California Policy Center

Russ Brown
President
Center for Independent Employees

Timothy Lee
Senior Vice President of Legal and Public Affairs
Center for Individual Freedom

David McIntosh
President
Club for Growth

Diana Petrak
President
Colorado Policy Pathways

Sean Higgins
Research Fellow
Competitive Enterprise Institute

Rebecca Friedrichs
Founder
For Kid and Country

Maxford Nelsen
Director of Research and Government
Affairs
Freedom Foundation

Ryan Walker
Executive Vice President
Heritage Action for America

Douglas P. Seaton
President
Upper Midwest Law Center

F. Vincent Vernuccio
President
Institute for the American Worker

Tony Daunt
Senior Director
Workers for Opportunity

Mailee R. Smith
Senior Director of Labor Policy
Illinois Policy Institute

Carol Platt Liebau
President
Yankee Institute

Carrie Lukas
President
Independent Women's Forum

Heather Higgins
CEO
Independent Women's Voice

Alfredo Ortiz
CEO
Job Creators Network

Shannon Meade
Executive Director
Littler Workplace Policy Institute

Brandon Arnold
Executive Vice President
National Taxpayers Union

Mike Hruby
President
New Jobs America

Tom Hebert
Executive Director
Open Competition Center

Paul Gessing
President
Rio Grande Foundation

Isabel Soto
Director of Policy
The LIBRE Initiative

Derrick Max
President and CEO
Thomas Jefferson Institute for Public Policy