



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

November 21, 2011

The Honorable Brian E. Hayes, Member
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Dear Member Hayes:

I was greatly disappointed to read your letter, dated November 18, 2011, to Chairman John Kline of the House Committee on Education and the Workforce, which discusses in great detail internal Board deliberations and processes. Your willingness to publicly disclose pre-decision, deliberative conversations constitutes a dangerous departure from over 75 years of Board practice and threatens the ability of future Board members to deliberate freely and openly independent of external political and other pressures. Of even more concern, however, is the inaccurate and misleading nature of your description of those deliberations and processes. It is these inaccuracies that require me to clarify the record today.¹

Before I address the specific allegations in your letter, it is important to note that you could have voiced all of the views expressed in your letter in an appropriate and public forum, but chose not to do so. In your dissent to the Notice of Proposed Rulemaking concerning the Board's representation case procedures, published on June 22, 2011, you stated, "I believe the Board should also have exercised its discretion to hold an open meeting under the Government in Sunshine Act." On November 10, I informed you that the decision about whether, how, and to what extent the Board would proceed with any final rules would likely be made at a public meeting. Last week, before you sent your letter to Chairman Kline, the Board sent a notice of such a meeting to the Federal Register and announced that the meeting would be held on November 30. At that open meeting, you will have a chance fully to express your views on the proposed rules, the procedures used to consider their adoption, and the propriety of the Board adopting them at this time, and your colleagues will have an opportunity to respond to your concerns. It would have been appropriate for you to express any views, however strongly held and however contrary to those of any of your colleagues, face to face, across the Board's conference table, and in public.

¹ Your letter and its release to the public have forced me to correct the record as to internal Board processes. I have, however, endeavored not to further compromise the deliberative process and thus have refrained herein from any disclosure of discussions of the substance of the proposed rules or pending cases.

Instead, upon the announcement of the public meeting, you immediately directed your Chief Counsel to inform the Board's Executive Secretary and the Board's Solicitor that you would not participate. You thus decided to refuse to participate in an open, deliberative process in favor of a one-sided and inaccurate letter to a congressional committee released late on a Friday afternoon.

No decision has been made on the proposed rules

In your letter to Chairman Kline, you make a number of false or misleading allegations. First, you assert that a decision has already been made to issue a final rule before the end of Member Becker's service on the Board. That is untrue. No decision has been made and no vote has been taken. As announced publicly last week, a decision on whether, how and when to proceed with any parts of the proposal will be made at the public meeting on November 30. The planned dates for circulation of a final rule and publication in the Federal Register were, when the Board's Solicitor wrote to Chairman Kline on November 10, and remain today, "unknown." Furthermore, the Solicitor accurately stated in that letter: "Discussions between Board Members on how to complete the R-Case Rulemaking are ongoing and no specific timetable has been established at this time." The fact that individual Members may have stated their views on these matters to you does not constitute a decision of the Board. Rather, it constitutes the normal deliberative process of a multi-member agency.

You have been fully informed about and invited to participate in the rulemaking process

You assert in your letter that your colleagues have proceeded to consider the proposed rules "without my participation." That is also untrue. Since the Board first began consideration of amendments to the representation case procedures, you have been kept fully informed and have been invited to participate fully in the deliberations. After you were sworn in as a Member, you were briefed on proposals to amend the rules. At each stage of the preparation of the proposed rule, you were advised of the other Members' thinking and invited to ask questions and provide comments. You were provided with a draft of the proposed rule as early as April of this year and offered a personal briefing concerning the draft. While you did not avail yourself of the briefing, detailed questions from your staff were answered by members of the drafting team, who offered continued assistance with any future questions that might arise. Although the Administrative Procedures Act does not require or provide for the publication of dissents from notices of proposed rulemaking, you were afforded an opportunity to write a dissent, which was published as part of the NPRM in the Federal Register.

The proposed rule, along with your dissent, was published in the Federal Register on June 22, 2011. On June 24, 2011, Board staff held a bipartisan, bicameral briefing for congressional staff. Your staff was invited to attend the briefing and did so. On July 18 and 19, 2011, the Board held a public hearing on the proposed rule. Prior to the hearing, you were briefed on the preparations for the hearing. You were provided a list of witnesses in advance of the hearing and you attended the hearing and participated in asking questions of the witnesses. Initial public comments on the proposals were due on August 22, and reply comments were due on September 6. You and all members of your staff had access to all public comments filed with the Board as soon as they were

filed. At no time did you request assistance in accessing those comments, although it was offered to you, or for additional staff help in reviewing those comments. Nothing in your letter to Chairman Kline suggests that you or any member of your staff has made any effort to review public comments concerning the proposals despite the statutory duty of the Agency, and, thus, of each of its Members, to review and consider all public comments. See 5 U.S.C. § 553(c); *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F. 2d 1516, 1520 (D.C. Cir. 1988), cert. denied 489 U.S. 1078 (1989) (agency has a “statutory obligation to consider fully significant comments”). While decrying a lack of public participation in the process, you have apparently chosen to simply ignore the extraordinary wealth of public comments concerning the proposal, many of which are highly sophisticated and contain valuable insights.²

Before the public comment period for the proposed rule closed on September 6, 2011, at my direction, agency staff began reviewing and coding the tens of thousands of comments that were submitted. You were invited to have your staff participate in the coding and review of comments. One member of your staff received training in coding, but, according to your Chief Counsel, never had time to participate because of other duties. On September 1, you were provided with a list of all the Board-side staff who had been trained to or were actually working on the comment review and coding³ as part of my written request to you that the single member of your staff who had been trained to help be permitted to assist with the final review all the comments. After advising me that you would respond to the request after checking with your Chief Counsel, you never responded. In sum, the record is clear that you chose not to make any member of your staff available to assist with the large and complex task of reviewing and coding the comments. Every other Board Member contributed several staff attorneys. If you had honored my request to contribute members of your staff to this necessary work of the agency, they would, of course, have been able to keep you fully informed about the process.⁴ Until Monday, November 14, 2011, neither you nor any member of your staff even inquired about the progress or status of the staff-level review of comments, although you were well aware that it was ongoing.

On October 7, you and your staff received copies of the comments Member Becker and I and our senior staff considered the most extensive, detailed, and useful (although all comments had been available to you since they were filed). You were also given computer generated reports identifying the issues addressed in all the comments that had been coded “most significant” and “significant” by the comment review team, along with instructions on how to locate any of the over 65,000 comments on the agency’s shared computer system. On November 14, you and your staff were directed to comprehensive lists of issues raised in the most significant and significant comments, which had been prepared by staff who reviewed all such comments a second time. Thus, despite the fact that you refused to provide any staff assistance in the Board’s review of the

² You may thus not be aware that, despite the strongly held views expressed in your dissent to the NPRM, the Agency received many comments supporting the proposal, not only from labor organizations representing millions of employees, but also from employers supporting many parts of the proposal.

³ Despite having been given this list, and despite the receipt by your staff of updates identifying all of the other comment reviewers, you state in your letter to Chairman Kline on page 2, n. 5, “I note that my colleagues did not provide you with a requested list of Board staff involved in this process, although that information is available to them, but not to me.” Your representation to the Chairman that you did not have access to the list is incorrect.

⁴ In fact, your staff received numerous updates concerning the progress of the coding during September and October.

over 65,000 comments, you have been provided full and complete access to the fruits of that undertaking.⁵

In addition to fully sharing with you the results of the review of all public comments on the proposals, your colleagues have repeatedly attempted to engage you in discussion of the proposals in an effort to find some common ground. However, you have chosen not to engage in the ordinary collaborative process of deliberation. As stated above, you were provided with a draft of the proposed rule as early as April of this year and all of your staff's questions concerning the draft were fully and promptly answered. At no time during the consideration of the proposal did you suggest any revisions or attempt to engage your colleagues about the substance of the proposals or the process for their consideration. In your dissent from the NPRM, you stated, "Parts of what my colleagues propose seem reasonable enough," yet neither before nor since publication of the NPRM have you identified the parts of the proposed rules you consider reasonable.⁶

Shortly after the publication of the NPRM in July, Member Becker met with you in your office and asked that you consider which aspects of the proposals could be agreed on and specifically asked that you make proposals in relation to those areas of greatest importance to you. You indicated you would consult your staff and respond, but you never did. Since the end of former Chairman Liebman's term in August, numerous lists of priority matters the Board hoped to dispose of before the end of Member Becker's service have been prepared and circulated among the Members. The rulemaking process was among those matters. I have attempted repeatedly to discuss those priority matters with you in order to reach agreement on a schedule for their disposition and you repeatedly deferred the discussion. In the past two weeks, you declined to attend two regularly scheduled weekly meetings of the Board at which the Members were to have discussed a schedule for the disposition of the priority matters.

In mid-October, I specifically discussed with you a potential schedule for consideration of the rulemaking. You did not offer any alternative schedule. You did not present me with any specific concerns you may have had with the substance of the proposed rules. Instead, you indicated that, if the Board proceeded with consideration of the matter, you would consider resigning your position.⁷

In early November, in response to your suggestion that you would resign, thereby depriving the Board of a quorum and preventing the issuance of *any* form of final rule as well as the adjudication of many cases now pending before the Board, I offered to delay publication of a final

⁵ Here, I must note that since August of 2010, when the term of former Member Schaumber ended, you have enjoyed the use of two full Board Member staffs, currently a total of 27 attorneys. Member Becker, by contrast, has a staff of only 14 attorneys.

⁶ Indeed, many parts of the proposed amendments appear indisputably necessary, the elimination of references to the use of "typed carbon copy," to name just one. Yet at no time did you indicate *any* aspect of the proposal you would support.

⁷ I note that you, like Member Becker and me, in response to the following written question from the Senate Health, Education, Labor and Pensions Committee -- "Do you intend to serve the full term for which you have been appointed or until the next Presidential election whichever is applicable?" -- provided, under oath, the answer "yes."

rule until after the new year when a quorum of the Board is reestablished (after the end of Member Becker's service), if you would simply agree that, after that time, you would produce a dissenting opinion within a specified time after receiving a draft final rule and notice approved by a majority of Members. I initially proposed a time period of 45 days. You advised me that that offer "did not work for you," and that you would suggest an alternative by the following week. You did not do so. It appears that you believe you are entitled to an unlimited amount of time to consider this matter in order to exercise an effective veto of the will of a majority, whether it be of two, three or four Members and whether it be this year or next.

On Thursday November 10, I advised you that despite your suggestion that you might resign, the Board majority wished to proceed with deliberations over the rulemaking. I encouraged you not to resign, but to participate in those deliberations. I told you that I was considering recommending significant modifications to the proposed rules and that I would appreciate your input. I told you that I would likely schedule a public meeting unless you preferred that the Board Members vote by electronic means (as we often do) on the questions of whether, how and to what extent the Board would proceed. You indicated that you thought a public meeting would probably be appropriate. I asked for your further views about how to proceed, and you said you would respond by Monday, November 14. I heard nothing from you by or on that date. On Tuesday, November 15, you emailed to advise me that you opposed a public meeting. In addition, you threatened to send an attached letter to Chairman Kline much like the letter you eventually sent at the end of the week.

In a final attempt to resolve our disagreements through the ordinary Board processes, Member Becker asked if you would consider a schedule under which the Board would consider only a very limited number of the proposed amendments and leave the remainder for consideration after the end of Member Becker's service. Member Becker did not ask you to agree to the amendments or to forego dissenting about any aspect of the proposals or the process used to adopt them, but simply that you agree to dissent within 30 days after receiving a draft final rule concerning the very substantially limited set of amendments.

Member Becker's proposal also included agreement of all Members to a temporary, emergency measure intended to permit the Board to issue decisions in cases that had been considered, voted on, and a majority decision written and approved before the end of Member Becker's service, given the possible loss of a quorum at that time. The proposal would have provided that no decision could issue unless a dissenting member had been afforded at least 30 days to write a dissent after receiving an approved majority opinion. Moreover, unlike the Executive Secretary Memorandum cited in your letter, the proposal would have allowed a dissenting member to take *any* amount of time he deemed necessary to write a dissent, which would then be issued and published separately from the majority opinion.⁸ The proposal was expressly denominated an

⁸ You state in your letter to the Chairman on page 3, "the 'emergency' procedures would deprive me of any meaningful opportunity to consider the majority position, much less prepare a response, in any number of cases." This representation is simply incorrect. Under the written proposal you were given, you would have had *at least* 30 days to prepare a dissent, and the opportunity, if that period was not sufficient, to publish a dissent at any time after issuance of the majority opinion.

“Emergency and Temporary” measure, necessitated by the possibility that the Board might be “without a quorum and unable to fulfill its statutory duty to issue decisions at the end of the current congressional session and, possibly, for an extended period after the end of the session.”⁹ Last Friday, you informed Member Becker that you would not agree to any aspect of his proposal and made no counterproposal.

In short, you have not in any way been excluded from the process of deliberation concerning the proposed rules. Rather, you have refused to assist with that process in any respect and refused to engage in the normal give-and-take of deliberation of a multi-member board.

A majority of the current Board has authority to adopt a rule

You assert in your letter that the Board cannot proceed to adopt any final rule because of its tradition of not overturning precedent through adjudication without the agreement of at least three Members. Of course, the Board has made no decision to adopt any portion of the proposed rules to date. Moreover, the proposed rules do not purport to overrule any extant precedent. Nevertheless, I must point out that the National Labor Relations Act expressly vests the Board with authority to adopt rules and does not require any form of super-majority vote in order to do so. To the contrary, under the Act, a lawful quorum of the Board consists of three members (out of the five members provided for by the statute). Under Section 3(b) of the Act, so long as the Board has a quorum of three, sitting Members, the Board can “exercise all of the powers of the Board.” 29 U.S.C. § 153(b). Rulemaking is one of the “powers of the Board.” See 29 U.S.C. § 156. There is no statutory basis to argue that a three-member quorum of the Board must act unanimously—as opposed to acting by majority vote, as the Board ordinarily acts—in order properly to exercise the Board’s powers, including rulemaking.

The Board does have a tradition, as you state, of not overruling its own prior precedents through adjudication with fewer than three votes to do so. See *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154, slip op. at 2 & fn. 1 (2010) (concurring opinion of Chairman Liebman and Member Pearce) (collecting cases dating back to 1985). This tradition, which is not unbroken,¹⁰ is not based on the Act itself, nor has it been codified in a Board rule or statement of procedure. No Board decision has ever articulated a reason for the practice.

⁹ As you know, Member Becker has advocated adoption of such an internal rule since the start of your and my service on the Board, and has informed you directly that he would publicly support its retention *regardless* of any subsequent changes in the composition of the Board. I note further that the proposal parallels rules governing case processing in federal courts of appeals, designed, of course, to prevent a dissenting judge from effectively exercising a pocket veto through delay. See, e.g., U.S. Court of Appeals for the Third Circuit, Internal Operating Procedures, §§ 5.5.3(b), 5.6; U.S. Court of Appeals for the Seventh Circuit, Operating Procedures, § 9(i).

¹⁰ See *Mathews Readymix, Inc.*, 324 NLRB 1005, 1008 fn. 14 (1997), enf. granted in part, denied in part, 165 F.3d 74 (D.C. Cir. 1999) (two-member majority overrules precedent); *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 775 fn. 3 (1997) (same).

The closest approximation to such a rationale comes from a federal appellate court. On review of *Hacienda Resort*, the U.S. Court of Appeals for the Ninth Circuit acknowledged the Board's traditional approach to overruling precedent in adjudication:

We recognize the Board's interest in protecting the stability of its legal precedent. Unlike other federal agencies, the NLRB promulgates nearly all of its legal rules through adjudication rather than rulemaking.... Under such a scheme, the Board's rules would be of little assistance to employers and unions in following the NLRA if the Board's rules interpreting the Act were subject to routine, frequent change. The Board reasonably has decided that requiring a three-member majority to overturn precedent provides for the necessary stability of its rules, and we defer to that judgment.

Local Joint Executive Board of Las Vegas v. NLRB, 657 F.3d 865, 872 (9th Cir. 2011).

The Ninth Circuit's statement underscores a critical aspect of the Board's practice: It has been followed in the Board's *adjudication* of cases, rather than in rulemaking. The notice-and-comment process of rulemaking does not implicate the same concerns about the stability of legal rules that adjudication does, because it does not permit the "routine, frequent change" of which the court spoke. The greater stability inherent in rulemaking has been cited by the Administrative Conference of the United States in recommending increased use of rulemaking by the Board. See Administrative Conference of the United States, Recommendation 91-5, *Facilitating the Use of Rulemaking by the National Labor Relations Board* (adopted June 14, 1991), 56 Fed Reg. 33851 (July 24, 1991). In sum, the notice and comment procedures of the Administrative Procedures Act, which you have acknowledged have been fully followed by the Board, are an appropriate substitute for the self-restraint the Board has traditionally imposed on itself in the context of adjudication.

You do not possess a veto over all Board action

You assert in your letter that you possess veto power over *any* action of the Board at this time under the Supreme Court's recent decision in *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). You assert that you must agree "to delegate decisional authority on this matter to a group of three Board members." Section 3(b) of the Act provides that "[t]he Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." At present, however, the Board, consisting of only three Members, is exercising its powers as a full Board and not delegating any powers to "any group of three or more members." Until now, you agreed, at least implicitly, with this construction of the Act: since the end of former Chairman Liebman's term, the three remaining Members of the Board have issued numerous decisions without any such delegation, including decisions in which a Member dissented. In fact, since that time, the language used in panel decisions when there are more than three sitting Members, "The National Labor Relations Board has delegated its authority in this proceeding to a three-member

panel," has not generally been used,¹¹ and you have raised no objection and never made the peculiar suggestion that the three sitting Members must somehow delegate authority to themselves until now.

No standing rule of Board procedure provides you with 90 days to dissent before publication of any final rule

You assert in your letter that Executive Secretary Memorandum No. 01-1 entitles you to 90 days to write a dissent to any final rule. That is untrue. Memorandum No. 01-1 applies to "Timely circulation of Dissenting/Concurring Opinions" -- i.e., it expressly applies only to the adjudication of "cases." While you acknowledge that the Memorandum applies only to adjudication, you assert that there is "no rational basis for not applying it to substantive rulemaking as well." There is one, however, and it is embodied in the APA. Significantly, as stated above, the APA makes no provision for publication of a dissent from either a notice of proposed rulemaking or final rule. Moreover, the APA requires a notice of proposed rulemaking. There is no parallel requirement of a published statement of a preliminary view by the majority in adjudication. Here, therefore, you have had a detailed statement of the majority's views since well before the NPRM was published in June. There is thus every reason to expect that "timely circulation" of an opinion dissenting from any final rule could be prepared in less than 90 days.¹² Finally, while you assert that your colleagues intend to "not allow the requisite time for preparing or circulating a dissent," the only proposal that has been made to you provided that if you did not believe you had sufficient time to prepare a dissent you could take as much time as you deem necessary and your dissent would be published in the Federal Register subsequent to the final rule.¹³

The Board's use of staff from its General Counsel's office and regional offices to fulfill its statutory duty to review public comments was entirely proper

You assert in your letter that the Board's use of staff from its General Counsel's office or regional offices to assist with the review of comments or in any other manner in connection with the rulemaking proposal somehow violates Section 4(a) of the Act. This allegation of illegal conduct is made without supporting citation or explanation. As you well know, nothing in that section prevents staff from any part of the agency, including the General Counsel's office or regional offices, from assisting in the review of public comments on a proposed rule or in research or drafting under a Board Member's supervision. Section 4(a), by its terms, applies to the

¹¹ Compare *Atlantic Scaffolding*, 356 NLRB No. 113, slip op. at 1 (March 18, 2011) (Liebman, Pearce and Hayes) with *Douglas Autotech Corp.*, 357 NLRB No. 111, slip op. at 1 (Nov. 18, 2011) (Pearce, Becker and Hayes). The absence of any delegation and thus of the delegation language in nearly all decisions since the Board dropped to three Members is consistent with the absence of any delegation (and thus the delegation language) whenever the Board acts through all its sitting members, i.e., when it acts *en banc*. See, e.g., *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 1 (Aug. 26, 2011).

¹² Indeed, Memorandum 01-1 expressly provides that "questions will arise which are not answered by these procedural instructions" and that they will be handled "on an ad hoc basis." Further, the Memorandum provides that "For good cause, the Board has the discretion to allow departure from these procedures on a case-by-case basis."

¹³ Memorandum 01-1 creates a 90-day period for circulation of a dissent, but contains no allowance for the subsequent publication of dissents if the dissenting Member requires more time.

adjudication of cases (to which the General Counsel is a party) and has never been construed otherwise. Moreover, you are well aware that staff from the General Counsel side of the agency are detailed from time to time to Board staffs where they perform a variety of duties. It is disturbing, to say the least, that you would raise a charge of illegal behavior in a letter to a Member of Congress without first speaking with me about your concerns or raising them with the Agency's Solicitor or Inspector General, who could easily have allayed your concerns on this score.

Other Board Members have continued to fulfill their duty to decide cases

You assert in your letter that the Board has not properly attended to the adjudication of pending cases while it was fulfilling its duty under the APA to consider all public comments on the proposed rules. This is untrue. As you point out in your letter, action by all sitting Members is traditionally required before a decision is issued. While I do not believe it is appropriate to publicly reveal the status of pending cases in each Member's office, under separate cover I will provide you with a list of all cases we have designated as priority cases in which decisions are ready to be issued pending only your action. For you to suggest that the delay in issuing cases is due to other Members' devotion of their time or their staffs' time to the rulemaking proceedings is disingenuous, particularly when you have refused requests to provide any staff to assist with the statutorily mandated task of reviewing public comments.¹⁴

The rulemaking process has been the most open and inclusive process in the Board's 75-year history

Finally, your letter asserts that the rulemaking procedure has been rushed and exclusionary. This is untrue. On June 22, the Board published in the Federal Register a 36-page NPRM setting forth the proposed rules along with a detailed explanation of why they were being proposed. The Board sought written comments on the proposals for 60 days and written reply comments (which are not required by the APA) for an additional 14 days thereafter. The Board held an unprecedented two-day public hearing on the proposals attended by all sitting Board members, at which many of the most experienced and skilled members of the labor and management bar as well as employers, employees, and union leaders testified concerning the proposals and were questioned by Board Members. The Board has received over 65,000 public comments on the proposals, and each unique comment has been personally read at least once if not many times by Board staff under my direction. To describe this extraordinarily careful and open process as in any respect rushed and exclusionary simply ignores reality. It appears that in your view due process means interminable process or, at least, process that extends until the Board is either disabled from acting or its

¹⁴ I further reject your suggestion that the Board attempted to "disguise" a "diminution in productivity" in its response to the congressional request. Exhibit 3, which you criticize in your letter, was prepared by the Executive Secretary's office in response to the request for a "monthly breakdown of decisions issued by the Board." When your staff pointed out that the request might refer to a subset of decisions, namely those in contested cases, a table providing that information was prepared as well, and attached as Exhibit 4. Both sets of numbers were provided to the committee at the same time. Neither even remotely supports your assertion that necessary work on the rulemaking proceeding has had an "adverse impact" on the issuance of decisions.

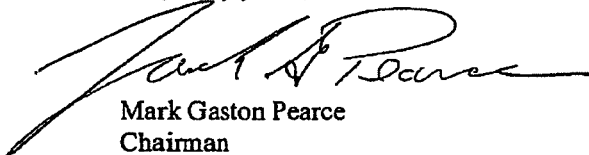
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composition changes. But that is not how due process is defined under the Constitution or the APA, and the Board has fully and fairly complied with both the letter and spirit of the law.

In sum, I recognize that you may disagree with my views of proper administrative procedure and Board priorities, and you have every right to do so and every right to express that disagreement in an appropriate forum. That forum is the planned public meeting, a private meeting with me or Member Becker, or a published dissent. At every step of this rulemaking process, the other members of the Board have attempted to include you and your staff in the accomplishment of the tasks necessary to fully and fairly consider the view of the public, to engage in discussions with you, and to seek your views. At every step of the process, however, you have declined to assist, to participate, and to engage in collaborative deliberation. With all due respect, your conduct has been inconsistent with the collegial norms of the Board.

I deeply regret that you continue to decline to participate in a meaningful way in this deliberative body. I urge you to return to your work here on the Board. Many cases, vitally important to the employees, employers, and labor organizations who rely on this Agency as well as to the general public, await your consideration. Every day, Member Becker and I along with all the other employees of our Agency strive to make the National Labor Relations Act work as a mechanism for the peaceful resolution of conflicts that arise in American workplaces. If you disagree with the approach we have taken, state your disagreements face to face across the conference table, where they can be considered and debated, or explain your position in a dissent, as both Member Becker and I have done when we have been in the minority, and as previous Members of this Board have done since the creation of this venerable body. You can come back to the work of the Agency and contribute your views to our important deliberations, or you can continue down a reckless path of unfounded public accusation. I, for one, hope you will return to work, and I invite you to do so. We still have much to do on behalf of the American people.

Very truly yours,



Mark Gaston Pearce
Chairman

cc: The Honorable John Kline, Chairman
House Committee on Education and the Workforce
The Honorable George Miller, Ranking Member
House Committee on Education and the Workforce
The Honorable Tom Harkin, Chairman
Senate Committee on Health, Education, Labor & Pensions
The Honorable Michael B. Enzi, Ranking Member
Senate Committee on Health, Education, Labor & Pensions