

Senator Richard Burr's Questions for the Record for NLRB Nominees

Questions for Nancy Schiffer

1. If you are ever served with a Congressional subpoena, will you commit to complying with said subpoena to the satisfaction of the issuing authority?

I will make every effort to comply with any Congressional subpoena.

2. Your public financial disclosure form lists pensions with AFL-CIO and UAW that provide you with monthly financial benefits. Do you plan to recuse yourself from all rulemakings and other matters that would have a direct financial impact on the AFL-CIO and UAW?

I take my ethical obligations very seriously. This includes any obligation that I may have to recuse myself from a specific case. I will fully comply with the ethics agreement I have entered into with the NLRB and with the standards of recusal applicable to executive branch officials set forth in 5 CFR 2635 and in Executive Order No. 13490. If any particular matter brought before me raises a question about my ethical obligations, I would consult with the Designated Agency Ethics Official (DAEO) at the National Labor Relations Board. It is my understanding that if I am confirmed to the Board, before I am sworn in, I will be fully briefed on all of applicable ethical guidelines. I pledge that I will make every effort to fully comply with all of them.

I am receiving retirement benefits from the International Union, UAW and the AFL-CIO. Because I will continue to participate in these defined benefit plans, I will not participate personally and substantially in any particular matter that will have a direct and predictable effect on the ability or willingness of either entity to provide me with this contractual benefit, unless I first obtain a written waiver under 18 USC 208(b)(1), or qualify for a regulatory exemption under 18 USC 208(b)(2).

3. What is your justification for your statement that the AFL-CIO is seldom before the Board? The record is replete with organizations under the authority of the AFL-CIO coming before the Board. The NLRB's website's Case Search engine calls up over 100 pages of results listing specific parties identifying themselves as AFL-CIO organizations.

Various unions that come before the Board are affiliated with the AFL-CIO, but that does not make the AFL-CIO a party to a case. Likewise, the Chamber of Commerce does not become a party by virtue of one of its members coming before the Board.

The reason a search of the NLRB's website finds cases listing the AFL-CIO is that affiliated unions and their locals include the name of the AFL-CIO to indicate the affiliation of their national union. There is a well-established body of law, including decades-old Supreme Court precedent, that the voluntary unincorporated association which is the AFL-CIO and those national unions which are its affiliates constitute legally separate and distinct entities.

4. In your experience as a lawyer, how frequently do you see an agent of a party in an ongoing dispute be made a judge in such disputes?

I have not, in my own experience as a lawyer, frequently seen a representative of a party in a particular case be called upon to adjudicate the particular case in which s/he represented one of the parties.

However, I have seen multiple situations where advocates become adjudicators. For example, many NLRB Board Members have come from private practice where they represented employers and the Chamber of Commerce. I do not anticipate that any of my fellow nominees will be biased or unduly influenced by their experiences working for management-side law firms representing employers and the Chamber of Commerce, or that Chairman Pearce would be biased based on his prior work history, my work experience will not inhibit me from being a neutral arbiter of the law.

5. Chairman Harkin said, based on his reading of an introductory portion of the NLRA that the job of the NLRB is to encourage collective bargaining. Do you share his belief or do you believe a more complete reading of the law says that the NLRB should be fair arbitrator between the parties in dispute and should protect the rights of employees to either choose or reject unions?

I agree with both articulations and do not think they are inherently in conflict. Chairman Harkin correctly quoted from the preamble to the Act; and the Act, in Section 7, protects, *inter alia*, the rights of employees to refrain from engaging in activities articulated therein.

6. Do you believe employers should have a right to legal counsel regarding unionization matters?

I believe that employers should be free to retain legal counsel to represent them if they so choose.

7. Could you provide three instances in your career where you have taken a stance in opposition to a union?

While I was employed by the International Union, United Auto Workers and by the AFL-CIO, I occasionally represented both entities in their capacities as employers and advised them on internal grievance matters. During the course of such grievance procedures, I represented my client in positions taken in opposition to the labor unions.

As a Field Attorney of Region 7 of the National Labor Relations Board, I brought picket line injunction cases against unions, I investigated unfair labor charges against unions, and I prosecuted at least one discharge case against a labor union.

Also during my tenure with Region 7, I recall issuing a decision in an NLRB post-election objection case in which I dismissed objections to conduct affecting an election, which had been filed by a union.

8. You've stated that you recognize the difference between being an advocate and being an arbitrator. Could you name three policy positions you were required to speak for as an employee of the AFL-CIO which you do not currently hold?

The fact that as an employee of the AFL-CIO I advocated specific policy positions does not mean that if I am confirmed as a Member of the NLRB that I would not be a neutral arbiter of the law. Regarding specific policy positions for which I advocated as an employee of the AFL-CIO, the advocacy and advice I provided are subject to attorney-client privilege and I cannot elaborate on internal deliberations I engaged in with my client. If I am confirmed as a Member of the National Labor Relations Board, I will approach cases with an open mind, carefully consider the specific facts and arguments presented, seek out the experience and expertise of career Board staff, engage in collegial and productive discussions with my colleagues on the Board to have the benefit of their experience and knowledge, and fairly consider the issues presented. I know the difference between advocating on behalf of my client, having personal viewpoints, and fairly applying the law. I am committed to doing the latter if I become a Member of the National Labor Relations Board.

9. Public-sector/public safety employees can be prohibited from volunteering due to employment contracts. The AFL-CIO has supported these clauses. Do you believe that such clauses are ever appropriate regardless of whether or not an organization is governed by the National Labor Relations Act?

The National Labor Relations Act does not apply to public sector/public safety employees and I do not believe that it speaks to this issue which would be governed by state law and the Fair Labor Standards Act.

I am not familiar with this issue and do not believe I have ever taken a position relating to this issue.

10. Do you believe threats of physical violence by pro-union supporters is ever acceptable? Do you consider such behavior to be coercive and an unfair labor practice?

I believe that threats of violence are not acceptable and are coercive. Whether the threats constitute an unfair labor practice would depend on whether they were made on behalf of an employer or a union and on the objective in making the threat. The unfair labor practices set forth in the National Labor Relations Act apply to conduct by employers and unions. Threats by individuals are a matter for local law enforcement.

11. Do you envision a scenario in which you would support an effort by employees to preserve an open shop?

I would neutrally enforce the National Labor Relations Act to protect employees engaged in protected activity without regard to their support for or opposition to union organizing or membership. I would approach any case that raised the issue presented in your question based on the facts of the case and the applicable law.

Questions for Kent Hirowzawa

1. If you are ever served with a Congressional subpoena, will you commit to complying with said subpoena to the satisfaction of the issuing authority?

I will make every effort to comply with a Congressional subpoena.

2. In your experience as a lawyer, how frequently do you see an agent of a party in an ongoing disputes be made a judge in such disputes?

It would be highly unusual for an agent of a party in ongoing litigation to be made a judge in that case. I don't believe I have ever seen such a case. In addition, the ethical rules applicable to judges require a judge to recuse him or herself from adjudicating a case based on certain prior or ongoing relationships with a party to the case.

I take my ethical obligations very seriously. This includes any obligation that I might have to recuse myself from a specific case. If any case or issue brought before me raised a question about my ethical obligations, I would consult with the Designated Agency Ethics Official (DAEO) at the National Labor Relations Board, and, if advisable with the Office of Government Ethics (OGE). It is my understanding that if I am confirmed to the Board, before I am sworn in, I will be fully briefed on all of applicable ethical guidelines. I pledge that I will fully comply with all of them.

3. Chairman Harkin said, based on his reading of an introductory portion of the NLRA that the job of the NLRB is to encourage collective bargaining. Do you share his belief or do you believe a more complete reading of the law says that the NLRB should be fair arbitrator between the parties in dispute and should protect the rights of employees to either choose or reject unions?

The National Labor Relations Act states very clearly that the policy of the United States is to promote the free flow of commerce by encouraging collective bargaining. The NLRB's statutory duty is to implement and enforce the Act consistent with that policy. The NLRB is charged with protecting all the rights that employees, unions, and employers have under the law, including the right of employees to choose whether or not to be represented by a union. The NLRB is designed to be a neutral arbiter of disputes that arise under the Act.

4. Do you believe employers should have a right to legal counsel regarding unionization matters?

The National Labor Relations Act does not require parties coming before the NLRB to retain counsel, but any party who wishes to be represented by counsel in such matters is of course welcome to be so represented.

5. Could you provide three instances in your career where you have taken a stance in opposition to a union?

Local 32B-32J, Service Employees International Union, AFL-CIO (Pritchard Services, Inc.), Case No. 2-CB-1513 (charge filed, complaint issued, hearing held 1986). The charge was filed by an individual employee against the union alleging that the union had caused the employer to discriminate against her with respect to bumping rights for reasons other than failure to tender periodic dues and initiation fees. As a Board attorney, I investigated the charge, the regional director issued a complaint against the union, and I litigated the Board General Counsel's case against the union in a hearing before an administrative law judge and filed a post-hearing brief urging that the judge find a violation by the union.

Regional Import & Export Trucking Co. and Truck Drivers Local No. 807 a/w International Brotherhood of Teamsters, 318 NLRB 816 (1995), 323 NLRB 1206 (1997). I litigated the compliance stage of this case on behalf of a group of truck drivers and warehouse workers against a trucking company and a local union. The two respondents were held jointly and severally liable for back pay and interest totaling over \$1 million.

Rabbitt v. Gallo, No. 01-CV-7583 (NG) (E.D.N.Y. 2001). I filed a lawsuit in federal district court against a union on behalf of several members, seeking an injunction requiring the union to place on the ballot a candidate for union office who had been ruled ineligible to run.

6. Public-sector/public safety employees can be prohibited from volunteering due to employment contracts. The AFL-CIO has supported these clauses. Do you believe that such clauses are ever appropriate regardless of whether or not an organization is governed by the National Labor Relations Act?

To the best of my understanding, the National Labor Relations Act does not address the issue that you raise, nor am I familiar enough with the issue to have formed an opinion.

7. Do you believe threats of physical violence by pro-union supporters is ever acceptable? Do you consider such behavior to be coercive and an unfair labor practice?

Under existing case law under the National Labor Relations Act, threats of physical violence by pro-union supporters may be, depending on the circumstances (including the identity of the persons making threats and the credibility of the threats), objectionable conduct requiring a representation election to be set aside and may also be an unfair labor practice. I believe that such behavior can be coercive and an unfair labor practice.

8. Do you envision a scenario in which you would support an effort by employees to preserve an open shop?

As a Board Member, my responsibility would be to neutrally adjudicate any case that presented the issue you raise, based on the record evidence and applicable law.