

Senator Michael Enzi's Questions for the Record for NLRB Nominees

Questions for Nancy Schiffer and Kent Hirozawa

RE: Federal Labor Law on Tribal Lands – Nominee Hirozawa

1. Wyoming is home to the Wind River Reservation where tribal governments and enterprises are recognized to have sovereignty over activities which take place on tribal lands. In a number of cases, the Supreme Court has recognized that federal law does not infringe on this sovereignty unless Congress expressly says federal law applies on tribal land. Do you believe that the National Labor Relations Act should override tribal employment codes?

Under existing Board precedent, the National Labor Relations Act may effectively override tribal employment codes, depending on various factors. The leading Board decision in this area is *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004). The United States Court of Appeals for the District of Columbia Circuit affirmed the Board's decision, and the Board has followed it subsequently.

2. Do you believe Congress intended the National Labor Relations Act to apply to tribal businesses?

The National Labor Relations Act does not contain an express exclusion for tribal businesses, in contrast to certain other entities identified in Section 2(2). In *San Manuel Indian Bingo & Casino*, cited above, the Board concluded that the Act could be applied to tribal businesses, depending on various factors.

RE: Federal Labor Law on Tribal Lands – Nominee Schiffer

1. Wyoming is home to the Wind River Reservation where tribal governments and enterprises are recognized to have sovereignty over activities which take place on tribal lands. In a number of cases, the Supreme Court has recognized that federal law does not infringe on this sovereignty unless Congress expressly says federal law applies on tribal land. Do you believe that the National Labor Relations Act should override tribal employment codes?

I do not have a view on this question. If I am confirmed, I will approach the issue with an open mind, taking into consideration the views of my colleagues, the professional staff of the Agency, and the parties that would be affected, and the specific facts of the case at issue.

2. Do you believe Congress intended the National Labor Relations Act to apply to tribal businesses?

The National Labor Relations Act does not contain an express exclusion for tribal businesses, in contrast to certain other entities identified in Section 2(2) of the Act. In *San Manuel Indian Bingo & Casino*, the Board concluded that the Act could be applied to certain tribal businesses.

Question for Kent Hirozawa

RE: Notice Posting Rulemaking

1. The NLRB's 2011 rulemaking that requires employers to post a notice of only certain employee rights was invalidated recently by two federal courts. This notice rule emphasizes posters advertising an employee's right to unionize and collectively bargain but does not include information about the right for employees to object to the use of their union dues and fees to go towards political purposes. Do you defend the NLRB using a rulemaking to cherry pick what it requires employers to post when at least one study suggests 67 percent of workers are unaware of their right under the NLRA to withhold mandatory union fees for political purposes?

In its preamble to the final rule, published in the Federal Register, the Board addressed the issue that you raise. 76 Fed. Reg. 54023 (Aug. 30, 2011). The Board observed that the rights to which you refer (known as Beck rights) “apply only to employees who are represented by unions under collective bargaining agreements containing union-security provisions” and that “unions that seek to obligate employees to pay dues and fees under those provisions are required to inform those employees of their Beck rights” under existing Board precedent. The Board also stated that it “was presented with no evidence during this rulemaking that suggests that unions are not generally complying with their notice obligations.” In sum, the Board concluded that “because Beck does not apply to the overwhelming majority of employees in today’s private sector workplace, and because unions already are obliged to inform the employees to whom it does apply of their Beck rights, the Board is not including Beck notification in the final notice.”

Questions for Nancy Schiffer

RE: Congressional Oversight

1. In a 2012 presentation before the American Bar Association you authored a paper in your capacity as Associate General Counsel of the AFL-CIO suggesting that Congressional oversight of the National Labor Relations Board (NLRB) was “over the top.” Specifically, you noted that “information requests were rampant” and identified specific bills introduced in the House and Senate which you consider as attacks on the NLRB. Is

it your opinion that Congress does not have an institutional prerogative to conduct oversight over federal agency activities? Additionally, is it your opinion that Congress cannot consider legislation amending organic statutes including those which created the NLRB?

The Constitution grants Congress the authority to conduct oversight over federal agency activities and to amend statutes including the NLRA. My presentation did not state otherwise. I believe Congress has the right to consider such matters.