

National Labor Relations Board Member Nominee: Mark G. Pearce
Senate Committee on Health, Education, Labor and Pensions
July 30, 2009

Questions for the Record: Senator Enzi

- 1) Have you discussed with any members of the Obama Administration, the transition team, any clients, or any other stakeholders the prospect of altering any National Labor Relations Board decisions, regulations or policies, or the prospect of taking steps to promulgate new policies or regulations?

ANSWER

I have had no such discussions.

- 2) What have you discussed possibly rescinding and/or promulgating? With whom have you discussed the prospect of rescinding or promulgating any such regulations? What has been the substance of each of those discussions?

ANSWER

I have had no such discussions.

- 3) Please describe your view of the overall role of the National Labor Relations Board. Do you have a general philosophy regarding the appropriate balance to be struck by the Board in weighing the importance of individual liberty versus collective rights in its decisions?

ANSWER

The National Labor Relations Board is an independent federal agency created by Congress to administer the National Labor Relations Act. The Board has two primary functions: to oversee the representation process by which workers decide whether they want to be represented for collective bargaining, and to decide cases alleging that a union or an employer has committed an unfair labor practice. The appropriate balance to be struck by the Board in weighing the importance of individual liberty versus collective rights in its decisions is determined on a case-by-case basis, within the parameters of the Act.

- 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? What standard would you apply in determining whether to overrule a prior Board decision?

ANSWER

The standards for the NLRB's application of precedent and interpretation of the NLRA are those that are consistent with Congress's intent, including its intent to give the Board a policy-making function. The Board should consider precedent very carefully and respect the principle of stare decisis. Nevertheless, the Board has the power to change so long as it adheres to the Act's fundamental principles and it fully explains the reasons that impel it to disagree with a prior decision.

This view has been reasonably articulated by the former Chair of the NLRB, Robert Battista. On December 13, 2007, testifying at a joint House-Senate hearing, Mr. Battista noted that:

The genius of the Act is that it sets forth enduring fundamental principles, and yet allows for flexibility and change. It accomplishes the former by setting forth fundamental principles in clear and compelling language. It accomplishes the latter by using broad language that gives the administering agency, the Board, the freedom and responsibility to make policy judgments within the parameters of those principles."

Mr. Battista went on to say:

[A] responsible Members realize the value of stare decisis – the value of having stability, predictability and certainty in the law. However, if a Member honestly believes that a prior precedent no longer makes sense, and that a change would be more in keeping with the fundamental principles [of the National Labor Relations Act] he/she can – and may feel obligated to – vote to change the law. To be sure, the values of stare decisis counsel against an onslaught of changes. But prudently exercised, change is proper and, indeed, was envisaged by Congress.

- 5) Do you believe the authority provided to the National Labor Relations Board under current law has been effective in enabling it to fulfill its purpose?

ANSWER

The authority provided to the National Labor Relations Board to fulfill its purpose is determined by Congress. I am aware that the question posed is the subject of discourse in the House and Senate at the present time. That is the appropriate forum for consideration of any changes to the statute. My role as a Board Member would be to apply the law as enacted by Congress whether it remains in its present form or as further amended.

- 6) Do you believe National Labor Relations Board supervised elections are fairly run currently?

ANSWER

The election process appears from my experience to be administered fairly by the NLRB. The Act recognizes, however, that certain conduct by employers, unions or employees in the course of the election campaign can interfere with a fair election and prevent employees from being able to freely exercise their choice about unionization. Whether a particular election was fair is determined by the Board on a case-by-case basis.

7) In your opinion, what changes could be made under current law to improve the union certification process?

ANSWER

I have no predisposed intentions as to what should be done, if anything, to improve the union certification process.

8) In your opinion, what changes could be made under current law to improve the union decertification process?

ANSWER

I have no predisposed intentions as to what should be done, if anything, to improve the union decertification process.

9) Please describe your view of the financial obligation an individual employed in a unionized workplace located in a non-right to work state owes to the union? What rights does that employee have to be informed of how union funds are being spent, and to control, limit and/or challenge use of his/her own dues contribution?

ANSWER

Except where it is prohibited by a state right-to-work law, the National Labor Relations Act permits unions and employers to negotiate so-called "union security" agreements under which all individuals in the bargaining unit represented by the union are required to contribute to the cost of representation by the union. Bargaining unit employees who choose to be non-member fee payers have rights under CWA v. Beck to limit their fee payments to collective bargaining activities and to avail themselves of procedures designed to ensure that such limitations are safeguarded.

10) Please describe your view of the financial obligation an individual employed in a unionized workplace located in a right to work state owes to the union? What rights does that employee have to be informed of how union funds are being spent, and to control, limit and/or challenge use of his own dues contribution?

ANSWER

In right-to-work states, the parties to a collective bargaining agreement are barred from negotiating union security clauses. Generally, there exists an “open shop,” where the payment of dues is optional for workers represented by the union. Individuals who choose not to join the union cannot be required to financially contribute to the cost of representation.

Bargaining unit members who choose to join the union have rights as union members relative to union administrative functions including financial issues that are set forth in the Labor Management Reporting and Disclosure Act (LMRDA), administered by the Department of Labor.

11) What is your opinion with regard to the appropriate level of employee control of union dues contributions? Do you have an opinion as to whether union members should be compelled to contribute to unions for purposes of political and lobbying expenses?

ANSWER

As stated above, the rights of bargaining unit employees who choose to join the union with regard to dues and other financial issues are generally covered by the LMRDA. Bargaining unit employees who choose to be non-member fee payers have rights under CWA v. Beck to limit their fee payments to collective bargaining activities and to avail themselves of procedures designed to ensure that such limitations are safeguarded.

The appropriate level of employee control of union dues contributions and the question of whether union members should be compelled to contribute to unions for purposes of political and lobbying expenses are matters that may be addressed by the National Labor Relations Board. If I am confirmed, such issues may come before me as a Board member. Therefore it would not be appropriate to address these issues in this context.

12) What is your view of preemption under the National Labor Relations Act? Do you support the continued validity of both *Garmon* and *Machinists* preemption? Do you support the Supreme Court's decision in *Chamber v. Brown*? Do you believe state or local government attempts to restrict private employer speech as to unionization are generally preempted by the NLRA?

ANSWER

The Supreme Court held that when conduct is “arguably subject to § 7 or § 8 of the Act,” federal law preempts state regulation on the subject. Under Garmon preemption, the “NLRA’s preemptive orbit proscribes not just actual conflict with state law, but also state action that attempts to regulate conduct that is arguably either protected or prohibited by the NLRA.”

The Supreme Court articulated the Machinists preemption doctrine in Lodge 76, International Association of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission. In that case, the Supreme Court stated that although the NLRA may not address specific economic weapons available to unions and employers, “Congress meant that these activities . . . were not to be regulable by States” When Congress enacted the NLRA, it left certain areas of conduct unregulated, “to be controlled by the free play of economic forces.” Machinists preemption, then, is the doctrine preempting state regulation of labor relations “intentionally left unregulated” by Congress.

I believe that the National Labor Relations Board should adhere to Supreme Court decisions as they apply to issues before the agency, including Chamber v. Brown and the above noted cases.

- 13) Does current law adequately protect an employee’s ability to choose whether or not to join a union in an environment free from harassment on the part of union organizers? If so, how so? If not, how not?

ANSWER

I am aware that the question posed is the subject of discourse in the House and Senate at the present time. That is the appropriate forum for consideration of any changes to the statute. My role as a Board Member would be to apply the law as enacted by Congress whether it remains in its present form or is further amended.

- 14) What role do you believe a union that does not represent the majority of employees in a workplace should have under the National Labor Relations Act?

ANSWER

Under current NLRB statute and doctrine, the legally designated majority representative of the bargaining unit is its exclusive representative regarding terms and conditions of employment. It is my understanding that there is an application before the NLRB which raises issues related to representation by a union that does not represent a majority. It would be inappropriate for me to comment on a subject that may be placed before me if I am confirmed as a member of the Board.

- 15) Do you believe employers should be involved in representation elections and proceedings regarding such elections before the Board? Would you maintain their current rights to petition the Board, expand those rights or reduce those rights? Which if any changes could be implemented without legislation?

ANSWER

Under current NLRB statute and doctrine employers are involved in representation elections and proceedings. As noted above, I have no predisposed intentions as to changes, if any, that should be made in the representation process. The right of employers to petition the Board for elections is established by statute in section 9(c)(1)(B) of the Act. Changes to this provision would have to be made through legislation.

16) What changes have you advocated or do you advocate regarding the filing of unfair labor practice charges in the wake of an election in which a union is certified? Can any of these changes be accomplished under current law?

ANSWER

While I have represented clients who have filed unfair labor practice charges in the wake of elections where a union is certified, I have not advocated for systemic changes in that regard. As noted above, I have no predisposed intentions as to changes, if any, that should be made in the representation process.

17) What changes have you advocated or do you advocate with regard to the legality of primary, secondary and intermittent strikes and treatment of participating employees? Do you believe any of these changes can be accomplished under the current National Labor Relations Act?

ANSWER

While I have represented clients involved in issues related to primary and secondary strikes and the treatment of participating employees, I have not advocated for systemic changes in that regard. I have no predisposed intentions regarding changes in the law, if any, that should be made in this area.

18) In your opinion, are there aspects of foreign labor law that give employees superior ability to self-organize and bargain collectively? If so, please describe. Would you favor adopting any aspects of foreign labor law in the United States? If so, are there any aspects that could be adopted without legislative changes to the National Labor Relations Act?

ANSWER

Whether any concepts derived from foreign law are incorporated into future statutory schemes is the province of Congress. My role as a Board Member would be to apply the law as written by Congress whether it remains in its present form or is amended.

19) According to National Labor Relations Board statistics, unions have won a majority of all certification elections since 1997 and won over 66 percent last year with the total number of elections up also. Additionally, the percentage of elections that are “re-run” because of employer misconduct has dropped to under 1 percent. The median time period from presentation of a petition to election is reported to be 39 days. How do you interpret these statistics?

ANSWER

I currently do not have enough information on the overall context from which these statistics are extracted to have formed any particular opinion about their significance.

20) Do you believe that the National Labor Relations Board’s current definition of supervisory employee is broad enough? What do you believe is the meaning of the Supreme Court’s decision in *Kentucky River*? Do you believe the NLRB’s subsequent trio of decisions applying *Kentucky River* were appropriately decided?

ANSWER

Kentucky River is the Supreme Court’s most recent statement on the subject of supervisory employees. At present, it is the law of the land and must be followed by the Board. There are numerous cases pending before the Board raising issues relative to the scope of supervisor status. Accordingly, it would be inappropriate for me to comment on this subject.

21) Currently the National Labor Relations Board provides a small business exemption, but it is so outdated that it covers very few employers. Would you support expanding or restricting this exemption? Do you support a continued small business exemption? What do you think would be an appropriate level for a small business exemption?

ANSWER

The Supreme Court has held that the NLRB has broad discretion to set jurisdictional standards within the parameters of the interstate commerce clause. In 1959, however, Congress amended the Act to impose some limitations to that discretion in the wake of certain shifting jurisdictional determinations. One significant effect of this amendment is that the NLRB is prohibited from exempting classifications of employers over which it would have asserted jurisdiction under the prevailing standards of August 1, 1959. It is the province of Congress to make any changes to this law. My role as a Board Member would be to apply the law as written by Congress whether it remains in its present form or is amended.

22)Do you believe that current National Labor Relations Act remedies are sufficient to deter unfair labor practices by unions?

ANSWER

I am aware of concerns that the National Labor Relations Act provides inadequate remedies to adequately achieve deterrence. However, it is the province of Congress to make changes to this law. My role as a Board Member would be to apply the law as written by Congress whether it remains in its present form or is amended.

23)Do you believe that current National Labor Relations Act remedies are sufficient to deter unfair labor practices by employers?

ANSWER

As stated in the previous answer, I am aware of concerns that the National Labor Relations Act moves slowly and provides inadequate remedies to adequately achieve deterrence. However, it is the province of Congress to make changes to this law. My role as a Board Member would be to apply the law as written by Congress whether it remains in its present form or is amended.

24)Do you believe a legal representative's ideology is relevant to his/her ability to represent a client before the Board?

ANSWER

No.

25)What do you believe are allowable activities that a union can engage in that do not violate the secondary boycott restriction under the NLRA? What do you believe are activities that would violate the secondary boycott restriction? Would you advocate any changes? What is your view of what is known as bannerng?

ANSWER

I am not predisposed to a particular position on these issues. Should I be confirmed, and should such an issue arise before the Board, I would examine the facts and the relevant statutes and precedent before reaching a decision. Given that questions relating to bannerng and the other above issues may be placed before the Board while I am serving as a member, if I am confirmed, I feel that it would be inappropriate for me to comment on these subjects.

26)The National Labor Relations Board's strategic planning process focuses, in part, on setting goals and performance measures. These efforts include establishing

performance goals and measures. What strategic planning experience do you have that might assist the Board in improving its planning processes?

ANSWER

As a founding partner in my law firm, I created a business plan for our office to manage clients, manage finances, market the firm, prioritize work, and set performance goals for associates and partners. I was asked by Chief Justice Judith Kaye to serve on the New York State Office of Court Administration's Commission on Small Firms and Solo Practice. Among the goals of that commission was to provide recommendations and guidance to small firms and the Courts of New York State regarding firm organization, training, practice before the courts, and opportunities for greater mutual benefit. I have participated in local bar procedure and planning committee groups in partnership with the Buffalo NLRB office, and with the American Bar Association's Committee on Procedure and Practice before the NLRB in partnership with the NLRB. As a board member of the New York State Industrial Appeals Board I also provided input on that board's procedures, including evaluation of overall case management and hearing practices. Finally, for decades I have sat on numerous boards in the Western New York area and have participated in the creation of long term financial planning, membership drives, and goal-setting for these organizations.

27)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?

ANSWER

As noted above in my response to question twenty-six, as a principal partner in my firm I evaluate on a regular basis the effectiveness of the office. My board participation with organizations calls for evaluating the strengths and weaknesses of the organizations. I would not, however, suggest actions the Board should take to improve the effectiveness of its programs without being privy to all the information that would be necessary for a full and fair evaluation.

28)What 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? Please explain why you feel the metrics you identify are appropriate under the National Labor Relations Act.

ANSWER

I do not have a comprehensive view as to which metrics should be used to evaluate the effectiveness of the Board. However, because one of the purposes of the Act is to prevent the commission of unfair labor practices by both employers and unions, I believe it is appropriate to take that goal into account in measuring the effectiveness of the Board. With respect to the bargaining of first contracts, I am aware that General Counsel Meisburg has issued a memorandum (GC-7-08) in which he noted that “initial contract bargaining constitutes a critical stage of the negotiation process” and that “[u]nfair labor practices by employers and unions during this critical stage may have long-lasting, deleterious effects on the parties’ collective bargaining and frustrate employees’ freely-exercised choice to unionize.” In that memorandum, he identified additional remedies to be considered when unfair labor practices occur during bargaining for an initial contract.

29)What is your opinion of binding interest arbitration? Do you believe the government would be as effective at deciding the appropriate terms for a collective bargaining agreement as employers and employees through their representative?

ANSWER

In my own experience, in circumstances in which bargaining breaks down despite efforts by the parties, interest arbitration can provide an incentive to parties to reach their own agreement and, if that fails, to reach an agreement with the help of an impartial arbitrator.

I am also aware that this is an issue currently under consideration by Congress. If confirmed, my role as a Board Member would be to apply the law as written by Congress whether it remains in its present form or amended.

30)What is your opinion of unions and employers negotiating terms and conditions of a contract before the union achieves majority recognition? Would you favor any sort of required disclosure to employees of proposed contract terms prior to a vote or other recognition of the union?

ANSWER

It is my understanding that there are cases pending before the Board raising issues relative to this issue. Accordingly, it would be inappropriate for me to comment on this subject.

31)Do you believe employers can hire replacement workers during a strike under the National Labor Relations Act? Would you advocate changing this and if so how? Do you believe this can be altered by the Board without legislative action?

ANSWER

It is well established under current law that employers, under certain conditions, can hire replacement workers during a strike. It is my understanding that a prohibition against the hiring of replacement workers would require legislative action. If confirmed, my role as a Member of the NLRB would be to apply the law as written by Congress whether it remains in its present form or is amended.

32)What is your opinion of the Labor-Management Reporting and Disclosure Act's requirements for democratic secret ballot elections for union officers and transparency? Do you support the mandatory disclosures and transparency requirements, including the obligation to provide financial records to union members upon request?

ANSWER

I support the requirements of the Labor-Management Reporting and Disclosure Act relating to election of officers and financial disclosures of labor organizations. These requirements were set by Congress and are not enforced by the NLRB.

Mark G. Pearce, Nominee for National Labor Relations Board

**Response to Questions for the Record for Senator Isakson
Senate Health, Education, Labor and Pension Committee**

1. Please describe your role at your current employer with regard to providing legal services related to labor organizing, including any involvement with the National Labor Relations Board (NLRB). Do you provide advice on representation issues or unfair labor practice litigation to individual locals, nationals, internationals, or intermediate bodies of unions? Do you provide strategic advice or coordinate litigation and/or supervise other lawyers involved in individual cases before the NLRB?

Answer

As a labor attorney I provide advice on representation issues and unfair labor practice litigation to individual locals, nationals, internationals, and intermediate bodies of unions. I have represented labor organizations regarding the filing of representation petitions, representation hearings, the negotiation of stipulations to elections, and the filing and litigation of unfair labor practice cases. I occasionally provide advice on litigation and have supervised associates in my firm involved in cases before the NLRB.

2. To the fullest extent possible, please describe your representation of Mr. Frank Ervolino and the union(s) he served in. What led you to believe that the several hundred union members who reportedly petitioned for access to financial records were not entitled to those documents? Did you have any involvement in representing Mr. Ervolino in the criminal investigation that led to his and his wife's indictment? Were you questioned by investigators as part of that investigation?

Answer

I did not represent Frank Ervolino at any time. Fourteen years ago, while I was with the law firm of Lipsitz Green Roll Fahringer Salisbury and Cambria, I represented the Hospital and Nursing Home Council, a labor organization of which Mr. Ervolino was president. I recall generally that I was involved in coordination of an internal union election and oversight of compliance with the election rules. I do not have a specific recollection of the circumstances discussed above, but I assume that any legal conclusions I drew were based on my understanding of the facts and the applicable legal principles. I

provided no legal representation regarding criminal matters and was not questioned by investigators in connection with any such matters.

3. Have you represented other union officials that later were indicted or convicted of racketeering or embezzlement or have you represented unions where an indictment or information was brought alleging such activities had occurred? Were any convictions entered or pleas entered by your clients? Please describe the nature of your work.

Answer

I have not represented any such union officials. I did represent Local 17 of the International Union of Operating Engineers in a representation proceeding before the NLRB. Subsequent to my representation, I believe officials of Local 17 were indicted for matters unrelated to my representation. I have no knowledge of what transpired subsequent to these indictments as I did not provide legal representation in these matters. I am not aware of any other instances in which I represented a labor organization with officials that were subsequently subject to indictment or conviction for racketeering and/or embezzlement.

4. Have you performed work for ACORN or ACORN-affiliated groups? Has your law firm performed work for ACORN or any of its affiliate groups? Please describe the nature of your work.

Answer

To the best of my knowledge, neither I nor my law firm has performed work for ACORN or ACORN-affiliated groups.