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HEARING

BEFORE THE

COMMITTEE ON HUMAN RESOURCES
UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

JOHN H. FANNING, OF RHODE ISLAND, TO BE CHAIRMAN, NATIONAL LABOR RELATIONS BOARD

OCTOBER 26, 1977

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NOMINATION

WEDNESDAY, OCTOBER 26, 1977

U.S. SENATE,
COMMITTEE ON HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, at 10:45 a.m., in room 4232, Dirksen Senate Office Building, Senator Harrison A. Williams, Jr. (chairman of the committee) presiding.

Present: Senators Williams, Pell, Javits, Hatch, and Chafee.

The CHAIRMAN. We will come to order and begin our hearing this morning with our first nominee, John H. Fanning, the present Chairman of the National Labor Relations Board. He has been nominated to a full term in this position.

Mr. Fanning is a resident of Rhode Island and a member of the bar of Rhode Island and of the U.S. Supreme Court. He is a career Federal employee who served from 1942 to 1957 in legal and industrial relations positions in the Departments of Labor, Army, and Defense.

Since 1957, he has served as a member of the National Labor Relations Board. He is the only Board member to be appointed to four successive terms by five different Presidents—Presidents Eisenhower, Kennedy, Johnson, Nixon, and now President Carter. Mr. Fanning served as Acting Chairman from December 1974 to February 1975, and was appointed to that post again by President Carter on April 14, 1977. He has now been nominated for a full term as Chairman which will run until December 17, 1982.

Mr. Fanning's extensive experience in this difficult area of the law can hardly be overstated. I believe that his service has been a great asset to the effective administration of the National Labor Relations Act, and I personally look forward to his continued service in that capacity.

At this time, I will insert into the record a brief description of the functions of the Board.

[The following was received for the record:]

DUTIES AND FUNCTIONS OF THE NATIONAL LABOR RELATIONS BOARD

(Excerpt from United States Government Manual, 1977/78)

The National Labor Relations Board is an independent agency created by the National Labor Relations Act of 1935 (Wagner Act), as amended by the acts of 1947 (Taft-Hartley Act) and 1959 (Landrum-Griffin Act).

The act affirms the right of employees to self-organization and to bargain collectively through representatives of their own choosing or to refrain from such activities. The act prohibits certain unfair labor practices by employers and labor organizations or their agents and authorizes the Board to designate appropriate units for collective bargaining and to conduct secret ballot elections to determine whether employees desire representation by a labor organization.

As of July 1, 1971, the Postal Reorganization Act (84 Stat. 719; 39 U.S.C. Prec. 101 note) conferred jurisdiction upon the Board over unfair labor practice charges and representation elections affecting U.S. Postal Service employees. As of August 25, 1974, jurisdiction over all privately operated Health Care Institutions was conferred on the NLRB by an amendment to the act (29 U.S.C. 152 et seq.).

FUNCTIONS AND ACTIVITIES

The Board has two principal functions under the act: preventing and remedying unfair labor practices by employers and labor organizations or their agents, and conducting secret ballot elections among employees in appropriate collective-bargaining units to determine whether or not they desire to be represented by a labor organization. The Board also conducts secret ballot elections among employees who have been covered by a union-shop agreement to determine whether or not they wish to revoke their union's authority to make such agreements; in jurisdictional disputes, decides and determines which competing group of workers is entitled to perform the work involved; and conducts secret ballot elections among employees concerning employers' final settlement offers in national emergency labor disputes.

The General Counsel in unfair labor practice cases has final authority to investigate charges, issue complaints, and prosecute such complaints before the Board. The General Counsel, on behalf of the Board, prosecutes injunction proceedings; handles courts of appeals proceedings to enforce or review Board orders; participates in miscellaneous court litigation; and obtains compliance with Board orders and court judgments. The General Counsel is responsible for the processing by field personnel of the several types of employee elections referred to above.

Under general supervision of the General Counsel, 32 regional directors and their staffs process representation, unfair labor practice, and jurisdictional dispute cases. (Some regions have subregional or resident offices.) They issue complaints in unfair labor practice cases; seek settlement of unfair labor practice charges; obtain compliance with Board orders and court judgments; and petition district

courts for injunctions to prevent or remedy unfair labor practices. The regional directors also direct hearings in representation cases; conduct elections pursuant to agreement or the decision-making authority delegated to them by the Board, or pursuant to Board directions; and issue certifications of representatives when unions win or certify the results when unions lose employee elections. They process petitions for bargaining unit clarification, for amendment of certification, and for rescission of a labor organization's authority to make a union-shop agreement. They also conduct national emergency employee referendums.

The Board can act only when it is formally requested to do so. Individuals, employers, or unions may initiate cases by filing charges of unfair labor practices or petitions for employee representation elections with the Board field offices serving the area where the case arises.

In the event a regional director declines to proceed on a representation petition, the party filing the petition may appeal to the Board. Where a regional director declines to proceed on an unfair labor practice charge, the filing party may appeal to the General Counsel.

* * * * *

The CHAIRMAN. It is most appropriate, I believe, to pause now and turn to the senior Senator from Rhode Island who will introduce Mr. Fanning to the committee.

Senator PELL. Thank you, Mr. Chairman.

It is a great personal pleasure to introduce an old friend from Rhode Island, John Fanning, to our committee today. He has been nominated by President Carter to serve his fifth term as a member of the National Labor Relations Board, and this will be his first full term as its chairman.

Chairman Fanning has testified before our subcommittee on several occasions over the 20 years he has served on the Board. I believe his deep knowledge of labor law and sensitivity to the law and its congressional intent, his outstanding personal commitment to the principle of collective bargaining and employee-management relations have been evident throughout these two decades.

He served six Presidents; three Democrats and three Republicans and through periods of difficulty and harmony on the labor management scene. He has contributed to the Board's wisdom and perspective with a strong sense of fairness and practicality which is so necessary to an effective institution.

John Fanning's renomination comes at a time when we can really use his perspective and experience as we consider the Labor Reform Act on which he testified very ably earlier in this session. He testified very ably and at length.

I am proud of the talents that Mr. Fanning has brought to Washington and look forward to his remarks this morning.

The CHAIRMAN. Thank you very much.

Senator PELL. I would also like inserted in the record at this point an editorial which appeared in the Providence Journal concerning Mr. Fanning, entitled, "Nice Work, Mr. Fanning."

The CHAIRMAN. We will include your biography, Mr. Fanning, in the record at this point.

[The following was submitted for the record:]

The Providence Journal
Friday, October 14, 1977
Page A-22

Nice work, Mr. Fanning

When John H. Fanning, now 61, left Pawtucket 35 years ago to go to Washington as a government labor lawyer, he didn't have that in mind as a lifetime career. Nevertheless, his talents in that direction have brought it about.

These raised him through the bureaucracy to National Labor Relations Board membership — although a Democrat — by appointment of President Eisenhower in 1957. President Kennedy, Johnson and Nixon reappointed him in bipartisan recognition of a good public servant. President Carter designated him NLRB chairman last April and now has named him to a record fifth five-year term on the board.

This is a deserved tribute for a job that has been and will continue to be well done. Mr. Fanning also has done Rhode Island proud and for this he has the hearty applause of the folks back home.

JOHN H. FANNING

BIRTH:	September 19, 1916, Putnam, Conn.
EDUCATION:	Norwich Free Academy, Norwich, Conn., 1934. Providence College, Providence, R.I., A.B. (cum laude) 1938. Catholic University of America School of Law, Washington, D.C., LL.B., 1941. Providence College - Doctor of Public Administration, 1969 (honoris causa).
PROFESSION:	Lawyer - Member of State of Rhode Island and U.S. Supreme Court Bars. Member of Federal Bar Association and Rhode Island Bar Association.
GOVERMENT CAREER:	Federal career employee from 1942 to 1957, serving in legal and industrial relations positions in the Departments of Labor, Army, and Defense. Since December 1957 has served as a Presidential Appointee as a Member of the National Labor Relations Board. In December 1972 was appointed by President Nixon to a fourth 5-year term as a Member of the National Labor Relations Board. He is the only Board Member to be appointed to four successive terms by four Presidents of different political parties. He previously was appointed to the Board by Presidents Eisenhower, Kennedy, and Johnson, and has served continuously since December 1957. From December 1974 to February 1975 served as Acting Chairman by appointment of President Ford. Appointed Chairman by President Carter on April 14, 1977.
NON-GOVERNMENT EXPERIENCE:	Law firm of Corcoran and Mangan, Pawtucket, R.I., 1941-1942.
MARITAL STATUS:	Married to former Eloise M. Cooney, Pawtucket, R.I. Mrs. Fanning is a graduate (A.B. degree) of Brown University, Providence, R.I., 1938 and teaches Latin at the Immaculata Preparatory School, Washington, D.C. Five children, three girls, two boys; nine grandchildren, six girls, three boys.
POLITICAL AFFILIATION:	Registered Democrat
LEGAL RESIDENCE & DOMICILE:	15 Pierce Street, Pawtucket, R.I.
WASHINGTON, D.C. RESIDENCE:	5905 Welborn Drive, Washington, D.C. 20016
PROFESSIONAL AWARDS:	In October 1975, the annual John H. Fanning Conference on Labor-Management Relations was established by the Quirk Institute of Industrial Relations of Providence College, in Rhode Island, and Mr. Fanning received the first Quirk Institute Award for his public service contribution to industrial peace and labor-management relations.

November 1965, received Catholic University of America Alumni Association Annual Award for Outstanding Achievement in the field of Government.

May 1965, inducted as Honorary Member in Phi Alpha Delta Law Fraternity for service to Catholic University Law School and students.

May 1958, received Providence College Alumni Association Annual Personnel Achievement Award.

April 1958, received Department of Defense Meritorious Civilian Service Medal.

May 1957, received from National Civil Service League its Annual Career Award given to outstanding Government employees.

OTHER PROFESSIONAL ACTIVITIES:

Has participated as guest speaker or lecturer in numerous programs sponsored by many of the Nation's outstanding colleges and universities, Bar Associations, and professional, labor, and management groups.

Has authored articles appearing in publications of Boston College, George Washington, Catholic, Loyola, Tulane, Georgia, Pennsylvania, Baylor, Arizona, Wayne State, and New York Universities; THE RECORD of the Bar of the City of New York, Monthly Labor Review of the U.S. Department of Labor, Labor Law Journal, Social Order and the New Catholic Encyclopedia, and the Bureau of National Affairs.

1971 - 1977, Member of the Administrative Conference of the United States. Resigned when appointed Chairman of National Labor Relations Board in April 1977.

COMMUNITY ACTIVITIES:

1968 - 1973, Member of Cardinal O'Boyle's Committee of the Laity for the Archdiocese of Washington, to advise on and implement charitable and social activities of the Archdiocese.

1969 - , Board of Directors, Catholic Youth Organization, Archdiocese of Washington, D.C.

ALUMNI ACTIVITIES:

1977 - , Board of Governors, Catholic University of America Alumni Association.

1975 - 1976, National Secretary, Providence College Alumni Association.

1974 - 1975, National Chairman, Providence College Annual Loyalty Fund Campaign.

1971 - , Board of Directors, Catholic University Law School Alumni Association.

1961 - 1962, Board of Governors, Providence College Alumni Association.

1959 - 1962, National President, Catholic University Law School Alumni Association.

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The CHAIRMAN. Senator Chafee?

Senator CHAFEE. Thank you very much, Mr. Chairman.

I would like to join in expressing my delight at the President's sagacity in reappointing Mr. Fanning to the National Labor Relations Board. John Fanning has brought great distinction to our State in a variety of ways; he is a native; he is a graduate and honorary degree recipient from Providence College and we are very proud of his achievements.

I notice that Senator Pell mentioned that he served under six Presidents. I think that is pretty nearly a record. Maybe he and Averell Harriman are the only ones that share that distinction, so we hope you will continue with many years of excellent service as you have in the past.

Thank you very much.

The CHAIRMAN. Thank you very much, Senator Chafee.

Did you want to greet the chairman?

Senator HATCH. I am very happy to welcome you also, Mr. Fanning. We have heard your testimony in the Labor Reform Act hearings and there is no question you are a very knowledgeable member of the Board and should be able to add a great deal, and even more as the chairman.

Thank you, Mr. Chairman.

The CHAIRMAN. To save time, the full statement of my praise for your accomplishments in this office will be included in the record, Mr. Fanning. I would ask, do you have any statement you would like to make?

STATEMENT OF JOHN HAROLD FANNING OF RHODE ISLAND

Mr. FANNING. No, Mr. Chairman. I have provided the committee with a statement of my biographical résumé and a statement of my net worth. I do want to thank Senator Pell, my senior Senator and Senator Chafee, my junior Senator—junior only in the sense that one must be senior and one must be junior. I have known both of them for many, many years. They are very distinguished gentlemen representing the State of Rhode Island.

Rhode Island has always been blessed with outstanding Senators, going back to Senator Theodore Francis Green, Senator Pastore, Senator Pell, Senator Chafee, and it is a very great privilege for me to be cited by them at this kind of a conference. We Rhode Islanders are peculiar people in the sense that we are a very small State and very conscious of that, and so, we are very close together. I thank both the Senators for being here this morning.

The CHAIRMAN. It really is unnecessary to develop a lengthy record here because your record speaks for itself. We are, of course, concerned with the administrative efficiency of the National Labor Relations Board, with the tremendous caseload that comes to you and you have indicated to us that the caseload would reach 57,000 cases in fiscal 1978. Administrative law judges, I understand, the median time it takes administrative law judges to issue decisions is about 100 days.

What is the present situation with respect to administrative law judges; how many positions are authorized and how many are filled, and do you feel the ALJ staff is adequate in that respect?

Mr. FANNING. I think that operationally speaking the administrative law judge's problem is probably the most serious problem we have. We have at the present time, 93 administrative law judges. We have appropriation authorization to go up to 130, but we do not have the supergrade allocation that would be necessary to compensate an additional 30 administrative law judges.

Some weeks ago the House passed a bill, H.R. 6975, which would increase the authorized number of administrative law judges to 100, of which, informally we believe, we have a good chance of being allocated 30 spots. I am scheduled to testify on Friday before Senator Sasser's subcommittee in support of this measure, and if the committee regards the measure favorably and the Senate takes favorable action I think that will go a long way toward solving our administrative law judge problem.

The CHAIRMAN. I missed your first point. You said you had 93 administrative law judges.

Mr. FANNING. Yes; we have Appropriations Committee authorization and we have the money to hire up to 130, but under the governmental scheme, all of our administrative law judges are salaried at what is known as a GS–16 grade. There is a limitation on the number of those supergrades and there are no grades available from the Civil Service Commission beyond what has been allocated to us. And so, until we can get authorized by the Senate and by the House to increase the number of grades we cannot recruit any more administrative law judges.

The CHAIRMAN. You have the money but not the grades?

Mr. FANNING. That's right, sir. It is a rather peculiar situation. I hope that we can convince Senator Sasser and his committee on Friday to act favorably on our request, and then it will be a job of recruiting and training and getting qualified people.

The CHAIRMAN. Senator Hatch?

Senator HATCH. I notice that Senator Javits is here.

Senator JAVITS. Please go ahead.

Senator HATCH. Thank you, Senator.

Thank you, Mr. Chairman.

Mr. Fanning, one question that I have concerns the Board's decision in the *General American Transportation* case which was decided in 1977, at 228 NLRB 102 in 1977. That case overturned much of the Board's well established Collyer doctrine, as you know, governing Board deferral to parties' agreements to arbitrate contract disputes, a doctrine that you must agree helps to reduce the Board's backlog of cases as it encourages private dispute settlement procedures. I think you would agree with me on that.

Mr. FANNING. I, of course, have been in the minority on the so-called Collyer policy, Collyer line of cases since its inception some years ago so I cannot explain to you why some of my colleagues have decided the Collyer issue differently so that at the present time a majority of the Board would not defer to private dispute settlement mechanisms in the 8(a)(3) category or the discharge category but a different majority would continue to defer in the 8(a)(5) category. There are different majorities for each conclusion.

I happen to be convinced that there is a statutory issue here and that under our statutory responsibility any grievant has a right to come to the Board and ask the Board to investigate allegations of

the unfair labor practices which are being charged. Whether I'm right or whether the majority is right, of course, is ultimately up to the courts to say, but I would agree with you in this respect, that I think it would have been better to have either full Collyer or no Collyer. I think that the present situations of having a divided majority is not desirable.

Senator HATCH. I see. As the present number of cases arising out of disputes over the terms of collective bargaining contracts indicates, no matter how well an agreement is drafted questions inevitably develop involving the meaning and applicability of the bargaining agreement as no group of persons can anticipate all of the problems that will arise in the course of the contract term. Thus, in order to conserve agency and judicial resources and strengthen the collective bargaining relationship and speed up dispute resolution procedures the courts have bent over backward to enforce agreements to arbitrate against parties who refuse to submit themselves to arbitration.

Indeed, Collyer requires the parties to exhault their contract remedies calling for arbitration prior to seeking relief from the Board, and my bill, S. 1855, has a similar feature in it. Nevertheless, as you have pointed out, the Board has now decided under *General American Transportation* to limit its policy of deferral as set forth in Collyer and subsequent cases and deferral, again, as you pointed out, will only be made in section 8(a)(5) cases and not in section 8(a)(3) cases, those alleging discrimination on the basis of union membership.

For some time now this committee has heard witness after witness testify as to the problem of delayed decisionmaking by the National Labor Relations Board. Yet, under *General American Transportation*, the Board will be saddled with a large number of discrimination cases that had been previously deferred to arbitration.

Don't you think that the Board has more important things to do with its limited resources than to hear arguments on the law and then issue a decision on such issues as whether an employer violates the act by taking away rubber floor mats on which employees had been standing, and I refer in that case to *U.S. Postal Service*, 228 NLRB 147, a 1977 case decided by the Board?

Mr. FANNING. I would say simply this in supplementation of what I've said, Senator: My position has nothing to do with contract interpretation. I certainly agree that matters of contract interpretation—and there will always be matters involving contract interpretation—should be referred to the privately-agreed-upon dispute-settling arbitration techniques.

I have dismissed cases where I thought there was a contract basis for settling the dispute. All I'm talking about and all Member Jenkins and I were talking about in our dissent in Collyer and in our subsequent dissents were pure statutory issues. If it wasn't for private arbitration the Board would have been flooded. We wouldn't be able to handle it.

Senator HATCH. So, your interpretation then of American Transportation would be merely on statutory issues?

Mr. FANNING. Yes. It always has been so.

Senator HATCH. That is good to know.

Under section 10(j) of the National Labor Relations Act, the Board, as you know, has discretionary authority to petition the court of an injunction in connection with any unfair labor practice after a com-

plaint has been issued. According to the 41st annual report of the NLRB in fiscal 1976, although unfair labor practice complaints were issued in 3,793 cases the Board found only 20 petitions for 10(j) relief.

The Board's reluctance to use its discretionary authority under 10(j) is one of the reasons that S. 1883 and H.R. 8410 each contain a provision making it mandatory for the Board to seek court injunctions whenever a charge is filed alleging a discriminatory discharge during a union organizing campaign or during bargaining for an initial contract and preliminary investigation suggests that the charge has any merit.

As a long-time member of the Board, would you please outline for our committee here some of the reasons behind the Board's unwillingness to use its 10(j) authority as evidenced by those complaints and the only 20 times it has exercised that authority.

Mr. FANNING. I think part of the problem, Senator, is the organizational structure of the Board. The Board, of course, is a judicial or quasi-judicial agency. It's the General Counsel who is the Federal prosecutor. It's the General Counsel who issues the complaints. The Board doesn't see these cases until the case has been decided by the administrative law judge and some aggrieved party requests or files an appeal or what we call "files exception".

What has prompted the General Counsel not to seek 10(j) relief in many of these cases more frequently than he has I cannot answer for you. I do know this, that our batting record with some of the U.S. district courts has not been very encouraging. We have not been too successful in going into a U.S. district court and asking the judge to reinstate someone that we allege is an 8(a))(3) until we can dispose of the case. Many of the judges feel that after we have disposed of the case the back pay remedy and the reinstatement remedy will be an adequate remedy for the individual. I can't explain why some judges feel that way but that has been one of our problems. They feel that at the end of the line the individual will be recompensed and will be reinstated.

I have advocated in several speeches that we should be more generous, if you will term the expression, more generous in seeking 10(j) relief. I think some of the new bills, the House bill and, I think, the Senate bill, would suggest to us that we do try to use 10(j) relief more frequently. The ABA has indicated to us that they think we should and we are, I think,——

Senator HATCH. Do you think you should be mandated to do it though?

Mr. FANNING. Yes; I think we are doing it more frequently than we did when I first came to the Board 20 years ago.

Senator HATCH. Under the House-passed H.R. 8410, the mechanism would be created whereby the Board would be given authority to obtain a district court injunction against stranger picketing and wildcat strikes. It would be available only where there is a no-strike agreement in the contract of the employer involved and only when the Board found the "public interest" would be served by stopping the activity.

The authority is discretionary, and private parties would be barred from going into court on their own to seek relief under this section. Because of the Board's demonstrated unwillingness to use discretionary injunctive authority, would not the public be better served by

granting a party to an agreement containing a no-strike, no-lockout provision, the right to seek injunctive relief against wildcat strokes and stranger picketing?

Mr. FANNING. They may have that now depending on the State and the court that they go looking to relief for.

Senator HATCH. My point is, regardless of the State, if we are trying to remedy the evil, shouldn't we also extend it to the individual aggrieved parties to be able to seek injunctive relief against both wildcat strike and stranger picketing?

Mr. FANNING. I would be inclined to suggest, Senator, that that is better left in the hands of a public authority which can exercise some kind of public policy under the guidance of the statute that we're operating under——

Senator HATCH. But that bothers me, where you would be willing to have mandatory injunctive relief forced upon the Board in the one case but not allow equal treatment on the other side. It would appear to me that it is equal treatment because I think almost everybody admits that wildcat strikes and stranger picketing are bad.

Mr. FANNING. I think that would produce, however, a lot of private litigation. I don't happen to believe in private litigation as the answer to labor-management disputes. I sometimes think that there are too many lawyers in the labor-management business now. I happen to be an attorney, but the secret of labor-management relations is a recognition of the rights and obligations of each other, a spirit of compromise, and a willingness to resolve their disputes.

If every trade union and every employer had a sense of public responsibility, we might not need a lot of the things that we're talking about, but I would prefer to keep this in the hands of the public tribunal.

Senator HATCH. Under the House-passed H.R. 8410, the Board would be required to establish expedited election procedures under which a series of complex issues are decided and an election directed within 25 days of the filing of the petition in cases where the union has obtained authorization cards from at least 50 percent of the employees in question. There is no requirement in the bill that the Board resolve challenges to the election prior to the holding of an election in order to give the employees the opportunity to know exactly how fundamental questions affecting the election will be resolved.

Indeed, under the Board's "vote and impound" procedure where there are questions concerning the appropriateness of composition of a bargaining unit, or the propriety of holding an election sufficiently serious for review by the Board itself, the election is conducted and the votes impounded without first resolving the pending issues.

This procedure seems to me to be a rather clear infringement of employee rights. If an issue is sufficiently serious for Board review, the employee surely should be entitled to know how that issue would be resolved before being required to vote. For example, skilled tradesmen over the years have, at times, been less than enthusiastic over being included in the same bargaining unit with rank-and-file employees.

Don't you think that before employees such as these vote on whether to be represented by a union, they should be told how questions over the composition of the bargaining unit will first be resolved?

Mr. FANNING. I think it depends on the seriousness of the issue, Senator. There are many cases where the issues are relatively minor in

the sense that they involve only a few employees—eligibility questions and things of that kind. The task force which you are familiar with that we have had for the last couple of years recommended the adoption of a "vote and impound" procedure so that in some cases—it doesn't operate across the board—where, in the judgment of the Board, the issue involved could be just as well resolved after the election as before the election, and we would let the parties have their election and possibly by postelection agreement among themselves resolve these issues; we decided that we would have a "vote and impound" procedure.

But, we've only had it a few months, so I cannot tell you how many cases we've had. My best guess—and I qualify it by saying my best guess based on experience—would be that probably not much more than 150 cases a year out of the 9,000 elections we run would be subject to this procedure.

Senator HATCH. I have additional questions, but I don't mean to dominate the committee's time, Mr. Chairman. I notice we have a rollcall vote coming up. I would like to submit additional questions to you in writing, sir, and I will try and get those out to you today. If you could get them right back, I would be very appreciative.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Javits?

Senator JAVITS. Mr. Fanning, first let me say that I think it is splendid that you have given such long service to our country. I have looked over your financial statement. It certainly demonstrates the virtue of public service and how such service deprives people of any financial opportunity in normal terms to get ahead. I admire you for your self-sacrifice. You are an able and a good lawyer, and I am sure you could earn a great deal in private practice. You have accepted very modest compensation for so many years that I think you are entitled to our thanks and the thanks of the country for a very difficult job.

Mr. FANNING. Thank you, Senator.

Senator JAVITS. There is no question about your confirmation as far as I am concerned. I am all for you. There are some things in which within the context of a confirmation hearing you could enlighten us, and I am going to ask you only two questions and submit others in writing.

One question I will submit in writing, because I think it will take a little answering, is this—as you look down the road with your enormous experience and background for the next 5 years, what do you see as the principal challenges facing the Board?

Mr. FANNING. I can give you a quick answer now, Senator, if you would like.

Senator JAVITS. Please.

Mr. FANNING. I have said for many years that I think the No. 1 problem of the Board is delay. I think until we can run elections and notify the parties of our results in 30 days on the average, and until we can dispose of the Board decision in an unfair labor practice in 6 months, we are not doing the job we should be doing. Whether we are ever going to achieve those goals, I don't know. If I didn't think they were achievable, believe me, I would not invest another 5 years in trying to achieve them, but I think until we can do that there's much room for improvement.

Senator JAVITS. Within the context of this hearing for your own confirmation, could you tell us—again, we have got to go over and vote—how you believe those challenges can be met. For example, the next question I was going to ask you: We have a very highly controversial labor bill before us on procedure and time saving, which is exactly what you are testifying to. To what extent can you as Chairman of the Board, subject to confirmation now, enlighten us as to your views on whether that bill will or will not in its various parts advance the cause which you seem to feel keenly yourself?

Mr. Fanning. I have testified on S. 1883 favorably. I endorse the concepts reflected in the bill, and similarly, in H.R. 8410, I think they will be a big help. The imponderables are that next year we will have an increase of 6,000 or 7,000 cases in the influx of cases. Last year we had 51,000. This year we expect 56,000 or 57,000, and the year after we expect 62,000.

Our estimates have proven to be conservative over the years. I cannot predict with any certainty whether that trend will continue or not but I think it will simply because there are more people in the work force, and so forth, and so on. I think it's going to require a very energetic Board. I think it's going to require us trying to develop short cuts. I think it's going to require more administrative law judges. I think there are a lot of things down the road that we're going to need.

Senator JAVITS. Will you give us in writing what you believe should be the optimum organization of the Board? You can't do this except in a confirmation hearing. I know you have lots of cases but I am asking you now what do you believe to be the best functioning organization of the Board, as to panels, administrative judges, et cetera, as you estimate down the road 3 years where you have a firm estimate of the case load, and especially with the emphasis on unfair labor practice cases which are the longest and the toughest to resolve? Would you do that for us?

Mr. FANNING. Yes, sir.

Senator JAVITS. And, Mr. Chairman, I ask unanimous consent to include that in the record.

The CHAIRMAN. Yes.

When can we expect that? I missed how long Senator Hatch was requesting for the written reply. Did you hear that?

Mr. FANNING. He didn't give me a due date, but having in mind the potential adjournment of the Senate, I will get the answers back to him as quickly as possible.

The CHAIRMAN. By return mail, if you could.

Senator JAVITS. Why don't we fix a time, Mr. Chairman?

Mr. FANNING. As far as your question is concerned, Senator, I would think within 48 hours.

Senator JAVITS. Why don't we fix a time for everything, say, next Tuesday?

The CHAIRMAN. Let's finish it up this week.

Senator JAVITS. All right, by the close of business Saturday. Is that all right?

Mr. FANNING. Assuming that Senator Hatch gets me his questions today, as he intimated, we can get you answers by the close of business Friday, I would hope.

The CHAIRMAN. Excellent. And then, first thing next week we will be able——

Mr. FANNING. Thank you.

The CHAIRMAN. Thank you very much.

[The material referred to follows:]

NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C. 20570

October 28, 1977

SENATOR
WILLIAMS, N.J.

1977 OCT 28 PM 3:20

OFFICE OF
THE CHAIRMAN

The Honorable Harrison A. Williams
Chairman, Human Resources Committee
United States Senate
Washington, D.C. 20510

Dear Senator Williams:

I thank you for your very kind and courteous treatment at my confirmation hearings on Wednesday, October 26. You will recall that Senator Javits and Senator Hatch indicated that they would like me to respond in writing to certain questions which they did not have an opportunity to ask me. I have responded to their questions, and I attach hereto for your information copies of my responses.

If I can be of any further service to you or other members of the Committee, please call on me.

Sincerely yours,

John H. Fanning

John H. Fanning
Chairman

Enclosures

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

October 28, 1977

Honorable Orrin G. Hatch
Committee on Human Resources
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

Your letter of October 26, 1977, asks for my response to two questions.

Your first question expresses your concern that a recent decision of the Board in Construction Drivers Local 83, Teamsters (Allied Concrete, Inc.), 231 NLRB No. 181, is an attempt "to do an end run around Congress" in that it seems to legitimize so-called common situs picketing notwithstanding the House of Representatives' recent rejection of the common situs picketing bill. You contend that the effect of the Board's holding is to create a new exception to the general rule allowing contractors jointly engaged at a common situs to isolate picketing against one employer by creating a separate gate for its employees, and you seemingly accept the dissenting Members' view that the majority opinion creates a per se rule that all ambulatory picketing is primary and lawful.

You ask me to tell you "how your decision that pickets may ignore reserved gate signs, go onto the common situs and picket the construction workers at work where trucks of a struck employer were delivering concrete comports with the U.S. Supreme Court's decision in Denver Building Trades. It has always been my understanding that the Denver Court mandated the Board to insure that a union member's picketing in a construction site limit their picketing and strike activity to the employer with direct control over the immediate labor dispute in order that innocent neutrals be protected."

The decision you refer to was, as your letter indicates, issued by a divided Board. Three Members, myself, Member Jenkins and Member Murphy, found that the Respondent Union's ambulatory picketing of trucks transporting concrete to a construction site on an interstate highway construction project was lawful primary picketing. Members Penello and Walther dissented from that holding.

The essential facts of the case were that the pickets followed the trucks through a gate erected by the primary employer, the supplier of the concrete, in order to picket "between the headlights" as the drivers were making the actual delivery of the cement. The reserved gate had been erected by Allied Concrete, 300 yards from the site of the delivery, in order to keep the picketing and its attendant appeals as far from the employees of the prime contractor receiving the cement as was possible.

All the Members agreed that the picketing up to the reserved gates was lawful, primary picketing. The narrow issue was whether the pickets' action of following the trucks through the reserved gate to the site of the pour -- the situs of the dispute -- in the words of the Moore Dry Dock decision (92 NLRB 547, 549) in circumstances where neither the owner of the property nor the one in effective control of egress and ingress had not barred them entry, constituted lawful primary picketing.

The Board's decision of course must speak for itself, and I enclose a copy of that decision for your study. As the Supreme Court long ago said with respect to one of its opinions, "words of our opinion are to be read in the light of the facts of the case under discussion. General expressions transposed to other facts are often misleading." Armour & Co. v. Weis, 323 U.S. 126, 138. I suggest, further, and I have had some experience in the role, that a dissenter's opinion, although usually instructive as to strength and character of the competing policy considerations involved, is not the most reliable guide to how principles enunciated in a majority opinion are to be applied to the many variant fact situations arising in future litigation.

As noted in the majority opinion, nothing in the Supreme Court's decision in N.L.R.B. v. Denver Building Trades Council et al. (Gould & Preisner), 341 NLRB 675 (1951), required a result contrary to that reached by the majority. In that decision, the Court held that contractors and subcontractors working together in a common or joint effort of construction does not cause them to lose their status as independent business entities, and that the relationship of one to the other is one of "doing business" within the meaning of Section 8(b)(4)(B) of the Act. I see nothing in the decision you complain of that shows that the Board treated Allied Concrete and its customer, Ashton, the general contractor, as other than independent business entities as is required by Denver Building Trades.

At bottom the issue here involved is a construction of the proviso to Section 8(b)(4)(B) excepting primary strikes from the ban on activity which has an object of forcing one employer to cease doing business with another. As the Court made clear in both the General Electric case cited in the Allied Concrete decision and United Steel Workers of America v. Carrier Corp., 376 U.S. 472, which was not, but could have been cited, the

proviso to 8(b)(4)(B) preserved not only the right to strike but also the right to engage in primary picketing aimed at all who approach the situs of the dispute. The Court in Carrier clearly rejected a construction of the proviso which would permit picketing to be aimed at secondary employees only where incidental to appeals to primary employees. Such appeals, and I speak of primary appeals to respect a picket line, may be directed to those employees as they approach the picket line. In my view, the dissenters have failed to accept this principle.

Quite obviously, there is room for differences of opinion and judgment as to the weight of differing and sometimes contradicting policy considerations embedded in the statute. The differing opinions in Allied Concrete reflect as much. They represent, however, a conscientious and earnest attempt by each of the Board Members to give effect to the legislative policies involved.

In your second question you ask, given my support of the labor law reform proposals, would I, in the event they are adopted by the Congress, be willing to come back to this Committee with recommendations for correction if the changes do not work out in the best interests of employees.

I believe I can say with some accuracy that the Board as an agency, and I, as a Member of the Board, have always been ready to cooperate with the Congress and its Committees relative to the important task the Congress has delegated to the National Labor Relations Board. Should the future unfold as your question assumes it may, I trust I will give appropriate and effective response to any invitation or request the Committee may extend to me.

I thank you for your kind invitation to extend my remarks with respect to matters we discussed on Wednesday morning. I am content to have the record stand as it is.

Best regards,

John H. Fanning

John H. Fanning
Chairman

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

Honorable Jacob K. Javits
Committee on Human Resources
United States Senate
Washington, D.C. 20510

October 28, 1977

Dear Senator Javits:

Thank you for your very kind and generous remarks about my public service. I appreciate them very deeply because they come from a public servant and a man for whom I have the highest respect.

At the close of the hearing Wednesday you submitted three questions to me and asked that I respond in writing before the close of business today.

Question: What are the principal challenges that face the Board during the next five years?

Response: The Agency will, in the next five years, confront numerous challenges. Almost all will, however, derive from the ongoing challenge to our processes posed by delay in the disposition of cases. And the problem of delay arises in two, related but nonetheless divisible, contexts.

The challenge posed by "operational" delay is fairly obvious. We estimate that in FY '78 we will receive almost 57,000 new cases, over 61,000 new cases in FY '79. As the number of cases we are called upon to investigate, litigate and decide increases in such proportions, the threat that our casehandling machinery will become overburdened, even to the point of incapacitation, becomes proportionately more imposing. To overcome that challenge, maintenance of an efficient, smooth-flowing casehandling pipeline is absolutely imperative. This will

require improvements in our system for monitoring the the progress of cases, a reevaluation of established time-targets at both the Regional and Board levels, maintaining and improving our settlement and consent election rates, insuring that our Administrative Law Judge corps is fully staffed and continues the impressive rise in case production it has experienced, and improving the quality of Board decisions to reduce resort to review.

The second, though obviously no less significant, context in which the problem of delay arises, is the substantive or statutory one. For the greater part, the solution to the problem of statutory delay, by which the meaningfulness of what we do can be substantially undermined, exists in the legislative province. If the Congress concludes the Labor Reform Act of 1977 will further the goal of reducing such undue delay as may inhere in the statute as it presently reads, the principal challenge to the Board in this area will be to implement its provisions, particularly those related to rulemaking, as speedily, clearly, and authoritatively as possible.

Question: What, in your judgment, are the major reasons for the Board's increasing caseload of unfair labor practice cases? Is this increase, in the context of a well-defined and administered regulatory scheme, an indication of the ineffectiveness of the Board's remedial tools?

Response: I believe the increase is attributable to a variety of reasons and the extent to which one reason is "more responsible" for the increase than another depends on the analyst's perspective. In no particular order of contribution, the reasons for the climb are, in my judgment, an expanding population and workforce, an increasing awareness, on the part of the working public, of the rights accorded by the statute and a belief they will receive relief, an increase in organizational activity, a tendency, on the part of employees, to pursue legal redress when a job is lost during times of high unemployment, and a tendency, on the part of some employers, to more aggressively resist organization during inflationary periods. With respect to the second part of your question, there can be, in my judgment, little doubt that the currently available remedies do not always sufficiently deter statutory violations, especially during inflationary spirals. But while improved remedies are a virtual necessity and may contribute, over the long-term, to a reduction in the rate of increases we have witnessed, I attribute the bulk of the increase to

the effectiveness of the Agency as a governmental instrument and not to the limitations of our present remedial arsenal.

Question: What, in your experience, accounts for the Board's reluctance to use rulemaking powers to dispose of issues with wide impact?

Response: I touched upon this matter briefly in my testimony on S. 1883 and H.R. 8410 before the Senate and House. To amplify what I said then, the fundamental reluctance, on my part at least, to utilize rulemaking frequently, particularly in the representation case area, evolved from my analysis of the legislative history of the Wagner Act, and to a lesser extent, of Taft Hartley. Section 9(b) of the Act mandates the Board "decide in each case" the unit appropriate for bargaining, etc. The phrase "in each case," was, if recollection serves, the result of an amendment during the Wagner Act legislative process and I, as well as numerous other Board Members with whom I have served, took that to mean the Congress itself considered unit questions best resolved on a case-by-case basis. In a vacuum, unit issues probably lend themselves to rulemaking more readily than unfair labor practice issues, so the 9(b) language had, doubtless, a carryover effect into the unfair labor practice area.

Moreover, it has been the view of all Board Members I have served with that formal rulemaking is not particularly well suited to resolving issues which the Board has had to decide on a case-by-case basis. Formal rules have a tendency to freeze the development of law and policy to what emerges from the rulemaking process at the time engaged in. It is more difficult to change or adapt the policy to the many variant factual situations revealed by the myriad of cases arising in so many different industries.

Then too, the Board has not been convinced that establishment of governing principles and substantive determinations through adjudication has created uncertainty or lack of predictability as to the development of the law and its application to labor relations. Indeed, the fact that between 85 and 90 percent of unfair labor practices are resolved without formal litigation and approximately 75 percent of the elections are conducted pursuant to agreements of the parties is evidence to the contrary.

Even as to matters which might have been better handled by formal rulemaking, as some authorities have argued, matters such as contract bar rules, establishment

of jurisdictional standards, the Excelsior rule, the Board's use of case adjudication has produced certainty and predictability. The contract bar rules have remained relatively constant since 1956, the jurisdictional standards since 1958 - although rulemaking has been used for establishment of such standards for three industries.

All this is not to say that the Board has set its face unalterably against the use of formal rulemaking. Indeed it has felt the water, as it were, in establishing some jurisdictional standards through formal rulemaking proceedings. As principles of law become firmly established, it is possible that a codification of case law into formally established and published rules will better serve the Board in the expeditious discharge of its responsibilities. Any legislative direction towards this end will, of course, be heeded.

Once again, I thank you for your kind remarks during my confirmation hearings and look forward to seeing you in the future.

Best regards,

John H. Fanning

John H. Fanning
Chairman

The CHAIRMAN. The committee stands adjourned.
[Whereupon, at 1:05 p.m., the committee adjourned.]

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