December 12, 2007

Dear Members of Congress:

Recent decisions by the National Labor Relations Board reflect an ominous new direction for American labor law. By overturning precedent and establishing new rules, often going beyond what the parties have briefed or requested, the Board has regularly denied or impaired the very statutory rights it is charged with protecting—the rights of employees to join and form unions and to engage in collective bargaining. The Board's persistent efforts to undermine NLRA protections also have dramatized the need for Congress to enact serious labor law reform after nearly half a century with no substantial legislative change.

Since it was constituted in late 2002, the current Labor Board has mounted an aggressive campaign to curtail worker rights under the statute. In periodic waves of closely divided, highly partisan decisions, the current Board majority has effectively removed whole categories of workers from the Act's coverage[1]; stripped away protections promised by the Act[2]; and further diluted the strength of already inadequate remedies.[3] The Board's decisions are remarkable for their anti-union bias, and in that regard remarkably out of touch with the desires of American workers. A recent Hart Research poll shows that as many as 60 million workers want a union but do not have one.[4]

A key reason why employees are thwarted in their desire for a union is the Board's inability or unwillingness to protect genuine employee free choice. The NLRB-supervised elections process too often invites employer coercion or interference, and encourages employers to create delays that frustrate and discourage workers. The current Board has given employers even greater leeway during organizing campaigns—to threaten and intimidate workers for union activities,[5] and to impose onerous and

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[1] See e.g. Oakwood Healthcare, Inc., 348 NLRB No.37 (2006); Brown University, 342 NLRB No.42 (2004); Oakwood Care Center, 343 NLRB No.76 (2004); Brevard Achievement Center, 342 NLRB No.101 (2004).

[2] See e.g. Delta Brands, Inc., 344 NLRB No.10 (2005); Waters of Orchard Park, 341 NLRB No.93 (2004); Holling Press, Inc., 343 NLRB No.45 (2004); IBM Corp, 341 NLRB No.148 (2004).

[3] See e.g. Albertson's, Inc., 351 NLRB No.21 (2007); Desert Toyota, 346 NLRB No.3 (2005); First Legal Support Services, 342 NLRB No.29 (2004).

[4] See Richard B. Freeman, *Do Workers Still Want Unions? More Than Ever*, Economic Policy Institute (Washington D.C. 2007). See also *Upfront*, Business Week, Sept. 16, 2002, at 6.

[5] See e.g. Airport 2000 Concessions, LLC, 346 NLRB No.86 (2006); Alladin Gaming, 345 NLRB No.41 (2005); Crown Bolt, 343 NLRB 776 (2004).

ambiguous workplace rules that deter union support and chill workers' exercise of their rights.[6]

As a result of the failure of the NLRA's representation process to guarantee free and fair elections, workers and unions have turned to other organizing strategies. One important approach involves securing voluntary recognition through majority sign-up, when a majority of workers sign cards indicating their preference for a particular union and the employer decides not to contest the card majority. This form of organizing was recognized by Congress in the Act itself and has been endorsed by the Board for decades, as well as by the Supreme Court.[7]

In response to the increasing reliance on majority signup by workers who want a union, the current Board majority has erected substantial new hurdles to voluntary recognition. More than 70 years ago, section 9 of the Act established that a union will be recognized as exclusive representative if "designated or selected" by a majority of employees. But the Board has now made clear that it will not protect new bargaining relationships created through majority signup and voluntary recognition until a minority of workers who oppose the union have a second chance to defeat the majority's choice of union representation.[8] Indeed, the Board now insists that employers who voluntarily recognize their workers' free and uncoerced majority choice for a union must post an NLRB notice telling workers how 30% of them may force the union to demonstrate majority support a second time.[9] In stark contrast, the Board does not require any employer-posted notice that explains to workers how to exercise their rights to form, join, or organize a union for the purpose of engaging in collective bargaining.

In addition to its decisions restricting workers' rights during an organizing campaign and burdening union efforts to achieve voluntary recognition, this Board has repeatedly undermined remedies for employer misconduct. Although the NLRA's remedial scheme has long been criticized as inadequate, the current Board majority has rebuffed various initiatives from past Boards aimed at enhancing compensation for victimized employees and overcoming the effects of unlawful employer activity. This Board has rejected remedial bargaining orders, broad cease-and-desist orders, and so-called "special" organizing remedies;[10] absent such relief, the penalty for serious employer wrongdoing is too often simply to post a notice and promise not to do it again. These notices do far too

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[6] See e.g. Guardsmark, LLC, 344 NLRB No.97 (2005), *enf't denied*, 475 F.3d 369, 378-80 (DC Cir. 2007); Palms Hotel and Casino, 344 NLRB No.159 (2005); Lutheran Heritage Village-Livonia, 343 NLRB No.75 (2004)

[7] See e.g. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Franks Bros. v. NLRB, 321 U.S. 702 (1944); NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318 (1940).

[8] Dana Corp, 351 NLRB No.28 (2007).

[9] Id.

[10] See cases cited at note 3 above; see also Intermet Stevensville, 350 NLRB No.94 (2007); Abramson, LLC, 345 NLRB No.8 (2005); The Register Guard, 344 NLRB No.150 (2005).

little to dispel the intimidation and fear created by an aggressive, illegal anti-union campaign, and far too little to discourage employer illegality in the first place.

Finally, the current Board has made it more difficult for workers to recover even the modest backpay remedy to which the law entitles them when they are fired, laid off or denied employment because of their union support. Once such a violation is found, the burden has always fallen on the adjudicated lawbreaker to present information that would constitute grounds to reduce the backpay owed an illegally fired worker. This Board, however, has turned the remedial process on its head. Recent decisions have required employee victims to produce evidence that they searched for particular new jobs[11] even while engaged in picketing to get their old jobs back,[12] or that they would have worked for the employer for the entire backpay period following their having been illegally denied a job.[13] Board resources must now be directed away from investigating and prosecuting labor law violations and devoted instead to reducing the backpay liability of the lawbreaker. The Board's new direction further weakens remedies and makes it less expensive to violate workers' rights.

The Congresses that enacted and amended the NLRA from 1935 to 1959 viewed collective bargaining as an essential way to maintain and expand America's middle class. This Board's decisions, significantly eroding workers' ability to gain the right to bargain with their employer for a better future, highlight the need for legislative reform and for a return by the current Board to its statutory mandate. We call upon Congress to address both of these urgent needs.

Sincerely,

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[11] See St. George Warehouse, 351 NLRB No.42 (2007)

[12] See The Grosvenor Resort, 350 NLRB No.86 (2007)

[13] See Oil Capitol Sheet Metal, Inc., 349 NLRB No.118 (2007). See also Toering Electric Co., 351 NLRB No.18 (2007).

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