

Senator Johnny Isakson's Questions for the Record for NLRB Nominees

Questions for Kent Hirozawa

1. In your opinion, do you agree with the Board's decision to apply a decision concerning an acute nursing facility to all manner of industries, including those having nothing to do with medical or health care? For example, Bergdorff Goodman's in New York City as well as a Macy's outside of Boston are both facing serious fragmentations of their workforce because of the application of the *Specialty Healthcare* decision.

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. Moreover, the standard the Board adopted in *Specialty Healthcare* was enunciated by the United States Court of Appeals for the District of Columbia Circuit in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421-423 (2008), 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. During the hearing, when you were asked why the NLRB overruled decades of precedent in *Specialty Healthcare*, you stated that due to attorney-client confidentiality, you could not speak as to Chairman Pearce's views or your personal views at the time the decision was issued. You also stated that you could not pre-judge future questions. But you acknowledged that a department store with 35 different unions representing 35 different departments would be "disruptive" to labor relations. As such, my question is not about the past or the future, but rather about the present and the experience of employers living under the *Specialty Healthcare* decision. What is your personal opinion (not Chairman Pearce's) of the *Specialty Healthcare* decision at present (not when the decision was issued) in light of the reported fragmentation of bargaining units in several department stores, including Macy's and Bergdorf Goodman?

As I stated in my testimony at the July 23, 2013 hearing, my personal opinion of the Board's decision in *Specialty Healthcare* is, in a sense, a moot point: *Specialty Healthcare* is now Board law. (It is also the law of the United States Court of Appeals for the District of Columbia Circuit. In *Specialty Healthcare*, the Board expressly adopted the D.C. Circuit's standard enunciated 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.) I am therefore obligated to treat it as I would any prior Board precedent.

***Macy's* and *Bergdorf Goodman* are two cases currently pending before the Board. In each case, the employer and the union disagree over the appropriateness of the petitioned-for bargaining unit. It is the Board's obligation to determine whether the petitioned-for units are fragmented, that is, whether they would be appropriate without the inclusion of other employees. With respect, I do not believe that I can**

address those issues here consistent with my ethical obligations to maintain confidentiality regarding internal deliberations in pending cases.

3. There seems to be a very consistent theme of the Board's recent history. 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 three courts, one in South Carolina and two in DC, which 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 has become one that has had to be kept in check by the judicial branch. How can you assure to us that you will work in the spirit of impartiality that is supposed to be at the core of the Board's mission?

As I stated in my testimony before the Committee, if confirmed, I pledge to dedicate myself to the fair and even-handed enforcement of the commands of the National Labor Relations Act, consistent with Act's purpose of maintaining industrial peace. I would carry out my duties fairly and impartially and enforce the Act without bias or agenda.

Questions for Nancy Schiffer

1. In 2007, while you were at the AFL-CIO, your organization called for the NLRB to be “shut down” until a Democratic president could appoint a Board more favorable to organized labor. Ironically, in the past year, the same organization whom you used to work for called on the Senate to ensure that NLRB was a fully functioning Board. Should the Board’s existence merely be a matter of convenience to the agenda of organized labor?

No. I believe in the Act and in the mission of the National Labor Relations Act and I do not think it should be shut down.

2. In January 2012, when the Senate was in a pro forma session, President Obama “recess” appointed Sharon Block and Richard Griffin to the NLRB. Since then, three Federal circuit courts have ruled that the President’s recess appointments violated the Constitution and the Supreme Court is expected to hear arguments surrounding this issue in the near future. In your opinion, do you believe that the President acted responsibly and appropriately when he chose to appoint Ms. Block and Mr. Griffin during a pro forma session of the Senate?

The question of the January 2012 recess appointments is currently pending before the Supreme Court. Only the Supreme Court can answer that question, and it is not within my purview.

3. In a case involving Bergdorff Goodman, the Board’s regional director used *Specialty Healthcare* as the premise for allowing the Retail, Wholesale, Department Store Union to represent both full-time and regular part-time women’s shoes associates on the 2nd floor and 5th floor of the store. Wouldn’t common sense dictate that creating various, small collective bargaining units within the same workplace lead to increased labor relations costs as well as hostility among employees regarding wages, benefits and pensions? How does that help an employer stay in business? How does that create jobs?

The case involving Bergdorff Goodman is currently pending before the Board. I do not want to prejudge any case that may, if I am confirmed, come before the Board. I need the opportunity to review the record and consider the views of career Board staff, my colleagues, and the parties. I am aware of cases where employers have invoked *Specialty Healthcare* in support of their own positions regarding appropriate bargaining units, so it seems to depend on the specific facts of the case.

4. Do you believe that it is within the purview and Constitutional authority of the Congress of the United States to hold hearings, conduct investigations and deliberate matters in the interest of transparency and accountability?
 - If no, then please explain.
 - If yes, then please explain why at the 2012 American Bar Association Midwinter Meeting you characterized recent efforts by the Congress to conduct its responsibility of providing oversight of the NLRB as an “attack.”

I believe in the right and obligation of Congress to engage in oversight. In my presentation, I listed certain rhetoric, some of which was directed personally at the Acting General Counsel and career staff and was not attributed to Members of Congress or linked to any Congressional action which, in my opinion, constituted a personal attack and not a congressional inquiry.