



United States Government

**NATIONAL LABOR RELATIONS BOARD**

Office of the Chairman

1015 Half Street, SE

Washington, DC 20570

October 8, 2021

The Honorable Patty Murray  
Chairman, Committee on Health, Education, Labor & Pensions  
United State Senate  
Washington, DC 20510

The Honorable Richard Burr  
Ranking Member, Committee on Health, Education, Labor & Pensions  
United States Senate  
Washington, DC 20510

The Honorable Robert C. Scott  
Chairman, Committee on Education & Labor  
United States House of Representatives  
Washington, DC 20515

The Honorable Virginia Foxx  
Ranking Member, Committee on Education & Labor  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Murray, Ranking Member Burr, Chairman Scott, and Ranking Member Foxx:

With the appointment of Member David Prouty, I am pleased to report that the National Labor Relations Board is now operating with a full complement of five members. However, in the interests of transparency, I write to inform the Committees that, due to an internal agency misunderstanding, Member Prouty took the oath of office and entered on duty as a Board Member before the President had signed the formal appointment paperwork. This error has likely delayed the official commencement of Member Prouty's service as a Board Member from August 28, 2021 to September 22, 2021. After this procedural misstep was discovered, the Board took all necessary steps to address any legal and administrative concerns arising from the error, including acting to ensure that no Board order or action was actually impacted. No contested cases issued with Member Prouty's participation during that time. Moreover, I have initiated a thorough review to identify the cause of the mistake and prevent such an error from occurring again. I can now state with confidence that any change in the date on which Member Prouty officially became a Board Member had no effect on the Board's important work administering and enforcing the National Labor Relations Act.

For the sake of transparency and so that your Committees and all interested Members of Congress are fully apprised, I will set forth below the sequence of events that have transpired and give a fuller description of the steps that the Agency has taken thus far.

On July 28, the Senate confirmed David Prouty as a Member of the National Labor Relations Board for a term of five years expiring on August 27, 2026, vice William J. Emanuel, whose term was due to end at midnight on August 27, 2021. Member Prouty appropriately asked to be sworn in as a Member at the earliest possible time, and the Agency arranged his oath of office for 11 a.m. on August 28. I administered the oath to Member Prouty that day. The Agency immediately executed an affidavit of appointment, and Member Prouty thereupon began his service as a Member.

Over the next 25 days, Member Prouty undertook a variety of tasks at the National Labor Relations Board consistent with his responsibilities as a Member. He received briefings from offices throughout the Agency and began to learn the mechanics of the Board's casehandling process. He received his initial ethics training and complied with his ethics pledge. He worked with the Designated Agency Ethics Official to compile his list of recusal obligations, which was finalized and posted on the Agency's public website on September 14. Until the time of that ethics posting, Member Prouty's involvement in adjudicative matters was limited to a small number of time-sensitive cases, and he participated in each only after obtaining clearance from our Ethics Office.

At 10:30 a.m. on September 22, I received an email from the White House Office of Presidential Personnel, informing me that the President had officially appointed Member Prouty. Because at that point it appeared likely that Member Prouty had been sworn in without a Presidential commission three weeks prior, and after consultation with agency counsel and in an abundance of caution, I re-administered the oath of office to Member Prouty at 1 p.m. on September 22 and executed another affidavit of appointment. I also shared this development with the other Board members and with the NLRB's Inspector General, who made an initial determination to defer to the Agency's internal processes for addressing the situation as there was no indication of misconduct, waste, fraud, or abuse. We promptly identified all casehandling matters in which Member Prouty had taken any formal action prior to September 22. Because of the care employed to ensure that Member Prouty's recusal list was thorough and accurate, he had only entered an action in three issued cases (declinations to participate or internal litigation authorizations) and in five still-pending cases before September 22. After an independent and detached review of each case, and in consultation with staff and Board counsel, Member Prouty ratified those earlier decisions.

We also concurrently analyzed administrative issues arising out of Member Prouty's entry-on-duty without a signed Presidential commission. With input from internal agency experts, the Department of Justice, and the Office of Personnel Management, we concluded that, at the very least, Member Prouty was a *de facto* employee of the National Labor Relations Board between August 28 and September 22. The *de facto* employee finding informs the handling of compensation issues, and it also supports our conclusion that Member Prouty's early entry on duty did not run afoul of any ethics rules or information security protocols. From the moment he

began his service with the NLRB on August 28, Member Prouty complied with all ethics and information security requirements. He followed all government rules and regulations; severed relationships with prior employers and clients; abided by ethics rules; received his security clearance and followed agency security protocols; and protected confidential information. Between August 28 and September 22, agency employees had no reason to doubt Member Prouty's status as a Board Member, nor did Member Prouty himself. Therefore, after consultations with the Inspector General, the Agency's Ethics officials, and our Chief Information and Privacy Officer, we have concluded that Member Prouty's service before September 22 caused no harm to agency operations, and we have identified no law, rule, or regulation that may have been violated during that period.

I have initiated an in-depth internal review to pinpoint the missteps that led the Agency to administer the oath of office to Member Prouty without first confirming that the President had signed his commission. Once the review of the facts and circumstances of this matter is complete, the Agency will also comprehensively reexamine and revise our internal controls governing the nominations process as appropriate to ensure that a situation like this does not recur. If you wish, I would be happy to update you on these actions after our review is completed.

I stand ready to work with the Committee to address any concerns or questions, and I am available to provide you and/or your staffs a briefing on this matter. Please contact me or Adam Naill in the Office of Congressional and Public Affairs at [adam.naill@nlrb.gov](mailto:adam.naill@nlrb.gov) or (202) 273-1704 if you would like further information.

Sincerely,

A handwritten signature in black ink that reads "Lauren McFerran". The signature is written in a cursive, flowing style.

Lauren McFerran  
Chairman