QUESTIONS SUBMITTED FOR THE RECORD

BRIAN HAYES

NOMINEE FOR THE NATIONAL LABOR RELATIONS BOARD

1. Please describe your duties and accomplishments as the Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions.

   The Republican Labor Policy Director works directly for the Chairman/Ranking Republican on the HELP Committee. For the entirety of my tenure that has been Senator Enzi (R-WY). The Policy Director is responsible for providing professional advice and expertise to the Chairman/Ranking Member in conjunction with his or her given policy area and assisting the Chairman/Ranking Member in formulating and effectuating the Member's policy with respect to legislative matters.

   Since the work of the Committee is that of its Members, and is collegial in nature, I do not regard successful legislative initiatives as personal accomplishments. However, during my tenure with the HELP Committee there have been some notable Committee accomplishments in the legislative arena including passage of The MINER Act, the first comprehensive reform of federal mine safety law in three decades, passage of the Americans with Disabilities Amendments Act, and passage of minimum wage legislation. The Labor Policy office was involved in each of these legislative efforts.

2. In your experience in the private sector, did you ever represent a labor union? If so, please describe the circumstances surrounding your representation.

   Answer: In the field of private sector labor and employment law the bar is traditionally divided between practitioners that exclusively represent unions and/or individual employees, and those that represent employers. This division exists for practical reasons, and, in large part, stems from the necessity to avoid actual or perceived conflicts of interest. My practice was confined to representing employers.

3. In your experience in the private sector, did you ever represent an individual or group of employees in an adversarial proceeding against an employer? If so, please describe the circumstances surrounding your representation.

   Answer: No. Please see response to Question 2.

4. How many clients have you advised during a union organizing campaign? During how many of those campaigns were unfair labor practice charges filed?

   Answer: Based on my best recollection I would estimate that I have advised clients in approximately fifty organizing campaigns, most of which resulted in an NLRB-supervised election. In those instances which did not result in a Board election, I would approximate that unfair labor practice charges were filed in only two or three instances. In those campaigns that proceeded to election I would estimate that unfair labor practices were filed in less than half of those cases. In a significant majority of those instances the charges were determined to have no merit. To the best of my recollection I have not represented an employer during an organizing campaign in which it was determined that the employer engaged in any objectionable conduct requiring that the election results be set aside.

   As noted, the foregoing response is based on my best recollection. I began my private sector career in 1976; and thus, the records from which some of the specific information sought by question 4 encompass a more than 33-year long period. The vast majority of these records are not in my possession or control. These records are located and/or archived at multiple out-of-state sites; and, in a large number of cases, pursuant to the record retention policies of my former law firms, have been returned to the clients to whom such records belong.

5. Have you ever advised a client to voluntarily recognize a union upon demand from a majority of workers? Have you ever advised a client to enter into a neutrality agreement with a union? In what circumstances do you think that an employer should voluntarily recognize a union?

   Answer: The use of neutrality agreements and the incidence of voluntary recognition have both increased in recent years at a time when I have not been engaged in private practice. My experience, however, would suggest that matters such as voluntary recognition and/or entry into a neutrality agreement would be

the result of a client's wishes, not counsel's advice. I have not had occasion to advise either of these options.

Such recognition would clearly have to be lawful; however, beyond that requirement, I have no opinion as to what additional hypothetical facts or combination of facts might or might not suggest to an individual employer the propriety of voluntary recognition.

6. How many clients have you advised concerning National Labor Relations Board-run elections? During how many organizing campaigns in which a petition for an election was filed did your clients demand a pre-election hearing? For each such hearing, please describe the issues raised by your client, the outcome of each issue (including any attempted appeals from the Regional Director's decision), and the total amount of time between the filing of the election petition and the date of the election.

   Answer: Based on my best recollection, I would estimate that I have advised clients in approximately forty to fifty Board-supervised elections. I would further estimate that a significant majority of those resulted from stipulated election agreements without the necessity of a hearing. Cases in which the Regional relevant Office(s) conducted a hearing typically involved issues relating to the appropriate unit placement of broad categories of employees, the scope of the proposed bargaining unit, and/or the statutory status of individuals or employee classifications. Again, based on my recollection, the general average case processing time for Representation Case petitions during the years I was in practice ranged from approximately 40 to 56 days for stipulated and litigated cases, respectively. To the best of my recollection, with the exceptions noted below, the cases in which I was involved fell within this general average range. I do not recall representing an employer in any Representation Case in which an Employer's Request for Review of a Regional Director's Decision and Direction of Election resulted in any postponement or extension of the scheduled election date. I did represent a few health care clients in Representation Cases that arose after the National Labor Relations Act was amended to extend coverage to such institutions and which involved then-novel unit questions. In those few instances, the case processing time may have exceeded the range cited above.

   As previously noted, this response is based on my best recollection. I began my private sector career in 1976; and thus, the records from which some of the

specific information sought by question 6 encompass a more than a 33-year long period. The vast majority of these records are not in my possession or control. These records are located and/or archived at multiple out-of-state sites; and, in a large number of cases, pursuant to the record retention policies of my former law firms, have been returned to the clients to whom such records belong.

7. How often have you served as lead negotiator in negotiations for a collective-bargaining agreement? How many times did those negotiations end in a strike? Were any of those strikes protracted – more than one month? Have you ever represented an employer who hired permanent replacements during a strike?

   Answer: Based on my best recollection, I would estimate that I have served as lead negotiator in over a dozen contract negotiations. None of those instances resulted in a strike, protracted, or otherwise; and, thus, none involved the employment of replacement workers.

   This response is again based on my best recollection. As previously noted, I began my private sector career in 1976; and thus, the records from which some of the specific information sought by question 7 encompass a more than 33-year long period. The vast majority of these records are not in my possession or control. These records are located and/or archived at multiple out-of-state sites; and, in a large number of cases, pursuant to the record retention policies of my former law firms, have been returned to the clients to whom such records belong.

8. How many of the contract negotiations in which you served as lead negotiator ended with the signing of a collective bargaining agreement? For each such negotiation, how much time transpired between the initial demand for bargaining and the signing of a collective bargaining agreement?

   Answer: To the best of my recollection, with only one exception, all the negotiations in which I was the lead negotiator ended with the execution of a

contract. All were successor contracts, and all were completed prior to the expiration of the prior agreement, and/or any mutually-agreed to extender.

This response is again based on my best recollection, since I began my private sector career in 1976; and thus, the records from which some of the specific information sought by question 8 encompass a more than 33-year long period. The vast majority of these records are not in my possession or control. These records are located and/or archived at multiple out-of-state sites; and, in a large number of cases, pursuant to the record retention policies of my former law firms, have been returned to the clients to whom such records belong.

9. How many of the contract negotiations in which you served as lead negotiator ended without the signing of a collective bargaining agreement? During how many of those negotiations were unfair labor practice charges filed against your client?

   Answer: To the best of my recollection and as noted above in response to Question 8, in one instance the negotiations did not end with the execution of a contract. In that instance, the incumbent union disclaimed interest during the course of the negotiations. No unfair labor practice charges were filed in this instance.

   Once again, this response is based upon my best recollection, since I began my private sector career in 1976; and thus, the records from which some of the specific information sought by question 9 encompass a more than 33-year long period. The vast majority of these records are not in my possession or control. These records are located and/or archived at multiple out-of-state sites; and, in a number of cases, pursuant to the record retention policies of my former law firms, have been returned to the clients to whom such records belong

10. Have you ever advised a client to utilize contractual terms requiring that disputes be resolved through arbitration? How many of your clients maintained policies or rules requiring their employees to use arbitration to resolve employment-related disputes?

    Answer: To the best of my recollection I have never represented a unionized client that resolved any substantive contractual terms through binding interest arbitration. Apart from interest arbitration, all of the unionized clients that I

represented had provisions in their collective-bargaining agreements providing for *ad hoc* grievance arbitration. As the law relating to agreements to arbitrate individual employment claims, including wrongful discharge, Title VII and related FEP claims developed, a number of non-unionized clients considered the prospect of adopting such policies. Only a few already had, or subsequently adopted such provisions. While I am unsure of how many, I would approximate that less than a half dozen adopted or maintained such provisions.

Once again, this response is based upon my best recollection, since I began my private sector career in 1976; and thus, the records from which some of the specific information sought by question 10 encompasses a more than 33-year long period. The vast majority of these records are not in my possession or control. These records are located and/or archived at multiple out-of-state sites; and, in a number of cases, pursuant to the record retention policies of my former law firms, have been returned to the clients to whom such records belong

11. The National Labor Relations Board's strategic planning process focuses, in part, on setting goals and performance measures. What strategic planning experience do you have that might assist the Board in improving its planning processes?

    Answer: As a partner/principal in private legal practice, and in a managerial position in the Senate I have had experience in institutional and programmatic planning, goal setting and evaluation. I have also had the opportunity to view the process from the prospective of an associate attorney in private practice, and a staff attorney at the NLRB. I believe my prior work in this area, the combination of my perspectives, my involvement in NLRB oversight as Senate HELP Committee staff, and the fact that I have prior work experience at the Board might prove helpful in this respect should I be confirmed.

12. 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 that the Board take to improve the evaluation of its programs?

    Answer: Please see the answer to Question 11, above. The Board should solicit and consider the input of its career staff, and consider the views of practitioners, parties, and the Congress in conducting its programmatic evaluations.

13. Have you taken a public position on the Employee Free Choice Act? If so, please describe that position.

Answer: I have publicly espoused, discussed and defended the views of Senator Enzi, Ranking Member of the HELP Committee, and what I believe is the unanimous view of the Minority Members of the Committee on the EFCA bill. Those views, which oppose the legislation, are a matter of public record

14. What is your opinion of the 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? How would you propose to stabilize issues of Board law that have fluctuated between Democratic and Republican administrations?

    Answer: I believe the Board should respect the principle of *stare decisis.* Decisional consistency not only evinces intellectual integrity in the adjudicatory process, it also enhances compliance, since regulated parties are clear with respect to the limits and constraints on their actions and can modify their behavior accordingly. Decisional consistency and predictability not only serve the best interests of individual litigants, and enhance the credibility of the Board, they also serve as a general stabilizing force for labor/management relations. Sharp departures from precedent or ever-changing "rules of the road" tend to de-stabilize labor-management relations – a result at odds with the underlying purpose of the Act. Departures from precedent should be as limited as possible and should always be based on a compelling and clearly articulated rationale that such departure is necessary to effectuate the purposes of the Act.

15. The National Labor Relations Act gives workers both the right to engage in union activity and the right to refrain from union activity. Do you think that the Bush Board struck the proper balance between the right to engage in union activity and the right to refrain?

    Answer: The language of Section 7 suggests that the drafters intended that both rights were of equal importance and that both should be equally protected. While there may occasionally be tension between the two rights, the manner in which such tension is resolved or accommodated is susceptible to meaningful evaluation only in particular fact-specific contexts. I do not have a view as to whether or not there has been a generalized approach to the resolution of any tension between Section 7 rights over any years' long period of time; and consequently no opinion as to its propriety.

16. After an employer voluntarily recognizes a union, do you think that there should be an election bar for a reasonable period of time following voluntary recognition?

    Answer: Under the Board's 2007 decision in Dana Corporation, the voluntary recognition bar does not become operative until bargaining unit employees are provided with notice of the recognition and notice of a forty-five day window period within which a petition for decertification, or a petition by a rival union may be filed. The issues presented in Dana will very likely come before the Board again. Indeed, questions related to Dana and the voluntary recognition bar are already pending. It would be inappropriate for me to comment further as it would incorrectly suggest that I have pre-judged these matters. If I am confirmed I would approach this issue and any of these cases with an open mind. I would study the issue in depth, and familiarize myself with the facts of the specific case(s), the relevant precedents, consult and discuss the matter with professional staff, and study the countervailing arguments before formulating an opinion.

17. Do you believe that the majority sign up process is inferior to the election process? If so, why? What advantages do you recognize to employees, employers and unions from utilizing the majority sign up process?

    Answer: I believe that it is the predominant view of the federal Courts, including the Supreme Court, and the traditional view of the Board that as a general proposition a secret ballot election is a more reliable indicator of employees' desires with regard to representation. I believe this view is consistent with the predominant societal view in the use of the secret ballot in determining the wishes of individuals with respect to a host of other types of decisions. I agree with those views. Reliance on a card check might arguably result in a faster initial resolution of questions concerning representation.

18. Do you believe that the Board has struck a proper balance by allowing an employer to withhold recognition of a union, subject to a NLRB-run election, when a majority of its employees have signed authorization cards, while also allowing an employer to withdraw recognition from a union, without a NLRB-run election, when a majority of its employees have signed a decertification petition?

    Answer: With regard to recognition, the Supreme Court has held that absent the commission of unfair labor practices or a contrary agreement regarding recognition that an employer cannot be required to bargain in the absence of an election. The decisions of the Supreme Court are controlling. With regard to the

withdrawal of recognition, an employer's ability to lawfully withdraw recognition is not, as the questions suggests, completely unconstrained, but has traditionally been limited by the Board. For example, under Levitz Furniture, the Board held that an employer may only withdraw recognition upon proof that the incumbent union has, in fact, lost its majority support. I do not know if the Board, and its changing majorities over the years, consciously sought to "balance" recognition and withdrawal of recognition. Factors such as deference to the opinions of the Supreme Court, and a concern for fashioning policies consistent with the Act's unfair labor practice provisions appear to have played the predominant role in the Board's treatment of these issues.

19. The Bush Board reversed decades of precedent to put the burden of proof on workers in back pay cases. Do you think the Board was right to shift the burden of proof?

    Answer: This question appears to ask if the Board's decision in *St. Georges Warehouse,* 351 NLRB 961 was correct. I have not studied this issue, reviewed the facts in the case or reviewed the countervailing arguments or the relevant precedents, nor have I had the opportunity to discuss the matter with professional staff. *St. Georges* was a 3-2 decision in which the only two Members of the current Board were on opposite sides. It is thus not only possible, but likely that this issue will come before the Board again. If I am confirmed I would study the issue, familiarize myself with the specific facts, review the countervailing arguments and relevant precedents, consult with professional staff and approach the matter with an open mind should it come back before the Board. I therefore believe that responding to a generalized hypothetical in this context is not appropriate and would create the incorrect appearance of my having pre-judged a matter.

20. Do you believe that when workers who have been the victims of unlawful discrimination take more than two weeks to start looking for new jobs, the General Counsel should bear the burden of proving that they are entitled to back pay?

    Answer: This question appears to ask if the Board's decision in *Grosvenor Resort,* 350 NLRB 1197, was correct. For the reasons cited in Answer 19, above, I believe it would be inappropriate to respond further.

21. Do you believe that the burden of proof should be on the General Counsel to prove that workers who have been the victims of unlawful discrimination tried hard enough to find new jobs?

Answer: Please see Answers 19 and 20, above.

22. Do you think that the Board should issue decisions shifting the burden of proof if the General Counsel doesn't agree? Do you think that the Board should issue decisions shifting the burden of proof if the parties have not fully briefed the issue?

Answer: In the litigation context, the General Counsel serves as prosecutor and a party/litigant, and the Board serves as adjudicator. The Board, not litigants, possesses the adjudicatory power to decide matters of substance and procedure. As a general proposition I believe the adjudicatory process is almost always advanced by the full participation of the parties.

23. Do you believe that bannering without patrolling constitutes picketing? Do you believe that holding up a large inflatable rat constitutes picketing?

Answer:

The legal determinations which the question asks implicate complex issues not only under Section 8(b) (4) and other sections of the Act, but under the First Amendment as well. These issues are invariably fact and context specific. Moreover, the issues implicated by the question are not only likely to be before the Board in the near future, they are already pending. If I am confirmed I would study the issues in this type of case, consult with professional staff, familiarize myself with the specific relevant facts, review the countervailing arguments and relevant precedents and approach the matter with an open mind. I therefore believe that responding to a generalized hypothetical in this context is not appropriate and would create the incorrect appearance of my having pre-judged a matter currently pending before the Board, and or likely to be before the Board in the near term.

24. The Board has always had to balance employer's interests and workers' rights under the NLRA. Do you believe that the Bush Board struck an appropriate balance between business interests and workers' statutory rights?

Answer: Where there is a tension between Section 7 rights, and other rights I believe that the analytical approach espoused by the Supreme Court in dealing with the accommodation of property rights and Section 7 rights is the most prudent. Thus, such countervailing rights should be accommodated with "as little destruction of one as is consistent with the other". I believe the propriety of such

individual accommodations is not susceptible to a generalized characterization, but must be analyzed on a case-by-case basis.

25. If an employer allows workers to sell Girl Scout cookies or engage in other charitable activities in the workplace, should union solicitation be protected in that same workplace? Under what circumstances do you think that an employer's private property rights should yield to workers' right to organize under *Babcock & Wilcox* and *Lechmere*? Do you believe that there are truly inaccessible workers such that the Board could order an employer to permit third party union organizers onto the employer's private property?

    Answer: From an analytical perspective the legal issues involving solicitation, distribution, and access are intensely fact and context specific, and traditionally involve multiple variables such as where and when the solicitation, distribution, or access takes place, whether or not the individuals involved are employees, off-duty employees, or non-employees, what the precise legal character of the relevant action is (e.g. solicitation or distribution) and whether there are employer-promulgated rules or other matters regulating such activities and the consistency with which such regulatory limits are applied. These complex issues are not susceptible of analysis in the context of a generalized hypothetical. Moreover, Question 25, as well as Question 30, below, involve matters either likely to be before Board, or already pending. Under such circumstances it is inappropriate for me to comment further as it would incorrectly suggest that I have pre-judged any of these matters. If I am confirmed I would approach this issue and these cases with an open mind. I would study the issue in depth, and familiarize myself with the facts of the specific case(s), the relevant precedents and countervailing arguments, and consult with professional staff, before formulating an opinion.

26. Do you agree with the Supreme Court's decision in *Town and Country* that union salts are employees, protected by the NLRA? Do you believe the Board should impose any limits on the protections afforded union salts?

    Answer: I believe the question before the Supreme Court in *Town and Country* was whether the Board could lawfully interpret the statutory term "employee" to include company workers who are also paid union organizers. The Court answered this question in the affirmative. I believe this is a correct view of the Board's authority. Beyond this observation, I have no preconceived views on the remaining issues.

27. Do you believe that the General Counsel should bear the burden to prove that salts who were discriminated against really wanted the jobs for which they applied?

    Answer: Questions 27 and 28 raise issues implicated in recent Board decisions and a General Counsel Memorandum, and are very likely to come before the Board again in the near term. I have not studied these issues at length, nor formed any opinion about them. If I am confirmed I would study the issues, familiarize myself with the specific facts in any case or cases in which they might arise, review the countervailing arguments and relevant precedents, consult with professional staff, and approach the matter with an open mind. I therefore believe that responding in any further detail in this context is not appropriate and would create the incorrect appearance of my having pre-judged these matters.

28. Do you believe that back pay for salts who were discriminated against should be cut off unless the General Counsel can prove how long the salts would have stayed on the job?

    Answer: Please see Answer 27, above.

29. Do you believe that the Board's current definition of supervisory employee is too broad? What do you believe is the meaning of the Supreme Court's decision in *Kentucky River*? Do you believe that the Board's subsequent trio of decisions applying *Kentucky River* were appropriately decided?

    Answer: The "definition" of the term "supervisor" is contained in the statute. The Board has traditionally and repeatedly been called upon to construe that definition within the context of very specific factual patterns. In *Kentucky River* the Supreme Court affirmed the view that while the Board has discretion in its interpretation of statutory terms within the context of specific facts, that such discretion is not unlimited and is anchored in the statutory text. Specifically in *Kentucky River* the Court rejected the Board's argument that the statutory phrase "independent judgment" could be modified or limited to such judgment if it was "ordinary professional or technical judgment in directing less-skilled employees to deliver services", a non-statutory phrase.

    The determination of statutory employee status is invariably highly contextual and fact specific. I am not sufficiently conversant with the specific facts,

arguments or precedents involved in any of the cases decided since Kentucky River to evaluate the decisions. Moreover, issues involving the interpretation of Section 2(11) of the Act are routinely before the Board and I would not wish to convey the erroneous impression that I have pre-judged any of these. If confirmed, I would approach each of these cases with an open mind, and careful review of the specific facts and arguments in the given case.

30. Please explain your views on permissible usage by employees of their work email accounts to discuss a union organizing drive.

Answer: Please see Answer 25, above.

31. Do you believe, as a general principle, that workers would suffer if organized labor lacked the funds to lobby Congress around issues such as minimum wage standards, employment discrimination and workplace safety? Do you believe that workers' political interests are adequately represented by lobbyists hired by their employers?

Answer: As a general principle, and based on my experience working in the Senate, it is my view that quite apart from the activities of any lobbyists, Members of the Senate have an independent interest in the welfare of American workers and that lobbying efforts, or activity by organized groups is not necessary for Members to act in the best interests of workers. It has also been my experience that the interests of employers and employees are frequently aligned, and that "workers' interests" are not always unitary or monolithic.

32. What is your opinion of unions and employers negotiating terms and conditions of a potential collective bargaining agreement subject to the union's future achievement of majority status? What, if any, disclosure of the agreement do you think should be required prior to recognition of the union?

Answer: The issues implicated by this question are not only likely to come before the Board, many are already pending before the Board. If I am confirmed I would study this issue, familiarize myself with the specific facts in any case or cases in which they might arise, review the countervailing arguments, and relevant precedents, consult with professional staff and approach the matter with an open mind. I therefore believe that responding in any further detail in this context is not appropriate and would create the incorrect appearance of my having pre-judged these matters.

33. For decades, there has been no increase in the number of employees denied collective bargaining rights under the NLRA through expansion of minimum jurisdictional thresholds. Would you support stripping more employees of their labor rights through an expanded exemption of small businesses from the NLRA? Do you believe that such a change could be accomplished without new legislation?

Answer: Congress has recognized the authority of the Board to decline jurisdiction over any labor dispute involving a class or category of employers where the effect on interstate commerce is not substantial. However, Congress has also limited this discretion by providing that the Board cannot decline to assert jurisdiction over any labor dispute over which it would have asserted jurisdiction under the Board's jurisdictional standards prevailing in 1959. Since the 1959 standards utilize specific dollar amounts it would appear that the dollar amounts, or "thresholds" set forth in such 1959 standards could not be increased by the Board.

34. Do you believe that the Board should engage in more rulemaking in addition to issuing decisions? If so, what types of issues should be the subject of rulemaking?

Answer: As contemplated by Section 6 of the Act rule-making consistent with the Administrative Procedure Act may, from time to time, be necessary and helpful in carrying out the provisions of Act. In my view such rule-making can aid in the administration of the Act, but is not without limitations, both practical and statutory. I simply have not considered nor reached any determination as to what specific issues might or might not be amenable to and appropriate for rule-making. If confirmed that is certainly a matter which, in each specific case, I would want to study, confer with my colleagues, review the countervailing arguments and avail myself of the expertise of Board staff in determining the propriety and potential contours of any rule-making.

34. If confirmed, what would be your priorities for your term on the Board?

Answer: I believe for any Board Member the fair and full administration and enforcement of the statute must be the principal priority.

35. Do you believe that it is especially important for the Board to quickly and thoroughly protect the rights of workers during an organizing campaign? If so, how would you do that?

Answer: Section 7 rights are all equally important and deserving of full protection regardless of the context in which they arise; however, the protection of such rights within the context of an organizing campaign may often raise singular issues with respect to the protection of those rights. Section 10 (j) of the Act does provide a more rapid means for protecting such rights and should be utilized in appropriate cases. The propriety of seeking relief under Section 10(j) invariably involves a case-by-case analysis of the all the salient facts and how they relate to such considerations.

36. In your opinion, what changes could be made without new legislation to improve the union certification process?

Answer: I have no opinion with respect to such potential legislation. As a nominee, I believe the development of legislation is most appropriately undertaken by those in the legislative branch.

37. In your opinion, what changes could be made without new legislation to improve the Board's remedies for unlawful threats and discharges?

Answer: Please see Answer 36, above.

38. In your opinion, what changes could be made without new legislation to improve the prospects for employees' bargaining representatives to successfully bargain a first contract with their employers? What remedies should the Board utilize when it encounters employers who are completely opposed to ever reaching a collective bargaining agreement?

Answer: The Board's responsibility is to enforce the statute in all respects, including the statutory obligation to bargain to bargain in good faith. All instances of a refusal to bargain in good faith violate the Act; however, those which occur within the context of bargaining for an initial contract are particularly problematic. The General Counsel's current First Contract

Initiative, begun in 2006 is certainly an example of the type of approach that may serve to enhance enforcement efforts relating to this critical point. As I understand the initiative, it mandated the central reporting all first contract unfair labor practice claims and the assessment of meritorious claims for remedial actions including: filing for 10(j), imposing bargaining and/or litigation costs, requiring scheduled and/or compressed bargaining, requiring bargaining process reports, extending certifications, and others. In addition to these actions, respondents that refuse to comply with enforced Board orders are subject to civil contempt actions.

39. What specific metrics do you believe the Board should be judged on? Please explain why you feel the metrics that you identify are appropriate under the NLRA.

Answer: The Board should be judged on its timely, consistent and appropriate enforcement of the Act. Statistical data such as appellate court reversal rates, case processing time, and the like, are helpful in formulating such judgments, but are not necessarily dispositive since cases are not fungible commodities and present issues of widely varying complexity and numerosity.

40. Given your extensive private practice representation of management interests, how will you be able to fairly and even handedly adjudicate charges filed by unions and employees alleging unlawful conduct by employers?

Answer: I do not believe that being an advocate renders one incapable of being a fair arbiter. An attorney has an ethical duty to zealously represent the interest of his or her clients within the bounds of the law. As an attorney in private practice I always sought to meet that ethical duty. An individual in an adjudicatory position has a different, yet no less compelling ethical obligation. If I am confirmed I would regard such new ethical obligation with equal seriousness and resolve and would approach each case with an open mind, carefully considering the specific facts, relevant precedents, arguments presented and the advice and counsel of professional staff.

41. If the Employee Free Choice Act becomes law, how will you be able to fairly and effectively carry out its mandate considering your long experience in the Senate working in opposition to EFCA?

Answer: Please see Answer 40, above. I do not believe advocating, or working in support of a particular legislative or policy outcome on behalf of the

Member for whom one works renders one incapable of being a fair arbiter. Nor do I do not believe that prior agreement with every principle or provision of a law is a prerequisite to successful or faithful enforcement of that law.