Senator Tim Scott's Questions for the Record for NLRB Nominees

Questions for Kent Hirozawa

1. In your testimony, you vowed to dedicate yourself "to the fair and even-handed enforcement of the commands of the Act, consistent with the Act's purpose of maintaining industrial peace." However, the Board has pursued rulemakings that represent a gross overreach of the NLRB's statutory authority under the NLRA. The "Notice Posting Rule" issued in 2011 was struck down by the U.S. Court of Appeals for the Fourth Circuit for this very reason. The Court held that the Board "exceeded its authority in promulgating the challenged rule" and that the NLRA "only empowers the Board to carry out its statutorily defined reactive roles in addressing unfair labor practice charges and conducting representation elections upon request."

    - Given that support of the "Notice Posting Rule" would contradict a commitment to work within the bounds of the Act in an impartial and reactive manner, as a Board member will you support the rulemaking going forward?

      The "Notice Posting Rule" remains the subject of ongoing litigation. The issue of how the Board should proceed with respect to the rule is a pending issue that must be deliberated and decided by the full Board. If confirmed, I would give the issue careful consideration, in consultation with my fellow Board members and the Board's professional staff.

    - Do you think the Board has used its resources efficiently by pursuing unprecedented rulemakings that have been repeatedly challenged and struck down in federal courts?

      Rulemaking by the Board is not unprecedented. The Board has issued procedural rules on dozens of occasions. It has also issued a significant rule, the Health Care Rule, that was challenged in the federal courts, but ultimately upheld by the Supreme Court. The litigation involving recent Board rules remains ongoing. I believe that rulemaking is an appropriate exercise of the Board's statutory authority and that the Board has used its resources efficiently in this area.

    - You indicated in your nomination hearing that following the aftermath of the litigation surrounding these rulemakings, "there are lessons to be learned for a new Board." Please elaborate further on what those lessons are in your opinion and how you will incorporate them as a Board member.

The lessons to be learned from recent rulemaking include the importance of seeking broad public participation in the process, which I believe that the Board successfully achieved by holding public hearings and by accepting public comments electronically, as well as the importance of carefully considering and addressing the public comments received, which I believe that the Board did.

If I become a Board member, I would favor a discussion with all of my colleagues concerning the conclusions to be drawn from the litigation.

2. The Board under this Administration has not acted as a neutral arbiter and has pursued numerous decisions that upend decades of precedent. You have indicated on multiple occasions that precedent is imperative for stability and should only be overturned in the rarest of circumstances.

   - Please identify which of the below Board decisions meet that rare instance in which you believe precedent should be overturned:

     - 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)

   With respect, I do not share your view that the Board has "not acted as a neutral arbiter." I do believe that reversals of precedent should remain relatively rare and should always reflect careful consideration. Examples of cases in which the Board may well be justified in reversing precedent are where existing Board law lacks a clear and coherent rationale and/or where the Board has been directed by a federal court to reconsider its approach to a particular legal issue.

   Of the decisions cited above, *IronTiger Logistics*, *United Nurses and Allied Professionals (Kent Hospital)*, *Hispanics United of Buffalo*, *Karl Knauz BMW*, *Dish Network*, and *Fresenius USA Manufacturing*, 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).

2. In your nomination hearing, you agreed that micro-unions would make labor relations much more complicated. Can you please describe what you believe is an appropriate bargaining unit?

   Section 9(a) of the National Labor Relations Act begins as follows: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for bargaining for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment …." Section 9(b) begins as follows: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof …." Since the passage of the Act, the Board and the federal courts have developed an extensive and detailed body of law interpreting those provisions to determine what constitutes an appropriate unit for bargaining. That body of law is best summed up by the term "community of interest." Employees have a community of interest, such that they constitute an appropriate for bargaining, if they have substantial mutual interests in wages, hours, or other conditions of employment.

3. Do you agree with the Board's decision in *Specialty Healthcare*? Please answer yes or no.

   With respect, I do not believe that I can answer that question consistent with my ethical obligations to maintain confidentiality regarding advice I gave to then-Member Pearce at the time the Board was considering *Specialty Healthcare*. In addition, and as I believe I stated at my confirmation hearing, whether I agree with 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.

Questions for Nancy Schiffer

1. Ms. Schiffer, you asserted in 2010, "We really need to streamline the election process and eliminate so much delay that is now built into the National Labor Relations Act process."

    - How can you feel this way, given that the median election time is 38 days, which according to the Acting General Counsel's FY2011 Summary of Operations is "below [the] target median election time of 42 days?"

    I testified and made statements about the election rule in my capacity as an advocate for the AFL-CIO. I fully understand the differences in the role of an advocate and a neutral arbiter of the law. In testimony I gave in 2004, I referenced a specific case in which an election was conducted soon after a petition for representation was filed and in which approximately 500 workers chose union representation by an almost 100 vote margin. Yet those workers were not able to be represented or engage in collective bargaining for six and one half years because of post-election litigation brought by the employer. That case was recounted in my testimony for the purpose of illustrating that, in that case, conducting an election within the Board's target median election timeframe that resulted in the selection of union representation did not insure that the election process was not fraught with delays. Whether the election process is fair depends on the circumstances in which the process is conducted.

    - 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?

    As I understand it, the Board's proposed election rule does not set any minimum or maximum time in which an election must be held. This issue may come before the Board and therefore it is inappropriate for me to prejudge it. I have no preconceived agenda. If presented with such positions, I will consider them with an open mind and make my decision based on the facts of the particular case and in consultation with my colleagues and career Board staff and with due consideration to the positions of the parties and the facts of the case.

    - How can you portray the election process as riddled with intimidation and lacking protections for workers seeking to organize when the facts suggest just the opposite?
        - Unions won 66% of elections in 2009, up from a 51% success rate in 1997.

Again, in testimony I gave in 2004, I referenced a specific case in which an election was conducted soon after a petition for representation was filed and in which approximately 500 workers chose union representation by an almost 100 vote margin. Yet those workers were not able to be represented or engage in collective bargaining for six and one half years because of post-election litigation brought by the employer. That case was recounted in my testimony for the purpose of illustrating that, in that case, conducting an election within the Board's target median timeframe that resulted in the selection of union representation (i.e., within the 66% statistic) did not insure that the election process was not fraught with delays. Whether the election process is fair depends on the circumstances in which the process is conducted.

- However, the NLRB only accepted 44% of employee petitions to hold decertification elections in FY2010, down from 54% in FY2007.

It is my understanding that the Board will accept any timely petition to hold a decertification election where there is a sufficient showing of interest.

- Given your extensive partiality towards unions and your characterization of the NLRA as a "sword which is used by employers to frustrate employee freedom of choice" that "no longer protects workers' rights to form a union," can you commit to carry out the mission of the Act in a neutral manner?

If confirmed, I would take my role as a neutral adjudicator of the law very seriously. I pledge that if I was confirmed as Board Member, I will apply the law impartially to all parties that come before the Board with no preconceived agenda and make sure that cases are decided in a fair and expeditious manner.

2. You extensively rebuked two critical functions of Congress, oversight and legislative, in your "Congressional Review of the National Labor Relations Board: Oversight or Over-the-Top." By characterizing my House Republican colleagues and me as being on a "meandering witch hunt" against the NLRB, you made a broad presumption that House oversight activities were unfounded. Are you aware that the subpoena for emails of the Office of General Counsel relating to the Boeing case revealed troubling violations of the NLRB's own *ex parte* rules, the separation principle between the Office of General Counsel and the Board, as well as an extreme lack of professionalism and neutrality?

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. If confirmed, I pledge to cooperate with Congressional inquiries and oversight.

3. Since you have so openly discussed your views on the Boeing case, please confirm whether or not you believe that a company located in a non-Right-to-Work state, in this case Boeing, seeking to expand and create new jobs in a Right-to-Work state should be charged with an unfair labor practice when no jobs were lost.

   I do not believe that a company located in a non-Right-to-Work state seeking to expand and create new jobs in a Right-to-Work state should be charged with an unfair labor practice on that basis alone. Whether the company's actions could be alleged to have violated the National Labor Relations Act would depend on other facts and circumstances.