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 decision² 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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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.
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.


7 Air Transport Association of America, Inc. v. NMB, 663 F.3d 476, 488 (D.C. Cir. 2011).

8 Id. at 487.