NOMINATION

HEARING

BEFORE THE

COMMITTEE ON LABOR AND PUBLIC WELFARE UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

SECOND SESSION

ON

GERALD A. BROWN, OF CALIFORNIA, TO BE A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD

AUGUST 30, 1966

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NOMINATION

TUESDAY, AUGUST 30, 1966

U.S. SENATE,
COMMITTEE ON LABOR AND PUBLIC WELFARE,
Washington, D.C.

The committee met at 10:06 a.m., pursuant to recess, in room 4232, New Senate Office Building, Senator Joseph S. Clark, presiding pro tempore.

Present: Senators Hill, Yarborough, Clark (presiding pro tempore), Randolph, Williams, Nelson, Javits, Dominick, and Fannin.

Committee staff members present: Stewart E. McClure, chief clerk; John S. Forsythe, general counsel; Stephen Kurzman, minority counsel; and Frank Cummings, minority labor counsel.

Senator CLARK. I would like to ask Mr. Gerald Brown, nominated by the President to be a member of the National Labor Relations Board, to take the witness seat.

Mr. Brown, there will be a number of other members of the committee coming in from time to time and I have no doubt that they will ask you a good many questions.

I think we could get rolling by asking you if the summary which you have furnished the committee is accurate?

Mr. BROWN. Yes, sir; it is.

Senator CLARK. You have been serving as a member of the NLRB since April 14, 1961? Is that correct?

Mr. BROWN. Yes, sir.

Senator CLARK. You were renominated to the Board when?

Mr. BROWN. August 22, sir.

Senator CLARK. Of this year?

Mr. BROWN. Yes, sir.

Senator CLARK. And your term has already expired?

Mr. BROWN. On August 27.

Senator CLARK. Under the law you are no longer able to be paid?

Mr. BROWN. That is correct, yes.

Senator CLARK. Nor are you permitted to sit as a member of the Board?

Mr. BROWN. That is correct, yes, sir.

Senator CLARK. How many members of the Board are there?

Mr. BROWN. Five members.

Senator CLARK. What is their political affiliation?

Mr. BROWN. Three Democrats and two Republicans.

Senator CLARK. Since you are a Democrat and are not able to serve, the Board is now two Democrats and two Republicans?

Mr. BROWN. Yes, sir.

Senator CLARK. We will place your biographical summary in the record at this point.

(The document referred to follows:)

BIOGRAPHICAL RÉSUMÉ OF GERALD A. BROWN

Born August 13, 1914 in Olustee, Oklahoma.
Married to Mary May Harrison of Canyon, Texas in 1939.
Two daughters, Barbara, age 21 and Carol, age 12.
Residence: 6500 Marjory Lane, Bethesda, Maryland.
Legal Residence: California.

EXPERIENCE

April 14, 1961 to date: Member, National Labor Relations Board.
June 16, 1947 to April 13, 1961: Regional Director, 20th Region, NLRB, San Francisco, California.
1945 to 1947: Examiner in Charge of Subregional Office, NLRB, Memphis, Tennessee.
1942 to 1943: NLRB Field Examiner in Atlanta and Chicago.
From February 1943 to December 1945 on military leave.
September 1939–February 1942: University of North Carolina, instructor of economics. (Full teaching load while doing graduate work.)
From 1938 to 1939: Amarillo Junior College, Amarillo, Texas, instructor of economics and political science.
From 1935 to 1938: Canyon High School, Canyon, Texas, instructor of social sciences.

EDUCATION

From 1939 to 1942: University of North Carolina, graduate study in economics while teaching.
Summers 1936–38: University of Texas, M.A. degree in economics.
From 1933 to 1935: West Texas State College, B.A. degree in history.
From 1931 to 1933: Amarillo Junior College, Amarillo, Texas.
From 1920 to 1931: Public Schools, Amarillo, Texas.

Senator CLARK. Mr. Brown, is there anything you care to say in connection with your nomination?

Mr. BROWN. Well, sir, I am honored to appear before this committee for a second time and happy to try to answer any questions you may have.

Senator CLARK. You believe that you have conducted yourself properly in office and that you are qualified for renomination?

Mr. BROWN. Yes, sir; I do.

Senator CLARK. Senator Fannin?

Senator FANNIN. I would like to ask you some questions about a statement you have made publicly.

You made a statement that the Board is unquestionably a policy-making tribunal?

Mr. BROWN. Yes, sir. That statement occurred in a speech made at Duke University in 1962. In the course of the remarks I said very clearly that the basic law was established by Congress, that the Board also was limited by Court decisions, but that the Congress had phrased some of the provisions of the law in very broad, general terms, and that in applying those to specific factual situations, unquestionably the Board did have to make some policy decisions. This has been so stated in a number of Supreme Court decisions. In these broad areas where there is allowable discretion, I did not think you took the facts, placed the statute alongside of them and reached a mechanical decision; that you had to view these varying situations in terms of your overall view of what congressional intent was.

Senator FANNIN. Exactly, but I understand that policymaking is the duty of the Congress and not of the Board.

Mr. BROWN. Well, I understand that to be the duty of Congress, sir, but when Congress writes a provision which says, for example,

that the Board shall decide whether the employer unit, craft unit, plant unit, or subdivision thereof shall be the appropriate unit, and the courts tell us that we have to develop some general rules with respect to which of these is appropriate under varying and changing factual conditions, the Board does have to exercise allowable discretion in order to conform to the intent of Congress.

Senator CLARK. Will the Senator yield?

Senator FANNIN. Yes.

Senator CLARK. It would occur to me that with all of these regulatory commissions, whether it be the NLRB, the Federal Communications Commission, or others, while Congress lays down general standards to guide the Board with respect to its quasi-judicial functions there is a very wide area of discretion. I think this is inherent.

Senator FANNIN. I understand, Mr. Chairman, but I think that the Board has gone beyond that concept in many cases.

Now, at another time you spoke of a balance of competing interests and the right of an individual employee to be free in his employment status from union control.

Is this your belief?

Mr. BROWN. Well, again, within specific factual situations there are some times when they may be subject to control under a contract or under the law in various other situations, but in general the purpose of the law is to provide for democratic choice of individuals as to whether or not they will be represented free from coercion from any source and I certainly believe that.

Senator FANNIN. How about the employee's rights in the *Allis-Chalmers* case; you are, of course, familiar with that case, where an employee was fined for exceeding union production quota?

Mr. BROWN. Well, sir, we have several cases in that general area. The *Allis-Chalmers* case, I believe, really had to do with a fine for crossing a picket line.

Senator FANNIN. That is right.

Mr. BROWN. Yes; but this is the type of problem where we do have to make a choice between what we understand Congress meant when it enacted, first of all, a provision which gave a union representing a majority of the employees the status of exclusive representative, and then in the proviso to 8(b)1 of the act said that this law did not seek to restrict the union in prescribing its own rules for the retention or acquisition of membership. Senator Taft in explaining the report of this committee to the Congress said very clearly that the purpose of the law was to insulate the employee in his job rights, and that it really was not the function of the Government to seek to regulate the internal affairs of these organizations. In that case there was absolutely no interference with his job rights. We have in that case an employee who is a member of the union, who was fined for crossing a picket line, but when they made very clear that they sought to have no impact on his job, the Board decided——

Senator FANNIN. Now, Mr. Brown, what is more important to an employee's job rights than the right to go to work that day? The purpose of crossing that picket line?

Mr. BROWN. Well, that was his choice to go or not to go, but as a member——

Senator FANNIN. No; it wasn't his choice, in this case. He was fined for crossing the picket line in the *Allis-Chalmers* case as you related.

There were the two cases, the Allis-Chalmers which was the picket line case, and that in which a fine was imposed.

Mr. BROWN. Well, sir, he did go to work, and he was fined, but the union's effort to collect the fine was clearly separated from interference with his opportunity to work.

They did not seek to curtail his right to continue to work for that employer; I think it is worth noting as to whether our interpretation of this provision was correct, the Seventh Circuit Court of Appeals heard the case, and the first time three members of that court unanimously upheld the Board's decision.

There was a motion for reconsideration and a hearing en banc of seven members of that court. That court split the second time 4 to 3, finding that the Board's interpretation was incorrect, with two members who voted in the first case to sustain the Board's position switching sides.

In that case there is a petition for certiorari pending before the Supreme Court.

Senator DOMINICK. Will you yield just a minute?

Senator FANNIN. Yes.

Senator DOMINICK. Is that the *Wisconsin Motors* case, Mr. Brown?

Mr. BROWN. The *Allis-Chalmers*. The *Wisconsin Motors* case is pending in the seventh circuit. The related *Roberts* case has been enforced, I believe, in the Court of Appeals for the District of Columbia.

Senator DOMINICK. Thank you.

Senator FANNIN. Let us place this in a different perspective. If the employer had said, if you don't cross the picket line your wages will be cut in half?

Mr. BROWN. Well, that would be having an impact on his job conditions and I think clearly would be a violation of the law.

Senator FANNIN. Any different from fining him on the union side?

Mr. BROWN. Well, that—we may have to wait for the Supreme Court to be sure whether there is a difference under the law, but again——

Senator FANNIN. I am asking you for your opinion.

Mr. BROWN. Well, in my opinion, the law and the intent of Congress as I read it, was that so long as the individual's employment rights were protected, these membership obligations were internal affairs which were not properly the concern of the Government.

Senator FANNIN. Mr. Chairman, I would like to read into the record the section referred to.

Senator CLARK. Without objection the section will be printed in the record.

Senator FANNIN. I would like to read it in. It just a short section.

Senator CLARK. Go ahead.

Senator FANNIN (reading):

> Employee shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choice and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and shall also have the right to refrain from any or all of such activities except to the extent that such rights might be affected by agreement requiring membership in a labor organization as a condition of employment as authorized in section 8A3.

Going back to refraining, were they refrained from crossing picket lines?

Mr. BROWN. Well, there is additional language which comes into play in a proviso to 8(b)(1)(a), but I would answer your question. He has a right to refrain from crossing a picket line or refrain from refusing to cross it without having any interference with his job rights.

Senator FANNIN. In the *Allis-Chalmers* case, that is what I am concerned about. The interpretation you have given on the Board and the actions you have taken?

Mr. BROWN. Well, again, our view was that so long as they did not attempt to have any impact on his continuing to work for that company that the statutory provisions governing the internal affairs of unions gave them the right to take that action without violating the law.

Senator FANNIN. Isn't fining him an impact upon his rights to cross that picket line?

Mr. BROWN. No question.

Senator FANNIN. And to go ahead with his employment?

Mr. BROWN. Yes, sir.

Senator FANNIN. Well, you are not very consistent.

Mr. BROWN. Well, I would just say that we sought to apply both those provisions of the law and again that the difficulty involved is illustrated by the fact that the Seventh Circuit has decided that very same case two different ways.

Senator CLARK. Will the Senator yield for a moment?

Senator FANNIN. Yes.

Senator CLARK. I note that due to a misunderstanding the hearing room is marked as though this were an executive session. Actually it is an open session—open to the general public and the press.

I have just instructed the chief clerk to change the sign and to notify the AP and UPI this is an open hearing.

I know there are members of the general public here but I want to have it very clear for the record this is an open, not executive hearing.

Senator FANNIN. Well, Mr. Brown, another subject.

What are your thoughts regarding industrywide collective bargaining? What are your thoughts about legislation that may be needed?

Mr. BROWN. Well, if industrywide collective bargaining is construed to include multiemployer units and otherwise we do not have very much to do with industrywide collective bargaining. But under Board law we have situations where different employers have voluntarily combined and in agreement with the union, have established bargaining units that extend beyond one employer; those have been accepted by the Board and by the courts.

We have some pending issues involving the rights of both unions and employers to break up those multiemployer units, but——

Senator FANNIN. There may be a different interpretation of voluntary than what is considered by one party.

I am talking about the excessive power that, say, is in the hands of the Teamster's Union whereby they could close down the wheels of progress of the Nation. Do you think that this is fair and equitable?

Mr. BROWN. Well, so far as the Labor Board has any official concern with that, there are no multiemployer units that have not been established by agreement of the union and the employers involved. The Labor Board has certainly not established such units, absent agreement on both sides.

Where there has been that agreement, as I say, the Board and the courts have approved such units.

Senator FANNIN. In other words, you do not believe there has been coercion in this regard?

Mr. BROWN. There may be a lot of cases I don't know anything about; I have no knowledge of any.

Senator FANNIN. Along the line of this questioning I would also like to get your thoughts on company operating decisions and its relationship to codetermination. What are your thoughts in this regard?

Mr. BROWN. Well, a question of what is a mandatory subject of bargaining is perennially before the Board and there has been a shift in the subject matters coming to us in cases.

I should note that we do not go out and look for cases. We have no authority to do anything until somebody files a charge with us. The charges that are filed really reflect the changing problems and concerns of the people of this country in labor relations and it has shifted from wages and hours and pensions and welfare plans until the subject that has had most attention recently has been the matter of subcontracting. In *Fibreboard* and some of the other cases, the Board did decide that subcontracting work to another company to be done by other employees, even though it was being done for economic reasons, was a mandatory subject of bargaining, that the law did not require agreement but that it did require bargaining in good faith because of its impact on the employees in the unit.

Senator DOMINICK. May I interrupt right there?

Mr. BROWN. Yes, sir.

Senator DOMINICK. You mean to say that when management decided they were going to subcontract an order or a contract that they had obtained, the Board held that the union could say this is a bargaining agreement and prevent them from subcontracting the order?

Mr. BROWN. Well, in the actual *Fibreboard* case, the problem was maintenance work. The company had for something like 50 years been bargaining with the Steelworkers Union for its maintenance employees. The company decided that they could contract the maintenance out to another corporation and for economic reasons obtain the same maintenance work at a cheaper cost.

The result, however, would also mean that some 50 employees who had been working there for many years, lost their jobs, and that is what happened.

The Board did decide that subcontracting which had this impact on the unit did fall within the statutory phrase of wages, hour, and other terms and conditions of employment and that, as such, the law required the company to bargain in good faith with the certified bargaining agent without taking, or prior to taking, unilateral action.

Senator DOMINICK. Was the effect of this to prevent them from going ahead and subcontracting the work?

Mr. BROWN. Well, the effect of the decision would not prevent them from subcontracting it after they had bargained in good faith with the union about it. It does not compel them to make an agreement. In that particular case they did it without bargaining, without notice, and about the last day before the contract expired, and people were off the payroll. I think it is——

Senator DOMINICK. Did you hold that that was an unfair labor practice?

Mr. BROWN. Yes, sir.

Senator Dominick. Holy smokes.

Mr. BROWN. Well, sir, I think it is worth noting that that case went to the Supreme Court and the Supreme Court upheld the Board's decision, saying that the national labor policy established by Congress required them to make an effort to solve these problems by collective bargaining.

Senator FANNIN. So, in other words, you say management cannot make a purely economic decision without first bargaining with the union?

Mr. BROWN. A decision to subcontract which has an impact upon the employees in the unit is in my view a mandatory subject of bargaining under this statute and the Supreme Court has agreed.

Senator FANNIN. Well, that is certainly inconsistent. How would management determine what is considered as coming under your ruling and what is not under your ruling?

Mr. BROWN. Well——

Senator FANNIN. In other words, every decision they make, will they need to get official permission from the union?

Mr. BROWN. After the *Fibreboard* case was out, there were a lot of management people who voiced their concern and asked questions of this type. Both before the Supreme Court decision and after the Supreme Court decision in a series of cases—the *Westinghouse* case, the *Kennecott* case, the *General Motors* case, the *Shell Chemical* case, the Board found under specific circumstances either that the subcontracting had no impact on the unit or that it was merely a continuation of past practice, or that there had already been bargaining about it and contractual provisions which governed it. In all of those cases the Board dismissed charges that there had been a violation.

So that while there are still problems, generally speaking, there have been a series of cases which have spelled out, I think, fairly well, the obligations of the parties in this area and I think there is much less concern about it than there was initially.

Senator NELSON. May I ask a question? If, in the *Fibreboard* case the company had negotiated with the union and at the conclusion of good faith bargaining there was no point at which they could get together, in other words, the company could make a substantial saving if that were the case and they proceeded then to contract privately, is it your view then that the Board and the Supreme Court would have said that they complied with the law?

Mr. BROWN. Yes, sir, very definitely.

Senator NELSON. Now——

Senator DOMINICK. May I ask a question here?

Senator NELSON. Yes.

Senator DOMINICK. How long do they have to bargain?

Mr. BROWN. Well, that will vary——

Senator DOMINICK. And how does anybody know?

Mr. BROWN. I don't know how you answer that in any general terms. The Board has said it does not require marathon bargaining. It could be—maybe 5 minutes, it may be longer. It depends on the circumstances.

I also think it is of interest to note the success of the policy of Congress requiring an effort to solve these problems through collective bargaining in the *Fibreboard* case itself. I know about it because it arose in California—I was familiar with the case before I came to the Board and have talked to the people involved when I have been back in California.

After the Supreme Court decision, and although several years later, they did terminate their subcontract, reinstate a number of these employees, work out an agreement with that union, and today I believe it to be more economical than it was and much more efficient than it was under either of the prior circumstances.

Senator NELSON. Is there a clear definition in this kind of an instance of good faith bargaining? That is, an instance where there is no room for compromise by either side? That is, where the union is not able to say, you are right, we let 50 jobs go, and the company is not able to say anything other than we can save x numbers of dollars and it is an obligation of ours to do it, thus they meet and neither party is able to concede a point. Is that good faith bargaining?

Mr. BROWN. The chief characteristics of the cases that come before us are the tremendous variations in factual circumstances and we do have to look at all the facts.

Taking the question just as you have asked it and assuming they have reached an impasse and there is at least an effort to reach an agreement and no effort to evade their responsibilities, they reach an impasse, the law does not compel agreement.

Senator CLARK. Will the Senator yield for a moment?

That is a live quorum.

If there is no objection, we will suspend for a few minutes and come back.

(A brief recess was taken.)

Senator CLARK. Senator Dominick, are you ready to go ahead with the questioning of Mr. Brown?

Senator DOMINICK. Yes, I can go ahead for a while until Senator Fannin comes back.

Senator CLARK. Senator Dominick.

Senator DOMINICK. Mr. Brown, we were talking just before the live quorum in connection with the question of union codetermination of whether management can make an economic decision without collective bargaining, and the ruling, as I understand it, that you had in the *Fibreboard* case, was that they have to bargain collectively on this.

Then the next thing we were discussing was how long they must bargain and I did not get any clear idea of this from you. I call your attention to the *Bethlehem Steel Shipbuilding* case where apparently they bargained for 2 months and a couple of years later the Board said they had not bargained in good faith.

Is this accurate? Were you a member of the Board at that time?

Mr. BROWN. I do not remember that decision particularly.

Senator DOMINICK. Do you think, as a matter of help to the Board, that there should be any legislation enacted which would refer to time intervals as to what is required in collective bargaining before you reach a good-faith impasse?

Mr. BROWN. It would be my opinion, sir, that that would be virtually impossible.

As I said earlier, the chief characteristic in my view of the flood of cases that we get is the tremendous variation in facts.

When particularly you are talking about a concept such as good faith bargaining, which is not a very precise term anyway, both Board and court decisions indicate that you must take the whole context of facts into consideration. Sometimes an impasse has been reached very quickly and sometimes it takes longer.

Senator DOMINICK. Mr. Brown, do you feel that the present rules decided in the Board decisions or by court decisions are sufficiently clear so that a company can make a unilateral decision that they have reached a point where there is a good faith impasse and they can then go ahead and make their own decision?

Mr. BROWN. I do think it is a complex and difficult matter. I do think that when you add all of the decisions together, not only Fiberboard, but the others I mentioned and some others that I have not mentioned, that informed management has a fairly good basis for evaluating these matters.

Senator DOMINICK. Now, this is pretty difficult, is it not, on both the companies and the employees? In other words, the company has to rely on the analysis made by their attorneys, the employees have to rely on the analysis made by their own representatives and attorneys; no one knows whether they are going to be cut off from a job or whether you can go ahead with an economic decision until the case has been tried eventually before the Board and brought before the court.

Would it not be helpful to try and lay some rules down?

Mr. BROWN. Well, it might be. The number of cases we have involving that subject is relatively small in number and the many, many decisions that are made involving cases that never get to the Board indicates to me that it is operating. A number of the management people I have talked to have told me that they had fewer concerns after these other decisions have come out than they had at the time of the original *Fibreboard* decision.

Senator DOMINICK. In collective bargaining, what is and what is not good faith bargaining? It is necessary for management to say that they are going to retreat from their position in order to be in good faith?

Mr. BROWN. No, sir. Over the years a number of decisions, both by the Board and by courts, considering the total context have established guidelines with reference to sincere efforts to reach an agreement in good faith. Outside of a few cases in which there is controversy, because it is a controversial field, by and large we have less trouble with the concept of good faith than we have with mandatory subjects of bargaining.

Senator DOMINICK. In other words, you do not feel that this good faith impasse that we have been talking about is necessarily very vital to the companies or to the employees?

Mr. BROWN. I think it is very vital.

Senator DOMINICK. Well, at one point here I understood you to say that you thought that it would be helpful if the rules were more clear on this point. Am I incorrect or correct in that regard?

Mr. BROWN. I think it is always desirable to have as clear an understanding of one's obligations and rights as possible. I think in this field it is very difficult to establish precise rules.

Senator DOMINICK. In this field then, you think that if we asked you for recommendations on what time intervals should transpire before a good faith impasse is reached, you would be unable to give us any recommendation?

Mr. BROWN. I certainly would appreciate any help we can get, but if you ask me, I would think in terms of precise time intervals, that I would find it very difficult to make any recommendation.

We have said in some decisions in some cases that the bargaining has taken place in 5 minutes, and in others it has stretched out over a period of months. It depends on so many things that I would not know how to set up precise time limits.

Senator DOMINICK. What factors do you take into consideration as to whether they have to bargain 5 minutes or 2 months?

Mr. BROWN. We make an effort to look at the entire set of facts and it would depend on whether or not they may have already covered this in the contract, it depends on whether or not they are doing things that have been their practice in the past or whether or not they are making substantial changes, whether or not the changes they contemplate have a real impact on the terms and conditions of employment of the employees, on many factors.

Senator DOMINICK. The staff suggests I ask a hypothetical question: Suppose it is a fresh question, that you have no history on it and you make a determination that this is what you need to do for the better management of the company. How long do they have to bargain? Suppose it would have a substantial impact on company employment.

Mr. Brown. Well, there is no way that I know for saying that there is a specific time limit that is either required or not.

Senator DOMINICK. This makes it terribly difficult then, does it not, for the employees and the management together?

Mr. BROWN. Yes, sir.

Senator DOMINICK. Because they don't know what their rights are until someone has tested them out, either before the Board or before the Board and the courts; is that correct?

Mr. BROWN. I think that is correct.

Senator DOMINICK. And then do you have any suggestions as to what we might do to try and straighten this out?

Mr. BROWN. I would have to look at all the cases to try to see where some legislative action might be helpful. At the moment I would not be prepared to make any recommendations.

Senator DOMINICK. Did I understand you to say earlier, and I am sorry I was not here at the beginning, that you view the Board as a policymaking group?

Mr. BROWN. Within the frame of reference that I mentioned earlier, I think the Board has some discretion provided by the general provisions of the statute, provided by the necessity for fitting different provisions of the statute together where we have some conflict in rights. And governed always by the basic policy established by Congress and under the interpretations of the courts, the Board does not decide these matters mechanically. There is an amount of discretion required, and I think the Board must exercise it.

Senator DOMINICK. One of the basic policies established by Congress was to establish the NLRB as a means of resolving disputes between management and labor in order to try and make these relationships more clear and more easily susceptible to final deter-

mination. Within that scope would it not be sensible for the Board to address themselves to this problem?

Mr. BROWN. Yes, sir; and to the extent I understand the question, I think we have to, and do do that, as we decide these cases that come to us.

Senator DOMINICK. But you still feel that you should do it on an individual case basis and not establish any broad principles?

Mr. BROWN. I think the tremendous variation in the facts we get in the cases coming from all over this country require us to do that; yes, sir.

Senator DOMINICK. Now, Mr. Brown, I would like to turn to a different subject. I had a labor leader from my State come into my office the other day for a visit. He was very concerned, with the method of election of union officers. Because I do not pretend to be an overall expert in labor law, I would like to ask you if there are any provisions in the law at the present time which deal with the method of determining State union heads and international heads of unions?

Mr. BROWN. Well that, whatever provisions there are are under a section of the law that we have nothing to do with and I am just familiar with them in a very general way.

Senator DOMINICK. Now, you have had long experience in the labor field and having been a field examiner as long ago as 1942, I wonder if you could give me some ideas about this. Has this created any problems as far as union management is concerned?

Mr. BROWN. Well, the election of union officers has been an internal operation of the union with which I have had no contact whatsoever.

Senator DOMINICK. You have had no experience in this field at all?

Mr. BROWN. No, sir.

Senator DOMINICK. Let me ask you about some of the pieces of legislation that I have introduced.

First of all, requiring that a secret ballot election be held wherever you have a request for representation. What is your viewpoint on that type of legislation? This is to eliminate the card certification method.

Mr. BROWN. Yes, sir.

It is my view that the elections normally are a much more satisfactory method of resolving these issues and as other types of subjects we have coming before us, this one provoked a lot of discussion within the past year or two. I think some of that is dying down. I think it is necessary to see it in context. In the last 5 years we have conducted some 38,353 elections; we have certified a union on the basis of cards in 489 cases. When you subtract the elections which unions lost, certifications on the basis of cards is approximately 2 percent of the certification by elections.

Now, that 2 percent, however, has come—generally speaking—where the Board has felt that unfair labor practices made a fair election impossible and in those circumstances a card check was the necessary method of protecting individual employee rights.

Senator DOMINICK. So you gave them two chances, you mean: First, by election; then you void that and give them a card check?

Mr. BROWN. In some cases that has been the situation. Under one decision of the Board, the Irving Airchute Case, if there were unfair labor practices prior to the filing of the petition, those unfair labor practices have not been used to set aside an election. It is only where

unfair labor practices have occurred between the filing of the petition and the conduct of the election that the Board felt destroyed the free election conditions, that they then went back to cards and checked to see whether or not a majority existed previously.

Senator DOMINICK. Now, if you have an unfair labor practice which in your opinion justifies the setting aside of an election, can you not call another election at that point?

Mr. BROWN. Wo do, and we can and frequently do.

Senator DOMINICK. Now, an unfair labor practice could be the refusal to recognize the cards, too, as I understand it.

Mr. BROWN. Well, those are very rare cases. Usually they are cases where an employer has agreed to recognize on the basis of the card check and they have had a minister or a college professor or a judge or someone else check the cards, and then has refused to honor his agreement. Out of some 38,000 cases in the past 5 years there have been about 45 such cases.

Senator DOMINICK. In other words, what you are saying is that an employer has prior to this time agreed to recognize a card type of election and then refused to do it? This is in general what you are saying?

Mr. BROWN. Yes, sir.

Senator DOMINICK. Now, does not this agreement to recognize the card type of election enhance the possibility of sweetheart contracts?

Mr. BROWN. I suppose it might.

Senator DOMINICK. Do you see anything wrong in requiring an election by secret ballot?

Mr. BROWN. As I said earlier, I much prefer an election by secret ballot, but I do think under the circumstances that I mentioned previously that the use of cards may be more appropriate.

Since this question first became of so much concern, and I know that about a year ago you were asking questions about it, since that time there have been a number of decisions which I think clarify this area to some extent. That is, in the *Serpa* case the Board has said you cannot just come in and flash the cards and say, "We have a majority and therefore there is a refusal to bargain."

It says very clearly the burden of proof is on the General Counsel to establish that there was bad faith in that refusal.

In the *Hammond & Irving* case the Board has said not just any little unfair labor practice creates a refusal to bargain. There was some isolated interrogation but the Board felt there was not, under the facts an effort to evade the bargaining responsibility and refused to use the cards.

In another case the union had exactly 50 percent of the cards and there were, the Board felt, serious unfair labor practices. We unquestionably would have issued a refusal to bargain order if there had been a majority on the cards, but they were 50–50 and the Board felt that was not a proper set of circumstances for a bargaining order.

Senator DOMINICK. Did you participate in cases that I have brought up in the McCulloch hearing under which the card said if you want an election for representation, sign the card below in big capital letters and in small letters, and you hereby authorize me to be your bargaining agent?

Mr. BROWN. I believe I did; yes, sir.

Senator DOMINICK. Was there any question raised in those cases about the validity of those cards? And what is your attitude about this method of obtaining cards?

Mr. BROWN. Well, the law requires that the card designate a representative. The Board would not accept a card which merely said, "I want an election."

Senator DOMINICK. Why not?

Mr. BROWN. The statute itself requires that employees, in order to get an election, have designated a representative; and we think under the statute a card which merely said "I want an election" would not be in conformity with the statutory language. So, we do get cards which have both statements, and it is true that most cards are used for the purposes of obtaining an election. Then we have some cards that are ambiguous and some we do not think are clear enough or some we think have been obtained through fraud and coercion, and we do not accept those. So it is a matter of judgment in an individual case.

Senator DOMINICK. You have not set up any policy rules on the makeup of cards, have you?

Mr. BROWN. We have not. We have considered that. Some people have urged it and I confess I have some liking for that proposal. One of the reasons we have not is a fear of getting the Government too involved in saying, "This is the only thing that is acceptable to us."

The Supreme Court in another case said when the Board established some rules of this sort, that they were improperly restricting the operation of these organizations. So we have considered it. We have not decided to do it. I have mixed feelings about it at the moment.

Senator DOMINICK. It is my understanding that the *Tawas* case—and I want to repeat I do not pretend to be an expert in labor law—the Board has decided that a union can expel members who ask the NLRB for an election; is that correct?

Mr. BROWN. Yes, sir. In the *Tawas Tube* case an individual member of the union filed a petition to decertify that union. That union expelled him from membership. It clearly made no objection to his continued employment or interfered with his right to continue as an employee.

The Board again, because of that proviso which says it is up to the union to make its own rules with respect to acquisition of membership, felt that it was not the Board's prerogative to seek to control it.

Senator DOMINICK. Suppose this had come up in a union shop case? I presume this is not a union shop.

Mr. BROWN. I think not, I am not sure. Again, they could not expel the employee and then prevent his working there. If they said you have to be a member to work here and we will not let you be a member, that clearly would have been a violation.

Senator DOMINICK. So if it had been a union shop by virtue of his being expelled, he could have no longer worked there, you would have said this would have been a violation?

Mr. BROWN. That would have been my view.

Senator CLARK. Senator, do you want to yield to Senator Fannin at this point?

Senator DOMINICK. Yes.

Senator FANNIN. Go right ahead.

Senator DOMINICK. I want to continue, if I may.

They could fine him, however, and you would not think this was any problem?

Mr. BROWN. I think that is right.

Senator DOMINICK. Now, would the degree of that fine have anything to do with your decision?

Mr. BROWN. The amount of the fine?

Senator DOMINICK. Yes.

Mr. BROWN. I don't know. We have not had that.

Senator DOMINICK. I realize these are tough decisions, and what I am trying to do is get your general feeling on these matters. What you are saying to me, as I understand it, is that under a policy of some kind, and I don't know where it comes from, whether it is the statute or the Board policy, that a union can be pretty free and pretty tough with their memership so long as it does not actually deprive him of the right to work; is that correct?

Mr. BROWN. I think that is correct. On your other hypothetical question, if the amount of the fine, for example, was more than he was making as an employee so that in effect they are destroying his job, I think that might be found to be something different.

Senator DOMINICK. Suppose it brought him down below the Federal minimum wage as far as take-home pay is concerned?

Mr. BROWN. That one I would have to think about. There is a matter of degree.

Senator DOMINICK. There is another matter of interest in this *Tawas Tube* case, did they get an election or did you just say they could not have one?

Mr. BROWN. Oh, this action would have no impact on his getting an election. I think they got an election. I don't recall precisely, but this action would have had no impact on their getting an election.

Senator DOMINICK. You feel, however, that unions should have the right to prevent a member of the union from getting another election so long as it does not affect his job?

Mr. BROWN. It should not prevent him getting an election; no, sir.

Senator DOMINICK. It creates a pretty big monetary loss for him, does it not?

Mr. BROWN. I know of nothing he lost out of that case except membership in the union. He did not lose his job; he did not lose his salary, and he did get an election. And if a majority of those voting, vote to decertify the union, the union loses its representation rights; at any time during the life of the contract they can also deauthorize the union from maintaining its union shop agreement.

Senator DOMINICK. Most fines are used in ordinary statutes that we pass for the purposes of creating a deterrent which penalizes certain conduct. Do you not feel that the union's ability to impose a fine without any comeback gives them some rights that no one else in the country has?

Mr. BROWN. Well, so long as it has no impact on his job rights, the internal affairs of this and other organizations—as I have indicated—I think are outside of the statute.

Senator DOMINICK. Is this a statutory interpretation by courts or is it a statutory interpretation by the Board which created this situation?

Mr. BROWN. By the Board initially and then I mentioned earlier the *Allis-Chalmers* case was decided two different ways by the seventh

circuit and the petition for certiorari is pending before the Supreme Court from which we may get more clarification.

Senator CLARK. Mr. Chairman—the Senator from Texas.

Senator DOMINICK. Could I ask one more question on that?

I gather that some unions as bargaining agents of the employees in the plant get certain privileges—you may have a club, you may have a special dining room or something like this open for members only; is that correct?

Mr. BROWN. I am not aware of that.

Senator DOMINICK. You are not?"

Mr. BROWN. No, sir. I remember one time when I was in San Francisco when a union was operating a hiring hall under a contract, they called and said, "We know we have to dispatch people without discrimination, but it is raining and we cannot have all the members and the nonmembers in the hiring hall. Is it discrimination if we just take the members in out of the rain?

And we told them we didn't know of any decision covering that, but we thought they all ought to be treated equally.

Senator WILLIAMS. What union was that?

Mr. BROWN. The Longshoreman's Union.

Senator DOMINICK. Senator Yarborough, you wanted to ask some questions at this point?

Senator YARBOROUGH. Yes, thank you, Senator, if you would yield for just a moment.

Mr. Chairman, I have no questions. I have another engagement and must leave. After Mr. Brown returned from his military service in World War II and his work took him to California. He has been a resident of that State now for about 20 years and I guess we permanently lost him in Texas. He went through the public schools of Texas and junior college in Amarillo and received his bachelor's degree in history at West Texas State College, and his master's degree in economics at the University of Texas, my old alma mater. He taught in Amarillo Junior College and taught economics at the University of North Carolina for 3 years. I have had a number of expressions of very great support for him primarily from the academic community of my State.

I want to say though you have gone out to the fairer fields on the west coast, Mr. Brown, we are still proud of your work in Texas and proud of the fact that you received your training in the public schools, the junior State and colleges and the University of Texas.

Mr. BROWN. Thank you, sir.

Senator YARBOROUGH. I thank the Senator for yielding.

Senator DOMINICK. Let me just ask a couple of quick questions.

Do you see any difficulty in requiring that secret elections be held when asked for and outlawing the card certification method?

Mr. BROWN. I do see the problems I mentioned earlier that in some circumstances where serious unfair labor practices have created a situation where a fair election cannot be held, that the cards may be a more accurate reflection of the employees' wishes than the election.

Senator DOMINICK. You have a right, I think you said, that if there was an unfair labor practice, to require another election and supervise it, do you not?

Mr. BROWN. Yes, sir.

Senator DOMINICK. Would that not take care of most of those problems?

Mr. BROWN. It is possible except you do not just hold an election immediately in an atmosphere of coercion. It may require some time for the effect of that to be dissipated and so that would be one of the considerations.

Senator DOMINICK. Do you see any problem in putting a provision in the law which requires that unions shall not discriminate on the ground of race, creed, or color?

Mr. BROWN. Well, we have in some decisions found that where a union was the exclusive representative of the employees, that it had an obligation to represent all employees fairly and some of those cases are now pending in the fifth circuit.

Senator DOMINICK. That has nothing to do with discrimination on the race, creed, or color?

Mr. BROWN. Yes, sir; these were cases where they had not pursued grievances for members or employees because of race, where they had not sought to make all the facilities available to all of them.

Senator DOMINICK. Well, a provision in the law then would be helpful to you as opposed to being harmful; is that correct?

Mr. BROWN. It might be; yes, sir.

Senator DOMINICK. There have been fines for production quotas, for exceeding production quotas. Do you see any problem in passing legislation which would outlaw the right of the union to penalize a member for working to his full ability?

Mr. BROWN. Well——

Senator WILLIAMS. I missed the last.

Senator DOMINICK. Working to his full ability.

Mr. BROWN. In that connection, Senator, we had the *Wisconsin Motors* case, and in the *Wisconsin Motors* case it was our view that the company really had agreed to these limitations.

We had another case, the *Associated Home Builders* case out in California where the same general factual picture appeared except that there was no evidence that the company had ever agreed to such limitation. The Board reached the same decision in both cases.

The ninth circuit remanded the *Associated Home Builders* case, saying that the Board should have considered whether under another section of the law the union was refusing to bargain in good faith by seeking unilaterally to establish these work quotas.

In that case we have held another hearing, the parties are filing briefs and that issue is now pending before the Board as to whether the answer should be different under those circumstances.

Senator DOMINICK. I was asking you a little different question. The question was, do you see any problem in labor-management relationships if you passed a law which says that production quotas imposed on membership shall not be permitted? A fellow would then be permitted to work to the best of his ability.

Mr. BROWN. I do not know whether I can anticipate what that might mean in a number of situations. If you applied it to *Wisconsin Motors* and to the facts that existed there, then I would think that that might be an interference with collective bargaining.

If you applied it to the other case, it might be something different, and so I—because that issue is pending with us, I would not——

Senator DOMINICK. You think this would be a bad policy decision?

Mr. BROWN. I can only say again if that provision would prevent the result of *Wisconsin Motors*, I think it might be an interference

with collective bargaining, because I think the union and the company had agreed to that and the company really was helping to police it.

In the other situation, we are now reconsidering that and I——

Senator DOMINICK. Mr. Brown, as a matter of policy, national policy, do you think it is proper for anyone to prevent anybody from working to the best of his ability?

Mr. BROWN. No.

Senator DOMINICK. And if a situation arises where this is the effect, whether it is management or labor doing it, do you not think we should take some action on it?

Mr. BROWN. That I think would have to consider some other factors. There are a lot of things where employers and unions bargaining together reach agreement that I may not personally think is wise, but whether—it is our function to restrict them in that I have to leave with you, I believe, sir.

Senator DOMINICK. Now, if we should pass a law of this kind, do you feel that it would create any additional problems for the Board?

Mr. BROWN. Offhand I would not see that was any more difficult than the ones we now have.

Senator DOMINICK. I have introduced another bill which says that unions must get the consent of their membership before they use dues for political purposes.

Do you see any problems in this?

Mr. BROWN. I have no information or have no contact with that sort of provision. It is my general understanding that there are some court decisions that, in effect, say that now, but there may be doubt about it and that might be clarifying it. I have no connection with that.

Senator DOMINICK. If we make it unfair labor practice to spend money for political candidates taken from dues without the consent of the members, do you see this as a difficult problem for the Board?

Mr. BROWN. This gets into an area where we presently have no responsibility or authority. I don't know.

Sneator DOMINICK. You would rather not take a position on that?

Mr. BROWN. Yes, sir.

Senator FANNIN. Mr. Brown, I would just like to clarify what position you do take as far as your obligation or concern as a member of the Board.

Do you believe it is your obligation to protect the individual rights of employees?

Mr. BROWN. Yes, sir.

Senator FANNIN. How about the rights of employers?

Mr. BROWN. Yes, sir.

Senator FANNIN. How about the general public?

Mr. BROWN. Yes, sir.

Senator FANNIN. Well, with that in mind, why would you then vote to fine members who exceed union production quotas, fine members who cross picket lines in Wisconsin Motors, expel members who ask the NLRB for an election? I just do not see how you are being consistent.

Mr. BROWN. Well, sir, our responsibility is to try the best we can to apply the law as it is written by Congress and Congress has the proviso in 8(b)(1) that says nothing in this law is to prevent the union

from making its own rules with respect to the acquisition or the retention of membership.

The legislative history clearly indicated that it did not want the Government interfering in the internal affairs, while they did want to protect the individuals in their job rights. Our interpretation has been, as I have indicated, that we sought to interpret and to enforce this law as written.

Senator FANNIN. So you are not protecting the individual's rights if that is your interpretation, if the unions can promiscuously set down rules and regulations.

Mr. BROWN. It was our view that is what Congress said.

Senator FANNIN. That the unions can promiscuously set down rules and regulations that do take away individual rights of members?

Mr. BROWN. With respect to their membership obligations and rights, not with respect to their job rights.

Senator FANNIN. Should not that be corrected then by legislation if there is going to be that unfairness to the employees?

Mr. BROWN. Well, that involves very basic questions of the regulations of private organizations and how much you want to do that, and I have no——

Senator FANNIN. They are given many protections by law so why should they not also have the obligation by law to protect their own members?

Mr. BROWN. They have obligations under the law now in some respects. That is something different than we now think the law now says. If Congress chooses to change it, of course, we will do what Congress tells us to do; but it is not our view that that is what they have so far said.

Senator FANNIN. Do you believe the employee is entitled to hear both sides of claims made by the unions or the employer?

Mr. BROWN. Yes, sir.

Senator FANNIN. Why is it in the *GE* case you ruled that it was an unfair labor practice act when they tried to disseminate essential information to the employees?

Mr. BROWN. Well, the Board did not so rule actually, in the *GE* case. The Board found, and five members of the Board, although two of them had different positions with respect to a couple of things, found that overall the company really was trying to bargain with the employees and to bypass the union and that that was contrary to their obligations under the law.

In a case recently issued, Procter & Gamble, some similarities between that and GE—communications with the employees, extensive communications with the employees; the Board unanimously found it was not a violation of law under those facts. The Board has not said that GE violated the law by communicating with the employees; it did say under all the circumstances they felt they had not bargained in good faith and that case is pending in the courts.

Senator FANNIN. And GE disputes your claim in that regard?

Mr. BROWN. Yes, sir.

Senator FANNIN. Mr. Chairman, we have a live quorum.

The CHAIRMAN. Do you want to go answer it and come right back?

Senator CLARK. Would the Senator yield? Do you gentlemen have a great many questions you wish to ask or are you about through?

Senator DOMINICK. I have a few more, I know Senator Prouty has some.

Senator CLARK. Senator Prouty has called and cannot be here, we understand that Senator Javits, Senator Griffin, and Senator Murphy have no objections.

Senator DOMINICK. All I am trying to do is protect Senator Prouty's rights, that is all.

The CHAIRMAN. Do you have any idea when he will be here?

Senator DOMINICK. I do not, I had no idea he would not be here today.

The CHAIRMAN. We called his office and they said he was downtown.

I think we have three nominations here, I am quite sure there are no objections to them.

Senator DOMINICK. Staff informs me he can be here tomorrow.

The CHAIRMAN. We have other things scheduled for tomorrow.

We are trying to have a conference on the wage and hour bill and also Senator Clark is trying to have a meeting on his poverty program.

Senator Javits has just arrived.

Senator DOMINICK. I want to say for the record while we are at it, that the fact that we want to ask some questions on the makeup of the National Labor Relations Board should not be necessarily surprising to any member of the committee.

Senator CLARK. It is not.

Senator DOMINICK. And it is not our fault that we are caught in this bind because the President did not send up the nominations until very, very late.

Senator CLARK. The Senator is correct.

The CHAIRMAN. The Senator is absolutely right about that.

Senator DOMINICK. I just do not want the record to reflect that we are trying to delay here, that is all.

The CHAIRMAN. No, you should not because the nominations only came here a few days ago.

Senator FANNIN. Mr. Brown, on a ballot that is involved in representation elections, shouldn't it always offer a "no union" choice?

In other words——

Mr. BROWN. Well, it does in our elections, in Labor Board elections, except sometimes in a runoff situation where it takes the highest two choices, which may or may not have a no-union choice.

Senator FANNIN. On the final ballot is it possible that there could be a choice of no union?

Mr. BROWN. Well, that could be, or it could be not, depending on the results where you have—always you have a choice for no union in the first election. If a runoff is necessary—we have elections where there may be no votes for no union, and substantial number for two or three other unions, and the runoff may just have the two top choices on the ballot as of now.

Senator FANNIN. There is no uniformity as to the procedure you follow?

Mr. BROWN. The rule is clear, but it depends on the election results. If the vote for no union is one of the top two choices but a plurality and no majority, then there is a place for no union on the ballot, too.

Senator FANNIN. But there are many cases in which there are elections held wherein the ballot does not disclose a no union choice?

Mr. BROWN. There are some. There are not very many because we do not have very many runoffs and every election has a choice of

no union available on the first election. It is only in the runoff where those are possible and are not very frequent.

Senator JAVITS. Mr. Chairman, I would like to express my pleasure—and I am sure the pleasure of the other members of the minority, Senator Hill—in seeing you here at the first meeting at which I believe you have presided since your illness.

The CHAIRMAN. Thank you, sir, may I express my appreciation to you, Senator Javits, each member of the minority and may I say that is a very gracious, lovely letter from Mr. McClure, written on instructions from the members of this committee, expressing their concern and their good wishes to me and I am deeply grateful to each and every one of you, deeply grateful.

Senator JAVITS. Thank you, Mr. Chairman.

Senator DOMINICK. Would you yield at that point?

Senator FANNIN. Yes, I do.

Senator DOMINICK. I just want to contest the statement that you made because this is not my impression. It is my impression that the only way that you can vote for no union is not to vote. When you have a union representation between two competing unions the only way you can say that you want to vote for no union is not to vote at all.

Mr. BROWN. I think the Senator may be thinking about the practice under the Railway Board. That is not the practice under the National Labor Relations Board.

Senator DOMINICK. I think perhaps you are right. In fact, I am sure you are right because I was thinking of the aviation strike.

Mr. BROWN. Yes, sir.

Senator DOMINICK. Excuse me.

Senator FANNIN. In situations where a union is involved and a belated tender of dues pursuant to a valid union security clause, what is your position? How do you think the Board should hold if it has conflicting goals, those of enforcing the union security clause and of protecting the fight of an individual employee to be free of union control?

Mr. BROWN. A belated tender of union dues?

Senator FANNIN. Yes, a belated tender of union dues.

Mr. BROWN. If the individual employee is obligated under the contract to tender the dues in a timely fashion and does not, and if the practice is uniform, that is they are not picking and choosing among people that do it, then there would be no violation under present decisions of the Board if the individual were discharged for failure to pay dues.

Senator FANNIN. It seems it has been an arbitrary practice as far as unions are concerned. Do you feel they should be able to take advantage of such a situation, to take away an individual's rights?

Mr. BROWN. We do not have very many cases coming to us of that type, again, but you have problems where individuals have been delinquent repeatedly, month after month after month, and so whether a belated tender should always be acceptable is something that we have considered in our decisions and decided it was not required.

Senator FANNIN. You decided it was not required, but now do you have stipulations to that effect that it followed in the decisionmaking process?

In other words, what concerns me is that you could be so arbitrary in these actions and that you do not set down rules and regulations that you follow.

Mr. BROWN. The decisions very clearly indicated, I think, that if they are late in their tender and if the practice has been uniform and if they are not picking and choosing, they are merely adhering to their uniform practice and the same conditions are uniformly applicable to other employees, there is no violation of our law.

There is not a very significant problem numberwise in the cases we have.

Senator DOMINICK. Going back to this production quota, Mr. Brown, in the *Bay Counties District* case, District Council of Carpenters, which I believe you participated in?

Mr. BROWN. Yes, sir.

Senator DOMINICK. The union member was fined for violating a rule of the union, not for violating an agreement between the union and the company. It was section 12(a) of the working rules of the union and it said "Pace setting; any member who hurries or works at excess speed or tries to get his fellow workmen to do the same to complete his quota in less than 8 hours and leaves the job before 4:30 p.m., or the time allowed, shall be paid by the contractor on a pro rata basis or actual time worked."

Then it gives the right to prefer charges against any pacemaking.

Now, this again brings up that same point; should there be an enforceable policy by a union which permits them to fine anybody who wants to exceed a production quota?

Mr. BROWN. Senator, that is the case I mentioned in which the Board followed the same theory as in *Wisconsin Motors*, the ninth circuit reversed the decision and remanded it to the Board to determine whether or not the union was refusing to bargain in good faith by unilaterally establishing these conditions rather than bargaining.

This case has been remanded by the Board to a trial examiner, another hearing has been held, and it is under consideration by the Board at the present time.

Senator DOMINICK. I am not trying to get into the merits of the particular case, Mr. Brown, other than this way: I am talking about it as a matter of policy, your philosophy on the matter. I want to know your philosophy on whether the union should have the right to prevent a person from working to his full capability.

Mr. BROWN. Senator, if you are asking in broad terms I think everybody ought to have the right to work to his full capability. If you talk about a provision of the law of this type then you bring into play other considerations where employers and unions are bargaining and voluntarily reaching agreements that may be spreading the work and you say under a contract no employee can work more than so many hours a week so long as people are unemployed.

There are many other factors that would come into play and at the moment I would have no recommendation with respect to legislation on that topic.

Senator WILLIAMS. Will the Senator yield?

Senator DOMINICK. You agree then, that a union should be entitled to say that no person shall work more than so many hours as long as anybody is out of work?

Mr. BROWN. I would agree that employers and unions are free under the law today to negotiate voluntary agreements to that effect.

Senator DOMINICK. I am talking about philosophy.

Senator WILLIAMS. Would the Senator yield?

Senator DOMINICK. Yes.

Senator WILLIAMS. Did we not answer this philosophically when we legislated the 40-hour week? There are a lot of men who are fully able to work full steam 60 hours a week.

We legislated a 40-hour week, did we not?

Senator DOMINICK. We legislated a 40-hour week, we gave them a right to do more at overtime. We did not say you have to stop work for good at 40 hours.

Senator WILLIAMS. But this reduced the working opportunity to some degree?

Senator DOMINICK. Yes; but it did not prevent them from going forward on overtime if they wanted to and if the employer wanted to hire them.

I have one more question.

Page 54 of the nomination hearing on Mr. McCulloch, which I referred to when you were talking with me.

Mr. BROWN. Yes, sir.

Senator DOMINICK. We have these two cards printed on this election certification?

Mr. BROWN. Yes, sir.

Senator DOMINICK. The second card seems to me to be pretty misleading.

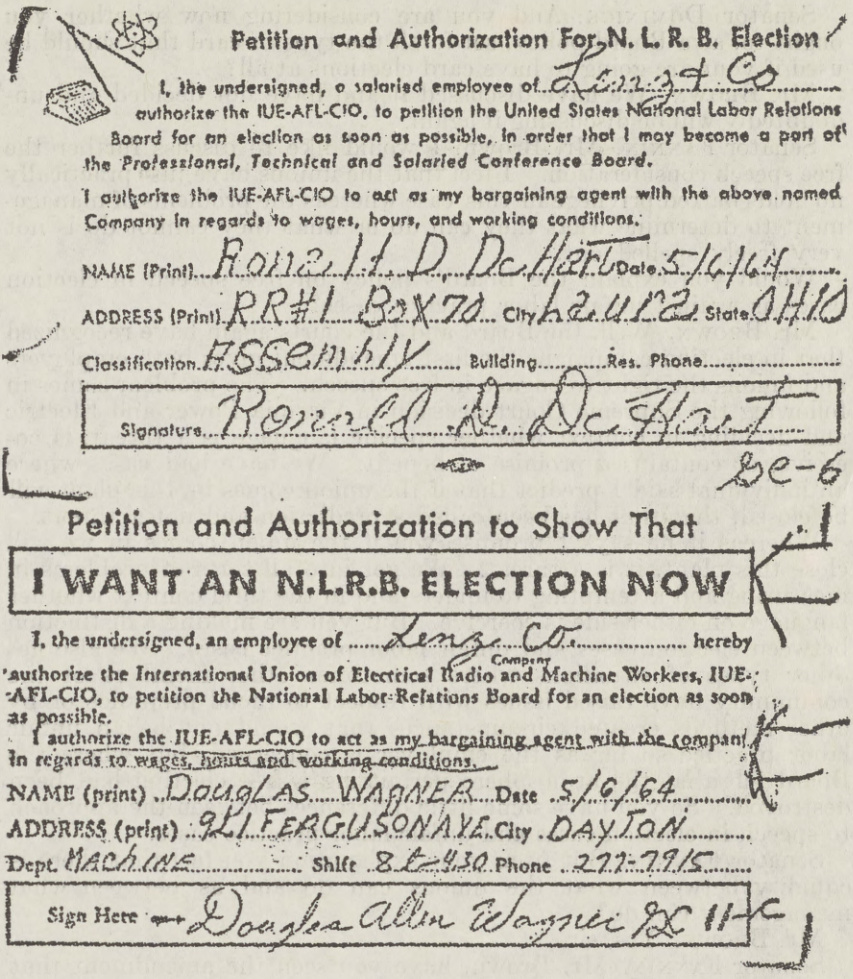
Was any point made of this in the process of your decision?

Mr. BROWN. I do not believe so.

Senator DOMINICK. Mr. Chairman, I think for purposes of the record it would be helpful if we had these two cards reprinted at this point in the record.

The CHAIRMAN. All right. Without objection it is so ordered.

(The cards referred to follow:)



Petition and Authorization For N. L. R. B. Election

I, the undersigned, a salaried employee of Lenz Co authorize the IUE-AFL-CIO, to petition the United States National Labor Relations Board for an election as soon as possible, in order that I may become a part of the *Professional, Technical and Salaried Conference Board.*

I authorize the IUE-AFL-CIO to act as my bargaining agent with the above named Company in regards to wages, hours, and working conditions.

NAME (Print) Ronald D. DeHart Date 5/6/64

ADDRESS (Print) RR#1 Box 70 City Lewis State OHIO

Classification Assembly Building Res. Phone

Signature Ronald D. DeHart

Se-6

Petition and Authorization to Show That

I WANT AN N.L.R.B. ELECTION NOW

I, the undersigned, an employee of Lenz Co. (Company) hereby authorize the International Union of Electrical Radio and Machine Workers, IUE-AFL-CIO, to petition the National Labor Relations Board for an election as soon as possible.

I authorize the IUE-AFL-CIO to act as my bargaining agent with the company in regards to wages, hours and working conditions.

NAME (print) Douglas Wagner Date 5/6/64

ADDRESS (print) 921 Fergusonaye City Dayton

Dept. Machine Shift 8 to 430 Phone 277-7915

Sign Here Douglas Allen Wagner IX 11-C

Senator DOMINICK. Your reply, as I understand it, was that no point was made of this?

Mr. BROWN. I do not really remember that case, and so far as I recall there was no point made of it.

Senator DOMINICK. Do you ordinarily, in a card certification, look at the type of card to see whether it is misleading?

Mr. BROWN. Yes, sir.

Senator DOMINICK. But you do not remember whether this was done in that case?

Mr. BROWN. I assume it was done, this is done initially by the General Counsel in the investigation of these cases in the field and then they are presented to a trial examiner. When the parties file exceptions to those issues, the matter comes to the Board and the Board makes its decision on whether that card would be adequate to support a refusal to bargain charge. It is my recollection that the Board so found in that case.

Senator DOMINICK. And you are considering now whether you ought to, as a Board policy, set forth the type of card that should be used if your are going to have card elections at all?

Mr. BROWN. We have discussed it and have not decided and undoubtedly will be discussing it again.

Senator FANNIN. Mr. Brown, I would like to discuss further the free speech consideration. I feel that the unions have just practically no holds barred privilege in this case whereas the problems of management to determine what they can do or what they cannot do is not very freely spelled out.

Would you explain the Board's policy on free speech in election cases as against unfair labor practice cases?

Mr. BROWN. Well, the Board and the courts again have recognized that in election campaigns the first amendment gives both employers and unions the right to engage in free speech. The problem comes in following the Supreme Court decision in Virginia Power and Electric and deciding in context whether specific language is a threat, is coercive, or contains a promise of benefit. We have had cases where an individual said I predict that if the union comes in, this plant will be closed, that that has been called a prediction and not a threat.

Whereas if he says I promise you if the union comes in we will close this plant, it is a threat. We get into all sorts of problems in measuring and attempting to understand in the total context whether language on either side is coercive. But you are making a distinction between election cases and unfair labor practice cases. We also get other types of situations where sometimes other members of the community have raised issues with respect to racial prejudice or by other methods created circumstances that would not be an unfair labor practice so far as the employer is concerned, but where the Board felt that the atmosphere permitting a free election had been destroyed. So you have some little differences between the approach to speech in election cases and unfair labor practice cases.

Senator FANNIN. But from your explanation you feel that there is equality between what the unions can do and as between what management can do?

Mr. BROWN. Yes, sir.

Senator FANNIN. Mr. Brown, have you seen the amendment that I offered regarding secret elections?

Mr. BROWN. Yes, sir.

Senator FANNIN. Would you favor the adoption of that amendment?

Senator WILLIAMS. Is this on the last offering?

Senator FANNIN. I will read 2, "ability to amend the National Labor Relations Act so as to require a Board-conducted election in representation cases unless the employer has engaged in a course of conduct in violation of section 8 of such act."

Senator WILLIAMS. This came up on the airlines strike, did it not?

Senator FANNIN. I offered that June 29, 1965, originally.

Senator WILLIAMS. Then this is not that last offer?

Senator FANNIN. Very similar, but the bill I am referring to is the one I offered last year.

Mr. BROWN. As I listen to it and think about it, Senator, to the extent that I understand it, it is about what we do now except that it

would exclude the cases where the employer had agreed to a card check and then sought to back out of it.

Senator FANNIN. Well, it would exclude the card check program.

Mr. BROWN. I would have to say the same thing I said to Senator Dominick earlier, that in the very limited number of cases where we use them, and recognize them, that in those cases I think that is a better protection for the rights of the individual than to eliminate that choice.

Senator FANNIN. You mean, you think that the card system is a better protection?

Mr. BROWN. Under the limited circumstances that we use them; yes, sir.

Senator FANNIN. Well, you have brought out today the many problems that you have as far as the card check is concerned.

Mr. BROWN. And I agree that elections are preferable and we held 38,000 elections as against 489 cases with cards. But under circumstances where unfair labor practices may have made the fair election impossible and in some of these other very few cases, the cards may be a more fair reflection of the employees' desires than the secret ballot.

Senator FANNIN. I do not follow you. You say the cards would be a better reflection than a secret ballot?

Mr. BROWN. In some cases where the individual has signed the card. I do not think workers sign cards lightly. We have cases where there is misrepresentation; we have cases where there is fraud and coercion, but it has not been my experience that they sign cards lightly. When they designate a collective bargaining representative and after that have been exposed to restraint or coercion and now say, "I did not know what I was doing when I signed the card," I have a feeling maybe the signing of the card was a more accurate reflection of their real wishes than an election we might conduct.

Senator FANNIN. How could anything reflect better their desires than a secret election? How could any system better represent their desires?

Mr. BROWN. If there is no atmosphere of interference, coercion, restraint, I agree with you and, as I said, we do it 38,000 times to 400.

Senator NELSON. To pursue that a moment, are you saying——

The CHAIRMAN. Any further questions, gentlemen?

Senator NELSON. I have one, Mr. Chairman.

The CHAIRMAN. All right, Senator Nelson.

Senator NELSON. Are you saying there are circumstances where there was no coercion in signing the card and no coercion exercised against the signing of the card and that therefore that situation at that time reflected the true wishes of the employee and there are circumstances when subsequent to signing the card, there is coercion and efforts to propagandize, indicating that a union would be bad for the employee and that under those circumstances a secret election would be less of an indication of the employees' desires than the original card; is that what you are saying?

Mr. BROWN. Yes, sir.

The CHAIRMAN. Any further questions from any of you gentlemen here of Mr. Brown?

Senator WILLIAMS. No questions, but I would like to make an observation.

The CHAIRMAN. All right, Senator Williams.

Senator WILLIAMS. You have been working in this field with the National Labor Relations Board since 1942?

Mr. BROWN. Yes, sir.

Senator WILLIAMS. With a term out for military service?

Mr. BROWN. Yes, sir.

Senator WILLIAMS. As a member of the Board, as I look at the list here, you have a record of longest service in the field of labor-management relations among the Board members.

Mr. BROWN. Certainly with the agency; yes, sir.

Senator WILLIAMS. I certainly want to support Senator Yarborough's statement of praise for this long period of service.

Mr. BROWN. Thank you, sir.

Senator CLARK. So do I. I would like the record to so show.

Mr. BROWN. Thank you, sir.

The CHAIRMAN. Any further questions?

Senator CLARK. We will not need to call Mr. Brown back.

Senator JAVITS. Apparently not. Of course, that may not be excluded absolutely.

Senator WILLIAMS. Could we expedite the time on this?

The CHAIRMAN. We want to thank you very much, Mr. Brown.

Mr. BROWN. Thank you, sir.

The CHAIRMAN. Gentlemen, we do have three nominations here to which I think there is no objection.

Senator DOMINICK. Yes; there is, as I gather——

The CHAIRMAN. I am talking about Dr. Bennett, Ivan L. Bennett, to be Deputy Director of the Office of Science and Technology.

Senator DOMINICK. You said three.

The CHAIRMAN. Then there are two of the Mine Safety Board, I think there are no objections—Harry R. Pauley and Mr. Charles R. Ferguson; is that not correct?

Senator CLARK. I asked a question whether there were any further questions and got a negative answer.

Senator FANNIN. You were asking questions.

The CHAIRMAN. The committee will kindly go into executive session.

(Whereupon, at 12:15 p.m. the committee recessed and went into executive session.)

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