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UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION OFFICE
Washington D.C. 20570

Via E-Mail

Date: July 31, 2014

Re: FOIA ID: LR-2014-0545

This is our final response to your letter dated June 15, 2014, received in this Office on June 20, 2014, in which you request, pursuant to the Freedom of Information Act (FOIA), "a copy of each response to a Question for the Record (QFR) provided to Congress by the NLRB." You limited this request to records created since January 1, 2009. Interim replies were sent to you on July 3 and 21, 2014.

I have enclosed a copy of the requested documents.

For the purpose of assessing fees, I have placed you in Category III, the "all other requesters" category. As a requester in this category, you "will be assessed charges to recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first 2 hours of search time shall be furnished without charge." **NLRB Rules and Regulations, Section 102.117(d)(2)(ii)(D)**. Charges for all categories of requesters are: \$3.10 per quarter-hour or portion thereof of clerical time; \$9.25 per quarter-hour or portion thereof of professional time; and 12¢ per page of photoduplication. **NLRB Rules and Regulations, Section 102.117(d)(2)(i)**.

Two and one-half hours of professional time were expended in searching for the requested material. Accordingly, please remit \$18.50.

To pay this amount by check or money order (do not send cash) please submit your payment along with the invoice to the NLRB's Finance Branch at the address reflected at the top of the invoice. Please make the check or money order payable to the National Labor Relations Board and **note on your payment the invoice number to insure that your payment will be properly credited**. You may also submit your payment by credit or debit card over the internet by following the instructions I have enclosed.

The undersigned is responsible for the above determination. You may obtain a review thereof under the provisions of the **NLRB's Rules and Regulations, Section 102.117(c)(2)(v)**, by filing an appeal with the Division of

Legal Counsel, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C., 20570, within 28 calendar days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Thus, the appeal must be received by the close of business at 5:00 p.m. (ET) on August 28, 2014. Any appeal should contain a complete statement of the reasons upon which it is based. Questions concerning an appeal of this determination should be directed to the Division of Legal Counsel. For questions concerning this letter, please call Diane Bridge, FOIA Supervisor, at (202) 273-3851.

Sincerely,

A handwritten signature in black ink, reading "Richard A. Bock". The signature is fluid and cursive, with a stylized "R" and "B".

Richard A. Bock
Acting Freedom of Information Officer

Attachments

MW/kmb

Response to Questions of Senator Enzi by Harold Craig Becker

Question 1. An article in The Nation magazine this weekend supporting your confirmation noted that labor law changes in many areas could be made without congressional action. Could NLRB take action to impose a deadline of, for example, 10 or 15 days, in which to hold certification elections?

Answer 1. Section 9 of the Act vests in the Board broad authority to conduct and regulate representation elections. Subject to the constraints of the principle of stare decisis and the requirements of the Administrative Procedure Act, where applicable, the Board could make changes in election procedures and rules if it determined, after appropriate deliberation, that they were consistent with Congress' intent and would improve the election process. The statute does not establish a specific time period during which elections must be conducted, but section 9(c) requires that before an election can be held, the Board must provide for ``an appropriate hearing upon due notice.''

Question 2. Would you ever support imposing such a certification election deadline?

Answer 2. If I am confirmed as a member of the NLRB, I will not assume the position with any preconceived agenda as to such questions of administration. Whether I would ever support imposing any form of deadline of the sort you describe would depend on the arguments, both in favor and against doing so, properly addressed to the Board; the evidence relevant to the impact of such an action; the views of the Board's career staff, particularly staff in the representation unit and in the regional offices who actually conduct elections; and any other considerations relevant to the particular proposal at the time it is made. In evaluating any such proposal, I would also consider, among other factors, the number and complexity of issues the Board must resolve prior to conducting elections, the nature of the proceedings required to resolve the issues, and the difficulty of preparing to conduct elections.

Question 3. The same article stated that NLRB could act under current law to require an employer to turn over employee personal contact information in any union organizing drive. Does NLRB have the ability to make this requirement under current law?

Answer 3. Under current Board precedent, upheld by the Supreme Court, employers are required to provide to a petitioner labor organization the names and addresses of employees after the direction of an election. See *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Current NLRB procedures require that an employer prepare a list of eligible voters and their addresses for an NLRB-conducted representation election and file it with the NLRB's regional director who then makes the list available to all parties, including individuals and/or labor organizations which have filed a representation petition or intervened in the proceedings. See NLRB Casehandling Manual paragraph 11312.1. If I am confirmed as a member of the NLRB and if the Board is presented with an argument that the standards governing the requirement to make a list of employees' names and addresses available to a labor organization seeking to represent the employees could and should be altered, I will consider it with an open mind based on the terms of the act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address

them further in this context.

Question 4. Would you ever support requiring an employer to turn over employee personal contact information in any union organizing drive, either through rulemaking or Board decisions?

Answer 4. Please see my answer to question 3.

Question 5. The article also declared that NLRB could require inside the workplace access for union organizers during campaigns. Could NLRB require inside the workplace access for union organizers?

Answer 5. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992), the Court held that absent discrimination, nonemployee union organizers are not entitled to access to an employer's private property except in the ``rare'' case where ``the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels''--for example, where the employees work at a remote logging camp. Unless Congress amends the statute to overrule that decision, the Board is bound to follow it.

Question 6. If you are confirmed, would you ever support interpreting NLRA to allow inside the workplace access to union organizers?

Answer 6. Absent a claim of discrimination, I believe that the Supreme Court's decisions in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), preclude the Board from construing the act to require employers to grant nonemployee union organizers access to their property when the union has a reasonable ability to communicate with employees off the property. Nevertheless, if I become a member of the NLRB and an argument that the Board can and should require employers to grant such access under some set of circumstances is made to the Board, I will consider it with an open mind based on the terms of the act and relevant Supreme Court precedents.

Question 7. The Nation article proposed that NLRB could act without new statutory authority to increase penalties on employers for NLRA violations. Does NLRB have the power to increase penalties under current law?

Answer 7. Congress has vested the Board with specific remedial authority in section 10 of the Act. The NLRB has authority to fashion new remedies consistent with section 10 and relevant Supreme Court precedent. Outside those bounds, use of new remedies must be authorized by Congress. I do not believe the Board has authority to award double or triple back pay as a remedy for a violation of section 8(a)(3) without congressional action, nor do I believe that section 10 of the Act currently vests in the Board the authority to impose civil penalties. However, if I am confirmed as a member of the NLRB and if an argument that the Board has and should exercise such authority is presented to the NLRB, I will consider the argument with an open mind based on the terms of the act and relevant Supreme Court precedent, and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties' legitimate reliance on existing law.

Question 8. Would you support exercising any ability to increase penalties on employers, either through rulemaking or Board decisions?

Answer 8. Please see my answer to question 7.

Question 9. Under the Gissel decision, in cases of employer misconduct the NLRB may impose a duty to bargain, even if there is no showing that a majority of employees want to unionize. Do you believe Gissel could be applied more broadly under current law?

Answer 9. As you note, the Supreme Court held in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), that under appropriate circumstances an order that an employer bargain with a union is a lawful and appropriate remedy for employer unfair labor practices that prevent the conduct of a fair election. If I am confirmed as a member of the Board and if an argument for changing the current standards for issuance of Gissel bargaining orders is made to the Board, I will evaluate the argument with an open mind based on the terms of the statute and relevant Supreme Court precedent and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties' legitimate reliance on existing law.

Question 10. Would you support broadening Gissel absent any changes to the statute?

Answer 10. Please see my answer to question 9.

Question 11. Is it possible to impose mandatory binding interest arbitration under the current NLRA and existing precedent?

Answer 11. Under current law, employers and unions may voluntarily agree to submit contract issues they have been unable to resolve through bargaining to binding arbitration. However, the Supreme Court has stated that ``allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the act is based.'' *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-108 (1970). Thus, in my view, it would not be possible to require binding arbitration of contract disputes under the current law and existing precedents.

Question 12. Would you ever support imposing mandatory binding interest arbitration without new congressional authority, either through rulemaking or a Board decision?

Answer 12. Please see my answer to question 11. Nevertheless, if I am confirmed as a member of the NLRB and if an argument that the Board could impose mandatory binding interest arbitration is made to the Board, I will consider it with an open mind based on the terms of the act and relevant Supreme Court precedents.

Question 13. How do you define the term ``secret ballot election'' as used in the NLRA? Under your definition, what specific safeguards must be in place to preserve the secrecy of the ballot?

Answer 13. The act does not define the term ``secret ballot election.'' In general, a secret ballot election has been understood to be an election in which voters cast their ballot in a manner such that no one can see or otherwise determine how any individual voter marked his or her ballot and in which that secrecy is maintained, to the extent possible, throughout the election and any post-election proceedings. The Board and Federal Courts of Appeals have developed an extensive jurisprudence concerning what steps are necessary to insure the secrecy of the ballot and what actions constitute objectionable conduct, requiring that the election be rerun, on the grounds that they interfered with the secrecy of the ballot. Because questions concerning these issues could arise before the Board, I do not believe it would be

appropriate to address them further in this context.

Question 14. What specific metrics do you believe the Board should be judged on? For example, do you believe the Board should be evaluated on whether or how long it takes employers and unions to agree to first contracts after a Board-supervised election? Can you please also explain why the metrics you identify are appropriate under the National Labor Relations Act?

Answer 14. The Board should be judged based on its fidelity to Congress' intent as expressed in the National Labor Relations Act, as amended, and on how effectively it implements the policies Congress intended to effectuate through the act. Identifying specific metrics to use in judging the Board is difficult given the numerous functions performed by the Board, the various policies Congress intended to effectuate through the act, and the roles other parties, for example, the Board's General Counsel and the Federal Courts of Appeal, play under the act. Reliance on a single metric or set of metrics has the potential to create incentives to improve performance as judged by the metric even under circumstances where doing so is not consistent with Congress' intent and does not effectuate the policies Congress intended to effectuate through the act. If I am confirmed, I intend to fully inform myself concerning what metrics the Board currently employs before drawing any conclusions about which metrics are most appropriate.

Response to Questions of Senator Burr by Harold Craig Becker

Question 1. Do you believe the NLRB must maintain an online database of all card check recognitions and any subsequent union decertification elections?

Answer 1. The National Labor Relations Act does not require that the NLRB make any particular data publicly available, but I am not at this point familiar with any other statutory or other requirements that may be applicable. If confirmed, it would certainly be my intent to comply with any such requirements. I am aware that the Board has historically and continues to maintain publicly available data on elections and unfair labor practice proceedings, and that this data is increasingly available on the Board's Web site. If confirmed, I would be supportive of that effort.

Question 2. Do you support ``voluntary unionism,' ' i.e., that employees have the right to voluntarily choose to participate in unions or refrain from doing so?

Answer 2. Yes. The act vests in employees the right to self-organization and to form, join, or assist labor organizations and the right to refrain from doing any and all of such activities with the limited exception provided in section 8(a) (3) as modified by section 14(b). If I am confirmed, I will faithfully apply those provisions of the law.

Question 3. Do you believe that a secret ballot election better reflects the true freedom of choice guaranteed workers by Section 7 of the NLRA to engage in collective bargaining or to refrain from doing so?

Answer 3. Please see my answer to Senator Alexander's July 30, 2009, Question 25:

``I believe the answer to that question depends on the procedures used to conduct the secret ballot election or card

check process, the rules governing each, and the legal consequences that attach to their outcomes. Because questions concerning whether a secret ballot election is a superior mechanism to the card check process may arise before the Board, for example, in the context of a decision whether to order a rerun election or issue a bargaining order based on a card showing of majority support, I do not believe it would be appropriate to address them further in this context.'

Question 4. Do you agree with the Supreme Court that ``[b]y its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers.' Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992).

Answer 4. The Board is bound by the holding in Lechmere. In Lechmere, the Supreme Court construed the terms of section 7 of the Act which vests rights in ``employees.' In the context of the statement provided by the Supreme Court in Lechmere, I agree that section 7 expressly vests rights only in employees. Other provisions of the act vest rights in labor organizations and employers, for example, section 9 which permits both labor organizations and employers to file petitions for an election under specified circumstances.

Question 5. Do you fully support the North Carolina Right To Work law--N.C. Gen. Stat. §§95-78 to 84? Would you use your position at NLRB to challenge any aspect of this law or its prior interpretation?

Answer 5. Section 14(b) of the Act permits States to enact laws that prohibit the execution or application of agreements requiring membership in a labor organization as a condition of employment. If I am confirmed, I will faithfully apply that provision of the NLRA, and I will fully respect any law that North Carolina has enacted pursuant to the permission contained in NLRA §14(b). Accordingly, I would not, nor could I, use my position to challenge any such law.

Response to Questions of Senator Isakson by Harold Craig Becker

Question 1. I understand from your testimony today that you will recuse yourself from any cases involving the Service Employees International Union. Will you also recuse yourself from cases involving SEIU locals?

Answer 1. In the course of my work for SEIU, I have represented a small number of local unions affiliated with SEIU. Pursuant to 5 CFR 2635.502, for a period of 1 year after I last provided services to a former client, including any such locals, I will not participate in any particular matter involving specific parties in which a former client is or represents a party, unless I am first authorized to participate, pursuant to 5 CFR 2635.502(d). In addition, I understand that as an appointee I am required to sign the Ethics Pledge under Executive Order No. 13490 and that I will be bound by the requirements and restrictions therein in addition to the requirements of 5 CFR 2635.502. Accordingly, I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to a former client as those terms are defined in Executive Order No. 13490, including any such locals, unless I am first authorized to participate, pursuant to Executive Order No. 13490 Sec. 3. I have entered into an ethics agreement with the National Labor Relations Board to fully abide by both of these sets of restrictions. Moreover, if at any time during my service on the Board a case comes before me relating to SEIU, an SEIU local or any

other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Finally, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 2. Do you believe the NLRB has the authority under current law to compel a non-union employer to bargain with a union in the absence of a secret-ballot election?

Answer 2. The National Labor Relations Act was amended in 1947 to give employers the right to petition for a secret-ballot election if presented with a demand for recognition by a labor organization. This right is specified in Section 9(c) (1) (B) of the Act and cannot be changed except by Congress. The Supreme Court has held, however, that where an employer has engaged in unfair labor practices ``likely to destroy the union's majority and seriously impede the election'' the employer may not insist on an election and can be ordered by the Board to bargain. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 600 (1969).

Question 3. You stated today that that the SEIU is not party to many NLRB cases. Do you know how many cases in the current NLRB backlog are ones in which SEIU is a party?

Answer 3. I am not personally aware of any cases in which SEIU is a party currently pending before the NLRB itself and a review of available public records does not reveal any. There are a small number of cases pending before the Board in which a local labor organization affiliated with SEIU and currently in trusteeship, as that term is used in 29 U.S.C. 462, is a party.

Question 4. What is your opinion of the National Labor Relations Board's obligation to follow precedent? Are the Board's prior decisions controlling for future cases? Are there any existing decisions that you believe the Board decided improperly and should be revisited? What standard would you apply in determining whether to overrule a prior Board decision?

Answer 4. I think the NLRB, like other adjudicatory agencies, should respect its own precedent and the rule of stare decisis. I think the Board should respect parties' legitimate reliance on past precedent to guide their actions. I think that the Board should not depart from its own precedent without citing that precedent and openly acknowledging that it is overruling past precedent. I think that when the Board decides to overrule prior precedent it should do so expressly and only after fully explaining the basis of its decision.

I believe that is the standard applied to the Board in the courts of appeals and it is the standard I would apply in considering whether to overrule a prior Board decision.

Because the question of whether a particular decision was incorrect and should be overruled may arise before the Board, I do not believe it would be appropriate to address the question in this context.

Question 5. What specific metrics do you believe the Board should be judged on? For example, do you believe the Board should be evaluated on whether or how long it takes employers and unions to agree to first

contracts after a Board-supervised election? Can you please also explain why the metrics you identify are appropriate under the National Labor Relations Act?

Answer 5. The Board should be judged based on its fidelity to Congress' intent as expressed in the National Labor Relations Act, as amended, and on how effectively it effectuates the policies Congress intended to effectuate through the act. Identifying specific metrics to use in judging the Board is difficult given the numerous functions performed by the Board, the various policies Congress intended to effectuate through the act, and the roles other parties, for example, the Board's General Counsel and the Federal courts of appeal, play under the act. Reliance on a single metric or set of metrics has the potential to create incentives to improve performance as judged by the metric even under circumstances where doing so is not consistent with Congress' intent and does not effectuate the policies Congress intended to effectuate through the act. If I am confirmed, I intend to fully inform myself concerning what metrics the Board currently employs before drawing any conclusions about which metrics are most appropriate.

Question 6. I understand from your response to me today that the change from certification by secret ballot to certification by card check requires congressional action. However, there are multiple sections of the Employee Free Choice Act. Which provisions of EFCA could be implemented without congressional action? Which provisions require congressional action?

Answer 6. The Employee Free Choice Act has three substantive sections. The first section establishes a procedure by which a union could be certified as a bargaining representative on the basis of signed authorization cards. As I stated at the hearing, this change would require action by Congress and could not be accomplished administratively.

The second section establishes procedures for mediation and, if necessary, binding arbitration in circumstances where a union or employer engaged in bargaining for a first contract are unable to reach agreement. Under current law, employers and unions may voluntarily agree to submit contract issues they have been unable to resolve through bargaining to binding arbitration. However, the Supreme Court has stated that ``allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the act is based.'' *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-108 (1970). Thus, action by Congress would also be required to implement these procedures.

The third and final section of EFCA would establish civil penalties and a treble back pay remedy for certain unfair labor practices, and require the Board to seek injunctions where it finds reasonable cause to believe certain violations of the act have occurred. Congress has vested the Board with specific remedial authority in section 10 of the Act. The NLRB has authority to fashion new remedies consistent with section 10 and relevant Supreme Court precedent. Outside those bounds, use of new remedies must be authorized by Congress. Section 10(c) vests in the Board authority to order a party to take affirmative action, including re-instatement with or without back pay. I do not believe the Board has authority to award double or triple back pay as a remedy for a violation of section 8(a)(3) without congressional action nor do I believe that section 10 currently vests in the Board the authority to impose the penalties discussed above. However, if I am confirmed as a

member of the NLRB and if an argument that the Board has and should exercise such authority is presented to the NLRB, I will consider the argument with an open mind based on the terms of the Act and relevant Supreme Court precedent, and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties' legitimate reliance on existing law.

As for the ability to seek injunctive relief, section 10(j) of the current Act provides that the Board has power to seek an injunction in any case where a complaint issue alleging the statute has been violated, therefore, it is currently within the discretion of the Board to decide in any particular case whether it will petition in Federal district court for an injunction. Of course, only Congress can require that the Board do so under the circumstances specified in the EFCA.

Question 7. Recently, in The Nation magazine, Dmitri Iglitzin, an attorney that has represented the AFL-CIO, wrote:

``Most legal scholars and labor experts believe that the NLRB has the authority to enact procedural changes that could, among other things:

drastically shorten the timeframe for holding union elections;

eliminate cumbersome pre-election procedures that allow employers to dispute who is eligible to vote in such elections;

require the employer to turn over employee names, addresses and phone numbers early in any union organizing drive;

require equal access to both workers and the workplace for unions during campaigns; and

increase the penalties on companies that violate their workers' legal rights.''

In which of these items, in your opinion, could be accomplished without congressional action?

Answer 7. It is my understanding that Dmitri Iglitzin has never represented the AFL-CIO in any matter.

With regard to the suggestion that the Board ``could drastically shorten the timeframe for holding union elections,' ' I would note that the Board is constrained in that regard by the current statutory requirement in section 9(c) that before an election can be held, the Board must provide for ``an appropriate hearing upon due notice.' ' This hearing requirement is often cited as the primary reason for the time it currently takes to schedule and conduct a Board election. Only congressional action could eliminate the hearing requirement. The statute does not establish any specific time period during which such elections must be conducted except the hearing requirement described above.

With regard to the suggestion that the Board could ``eliminate cumbersome pre-election procedures that allow employers to dispute who is eligible to vote in such elections,' ' as explained above, section 9(c) requires that the Board provide for ``an appropriate hearing upon due notice' ' prior to directing an election. That pre-election procedure cannot be eliminated without congressional action.

With regard to the suggestion that the Board could require ``equal access,' ' in *Lechmere, Inc. v. National Labor Relations Board*, 502 U.S.

527, 535 (1992), the Court held that absent discrimination, nonemployee union organizers are not entitled to access to an employer's private property except in the ``rare'' case where ``the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels''--for example, where the employees work at a remote logging camp. Unless Congress amends the statute to overrule that decision, the Board is bound to follow it.

With regard to requiring employers to turn over contact information for employees, under current Board precedent, upheld by the Supreme Court, employers are required to provide to a petitioner labor organization the names and addresses of employees after the direction of an election. See *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Current NLRB procedures require that an employer prepare a list of eligible voters and their addresses for an NLRB-conducted representation election and file it with the NLRB's regional director who then makes the list available to all parties, including individuals and/or labor organizations which have filed a representation petition or intervened in the proceedings. NLRB Casehandling Manual paragraph 11312.1. The Court held that the promulgation of such a requirement was a proper exercise of the Board's authority to oversee the conduct of elections. Because questions concerning whether the Board has authority to, in any manner, alter the timing or preconditions for imposition of such a requirement may arise before the Board, I do not believe it would be appropriate to address them specifically in this context.

Finally, with regard to penalties on employers who violate their workers' rights, please see my response to your Question 6.

Response to Questions of Senator McCain by Harold Craig Becker

Question 1. Please describe the nature of your involvement in organizing home health-care and/or home day-care workers in any way. What mechanisms (e.g., card check or elections) were used to organize these workers in each State?

Answer 1. I have provided legal counsel to SEIU and, in some cases, to local labor organizations affiliated with SEIU, concerning their efforts to assist home health-care workers to organize and engage in collective bargaining. I have had no similar involvement in relation to home day-care workers. In the States in relation to which I have provided some such legal counsel and in which home-care workers were able to make a choice concerning whether they wished to be represented and have subsequently engaged in collective bargaining, including California, Illinois, Michigan, Ohio, and Washington, the mechanism through which the choice was made was an election to the best of my knowledge.

Question 2. Mr. Becker, as counsel to the SEIU, you are familiar are you not with the dispute between the SEIU International and the National Union of Healthcare Workers formed by ousted members of an SEIU local in California?

Answer 2. I am aware that there is a controversy involving SEIU and the National Union of Healthcare Workers.

Question 3. Are you aware that the NUHW has petitioned the NLRB to hold elections at dozens of health care facilities where workers are currently represented by the SEIU?

Answer 3. Although I have had no personal involvement in the matters, I am aware that petitions have been filed seeking elections at

some facilities where employees are currently represented by a local labor organization affiliated with SEIU which is currently in trusteeship, as that term is used in 29 U.S.C. § 462.

Question 4. And you know that some of those elections have been blocked by charges of unlawful conduct filed by the SEIU against the NUHW with the NLRB General Counsel?

Answer 4. Although I have had no personal involvement in the matters, I am aware that some unfair labor practice charges have been filed that may have blocked some elections for some periods of time.

Question 5. All of these petitions and the unlawful conduct charges are likely to come before the NLRB. Do you intend to recuse yourself from all those cases?

Answer 5. Yes.

Question 6. Have you ever performed work for and/or provided advice to ACORN or ACORN-affiliated groups while employed by your current employers or on a volunteer basis? Did you perform such work in prior positions? Please describe the nature of that work.

Answer 6. No.

Question 7. Have you ever met with or spoke to Mr. Wade Rathke? Have you worked with and/or provided advice to Mr. Rathke or Service Employees International Union (SEIU) Locals 880 or 100 or their officials/members?

Answer 7. I am not certain whether I have ever met or spoken with Mr. Rathke, but if I believe it would have been on a casual, unplanned, nonprofessional basis. I have never worked with or provided advice to Mr. Rathke or SEIU Local 100 or its officials or members. I have worked with and provided advice to SEIU Local 880 (now merged with two other locals into SEIU Healthcare Illinois-Indiana) and its members. I have worked with officials of Local 880, but never provided them advice as individuals.

Question 8. Mr. Rathke has noted your success in crafting and executing legal strategies for SEIU throughout your career. He has stated:

``For my money Craig's signal contribution has been his work in crafting and executing the legal strategies and protections which have allowed the effective organization of informal workers, and by this I mean home health-care workers, under the protection of the National Labor Relations Act. . . . His role was often behind the scenes devising the strategy with the organizer and lawyers, writing the briefs for others to file, and putting all of the pieces together, but he was the go-to-guy on all of this.''

<http://chieforganizer.org/2009/04/30/becker-to-the-nlrb/>. What specific legal strategies was he referencing?

Please provide a copy of all briefs or memos you authored in this area as referenced by Mr. Rathke.

Answer 8. I am not certain what Mr. Rathke was referring to in the quoted statement. The protection of home health-care workers under the National Labor Relations is well established if they are employed by a private agency. Mr. Rathke might have been referring to several briefs

I have written concerning the coverage of home health-careworkers under the Fair Labor Standards Act. The most recent brief I wrote in that area was in the case of Long Island Care at Home, Inc. v. Coke, 551 U.S. 158 (2007). I have already provided a copy of that brief to the committee. Mr. Rathke might also have been referring to counsel I have provided to SEIU concerning the Union's efforts to assist home-care workers employed in a variety of publicly funded programs to organize and engage in collective bargaining under State law. In many States, the employment status of such workers has been uncertain because the duties and obligations of employers are split among several parties with respect to these workers. Often the State or other public entity sets the hourly wage and the hours of work of the home-care workers, but the consumers whom they care for hire, supervise and can terminate the workers. As a result, there have been conflicting decisions under a variety of labor and employment laws in various States concerning which entities had which obligations under those laws (for example, to insure compliance with wage and hour law, to pay unemployment insurance, to obtain workers' compensation insurance, and to engage in collective bargaining if the workers duly select a representative). I have provided advice and counsel to SEIU (and in some cases to local labor organizations affiliated with SEIU) in relation to its efforts to assist such home-care workers who wanted to organize to do so and to obtain recognition for their chosen representative from the State or other public entity which could engage in meaningful bargaining with the home-care workers about the terms of their employment.

Question 9. To the extent Mr. Rathke's statement regarding your having written briefs for others to file is correct, please provide a list of all briefs or pleadings you wrote for other parties to file (if any) and list the courts or administrative agencies in which they were filed.

Answer 9. I have described all briefs and pleadings that Mr. Rathke might have been referring to in my answer to Question 9.

Question 10. Have you discussed labor law or SEIU efforts to organize or obtain collective bargaining rights for 37,000 home health-care workers with former Governor Blagojevich or any members of his staff? Did you have any role in developing legislation, Executive orders or other advice to assist SEIU or Governor Blagojevich with organizing home health-care workers or other workers in Illinois? Please provide details and specific pieces of legislation, Executive orders or memos you worked on.

Answer 10. As I testified in response to your question at my confirmation hearing on February 2, 2010, while I was in practice in Illinois, I represented and provided counsel to one of the local labor organizations affiliated with SEIU in Illinois which, for a period of time long preceding the Blagojevich administration, had been working to organize home-care workers. As explained in my answer to your Question 9, in many States, the employment status of such workers has been uncertain because the duties and obligations of employers are split among several parties with respect to these workers. Often the State or other public entity sets the hourly wage and the hours of work of the home-care workers, but the consumers whom they care for hire, supervise and can terminate the workers. As a result, there have been conflicting decisions under a variety of labor and employment laws in various States concerning which entities had which obligations under those laws (for example, to insure compliance with wage and hour law, to pay

unemployment insurance, to obtain workers' compensation insurance, and to engage in collective bargaining if the workers duly select a representative). In Illinois, the agency which administers the State's public sector collective bargaining law had declined to assume jurisdiction over a petition concerning the representation of home-care workers. I was party to discussions of this matter with representatives of several prior administrations in Illinois. After Governor Blagojevich was elected, I had discussions with members of his staff, and on one occasion, I participated in a discussion that included the Governor. My discussion with the members of the Governor's staff and with the Governor had to do with the legal technicalities involved in the drafting of an executive order and legislation, eventually adopted by both houses of the State legislature, which extended collective bargaining to home-care workers. I participated in these discussions because of my expertise in this area, having previously provided counsel concerning similar legislation in California which was adopted by the legislature and signed by a Republican Governor.

Question 11. According to the Wall Street Journal, a second Executive order contemplated by former Governor Blagojevich was designed to enable the SEIU to organize workers in the State who care for developmentally disabled people in their homes. Did you have any involvement in preparing or developing a reported second Executive order for Governor Blagojevich to expand organizing to this group? Did you have any involvement with the development of Executive Order 15-2009, signed by Illinois Governor Pat Quinn on June 26, 2009 to allow organizing of these workers? Have you been involved with the SEIU organizing campaign that began after Governor Quinn's executive order was signed? Please describe the nature of any involvement.

Answer 11. I have had no involvement with these matters.

Question 12. Have you ever had any interactions or relationships with the Long Term Care Housing Corp., the Homecare Workers Training Center or their officers, directors, employees or affiliates?

Answer 12. No.

Question 13. Have you been involved in any manner with the State bills/laws that allow card check organizing in New York, New Mexico, Illinois, New Jersey, New Hampshire, Oregon, and Massachusetts? Please describe the nature of your involvement.

Answer 13. No.

Question 14. Enshrined in our Constitution, and implemented in numerous statutes, Executive orders, and court decisions, is our Nation's recognition of the status of Indian tribes as ``domestic dependent'' sovereign governments. In fact, our Nation has long acknowledged its great moral duty toward these sovereign tribes contains a ``trust responsibility'' to protect and encourage tribal governments. However, as you may know, in 2004, the NLRB overruled 30 years of precedent and held the NLRA applicable to a tribally-owned enterprise located on tribal lands. Therefore, as I read this decision, the NLRB believes it can countermand the laws and policies we have enacted to support tribal employment laws, like tribal employment rights laws. These laws are critically important on the reservation, which have struggled to create employment opportunities for Indians. Do you agree with this San Manuel decision? What Federal law principles can justify this decision?

Answer 14. Because questions concerning the application of the NLRA to enterprises located on tribal lands may come before the Board, I do not believe it would be appropriate to address them in this context.

Question 15. I am very concerned that, unless the San Manuel decision is overturned, it could apply to many other entities operating on Indian tribal lands--including schools, hospitals, construction crews, etc., especially if the current Congress were to actually enact the so-called ``Employee Free Choice Act''. Many in Congress, including Senator Inouye, Indian Affairs Committee Ranking Member Senator John Barrasso, Congressmen Dan Boren and Tom Cole and others have urged that the governmental status of Indian tribes be respected if the EFCA bill proceeds. What are your thoughts on this?

Answer 15. Please see my answer to Question 14 above. To the extent this question concerns issues beyond the scope of the NLRA as currently written, it is appropriately addressed by Congress.

Question 16a. Have you ever spoken to Andy Stern or any person affiliated with the SEIU as to what the SEIU's expects from you if you are confirmed for a seat on the National Labor Relations Board?

Answer 16a. No, at no time have I discussed with any person any action I would or would not take as a member of the Board.

Question 16b. With whom did you speak and what did they say?

Answer 16b. Please see my prior answer.

Question 17a. Have you spoken with any person affiliated with the AFL-CIO as to what the AFL-CIO's expectations are for you if you are confirmed for a seat on the National Labor Relations Board?

Answer 17a. No, at no time have I discussed with any person any action I would or would not take as a member of the Board.

Question 17b. With whom did you speak and what did they say?

Answer 17b. Please see my prior answer.

Question 18a. Have you discussed with Andy Stern or any person affiliated with the SEIU or the AFL-CIO Board decisions that SEIU or the AFL-CIO would like to see reversed?

Answer 18a. No, at no time have I discussed with any person any action I would or would not take as a member of the Board.

Question 18b. With whom did you speak and what decisions did they say they wanted to see reversed?

Answer 18b. Please see my prior answer.

Question 19a. Have you discussed with Andy Stern or any person affiliated with the SEIU or the AFL-CIO how provisions of the Employee Free Choice Act could be administratively adopted by the Board either through rulemaking or Board decisions.

Answer 19a. No, at no time have I discussed with any person any action I would or would not take as a member of the Board.

Question 19b. With whom did speak and what did they say?

Answer 19b. Please see my prior answer.

Question 20. Have you played any role in the public statements issued by the SEIU and the AFL-CIO critical of Board decisions issued

during the past 10 years?

If yes, statements involving which decisions?

Answer 20. I may have given legal counsel to SEIU and the AFL-CIO concerning public statements critical of Board decisions issued during the past 10 years. I cannot, however, recall giving such legal counsel relating to specific statements involving specific decisions.

Question 21. Have you discussed with Wilma Liebman, the Board's current Chairman, and/or Mark Pearce, the other Democrat nominee, what changes the political majority on the Board plan to make in Board law?

Answer 21. No, at no time have I discussed with Wilma Liebman, the Board's current Chairman, and/or Mark Pearce, the other Democrat nominee, what changes the political majority on the Board plan to make in Board law.

Question 22. Have you ever discussed with anyone whether card check could be imposed by the Board under the NLRA?

Answer 22. No, at no time have I discussed with any person any action I would or would not take as a member of the Board.

Question 23. What is your view on whether the timeframe should be shortened from the date a petition is filed to the date a representation election is held?

Answer 23. If I am confirmed as a member of the NLRB, I will not assume the position with any preconceived agenda as to such questions of administration. I will seek the benefit of the immense experience and expertise of the Board's career staff in administering and enforcing the Act, in particular, in conducting elections. I will consult with my fellow Board members. The Board's regional office staffs and central representation case unit have been involved in thousands of elections. If I am confirmed as a member of the NLRB, I would seek their counsel before reaching any conclusion on whether such a timeframe should be imposed. If suggestions for mandating such a timeframe are made, I will evaluate them with an open mind based on the terms of the statute and relevant Supreme Court precedent and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties' legitimate reliance on existing law. In considering any such suggestion, I would consider, among other factors, the number and complexity of issues the Board must resolve prior to conducting elections, the nature of the proceedings required to resolve the issues, and the difficulty of preparing to conduct elections.

Question 24. Do you think that any form of employer speech should be limited during an organizing campaign in any manner?

Answer 24. As I stated at my confirmation hearing, in answer to a question from Senator Isakson, the current law clearly protects employers' ability to express their views--not only the National Labor Relations Act, but the first amendment to the U.S. Constitution. It is clear that employers have legitimate interests and have an indisputable right to express their views on the question of whether their employees should unionize. The Board, with the approval of the Supreme Court, has, however, held that the Act bars employer expression that contains a threat of reprisal or force or promise of benefit. The Board has also held that making speeches on company time to massed assemblies of employees during the last 24 hours before an election is objectionable conduct and grounds for overturning the results of an election.

Question 25. Have you participated in any cases currently pending before the Board?

Answer 25. Yes.

Question 26. How many? In what capacity? Please provide a list?

Answer 26. Dana Co., No. 7-CA-46965, as counsel to amicus curiae; Hacienda Resort Hotel & Casino, 351 NLRB 504 (2007), as counsel to amicus curiae on review of prior Board decision in Ninth Circuit and on prior remand to Board; Correctional Medical Services, 349 NLRB 1198 (2007), as counsel to petitioner in Court of Appeals; Tribune Publishing Co., 351 NLRB 196 (2007) (may remain pending after petition for review denied for purposes of compliance), as counsel to putative intervenor in Court of Appeals; Guardsmark, LLC, 344 NLRB 809 (2005) (may remain pending after petition for review granted by Court of Appeals), as counsel to petitioner in Court of Appeals; Randell Warehouse of Ariz., Inc., 328 NLRB 1034 (1999) (may remain pending after petition for review granted by Court of Appeals), as counsel to intervenor in Court of Appeals.

Question 27a. Have you taken the Administration's ``Ethic's Commitments by Executive Branch Personnel?''

Answer 27a. If confirmed, I will take the President's Ethics Pledge upon confirmation. Please see my answer below.

Question 27b. Do you intend to?

Answer 27b. Yes. I have entered into an ethics agreement with the NLRB that provides:

``I understand that as an appointee I am required to sign the Ethics Pledge (Executive Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.''

Question 28. Do you intend to seek a waiver from the Director of OMB [permitted by paragraph 3]?

Answer 28. No.

Question 29. Are you familiar with 5 CFR Section 2635.02 which provides that an employee is required to consider whether the employee's impartiality would reasonably be questioned if the employee were to participate in a particular matter involving specific parties where persons with certain personal or business relationship with the employee are involved. If the employee determines that a reasonable person would question the employee's impartiality, or if the agency determines that there is an appearance concern, then the employee should not participate in the matter unless he or she has informed the agency designee of the appearance and received authorization from the agency.

Answer 29. Yes, I am familiar with 5 CFR Section 2635.502 which provides:

``Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship

is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.''

Question 30. Apart from the Executive Order, don't you believe that if you participated in decisions raising issues on which the AFL-CIO or the SEIU have taken a public position while you were employed by them that your impartiality would reasonably be questioned?

Answer 30. If at any time during my service on the Board a case comes before me relating in any way to SEIU or the AFL-CIO or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Moreover, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 31. Since 1990 you have been a member of the office of General Counsel for the SEIU in Los Angeles and Chicago and since 2004 Staff Counsel for the AFL-CIO in Chicago. Mr. Becker, do you understand that you are the first person in the history of the National Labor Relations Board to be nominated for a full term on the Board who, if confirmed, would go on the Board directly from a labor organization, in your case two of the Nation's largest international unions, the AFL-CIO and the SEIU International? Are there any unique challenges posed by your background that members of the committee should take into consideration as they consider whether you can fulfill your obligation to carry out your duties as a member of the Board fairly, impartially and in a non-biased fashion?

Answer 31. I do not believe that there are unique challenges. Many NLRB members came from private practice where they had represented labor or management or employees on issues that could come before the Board. One former member came to the Board directly from service as Director of Labor Law Policy at the U.S. Chamber of Commerce. As I testified at my confirmation hearing and repeated in answer to your Question 31, above, if confirmed, I will avoid any conflicts of interest and carry out my Board duties fairly, impartially and in strict accordance with law.

Question 32. You testified that if confirmed to the National Labor Relations Board you intended to scrupulously comply with paragraph 2 of the President's Executive Order, Ethics Commitments by Executive Branch Personnel. I accept that to mean that you do not intend to seek a waiver from the application of paragraph 2 from participating in any matter that comes before the Board that is directly or substantially related to the AFL-CIO or the SEIU International. Is that correct?

Answer 32. Yes.

Question 33. Do you agree that a charging or a charged party in a case before the NLRB is a ``party'' under the Ethics Pledge?

Answer 33. Yes.

Question 34. Do you intend to participate in cases that are directly or substantially related to the AFL-CIO or the SEIU International after your first 2 years on the Board are concluded?

Answer 34. Please see my answer to Question 31 above.

Question 35. Does your answer to Question 33 mean that, if confirmed, during your first 2 years on the Board you do not intend to participate in any case that is filed by the NLRB General Counsel based on the recent charges filed by the SEIU International alleging that the National Union of Healthcare Workers (formed by leaders whose SEIU local was put into trusteeship by the SEIU International) was engaged in unlawful conduct. Please answer ``yes'' or ``no'' and then explain. If your answer is in the negative, please explain how you can ethically participate in such cases.

Answer 35. I have had no involvement and am not familiar with any charges alleging unlawful conduct by the National Union of Healthcare Workers. However, if I am confirmed, if the charges you describe result in the issuance of a complaint, if the issuance of a complaint results in the matter coming before the Board, and if the matter comes before a panel to which I am assigned, I will recuse myself from any consideration of the matter.

Question 36. Do you intend to participate in cases involving the petitions for election that were blocked by the latter charges of the SEIU local? If your answer is in the affirmative, please explain how you can ethically participate in such cases.

Answer 36. Please see my answer to Question 6 above.

Question 37. Do you intend to participate in any such cases referred to in Questions 5 and 6 after your first 2 years on the Board are concluded?

Answer 37. Please see my answer to Questions 6 and 31 above.

Question 38. Does your answer to Question 33 mean that, if confirmed, during your first 2 years on the Board, you do not intend to participate in any case that is filed by the NLRB General Counsel based on charges filed by an SEIU local alleging that the NUHW, which petitioned for an election, was engaged in unlawful conduct? Please answer ``yes'' or ``no'' and then explain. If your answer is in the negative, please explain how you can ethically participate in such cases.

Answer 38. Please see my answers to Questions 6 and 31 above.

Question 39. Do you agree that the SEIU International has a substantial interest in the resolution of cases filed by the NLRB General Counsel based on charges filed by an SEIU local alleging that the NUHW, which petitioned for an election, was engaged in unlawful conduct? Please answer ``yes'' or ``no.'' If your answer is in the negative, please explain?

Answer 39. Please see my answer to Question 6 above. I do not believe it is appropriate to opine on hypothetical cases, on cases that have not yet been filed, or on cases involving facts of which I am not aware at this time. If confirmed, once the facts of a particular matter involving specific parties are presented to me, I intend to follow the commitments I described in my answer to Question 31 above.

Question 40. Does your answer to Question 33 mean that, if confirmed, during your first 2 years on the Board you do not intend to participate in any case involving a petition filed by the NUHW seeking an election in units represented by an SEIU local? Please answer ``yes'' or ``no'' and then explain. If your answer is in the negative, please explain how you can ethically participate in such cases.

Answer 40. Please see my answer to Question 6 above. I do not believe it is appropriate to opine on hypothetical cases, on cases that have not yet been filed, or on cases involving facts of which I am not aware at this time. If confirmed, once the facts of a particular matter involving specific parties are presented to me, I intend to follow the commitments I described in my answer to Question 31 above.

Question 41. Do you agree that without regard to the Ethics Pledge that if you were to participate in any of the cases referred to in the above Questions 36, 39 and 41, your impartiality as a result of being a former Associate General Counsel of the SEIU International for nearly 20 years could reasonably be questioned?

Answer 41. Please see my answers to Questions 6, 31, 36, 39 and 41 above. I do not believe it is appropriate to opine on hypothetical cases, on cases that have not yet been filed, or on cases involving facts of which I am not aware at this time. If confirmed, once the facts of a particular matter involving specific parties are presented to me, I intend to follow the commitments I described in my answer to Question 31 above.

Question 42. If your answer to the above Question 42 is in the affirmative, will you commit now as a member of the Bar and without regard to the Ethics Pledge and 5 CFR Section 2635.502 to recuse yourself from all such cases? Please answer ``yes'' or ``no.'' If your answer is in the negative, how will it be possible to protect the integrity of the NLRB and the perception of that Board as an impartial adjudicator of disputes?

Answer 42. I do not believe it is appropriate to opine on hypothetical cases, on cases that have not yet been filed, or on cases involving facts of which I am not aware at this time. If confirmed, once the facts of a particular matter involving specific parties are presented to me, I intend to follow the commitments I described in my answer to Question 31 above.

Question 43. Do you believe your ethical obligations as a member of the Bar are limited to the Ethics Pledge and 5 CFR 2635.502? Please answer ``yes'' or ``no'' and then fully explain your answer.

Answer 43. No. If at any time during my service on the Board a case comes before me in which recusal is not required by 5 CFR 2635.502 or by my ethics pledge, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Moreover, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 44. As to each of the following cases did the AFL-CIO or the SEIU International file an amicus brief or, after the case was issued, take a public position that the case was wrongly decided and/or should be reversed? In answer to your question, for each case please

indicate whether the AFL-CIO or the SEIU International filed an amicus brief or took a public position that the case was wrongly decided and/or should be reversed. Did you have any role in writing, reviewing or approving any comments on the following cases?

Answer 44. Please see my answer to Question 46.

Question 45a. Dana Corp & Metaldyne, 351 NLRB 434 (2007)

Answer 45a. The AFL-CIO filed an amicus brief in this case. SEIU did not file an amicus brief. Please see my answer to Question 21.

Question 45b. Oakwood Healthcare Inc., 348 NLRB 686 (2006)

Answer 45b. The AFL-CIO filed an amicus brief in this case. SEIU filed an amicus brief in this case. Please see my answer to Question 21.

Question 45c. Oil Capitol Sheet Metal, 349 NLRB 1348 (2007)

Answer 45c. To the best of my knowledge, neither the AFL-CIO nor SEIU filed an amicus brief in this case. Please see my answer to Question 21.

Question 45d. Toering Electric Co., 351 NLRB 225 (2007)

Answer 45d. To the best of my knowledge, neither the AFL-CIO nor SEIU filed an amicus brief in this case. Please see my answer to Question 21.

Question 45e. Harborside Healthcare, 343 NLRB 906 (2004)

Answer 45e. To the best of my knowledge, neither the AFL-CIO nor SEIU filed an amicus brief in this case. Please see my answer to Question 21.

Question 45f. Brown University, 342 NLRB 483 (2004)

Answer 45f. The AFL-CIO filed an amicus brief in this case. SEIU did not file an amicus brief in this case. Please see my answer to Question 21.

Question 45g. BE&K Construction Co., 351 NLRB 451 (2007)

Answer 45f. To the best of my knowledge, neither the AFL-CIO nor SEIU filed an amicus brief in this case. Please see my answer to Question 21.

Question 46. Do you agree that whether or not they are a party to the particular case seeking the reversal, the AFL-CIO and the SEIU International believe they have a substantial interest in seeing the cases referred to in the above Question 45 reversed?

Answer 46. I do not believe it is appropriate to speculate about what the beliefs of these organizations will be at some time in the future concerning hypothetical cases, cases that have not yet been filed, and cases involving facts of which I am not aware at this time. If at any time during my service on the Board a case comes before me relating in any way to SEIU or the AFL-CIO or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Moreover, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the

particular circumstances presented would be appropriate.

Question 47. Do you agree that without regard to the Ethics Pledge that if you were to participate in a case seeking the reversal of one of the cases referred to in Question 45 in which the AFL-CIO or the SEIU International filed an amicus brief or, after the case issued, took a public position that the case was wrongly decided and/or should be reversed, that your impartiality as the result of being a former Associate General Counsel of the SEIU International and AFL-CIO could reasonably be questioned?

Answer 47. I do not believe my impartiality concerning a particular case could be reasonably challenged solely because when I was in private practice I represented a client that took a position on a legal issue. Whether my impartiality could be reasonably questioned would depend on the particular facts of the situation. If at any time during my service on the Board a case comes before me relating in any way to SEIU or the AFL-CIO or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Moreover, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 48. If your answer to Question 47 is in the affirmative, will you commit now as a member of the Bar to recuse yourself from cases seeking the reversal of such precedent. Please answer ``yes'' or ``no''.

Answer 48. My answer to Question 47 was not in the affirmative. Please see my answer to Question 31.

Question 49. If your answer to Question 47 is in the negative, please explain how your impartiality would not reasonably be questioned since you were an Associate General Counsel of both labor organizations at the time?

Answer 49. My answer to Question 47 was not in the negative. Please see my answer to Questions 31 and 48.

Question 50. If you are confirmed as a member of the NLRB, when your term ends do you have plans to return to work for the AFL-CIO and/or the SEIU International or to work for another labor organization?

Answer 50. I have no such plans.

Question 51. Without regard to Board certification of the results, do you favor recognition of a union based on card check over the secret ballot election and, if so, why?

Answer 51. Under the NLRA as currently construed, employees can choose a representative either through a Board-supervised election or (with their employer's consent) by otherwise demonstrating that a majority of employees wish to be represented by the representative. Both of those procedures have, under appropriate circumstances, been held to be consistent with the act's protection of employees' free choice of a representative. However, an employer can generally decline to recognize a representative chosen by means other than a Board-supervised election. In addition, only an election can result in Board

certification. The questions of whether the Board should be authorized to certify a representative based on evidence of majority support other than the results of an election and whether collective bargaining representatives should only be chosen in Board-supervised elections are questions appropriately addressed in Congress. In general, I believe private, secret ballot elections have been enormously important in advancing democratic values in a variety of arenas in this country and around the world. How effective secret ballot elections are in advancing democratic values depends on the procedures used to conduct the election, the rules governing the election, and the legal consequences that attach to its outcome. Because questions concerning the relative superiority of Board-supervised elections versus nonelectoral evidence of majority support may arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question 52. Do you believe that a card check, with the cards solicited and collected by the union, is as reliable an indicator of employee free choice as the secret ballot election?

Answer 52. I believe the answer to that question depends on the procedures used to conduct the secret ballot election or card check process, the rules governing each, and the legal consequences that attach to their outcomes. Because questions concerning whether a secret ballot election is a superior mechanism to the card check process may arise before the Board, for example, in the context of a decision whether to order a rerun election or issue a bargaining order based on a card showing of majority support, I do not believe it would be appropriate to address them further in this context.

Question 53. Do you believe that an employer's recognition of a union based on a card check must be voluntary?

Answer 53. An employer is generally free to decline to recognize a representative chosen by means other than a Board-supervised election. The Supreme Court has held, however, that where an employer has engaged in unfair labor practices ``likely to destroy the union's majority and seriously impede the election'' the employer may not insist on an election and can be ordered by the Board to bargain. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 600 (1969).

Question 54. If an employer's recognition of a union occurs after a vigorous corporate campaign conducted by that union which negatively impacts on the employer's business is that recognition voluntary? Should it be recognized by the Board?

Answer 54. The term ``corporate campaign'' is not used in the act or elsewhere in Federal or State law as far as I am aware. The term has no precise meaning. If the recognition is the result of a violation of the act, it is subject to challenge before the Board.

Response to Questions of Senator Hatch by Harold Craig Becker

Question 1. The January 20, 2010 issue of *The Nation* magazine, in an article entitled ``Obama's pro-union nomination to labor relations board stalled,'' the authors commented as follows regarding your ability to enact far-reaching labor law reforms at the NLRB:

``The NLRB even could make it easier for workers to unionize based on a card check showing of majority support--just as the EFCA would. It could force employers to recognize a union as

the representative of its employees so long as a neutral third party verified that more than 50 percent of those employees had signed a written statement expressing a desire to be represented by that union. That's a fairer way for workers to become unionized than the current cumbersome and flawed NLRB election process, which is often abused by employers who threaten retaliation against their workers.'

Subsequently, the editors of The Nation clarified that they did not mean to suggest that you had made such a suggestion in your writings with reference to card-check recognition. Do you agree with that original statement?

Answer 1. I do not believe that the Board has authority to implement the card check provisions of EFCA. As I stated at my confirmation hearing, in response to a question from Senator Harkin, the reason the Employee Free Choice Act has been introduced in Congress and the reason that question is before the Congress and not the Board is that the current act clearly precludes certification in the absence of a secret ballot election. Section 9 of the Act, in two distinct ways, makes clear that Congress has intended that a secret ballot election be a precondition for certification of the union as a representative of a unit of employees. First, the act provides explicitly that the Board shall certify the results of a secret ballot election. Second, the act provides that employers--should they be confronted with a demand for recognition based on evidence of majority support, for example, by signed authorization cards--may petition for a secret ballot election. So the law is clear that the decision as to whether an alternative route to certification should be created rests with Congress, not with the Board.

Question 2. Former NLRB Chairman Bill Gould apparently agrees with The Nation magazine article. In the July 2009 issue of Workforce Magazine, in an article entitled ``NLRB decisions could make card check a reality'' the author states:

``If the card-check provision of the Employee Free Choice Act fails to survive legislative negotiations, it may not necessarily die. If the right case comes along, the National Labor Relations Board could rule that a company must recognize a union formed through the card-check process.'

When asked, former NLRB Chairman Gould responded: ``in my judgment, yes, the Board could issue such a ruling.'

Do you agree or disagree with Chairman Gould? That is, do you agree that as a member of the NLRB, you could vote for a card check system which would force employers to recognize and bargain with a union, without a secret ballot election, even without the employer having committed any unfair labor practices or without having engaged in any objectionable conduct, just as EFCA would?

Answer 2. I do not believe that the NLRB can order an employer that had not committed any unfair labor practice or engaged in any objectionable conduct to recognize and bargain with a union without a secret ballot election. Please see my answer to Question 1.

Question 3. Would you assure us now that should you be confirmed, you will not vote, either through rulemaking, decisionmaking, or administrative interpretation, to force employers to recognize and

bargain with a union based solely on signed cards?

Answer 3. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court held that under appropriate circumstances an order that an employer bargain with a union is a lawful and appropriate remedy for employer unfair labor practices that prevent the conduct of a fair election. Since that decision, the Board has issued such orders and they have routinely been upheld in the Courts of Appeals. If I am confirmed as a member of the Board and if an argument for categorically refusing to issue Gissel bargaining orders as you suggest is made to the Board, I will evaluate the argument with an open mind based on the terms of the statute and relevant Supreme Court precedent and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties' legitimate reliance on existing law.

Question 4. You do agree that under the Gissel decision, the Board has the authority to issue what are known as Gissel Bargaining Orders to force an employer to recognize a union without an election, or even without a showing of majority support to remedy an employer's unfair labor practices?

Answer 4. The Supreme Court stated in Gissel that the Board has authority to issue bargaining orders directing an employer to bargain with a union that has not won an election in two situations. Where the employer has committed ``outrageous'' and ``pervasive'' unfair labor practices, the Board may issue a bargaining order even if the union had never demonstrated majority support. Where the unfair labor practices are less severe but nonetheless tend to undermine majority support and impede the election process, the Board may also issue a bargaining order if the union had at one time achieved majority support and the possibility of erasing the effects of the unlawful conduct and ensuring a fair election through traditional remedies is slight.

Question 5. Are you in favor of using this existing power more frequently? In other words, are there cases where you believe a Gissel Bargaining Order was warranted, but not awarded, such as the Board's decisions in *Abramson* (2005), *Hialeah Hospital* (2004), *Register Guard* (2005), *Internet Stevensville* (2007), and *First Legal Support Services* (2004) all of which contained dissents from member--Liebman or member Walsh?

Answer 5. The appropriateness of the issuance of a Gissel order depends on the facts of a particular case. I would not form any conclusion about the appropriateness of such an order without fully reviewing the record in a particular case and having the benefit of adversarial presentation of the arguments by all parties.

Question 6. Are you in favor of increasing the Board's use of extraordinary remedies, such as Gissel Bargaining Orders, even where the union has never demonstrated majority support among the employees (so-called ``non-majority bargaining orders'') even based on signed union authorization cards?

Answer 6. If I am confirmed as a member of the NLRB and if an argument for a particular remedy is presented to me as a member of the NLRB in a case where the Board has found that a labor organization or an employer has engaged in an unfair labor practice, I will consider the argument with an open mind based on the terms of the act, relevant Supreme Court precedent, and with due regard for the principle of stare decisis and the importance of stability in the law and respect for

parties' legitimate reliance on existing law. Because questions concerning appropriate remedies could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question 7. Do you agree with the statement in The Nation Magazine article that card check is ``a fairer way for workers to become unionized''--that is fairer than a secret ballot election? Is a public card check really fairer than an NLRB-Supervised private ballot, or secret ballot, election?

Answer 7. Under Federal labor law as currently construed, employees can choose a representative either through a Board-supervised election or (if their employer consents) by otherwise demonstrating that a majority of employees wish to be represented by the representative. I believe the answer to your question depends on the procedures used to conduct the secret ballot election or card check process, the rules governing each, and the legal consequences that attach to their outcomes. Because questions concerning whether a secret ballot election is a superior mechanism to a card check process may arise before the Board, for example, in the context of a decision whether to order a rerun election or issue a bargaining order based on a card showing of majority support, I do not believe it would be appropriate to address them further in this context.

Question 8. The article refers to the current secret ballot election process as being ``cumbersome and flawed'' and ``often abused by employers who threaten retaliation against their workers.'' Of course, democracy sometimes is cumbersome and flawed, as we know from political elections. Do you believe that the NLRB-Supervised secret ballot election process--what has been referred to in the past by both labor and management as the NLRB's crown jewel--is so cumbersome and flawed that it should be rejected in favor of a union card check certification process?

Answer 8. As I testified at my confirmation hearing on February 2, 2010, in response to a question from Senator Harkin, the question of whether the secret ballot election process should be rejected in favor of or supplemented with a card check certification process rests with Congress.

Question 9. Is it not just as true that unions threaten workers who do not agree to vote for the union? And would it not be likely--and perhaps even more likely--for unions to abuse the card check process by threatening or coercing workers to sign cards?

Answer 9. Current law bars coercion by unions and employers in relation to employees' choice of whether to be represented, whether that choice is being made in a Board-supervised election or by signing authorization cards. Such threats by employers or unions are grounds for objections that may result in overturning the results of an election. Such threats by employers or unions are also grounds for unfair labor practice charges that may result in an order that an employer cease recognizing a union. Different procedures for gauging majority support present different opportunities for such unlawful coercion by both unions and employers. Whether employees would be subject to heightened levels of intimidation, threats or coercion if Congress authorized the Board to certify a representative based on authorization cards is an empirical question, the answer to which would depend on the procedures used in the processes and the rules governing

the processes and is a question appropriately addressed by Congress.

Question 10a. In that same Nation Magazine article, the authors state:

``NLRB nominee Craig Becker has written that in National Labor Relations Board proceedings related to unionizing, where a union or workers file for a Board election in order to form or dissolve a union, there is nothing in the National Labor Relations Act which compels the NLRB's current policy, which is to permit the employer to be an active participant either favoring, opposing or even obstructing such an election.''

I know that the editors have clarified that you did not write those views in exactly those terms. But do you agree with the statement that there's nothing to compel the Board's current policy?

If yes, then you agree that you would have the power as a member of the NLRB to vote to exclude employers from being an active participant in the representation election process?

Answer 10a. As I stated at my confirmation hearing, in answer to a question from Senator Isakson, the current law clearly protects employers' ability to express their views on the question of whether their employees should vote to be represented by a labor organization--not only the National Labor Relations Act, but the first amendment to the U.S. Constitution. It is clear that employers have legitimate interests and have an indisputable right to express their views on that question.

Question 10b. If no, then did you not advocate in the 1993 Minnesota Law Review that: ``Employers should have no legally sanctioned role in union elections'' and also that ``Employers should be stripped of any legally cognizable interest in their employees' election of representatives?''

Answer 10b. In my 1993 Minnesota Law Review article, I suggested that employees should be afforded party status in proceedings concerning whether or not they should be represented and that employers could protect their legally protected interests in a subsequent unfair labor practice proceeding. I did not suggest that employers should be barred from freely communicating their views on union representation. The suggestions in my 1993 Minnesota Law Review article were made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially.

Question 11. In your 1993 Minnesota law review article you advocated in favor of ``Altering the nature of the choice presented to workers in union elections. And that such a reform would mandate employee representation, and the question posed on the ballot would simply be which representative.''. Your response to my previous written question on this point was, I have to say, rather weak. You responded that in the article you ``did not suggest that your argument should be accepted,' but you do not deny that it was your view. Do you really believe that employees' options should be limited to ``which

representative'' and that employees should, in that way, be mandated to join a union?

Answer 11. That was not my view. In my 1993 Minnesota Law Review article, I described this as an argument that could be made. I did not suggest that argument should be accepted. In fact, I suggested the opposite. I also stated in my 1993 article that such a change would ``require fundamental statutory revisions.'' 77 Minn.L.Rev. at 584. Only Congress could mandate employee representation.

Question 12. At another point in your written advocacy you state that employers should be bound by their own restrictions on solicitation, distribution, and access rules that they apply to outsiders and other strangers to the workplace. In response to my previous written question on this point, you confirmed that is your view, but that you wrote that as a ``scholar'' and that you have no personal views that would prevent you from being open-minded.

Does that not mean that, in your view, in spite of the free speech provisions of section 8(c) of the Act, employers should be prohibited from solicitation, distribution, and access to their own employees on the employer's own property, to communicate about union organizing, just as they prohibit outsiders and strangers from doing?

Answer 12. In my 1993 Minnesota Law Review article, I did not suggest that employers should be prevented from speaking to their employees at work without offering a labor organization the same opportunity. Moreover, the suggestions in my 1993 Minnesota Law Review article were made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudice, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a member of the NLRB and an argument that the Board should somehow alter its solicitation, distribution or access rules in some manner is made to the Board, I will consider it with an open mind based on the terms of the act, the first amendment, and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question 13. You also wrote in the Minnesota law review that defining employer requirements that employees listen to speeches opposing or supporting unionization as being ``objectionable conduct'' sufficient to overturn the results of a representation election, would be consistent with section 8(c) of the act--the ``free speech'' provision. Apparently, in your view, it would be objectionable even absent ``threats, coercion, or promises of benefit.'' Simply requiring employees to listen--whether or not they agree with what is being--said would be objectionable conduct. Is it your position, therefore, that--employers should be prevented from mandatory workplace meetings with employees at work? What about such meetings elsewhere?

Answer 13. In my 1993 Minnesota Law Review article, I described the adoption of section 8(c) and stated that it prevents the Board from considering employer speech ``evidence of an unfair labor practice'' absent a threat or promise of benefit. I did not suggest that it would be consistent with section 8(c) to prevent an employer from expressing its views. I suggested only that defining employer requirements,

undergirded by an express or implied threat of discipline, that employees listen to speech opposing or supporting unionization as objectionable conduct would be consistent with section 8(c). The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a member of the NLRB and if any such argument is made to the Board, I will consider it with an open mind based on the terms of the act, the first amendment, and relevant Supreme Court precedents. Because questions concerning the scope of protection afforded by section 8(c) could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question 14. You also have advocated in an article entitled ``Better Than a Strike: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act'' that repeated, short-term grievance strikes should replace the prohibited ``intermittent'' or ``partial'' strikes. In your opinion, is that what we need in this country--more strikes and short-term disruptions, especially in this economy? Isn't one of the purposes of the National Labor Relations Act to prevent obstructions to interstate commerce?

Answer 14. It is the declared policy of Federal labor law to ``promote the full flow of commerce'' and to ``eliminate the causes of certain substantial obstructions to the free flow of commerce.'' My 1994 Chicago Law Review article suggested that short strikes over specific grievances are less disruptive of production than open-ended strikes and would lead to greater labor-management cooperation than open-ended strikes. The article did not suggest that any existing precedent should be overruled. The article suggested that existing law should be applied to such strikes. The suggestions in my 1994 University of Chicago Law Review article were made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The article explained that the suggestions were consistent with the act, then existing Board and court precedent, and then existing Board General Counsel Memoranda. I am not currently aware of any subsequent Board or court holdings rejecting the narrow suggestions advanced in my article. The statements in the article will not control my judgment on these questions if I am confirmed as a member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a member of the NLRB and if any argument concerning strikes is made to the Board, I will consider it with an open mind based on the terms of the act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question 15. What are your views on expanded rulemaking? What types of representation issues should be considered? And I ask you to respond not as a candidate for the NLRB as to what you may or may not do if confirmed, but as a long-time union lawyer.

Answer 15. The act vests in the Board authority to adopt rules and regulations ``as may be necessary to carry out the provisions of '' the act. The Board has promulgated rules governing procedures in unfair labor practice, representation, and other types of cases. I would cite the Board's rulemaking procedures in 1989 establishing presumptively appropriate units in acute care hospitals, see 29 CFR 101.30, approved by the Supreme Court in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991), as an example of the types of circumstances where rulemaking is appropriate.

Would this not be a way to inject your views on representation elections, as expressed in your articles, even without having to wait for a case to decide, and possibly be reversed in a Federal court of appeals?

Answer 15. No.

Question 16. Have you had conversations with Chairman Liebman concerning NLRB rulemaking?

Answer 16. No.

Question 17. Have you had conversations with any of your colleagues at the SEIU or the AFL-CIO, or anyone else, about NLRB rulemaking? What rules have they advocated with regard to the representation process?

Answer 17. Over the course of my 28 years in the practice of labor law, I may have had conversations with colleagues and other labor lawyers, professors, and students about rulemaking. I do not recall discussing any specific proposals. At no time have I discussed with any person any action I would or would not take as a member of the Board regarding rulemaking or any other matter.

Question 18. You are a very strong and effective advocate for the interests of the SEIU and the AFL-CIO, and have been throughout your legal career. When you drafted president Obama's executive order on employees rights under labor laws while still employed by the SEIU and AFL-CIO [on paid vacation] were you not, in effect, acting as an advocate for their interests? And, isn't that the type of conflict that president Obama sought to avoid?

Answer 18. I have not represented the SEIU or the AFL-CIO throughout my legal career. I have represented many other clients and I have also taught at three different law schools. I served as a volunteer member of the Presidential Transition Team while using vacation leave from my employment. I was asked to provide advice and information concerning possible executive orders consistent with policies that the President had publicly announced during the campaign. While serving on the Presidential Transition Team, I spoke and acted solely for myself. I did not have any policymaking role. I abided by the Transition Team's ethics rules and there was no conflict of interest.

Question 19. The recently proposed notice from the Department of Labor required by the Executive order to be posted in the worksites of all Federal contractors and subcontractors was inaccurate, and in most cases simply incomplete or incorrect interpretations of employees' rights to organize, bargain collectively, and engage in other forms of concerted activity under the National Labor Relations Act. In fact, if workers followed the advice on the proposed notice, they may find themselves subject to lawful discipline under current board law. It has been widely discussed that the NLRB also may be considering requiring a

notice to be posted in all workplaces covered by the National Labor Relations Act--not just the workplaces of Federal contractors--concerning the rights of employees under the act. I would have to believe that the NLRB would do a better job of it than the Department of Labor, so what happens when the two posters conflict?

Answer 19. The NLRB has primary jurisdiction to enforce and administer the National Labor Relations Act. While I do not know what incomplete or incorrect interpretations the question refers to, no statement in the Department of Labor's notice would be binding on the NLRB.

Question 20. Do you think that advice in the form of written materials drafted by union and management lawyers and provided by union and management lawyers to their clients regarding employees' decisions to exercise or not exercise the right to organize and bargain collectively, should be subject to broader financial reporting requirements under the Labor-Management Reporting and Disclosure Act (LMRDA)?

Answer 20. The National Labor Relations Board does not enforce or administer the Labor-Management Reporting and Disclosure Act. This question is appropriately addressed by Congress and the Department of Labor.

Question 21. Don't unions, union lawyers, and union consultants try to persuade employees (which is their right), just as it is the employer's free speech right under the caveats of section 8(c) of the LMRDA? Shouldn't both unions and union lawyers therefore be subject to the same rules as employers and management lawyers?

Answer 21. The National Labor Relations Board does not enforce or administer the Labor-Management Reporting and Disclosure Act. The provision of the LMRDA to which you refer, 29 U.S.C. 433(b), currently refers only to persons who ``pursuant to any agreement or arrangement with an employer'' undertake specified activities. This question is, therefore, appropriately addressed by Congress.

Question 22. If confirmed, how long do you intend to recuse yourself from matters involving your current employers?

Answer 22. Pursuant to 5 CFR 2635.502, for a period of 1 year after I last provided services to a former employer, I will not participate in any particular matter involving specific parties in which the former employer is or represents a party, unless I am first authorized to participate, pursuant to 5 CFR 2635.502(d). In addition, I understand that as an appointee I am required to sign the Ethics Pledge under Executive Order No. 13490 and that I will be bound by the requirements and restrictions therein in addition to the requirements of 5 CFR 2635.502. Accordingly, I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to a former employer as those terms are defined in Executive Order No. 13490, unless I am first authorized to participate, pursuant to Executive Order No. 13490 Sec. 3. I have entered into an ethics agreement with the National Labor Relations Board to fully abide by both of these sets of restrictions. Moreover, if at any time during my service on the Board a case comes before me relating to a former employer or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will

recuse myself. Finally, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 23. Are you covered by President Obama's Executive Order 12490?

Answer 23. If I am confirmed, I will be covered by the Executive Order 13490, Ethics Commitments by Executive Branch Personnel (January 21, 2009). Please see my answer to Question 22.

Question 24. If some exception applies, do you believe it is appropriate that different standards should apply to NLRB members as apply to Executive Branch nominees?

Answer 24. The Executive Order does not expressly create different standards for NLRB members than apply to other executive branch nominees. Any further views I might form on this question would depend on the nature of the executive branch official's job duties and decisionmaking authority and his or her relation to the particular circumstances presented.

Question 25. Will you recuse yourself only from those cases where the SEIU or the AFL-CIO are a party, or also those cases in which they have an interest (such as an amicus)? What about cases that the SEIU or AFL-CIO has taken a formal position in, though may not have participated formally in the case?

Answer 25. Please see my answer to Question 22.

Question 26. How will you draw this line if it is a local SEIU chapter, rather than the international, that is the charged or charging party? Will you recuse yourself from all such cases or draw the line in some other way?

Answer 26. In the course of my work for SEIU, I have represented a small number of local unions affiliated with SEIU. Pursuant to 5 CFR 2635.502, for a period of 1 year after I last provided services to a former client, including any such locals, I will not participate in any particular matter involving specific parties in which a former client is or represents a party, unless I am first authorized to participate, pursuant to 5 CFR 2635.502(d). In addition, I understand that as an appointee I am required to sign the Ethics Pledge under Executive Order No. 13490 and that I will be bound by the requirements and restrictions therein in addition to the requirements of 5 CFR 2635.502. Accordingly, I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to a former client as those terms are defined in Executive Order No. 13490, including any such locals, unless I am first authorized to participate, pursuant to Executive Order No. 13490 Sec. 3. I have entered into an ethics agreement with the National Labor Relations Board to fully abide by both of these sets of restrictions. Moreover, if at any time during my service on the Board a case comes before me relating to SEIU, an SEIU local or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Finally, in any such case where there is no actual conflict but my participation might be

perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 27. The SEIU, the AFL-CIO or their locals are often parties in cases before the NLRB, correct?

Answer 27. The SEIU and the AFL-CIO are rarely parties to cases before the NLRB. Only four local labor organizations are directly affiliated with the AFL-CIO and they are rarely parties to cases before the NLRB. Local labor organizations affiliated with SEIU are, on occasion, parties to cases before the NLRB.

Question 28. In how many cases are the SEIU or AFL-CIO currently a party?

Answer 28. I am not aware of any cases currently pending before the Board in which either the SEIU or the AFL-CIO is a party.

Question 29a. Isn't the SEIU involved and likely to become involved in quite a few cases before the Board involving its dispute with the National Union of Healthcare Workers?

Answer 29a. I have had no involvement in the dispute between SEIU and the National Union of Healthcare Workers and I am not in a position to know or predict what cases, if any, related to that dispute may come before the Board in the future.

Question 29b. Have you provided legal advice to the SEIU on that dispute in any way?

Answer 29b. No.

Question 30. Have you participated in any cases currently pending before the Board? If so, how many and in what capacity? Can you provide a list?

Answer 30. Yes, as follows: Dana Co., No. 7-CA-46965, as counsel to amicus curiae; Hacienda Resort Hotel & Casino, No. 28-CA-13274, as counsel to amicus curiae; Correctional Medical, 349 NLRB 1198 (2007), as counsel to petitioner in Court of Appeals; Tribune Publishing, 351 NLRB 196 (2007) (may remain pending after petition for review denied for purposes of compliance), as counsel to putative intervenor in Court of Appeals; Guardsmark, LLC, 344 NLRB 809 (may remain pending after petition for review granted by Court of Appeals), as counsel to petitioner in Court of Appeals; Randell Warehouse of Ariz., Inc., 328 NLRB 1034 (many remain pending after petition for review granted by Court of Appeals), as counsel to intervenor in Court of Appeals.

Question 31. The SEIU and the AFL-CIO have publically advocated the reversal of certain Board precedent, correct? Which precedents?

Answer 31. I do not know whether the SEIU or the AFL-CIO have publicly advocated reversal of specific Board precedents outside the context of advocacy in a specific, pending case. It is likely, however, that both organizations have publically criticized Board decisions over the course of the past 75 years.

Question 32. Do you intend to recuse yourself from that case and other cases in which the SEIU or AFL-CIO have taken a public position?

Answer 32. I do not believe my impartiality concerning a particular case could reasonably be questioned solely because when I was in

private practice I represented a client that took a position on a legal issue. However, please see my answer to Question 22. Beyond that, I do not believe it is appropriate to opine on hypothetical cases, on cases that have not yet been filed, or on cases involving facts of which I am not aware at this time.

Question 33a. Have you taken the Administration's ``Ethic's Commitments by Executive Branch Personnel?''

Answer 33. If confirmed, I will take the President's Ethics Pledge upon confirmation. Please see my answer below.

Question 33b. If not, do you intend to?

Answer 33b. Yes. I have entered into an ethics agreement with the NLRB that provides,

``I understand that as an appointee I am required to sign the Ethics Pledge (Executive Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.''

Question 34. That pledge at paragraph 2 requires that an appointee recuse himself or herself for 2 years from any particular matter involving specific parties in which a former employer or client is or represents a party, if the appointee served that employer or client during the 2 years prior to the appointment. Specifically it reads:

``I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.''

Do you intend to comply with paragraph 2?

Answer 34. I intend to comply with the entire pledge.

Question 35. Does that mean that you will recuse yourself not only from all cases that you have participated in any way while working for the SEIU and AFL-CIO but also from all cases raising issues that the SEIU or AFL-CIO have taken a public position?

Answer 35. Please see my answers to Questions 22 and 32.

Question 36. Do you intend to seek a waiver from the Director of OMB [permitted in Paragraph 3]?

Answer 36. No.

Question 37. Are you familiar with 5 CFR Section 2635.502? This provides that an employee is required to consider whether the employee's impartiality would reasonably be questioned if the employee were to participate in a particular matter involving specific parties where persons with certain personal or business relationship with the employee are involved. If the employee determines that a reasonable person would question the employee's impartiality, or if the agency determines that there is an appearance concern, then the employee should not participate in the matter unless he or she has informed the agency designee of the appearance and received authorization from the agency.

Answer 37. Yes, I am familiar with 5 CFR Section 2635.502 which provides:

``Where an employee knows that a particular mailer involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.''

Question 38. Apart from the Executive order, don't you believe that if you participated in decisions raising issues on which the AFL-CIO or the SEIU have taken a public position while you were employed by them that your impartiality would reasonably be questioned?

Answer 38. Please see my answers to Questions 22 and 32.

Response to Questions of Senator Coburn, M.D. by Harold Craig Becker

Question 1. In November 2009, the National Mediation Board issued a proposed rule in which it relied on the ``broad discretion'' that the majority opinion believed was provided to it under the Railway Labor Act. Outrageously, this proposed rule threatens to overturn 75 years of standing labor policy (Federal Register/Vol. 74, No. 211/Tuesday, November 3, 2009/Docket No. C-6964). Under the proposed rule, a union could be certified through a simple majority of the employees who vote.

Do you think the National Mediation Board has the authority under current law to reverse the current, long-standing rule on its Representation Election Procedure?

Answer 1. The National Mediation Board administers the Railway Labor Act. The National Labor Relations Board (NLRB) administers the National Labor Relations Act (NLRA). I have never appeared before the National Mediation Board and have not practiced under the Railway Labor Act. I cannot at this time offer an informed opinion about this question.

Question 2. Do you think the National Mediation Board's proposed rule is in keeping with precedent?

Answer 2. As I understand the National Mediation Board's proposal based on reading the notice of proposed rulemaking, the proposal is to revise an existing rule.

Question 3. Do you think the majority of the National Mediation Board, in proposing this rule, fulfilled its duty under the Administrative Procedures Act to explain adequately its departure from agency precedent?

Answer 3. Please see my answer to Question 1.

Question 4. Do you think the NLRB has broad discretion under the law to make changes to election procedures through administrative means?

Answer 4. Section 9 of the Act sets forth certain standards for the conduct of elections that the Board must honor. For example, section 9

specifies preconditions for the conduct of an election and bars an election in a unit in which an election has been conducted in the prior 12 months. The Board cannot depart from the standards established in section 9. Consistent with those statutory standards, the Supreme Court has held that the Board has broad discretion concerning the conduct and regulation of elections.

Question 5. In questions for the record submitted to you on July 30, 2009, Senator Michael Enzi, Ranking Member of the Senate Committee on Health, Education, Labor, and Pensions, asked you the following question: ``In your opinion, what changes could be made under current law to improve the union certification process?'' You replied that,

``The Act vests broad discretion in the Board to conduct and regulate representation elections and certify the results. Subject to the constraints of the principle of stare decisis discussed in my answer to Question 4 and the requirements of the Administrative Procedures Act, where applicable, the Board could make changes in election procedures and rules fit determined after appropriate deliberation that they were consistent with Congress' intent and would improve the process'' (emphasis added).

Please explain more fully your comment that the act vests broad discretion in the Board to conduct and regulate representation elections and certify results.

Answer 5. I was referring to decisions of the Supreme Court which have so held. See, for example, *NLRB v. Waterman S.S. Co.*, 309 U.S. 206, 226 (1940) (``The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.''); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) (``Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.''); and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (``Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives.'')

Question 6. What types of changes in election procedures and rules could be made under the current broad discretion available under law that you mention? What changes could be made under current law to improve the union certification process? What changes could be made under current law to improve the decertification process?

Answer 6. In the past, the Board has changed the election procedures and rules in a number of respects. For example, in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962), the Board held that misrepresentations by a union or employer during an election campaign were grounds for overturning the election results. Later, in *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982), the Board overruled its prior decision and held that it would no longer regulate the content of campaign propaganda in that manner. Examples of more recent cases in which the Board has changed its election-related rules include *Kalin Construction Co.*, 321 N.L.R.B. 649 (1996), holding that an employer's changes to its paycheck process during the period beginning 24 hours before the opening of the polls and ending with the closing of the polls is objectionable; and *Fessler & Bowman, Inc.*, 341 N.L.R.B. 932

(2004), holding that when either union or employer agents collect or otherwise handle voters' mail ballots it is grounds for objection. All of these changes, as well as the prior rules they overturned, applied to decertification elections as well as certification elections.

Question 7. What role does precedent play limiting interpretation of the law? Are the Board's prior decisions controlling for future cases? What standard would you apply in determining whether to overrule a prior Board decision?

Answer 7. I think the NLRB, like other adjudicatory agencies, should respect its own precedent and the rule of stare decisis. I think the Board should respect parties' legitimate reliance on past precedent to guide their actions. I think that the Board should not depart from its own precedent without citing that precedent and openly acknowledging that it is overruling past precedent. I think that when the Board decides to overrule prior precedent it should do so expressly and only after fully explaining the basis of its decision.

Question 8. During the February 2, 2010 hearing before the HELP Committee, comments were made that those with concerns about your nomination are opposing you solely on the basis of your having represented labor interests. Your past writings, however, provide ground for concern. These concerns are heightened by recent actions of the National Mediation Board in which precedent was seemingly dumped in favor of the personal agenda of recent Board appointees. In testimony before the HELP Committee on February 2, 2010, you responded to questions on your controversial remarks in the Minnesota Law Review, stating at the hearing that: ``If confirmed, my decisions, unlike the views of a scholar, will have practical, concrete and important consequences. I will have a duty to implement the intent of Congress.''

Please explain this comment more fully. If confirmed, how would your analysis of labor law and precedent differ as a practitioner studying the body of law, as opposed to a scholar studying that same body of law? As a practitioner, would you reach the conclusion reached in your 1993 Minnesota Law Review article that ``employers should be stripped of any legally cognizable interest in their employees' election of representatives?'' What restraints would factor into your analysis as a practitioner that do not factor into your analysis as a scholar?

Answer 8. A scholar does not take an oath and has no duty to uphold and fairly enforce the law. Scholars can and often do advocate for changes in existing law. Scholars do not have the benefit of or a duty to consider a full and fair presentation of arguments by both sides as takes place in adjudication. Scholars do not have the benefit of collaborative deliberation of the type I will engage in with my fellow Board members should I be confirmed. Only after full and fair procedures, consideration of all arguments appropriately expressed to the Board, and on the basis of specific facts would I reach any conclusions concerning questions that might come before the Board.

Question 9. As a member of the NLRB, would you consult and factor into your decisionmaking any scholarly or academic work related to the topic you are considering?

Answer 9. If I am confirmed as a member of the NLRB, I will be bound by the law as enacted by Congress. I will also fully respect and apply any applicable precedents of the Supreme Court. I will also respect the prior precedents of the Board itself, consistent with the

principle of stare decisis. I would review scholarly and academic work cited by parties to Board proceedings or otherwise brought to my attention. They would, of course, be given no controlling weight of any sort.

Question 10. How do you plan to work with all members of the Board to ensure that decisions reached are in full keeping with the law and precedent?

Answer 10. I hope to engage in a collaborative decisionmaking process with my fellow Board members, should I be confirmed. Just as the adversarial process helps to insure that all arguments about what the law requires or what prior precedent provides are fully aired and considered, I believe that a collaborative process in which any disagreements are fully discussed and considered will result in decisions that are faithful to the law and respect prior precedent.

The NLRB has rarely exercised its rulemaking capacity, relying instead on case-by-case decisionmaking.

Question 11. What conditions do you believe are necessary for the NLRB to initiate the rulemaking process?

Answer 11. The NLRB may initiate the rulemaking process only in a manner consistent with its statutory rulemaking authority, with the Administrative Procedure Act, and with any other applicable laws. The NLRB should have a sound policy basis for a decision to proceed through rulemaking.

Question 12. What types of issues should be the subject of rulemaking?

Answer 12. I would cite the Board's rulemaking proceedings in 1989 establishing presumptively appropriate units in acute care hospitals, see 29 CFR 101.30, approved by the Supreme Court in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991), as an example of the types of circumstances where rulemaking is appropriate.

Question 13. Do you think the Board should break from tradition and begin utilizing the rulemaking process?

Answer 13. The Board has promulgated rules governing procedures in unfair labor practice, representation, and other types of cases. As I indicated above, I would cite the Board's rulemaking proceedings in 1989 establishing presumptively appropriate units in acute care hospitals, see 29 CFR 101.30, approved by the Supreme Court in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991), as an example of the types of circumstances where rulemaking is appropriate.

Question 14. Do you believe it is necessary to have the full participation of all Board members in the rulemaking process, including the drafting of all documents related to that process before decisions are issued? Do you think minority views need to be consulted and their views carefully considered before significant regulatory decisions are made?

Answer 14. When it engages in rulemaking, the Board must act in full compliance with its statutory rulemaking authority, the Administrative Procedure Act, and any other statutory requirements. If I am confirmed and a proposal for rulemaking were to come before the Board, I would fully familiarize myself with those statutory requirements and act in full compliance with those statutory commands. I believe all Board members have a statutory right and obligation to

participate in any rulemaking process. Of course, full and adequate consultation among Board members will better insure that all relevant considerations are raised. If there is disagreement among members, the majority should fully consider the views of the minority before acting and the minority should fully consider the views of the majority before acting.

Question 15. What benefits do you believe the NLRB could gain through rulemaking that exceed the Board's traditional reliance on adjudication?

Answer 15. As I stated in my prior answer, I would cite the Board's rulemaking proceedings in 1989 establishing presumptively appropriate units in acute care hospitals, see 29 CFR 101.30, approved by the Supreme Court in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991), as an example of the types of circumstances where the Board has achieved benefits in the areas of stability and greater predictability for employers, employees and labor organizations that it had not been able to obtain through adjudication.

Question 16. What role should law and Supreme Court precedent have in rulemaking?

Answer 16. The NLRB may initiate the rulemaking process only in a manner consistent with its statutory rulemaking authority, with the Administrative Procedure Act (APA), and with any other applicable laws. Of course, any rules must be consistent with Federal labor law itself. The Supreme Court's decisions under the APA, Federal labor law, and any other applicable law are binding on the Board in rulemaking as in adjudication.

Question 17. In 2007, you represented the plaintiff in *Long Island Care at Home v. Coke* before the Supreme Court. You were unsuccessful in arguing that the Court should overturn a Labor Department regulation that exempted home-care aides employed by third-party companies from the Federal minimum wage and overtime coverage under the Fair Labor Standards Act. Following the Supreme Court's decision, you testified before the House Education and Workforce Committee where you stated that DOL's adopted regulations `` . . . radically broadened the companionship exemption in a manner inconsistent with both Congress' intent and the DOL's treatment of babysitters.''

If the NLRB were to undertake rulemaking, how would you handle instances where your personal interpretation of congressional intent and current regulation is in direct conflict with Supreme Court precedent?

Answer 17. I would act in accordance with congressional intent and Supreme Court precedent.

The Daily Labor Report recently reported \1\ that organized labor is increasingly turning to ``corporate campaigns'' that attack a company's reputation as a way to achieve union goals.

\1\ Daily Labor Report, ``Management Attorneys Say Unions Increasingly Using Corporate Campaigns,' ' By: Janet Cecelia Walthall, 1-19-10.

Question 18. Do you think the law should be amended to specifically define a corporate campaign?

Answer 18. I believe that question is properly addressed by Congress.

Question 19. Have you ever participated in a corporate campaign?

Answer 19. The term ``corporate campaign'' is not used in the National Labor Relations Act, as amended, or in any other Federal or State law that I am aware of. It has no precise definition. As counsel to various labor organizations, I have provided advice concerning efforts to assist employees to organize and obtain representation and efforts to reach agreement in collective bargaining.

Question 20. Have you ever, through your work at the SEIU or AFL-CIO given counsel on how to organize and/or implement a corporate campaign?

Answer 20. Please see my answer to your Question 19.

Question 21. Do you think there should be any restrictions on anti-employer corporate campaigns?

Answer 21. As stated above, the term ``corporate campaign'' is not used in the act or elsewhere in Federal or State law as far as I am aware. The term has no precise meaning. Various restrictions contained in Federal labor law might apply to activity engaged in during what is sometimes referred to as a corporate campaign, including the restrictions created by section 8(b) (4). Whether additional restrictions of some sort should be imposed is a question appropriately addressed by Congress.

Question 22a. Do you think penalties for union misconduct should be increased?

Answer 22a. As I have stated in answers relating to the Board's authority to implement the provisions of the Employee Free Choice Act without congressional action, Congress has vested the Board with specific remedial authority in section 10 of the Act. The NLRB has authority to fashion new remedies consistent with section 10 and relevant Supreme Court precedent. Outside those bounds, use of new remedies must be authorized by Congress. Section 10(c) vests in the Board authority to order a party to take affirmative action, including re-instatement with or without back pay. I do not believe that section 10 currently vests in the Board authority to impose penalties. Thus, this question is one for Congress to resolve.

Question 22b. As you know private union membership has steadily declined over the years and is currently at record lows. Do you think the NLRB has the responsibility under law to increase union participation?

Answer 22b. No.

Question 23. In a February 9, 2008 letter to Andy Stern, Sal Roselli, President of the SEIU United Health Care Workers West, wrote that:

``An overly zealous focus on growth--growth at any cost, apparently--has eclipsed SEIU's commitment to its members. As labor leaders, we are obligated to place the needs of our members first and to uphold democratic principles not only in the workplace, but also in our union. That is increasingly being blocked, circumvented and manipulated.''

How do you assure members of Congress that the win-at-all-costs culture noted by Mr. Roselli as permeating your current place of employment will not carry over into your work at the NLRB, or impair or

limit your judgment as a member of the NLRB?

Answer 23. I have had no involvement in the dispute between SEIU and Mr. Roselli and the organization with which he is currently affiliated. If confirmed, I will apply the law as written fairly and even-handedly.

Question 24. Do you believe that the rights of SEIU United Health Care Workers West members were blocked, circumvented or manipulated in any way?

Answer 24. As stated above, I have had no involvement in the dispute between SEIU and Mr. Roselli and the organization with which he is currently affiliated.

Question 25a. Mr. Roselli also noted that:

``You [Stern] and other international officers interfered in the affairs of the SEIU California State Council--our collective vehicle for State legislation and electoral action--using the imposition of a revised constitution and bylaws to prompt a presidential election when none was anticipated, then manipulating the per capita voting formula and procedures in order to produce the outcomes you desired.''

Did you provide counsel to the SEIU concerning the affairs of the SEIU California State Council, or the implementation of a revised constitution and bylaws? Please explain.

Answer 25a. No.

Question 25b. In testimony given before the Senate Committee on Health, Education, Labor, and Pensions on February 2, 2010, you mentioned letters of support that were issued by management teams you have worked with in the past while representing the interests of labor. I regret that I have not been able to see a copy of the support letters you mentioned. A published hearing record will not be available so that I can access such letters prior to the vote on your confirmation due to the expedited nature of your hearing this second session of the 111th Congress. Please include in your written response copies of all letters you are aware of in support of your nomination.

Answer 25b. Copies of all letters of support within my possession are attached.

Question 26. In testimony before the HELP Committee on February 2, 2010, you clearly stated in response to a question to Chairman Tom Harkin that you will recuse yourself from all cases involving the SEIU. In testimony, you said this would apply to the first 2-year period following your resignation from the SEIU. However, in the questionnaire you submitted to the committee you said you would recuse yourself for a 1-year period.

For how long a period will you recuse yourself from cases involving the SEIU?

Answer 26. Two years, as I explain below. My answers to the HELP Committee questionnaire stated that I would abide by both the terms of the Code of Federal Regulations which require recusal for a period of 1 year and the terms of the President's Executive Order which require recusal for a period of 2 years. Accordingly, pursuant to 5 CFR 2635.502, for a period of 1 year after I last provided services to a former client, including SEIU, I will not participate in any particular matter involving specific parties in which a former client is or

represents a party, unless I am first authorized to participate, pursuant to 5 CFR 2635.502(d). In addition, I understand that as an appointee I am required to sign the Ethics Pledge under Executive Order No. 13490 and that I will be bound by the requirements and restrictions therein in addition to the requirements of 5 CFR 2635.502. Accordingly, I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to a former client as those terms are defined in Executive Order No. 13490, including SEIU, unless I am first authorized to participate, pursuant to Executive Order No. 13490 Sec. 3. I have entered into an ethics agreement with the National Labor Relations Board to fully abide by both of these sets of restrictions. Moreover, if at any time during my service on the Board a case comes before me relating to SEIU or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Finally, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 27. Will you also similarly excuse yourself from cases involving your other employer, the AFL-CIO? For what period of time would you remove yourself from participation on matters related to the AFL-CIO?

Answer 27. Yes. I will apply the same time periods described in my answer to your Question 26.

Question 28. In questions for the record submitted to you on July 30, 2009, Senator Michael Enzi, Ranking Member of the Senate Committee on Health, Education, Labor, and Pensions, asked you the following question: ``The Board annually evaluates and reports on the effectiveness of its programs. What management experience do you have in evaluating programs and what actions would you suggest the Board take to improve the evaluation of programs?''

In your written response, you said:

``I have minimal management experience at this time. In addition, I have little knowledge of the Board's existing evaluation and reporting procedures. For these reasons, I would not make any suggestions to improve the evaluation of programs until I have fully informed myself about the existing programs should I be confirmed.''

Since this time, have you reviewed the Board's evaluation and reporting procedures?

Answer 28. No, I have not had the opportunity to do so.

Question 29. If so, do you have suggestions for the Board to improve the evaluation of programs?

Answer 29. Please see my answer to your Question 28.

Question 30. Do you think the NLRB has adequate fiscal resources to carry out its work effectively and efficiently?

Answer 30. I have not had a full and complete opportunity to review

appropriations to the Board, the Board's budget, and other relevant documents or to confer with all knowledgeable staff at the Board. Until I have the opportunity to do so, I will not form any conclusions about this matter.

Question 31. Do you think the NLRB has sufficient staff to meet the demands placed on it?

Answer 31. I have not had a full and complete opportunity to review appropriations to the Board, the Board's budget, and other relevant documents or to confer with all knowledgeable staff at the Board. Until I have that opportunity to do so, I will not form any conclusions about this matter.

**RESPONSES OF NATIONAL LABOR RELATIONS BOARD
TO QUESTIONS FOR THE RECORD
May 13, 2011**

*Department of Labor, Health and Human Services
and Education and Related Agencies*

**National Labor Relations Board FY12 Budget Request Hearing
April 6, 2011**

Questions From The Honorable Denny Rehberg, Chairman

Preemption of State Laws

Since the enactment of the National Labor Relations Act (NLRA), there have been several instances where state laws have been preempted by the terms of the NLRA. And this preemption has occurred without an actual legal challenge by the National Labor Relations Board.

Recently, four states have passed amendments to their own State constitutions protecting the right of secret ballot elections. These amendments were the result of a free, fair, and democratic election process. Yet, while there appears to have been no effort by these states to actually enforce these new laws, the Board has decided to pursue litigation against two, South Dakota and Arizona. Ostensibly, the reason behind this effort would be to uphold the terms of the NLRA. However, this is viewed by many as yet another attempt to enforce pro-union activities on right-to-work states.

1. What historical precedent exists that supports the Board's pursuit of litigation that seeks to overturn a State's duly enacted constitutional provision, law or ballot initiative?

Federal courts have consistently accepted the Board's authority to seek to enjoin the enforcement of state law that conflicts with federal law. *See, e.g., NLRB v. Nash-Finch Co.*, 404 U.S. 138, 140-141, 144 (1971); *NLRB v. State of North Dakota*, 504 F. Supp. 2d 750, 753-754 (D.N.D. 2007); *NLRB v. State of Illinois Dept. of Emp't Sec.*, 988 F.2d 735 (7th Cir. 1993); *NLRB v. Cal. Horse Racing Bd.*, 940 F.2d 536, 539-542 (9th Cir. 1991); *NLRB v. State of Fla., Dep't of Bus. Regulation, Div. of Pari-Mutuel Wagering*, 868 F.2d 391, 396-397 (11th Cir. 1989); *NLRB v. State of New York*, 436 F. Supp. 335, 339 (E.D.N.Y. 1977), *aff'd*, *NLRB v. State of New York*, 591 F.2d 1331 (2d Cir. 1978), *see also NLRB v. Comm. of Interns and Residents, and New York State Labor Relations Bd.*, 566 F.2d 810, 812 (2d Cir. 1977).

These preemption cases are all premised on the principle that, under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, validly enacted federal statutes such as the National Labor Relations Act are “the law of the land,” notwithstanding any contrary, duly enacted provision in a state constitution or a state statute. Because the Supremacy Clause, by its terms, applies equally to state constitutional provisions and state statutes, the NLRA precedents holding state statutes preempted apply as well to state constitutional provisions in conflict with federal law. Indeed, there is special reason to bring established principles of federal preemption law to bear on state constitutional provisions that are in conflict with federal law because such measures, even if not enforced, are likely to have a widespread detrimental impact on the free exercise of federal rights.

While the preemption litigation at issue here seeks to protect the federal rights of employees, the preemption cases cited above illustrate that the NLRB has also sought the invalidation of state laws that conflict with the federal rights of employers. Other examples include *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), where the Board, at the request of employer groups, joined the Solicitor General's Supreme Court brief in litigation aimed at establishing that a California statute improperly impaired employer rights to campaign for or against unionization. Further, the Board filed a brief in *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005), successfully arguing that a Milwaukee ordinance impaired an employer's NLRA right to choose whether or not to enter a card check and labor peace agreement.

When a state statute or constitution provision conflicts with our federal labor law, it is the practice of the General Counsel to contact that state's attorney general questioning its validity on pre-emption grounds. This occurred, for example, when former General Counsel Arthur F. Rosenfeld sent a letter to the Attorney General of the State of North Dakota seeking a repeal of a state statute (North Dakota Century Code Section 34-01014.1) that charged grievance processing expenses only to non-union members, which is directly contrary to federal law. Recently, as a result of an inquiry from the National Right to Work Legal Defense Foundation, Acting General Counsel, Lafe E. Solomon, wrote to the Attorney General of the State of California questioning the legitimacy of California's "professional strikebreaker" law (Cal. Labor Code §§ 1130-1136.2), which prohibits and punishes employers who employ certain strikebreakers. While this state law apparently has been in effect for some time without prompting individual complaints, the Acting General Counsel nonetheless expressed his view that the law appears to be preempted by the NLRA, and sought to determine whether there is a need for the NLRB to consider taking action to prevent its future enforcement.

Finally, leading labor lawyers have expressed support for the Board's decision to prevent encroachment by these state constitutional amendments on the long-standing legitimacy of alternative paths to employee representation guaranteed by the NLRA. Former General Counsel Arthur Rosenfeld, appointed by President George W. Bush, stated “Board law, of course, acknowledges other means such as voluntary recognition, card check, voice votes . . .” and “I have to applaud the Board's quick authorization, the quick action in authorizing the acting general counsel in order to protect the Board's

jurisdiction.” *Emerging Trends at the National Labor Relations Board*, Hearing before the Subcommittee on Health, Employment, Labor and Pensions, Feb. 11, 2011 (112th Cong.) at p. 15 (<http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg64230/pdf/CHRG-112hhrg64230.pdf>).

2. In terms of the impact against the Board’s budget, how much funding and how many FTE will be allocated to this effort? Secondly, will additional funds be necessary in fiscal year 2012 to maintain your planned workload in addition to these new lawsuits?

Litigation of this matter will be handled by the NLRB’s Special Litigation Branch in the normal course of business. No additional funds will be necessary in fiscal years 2011 or 2012 to maintain the agency’s planned workload in addition to these lawsuits.

Secret Ballot Elections

Chairman Liebman, H.R. 972, the Secret Ballot Protection Act was recently introduced in the House of Representatives, while a companion bill has also been introduced in the Senate. Both bills would guarantee the right to secret ballot union representation elections.

1. What activities is the Board currently engaged in to promote alternatives to secret ballot elections? Have there been, or are there pending, any adjudicatory decisions or general counsel memoranda that would have the effect of eliminating, curtailing, or otherwise replacing secret ballot elections?

Section 9(a) of the National Labor Relations Act provides that a labor union may become the exclusive representative of employees in an appropriate bargaining unit if the union is “designated or selected for the purposes of collective bargaining by the majority of the employees.”

Under this statutory language, as the Supreme Court has explained, employees may choose union representation (1) through a secret-ballot election conducted by the Board or (2) through voluntary recognition of the union by the employer, based on other methods of establishing majority support for the union, such as signed authorization cards. See *Gissel Packing Co. v. NLRB*, 395 U.S. 575, 597-598 (1969).

Under Section 9(c) of the Act, certification of the union by the Board, which entails special statutory privileges for the union, may be based only on a Board-conducted election. No decision by the Board or memorandum by the General Counsel could, consistent with the Act, eliminate, curtail, or otherwise replace secret ballot elections as the exclusive basis for union certification by the Board. Nor, absent legislative change, could any decision by the Board prohibit voluntary recognition by employers of unions that have the uncoerced majority support of employees in an appropriate bargaining unit.

Unions may lose their representative status either (1) through a Board-conducted secret ballot election pursuant to Section 9(c) of the Act or (2) through the employer’s unilateral

withdrawal of recognition from the union, provided that the employer can establish, based on objective evidence in a context free of unfair labor practices, that the union actually has lost majority support. See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001).

The Board continues to administer and enforce the National Labor Relations Act in accordance with these established principles.

In *Dana Corp.*, 351 NLRB 434 (2007), the Board departed from 40 years of established Board law and practice respecting voluntary recognition agreements between employers and unions. See *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). The *Dana* decision established new procedures requiring the posting of a notice to employees and providing for a secret-ballot election, if a valid decertification petition is filed by employees within 45 days of the notice or if a rival union files a valid representation petition. In a pending case, *Lamons Gasket Co.*, 16-RD-1597, the Board has invited briefs addressing various issues, including whether the Board should modify or overrule *Dana*.

2. Approximately, what percent of the Board's budget and FTE are dedicated to promoting the use of electronic and mail balloting for union elections?

No NLRB budget resources or FTEs have been dedicated to promoting the use of electronic balloting in union elections. On June 9, 2010, the Board did post a Request for Information (RFI) soliciting information regarding the technology, capacity, availability, methodology and interest of industry sources for procuring and implementing secure electronic voting services to process remote and on-site NLRB union representation elections. Minimal staff time was needed to issue the RFI and to review the ten responses related thereto.

For decades, mail balloting or a combination of mail and manual balloting in NLRB union representation elections may be, and has been, agreed upon by the parties or required by the Agency. These situations typically arise where employees are geographically scattered or have varied work schedules such that all bargaining unit employees cannot be present at a common place at a common time to vote manually. See *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Further, mail ballot representation elections ensure that unit employees serving in the military are not disenfranchised.

In FY 2010, the NLRB conducted 2031 total elections of which only 217 (9.3%) were conducted by mail or by mixed mail/manual balloting. This low percentage has been fairly consistent in recent years.

Collective Bargaining Unit Determinations

Chairman Liebman, the issue of collective bargaining unit determinations was brought up by a few Members, particularly as it relates to the Specialty Healthcare case currently before the Board. While I would not aim to prejudge or presume the outcome in this case, if the Board adopts a job classification standard, unit determinations are likely to become the most contested area of Board Law.

1. What data exists that suggests that “unit” size is actually a problem and needs to be reconsidered? Seeing as this data would not compromise this pending matter, please provide the Committee evidence that stipulates that unit size has become an issue.

The issue briefed by interested parties and currently under consideration by the National Labor Relations Board (NLRB) in *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9*, 356 NLRB No. 56 (Dec. 22, 2010), is the appropriate *scope* of bargaining units for union organizing and collective bargaining in long-term care facilities. The Board is not considering, nor has it asked interested parties to opine on, the appropriate *size* of bargaining units in long-term care facilities. Notably, under the NLRA, the Board has had the authority to conduct elections in bargaining units comprised of as few as two employees and has done so over the years.

Incidentally, the petitioner in *Specialty Healthcare* seeks to represent a unit of 53 certified nursing assistants at the employer’s nursing home. That unit size is well above the median unit size of 25 employees for elections conducted during fiscal year 2010 and over the last decade.

The NLRB first issued an opinion on bargaining units in nonacute care facilities in 1991. That Board unanimously expressed its hope “that after various units have been litigated in a number of individual facilities, and after records have been decided from these records, certain patterns will emerge and illustrate which units are typically appropriate.” *Park Manor Care Center*, 305 NLRB 872, 875 (1991).

The NLRB’s review, 20 years later, of appropriate units for nonacute facilities in *Specialty Healthcare* is simply an instance of the Board fulfilling its statutory mandate to ensure that the National Labor Relations Act (NLRA) continues to serve its purpose in an industry that “has undergone a radical transformation in the past 20 years in the face of an aging population, changing consumer preferences relating to the form and location of long-term care, and a more general restructuring of the provision of health care, most importantly, a drastic reduction in the average length of stays in acute care hospitals.” *Specialty Healthcare and Rehab. Ctr.*, 356 N.L.R.B. No. 56 at 2, 12/22/2010.

2. What sort of analysis has been done on the impact that this increased activity would have on the Board's annual budget, and would it not necessitate an increase in FTEs to support the additional workload?

The NLRB does not anticipate that any decision reached by the Board in *Specialty Healthcare* will have an impact on the agency's annual budget.

3. In cases related to unit determinations, how many cases have there been in which a federal court overturned the Board's ruling?

During the last 10 years, the courts of appeals have ruled on Board unit determinations in 16 cases, and have upheld the Board's ruling in 15 of them. See *NLRB v. Eastern Natural Gas*, 24 F.App'x 278 (6th Cir. 2001); *Virginia Mason Medical Ctr. v. NLRB*, 35 F.App'x 4 (D.C. Cir. 2002); *Massachusetts Society for Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41 (1st Cir. 2002); *Overnite Transportation Co. v. NLRB*, 294 F.3d 615 (4th Cir. 2002); *NLRB v. Office Depot, Inc.*, 28 F.App'x 579 (7th Cir. 2002); *Werthan Packaging, Inc. v. NLRB*, 64 F.App'x 476 (6th Cir. 2003); *NLRB v. Palmer Donavin Mfg. Co.*, 369 F.3d 954 (6th Cir. 2004); *Fairfield Ford v. NLRB*, 116 F.App'x 601 (6th Cir. 2004); *NLRB v. Guardian Armored Assets, LLC*, 201 F.App'x 298 (6th Cir. 2006); *Marjam Supply Co. v. NLRB*, 213 F.App'x 4 (D.C. Cir. 2007); *NLRB v. Caswell-Massey Co.*, 247 F.App'x 381 (3d Cir. 2007); *Computer Sciences Raytheon v. IBEW Local 2088*, 248 F.App'x 66 (11th Cir. 2007); *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008); *NLRB v. 675 West End Owners Corp.*, 304 F.App'x 911 (2d Cir. 2008); and *Multi-Flow Dispensers of Toledo, Inc. v. NLRB*, 340 F.App'x 275 (6th Cir. 2009). In the one remaining case, *Sundor Brands, Inc. v. NLRB*, 168 F.3d 515 (D.C. Cir. 2002), the court remanded the case to the Board.

Persuader Reporting Orientation Program

In late January, the Office of Labor-Management Standards (OLMS) at the Department of Labor began a new initiative called the Persuader Reporting Orientation Program (PROP). Under this new program, OLMS notifies employers and consultants via a form letter about their duties to file reports under the Labor-Management Reporting and Disclosure Act (LMRDA). Specifically, it appears that OLMS is seeking information on financial agreements and arrangements between employers and third parties used to persuade employees on exercising their rights to unionize. According to its own news release (a copy of the text is provided beneath the following questions), OLMS compiles the names of employers and consultants from representation petitions filed before the National Labor Relations Board (NLRB).

One letter from OLMS to a stakeholder reads, in pertinent part (with identifying data omitted): "Information obtained by OLMS from the National Labor Relations Board (NLRB) indicates that you have identified yourself as the representative of XXXXX, an employer who is party to a petition for a representation election to be conducted by the NLRB..."

I am concerned that such filings are made publically available via OLMS' website as they would automatically become a tool for unions during a corporate campaign. If this initiative is a coordinated effort between the Department of Labor and the NLRB, then Congress and the public should be aware of any agreements, formal or informal, between the two agencies.

1. Does a cooperative relationship exist, in any way, between OLMS and the NLRB to share this type of data? If so, please provide a copy of all agreements, letters, or Memorandums of Understanding between the Board and the Department of Labor, or any of its sub agencies, relating to PROP or LMRDA reporting and information sharing.

The NLRB has a well established practice of cooperating with other Federal government offices and agencies in aid of the administration of their statutory mandates. This practice is required by the LMRDA, 29 U.S.C. 527, Section 607, which directs government agencies to engage in cooperative arrangements with or provide assistance to the Secretary in the performance of functions to avoid unnecessary expense and duplication.

In keeping with that practice, NLRB staff met with the Office of Labor-Management Standards (OLMS), at OLMS's request, to discuss whether data maintained by the NLRB would be useful in assisting OLMS. As a result of this meeting, the NLRB agreed to provide OLMS information concerning recently filed representation case petitions on a weekly basis. The NLRB began providing the information in October 2010. The information provided is also available to the public in accordance with the NLRB's current disclosure practices. There is no written inter-agency agreement or memorandum of understanding regarding the provision of this information.

2. What has been the NLRB's role, if any, in the creation and implementation of PROP?

The NLRB has no role in the creation or implementation of PROP.

Fiscal Year 2012 Budget Request

In all but one year since 2001, the Board has received an increase. H.R. 1, as passed by the House of Representatives, would have reduced the Board's budget to 2003 levels, approximately. According to your budget justification, in 2003, the Board received \$237 million, carried an FTE level of 1,873, and 28,871 Unfair Labor Practices (ULPs) charges. The 2010 appropriation reflects a nearly 20% increase, despite a 13% decrease in FTEs and an 18% decrease in ULPs. Your request for 2012 assumes an additional increase in funding, an increase of nearly 100 FTE and a sudden spike in ULP charges.

1. Given that the Board's budget is approximately 80% personnel compensation costs, and FTEs and caseload had been declining year after year, why has the Board's budget increased by nearly 21% since 2003?

Compensation costs, which are about 80% of the Agency's annual budget, and rent/security costs, which are about 10% of our annual budget, are the main drivers behind the increase in funding. From fiscal years 2003 to 2010, compensation costs increased by more than 30%, due to cost-of-living increases, contractual step increases and succession planning promotions. Similarly, for the same period of time, rent/security charges increased by more than 20%. Together, these increases accounted for about 20% of the Agency's total budget over the same period of time. From fiscal years 2003 to 2008 the agency's budget remained relatively static, and the agency was forced to defer training, infrastructure maintenance, and information technology advancements in order to cover the increased compensation, rent, and security costs.

2. **Has the compensation for any Board member or staff been exempted from the President's executive order freezing the rates of basic pay or salaries for all Federal employees?**

No. The compensation of Board Members, as Presidential Appointees, is set by Congress. The salaries of the staff of the Board Members have not been exempted from the Presidential Executive Order freezing pay or salaries of Federal employees.

- a. **Has any Board member or staff received additional bonus compensation that would otherwise not be covered under the President's executive order? If so, please provide a listing of the job titles and the amount of bonus payment(s) received.**

No Board Member or non-career staff have received or will receive bonuses. The Executive Order permits bonuses to career Senior Executive Service staff. Although no SES bonuses have been awarded yet this year, we plan to give awards to our career staff pursuant to standard OPM guidance, while adhering to the Administration's directive to cap spending on all awards at last year's level.

3. **Since fiscal year 2011 has been operating under a continuing resolution, how many FTE has the Board added to its payroll during FY 2011?**

The Board has added a net of 20 FTE to its payroll during fiscal year 2011, which accounts for about 1% of the total complement of Agency employees. These hires were primarily to fill longstanding vacancies in our Regional offices to support casehandling service to the public. The other hires were made to comply with government wide mandates related to Human Resources initiatives, security and acquisitions.

4. **What assumptions is the Board making with your FY 2012 request that details a planned spike in ULP Charges and nearly 100 FTE over 2010 levels? Will the additional FTE be added at the start of the fiscal year, or will they be added incrementally throughout the year?**

The projected increase in intake was based on the 4% increase in case intake that the NLRB experienced in fiscal year 2010. The FTE level in the FY 2012 request is the same as the level included in the FY 2011 request. It is comparable to the Agency's FTEs in fiscal year 2007, when case intake was lower than the projected intake for fiscal year 2012. The NLRB will continue to monitor case intake in fiscal years 2011 and 2012 and make adjustments to its hiring plans for those fiscal years, including adding FTEs incrementally, as appropriate.

Questions From The Honorable Jack Kingston

General Counsel Memoranda

Mr. Solomon, on March 11, 2011, you issued "Memorandum GC 11-07". In this memo, it seems that you are directing regional staff to identify cases through which the Board could overrule two 2007 decisions (*Grosvenor Resort* and *St. George Warehouse*, both having to do with back pay). It appears that you are in agreement with the dissenting opinions in those cases and therein lays the reason that you are seeking to overturn these decisions.

1. Were any of the regions consulted as to whether or not they were having difficulties with the findings in these two cases decisions? If so, can you provide the Committee evidence that these cases need to be overturned? In OM 08-54, *Grosvenor Resort*, the Regions were provided with guidance about placing greater emphasis on search for work issues during the initial stages of case processing to protect the viability of the Board's backpay orders when they reach the compliance stage. Similarly, in OM 09-01, *St. George Warehouse*, the Regions were provided with guidance for applying the new burden that increases the likelihood that Regions will have to litigate in compliance proceedings whether discriminatees conducted a reasonable search for work.
2. Are you in possession of facts that would support the conclusion that these cases unfairly shifted the burden of proof to the General Counsel's office?

Both cases modified longstanding Board precedent and judicial authority dating back over forty years. As discussed in detail in Memorandum GC 11-07, *Grosvenor Resort's* inflexible two-week deadline for initiating a search for work conflicts with the Board's and courts' "totality of the circumstances" approach to backpay mitigation, which requires the consideration of various factors that could reasonably affect the timing of a discriminatee's search for work. Similarly, *St. George Warehouse's* shifting of the burden onto discriminatees to prove that they properly mitigated backpay is inconsistent with the great weight of judicial authority properly placing that burden on the respondent, who is the violator of the statute, and is contrary to general principles of damages mitigation under the NLRA and other employment statutes.

3. Are the regions now spending taxpayer dollars in an effort to overturn these cases?

In Memorandum GC 11-07, regional offices were directed, in the normal processing of unfair labor practice charges, to identify appropriate cases in which to present an argument to the Board that it should reconsider *Grosvenor Resort* and *St. George Warehouse*. The decision to seek to overturn the Board's decisions in *Grosvenor Resort* and *St. George Warehouse* was based on an assessment that those decisions were inconsistent with well-established remedial principles under the NLRA, Title VII, and common law, as noted above.

Mr. Solomon, it's my understanding that the General Counsel's Office has issued memoranda requiring the Agency to seek stiffer penalties for unfair labor practice (ULP) charges in the context of organizing, and in the context of the negotiation of initial collective bargaining agreements.

1. Can you discuss what activities your office has taken to with regards to heightened penalties for ULP charges?

The NLRA does not provide penalties for violating the Act; rather, Section 10(c) authorizes the Board to order a respondent to cease and desist from its unlawful conduct and to take affirmative steps to restore victims of unfair labor practices to the status quo existing prior to the violations and to make them whole for losses suffered as the result of illegal acts. Consistent with the Board's broad authority to fashion remedies tailored to undo the harm created by unfair labor practices, my initiatives are designed to carefully consider the coercive and inhibitive effects of certain types of unfair labor practices and to seek remedies that will eliminate those effects and restore an atmosphere in which employees can freely exercise their Section 7 rights.

In the attached Memorandum GC 11-01, Effective Remedies in Organizing Campaigns, the Acting General Counsel instructed the regional offices to routinely seek the following remedies in response to serious unfair labor practices committed during organizing campaigns, where violations have a particularly devastating impact on employee free choice: reading of the Board's notice of violations and remedies to the employees (in addition to posting the notice at the workplace); granting the union access to employer bulletin boards to post its own notices; and requiring that employee names and addresses be provided to the union so that it can contact employees outside the workplace. If the employer's unfair labor practices have had such a severe impact on employee/union communication such that the above remedies are deemed insufficient to permit a fair election, Regions may also consider the propriety of the following additional remedies: granting the union access to nonwork areas during employees' nonwork time; giving the union notice of, and equal time and facilities for the union to respond to, any address made by the company regarding the issue of representation; and affording the union the right to deliver a speech to employees at an appropriate time prior to any Board election. These additional remedies may be warranted where an employer makes multiple unlawful "captive audience" speeches or where the employer is a recidivist and has shown a proclivity to violate the Act.

In the attached Memorandum GC 11-06, First Contract Bargaining Cases, the Acting General Counsel instructed the regional offices to routinely seek the following remedies in response to serious unfair labor practices committed during first-contract collective-bargaining, which is another period where violations have a devastating impact on employee free choice: reading of the Board's notice of violations to the employees (in addition to posting the notice at the workplace); a minimum six month extension of the bar on the filing of decertification petitions; and, where appropriate, the imposition of a bargaining schedule requiring the parties to meet a minimum number of times per month until agreement or a bona fide impasse is reached. Regions may also consider the

propriety of seeking to recover the union's bargaining expenses and/or litigation expenses of the Agency and the union in cases where the employer's bad faith bargaining or presentation of frivolous defenses has caused undue expense. This memorandum was a continuation of an initiative established by my Republican predecessor, General Counsel Ronald Meisburg, to ensure that employees' decisions regarding representation is protected by the Agency during a critical bargaining period.



United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570
www.nlr.gov

July 11, 2011

The Honorable Darrell Issa, Chairman
Committee on Oversight and Government Reform
House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa:

I write in response to your June 27, 2011 letter regarding an additional question for the June 17, 2011 hearing record. Specifically, the question from Congressman Ross is:

29 CFR 102.29 allows any person who wishes to intervene in a proceeding before the NLRB to file a motion to intervene. Section 10388.1 of the NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings, states that the "Counsel for the General Counsel should not oppose intervention by parties or interested persons with direct interest in the outcome of the proceeding." As you know, the parties that moved to intervene in this case claim that if the remedy requested in the Complaint is granted they will be "discharge[d] from employment;" therefore, they have a "direct" interest in the outcome of the case. Please provide an explanation of why you believe the risk of job loss does not amount to a "direct interest in the outcome" of the NLRB's proceeding against Boeing. Since you do not oppose these same parties filing post-hearing briefs, why should they be forced to wait until the hearing has concluded to express their concerns?

In response, I affirm my belief, with which the administrative law judge and the Board agreed, that the putative employee intervenors have no legally cognizable interest in the instant case that would warrant full intervenor status. This in no way prevents the parties from calling any of these employees as witnesses to provide relevant testimony during the Boeing proceeding before the administrative law judge, nor does it preclude these employees from filing a post-hearing brief.

The employees stated that they sought to intervene to oppose the complaint and the requested remedy. This is the exact same ultimate objective as Boeing, their employer. As a matter of law, it must be presumed that their interests will be adequately represented, and, in fact, there is a presumption of adequacy of representation when the intervenor has the same ultimate objective as an existing

party. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997). Thus, their presence as intervenors at the hearing is not necessary in order to enable the Board to determine whether Boeing has violated the statute or to make an appropriate order against Boeing.

As to the remedy, to the extent that these employees assert that their interest in the proceeding is based on their belief that the remedy sought will cause their discharges, such speculation does not justify their intervention as nothing in the complaint requires Boeing to shut down any of its operations in South Carolina and they cannot and do not know what business decisions Boeing will make if the remedy sought is granted. Moreover, it is well settled that employees do not have any protectable interest in positions that they may have obtained due to unlawful employment decisions. *Donnelly v. Glickman*, 159 F.3d 405, 411 (9th Cir. 1998), citing *Dilks v. Aloha Airlines, Inc.*, 642 F.2d 1155, 1157 (9th Cir. 1981). Additionally, I note that two of the three employees are not even assigned to work on the second 787 production line at issue in this case and they have not advanced any factual basis for believing that the remedy will affect their positions in the facilities where they do work. Lastly, the remedy sought does not interfere with their Section 7 right to elect not to be represented by a union.

In summary, full intervenor status, which would require participation of these employees as additional parties in this complex case, is not necessary, creates procedural burdens, and adds to the parties' litigation costs.

If you have further questions, please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700.

Sincerely,

A handwritten signature in black ink that reads "Lafe E. Solomon". The signature is fluid and cursive, with the first name "Lafe" being the most prominent.

Lafe E. Solomon
Acting General Counsel

cc: The Honorable Dennis Ross, Chairman
Subcommittee on Federal Workforce, U.S. Postal
Service and Labor Policy

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CHAIRMAN

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Congress of the United States

House of Representatives

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LAWRENCE J. BRADY
STAFF DIRECTOR

June 27, 2011

Mr. Lafe E. Solomon
Acting General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-0001

Dear Mr. Solomon:

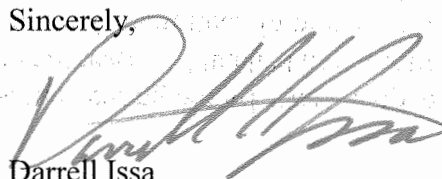
Thank you for appearing before the Committee on Oversight and Government Reform on June 17, 2011, at the hearing entitled, "Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise." We appreciate the time and effort you gave as a witness before the Committee.

Pursuant to the Chairman's directions, the hearing record remains open to permit Members to submit additional questions to the witnesses. Attached are questions directed to you from Representative Dennis Ross, a member of the Committee. In preparing your answers to these questions, please address your response to the Member who has submitted the question and include the text of the Member's question along with your response.

Please provide your response to these questions by July 11, 2011. Your response should be addressed to the Committee office at 2157 Rayburn House Office Building, Washington, DC 20515. Please also send an electronic version of your response by e-mail to Michael Bebeau, Assistant Clerk, at Michael.Bebeau@mail.house.gov in a single Word formatted document.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Kristina Moore or Kristin Nelson at (202) 225-5074.

Sincerely,


Darrell Issa
Chairman

Attachment

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Questions for Mr. Lafe E. Solomon
Acting General Counsel
National Labor Relations Board

Representative Dennis Ross
Committee on Oversight and Government Reform

**Hearing on "Unionization Through Regulation:
The NLRB's Holding Pattern on Free Enterprise."**

- 1) 29 CFR 102.29 allows any person who wishes to intervene in a proceeding before the NLRB to file a motion to intervene. Section 10388.1 of the NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings, states that the "Counsel for the General Counsel should not oppose intervention by parties or interested persons with direct interest in the outcome of the proceeding." As you know, the parties that moved to intervene in the case claim that if the remedy requested in the Complaint is granted they will be "discharge[d] from employment;" therefore, they have a "direct" interest in the outcome of the case. Please provide an explanation of why you believe that the risk of job loss does not amount to a "direct interest in the outcome" of the NLRB's proceeding against Boeing. Since you do not oppose these same parties filing post-hearing briefs, why should they be forced to wait until the hearing has concluded to express their concerns?

Sen. Casey 5/16/2013 NLRB Hearing QFR's

Mr. Johnson:

- Do you support the Board's rulemaking authority?

A: The Board definitely has rulemaking authority under the statute, so I acknowledge and support it in that sense.

- Should the Board be able to make rules if there is not unanimous agreement?

A: The Board can always promulgate rules if it complies with the Administrative Procedure Act. As a matter of policy, my belief is that the more impactful or precedent-changing the rule, the more unanimity the Board should have.

- In your estimation, is it important for the Board to modernize its processes and take advantage of technological opportunities such as e-voting or mail ballots in representation elections?

A: Only to the extent consistent with the statutory mandate in favor of secret ballot elections reflecting employee choice under laboratory conditions, and the Board's practice of having elections on site at the workplace when practicable. NLRB units are typically not gigantic or disparate units where mail ballots (i.e. currently used in less than 10% of elections) or e-voting (i.e. used in nationwide NLRB units) make sense.

- In your estimation, which is more important and more urgent, getting reinstatement and back pay for an illegally fired, low-wage employee, or protecting an employer against a jurisdictional dispute?

A: Under Section 10(k) of the Act itself, certain jurisdictional disputes receive priority and under the Acting General Counsel's "nip in the bud" Section 10(j) memorandum, certain types of unlawful terminations receive priority, so this depends on the circumstances. I would have sympathy for any illegally fired employee, low wage or not, not least because my mother's side of the family (from Mount Carmel, PA) were all workers in a mining town, and my brother-in-law is a union-represented worker.

- What is your view on the authority of precedent: is the Board bound by its precedent or by the precedent of the circuit courts of appeal?

A: It depends on where and when the circuit precedent issues. Consistent with the Board's prior memoranda on the subject, the Board sometimes justifiably can pursue a uniform national labor law interpretation outside of a circuit without regard to directly contrary authority inside of a circuit. However, the Board should be cognizant and respectful of such adverse authority applying inside of a circuit, if simply as a matter of enforcement practicality. Moreover, since the D.C. Circuit always has jurisdiction under the statute, the Board always has to be cognizant and respectful of the D.C. Circuit's precedents.

- Are there ways to increase the Board's ability to deter violations of the NLRA?

A: I would recommend better outreach and better use of technology, in the form of Tweets and Apps in particular, that directly interface with employers, unions, and employees. I would continue to support the Board's ongoing and commendable website improvements.

- From whom did you receive advice about how to prepare for the May 16, 2013 NLRB Confirmation hearing?

A: I was told by the Board that most of my preparation would be on my own (except for one moot hearing and a background dossier on the HELP Senators) because of Board work product privilege, and therefore that I should extensively consult with Phil Miscimarra, the other non-Board-incumbent attorney nominee. Thus, I talked to several attorneys inside and outside Arent Fox, including a few Board members/federal nominees, a former Senator, and attorneys who have testified before Congress previously like Mr. Miscimarra, as I never have appeared in Congress before May 16 to speak on anything. Here they are, to the best of my recollection: Darrell Gay, Mark Dreaux, Stewart Manela, Carla Feldman, Michael Stevens, Henry Morris, Kristine Dunne, Jon Bouker, Dan Renberg, Byron Dorgan, the other private practice nominee, Phil Miscimarra, Brian Hayes, Roger King, and Charles Cohen. Various Board officials also gave me some advice in this regard: Chairman Pearce, and Members Griffin and Block throughout, and Acting General Counsel Lafe Solomon and other Board personnel at a moot hearing whom I do not know or recall. The Board liaisons for me (Celine McNicholas, Esq. and Roxanne Rothchild) and Senate HELP Staff and Dan Schneider from Senator McConnell's office also gave me some degree of overview of the hearing format and my role in it, but nothing that could fairly be described as substantive advice about how to prepare for the hearing. Please note that there were other people to whom I talked or communicated about the nomination but they also did not give me advice on preparing for the hearing at all, e.g., they offered congratulations.

- You have a very impressive background dealing with employment law, particularly on the managerial side of employment law. Given your experience, are there any areas of labor law that are currently unclear since the D.C. Circuit found the recess appointments of Board Members Block and Griffin invalid and how does the cloud of uncertainty hanging over this current Board hurt employers?

A: Thank you. All the cases that they ruled on are now potentially unclear, including the Member Becker cases now that the Third Circuit has issued *New Vista Nursing*, so we are at nearly 1,200 unclear decisions total, from my unscientific estimation. Some employers would like greater certainty in the form of a confirmable and then confirmed Board, because these employers have to run their operations regardless of who is on the Board and have determined that they need guidance. Some employers were so unhappy with the trendline of recent Board decisions that they do not share this view.

- If you were recess appointed by President Obama, would you serve?

I was asked the same question by the Chairman, so I will reprint that answer here so that Senator Casey has the same complete answer:

"I respectfully regret in responding to the Chairman's question that I cannot provide a yes or no answer at this time. I cannot prejudge what I might do on a recess appointment scenario, given the necessarily unknown contextual facts, any more than I could prejudge a case if I were a confirmed member of the Board. I personally hope that this scenario does not occur, given the current state of political affairs.

In an effort to be open with the Chairman, however, I will reiterate and refine some of the factors that I shared with the HELP Majority staff when they asked me this question last Tuesday, which was the first time that I had ever heard it. Factors relevant to my decision would include: the extant circuit court precedents on the recess appointment power in the NLRB context up until the Supreme Court has ruled (which decision would then be the sole controlling factor if the facts were the same or similar), the text of the Constitution and Section 3(a) of the Act themselves, my oath as an attorney to protect and defend the Constitution, the sense of the Senate's will in terms of what would otherwise constitute a supermajority of Senators sufficient for confirmation (even if they had not or could not procedurally vote at that time), whether or not my decision would unfortunately prevent the Board from having a operational quorum under *New Process Steel* or whether the Board could still function regardless of my decision, any specific communications addressed to the situation by President Obama and the Senate leadership, the actual facts of what the Senate had done with the nominations at that point, if anything, and what kind of recess it was in at that point, if any. I am sure that there are some other factors that could enter into my decision, but I do not know what they are at this time."

Nominee: Harry Johnson, Member, National Labor Relations Board
Senate Committee on Health, Education, Labor and Pensions
May 14, 2013

Re: Follow up questions from Sen. Tom Harkin

Dear Mr. Johnson,

Thank you for appearance before the Senate HELP Committee. We have several follow up questions to which we would greatly appreciate a timely response. Thank you again for your assistance.

1. In your "SEIU/NUHW Developments" Legal Alert, you state that "one of the likely outcomes of this verdict is that non-union facilities will face increased exposures to union organizing activities" and that "we recommend that employers with non-organized facilities evaluate the legally proper responses to such efforts." What do you believe are the legally proper responses to such efforts? What kinds of actions would you recommend that employers take?

Answer to 1: Employers have a fairly broad spectrum of responses that they can take within the bounds of the law, so most of the answer really depends on the employer. Employers can express opinions on unionization as long as they comply with Sections 8(a)(1), 8(a)(3), and 8(c), for example. Employers can express support for unions as long as it is consistent with Section 8(a)(2) and other rules prohibiting material support. Employers can also express opinions opposing unionization, consistent with the above. And, finally, employers can express no opinion at all. I cannot divulge confidential and particular advice, but I can answer that generally I do not recommend any predisposed course of action but instead encourage employers to think through what their owners and stakeholders think about the issue and then operate within the bounds of the law to the extent that the employer wants to express an opinion on unionization.

2. In the 2002 paper you co-wrote, "Who let the Weingarten Rights out? The National Labor Relations Board Compounds Earlier Error by Supreme Court," you state, "in Weingarten, the Supreme Court initially erred in interpreting the National Labor Relations Act to require representational rights for union represented employees, and that this error has been compounded by decisions of the Board." If not representational rights, what do you believe is the most efficient way to deliver "mutual aid or protection" as provided by in the NLRA?

Answer to 2: In answering your question, I am interpreting "representational rights" to mean the right to have another person present at an investigatory interview that may lead to discipline, which is the sense it was meant in the academic paper. If a certified or recognized union exists, it certainly possesses exercises the right of representation generally under Sections 8 and 9, and it certainly can be efficient in

doing so. Also, *Weingarten* is the law of the land (i.e. its holding that the Board's construction of the right applying to union workplaces was a permissible construction of the Act is the law of the land), so whatever academic criticisms I had as a private citizen concerning the underlying fundamental assumptions behind that holding would be left aside in recognizing that the *Weingarten* right applies to union workplaces if I were ever confirmed as a Board member and had to adjudicate a *Weingarten* case in a union workplace. Depending on the context, group action by employees themselves directly expressing a point of view to their employer is a clearer and more effective means of mutual aid and protection than having an additional person attend a particular type of investigatory interview from time to time.

3. The article lays out a number of assumptions, that you and your co-authors believe are wrong, made by the Court and the Board regarding the benefits of representational rights for union represented employees. Do you believe there are any benefits to representational rights for union represented employees? How are the interests of individual employees and the union as a whole, promoted if they are denied this right?

Answer to 3: Again, in answering your question, I am interpreting "representational rights" to mean the right to have another person present at an investigatory interview that may lead to discipline, which is the sense it was meant in the academic paper. Again, if a certified or recognized union exists, it certainly exercises legally proper rights of representation generally under Sections 8 and 9 as the exclusive bargaining representative. And, to repeat, *Weingarten* is the law of the land, so whatever academic criticisms I had as a private citizen concerning the underlying fundamental assumptions behind its holding would be left aside in recognizing that the *Weingarten* right applies to union workplaces if I were ever confirmed as a Board member and had to adjudicate a *Weingarten* case in a union workplace. There can be benefits to union representation in investigatory interviews, depending on the context and the role of the union representative. Unions can bargain over disciplinary standards and procedures (and, under the recent Board *Alan Ritchey* case, over certain types of discipline themselves on a pre-discipline basis) or grieve discipline that is unjust under a collective bargaining agreement. Individual employees can file ULP or EEOC charges, or otherwise sue, for example, if discipline is unfair or unlawful.

4. In the podcast "Love, Hate, and Employment Law" you state that the fact the NLRB's keeps changing its standards on out of control employee outbursts is problematic. What do you view as the proper standard when it comes to out of control employee outbursts? In other words, what qualifies as protected, concerted activity?

Answer to 4: I agreed with the United States circuit court's opinion discussed in that podcast in noting the standards inconsistency. I cannot prejudge or opine on any case or issue that could conceivably come before me, if confirmed, especially if I have to rule on the same or a similar case because of a faulty Board quorum in its original iteration. However, factors that I would look to in trying to derive some unified standard that employers, employees, and the general public could understand and abide by in regard to this issue would be: whether the employee at the time was subject to an unfair labor practice him or herself, whether there were evenly enforced civility standards or rules, whether the conduct had some actual connection to *bonafide* employee group action, whether the employer invited the conduct, the effect of the conduct, if any, on other employees and/or customers, and the nature of the conduct. Any actual case would need additional analysis under its facts.

5. In your 2009 article describing significant labor and employment initiatives of the Obama administration your primary concern appeared to be that many of the administration's actions increased the scope of potential damages to employers along with the frequency with which claims were filed. Do you believe that over the past 3 years, your concerns were justified?

Answer to 5: I am not sure there was an actual concern in the article as described in the premise of this question. The article was intended to be a list of new laws and initiatives and how they were different or might be different than what had come before. I have not made a study of the aggregate data to determine the impact on damage/settlement figures or claims incidence from these initiatives, so I cannot give you an reasoned opinion on whether these phenomena have increased, decreased, or stayed the same following the initiatives described.

6. In the podcast "Board to Death: The NLRB's New Union Organizing Reform Initiatives Are Set for 2012" you state that "the Board has been giving short shrift to an employee's right to not form a union or even make an informed choice about whether to form a union or not." Please describe in detail any cases not mentioned in this podcast, that have come before the Board in the last two years, in which you believe the Board has been giving short shrift to an employee's right to not form a union or even make an informed choice about whether to form a union or not. Additionally, please describe the kinds of information you believe an employee requires to make an informed choice about whether to form a union or not?

Answer to 6: Respectfully, I cannot prejudge or opine on any case or issue that could conceivably come before me, if confirmed, especially if I have to rule on the same case because of a faulty Board quorum in its original iteration, so I cannot address any or every potential concern that might be significant in this regard. However, Member

Hayes himself noted this trend in a recent Board opinion in *2 Sisters Food Group, Inc.*, 357 NLRB No. 158 (2011) (“Time and time again, [my Board colleagues] have demonstrated a willingness, if not open zeal, for limiting employer communications [about unionization] and, in the process, for diminishing the impact of the Supreme Court’s *Lechmere* decision.”). For other examples of issues potentially implicating the concern regarding lack of employee choice to form or not form a union or the concern regarding limits to the free flow of information to employees concerning unionization, please see *Kent Hospital*, 359 NLRB No. 42 (employee not entitled to a copy of accountant’s verification letter concerning accuracy of audit of union’s categories of expenses, so that employees could be informed of whether their *Beck* rights were being honored); *Specialty Healthcare*, 357 NLRB No. 83 (2011) (posing potential of minority unions that may not be representative of the majority of employees’ choice in a workplace); *Dish Network*, 359 NLRB No. 32 (2012) (laying open challenge to 27-year-old *Tri-Cast* precedent allowing explanation to employees that “when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before”). There are many kinds of information that an employee might find relevant in determining whether to form or join, or not form or join, a union. Some examples are a basic description of the contours of the union’s rights and responsibilities if a union is selected, the employer’s track record, the union’s track record, and comparisons of terms and conditions of employment between employers whose employees are represented by that union and employers whose employees are not.

7. In this podcast, you also state that, “the rules aren’t neutral in terms of affecting election outcomes. As a whole they would be enormously beneficial to union win rates, which are already quite high.” When deciding cases, should union win rates be a consideration in the Board’s decision making? What do you believe is the ideal union win rate?

Answer to 7: I do not think that the current level of win rates themselves, at whatever particular level as they stand today, should in any way drive the need for or outcome of any rule change. However, a rule reform that would predictably have a substantial effect, up or down, on currently existing win rates for unions or employers, simply arising from the passage of the reform, should give the Board considerably more pause than a reform that would not have this predictable effect. Rule changes should not be designed to drive union or employer win rates up or down.

I reject the premise of an “ideal win rate” as anathema to the Act. In other words, there is no such thing as an “ideal union win rate” or “ideal employer win rate,” especially not from the perspective of a federal agency such as the Board that is tasked to hold elections that mirror employee free choice in laboratory conditions as

closely as possible. The employees should themselves determine any win or loss rate for unions or employers in any given election.

8. If you were recess appointed by President Obama, would you agree to serve?
Please respond with a simple yes or no before providing your reasoning.

Answer to 8. I respectfully regret in responding to the Chairman's question that I cannot provide a yes or no answer at this time. I cannot prejudge what I might do on a recess appointment scenario, given the necessarily unknown contextual facts, any more than I could prejudge a case if I were a confirmed member of the Board. I personally hope that this scenario does not occur, given the current political state of affairs.

In an effort to be open with the Chairman, however, I will reiterate and refine some of the factors that I shared with the HELP Majority staff when they asked me this question last Tuesday, which was the first time that I had ever heard it. Factors relevant to my decision would include: the extant circuit court precedents on the recess appointment power in the NLRB context up until the Supreme Court has ruled (which decision would then be the sole controlling factor if the facts were the same or similar), the text of the Constitution and Section 3(a) of the Act themselves, my oath as an attorney to protect and defend the Constitution, the sense of the Senate's will in terms of what would otherwise constitute a supermajority of Senators sufficient for confirmation (even if they had not or could not procedurally vote at that time), whether or not my decision would unfortunately prevent the Board from having a operational quorum under *New Process Steel* or whether the Board could still function regardless of my decision, any specific communications addressed to the situation by President Obama and the Senate leadership, the actual facts of what the Senate had done with the nominations at that point, if anything, and what kind of recess it was in at that point, if any. I am sure that there are some other factors that could enter into my decision, but I do not know what they are at this time.

9. Please provide 3 references from labor union employees or officials or from attorneys engaged in representing labor unions that can vouch for your neutrality on labor/management issues and explain how long and in what capacity you worked with them.

Answer to 9. I respectfully regret in responding to the Chairman's question that I cannot comply, because all the contacts I have had during my career with labor union employees, officials, and attorneys have come when I was in the capacity of adversarial representation on behalf of an employer and not a capacity of "neutrality on labor/management issues." I have never served as a neutral in an actual case or controversy, so this necessarily limits the scope of references to zero.

In an effort to be open with the Chairman, however, the below is probably the best that I can give him with this amount of notice.

a. Judith Belsito, Esq. Ms. Belsito is an extremely versatile and capable in-house attorney with the CWA, and we have been opposing counsel on a number of arbitrations in 2009-2011 between Verizon and the CWA, and an earlier RC case. (N.B.: We have each prevailed against the other, depending on the case.) She congratulated me upon my nomination (see below), so I assume that she would vouch that my nomination is not a mistake. Feel free to call her, and I have not forewarned her that you may be calling. [If this is published, I ask that her contact information be redacted for her and the CWA's privacy.]

From: Judith Belsito <jbelsito@cwa-union.org<<mailto:jbelsito@cwa-union.org>>>
Date: April 15, 2013, 7:59:44 PDT
To: <harry.johnson@arentfox.com<<mailto:harry.johnson@arentfox.com>>>
Subject: congratulations

Hi--Just wanted to convey my congratulations to you for your nomination to the NLRB. Here's hoping that all the nominations are approved. Also hope you and your family are doing well.

--
Judith G. Belsito, District Counsel
Communications Workers of America, AFL-CIO
District 9
Phone: (562) 944-1300
Fax: (562) 944-0088
Email: jbelsito@cwa-union.org<<mailto:jbelsito@cwa-union.org>>

b. Jason Marsili and Michael Posner: These are two partners from Posner & Rosen, a union- and employee-side firm in Los Angeles. See <http://www.posner-rosen.com/> I was recruited by them and serve with them to help run the Los Angeles regional competition round of the ABA Labor & Employment Section's Student Trial Advocacy competition (a competition for teams of law school students). http://www.americanbar.org/groups/labor_law/trial_ad.html I also serve as a judge or that competition, so they would have some familiarity with my ability to serve as a neutral, at least in terms of moot court cases. I also sought out and interviewed Jason on an episode of After Hours, which you may know from reviewing my earlier disclosures. Feel free to call them, and I have not forewarned them that you may be calling. [If this is published, I ask that their website information be redacted for their privacy.]

c. Johnda Bentley, Esq.: Ms. Bentley is an Assistant General Counsel at the SEIU. Although our contact was very recent and social only at an earlier ABA conference, she congratulated me upon my nomination (see below), so I assume that she would vouch that my nomination is not a mistake. Feel free to call her, and I have not forewarned her that you may be calling. [If this is published, I ask that her contact information be redacted for her and the SEIU's privacy.]

From: Johnnda Bentley <johnnda.bentley@seiu.org<mailto:johnnda.bentley@seiu.org>>
Date: April 12, 2013, 14:13:32 PDT
To: <harry.johnson@arentfox.com<mailto:harry.johnson@arentfox.com>>
Subject: Congratulations

Hi Harry,

I do not know if you remember me, but we met briefly in California at the ABA Midwinter Meeting for the PAP Section. You may recall I told you that my husband, Maulin Patel, works for Arent Fox in D.C. Anyway, a big congratulations to you on getting nominated to the NLRB! I have my fingers crossed that we will have a full Board again soon.
Take care,
Jonnee

--
Jonnee Bentley
Assistant General Counsel
Service Employees International Union (SEIU)
1800 Massachusetts Avenue, NW
Washington, DC 20036
(202) 730-7353 Office
(202) 406-0453 Cell

d. Developing Labor Law Editors: I have also been a chapter editor of Chapter 9 of the ABA's well-known publication, The Developing Labor Law, over the past few years, so you could probably ask Jolynne D. Miller at the NLRB (below) if my contributions were non-objective from an editorial perspective, although she is not from a labor union:

x THE DEVELOPING LABOR LAW—2011 SUPPLEMENT

Chapter 9

Chapter Editors

ANNA WERMUTH
Meckler Bulger Tilson Marick &
Pearson LLP
Chicago, IL

JOLYNNE D. MILLER
National Labor Relations Board
Washington, DC

10. Do you think the five pending nominees to the NLRB should be confirmed as a package? Please respond with a simple yes or no before providing your reasoning.

Answer to Question 10: I respectfully regret in responding to the Chairman's question that I cannot comply with an answer, as I stated at the hearing. This is totally out of my purview and is exclusively the Senate's instead. As I stated at the hearing, I can answer that I do not doubt the technical qualifications of any of the nominees.

11. Should Board Members be able to promulgate rules if there is not unanimous agreement among the members about the content of the rules? Please respond with a simple yes or no before providing your reasoning.

Answer to Question 11: Yes in some cases and no in some cases. The Board can always promulgate rules if it complies with the Administrative Procedure Act. As a matter of policy, my belief is that the more impactful or precedent-changing the rule, the more unanimity the Board should have.

12. Do you think the Board solicited sufficient public input before promulgating the election rule? Please respond with a simple yes or no before providing your reasoning. If not, what additional process should be required?

Answer to Question 12: Yes, to the extent of soliciting and accepting written comments, and no to the extent of oral discussion. (I do not know, however, how many of these comments were actually reviewed, and am simply assuming that all of the submissions were.) As a matter of policy, my belief is that such a major rule change should have afforded stakeholders more opportunity for interactive oral argument with visuals if they so chose.

13. Do you have any prior experience adjudicating cases? Do you think working on a collegial body requires a different professional temperament than what is required for working as an attorney engaged in advocacy or oversight? Please explain why you have a temperament suitable for adjudication.

Answer to Question 13: No, not real cases (see discussion of ABA trial competition, in answer 9.b., above). Yes, to the extent that it requires the adoption of a completely different attitude and perspective. However, I do not agree that a temperament suited for advocacy automatically disqualifies one from adjudication (e.g., prosecutors or public defenders can properly become judges).

The last part of this question is the hardest for me to answer in that human nature imposes some boundaries on the accuracy of introspection. Probably the best that I can say is that I am fully aware of how important it is to get the cases and the rules right for generations of Americans into the future, and that the President and the Senate are counting on my best efforts to that purpose. That would keep me focused on being as fair as possible, and open to hearing all sides of an argument from parties or colleagues before rendering a final decision, and, of course, would trump any consideration of ego, pride, or past advocacy. I also would try to put a premium on collegiality, noting that this also depends to some extent on reciprocity. In the past, even though I have been an advocate, I can relate to the Chairman that I have actively sought out opposing views in order to learn from them and engage with them in a respectful fashion (see, e.g., the podcast interviewees, whom I picked to all be from “the other side” of the practice, essentially). I also have a great respect for the history and achievements of the labor movement in the United States, the role and achievements of employers in the United States in our free enterprise system, and an empathy for the inherent situation and rights and dignity of any individual employee, whether or not he or she supports or opposes unionization.

14. Would you ever consider it appropriate to share draft opinions with persons outside the agency? Would you ever consider it appropriate to share draft rules/regulations with persons outside the agency? Please respond with a simple yes or no before providing your reasoning.

Answer to Question 14: No and no. I am essentially unaware of this, but I suppose that, after consultation with appropriate NLRB ethics officials and/or counsel, and in response to proper process, the Board might have to disclose draft opinions, rules, or communications regarding same for another agency's investigation, Congress's investigation, or as part of court discovery. However, I do not know under what circumstances this might come to pass.

15. Would you ever consider it appropriate to describe internal deliberations or provide documents describing internal deliberations of any sort – including rulemaking and adjudication – with persons outside the agency? Please respond with a simple yes or no before providing your reasoning.

Answer to Question 15: No. I am essentially unaware of this, but I suppose that, after consultation with appropriate NLRB ethics officials and/or counsel, and in response to proper process, the Board might have to disclose such information or materials for another agency's investigation, Congress's investigation, or as part of court discovery. However, I do not know under what circumstances this might come to pass.

16. What is the appropriate role of an NLRB Member in facilitating oversight by Members of Congress?

Answer to Question 16: To comply with Congressional demands for information, documents, or hearing appearances, where there are not *bonafide* grounds for executive or other applicable privilege. Having not served on the Board, this is my assumption, and I would need to confirm it with appropriate Board officials.

17. Is it ever appropriate for a single NLRB member to respond to an oversight request without going through counsel's office and working with the other NLRB Members? Please respond with a simple yes or no before providing your reasoning.

Answer to Question 17: I have no idea what the standards are here, having never served with the Board, so I regret to inform the Chairman that I cannot answer yes or no without actually consulting with appropriate Board officials, which I cannot do by the submission deadline of Monday morning. I assume, but would confirm in any actual case, that individual Board members do not answer such requests solo, but answers come from the Board as a whole, after review, consolidation of Members' responses, and the appropriate editorial decisions by the appropriate decisionmaker(s) at the Agency.

18. During your meeting with HELP Committee Staff, you said 30-50% of your workload is traditional labor law. Please name the last 10 cases that you worked on that arose under the National Labor Relations Act.

Answer to Question 18: The last ten active NLRA litigation cases (as opposed to NLRA counseling matters or labor contract arbitrations) were with Jones Day. I regret to inform the Chairman and Senate staff that there is no way I will effectively be able to get the data re: specific case numbers from Jones Day by Monday. I have worked on various CA, CB and RC cases there, in approximate reverse chronological order, for these clients that I can remember with the type of case noted where I can remember it: Bristol Farms (a series of CB/CC cases), St. Josephs Health System, Levitz Furniture (RC case), Verizon/Cellco Partnership (various cases over ten years), Verizon Supply Chain Services, Kenan Advantage Group, Kapiolani Medical Group, probably Hospital Corporation of America, Cedars-Sinai Medical Center, Albertson's (at least two dozen CA and CB cases), Verizon Cable, DecisionOne (RC), Yoplait/General Mills (RC), Monterey County Herald (2-4 CA cases), Detroit News Agency (Detroit Free Press and Detroit Times: various CA cases and Section 10(j) litigation), Libbey Owens Ford (2 RC cases) and Bell Atlantic NYNEX Mobile (at least 2 CA cases).

Philip A. Miscimarra, Nominee for National Labor Relations Board
Responses to Questions for the Record (dated 5/16/2013) from Senator Casey

May 20, 2013

1. *Do you support the Board's rulemaking authority? Should the Board be able to make rules if there is not unanimous agreement?*
-

Response: I support the Board's rulemaking authority, although it is well-known that the Board has traditionally relied much more heavily on case-by-case adjudication rather than rulemaking. In any rulemaking activities, I believe Board members should ensure that the potential rule is within the authority conferred by the NLRA; they should carefully consider the need for any rule, the content of any proposed rule, and the best ways to solicit public comment; and the Board should otherwise adhere to a process consistent with the requirements of the Administrative Procedures Act and other legal and regulatory requirements. Whether or not required, I would hope that rulemaking by the Board would have unanimous support among Board members, or at least the support of three Board members. This answer is subject to the caveat that I do not have exhaustive knowledge of the requirements of the Administrative Procedures Act or other legal or regulatory requirements that may bear on rulemaking within the Board, and I do not know whether unanimous agreement might be required in some circumstances. I would approach these issues with an open mind, I would carefully evaluate any rulemaking in view of relevant facts and existing legal decisions, I would consult and discuss these matters with other Board members, and I would do my best to address any rulemaking issues based on a careful review of relevant law, legislative history (to the extent appropriate), and the public interest.

2. *In your estimation, is it important for the Board to modernize its processes and take advantage of technological opportunities such as e-voting or mail ballots in representation elections?*
-

Response: The Board has justifiably earned praise from all sides – for many decades – for its ability to conduct secret ballot elections at workplaces throughout the country pursuant to election procedures that are regarded as fair, efficient and highly credible. For these reasons, I agree with the Board's traditional preference for conventional worksite elections, but I also agree with the Board's practice of permitting mail ballots in certain circumstances. To my knowledge, the Board has not conducted any significant number of elections based on "e-voting." More generally, the Board has made significant progress regarding its use of technology in recent years, including a very successful roll-out of public e-filing, other effective improvements to the Board's web site, and the upgrading of the Board's internal electronic casehandling processes. If I am confirmed, I will have an open mind regarding these and other technological changes, in consultation with other Board members, in addition to the need to promote efficiency within the NLRB, while preserving secrecy, credibility and security in elections, and remaining faithful to the Board's statutory mandates.

3. In your estimation, which is more important and more urgent, getting reinstatement and back pay for an illegally fired, low-wage employee, or protecting an employer against a jurisdictional dispute?

Response: I regard both situations as extremely important and urgent in different ways and for different reasons. With all due respect, for reasons that relate to important variables and the structure of the Act, I cannot reasonably make a generalization that one situation rather than the other is “more important and more urgent.”

First, any situation involving “an illegally fired, low-wage employee” is extremely serious, and can involve a need for urgent intervention, because it involves job loss and an immediate adverse financial impact on the employee and everyone whose welfare depends on the employee. Also, situations involving this type of illegal conduct can have a significant adverse impact on other employees in the exercise of their NLRA-protected rights, which is one reason that violations of sections 8(a)(2), 8(a)(3), 8(a)(4) and 8(a)(5) are also considered unlawful restraint, coercion and/or interference with protected rights in violation of section 8(a)(1).

Second, the question presumes a situation where, in fact, there has been an “illegally fired” employee. In most if not all cases, the central issue that requires careful investigation and eventual resolution by the Board is *whether* an employee has been “illegally fired.” Where liability is not clear, the question of urgency can take the form of whether the General Counsel may seek authorization from the Board to obtain interim injunctive relief pursuant to section 10(j) of the Act. In these cases, the Board must examine each case on an individualized basis. Therefore, it would be inappropriate for me to prejudge such situations, except to state that every request for 10(j) injunctive relief should be taken seriously, I would approach such situations with an open mind, in consultation with other Board members, and I would seek to decide these issues based on a careful review of the facts, existing legal precedents, and legislative history (to the extent appropriate).

Third, the Act does not treat all “illegally fired” employees equally in terms of urgency, and the Board must respect the delineations adopted by Congress. For example, section 10(m) of the Act commands that charges alleging unlawful discharges involving antiunion discrimination in violation of section 8(a)(3) “shall be given priority” over certain other cases, including those alleging unlawful discharges based on violations of section 8(a)(5).

Finally, the above question appears to suggest that jurisdictional disputes only implicate “protecting an employer,” but section 8(b)(4)(D) – which is the provision in the Act dealing with jurisdictional disputes – makes clear that such disputes involve *two sets of employees* who are claiming the same work. See NLRA § 8(b)(4)(D) (jurisdictional disputes involve picketing or related activities where an object is “forcing forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class *rather than* to employees in another labor organization or in another trade, craft, or class”) (emphasis added). Therefore, though not necessarily involving unlawful employer conduct, jurisdictional disputes can involve a large number of employees being permanently denied

certain work. Therefore, jurisdictional disputes may have significant importance and urgency based on their impact on employees. The Act also includes a specialized jurisdictional dispute enforcement provision adopted by Congress, set forth in section 10(k), which directs the Board to hear and resolve jurisdictional disputes.

4. *What is your view on the authority of precedent: is the Board bound by its precedent or by the precedent of the circuit courts of appeal?*

Response: Precedents of the Board and of the Circuit Courts of Appeals are both important, although they may affect the Board in different ways.

Many principles involving the NLRA have been unchanged for decades, and it is extremely valuable for the Board to apply the principle of *stare decisis* and to attach significant weight to existing precedents, especially those that have withstood the test of time, and particularly those that have continued unchanged during periods when Congress has evaluated or adopted other amendments to the Act. However, the NLRB in some areas has reversed ground and changed position, and in some instances this has occurred back-and-forth multiple times. Like other agencies, the Board is permitted to change its mind and to overrule prior determinations, although such changes of position must be explained and reflect a reasonably defensible interpretation of the Act. *See, e.g., NLRB v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 351 (1978). If a Circuit Court of Appeals upholds a Board interpretation as reasonably defensible, this does not necessarily preclude the Board from later deciding the same issue differently; in such instances, the court decision – which deferred to the Board's earlier interpretation – may subsequently be “non-binding” on the Board in the sense that the Board could later adopt a different interpretation. If a Circuit Court of Appeals *rejects* the Board's interpretation of the Act (on the basis that the Board's interpretation is not reasonably defensible), the Board must determine whether or not to abandon the rejected interpretation. Such situations implicate the question posed above – *i.e.*, should be the Board be “bound by its precedent or by the precedent of the circuit courts of appeal”? The Board has decided such situations differently depending on many different factors, and I do not believe one can formulate a generalization regarding how such situations should be resolved. Rejection of the Board's position by the D.C. Circuit presents special issues because any losing party can appeal to the D.C. Circuit. However, a conflict may exist between or among different Circuits, including the D.C. Circuit, and such conflicts may be unresolved until a particular issue is resolved by the Supreme Court.

If I am confirmed to serve on the Board, I would endeavor to work with other Board members with a view towards avoiding indiscriminate reversals in position by the Board, and I would favor giving substantial weight to the types of longstanding, existing precedents described above. As stated in my confirmation hearing testimony, I will approach every decision with an open mind, and I will share my opinions in a constructive way. I will try to forge agreements with fellow Board members, and I will be open to differing views. Above all, I will do my best

to discharge the “difficult and delicate responsibility” placed on every NLRB member (*NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 499 (1960), *quoting NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)), which is to apply the law as written, consistent with what Congress intended.

5. *Are there ways to increase the Board’s ability to deter violations of the NLRA?*

Response: Congress could increase the Board’s ability to deter violations of the NLRA in a variety of ways, based on amendments to the Act, and such changes obviously would extend beyond the authority of the Board and any Board member. The Board could seek to deter violations by attempting to effectively manage its case load and rendering unfair labor practice decisions in a timely manner, by continuing to engage in public outreach and further improving the resources made available electronically to employees, employers, unions and others via the Board’s web site and social media, by fashioning effective remedies while keeping within the Board’s remedial authority conferred by the Act, and – in appropriate situations – by authorizing the General Counsel to seek interim relief pursuant to section 10(j) of the Act, among other things. As noted in my answer to question 2 above, the Board has made significant progress regarding its use of technology in recent years, including a very successful roll-out of public e-filing, other effective improvements to the Board’s web site, and the upgrading of the Board’s internal electronic casehandling processes. If I am confirmed, I will have an open mind regarding these and other technological changes, in consultation with other Board members, in addition to the need to promote efficiency within the NLRB, while preserving secrecy, credibility and security in elections, and remaining faithful to the Board’s statutory mandates.

6. *From whom did you receive advice about how to prepare for the May 16, 2013 NLRB Confirmation hearing?*

Response: When a confirmation hearing was being scheduled on the pending NLRB nominations, including my nomination, it was not immediately clear what type of preparation for the hearing would be appropriate and with whom I should consult, since some nominees included current Board Chairman Mark Pearce and current Members Richard Griffin and Sharon Block; the other nominees were Harry I. Johnson III and me (neither of whom were currently at the NLRB); and it appeared that a five-nominee NLRB confirmation hearing had not previously been conducted. Regarding advice about how to prepare for the May 16, 2013 confirmation hearing, I had discussions with my fellow nominees Mark Pearce, Richard Griffin, Sharon Block and Harry Johnson; Celine McNicholas, Special Counsel, Congressional & Intergovernmental Affairs, NLRB; Roxanne Rothschild, Associate Executive Secretary, NLRB; Lafe Solomon, Acting General Counsel, NLRB, Linda Dreeben, Deputy Associate General Counsel, NLRB, and other NLRB participants (whose names I do not recall) in a meeting held on May 14, 2013; Kyle Hicks Fortson, Labor Policy Director, United States Senate Committee on Health, Education, Labor, and Pensions (Minority); Daniel Schneider, Policy Advisor, United States Senate (Minority); Charles I. Cohen, Ross H. Friedman, Timothy P. Lynch, David

Broderdorf, Rita Srivastava, Julie S. Sturniolo and Josh Ulman (my current or former colleagues at Morgan Lewis & Bockius LLP); and G. Roger King (a former colleague of nominee Harry Johnson).

7. You have participated in legal challenges to regulations issued by the Board. Would you recuse yourself from participating in any aspect of litigation regarding these rules?

Response: This is a question that, with all due respect, I cannot reasonably answer with a simple yes or no because I am not sufficiently familiar with the legal requirements and related considerations that may be relevant to recusal decisions within the agency, nor do I presently understand the manner in which NLRB members might be participating in litigation regarding the notice-posting or election rules. However, because I have represented clients in two cases regarding the notice-posting rule, and one case involving the election rule, regarding these rules and any and all other matters that arise during my service as a Board member, if confirmed, I intend to fully comply with all legal and regulatory requirements relating to real or perceived conflicts of interest, recusals, and other ethics matters, and I will consult fully and extensively with appropriate ethics advisors, including those within the NLRB and, to the extent appropriate, the Office of Government Ethics, in order to ensure that my actions satisfy the highest standards of ethical conduct as an agency official.

8. If you were recess appointed by President Obama, would you serve?

Response: For the following reasons, I respectfully state I cannot reasonably answer this question with a simple yes or no. At present, there are pending Supreme Court proceedings in the *Noel Canning* litigation involving whether recess appointments to the NLRB are constitutional in certain circumstances, and multiple courts of appeals have dealt in different ways with the constitutionality of different recess appointments. See, e.g., *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *petition for certiorari filed*, No. 12-1281 (2013); *NLRB v. New Vista Nursing and Rehabilitation*, Nos. 11-3440 *et al.* (3d Cir. May 16, 2013); *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*). I also anticipate that my oath as a Board member, if confirmed, will require me to be faithful to the United States Constitution and federal law, including the NLRA, and it is well-established that one of the NLRB's primary functions is to foster stability, certainty and predictability. See, e.g., *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-63 (1949); *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937); *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961).

Considering the above circumstances, it is my hope that appointments to the NLRB at the present time and in the immediate future will take the form of nominations that have been confirmed by the Senate, thereby avoiding any controversy or lack of certainty in connection with recess appointments. However, the present situation does not permit me to predict when or how the Supreme Court may rule in *Noel Canning*, when or how other courts may address similar issues, and what circumstances may exist at some point in the future if or when the President decided to make one or more recess appointments to the Board. Finally, if I were to

receive a recess appointment to the NLRB, the above considerations would make it very important to carefully and thoughtfully evaluate all of the variables identified above, based on the circumstances then existing, and it would undermine such an evaluation if I were to prejudge these issues at the present time. For these reasons, as noted above, it remains my hope that appointments to the NLRB at the present time and in the immediate future will take the form of nominations that have been confirmed by the Senate.

Philip A. Miscimarra, Nominee for National Labor Relations Board
Responses to Questions for the Record (dated 5/14/2013) from Senator Harkin

May 20, 2013

1. *In your testimony before the House Committee on Oversight and Government Reform regarding the Boeing litigation on June 17, 2011, you stated that “the process for resolving NLRA disputes is poorly suited to deal with significant investment decisions” and that “the litigation creates significant costs and uncertainty which can severely damage the vehicles people need for stable employment and economic growth.” Does the fact that a case before the board involves “significant investment decisions” mean that workers are limited in their right to assert that they are being unfairly retaliated against? What would be appropriate way to counterbalance the interests of employers with these concerns, with the interests of workers who have a right to have such cases heard?*
-

Response: The presence of capital investment does not eliminate employee protection against unlawful discrimination or retaliation regarding terms and conditions of employment under the National Labor Relations Act (“NLRA” or “Act”). In my testimony at the June 17, 2011 hearing (which pertained to the specific legal theory pursued in the Boeing case), I stated that “[u]sing the label, ‘capital investment’ does not give employers a blanket exemption from the NLRA.” (Miscimarra written statement, 6/17/2011, p. 9).

My comments about “process” in Part 1 of my written testimony (*id.*, pp. 5-6) made the point that the Acting General Counsel’s decision to pursue the Boeing litigation was significant, even though the complaint’s issuance did not constitute an actual “finding” of unlawful conduct. (*id.*, p. 5). My testimony indicated that many Supreme Court and NLRB cases gave special treatment to capital investment (see paragraph below). Based on the importance of capital investment, I indicated that the decision to litigate these types of cases meant “there will be significant adverse consequences for the employer – and others dependent on the employer – regardless of who eventually prevails” (*id.*, pp. 5-6). In other words, my testimony in Part 1 identified a “process” issue that was important to *everyone* in cases involving capital investment, including “employees . . . and – in many cases – even the union(s) and union members responsible for initiating the litigation” (*id.*, p. 6).

My testimony regarding Boeing focused on the decision of the NLRB Acting General Counsel to initiate the Boeing litigation, and NLRB members do not play a role in such decisions. Therefore, the “process” issue described above would not directly bear on my responsibilities as a Board member if I am confirmed. Likewise, the balancing of interests in these types of cases – between employees, unions, employers and others – has been established by Congress as reflected in the National Labor Relations Act (“NLRA” or “Act”), and in many existing cases, the U.S. Supreme Court and the NLRB have developed some specialized legal standards regarding capital investment and significant business changes (*id.*, pp. 6-9). If I were to decide these types of cases as a Board member, if confirmed, I would approach every situation with an open mind, I would carefully evaluate the facts and existing legal decisions, I would consult

and discuss these matters with other Board members, and I would do my best to contribute to a decision that reflected a balancing of interests consistent with the NLRA based on a careful review of prior decision(s) and, to the extent relevant, legislative intent.

2. *In your June 17, 2011 testimony you also state that the five strikes at the Washington facility were an appropriate factor for Boeing to consider when making the decision to perform the work in South Carolina. While an employer cannot transfer, relocate, or remove work from a facility based on antiunion hostility, your contention was that Boeing's decision was permissible because "decisions regarding whether and where to make major capital investment decisions are not considered a "term or condition of employment" for purposes of section 8(a)(3) and section 8(a)(5)." Do you believe that there is always a clear distinction between what is an employment term or condition and what is a business judgment? How would you resolve a case in which no clear distinction exists?*
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Response: With all due respect, I note that my June 17, 2011 testimony was more narrow than the above description suggests. In reference to numerous existing decisions of the U.S. Supreme Court, other courts and the NLRB, I observed: *"The cases indicate that – without some type of other tangible employment action – decisions regarding whether and where to make major capital investment decisions are not considered a 'term or condition of employment' for purposes of section 8(a)(3) and section 8(a)(5)." (Miscimarra statement, p. 9 and n.44) (emphasis added).*

There is *not* always a clear distinction between "term or condition of employment" of the type described in NLRA sections 8(a)(3) and 8(a)(5), on the one hand, and decisions that are given more specialized treatment because they involve "the core of entrepreneurial control" or similar factors, on the other hand. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). As noted in my response to question 1 above, if I evaluated these types of cases as a Board member, if confirmed, I would approach every situation with an open mind, I would carefully evaluate the facts and existing legal decisions, I would consult and discuss these matters with other Board members, and do my best to contribute to a decision that reflected a balancing of interests consistent with the Act based on a careful review of prior decision(s) and, to the extent relevant, legislative intent.

3. *What would be a scenario in which it would be appropriate for the NLRB to take action against a company who is unfairly retaliating against workers based on antiunion hostility?*
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Response: There are innumerable scenarios in which the NLRB should take action – and, as reflected in thousands of existing cases, has taken action – against a company that engages in unlawful antiunion discrimination based on antiunion hostility in violation of section 8(a)(3) of the Act, or unlawful retaliation in violation of section 8(a)(4) of the Act. Examples of prohibited discrimination or retaliation that have properly been denounced and remedied by the NLRB include unlawful discriminatory or retaliatory employment terminations, other discipline, wage reductions or freezes, subcontracting or relocations involving the removal and/or transfer of bargaining unit work based on antiunion hostility, and a many other types of adverse treatment affecting hours, benefits or other terms and conditions of employment. In these and many other

contexts, unlawful discrimination or retaliation should be addressed and remedied by the NLRB.

I do not believe it is appropriate to respond to the above question with any broader or more specific generalizations about hypothetical situations involving unlawful discrimination or retaliation, because these are issues that I would likely be called upon to decide as a Board member if confirmed. Therefore, it would be inappropriate for me to prejudge these issues in the absence of specific facts, a record developed in the course of an appropriate hearing, an Administrative Law Judge ("ALJ") decision, and potential exceptions filed with the Board. As noted in my prior answers, if I were to decide these types of cases as a Board member, if confirmed, I would approach every situation with an open mind, I would carefully evaluate the facts and existing legal decisions, I would consult and discuss these matters with other Board members, and do my best to contribute to a decision that reflected a balancing of interests consistent with the Act based on a careful review of prior decision(s) and, to the extent relevant, legislative intent.

4. *In the same testimony, you also assert that the issuance of the complaint is not merely the start of the case because "the challenged Company investment becomes the equivalent of a frozen asset, which is then basically tied up for years." How else could workers validate their rights if they were not permitted to go through the complaint process?*
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Response: As noted in my response to question 1 above, my testimony on June 17, 2011 focused on the fact that a decision to issue a complaint is significant, even though a complaint's issuance does not represent an actual "finding" of unlawful conduct. However, I stated that "[u]sing the label, 'capital investment' does *not* give employers a blanket exemption from the NLRA." (Miscimarra statement, p. 9) (emphasis added). If an employee experiences any type of antiunion discrimination prohibited under section 8(a)(3) of the National Labor Relations Act ("NLRA" or "Act") or retaliation prohibited under section 8(a)(4) of the Act, the issuance of a complaint would be appropriate so the matter can be adequately addressed and remedied by the NLRB.

Again, my testimony regarding Boeing focused on the decision of the NLRB Acting General Counsel to initiate the Boeing litigation, and NLRB members do not play a role in such decisions. Therefore, the Acting General Counsel's decision-making regarding the issuance of complaints would not directly bear on my responsibilities as a Board member if I am confirmed. However, as indicated in my response to question 3, if I were to decide section 8(a)(3) or section 8(a)(4) cases as a Board member, I would approach every situation with an open mind, I would carefully evaluate the facts and existing legal decisions, I would consult and discuss these matters with other Board members, and do my best to contribute to a decision that reflected a balancing of interests consistent with the Act based on a careful review of prior decision(s) and, to the extent relevant, legislative intent.

5. *While you went through a number of reasons why the issuance of a complaint is problematic for the company who is involved, does this process not have a number of benefits to workers? Are the interests of challenged companies the only issues that should be considered? How should one properly balance the interests of workers with the interests of employers?*
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Response: I did not state in my June 17, 2011 testimony that the Acting General Counsel should only consider company interests in cases involving significant capital investment, and such a suggestion would be contrary to my own views and my understanding of existing, well-established case law. As noted in my response to question 2 above, my June 17, 2011 testimony described cases where there was *no* “tangible employment action” that adversely affected employees (Miscimarra statement, p. 9). Even in this context, I testified that issuance of a complaint would not merely be problematic for the company, I stated “there will be significant adverse consequences for the employer – *and others dependent on the employer* – regardless of who eventually prevails” (*id.*, pp. 5-6) (emphasis added). My written statement was specific on this point: I explained that “problems and costs do *not* only affect the company: they cause adverse consequences for *employees, family members, customers and local businesses, state and local governments, surrounding communities, and – in many cases – even the union(s) and union members responsible for initiating the litigation*” (*id.*, p. 6) (emphasis added).

In my view, the NLRB should very carefully consider and balance the important interests of employees, unions, employers and the public in matters addressed by the Board. As noted in my prior answers, in cases I decide as a Board member, if confirmed, I would approach every situation with an open mind, I would carefully evaluate the facts and existing legal decisions, I would consult and discuss these matters with other Board members, and do my best to contribute to a decision that reflected a balancing of interests consistent with the Act based on a careful review of prior decision(s) and, to the extent relevant, legislative intent.

6. *In your February 11, 2011 testimony before the House Committee on Education and the Workforce, Subcommittee on Health, Education, Labor, and Pensions, you stated that, “because the [National Labor Relations] Act places such importance on the right of employees to decide whether or not to participate in collective bargaining, this is another area in where policy changes should originate in Congress.” In your view, what then is the proper role of the NLRB in this realm?*
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Response: My February 11, 2011 testimony related to the Board’s decision in *Dana Corp.*, 356 NLRB No. 49 (Dec. 6, 2010), where the employer entered into an agreement setting forth various terms binding on other locations where employees had not chosen to be union-represented (Miscimarra written statement, 2/11/2011, pp. 8-9).

Regarding the *Dana* decision, I respectfully suggest that my written testimony was more balanced than is reflected in the above question. On the one hand, I indicated that “[a]rguments can be made for and against these types of arrangements,” and I then gave an example where the *Dana* ruling potentially afforded greater certainty to parties than would otherwise exist under current law (*id.*, p. 9 and n.40). Conversely, my testimony pointed out that Congress

adopted the NLRA with only a single exception – set forth in section 8(f) – which permitted “pre-hire” agreements in the construction industry (*id.*, p. 9 and n.41). Because Congress specifically decided that “pre-hire” agreements were lawful only in construction work, I indicated that “[t]his is [an] area where policy changes should originate in Congress” (*id.*, p. 9) (footnote omitted).

Section 7 of the Act gives all employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all of such activities.” I believe one of the NLRB’s fundamental roles – which is reflected in thousands of existing decisions – is to protect these rights in a near-innumerable variety of contexts. Consistent with many of the above answers, should the NLRB evaluate these types of issues if I am confirmed, I would approach every situation with an open mind, I would carefully evaluate the facts and existing legal decisions, I would consult and discuss these matters with other Board members, and do my best to contribute to a decision that reflected a balancing of interests consistent with the Act based on a careful review of prior decision(s) and, to the extent relevant, legislative intent.

7. *In this same testimony you stated that, “reducing abrupt changes in position should be a non-partisan objective-employers, unions, and employees alike are disadvantaged by a proliferation of policy reversals at the Board.” How would you propose to accomplish that?*

Response: Many principles involving the NLRA have been unchanged for decades, and it is extremely valuable for the Board to apply the doctrine of *stare decisis* and attach significant weight to existing precedents, especially those that have withstood the test of time, and particularly those that have continued unchanged during periods when Congress has evaluated or adopted other amendments to the Act. However, the NLRB in some areas has reversed ground and changed position, and some reversals have gone back-and-forth multiple times. If I am confirmed to serve on the Board, I would endeavor to work with other Board members with a view towards avoiding indiscriminate reversals in position by the Board, and I would favor giving substantial weight to the types of longstanding, existing precedents described above. In addition to approaching every situation with an open mind, I will share my opinions in a constructive way; I will try to forge agreements with fellow Board members; and I will be open to differing views. Above all, I will do my best to discharge the “difficult and delicate responsibility” placed on every NLRB member (*NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 499 (1960), *quoting NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)), which is to apply the law as written, consistent with what Congress intended.

8. *Your testimony also includes the statement that “In a global economy, this places unions and companies in a relay race, and all too often in the United States, the union’s incentive is to use the baton to injure or maim the employer, instead of running the race against international competitors.” Do you believe that unions are generally attempting to injure or maim employers as opposed to ensuring that workers are getting the benefits that they deserve?*
-

Response: I do *not* believe that unions are generally attempting to injure or maim employers as opposed to ensuring that workers are getting the benefits that unions believe they deserve. In the above-quoted portion of my February 11, 2011 testimony, the most important word is the term “incentive.” The above-quoted testimony pertained to the structure and design of the NLRA – specifically, the potential role played by leverage and economic weapons available to both sides – and I was not making any type of negative institutional commentary about unions or their motivation.¹ In my experience, many unions and employers have maintained extremely constructive bargaining relationships and deserve substantial credit for their success addressing difficult problems, while avoiding or minimizing the potential for work stoppages, lockouts or other resort to economic weapons.

¹ The reference in my testimony to a union’s “incentive” to “injure or main” employers occurred in the following context:

The National Labor Relations Act . . . was adopted when there was a national economy, and the Act still centers around a bargaining model where each side’s leverage largely stems from economic damage it may inflict on the other party.³

In a global economy, this places unions and companies in a relay race, and all too often in the United States, the union’s *incentive* is to use the baton to injure or maim the employer, instead of running the race against international competitors. Companies and employees suffer greatly from this type of conflict, especially small businesses. Expanding the Act’s coverage and making the weapons more destructive – without direction to do so from Congress – runs counter to the NLRA’s primary objective, which is to foster economic stability.

³ See *NLRB v. Insur. Agents’ Int’l Union*, 361 U.S. 477, 489 (1960), where the Supreme Court referred to the bargaining contemplated by the Act, and observed that the parties “proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.”

9. *If you were recess appointed by President Obama, would you agree to serve? Please respond with a simple yes or no before providing your reasoning.*
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Response: For the following reasons, I respectfully state I cannot reasonably answer this question with a simple yes or no. At present, there are pending Supreme Court proceedings in the *Noel Canning* litigation involving whether recess appointments to the NLRB are constitutional in certain circumstances, and multiple courts of appeals have dealt in different ways with the constitutionality of different recess appointments. See, e.g., *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *petition for certiorari filed*, No. 12-1281 (2013); *NLRB v. New Vista Nursing and Rehabilitation*, Nos. 11-3440 *et al.* (3d Cir. May 16, 2013); *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*). I also anticipate that my oath as a Board member, if confirmed, will require me to be faithful to the United States Constitution and federal law, including the NLRA, and it is well-established that one of the NLRB's primary functions is to foster stability, certainty and predictability. See, e.g., *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-63 (1949); *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937); *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961).

Considering the above circumstances, it is my hope that appointments to the NLRB at the present time and in the immediate future will take the form of nominations that have been confirmed by the Senate, thereby avoiding any controversy or lack of certainty in connection with recess appointments. However, the present situation does not permit me to predict when or how the Supreme Court may rule in *Noel Canning*, when or how other courts may address similar issues, and what circumstances may exist at some point in the future if or when the President decided to make one or more recess appointments to the Board. Finally, if I were to receive a recess appointment to the NLRB, the above considerations would make it very important to carefully and thoughtfully evaluate all of the variables identified above, based on the circumstances then existing, and it would undermine such an evaluation if I were to prejudge these issues at the present time. For these reasons, as noted above, it remains my hope that appointments to the NLRB at the present time and in the immediate future will take the form of nominations that have been confirmed by the Senate.

10. *Please provide 3 references from labor union employees or officials or from attorneys engaged in representing labor unions that can vouch for your neutrality on labor/management issues and explain how long and in what capacity you worked with them.*
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Response: I am providing three references to the Committee concurrently with the submission of these responses.

11. *Do you think the five pending nominees to the NLRB should be confirmed as a package? Please respond with a simple yes or no before providing your reasoning.*
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Response: This is a question that, with all due respect, I cannot reasonably answer with a simple yes or no, and I would not presume to advise the Senate regarding how it should

address the pending NLRB nominations including my own nomination. However, as I stated during my confirmation hearing, the pending nominees have been extremely gracious during my dealings with them. Also, I agree with the statements made by Chairman Harkin and Ranking Member Alexander, among others, to the effect that all of the pending nominees have distinguished backgrounds and are qualified to serve on the Board. If confirmed, I would be pleased to serve on the Board with any other nominees who are confirmed by the Senate.

12. *Should Board Members be able to promulgate rules if there is not unanimous agreement among the members about the content of the rules? Please respond with a simple yes or no before providing your reasoning.*

Response: Yes, although I believe Board members should ensure that the potential rule is within the authority conferred by the NLRA; they should carefully consider the need for any rule, the content of any proposed rule, and the best ways to solicit public comment; and the Board should otherwise adhere to a process that is consistent with the requirements of the Administrative Procedures Act and other legal and regulatory requirements. Whether or not required, I would hope that rulemaking by the Board would have unanimous support among Board members, or at least the support of three Board members. However, I do not have exhaustive knowledge of the requirements of the Administrative Procedures Act or other legal or regulatory requirements that may bear on rulemaking within the Board, and I do not know whether unanimous agreement might be required in some circumstances. If confirmed, would approach these issues with an open mind, I would carefully evaluate any rulemaking in view of relevant facts and existing legal decisions, I would consult and discuss these matters with other Board members, and I would do my best to address any rulemaking issues based on a careful review of relevant law, legislative history (to the extent appropriate), and the public interest.

13. *Do you think the Board solicited sufficient public input before promulgating the election rule? Please respond with a simple yes or no before providing your reasoning. If not, what additional process should be required?*

Response: No, with the caveat that my opinion regarding the sufficiency of public input on the election rule reflects perceptions as an attorney in private practice, and I am not familiar with all aspects of the Board's internal processes regarding the solicitation of public input on the election rule or the rule's consideration and promulgation. I believe the public interest would have been served by providing more time for the election rulemaking process, including greater opportunities for public outreach and the solicitation of public input, because (i) the election rule involved great complexity; (ii) the election rule in many respects changed procedures that had been in place for many years; (iii) there was unprecedented public interest in the election rulemaking as reflected in more than 65,000 sets of public comments; (iv) the Board identified a subset of issues for inclusion in a final rule that would have been difficult to anticipate in advance; (v) the steps taken by the Board when adopting the final rule were difficult to discern, and (vi) within a very short time after the final rule's adoption, all but one of the Board

members who supported the rule had left the Board. Regarding the election rule, I would have favored a rulemaking process that more closely resembled the process followed by the Board when it adopted the healthcare bargaining unit rules governing acute care facilities in 1989, which were upheld by the U.S. Supreme Court in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991).

14. *Do you have any prior experience adjudicating cases? Do you think working on a collegial body requires a different professional temperament than what is required for working as an attorney engaged in advocacy or oversight? Please explain why you have a temperament suitable for adjudication.*

Response: I do not have prior experience adjudicating cases, and I believe the role of working as an adjudicator on a collegial body is very different from representing clients as an attorney-advocate. However, I believe both roles may be addressed by individuals having the same professional temperament, and some individuals who have been very effective attorney-advocates can be equally effective in the role of being a neutral adjudicator. For example, I have devoted my career to the representation of employers in matters involving labor and employment law. However, I have advanced clients' interests by focusing on substantive issues, while working to maintain constructive relationships with many opposing counsel and unions. Additionally, I have engaged in serious academic research and writing for more than three decades, based on my affiliation with the Wharton Center for Human Resources at the University of Pennsylvania's Wharton Business School. This work includes three books dealing with the NLRB in which I have engaged in a detailed, dispassionate analysis of complex NLRB issues, and these books have been directed to practitioners on *all* sides by summarizing – and hopefully making it easier to understand – some of the most complex legal principles developed by the Board and the courts. My success working through difficult issues in private practice, combined with my serious academic work, are indicative of a professional temperament that I believe would support effective service as a Board member, if I have the privilege of being confirmed.

15. *Would you ever consider it appropriate to share draft opinions with persons outside the agency? Would you ever consider it appropriate to share draft rules/regulations with persons outside the agency? Please respond with a simple yes or no before providing your reasoning.*

Response: No to both questions, with the caveat that I am not sufficiently familiar with the Board's internal processes to understand whether there may be circumstances where disclosure outside the agency might be entirely permissible and appropriate (*e.g.*, disclosure of proposed rules/regulations with officials responsible for publication in the Federal Register, responding to official inquiries from the Office of Government Ethics, and so on). Absent such circumstances, I would scrupulously avoid any external disclosure of internal deliberations, sharing of draft opinions or draft rules/regulations.

16. *Would you ever consider it appropriate to describe internal deliberations or provide documents describing internal deliberations of any sort – including rulemaking and adjudication – with persons outside the agency? Please respond with a simple yes or no before providing your reasoning.*
-

Response: No to both questions, subject only to the caveat stated in my answer to question 15 above.

17. *What is the appropriate role of an NLRB Member in facilitating oversight by Members of Congress?*

Response: I understand that Members of Congress play a variety of oversight roles regarding the NLRB, but I am not sufficiently familiar with the Board's internal processes, or details regarding potential interactions between Members of Congress and NLRB members, to have an informed view regarding what is appropriate by the latter in relation to "facilitating oversight" by Congress. I believe that NLRB members should be committed to the agency and to the public interest, and I have difficulty envisioning a circumstance when, as a Board member, I would take action without coordinating with agency counsel and other NLRB members. As to such issues, if confirmed, I would consult with other NLRB members and work with legal counsel within the agency, appropriate ethics advisors, or other authorized advisors to ensure that I acted in an appropriate manner consistent with my responsibilities as a Board member and whatever oversight-related actions or activities by the Board were permissible or required.

18. *Is it ever appropriate for a single NLRB member to respon[d] to an oversight request without going through counsel's office and working with the other NLRB Members? Please respond with a simple yes or no before providing your reasoning.*
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Response: See answer to question 17 above.

19. *You have spoken out against Decisions by the General Counsel in the past. Do you think it is ever appropriate for a sitting Board Member to speak publicly against decisions by the General Counsel in cases still pending before the agency? Please respond with a simple yes or no before providing your reasoning.*
-

Response: No, with the caveat that I am not sufficiently familiar with the Board's internal processes to understand whether there may be circumstances where a public statement regarding a General Counsel decision might be entirely permissible and appropriate while a particular case is still pending in the agency (e.g., in a concurring opinion or dissenting opinion if the Board authorizes or fails to authorize the General Counsel to seek interim injunctive relief pursuant to section 10(j) of the Act). If I am confirmed, I would recognize and maintain the distinct roles and lines of demarcation within the agency regarding the General Counsel and NLRB members, respectively.

20. *You have participated in legal challenges to two regulations issued by the Board: the notice posting rule and the elections rule. Would you recuse yourself from participating in any aspect of litigation regarding these rules? Please respond with a simple yes or no before providing your reasoning.*

Response: This is a question that, with all due respect, I cannot reasonably answer with a simple yes or no because I am not sufficiently familiar with the legal requirements and related considerations that may be relevant to recusal decisions within the agency, nor do I presently understand the manner in which NLRB members might be participating in litigation regarding the notice-posting or election rules. However, because I have represented clients in two cases regarding the notice-posting rule, and one case involving the election rule, regarding these rules and all other matters that arise during my service as a Board member, if confirmed, I intend to fully comply with all legal and regulatory requirements relating to real or perceived conflicts of interest, recusals, and other ethics matters, and I will consult fully and extensively with appropriate ethics advisors, including those within the NLRB and, to the extent appropriate, the Office of Government Ethics, in order to ensure that my actions satisfy the highest standards of ethical conduct as an agency official.

Senator Alexander's Questions for the Record for the NLRB Nominees

Questions for Chairman Mark G. Pearce

1. At the hearing, you answered that you are still considering ways to expand the information provided in an *Excelsior* list. Please describe the specific proposals you are currently considering.

The notice of proposed rulemaking published on June 22, 2011, included a proposed amendment of § 102.62 of the Board's Rules and Regulations that would codify and revise the voter list requirement created in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), and approved by the Supreme Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 768 (1969). This proposed amendment was not addressed in the December 2011 final rule and is currently under consideration by the Board.

2. If confirmed as Chairman, will you pursue expanding the information provided in an *Excelsior* list through new rulemaking?

Other than through continuing consideration of the June 22, 2011 notice of proposed rulemaking, I have no plans for the Board to engage in rulemaking relating to *Excelsior* lists.

3. Do you support allowing employees to opt out of providing a union with their personal information, including emails, cell phone numbers, and work shifts?

That is an option that was suggested in some of the comments submitted pursuant to the June 22, 2011 notice of proposed rulemaking. Those comments are the subject of ongoing Board deliberations concerning the proposed amendments and it would be inappropriate for me to disclose information about those deliberations.

4. Do you agree that individuals who have signed up for the National Do Not Call Registry should also be shielded from calls from union organizers?

This question calls for an interpretation of the Federal Trade Commission's Do-Not-Call rule. I am not in a position to offer an authoritative interpretation of the FTC's rule. However, I agree that if the rule covers such calls, then those individuals would probably be able to invoke the rule.

5. As Chairman, why have you chosen to ignore the U.S. Court of Appeals for the District of Columbia Circuit ruling in *Noel Canning* and continued to issue 209 decisions which are not enforceable if they are appealed to the DC Circuit?

The Board has not ignored the decision of the court in *Noel Canning*. The Solicitor General of the United States is currently seeking a writ of certiorari from the Supreme Court in that case. Whether the decisions of the Board issued since *Noel Canning* are enforceable depends, ultimately, on the decision of the Supreme Court.

Virtually all Board decisions are appealable in more than one of the courts of appeals, and, since the *Noel Canning* decision, not all parties have sought review in the D.C. Circuit. A party seeking review, not the Board, typically determines which court will hear the case. The appointments issue is currently pending in the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, as well as in the Third and D.C. Circuits.

6. Do you respect the U.S. Court of Appeals for the District of Columbia Circuit?

Yes. I think that the court wrongly decided *Noel Canning*, but I respect the process under which constitutional questions are resolved by the federal courts, subject ultimately to resolution by the Supreme Court. The Solicitor General, on behalf of the Board, has asked the Supreme Court to review the D.C. Circuit's *Noel Canning* decision.

7. Have you limited the Board's actions to decisions that are non-controversial in the wake of *Noel Canning*?

Following the issuance of *Noel Canning*, the Board has continued to issue decisions, which have not been limited to any particular class of cases.

8. You have compared the Board's current decision to disregard Constitutional and other legal challenges and proceed with regular business with the situation the Board face prior to the *New Process Steel* decision in 2010. Do you think the Board is proceeding in the same manner as it did in the 27 months prior to *New Process Steel*? If so, how?

As the Board did after the U.S. Court of Appeals for the District of Columbia Circuit ruled that the two-member Board lacked a quorum, the current Board has continued to issue decisions, despite the adverse ruling of the same court in *Noel Canning*. Now, as then, the Board has sought Supreme Court review of the lower court's decision. The Board has not disregarded Constitutional or legal challenges,

but rather has taken appropriate steps to achieve a definitive resolution of those challenges, just as it did prior to *New Process Steel*.

9. I understand that 131 cases have been appealed to federal courts already, and 168 cases are being appealed at the regional level. Do you think that the parties involved in these cases feel that their cases have been well-settled by the Board?

By their actions, those parties have sought review of the Board's decisions in their cases. I have no personal knowledge of the beliefs or motives of those parties.

10. On Nov. 29, 2011 you released an amended proposed rule on the Representation Case Procedures. The Board then finalized the amended rule less than one month later, on Dec. 22, 2011, without even publishing a dissent. Why did you choose to rush the finalization of that rule? Did you rush the finalization of the rule because Member Becker's recess appointment was going to expire at the end of 2011?

The appointment of Member Becker was set to expire at the end of the congressional session, no later than January 3, 2012. Once that happened, the Board would have been without a quorum and unable to act on the rule. The last time the Board had lost a quorum, it had remained with only two members for over 27 months. It was clear that time was of the essence. For that reason, in late November 2011, I proposed to issue a final rule limited to a small number of the proposed amendments contained in the Notice of Proposed Rulemaking. The Board approved the proposal at a public meeting on November 30, 2011. There was no "amended proposed rule."

11. The original proposed rule on Representation Case Procedures garnered over 65,000 comments, so there was obviously a major interest in what the Board was attempting to do. Did you or your staff review all of those comments?

Yes, all of the non-identical comments were reviewed by Board staff. I personally reviewed comments that had been identified by the staff as particularly significant.

12. During the election procedure rulemaking, the majority disregarded Board tradition with regard to the rights of the minority and limited the ability to circulate a dissent. Typically, dissents are filed and circulated before a majority acts so the decision makers may engage with one another and perhaps even influence each other's views. In this case, a dissent was only permitted to be filed after the fact. Why did you think it was appropriate to exclude a Senate-confirmed Board member from the Board's deliberative

decision-making process and not allow him to file a dissent until after the Representation Case Procedures rulemaking was finalized?

I respectfully disagree with the premise of the question. As explained in my November 21, 2011 letter to Member Hayes, he was not excluded from the deliberative process concerning the rule. I requested that he assign members of his staff to work with the other members' staffs to review the comments. He declined to do so. He declined repeated invitations from the other Board member and myself to discuss with us what to do with the proposed amendments. He was offered the opportunity to circulate and publish a dissent as part of the rule, in addition to publishing a second dissent after publication of the rule. He declined the offer.

13. Do you believe that a dissenting view may persuade you to modify a regulation under consideration?

I believe that the representation of diverse viewpoints is beneficial to the deliberative process. I have been persuaded by a colleague in discussion to change my views on issues in cases. I have no doubt that the same could occur with respect to proposed regulations. The best way for the Senate to insure the representation of diverse viewpoints in the Board's deliberative process is to confirm five members.

14. If confirmed, do you pledge to allow dissenting opinions to be circulated well before a final vote on the rule occurs and to ensure they are included in the Final Rule?

As I explained above in my answer to Question 10, the procedure followed by the Board for purposes of the December 2011 final rule was compelled by the imminence of a loss of quorum. The best way to avoid the repetition of such a circumstance would be through the confirmation of five Board members as soon as possible. It should be noted that the Notice of Proposed Rulemaking concerning representation-case procedure, which issued at a time when the Board had more than three members, included a dissenting statement by Member Hayes.

15. Under your leadership, the Board has reversed numerous long-standing precedents. These major policy reversals destabilize bargaining relationships and make compliance with the law more costly and difficult. In 2009, when you were going through your first confirmation process, you answered in a written question about your view of precedent that, "The board should consider precedent very carefully and respect the principle of *stare decisis*." Do you feel that you have adhered to your view of *stare decisis*? Is reversing decades-old precedent in line with the view you provided this committee in 2009?

I respectfully disagree with your view that the Board has made “major policy reversals [that] destabilize bargaining relationships and make compliance with the law more costly and difficult.” Where I have participated as a Board member in a small number of decisions that reverse precedent, those decisions have very carefully explained the Board’s reasons for doing so. Decisions following precedent, rather than reversing it, remain the Board’s norm. Both in following precedent -- as well as in reversing precedent infrequently and then only with reasoned care -- the Board has demonstrated respect for the principle of *stare decisis* and adhered to well-established principles of administrative law, which permit agencies to reverse their own precedent and receive no less judicial deference.

16. Last week a Federal appeals court in D.C. vacated the notice posting rule the Board finalized back in August 2011. That rule created a new poster that employers were to hang in their workplaces and post on their websites that notified employees of their rights to organize under the law. Failing to hang the poster would lead to an unfair labor practice finding. The NLRB decided not to implement the rule after two different Federal district courts issued differing opinions. Why did you choose to postpone the implementation of that rule back in April 2012?

The Board’s decision is explained in an April 17, 2012 press release. The press release observed that the U.S. Court of Appeals for the District of Columbia Circuit had temporarily enjoined the Board’s rule and that “[i]n view of the D.C. Circuit’s order, and in light of the strong interest in the uniform implementation and administration of agency rules, regional offices will not implement the rule pending the resolution of the issues before the court.”

17. Why did the Board choose not to postpone or delay other decisions or actions after other adverse court orders or decisions?

The Board’s choice whether to postpone a decision or action after an adverse court order or decision depends on the nature and scope of the Board’s decision or action, as well as on the nature, scope, and terms of the court order or decision and whether the Board is pursuing further judicial review. As a general rule, of course, the Board would comply with any injunctive order of a court that had not been stayed. The Board has not been enjoined from deciding any particular case or class of cases. The Board has implemented no rules in the face of an adverse court order or decision.

18. In an *Associated Press* story from Jan. 25, 2012, you were quoted as saying “We [the Board] keep our eye on the prize.” What did you mean by that?

As stated in my interview with The Associated Press, "We keep our eye on the prize," means keeping to the goal of creating a set of rules that eliminates the waste of time, energy and money for the taxpayers.

19. Under this administration, the Board has finalized two new regulations, both of which have been struck down by Federal courts. One of the rules, on Representation Case Procedures, was struck down completely on the grounds of failure to follow appropriate process. What have you done, or what do you plan to do, to make sure the process governed by the Administrative Procedure Act is properly followed?

In all of the rulemaking proceedings in which I have been involved as a member I have taken great care to insure that the Administrative Procedure Act (APA) is followed in every respect. None of the judicial decisions concerning the recent rules have taken issue with the Board's adherence to the process required by the APA. The District Court for the District of Columbia rejected the Board's rulemaking concerning representation-case procedure because it found that a quorum of the Board did not participate in the decision to issue the rule. An appeal of that ruling is before the U.S. Court of Appeals for the District of Columbia Circuit.

20. On several occasions over the last few years, the Board has taken a case which presents a narrow question of law and used it as a platform to overrule precedent and institute major changes to our understanding of labor law. The *Specialty Healthcare* decision is one example of this trend. Do you think it is appropriate for the Board to decide issues and address arguments not raised by the parties as it did in *Specialty Healthcare*?

I respectfully disagree with the premise of your question, both with respect to the *Specialty Healthcare* decision and a supposed "trend" at the Board. Before issuing the *Specialty Healthcare* decision, the Board on December 22, 2010, issued a notice and invitation to file briefs to the parties and to interested amici, asking them to address the issues raised in the case, as specified in a series of questions. The Board received and carefully considered several briefs in response to its invitation, including a brief from Senators Enzi, Hatch, and Isakson. The Board fully addressed the arguments made by the parties and amici in the Board's final decision.

21. If so, are you concerned that this practice violates the parties' due process rights? Please explain.

I do not believe that the procedure followed in *Specialty Healthcare*, which gave the parties full and fair notice and an opportunity to be heard, violated the parties' due process rights in any respect.

22. Several of the Board's recent decisions overruling decades of precedent were not applied to the parties before it. Rather, the Board decided to apply the new rules only prospectively. In your view, does this approach violate the Administrative Procedure Act inasmuch as the Board has effectively promulgated rules not used to adjudicate the cases before it without following the APA's notice and comment procedures?

Where the Board has determined to apply a new legal rule, established in a case adjudication, only prospectively, it has done so consistent with Board precedent on the issue of retroactivity and with the Administrative Procedure Act.

23. If confirmed, would you work to end this practice of exclusive prospective application of Board precedents?

The Board does not have a "practice of exclusive prospective application of Board precedents."

Questions for Richard Griffin

1. I understand that you participated in the Board's first attempt at rulemaking in 1987 as a NLRB staff member. That rulemaking involved defining the collective bargaining unit size for acute health facilities. The Board, led by Chairman Donald Dotson, set up four different hearings, across the country, including a hearing in Washington, D.C. that spanned seven days. The Final Rule was published in 1989, nearly two years after it was proposed. Compare this to the rulemaking on Representation Case Procedures in 2011 and the differences are striking. The Representation Case Procedures received 65,000 comments, yet the entire rulemaking took a scant six months from proposal to Final Rule. Do you believe the rulemaking you were part of in 1987 followed a prudent procedure?

I did not participate in the 1987 health care bargaining unit rulemaking as an NLRB staff member; I left the Board in September 1983 to go to work in the International Union of Operating Engineers (IUOE) Legal Department and participated in the 1987 rulemaking as part of the ultimately successful effort of the IUOE and the Building and Construction Trades Department, AFL-CIO to have a separate skilled maintenance unit determined to be one of the bargaining units found appropriate under the rule. Chairman Dotson did not lead the rulemaking effort, the initial notice of which in the July 2, 1987 Federal Register indicated that he and Member Johansen dissented. When the second, revised notice of rulemaking was published in the Federal Register on September 1, 1988, Chairman Dotson was no longer on the Board--two members (then Chairman Stephens and Member Cracraft) were in favor, Member Johansen dissented, and Member Babson did not participate. Moreover, the numerical size of the bargaining unit was not defined by the rule; rather, the rule determined which bargaining units were appropriate in acute care hospitals and found that, except in extraordinary circumstances and in circumstances where there are existing non-conforming units, eight separate units--- 1) all registered nurses, 2) all physicians, 3) all professionals except for registered nurses and physicians, 4) all technical employees, 5) all skilled maintenance employees, 6) all business office clerical employees, 7) all guards, and 8) all nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards---are appropriate in each such facility. Size did come into play in one sense---under the final rule, if a petitioned-for unit numbers five or fewer employees, the small size of the unit constitutes an extraordinary circumstance, and the Board will determine the appropriateness of the unit through adjudication.

The Board's exercise of its rulemaking authority in health care bargaining units--- although enforcement of the rule was initially enjoined by the federal district court in Chicago---was ultimately upheld by a unanimous Supreme Court in American

Hospital Association v. NLRB, 499 U.S. 606 (1991). However, the procedure followed in the healthcare bargaining unit rulemaking is certainly not the only procedure the Board could follow to enact rules under its authority granted by Section 6 of the Act, and a procedure which required travel to a number of different parts of the country would likely raise significant cost concerns that would have to be seriously considered in the current budget environment. What particular procedure is appropriate will depend on a number of factors, but the procedure must comply with the Administrative Procedure Act.

2. In comparing the 1987 rulemaking to the 2011 rulemaking, do believe the latter process was rushed?

No.

Question for Sharon Block

1. In 2004, Sen. Kennedy submitted an amicus brief to the Supreme Court in a case challenging the recess appointment of Judge William Pryor, Jr. to the 11th Circuit Court of Appeals. In that brief, Sen. Kennedy said “It is absurd to imagine that the Framers drafted the Recess Appointments Clause to provide the President such a power, to be exercised during intra-session Senate breaks lasting a fortnight, or a weekend, or overnight.” Do you think Sen. Kennedy was correct? Please explain your answer.

I was not employed by Senator Kennedy at the time he submitted the amicus brief in the case challenging the recess appointment of Judge William Pryor, Jr. to the 11th Circuit Court of Appeals. Nor did I ever discuss the brief with Senator Kennedy. Accordingly, I am not familiar with the arguments made in the brief or Senator Kennedy’s reasoning in making those arguments. I agree with the positions on the appropriate interpretation of the Recess Appointments Clause made in the briefs filed on behalf of the National Labor Relations Board regarding my recess appointment.

Questions for Sharon Block and Richard Griffin

Responses of Member Block

1. The President could have made your “appointment” during an intersession recess if he had acted just 2 days earlier. Why do you think he chose not to make your appointment intersession?

I do not know why the President chose not to make my appointment intersession. I was not privy to the President’s decision-making process.

2. At the hearing you testified that you had completed and submitted the requisite committee application to the White House prior to receiving a “recess” appointment on Jan. 4, 2012. What day did you submit your completed application to the White House?

I believe that I submitted my completed application to the White House in late November 2011, but I cannot be sure about the date because review of the application and a determination of its completeness was a judgment made by the White House.

3. Were you surprised that your completed application was not submitted to the HELP Committee until Jan. 25, 2012?

To the best of my recollection, my understanding was that my completed application was submitted to the Committee earlier.

4. Are you aware that the Committee needs these forms to conduct a background check and evaluate nominees?

Yes.

5. Why do you think it was appropriate to accept a recess appointment without having submitted that basic information to the committee responsible for approving your nomination?

The President asked me to serve and I made a commitment to him that I would serve. He made the decision to appoint me to the Board. I considered the nomination and appointment to be a great honor. Moreover, I was not aware at the time the recess appointment was made that my application had not yet been received by the Committee. Furthermore, I do not understand a pending

nomination including completed paperwork to be a prerequisite for the making of a recess appointment.

6. What day were you nominated for the National Labor Relations Board?

December 15, 2011. I was renominated on February 13, 2013.

7. What day were you recess appointed?

On January 4, 2012, the President announced his intent to recess appoint me to be a member of the National Labor Relations Board.

8. Do you think there was an unreasonable delay in considering your nomination?

I was nominated on December 15, 2011 and my nomination was pending before the Senate throughout 2012 without any consideration by the Senate. I think that it is in the best interest of the Board to have the nominations of members of the National Labor Relations Board promptly considered and confirmed so that the Board consists of five confirmed members. I do not believe it is appropriate for me to comment on the consideration of my particular nomination because I am not privy to the reason why the Senate did not consider my nomination while it was pending.

9. Then Sen. John F. Kennedy said, "There should be at least a 30 day interval between the request for an election and the holding of the election.....in which both parties can present their viewpoints." Do you think creating a minimum time frame to hold an election is a reasonable position? If so, what would be that time frame?

Neither the National Labor Relations Act nor the Board's representation case rules and regulations have ever mandated a minimum or maximum time frame for the period between the filing of a petition and the holding of an election. Moreover, neither the December 2011 final representation-case procedure rule nor the pending proposed rule would establish a minimum or maximum time frame. I see no reason to do so now.

Questions for Sharon Block and Richard Griffin

Responses of Member Griffin

1. The President could have made your “appointment” during an intersession recess if he had acted just 2 days earlier. Why do you think he chose not to make your appointment intersession?

I was not privy to the President’s thinking in making the recess appointment.

2. At the hearing you testified that you had completed and submitted the requisite committee application to the White House prior to receiving a “recess” appointment on Jan. 4, 2012. What day did you submit your completed application to the White House?

As I understood the relevant requirements, I had completed my portion of the application in July 2011, but I cannot be sure about the date of completion because review of the application and a determination of its completeness was a judgment made by the White House as part of its internal processes.

3. Were you surprised that your completed application was not submitted to the HELP Committee until Jan. 25, 2012?

To the best of my recollection, my understanding was that the application was submitted to the HELP Committee earlier.

4. Are you aware that the Committee needs these forms to conduct a background check and evaluate nominees?

Yes.

5. Why do you think it was appropriate to accept a recess appointment without having submitted that basic information to the committee responsible for approving your nomination?

The President appointed me and it has been an honor to serve as a Member of the Board. I was not aware at the time of the appointment whether information had been submitted to the Committee.

6. What day were you nominated for the National Labor Relations Board?

December 15, 2011. I was renominated on February 13, 2013.

7. What day were you recess appointed?

January 4, 2012.

8. Do you think there was an unreasonable delay in considering your nomination?

It is not for me to say whether the Senate's consideration of my nomination has been unreasonably delayed, since I do not know the reason that the Senate did not previously proceed to consider my nomination. I only know that I was nominated on December 15, 2011 and my nomination was pending before the Senate throughout 2012, without any consideration by the Senate. I was renominated on February 13, 2013, and I welcome consideration of my nomination now.

9. Then Sen. John F. Kennedy said, "There should be at least a 30 day interval between the request for an election and the holding of the election.....in which both parties can present their viewpoints." Do you think creating a minimum time frame to hold an election is a reasonable position? If so, what would be that time frame?

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Questions for Chairman Mark G. Pearce, Sharon Block, and Richard Griffin

Responses of Chairman Pearce

1. If the NLRB should lose a quorum, do you believe the Board will be unable to provide workers with any protections or recourse?

The Board through its decisions ensures that workers, employers and unions have a forum to have their issues heard and resolved and that our nation's economic security is protected from industrial unrest. There is no private right of action under the NLRA, so the Board is the only forum for workers, unions and employers to have their disputes heard and resolved. Obligations imposed by the NLRA are not suspended if the Board loses its quorum. The statute of limitations continues to run. Moreover, a fully functional Board hears and decides cases where men and women may have lost their jobs or aren't being hired because they tried to form or join a union at their workplace or protested their working conditions. It hears and decides cases where unions may have discriminated against workers because of their political activities or non-membership. While under very particular circumstances the Acting General Counsel may be able to obtain injunctive relief, such authority of the Acting General Counsel while there is a question as to the Board's quorum has been the subject of much litigation. A Decision and Order of a fully functional Board is the only avenue of protection and recourse for workers under its jurisdiction.

2. Do you agree that, should the Board lose its quorum, it will still be allowed to do the following? Please answer yes or no for each item.

The federal courts would be the ultimate arbiter of the Agency's authority to take various actions to administer and enforce the National Labor Relations Act, should the Board itself lose a quorum because it lacks a sufficient number of members. Legal challenges to a variety of actions by the Board, the General Counsel, Regional Directors, and administrative law judges are already pending. The Board's own view of its authority is not and cannot be conclusive. With that critical caveat, I offer the following answers:

- (a) Conduct elections wherein employees decide whether or not to form a union

Yes, some elections could be conducted. However, the Board would not be able to address any election-related disputes, whether before or after the election, nor would the Board be able to issue an order compelling an employer to recognize and bargain with a union that had won an election.

- (b) Investigate allegations of unfair labor practices (ULPs)

Yes, the General Counsel could continue to investigate ULP allegations, although the Board would not be able to resolve disputes related to such investigations, such as the issuance, enforcement, or quashing of subpoenas.

- (c) Issue a complaint if the unfair labor practices (ULPs) charge is found to be meritorious

Yes, the General Counsel could continue to issue ULP complaints, although the Board would not be able to decide ULP cases that were presented to it.

- (d) Administrative Law Judges (ALJs) could hold hearings on ULP complaints and issue decisions.

Yes, ALJs could continue to hold hearings on ULP complaints and issue decisions, but the Board would not be able to rule on matters that would ordinarily be presented to it during the course of proceedings before the ALJs, nor would the Board be able to review decisions issued by ALJs. Many ULP cases would therefore remain unresolved, because ALJ decisions are simply recommendations to the Board and are not themselves enforceable.

- (e) NLRB Regional Directors could settle cases of unfair labor practices (ULP).

Yes, the Regional Directors could effectuate certain kinds of settlements in ULP cases, with the important exception of settlements for which the Board's approval was legally required.

- (f) The General Counsel may also seek to enforce orders of the Board in federal courts, as long as the order was issued by the Board when it had a legitimate quorum.

Yes, the General Counsel could continue to seek to enforce Board orders in the federal courts in those circumstances.

- (g) The General Counsel could issue enforcement guidance memoranda.

Yes, the General Counsel could continue to issue enforcement guidance memoranda.

- (h) The General Counsel could perform actions that were delegated to it by a Board with a quorum.

Yes, the General Counsel could continue to perform actions for which a Board with a quorum had delegated its authority.

3. I've noted a seeming mismatch of caseload and funding trends at the NLRB. Looking at the NLRB's own data over the last 20 years, I see that:
- The annual representation caseload has dropped by 59%
 - The number of representation cases the Board decided has dropped by 72%
 - The number of unfair labor practice cases has dropped by 33%
 - The number of unfair labor practice cases the Board decided has dropped by 63%
 - The number of elections held has dropped by 57% (although I would note that the union win rate has increased)
 - Yet, during the same period funding has increased over 70%

I know that the NLRB requested another funding increase this year of 1.7%. The federal taxpayers have taken on the funding of many growing needs, such as education assistance for low-income children, but yours appears to be shrinking. How do you justify requesting an increase?

The NLRB protects the rights of tens of millions of private sector workers and protects employers from workplace unrest. Its work is critical to ensuring industrial peace, which is vital to our nation's economic security.

As Chairman, I have made every effort to ensure that the Agency is run in an efficient and fiscally conservative manner, while making sure that it can fulfill its statutory mission. The Agency has undertaken a consolidation plan for its regional offices in an effort to reduce costs. Many other cost savings measures, including severe restrictions on hiring, training, career employee performance awards, and travel, have been undertaken to comply with the reduction in our budget caused by sequestration.

A significant portion of the Agency's expenses, of course, are not linked to the caseload or charges filed. For example, mandatory GSA rent and Federal Protective Service charges are projected to be \$1 million to \$1.5 million greater in the coming fiscal year. In addition, the modest increase in the budget request will fund the equipment and services necessary to support a unified communications initiative to consolidate data, voice, video, and wireless networks for the Headquarters office and the NLRB's field offices across the country.

Finally, while I have not verified the statistics cited in this question, I would note that caseload statistics do not necessarily reflect the responsibilities or workload of the Agency. For example, an election run by the Board for 20 voters or 45,000

voters – like the recent health care unit election held in California – is counted as one case. Clearly, the resources required to support an election of that scale are substantial. Similarly, a case involving the discharge of a single worker or one involving the discharge of 146 strikers, like the *Douglas Autotech* case, 357 NLRB 111 (2011), or 22 unfair labor practice issues, like the *Flagstaff Medical Center* case, 357 NLRB 65 (2011), are all counted as one case.

4. Do you think the Board's pursuit of rulemaking has been a wise investment of resources?

Yes.

5. Would you do anything differently to achieve a more successful outcome?

No.

6. If confirmed, will you continue to pursue rulemaking?

Without prejudging the outcome of deliberations among the Board members regarding the disposition of the pending proposed rules, I do believe that the Board has a duty to address the proposals, taking into account the thoughtful comments we received. With regard to any new regulatory undertakings, it would be inappropriate for me to predict what issues may arise and what the Board's response would be.

7. Even though it is not required, would you support sending the Board's next proposed rule to the Office of Management and Budget (OMB) for review? If not, why not?

Currently, the Board has no plans to issue any new proposed rules. Accordingly, it would be inappropriate for me to prejudge the outcome of deliberations among the Board members regarding the procedure to employ if the Board decided to undertake a new rulemaking effort.

8. Recently, in *Lamons Gasket*, the Board overruled *Dana Corp.*, decided a mere four years earlier, based on concerns not supported by available evidence. In *Dana*, the Board had supplied a procedure for nonunion employees to petition for an election after an employer had voluntarily recognized a union based on card check. Are you concerned that such rapid policy reversals undermine the Board's credibility and legitimacy?

No, provided that the reversal of policy is well grounded, factually and legally, and carefully explained, as it was in *Lamons Gasket*. The *Lamons Gasket* Board pointed

out that *Dana Corp.* itself had overruled a decision more than 40 years old and that the empirical evidence developed under *Dana Corp.* refuted the factual premises on which its new election procedure had been based.

9. Are you concerned that such reversals undermine the predictability inherent in the rule of law to the detriment of unions, employees, and employers alike?

I believe that predictability is an important value under the law and that reversals of precedent should be the exception, not the rule. Reversals must be understood in the context of the Supreme Court's observation that "[t]o hold that the Board's earlier decisions froze the development ... of the national labor law would misconceive the nature of administrative decisionmaking," which the Court described as "the constant process of trial and error." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975).

Responses of Member Block

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The federal courts would be the ultimate arbiter of the Agency's authority to take various actions to administer and enforce the National Labor Relations Act, should the Board itself lose a quorum because it lacks a sufficient number of members. Legal challenges to a variety of actions by the Board, the General Counsel, Regional Directors, and administrative law judges are already pending. The Board's own view of its authority is not and cannot be conclusive. With that critical caveat, I offer the following answers:

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Yes, some elections could be conducted. However, the Board would not be able to address any election-related disputes, whether before or after the election, nor would the Board be able to issue an order compelling an employer to recognize and bargain with a union that had won an election.

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Yes, the General Counsel could continue to investigate ULP allegations, although the Board would not be able to resolve disputes related to such investigations, such as the issuance, enforcement, or quashing of subpoenas.

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Yes, the Regional Directors could effectuate certain kinds of settlements in ULP cases, with the important exception of settlements for which the Board's approval was legally required.

- (f) The General Counsel may also seek to enforce orders of the Board in federal courts, as long as the order was issued by the Board when it had a legitimate quorum.

Yes, the General Counsel could continue to seek to enforce Board orders in the federal courts in those circumstances.

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Yes, the General Counsel could continue to issue enforcement guidance memoranda.

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 - Yet, during the same period funding has increased over 70%

I know that the NLRB requested another funding increase this year of 1.7%. The federal taxpayers have taken on the funding of many growing needs, such as education assistance for low-income children, but yours appears to be shrinking. How do you justify requesting an increase?

I am regularly kept apprised of the Agency's fiscal situation and budget requests, and in light of the information I have been provided, I agree with Chairman Pearce's answer to this question.

4. Do you think the Board's pursuit of rulemaking has been a wise investment of resources?

Yes.

5. Would you do anything differently to achieve a more successful outcome?

No.

6. If confirmed, will you continue to pursue rulemaking?

Without prejudging the outcome of deliberations among the Board members regarding the disposition of the pending proposed rules, I do believe that the Board has a duty to address the proposals, taking into account the thoughtful comments we received. With regard to any new regulatory undertakings, it would be inappropriate for me to predict what issues may arise and what the Board's response would be.

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No, provided that the reversal of policy is well-grounded, factually and legally, and carefully explained, as it was in *Lamons Gasket*. The *Lamons Gasket* Board pointed out that *Dana Corp.* itself had overruled a decision more than 40 years old and that the empirical evidence developed under *Dana Corp.* refuted the factual premises on which its new election procedure had been based.

9. Are you concerned that such reversals undermine the predictability inherent in the rule of law to the detriment of unions, employees, and employers alike?

I believe that predictability is an important value under the law and that reversals of precedent should be the exception, not the rule. Reversals must be understood in the context of the Supreme Court's observation that "[t]o hold that the Board's earlier decisions froze the development ... of the national labor law would misconceive the nature of administrative decisionmaking," which the Court described as "the constant process of trial and error." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975).

Responses of Member Griffin

1. If the NLRB should lose a quorum, do you believe the Board will be unable to provide workers with any protections or recourse?

The Board through its decisions ensures that workers, employers and unions have a forum to have their issues heard and resolved and that our nation's economic security is protected from industrial unrest. There is no private right of action under the NLRA, so the Board is the only forum for workers, unions and employers to have their disputes heard and resolved. Obligations imposed by the NLRA are not suspended if the Board loses its quorum. The statute of limitations continues to run. Moreover, a fully functional Board hears and decides cases where men and women may have lost their jobs or aren't being hired because they tried to form or join a union at their workplace or protested their working conditions. It hears and decides cases where unions may have discriminated against workers because of their political activities or non-membership. While under very particular circumstances the Acting General Counsel may be able to obtain injunctive relief, such authority of the Acting General Counsel while there is a question as to the Board's quorum has been the subject of much litigation. A Decision and Order of a fully functional Board is the only avenue of protection and recourse for workers under its jurisdiction.

2. Do you agree that, should the Board lose its quorum, it will still be allowed to do the following? Please answer yes or no for each item.

The federal courts would be the ultimate arbiter of the Agency's authority to take various actions to administer and enforce the National Labor Relations Act, should the Board itself lose a quorum because it lacks a sufficient number of members. Legal challenges to a variety of actions by the Board, the General Counsel, Regional Directors, and administrative law judges are already pending. The Board's own view of its authority is not and cannot be conclusive. With that critical caveat, I offer the following answers:

- (a) Conduct elections wherein employees decide whether or not to form a union

Yes, some elections could be conducted. However, the Board would not be able to address any election-related disputes, whether before or after the election, nor would the Board be able to issue an order compelling an employer to recognize and bargain with a union that had won an election.

- (b) Investigate allegations of unfair labor practices (ULPs)

Yes, the General Counsel could continue to investigate ULP allegations, although the Board would not be able to resolve disputes related to such investigations, such as the issuance, enforcement, or quashing of subpoenas.

- (c) Issue a complaint if the unfair labor practices (ULPs) charge is found to be meritorious

Yes, the General Counsel could continue to issue ULP complaints, although the Board would not be able to decide ULP cases that were presented to it.

- (d) Administrative Law Judges (ALJs) could hold hearings on ULP complaints and issue decisions.

Yes, ALJs could continue to hold hearings on ULP complaints and issue decisions, but the Board would not be able to rule on matters that would ordinarily be presented to it during the course of proceedings before the ALJs, nor would the Board be able to review decisions issued by ALJs. Many ULP cases would therefore remain unresolved, because ALJ decisions are simply recommendations to the Board and are not themselves enforceable.

- (e) NLRB Regional Directors could settle cases of unfair labor practices (ULP).

Yes, the Regional Directors could effectuate certain kinds of settlements in ULP cases, with the important exception of settlements for which the Board's approval was legally required.

- (f) The General Counsel may also seek to enforce orders of the Board in federal courts, as long as the order was issued by the Board when it had a legitimate quorum.

Yes, the General Counsel could continue to seek to enforce Board orders in the federal courts in those circumstances.

- (g) The General Counsel could issue enforcement guidance memoranda.

Yes, the General Counsel could continue to issue enforcement guidance memoranda.

- (h) The General Counsel could perform actions that were delegated to it by a Board with a quorum.

Yes, the General Counsel could continue to perform actions for which a Board with a quorum had delegated its authority.

3. I've noted a seeming mismatch of caseload and funding trends at the NLRB. Looking at the NLRB's own data over the last 20 years, I see that:
- The annual representation caseload has dropped by 59%
 - The number of representation cases the Board decided has dropped by 72%
 - The number of unfair labor practice cases has dropped by 33%
 - The number of unfair labor practice cases the Board decided has dropped by 63%
 - The number of elections held has dropped by 57% (although I would note that the union win rate has increased)
 - Yet, during the same period funding has increased over 70%

I know that the NLRB requested another funding increase this year of 1.7%. The federal taxpayers have taken on the funding of many growing needs, such as education assistance for low-income children, but yours appears to be shrinking. How do you justify requesting an increase?

I am regularly kept apprised of the Agency's fiscal situation and budget requests, and in light of the information I have been provided, I agree with Chairman Pearce's answer to this question.

4. Do you think the Board's pursuit of rulemaking has been a wise investment of resources?

Yes.

5. Would you do anything differently to achieve a more successful outcome?

No.

6. If confirmed, will you continue to pursue rulemaking?

Without prejudging the outcome of deliberations among the Board members regarding the disposition of the pending proposed rules, I do believe that the Board has a duty to address the proposals, taking into account the thoughtful comments we received. With regard to any new regulatory undertakings, it would be inappropriate for me to predict what issues may arise and what the Board's response would be.

7. Even though it is not required, would you support sending the Board's next proposed rule to the Office of Management and Budget (OMB) for review? If not, why not?

Currently, the Board has no plans to issue any new proposed rules. Accordingly, it would be inappropriate for me to prejudge the outcome of deliberations among the Board members regarding the procedure to employ if the Board decided to undertake a new rulemaking effort.

8. Recently, in *Lamons Gasket*, the Board overruled *Dana Corp.*, decided a mere four years earlier, based on concerns not supported by available evidence. In *Dana*, the Board had supplied a procedure for nonunion employees to petition for an election after an employer had voluntarily recognized a union based on card check. Are you concerned that such rapid policy reversals undermine the Board's credibility and legitimacy?

No, provided that the reversal of policy is well-grounded, factually and legally, and carefully explained, as it was in *Lamons Gasket*. The *Lamons Gasket* Board pointed out that *Dana Corp.* itself had overruled a decision more than 40 years old and that the empirical evidence developed under *Dana Corp.* refuted the factual premises on which its new election procedure had been based.

9. Are you concerned that such reversals undermine the predictability inherent in the rule of law to the detriment of unions, employees, and employers alike?

I believe that predictability is an important value under the law and that reversals of precedent should be the exception, not the rule. Reversals must be understood in the context of the Supreme Court's observation that "[t]o hold that the Board's earlier decisions froze the development ... of the national labor law would misconceive the nature of administrative decisionmaking," which the Court described as "the constant process of trial and error." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975).

Sen. Casey 5/16/2013 NLRB Hearing QFR's

Responses of Chairman Pearce, Members Block and Griffin:

- When was the last time that the Board reviewed its rules regarding how to run elections?
 - Why is it important for the Board to consider making changes to the election rules?

The Board last undertook notice-and-comment rulemaking with regard to its representation-case procedure in 1989, when it issued a final rule regarding healthcare bargaining units.

The National Labor Relations Act spells out very little about the election process. That process has been governed by the Board's rules and regulations. In light of the changes in American workplaces and technological advances, it is important for the Board to periodically reassess our election procedures to ensure that our procedures are as efficient and effective as possible. Moreover, the Board conducts more than a thousand elections each year. With each election we conduct, we learn more about the election process. Rulemaking is a transparent and inclusive process by which the Board can share what we have learned with the public and improve our procedures.

- The Board's decision in Specialty Healthcare has been criticized for creating "micro-units." Does the data bear out that criticism?

In Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011), the petitioned-for unit was a group of 53 certified nursing assistants (CNAs)—the question was whether that unit was an appropriate unit or whether cooks and maintenance people and others were also to be included. The Board determined that the petitioned-for unit of CNAs was an appropriate unit.

The data demonstrates that the decision has not resulted in "micro-units." During the 10 years before Specialty Healthcare, from 2001 through 2010, the median size of the units in which the Board conducted elections ranged from 23 to 26. Thus, the bargaining unit found appropriate in Specialty Healthcare was more than twice as big as the median unit size in those ten

years. And, during the period from the Specialty Healthcare decision to date (8/27/11-4/30/13), the median unit size has been 27. Far from producing micro-units, the post-Specialty period has seen a slight increase in the median size of units for elections.

The The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman case concerning a petitioned-for unit of 46 women's shoe salespeople was also mentioned at the May 16, 2013 hearing on the nominations of Members to the Board. The Board has not decided Neiman Marcus Bergdorf Goodman; the Manhattan Regional Director found the unit appropriate, the employer petitioned for review, the Board granted review on May 30, 2012, and the Board is currently considering the case.

Senator Michael B. Enzi's Questions for the Record for the NLRB Nominees

Questions for Chairman Mark G. Pearce

The new “ambush elections” rule, which affects virtually all employers within the Board’s jurisdiction, became law less than 8 months after it was formally proposed. By contrast, the Board’s much narrower rulemaking concerning the appropriate units in acute care hospitals was accomplished over a period of several years with meaningful participation from all stakeholders.

- 1) Do you think it is consistent with due process principles to rush a rulemaking process in this manner?

I do not agree with the question’s premise that the rulemaking process was rushed. The Board provided an initial comment period of 60 days, followed by a reply comment period of 14 days, for a total of 74 days. As the Board noted in the rule, the Administrative Procedure Act provides no minimum comment period, and many agencies, including the Board in some recent rulemaking proceedings, have afforded comment periods of only 30 days. According to the Administrative Conference of the United States (ACUS), 60 days has become the benchmark period for comments on significant substantive rules. ACUS Recommendation 2011-2 at 3. For procedural rules, such as the Board’s representation-case procedure rule, no comment period at all is required. The process followed by the Board cannot accurately be described as rushed, and it was fully consistent with any due process principles that might have been applicable. The over 65,000 comments submitted and the depth of analysis they provided are ample testament to the adequacy of the opportunities for public participation in the process.

I do not believe that the procedure followed in the hospital-unit rulemaking provides a useful comparison. The contrast between the subject matter of the hospital-unit rulemaking and that of the representation-case procedure rulemaking could not be greater. The former required the Board to consider the nature and organization of work in a complex industry on a nationwide basis, a vast body of information as to which the Board had no systematic knowledge. As to the recent rulemaking, no party possessed greater knowledge of the Board’s own procedures and their efficacy in practice than the Board itself. It is also questionable whether the procedure followed by the Board in the hospital-unit rulemaking—described by one commentator as “procedural overkill”—actually generated more useful information, in a cost-effective way, than a simpler, shorter proceeding would have provided. Mark H. Grunewald, *The NLRB’s First Rulemaking: An Exercise in Pragmatism*, 41 Duke L.J. 274, 290 (1991).

- 2) If confirmed, will you support future rulemaking and, if so, will you commit to a full and deliberative process that engages all stakeholders?

If I am confirmed I will support consideration of the proposed amendments concerning representation-case procedure that were not addressed by the December 2011 final rule. I have no plans for rulemaking on any other subject, but I will keep an open mind as to any proposals that may arise. As to all rulemaking, I am committed to a full and deliberative process including the participation of all stakeholders and other members of the public that wish to be involved.

In addition, the new election rule will shorten the “critical period” between when a petition is filed and when an election is held to less than 15 days. Presently, the critical period lasts a median of 38 days. According to the Acting General Counsel’s FY2011 “Summary of Operations,” this number is “well below our target median of 42 days.”

- 3) If the current median critical period is “well below” the NLRB’s target, then why was it necessary to amend the Board’s election procedures to shorten that period?

The December 2011 final rule contained no provision to shorten that period, and the purpose of the rule was not to shorten the median period from petition to election. The primary purpose of the rule was to eliminate unnecessary litigation. I think it is unlikely to result in a material change in the median period from petition to election. Accordingly, I do not think that the rule will lead to “ambush elections.”

- 4) Was your objective to limit an employer’s opportunity to respond and thereby help unions win elections?

No.

- 5) If so, is that rationale consistent with your claim during the hearing that the NLRB is a “neutral arbiter” of labor disputes?

N/A (see item 4 above).

Senator Orrin Hatch's Questions for the Record for the NLRB Nominees

Questions for Chairman Mark Pearce

1. As Chairman of the National Labor Relations Board (NLRB), you have departed from a long-standing Board tradition - a tradition even supported by former Democratic Board Chair Wilma Liebman - when you overturned Board precedent with less than a full Board (e.g. *WKYC-TV, Inc.*; *Piedmont Gardens*), without a minority vote in favor of doing so, or even without three affirmative votes (e.g., the representation case rulemaking).
 - a. What were your reasons for setting aside these traditions of the Board?
 - b. Do you believe that abandoning these traditions have had an impact on the NLRB's credibility, integrity, and public image? Please explain.
 - c. Does the Board have an obligation to follow precedent? Please explain.

I respectfully disagree with the premise of your questions. The Board has never had a tradition that would require a full, five-member Board in order to overturn precedent. The Board's tradition, rather, is not to overturn case precedent, through case adjudication, in the absence of three votes to do so. There are numerous instances in which prior Boards, with fewer than five sitting members, have overturned precedent. Examples are collected in former Chairman Liebman's February 25, 2011 letter to Chairman Roe of the Subcommittee on Health, Education, Labor, and Pensions, Committee on Education and the Workforce, U.S. House of Representatives, in which she explains the Board's tradition as I have done here. Because the Board has engaged in significant rulemaking only infrequently, it has no comparable tradition with respect to the relationship between rulemaking and prior case adjudications. In any event, the representation-case procedure rulemaking did not overturn Board precedent.

Because the Board has not, in fact, abandoned tradition, it cannot be fairly or accurately criticized for having done so. Whether the Board's credibility, integrity or public image may have suffered as a result of unfounded criticism is for others to judge.

2. In April 2011, the NLRB filed a complaint against Boeing, alleging that the company illegally retaliated against union strikes. As a remedy, the Board's Acting General Counsel sought to force Boeing to shift work from South Carolina to Washington. The NLRB's action against Boeing was withdrawn before the courts could determine if the Board acted legitimately.

- a. In your view, were the Acting General Counsel's actions were justified? Please explain.

I am not in a position to evaluate the Acting General Counsel's actions. The Acting General Counsel made a prosecutorial decision based on evidence that was not made public and was never presented to me or the Board. I cannot speculate based upon my very limited knowledge of the Acting General Counsel's theory of the case.

- b. Does the National Labor Relations Act provide the NLRB with the authority to dictate where an employer can construct new facilities and who it can hire? Please explain.

The National Labor Relations Act does not authorize the NLRB to dictate where an employer can construct new facilities. Nor can the NLRB ordinarily tell an employer whom to hire. Section 8(a)(3) of the Act, however, makes it an unfair labor practice for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" Section 10(c) of the Act authorizes the Board, upon finding that an unfair labor practice has been committed to order the violator, "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act"

3. Prior to 2011, the NLRB had engaged in rulemaking on only one occasion. In 2011, the Board finalized two rules, both of which have been invalidated by federal courts.
- a. Does the Board's limited history and experience with successful rulemaking give you any pause when considering whether to engage in rulemaking in the future? Please explain.

The litigation as to both rules is ongoing. Therefore, I think it is premature to draw conclusions concerning future rulemaking. I should also point out that the premise of the question is erroneous. In fact, the Board had engaged in rulemaking on numerous occasions prior to 2011. Practically all of the rules promulgated by the Board prior to 2011 were procedural rules, like the December 2011 final rule.

- b. How has the courts' treatment of the Board's most recent rules impacted your decision-making?

Once the litigation is resolved, I will be guided by the ultimate holdings.

- 4. As you know, in *Noel Canning* the U.S. Court of Appeals for the D.C. Circuit ruled that President Obama's "recess" appointments of three Board members on January 4, 2012 were unconstitutional. According to this ruling, the Board has lacked a quorum since that date. And, just this week, the U.S. Court of Appeals for the Third Circuit handed down a decision that would have an impact similar to that of *Noel Canning*.
 - a. In your view, do these decisions call into question the validity of any actions by the Board? Please explain.

The appointments issue has not been resolved. The D.C. Circuit itself acknowledged in *Noel Canning* that its decision is at odds with the views expressed by the Second, Ninth, and Eleventh Circuit courts. The Solicitor General of the United States has petitioned the Supreme Court to resolve the conflict, and it is appropriate for the Board to continue to act while the matter is on appeal. I anticipate that the Board will prevail.

- b. Is the Board inviting additional chaos by continuing to issue decisions until these legal matters are resolved? Please explain.

No. The Board is continuing to issue decisions because our work is essential to the maintenance of industrial peace and the free flow of commerce. Ceasing to issue decisions would create more, not less, chaos.

- c. Many of the cases you've issued in the last year have been at the Board for some time. That being the case, why was it necessary for the Board to continue issuing decisions rather than waiting for some legal clarity?

Any delay in the Board's issuance of decisions is regrettable. In the last 10 years in particular, that delay is largely attributable to the lack of a full five-member Board during much of the time and to the lack of a quorum during the 27-month period when the Board consisted of only two members. To enable the persons appearing before the Board to return to work or to the operation of their businesses without strife, it is important that the Board issue decisions as quickly as is practicable.

Senator Johnny Isakson's Questions for the Record for NLRB Nominees

Questions for Chairman Mark Pearce

1. Why did the Board apply a decision concerning an acute nursing facility to all manner of industries, including those having nothing to do with medical or health care?

Governing law in Board representation proceedings typically applies across industry lines. The question addressed in *Specialty Healthcare*—how to determine an appropriate unit where one party contends that the unit sought by another party must include additional employees—was not specific to health care.

2. There seems to be a very consistent theme during your tenure on the Board. When you look at the so-called “ambush” election rulemaking, the courts overturned the decision based on the fact that there wasn’t a sufficient quorum. In the poster rule, we now have two courts, one in South Carolina and now the D.C. Circuit, that have deemed the ruling invalid. *Specialty Healthcare* is another case decision that is under review by the courts; and these are just naming a few. I am very concerned that the “independent” NLRB – under your direction – has become one that has had to be kept in check by the judicial branch. How can you defend the Board, and more importantly, its impartiality during this timeframe?

The NLRB during my tenure has conducted itself in a fair and impartial manner. My colleagues and I have made a conscious effort in every case to understand all sides of the case, to consider carefully the arguments of every party, and to render a fair decision based solely on the record evidence and the applicable legal principles. Similarly, the rules recently issued by the Board were issued only after every effort was made to understand and give full consideration to all the views and arguments presented in the comments received from the public. Regarding the employee rights notice rule, one circuit has ruled on the matter and the Board is giving fair evaluation to that decision. I respectfully disagree with your characterization of the rule on representation-case procedure as “‘ambush’ election rulemaking.” The primary reason for the rule was to eliminate unnecessary litigation.

3. At the hearing, you suggested that the Board’s *Specialty Healthcare* decision is consistent with precedent and that the Board looks for an “appropriate” unit, not necessarily the “most appropriate” unit. But you did not acknowledge that *Specialty Healthcare* was a sea change in the law governing the determination of bargaining units.
 - a. Isn’t it true that the Board in *Specialty Healthcare*, for the first time, imported the “overwhelming community of interest” standard from the accretion-of-units context?

In *Specialty Healthcare*, the Board expressly adopted the standard enunciated by the D.C. Circuit in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d

417, 421-423 (2008), a case that raised the same issue in a non-healthcare context. The D.C. Circuit itself borrowed that language from two prior Board cases, *Jewish Hosp. Ass'n*, 223 NLRB 614, 617 (1976), and *Lodgian, Inc.*, 332 NLRB 1246, 1255 (2000). Neither of those cases raised an accretion issue. Rather, each concerned a union's filing a representation petition covering a workplace where there was no existing collective-bargaining relationship.

- b. If so, isn't that a substantial change in the law, rather than merely an application of the Board's traditional community of interest factors?

As explained above, *Specialty Healthcare* was not a substantial change in the law, except with respect to non-acute care health care facilities.

- c. Isn't it also true that applying this standard when assessing the appropriateness of all petitioned-for units places a nearly insurmountable burden on employers to demonstrate that that a union's requested unit is inappropriate?

No. For example, in *Odwalla, Inc.*, 357 NLRB No. 132 (2011), a post-*Specialty Healthcare* decision, the Board reversed the hearing officer and agreed with the employer that the unit sought by the union was inappropriate without the inclusion of other employees. In its decision in *Odwalla*, the Board also cited pre-*Specialty Healthcare* decisions reaching the same conclusion.

Questions for Mr. Richard Griffin:

1. It appears that the IUOE has had issues with locals being infiltrated by organized crime? Did the issue concern you? What specifically did you do to root out the influence of organized crime figures in your union locals? Do you feel at all responsible for the permanence of the problem despite your tenure spanning decades?

In response to a similar question asked of me by Senator Hatch in his letter to me of July 18, 2012, I responded by letter dated August 6, 2012 to address matters he raised based on a new report concerning a few of the IUOE's more than 120 Local Unions, and involving .015% of the IUOE's approximately 400,000 members. On page two of the letter, I stated: "On several occasions during my tenure as General Counsel, I was called upon to provide counsel to the International Union's officers regarding criminal allegations concerning officers or members. The IUOE essentially has three mechanisms available to address the consequences for its members and the organization of alleged criminal conduct within Local Unions: 1) discharge or removal from employment if the individual is a union employee; 2) internal disciplinary proceedings to fine, suspend or expel individuals from membership; or 3) imposition of trusteeship or monitorship by the International Union to remove individuals from Local Union office and ameliorate any adverse effects on the Local Union's ability to function and represent its members. Trusteeship—called "International Supervision" under the IUOE Constitution—involves the suspension of Local Union autonomy and the complete takeover of the Local by the International to address problems the Local has demonstrated itself incapable or unwilling to address; Monitorship is a lesser form of International Union intervention designed to provide International Union resources and guidance to assist the Local in addressing problems without suspending the Local's autonomy. The International has made use of each of these mechanisms—by itself or in combination—as appropriate to respond to the facts and needs of particular situations. In each instance when such allegations were raised, I worked to advise the International's leadership on the course that was in the membership's best interests, promoted a culture and practice of the highest ethical standards, and strengthened the internal mechanisms for dealing with criminal conduct." The remedial actions taken in particular cases are detailed on page 3 of my response to Senator Hatch.

2. Are you currently named in a federal complaint filed by 10 members of IUOE Local 501 out of Los Angeles? Does complaint deal with a "scheme to defraud [the local] out of revenue, cost savings and membership,' by means of kickbacks, bribery, violent threats and extortion," as reported by The Wall Street Journal? Are you mentioned in the portion of the complaint dealing with a cover or hush up?

I am one of 43 defendants (including the plaintiffs' political opposition in the upcoming Local Union election) named in a federal complaint filed by 10 members or former members of Local 501. The allegations are false and without merit. A motion to dismiss has been filed on my behalf and I fully expect to prevail in the matter.

The January 11, 2013 Wall Street Journal editorial repeated the lawsuit's false and meritless allegations. Finally, there is only one paragraph in the plaintiffs' complaint that refers to a cover or hush up, and it does not mention or refer to me.

3. Do you believe a defendant in a racketeering and embezzlement case inspires the confidence of the American people? Do you believe that someone who has been accused of covering up crimes should be operating in a federal agency at the expense of U.S. taxpayers? Do you believe the President was so intent on expediting your nomination due to the remarkable stains on your record that he violated the U.S. Constitution and made recess appointments despite the fact the U.S. Senate was convening in pro-forma session?

As I stated above, the complaint's allegations are false and without merit. A motion to dismiss has been filed on my behalf and I fully expect to prevail in the matter. I do not believe the President's action recess appointing me on January 4, 2012 could have been in any way affected by false allegations made in a complaint filed more than ten months later on October 30, 2012. I respectfully disagree with the question's contention that the President's recess appointments violated the Constitution; the Solicitor General has filed a petition for a writ of certiorari with the Supreme Court in the *Noel Canning* case seeking to have the Supreme Court determine the constitutionality of the recess appointments. And, finally, I strenuously disagree with the question's characterization of my record and strongly believe that any fair-minded review of my career will demonstrate that I have acted honorably, ethically and to the best of my ability.

Question for the Record from Senator Murray

Member Block: I spoke earlier in my remarks about the problems of growing income inequality. Pay equity is one important tool for American women to help close that income gap. A letter from more than 30 groups concerned about what women are paid and pay equity has called for a smoothly functioning NLRB. Can you explain how the NLRB helps women address continuing disparity in pay?

An important tool in addressing pay equity is information. It is difficult for women to address disparities in pay unless they know that such inequities exist. Employer rules that prohibit employees from discussing their wages or other terms and conditions of employment with each other prevent women from obtaining information about pay disparities. For example, Lilly Ledbetter, for whom the Lilly Ledbetter Fair Pay Act was named, did not know for years that she was making less than her male counterparts because her employer had a rule that workers could not talk about their pay. As a result, she was unable to address the discrimination perpetuated against her.

In recent decisions enforcing the National Labor Relations Act, the Board has made clear that an employer may not stymie employees' ability to come together to improve their work conditions, pay, and perceived inequities, including by prohibiting employees from discussing their pay with each other. In addition, the Board has protected employees fired for discussing their salaries in violation of unlawful workplace policies. For example, the Board ordered back pay and reinstatement for Kimberly Tutt, who was unlawfully discharged because she began talking to her coworkers about their wages. See *Taylor Made Transportation Services*, 358 NLRB No. 53 (2012).

Predominantly female occupations pay lower wages than predominately male occupations. As the letter you submitted for the record states, women who are members of unions or whose jobs are covered by a union contract are paid more than women who have no union affiliation. To the extent that the Board ensures that women who choose union representation are able to freely and fairly express that choice, the Board assists them in addressing pay disparities.

Senator Pat Roberts' Questions for the Record for the NLRB Nominees

Questions for Chairman Mark G. Pearce

In my office the other day when I met personally with the five of you, I spoke on rulemaking. I understand that in the past several years the Board has issued two rules, both which have been overturned in federal courts. My question is not about if the process used was in strict adherence to the Administrative Procedures Act as outlined in the NLRB's Information Quality Guidelines, my question is

- a. Why in the past several years did the Board try and double the amount of rules it has passed in its history?

Thank you for taking the time to meet with us. It was a pleasure to meet you, and it was good to hear your views on this important subject. In voting to approve the employee rights notice rule and the representation-case procedure rule, it was not my purpose to try to double the number of rules or otherwise affect the number of rules issued by the Board. (The Board has issued dozens of rules during its 77-year history, so there clearly has not been a doubling of the number of rules issued by the Board.) I considered each proposed rule separately on its own merits, and in each of these two cases I concluded that the rule made sense and should be issued. In the case of the representation-case procedure rule, I proposed, and a majority of the Board agreed, that only a small number of the proposed amendments be addressed in the final rule.

- b. Is it the Board's main responsibility to propose and finalize multiple rules in a short amount of time?

No.

Questions for Sharon Block

1. What role do you think dissenting opinions have on decisions?

A dissenting opinion is an opportunity for a Board member to express publicly a minority view of the facts or the applicable law in a particular matter. Whenever possible, and in the vast preponderance of cases, Board members will have considered each others' views before the majority and dissenting opinions issue, and published opinions often reflect vigorous dialogue over the differences.

2. What part of the process should dissenting opinions be heard and published?

It is important that Board members be open to contrary views put forth by their colleagues while decisions are being made. Occasionally, the Board issues an order with its opinion to follow, or issues a decision or rule with a

dissenting or concurring opinion to follow. No order or rule issues without every sitting Board Member clearing its issuance.

Question for Richard Griffin

1. Currently, the Board issues reviews and decisions on a case by case basis. Do you believe this structure should be changed?

Section 10 (c) of the National Labor Relations Act provides for the Board to issue decisions in unfair labor practice cases. Any change to the language of Section 10 (c) would require an amendment to the National Labor Relations Act. Historically and prudentially, Members of the Board do not take positions with respect to legislative changes; rather, they are charged with enforcing the law as it is written. Therefore, it would be inappropriate for me to comment on a potential legislative change.

Senator Tim Scott's Questions for the Record for the NLRB Nominees

Question 1 for Chairman Mark G. Pearce:

- 1) The Board under the current administration, particularly over the past few years, has embarked on truly unprecedented, expansive rulemakings and issued a multitude of decisions that seem to tie the hands of employers at every turn. How can we expect America's job creators to help improve our dismal employment situation when the Board has injected such profound uncertainty in labor relations?

I respectfully disagree with the premise of your question and that the Board has injected "such profound uncertainty in labor relations." First, the rulemaking engaged in by this agency has not been unprecedented. The Board has, over its 77 years of existence, issued procedural rules on dozens of occasions. Second, we decide unfair labor practice cases based on whether or not the National Labor Relations Act has been violated. We make those decisions in a fair and impartial manner and with the statutory objectives of encouraging the practice and procedure of collective bargaining; protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection; providing orderly and peaceful procedures for the rights of individual employees in their relations with labor organizations; prescribing the legitimate rights of both employees and employers in their relations affecting commerce; and protecting the rights of the public in connection with labor disputes affecting commerce.

- 2) Has the confluence of the decline of private-sector unionization to 6.6% and the defeat of card check prompted the NLRB to serve as the vehicle for mitigating these losses? Is there an expectation on behalf of union organizations that the Board, particularly the Democrat members, should act in this way?

During my tenure as a member and Chairman of the National Labor Relations Board, I have strived to uphold my oath to administer the National Labor Relations Act in a fair and impartial manner, consistent with the requirements of the Act. I believe that the Board members with whom I have had the privilege to serve have similarly adhered to their oaths to serve faithfully and impartially. I cannot speak to the expectations of others.

- 3) Would you agree that unions have tried to use the political and legislative processes in every way possible in an attempt to reverse this decline in private-sector unionization?

For the last approximately three years, I have served as a member or Chairman of the National Labor Relations Board. I have not been an official, member, or employee of a

union. Accordingly, I am not privy to the motivation or decision-making process of any or all unions and, therefore, I do not think it is appropriate for me to characterize the actions of any or all unions undertaken in recent years.

Question 2 for Chairman Mark G. Pearce:

- 1) The Board's decision in *Specialty Healthcare* and Rehabilitation Center and subsequent cases that upend board precedent to allow the gerrymandering of bargaining units to increase rates of unionization will have major consequences on employees and employers. Why did the Board expand the *Specialty Healthcare* decision to industries beyond non-acute health facilities?

In *Specialty Healthcare*, the Board “return[ed] to the application of our traditional community of interest approach in this [nursing home] context” and also clarified the burden of proof for a party contending that employees not included in a petitioned-for unit must be included in order for the unit to be found appropriate. With respect to the latter point, the Board utilized a formulation of the standard stated by the D.C. Circuit in *Blue Man Vegas, LLC v. NLRB*, a case involving a unit of stage crew employees for a theatrical show performed in a casino hotel. Thus, the formulation adopted by the Board was one already in use outside the area of non-acute health facilities.

- 2) Commonsense says that the creation of “micro-unions” would lead to perpetual contract negotiations and strike threats as well as acrimony amongst employees. How is this good for our economy and labor relations?

The Board's obligation under Section 9 of the Act is to determine whether a petitioned-for unit is an appropriate unit. In carrying out this statutory obligation in the *Specialty Healthcare* case, the Board determined that a unit of 53 certified nursing assistants was appropriate. The data demonstrates that the *Specialty Healthcare* decision has not lead to “micro-unions.” During the 10 years before *Specialty Healthcare*, from 2001 through 2010, the median size of the units in which the Board conducted elections ranged from 23 to 26. Thus, the bargaining unit found appropriate in *Specialty Healthcare* was more than twice as big as the median unit size in those 10 years. And, during the period from the *Specialty Healthcare* decision to date (8/27/11-4/30/13), the median unit size has been 27. Far from producing micro-units, the post-*Specialty* period has seen a slight increase in the median size of units for elections. It is difficult to see how this decision would lead to perpetual contract negotiations, strike threats, and acrimony among employees.

- 3) How many decades of precedent were overturned in the *Specialty Healthcare* decision?

In *Specialty Healthcare*, the Board “return[ed] to the application of our traditional community of interest approach in this [nursing home] context” and overruled *Park Manor Care Center*, a case decided in 1991.

- 4) Would you deem as few as two employees as an appropriate bargaining unit in any circumstance? Please provide a yes or no response.

Yes, if a petitioned-for unit of two employees otherwise met the test for an appropriate bargaining unit, I would find such a unit appropriate, as the Board has throughout its history. See, e.g., *Tennessee Valley Broadcasting Company*, 73 NLRB 1509, 1510 (1947) (units of all regular staff announcers and all radio technicians—each composed of two employees—constitute two separate appropriate units).

- 5) When the Board is increasingly dictating every aspect of labor relations and creating immense uncertainty, we cannot expect for the employment prospects to improve for the nearly 12 million Americans who are out of work. Can you please quantify the number of decades of Board precedent that were overturned in each of the following decisions:

- WKYC-TV, Gannet Co., Inc. (08-CA-039190)
- Alan Ritchey, Inc. (32-CA-018149)
- IronTiger Logistics, Inc. (16-CA-027543)
- Piedmont Gardens (32-CA-063475)
- United Nurses & Allied Professionals (Kent Hospital) (01-CB-011135)
- Hispanics United of Buffalo (03-CA-027872)
- Karl Knauz BMW (13-CA-046452)
- Dish Network (16-CA-062433A)
- Fresenius USA Manufacturing (02-CA-039518)

I respectfully disagree with the premise of your question.

The decisions in *IronTiger Logistics*, *United Nurses and Allied Professionals (Kent Hospital)*, *Hispanics United of Buffalo*, *Karl Knauz BMW*, *Dish Network*, and *Fresenius USA Manufacturing*, all cited above, did not overturn precedent.

***WKYC-TV* overturned a decision issued in 1962, whose rationale (or lack thereof) had been rejected repeatedly by the U.S. Court of Appeals for the Ninth Circuit over more than a decade.**

***Alan Ritchey, Inc.* overturned a 2002 decision, which lacked rationale.**

***Piedmont Gardens* overturned a 1978 decision that had created an automatic exemption from disclosure for witness statements, rather than apply the interest-balancing test governing union information requests articulated by the Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).**

Question 3 for Chairman Mark G. Pearce:

- 1) Mr. Pearce, why did the Democrat members of the Board seek to overhaul the election process in such a profound way in its “ambush” elections rule, especially given that there was no demonstrated need or deficiency to prompt the changes?

I assume that your question refers to the final rule concerning representation-case procedure that the Board issued in December 2011. That rule, however, did not “overhaul the election process,” much less do so in “a profound way.” Rather, it adopted a handful of discrete amendments designed to eliminate unnecessary litigation. Unnecessary litigation, by definition, serves no useful purpose, and it wastes the time and money of the parties and the agency. To me, that demonstrated the need for the changes.

- 2) You have said that the Board used a “measured and deliberative fashion” in their rulemaking, yet the utter haste with which this rule was forced through is anything but measured and deliberative. What was the reason for pursuing this rule change, particularly in such a hasty fashion? Delays cannot possibly be the reason because my understanding is that the median time for a board election is 38 days, which is according to the Acting General Counsel’s FY2011 Summary of Operations “well below [the] target median election time of 42 days.”

I do not agree with the question’s premise that the rulemaking process was rushed through with “utter haste.” The Board provided an initial comment period of 60 days, followed by a reply comment period of 14 days, for a total of 74 days. As the Board noted in the rule, the Administrative Procedure Act provides no minimum comment period, and many agencies, including the Board in some recent rulemaking proceedings, have afforded comment periods of only 30 days. According to the Administrative Conference of the United States (ACUS), 60 days has become the benchmark period for comments on significant substantive rules. ACUS Recommendation 2011-2 at 3. For procedural rules, such as the Board’s representation-case procedure rule, no comment period at all is required. The process followed by the Board cannot accurately be described as rushed, and it was fully consistent with any due process principles that might have been applicable. The over 65,000 comments submitted and the depth of analysis they provided are ample testament to the adequacy of the opportunities for public participation in the process.

The primary reason for the final rule was to eliminate unnecessary litigation, as discussed in connection with the preceding question.

- 3) Can you please explain how decreasing this critical window down to as few as 10 days would

not fundamentally chill the rights of employers to make their case and the rights of employees to make informed decisions?

Nothing in the representation-case procedure rule addressed the timing of the election, much less reduced the time between petition and election to 10 days.

- 4) Did you allow Mr. Hayes, the minority member, to issue a dissent in advance of publishing this significant rule? Why did the majority issue a rebuttal with Mr. Hayes' dissent?

The question whether Member Hayes might publish a dissent in advance of the publication of the rule never arose. As far as I know, publication of a dissent prior to the publication of the rule to which it refers is unheard of and has never been done by any agency; but the question did not arise because Member Hayes never requested it.

It is a common practice for the majority of a tribunal to respond contemporaneously to a dissent. In this case, there was no majority rebuttal to Member Hayes's dissent. However, I published a personal concurrence together with his dissent, in accordance with the Board's publication order.

- 5) Doesn't merely publishing Mr. Hayes' dissent when the rule took effect completely preclude the true deliberative nature that the Board should reflect?

No. Member Hayes was offered the opportunity to circulate and publish a dissent as part of the rule, in addition to publishing a second dissent later. He declined the offer. As explained in my November 21, 2011 letter to Member Hayes, he also declined to have his staff participate in the review of the comments, and he declined repeated invitations from the other Board member and myself to discuss with us what to do with the proposed amendments.

- 6) There seems to be a very consistent theme of partiality to unions and activism during your tenure at the Board. The "ambush" election rule was struck down in its entirety in federal court on the grounds that the Board lacked a quorum. In the Notice Posting rule, we now have two federal courts, one of which is in my home state of S.C., that have struck the rule down in its entirety due to its violation of employer free speech rights. Do these court rulings not give you pause?

I respectfully disagree with the question's premise that there has been "partiality" and "activism" during my tenure at the Board. To the contrary, I have made a conscious effort in every case to understand all sides of the case, to consider carefully the arguments of every party, and to render a fair decision based solely on the record

evidence and the applicable legal principles. Similarly, with respect to proposed rules, I have made every effort to understand and give full consideration to all of the views and arguments presented in the comments that we received from the public.

As to the court rulings referred to in the question, the litigation is ongoing. Therefore, I think it is premature to draw conclusions.

- 7) Can you defend the impartiality of the Board during your tenure?

The NLRB during my tenure has conducted itself in a fair and impartial manner. My colleagues and I have made a conscious effort in every case to understand all sides of the case, to consider carefully the arguments of every party, and to render a fair decision based solely on the record evidence and the applicable legal principles.

- 8) Wouldn't you say that your comments like "We keep our eye on the prize" sound more like those of an activist, rather than a member of a quasi-judicial board that is supposed to be neutral?

As stated in my interview with The Associated Press, "We keep our eye on the prize," means keeping to the goal of creating a set of rules that eliminates the waste of time, energy and money for the taxpayers.

Question 1 for Mr. Richard Griffin:

- 1) Mr. Griffin, you are only the second Board member to come directly from a union, correct?

The Board's decisions benefit from the participation of Board Members with wide exposure to labor law questions in a variety of roles. I am not familiar with the backgrounds of all prior Board Members, but know that they have come to the Board from many different work experiences. For example, I understand that at least one other prior Board Member came to the Board directly from working for a union, as did at least one prior NLRB General Counsel, and that at least two other Board Members worked as union staff attorneys for a part of their pre-Board careers. I also understand that many prior Board Members worked as management lawyers—as have my fellow nominees Philip Miscimarra and Harry Johnson, III for more than 30 years and almost 20 years, respectively—prior to their nomination to serve on the Board. Whatever their backgrounds and the nature of their clients, upon taking office and taking the oath to execute faithfully the law all Board Members must cease acting as advocates for one side or the other in labor-management disputes and become neutral, impartial arbiters. This was what I did when I was appointed to the Board in January 2012, and this is what I will continue to do if confirmed.

- 2) Please respond to the allegations that were made against you in the federal lawsuit filed by members of the International Union of Operating Engineers (IUOE), Local 501?

I am one of 43 defendants (including the plaintiffs' political opposition in the upcoming Local Union election) named in a federal complaint filed by 10 members or former members of Local 501. The allegations are false and without merit. A motion to dismiss has been filed on my behalf and I fully expect to prevail in the matter.

- 3) One of the plaintiff's allegations involves the IUOE's actions in keeping individuals off of the Local's officer election ballot in 2010. According to the complaint, the Department of Labor ruled the election violated the Labor-Management Reporting and Disclosure Act (LMRDA). Please describe your involvement in that 2010 election. Do you believe union members should have the right to freely select their Local leaders without involvement from outside of the Local?

My role in the Local 501 officer election in 2010 was similar to my role in each Local Union election conducted by the IUOE Local Unions in the United States during my time as IUOE General Counsel. Such elections must be conducted in compliance with the Local's by-laws, the IUOE Constitution, and the Labor-Management Reporting and Disclosure Act (LMRDA). Both the IUOE Constitution and the internal union remedy exhaustion requirements of the LMRDA contemplate a role for the International Union in reviewing the conduct of Local Union elections to assure that they are run fairly and that members are able to participate in an election conducted in compliance with the union's by-laws, constitution and other legal requirements. My understanding is that Local 501 and the Department of Labor have resolved their legal dispute over the

Local's 2010 election by agreeing to have the Department of Labor oversee the conduct of the Local's regularly scheduled election taking place this summer.