AFL-CIO

LEGISLATIVE ALERT

February 28, 2018

The Honorable Lamar Alexander, Chairman
The Honorable Patty Murray, Ranking Member
U.S. Senate Committee on Health, Education, Labor
and Pensions
428 Dirksen Senate Office Building
Washington, D.C. 20510

Subj: Nomination of John Ring to the National Labor Relations Board

Dear Chairman Alexander and Ranking Member Murray:

On behalf of the AFL-CIO, a federation of 55 national and international unions representing 12.5 million working men and women, I am writing to urge your careful scrutiny of John Ring's nomination to the National Labor Relations Board (NLRB) when Mr. Ring comes before the Committee on Health, Education, Labor and Pensions (HELP) for a hearing next week.

As you know, the National Labor Relations Board was established by Congress more than 80 years ago to enforce the National Labor Relations Act, which protects the right of working people to join together with their co-workers to advocate for better pay, benefits, safety, and other improvements on the job. These rights, and collective bargaining, are more important than ever, given the dramatic income inequality in our country and the need for working people to have effective mechanisms to address it.

Since taking office, President Trump has nominated to this critically important agency three management lawyers with experience representing corporations on labor law issues, but not working people, and a Republican Hill staffer with no experience practicing labor law. And despite their commitments to your Committee that they brought no agenda or prejudgments to the agency, these appointees have carried out the agenda of the Chamber of Commerce and Republicans in Congress, ignoring established agency practice and, in one case ignoring a clear conflict of interest to reverse precedent and take other actions to undermine workers' rights.

The most dramatic examples of this occurred in December, when at the end of then-Chairman Miscimarra's term, the three-member Republican majority on the NLRB rushed to reverse at least five major precedents.[1] The overturned precedents include the NLRB's decision

[1] Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (Dec. 14, 2017) (reversing Browning-Ferris Industries on the joint employer standard); PCC Structurals, Inc., 365 NLRB No. 160 (Dec. 15, 2017) (reversing Specialty Healthcare on the rules for bargaining unit determinations); Raytheon Network Centric Systems, 365 NLRB No. 161

in Browning-Ferris Industries, where the NLRB had updated its test for determining whether two employers are joint employers with obligations to collectively bargain with jointly-employed workers. Browning-Ferris was an important decision, given employers' increased reliance on contractors, permatemps, and agency employees. It helped assure that workers would have the opportunity to sit down and bargain with the employer who effectively controls their working conditions. Within just a few months of taking office, Members Emanuel and (now Chairman) Kaplan joined Chairman Miscimarra in the Hy-Brand decision reversing Browning-Ferris. The Republican majority manufactured an opportunity to reverse Browning-Ferris even though it was not necessary to reach the joint employer issue to decide the Hy-Brand case. Worse yet, Member Emanuel ignored a clear conflict of interest, given that his former law firm represents one of the parties in Browning-Ferris, and proceeded to participate in deciding the case and then went on to participate in the Board's decision directing the General Counsel to seek remand of Browning-Ferris itself from the court of appeals. These breaches of ethical duties are now the subject of an Inspector General investigation. *See* https://www.propublica.org/article/william-emanuel-nlrb-member-is-under-investigation-for-a-conflict-of-interest.

The Miscimarra NLRB also overturned Specialty Healthcare's clear statement of the process for approving bargaining units and opened the door to employers litigating in every case over which workers should be in a bargaining unit when they are seeking to form a union. The three-member Republican majority did so in highly unusual circumstances that reveal the majority's rush to reverse precedent. The Board accepted review of a case and proceeded to use it to reverse Specialty Healthcare without giving the parties notice and an opportunity to file briefs in the case.

The Miscimarra majority also published a Request for Information asking for public comment on whether the NLRB's rules for representation election proceedings, which were adopted to reduce unnecessary litigation and streamline the election process, should be repealed or changed. The two Democratic appointees on the NLRB dissented, saying there was no reason to upset a system that has worked well and achieved its intended purpose.

Meanwhile, President Trump's appointee to be General Counsel of the agency, Peter Robb, has pursued radical and destructive ideas to reorganize the agency's field operations without the benefit of input from stakeholders, including working people and their representatives. *See* https://www.nytimes.com/2018/01/25/business/economy/labor-board.html. Robb has also issued memoranda to the field making clear his intention to seek reversal of Obama-era precedent for no other reason than that they were decided during the prior Administration. He has encouraged employers to take aggressive efforts to unwind bargaining unit determinations made while Specialty Healthcare was governing law, even where employees

(Dec. 15, 2017) (reversing E.I. du Pont de Nemours and expanding employers' ability to make unilateral changes); The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017) (loosening the rules on employer handbooks that contain language that chills workers from engaging in concerted activity); UMPC, 365 NLRB No. 153 (Dec. 11, 2017) (overruling precedent to allow "unilateral settlements" over the charging party's objections).

have already exercised their right to vote for union representation and the employer agreed that the bargaining unit was appropriate.

In this context, we hope it is evident why the nomination of yet another management lawyer to this critically-important workers' rights agency causes us such concern. John Ring has an extensive track record at the corporate law firm Morgan, Lewis & Bockius representing employers before the NLRB, other agencies, and in the courts, but to our knowledge, he has no experience representing working people seeking to exercise their rights. If confirmed, he would be the third Republican member of the five-member NLRB, thus restoring the majority's ability to reverse precedent and take other actions destructive of workers' rights.

It is essential that senators scrutinize Mr. Ring's record and ask him questions on the record to determine, among other matters, the following:

- Does he understand the role of the NLRB to enforce and protect workers' rights?
- Can he set aside his decades of experience representing corporations to fairly and impartially review cases and decide them in accordance with the purpose of the law, which is to promote collective bargaining?
- Will he respect his ethical obligations and not participate in cases posing conflicts of interest and err on the side of avoiding the appearance of a conflict?
- Will he respect NLRB traditions and provide opportunities for public notice and comment before undertaking significant action such as the reversal of precedent, modification of published rules, or reorganization of the agency?
- What confidence can working people have that a life-long management-side lawyer will protect their rights?

This nomination is critically important to the rights and interests of working people, and we ask for your thorough scrutiny to determine whether Mr. Ring is a suitable appointment to this agency at this time.

Thank you for your consideration of our views.

Sincerely,

William Samuel, Director
Government Affairs Department

cc: Members of Senate HELP Committee