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HEARING

BEFORE THE

COMMITTEE ON HUMAN RESOURCES

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

HOWARD JENKINS, JR., OF MARYLAND, TO BE A MEMBER OF
THE NATIONAL LABOR RELATIONS BOARD

SEPTEMBER 7, 1978

Printed for the use of the Committee on Human Resources

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NOMINATION

THURSDAY, SEPTEMBER 7, 1978

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

The committee met, pursuant to notice, at 9:30 a.m., in room 4232 Dirksen Senate Office Building, Senator Harrison A. Williams, Jr. (chairman) presiding.

Present: Senators Williams and Javits.

The Chairman. We will come to order.

This morning the Committee on Human Resources will consider the President's nomination of Howard Jenkins, Jr., of Maryland to serve a fourth term as a member of the National Labor Relations Board for a term expiring August 27, 1983.

Mr. Jenkins received his A. B. degree from the University of Denver and his law degree from that school in 1941. From 1946 to 1956 he was a professor of law at Howard University where he taught labor and administrative law. Following his tenure at Howard, Mr. Jenkins became an attorney on the staff of the Solicitor of the U.S. Department of Labor and subsequently held a number of administrative and legal positions in the Department of Labor.

Mr. Jenkins has served as a member of the NLRB for 15 years since he was first appointed by President Kennedy in 1963. He has now been nominated to successive terms on the Board by four different Presidents—Presidents Kennedy, Johnson, Nixon, and now President Carter. I can think of no greater testimony; to the dedication and competence which has marked his work at the Board.

Certainly the breadth and scope of Mr. Jenkins' experience in the field of labor law is a great asset to the effective administration of the NLRB. But, in my view, it is his reputation for fairness and impartiality in a most controversial area which brings him before this committee for a fourth time. I personally look forward to his continued service with the Board.

At this time I insert into the record Mr. Jenkins' biography along with a brief description of the functions of the National Labor Relations Board. I would also like to include in the record a letter from Robert A. Georgine, president of the Building and Construction Trades Department of the AFL-CIO which strongly supports the reappointment of Mr. Jenkins.

I received this morning a letter from the president of the Retail Clerks International Union, Mr. William H. Flynn.

We are pleased to have the record include this additional strong endorsement of this nomination.

[The following material was received for the record:]

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

Name: Jenkins (LAST) Howard (FIRST) (H) (OTHER)

Position to which nominated: Member, National Labor Relations Board Date of nomination: August 23, 1978

Date of birth: 16 June 1915 (DAY) (MONTH) (YEAR) Place of birth: Denver, Colorado

Marital status: Married Full name of spouse: Alice Elaine Jenkins

Name and ages of children: Judith - 35 Howard, III - 32 Larry - 26

Education:	Institution	Dates attended	Degrees received	Dates of degrees
	<u>Manual High</u>	<u>1929-1932</u>	<u>Graduate</u>	
	<u>University of Denver</u>	<u>1932-1936</u>	<u>A.B.</u>	
	<u>University of Denver (College of Law)</u>	<u>1937-1941</u>	<u>LL.B.</u>	

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Meritorious Service Award - U. S. Department of Labor - March 1963

Leader of the Year, YMCA, Metropolitan Washington 1967

Honorary Doctor of Laws - University of Denver 1973

Memberships:

List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable and other organizations for the last five years and any other prior memberships or offices you consider relevant.

Organization	Office held (if any)	Dates
Rotary Club of D. C.		1974 - Present
YMCA of D. C.		1956 - Present
Sigma Pi Phi		1972 - Present
Alpha Phi Alpha		1935 - Present

Employment record: List below all positions held since college, including the title or description of job, name of employer, location of work, and dates of inclusive employment.

1963-Present	Member, National Labor Relations Board
1962-1963	Assistant Commissioner, Bureau of Labor-Management Reports, Department of Labor
1959-1962	Director, Office of Regulations, Bureau of Labor-Management Reports, Department of Labor
1957-1959	Special Assistant to the Solicitor of Labor (responsible for International Labor Affairs)
1956-1957	Attorney, Office of the Solicitor of Labor, Department of Labor (responsible for administrative legal services)
1946-1956	Professor of Law, Howard University, Washington, D. C., (taught labor and administrative law, also prepared briefs for the Supreme Court and the U. S. Court of Appeals on cases involving Federal and State administrative regulations and constitutionality of administrative actions; did graduate work in law at New York University)
1946-1947	Consultant to General Counsel, National Wage Stabilization Board, Washington, D. C.
1945-1946	Chief Regional Enforcement Officer, National Wage Stabilization Board, Denver
1943-1945	Acting Regional Attorney, War Labor Board, Denver
1942-1943	Enforcement Officer, Office of Price Administration, Denver

**Government
experience:**

List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments other than those listed above.

None

**Published
writings:**

List the titles, publishers and dates of books, articles, reports or other published materials you have written.

None

**Political
affiliations
and activities:**

List all memberships and offices held in or financial contributions and services rendered to all political parties or election committees during the last five years.

I have held no office with any political party or election committee during the last 5 years. I have made numerous contributions to various political campaigns and election committees in the District of Columbia, Montgomery County and in the State of Maryland. I frankly do not have records of those contributions, but they range from \$25.00 to \$100.00 each.

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association or organization if you are confirmed by the Senate.

Not Applicable _____

2. State whether you have any plans after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization.

Not Applicable _____

3. Has a commitment been made to you for employment after you leave Federal service?

No _____

4. Do you intend to serve the full term for which you have been appointed or until the next Presidential election, whichever is applicable?

Yes _____

Potential conflicts of interest:

1. Describe any financial arrangements, deferred compensation agreements or other continuing financial, business or professional dealings with business associates, clients or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None _____

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

None _____

3. Describe any business relationship, dealing or financial transaction which you have had during the last five years whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

None

4. List any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any Federal legislation or of affecting the administration and execution of Federal law or policy.

None

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items.

Not Applicable

DUTIES AND FUNCTIONS OF THE NATIONAL LABOR RELATIONS BOARD

(Excerpt from United States Government Manual, 1978/79)

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), 1959 (Landrum-Griffin Act), and 1974.

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 elec-

tions 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. For details concerning filing such appeals with those Washington, D.C., offices, parties may communicate with the field office most convenient to them. Field office addresses and telephone numbers are listed on page 597.

Administrative law judges conduct hearings in unfair labor practice cases, make findings, and recommend remedies for violations found. Their decisions are reviewable by the Board if exceptions to the decision are filed.

HOWARD JENKINS, JR.
Member, National Labor Relations Board

Howard Jenkins, Jr. has been nominated by President Jimmy Carter for reappointment to a fourth term as a Member of the National Labor Relations Board.

The first black appointed to the five-member National Labor Relations Board, which administers the Nation's principal labor relations law, Mr. Jenkins, a Republican, was first appointed by President John F. Kennedy in 1963, reappointed by President Lyndon B. Johnson in 1968, and by President Richard M. Nixon in 1973. Born in Denver in 1915, he is also the first person of his race to pass the Colorado bar examination.

The NLRB member received his A.B. degree from the University of Denver in 1936 and his law degree from the same school in 1941. At the 1973 graduating exercises of his alma mater, Mr. Jenkins was admitted to the Honorary Degree of Doctor of Laws in recognition of distinguished achievement.

Prior to his NLRB appointment, Mr. Jenkins was serving as Assistant Commissioner of the Bureau of Labor-Management Reports.

During the war years, the NLRB member was Regional Attorney of the National War Labor Board and the Wage Stabilization Board in the Rocky Mountain Region. In 1946 he moved to Washington as a labor law professor at Howard University. Mr. Jenkins served in that position for ten years before he became an attorney on the staff of the Solicitor of the U. S. Department of Labor. At the Labor Department, he served in positions of progressively greater legal and administrative responsibility until his elevation to the National Labor Relations Board.

Mr. Jenkins is a member of the bars of Colorado and the District of Columbia.

* * *

(over)

Other Biographical Notes

Birth: June 16, 1915, Denver, Colorado

Education: Elementary - Denver public schools
 A.B. - University of Denver, 1936
 LL.B. - University of Denver, 1941

Family: Married Alice Elaine Brown (University of Denver, A.B., 1937), daughter of the Reverend Russell S. Brown, General Secretary, African Methodist Episcopal Church, in 1940.
 Children: Judith, Howard III, and Lawrence

Relaxations: Bridge, detective story reading, golf

Previous Positions: 1942-43 Enforcement Officer, Office of Price Administration, Denver
 1943-45 Acting Regional Attorney, War Labor Board, Denver
 1945-46 Chief Regional Enforcement Officer, National Wage Stabilization Board, Denver
 1946-47 Consultant to General Counsel, National Wage Stabilization Board, Washington, D. C.
 1946-56 Professor of Law, Howard University, Washington, D. C., (taught labor and administrative law, also prepared briefs for the Supreme Court and the U. S. Court of Appeals on cases involving Federal and State administrative regulations and constitutionality of administrative actions; did graduate work in law at New York University)
 1956-57 Attorney, Office of the Solicitor of Labor, Department of Labor (responsible for administrative legal services)
 1957-59 Special Assistant to the Solicitor of Labor (responsible for International Labor Affairs)
 1959-62 Director, Office of Regulations, Bureau of Labor-Management Reports, Department of Labor
 1962-63 Assistant Commissioner, Bureau of Labor-Management Reports, Department of Labor
 1963-Present Member, National Labor Relations Board

* * *

September 1978

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Building and Construction Trades Department

AMERICAN FEDERATION OF LABOR — CONGRESS OF INDUSTRIAL ORGANIZATIONS

215 SIXTEENTH ST., N.W., Suite 401 • WASHINGTON, D. C. 20036

(202) 347-1461



August 23, 1978

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

Dear Senator Williams:

The Building and Construction Trades Department, AFL-CIO strongly supports the reappointment of Howard Jenkins, Jr. as a member of the National Labor Relations Board. We urge his expeditious confirmation. I would be happy to appear and testify in support of Mr. Jenkins if you and the Committee would find this desirable.

Sincerely yours,

Robert A. Georgine
 Robert A. Georgine
 President

ljm

COMMITTEE ON
 HUMAN RESOURCES
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SENATOR
 WILLIAMS, N.J.
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Retail
Clerks
International
Union

H.R.

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August 30, 1978

The Honorable Harrison A. Williams
United States Senate
Washington, D. C. 20510

Dear Senator Williams:

We have learned that President Carter has renominated Howard Jenkins, Jr., to serve a fourth term as a Member of the National Labor Relations Board. President Carter is to be commended for his action in this matter, for Howard Jenkins has been, since 1963, an exceptionally competent and effective Member of the National Labor Relations Board and a dedicated and honorable public official.

With the voluminous record before the committee concerning Member Jenkins' qualifications, it would be sheer redundancy to do more than apprise you that the Retail Clerks International Union, on behalf of its more than 725,000 members, urges the United States Senate to confirm Mr. Howard Jenkins, Jr., as a Member of the National Labor Relations Board as soon as possible.

Sincerely,

William H. Wynn
International President

33-447 16

9- SEP 3/61

COMM. RE
WILLIAMS, A

William H. Wynn
International
President

Thomas G. Whaley
International
Secy.-Treas.

Affiliated with
AFL-CIO & CLC

1775 K Street, N.W.
Washington, D.C. 20006
Phone (202) 223-3111

The CHAIRMAN. Before I have a brief period of discussion with you, Mr. Jenkins, do you have an opening statement that you would care to make?

STATEMENT OF HOWARD JENKINS, JR., NOMINEE FOR REAPPOINTMENT TO THE NATIONAL LABOR RELATIONS BOARD

Mr. JENKINS. Yes, Mr. Chairman.

I appreciate greatly the opportunity to appear before this committee and to present myself for questioning concerning my appointment to a fourth term as a member of the National Labor Relations Board.

I am, of course, honored that four Presidents of the United States have proposed me for membership on the National Labor Relations Board and that on three occasions, the Senate has confirmed the choice.

My 15 years of service provide perhaps the best clue to my fitness to serve as a Board member, but if there are areas of concern to you or the members of this committee, I stand ready to respond.

Five years ago, I advised the committee by letter to the chairman of my willingness to appear and testify upon reasonable request of any congressional committee and account for my stewardship. I reiterate that commitment today.

I wish to take this occasion to express my appreciation for the trust and confidence evidenced by President Carter in nominating me to serve a fourth term as a member of the National Labor Relations Board. It is a high honor and a personal tribute for which I shall always be grateful. I wish also to express my appreciation to the Senate for having on three occasions entrusted me with these responsibilities. If I am confirmed by the Senate, I will endeavor, to the best of my ability, to continue to administer the Federal labor laws within the jurisdiction of the Labor Board in a manner consistent with the legislative policies expressed in those laws in a fair and impartial manner.

Mr. Chairman, if there are specific areas into which you or the committee would care to inquire, I am at your disposal.

The CHAIRMAN. I appreciate that. I appreciate your statement, and am pleased that Mr. Fanning, Chairman of the National Labor Relations Board, is with you this morning.

Mr. Fanning, do you have a statement?

STATEMENT OF JOHN H. FANNING, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD

Mr. FANNING. Mr. Chairman, I am John Fanning, Chairman of the National Labor Relations Board.

It has been my privilege to have served on the Board with Mr. Jenkins for the 15 years that Howard alluded to. In that time I became convinced that he is an exceptionally fine lawyer. He understands the purposes of the National Labor Relations Act, and is sympathetic to their accomplishment. That is why I recommended him to the President for reappointment, and why I recommend him to this committee for speedy confirmation.

He is a fine Board member. I would be very happy to continue to serve with him during the next few very difficult years that face us.

Thank you.

The CHAIRMAN. That has great meaning to me, and to this committee. We appreciate your statement.

Of course, the Board and the Board's work problems have been on our minds a lot this year, as you know. You make up two-fifths of the Board.

We had a bill in, you probably heard about it, that made this two-sevenths of the Board.

Mr. JENKINS. It has come to our attention.

[Laughter.]

The CHAIRMAN. Well, one aspect of our concern, and we expressed it when the legislation was discussed and debated at length this year, dealt with your workload problem at the Board. It is estimated in the coming fiscal year that over 61,000 new cases will be filed with the Board.

First of all, does that projection and estimate conform to any estimates that you might have of the caseload for the next fiscal year?

We will start with you, Mr. Jenkins.

Mr. JENKINS. The estimates are just as the chairman has indicated. More significantly perhaps is the constant growth of the work of the five Board members over the past 15 years.

In 1963, when I first came on board we issued a total of 970 contested decisions.

In fiscal 1977 that number had risen to 1,848. The work of the Board has increased tremendously, and one of the areas in which I think we are rightfully proud is that this increased work has been accomplished with no appreciable increase in staff. This has been the consequence I think of increased efficiency of those who have responsibility for pursuing this work.

One of the major problem areas, Mr. Chairman, lies in the long delays between the time a complaint is issued and the time of completion of the work by the administrative law judge in the contested unfair labor practice case. There is tremendous delay.

When I came on the Board, the delay between the issuance of the complaint and the hearing by the administrative law judge was about 4 to 5 weeks. Now that time delay is 4 to 6 months.

This, of course, is something that this committee is aware of, and the increased numbers of administrative law judges the Senate and the House have provided recently may provide some help to us. But these are the problem areas that we are dealing with.

The CHAIRMAN. The projection of 61,000 new cases, that represents, as I have it here, a 22 percent increase over fiscal 1976 figure.

Mr. JENKINS. I think that is correct, sir.

The CHAIRMAN. In response to the Board's observation of the need for 100 additional administrative law judge positions, 30 have been allocated by the Civil Service Commission.

Mr. JENKINS. It is correct that 30 have been made available to us. One of the problems there, of course, is that the Civil Service Commission also has control of the certification of eligibles, and in the past month, since the approval of the additional Judges, we have been furnished by the Civil Service Commission only five such persons as eligibles, who we promptly appointed.

There still is a delay in getting certified from the Civil Service Commission sufficient numbers of people to be able to fill these posts quickly.

The CHAIRMAN. Are these new positions in the Civil Service, or are these assignments from other areas to the National Labor Relations Board activities?

Mr. JENKINS. No; these are new positions.

The CHAIRMAN. New positions?

Mr. JENKINS. Yes.

The CHAIRMAN. I wonder if the Civil Service Reform Act will have anything to do with expediting their ability to assign. Mr. Fanning, this is more your department than Mr. Jenkins', I know—do you have anything to say about this?

Mr. FANNING. Yes. I think the big obstacle is this qualification process. It takes the Commission 4 to 5 months to qualify an individual. It is a very cumbersome procedure. I will not comment on whether or not it has to be that cumbersome.

The fact is that it is. The cumbersomeness of the practice scares applicants off. If you are a practicing attorney, and you decide you want to become an administrative law judge, you have to file an application, of course. You have to identify 20 references. You have to identify a lot of cases that you have been in, and so forth.

The Commission then writes to your 20 references, and in effect, asks them what they think about you.

In very short order your clients know, your community knows that you are contemplating going out of private practice and going into Government service.

They start looking for new legal counsel, and you are in effect out of business long before you are qualified, and with no assurance that the Board is going to appoint you, even after the Commission has qualified you.

That is a deterrent to many capable lawyers, who for their own purposes decide they would like to come into Government service. It deters them from applying.

We have worked with the Commission. As a matter of fact, there is a current study by the General Accounting Office which we have endorsed which is pending before some committee here in the Senate and the House which would change some of the procedures for qualifying people, and would provide accountability systems for production, would provide administrative review of various kinds.

I think when the Congress directs its attention to this General Accounting Office study, the Board will have something to say with respect thereto.

I think we are making some progress in simplifying procedure, but it is the biggest obstacle to our recruiting the judges which Senator Sasser's subcommittee was helpful in giving us last March.

The President signed the bill on March 2. It was May before we were authorized to put on these additional ALJ's. We have appointed five. The Commission has not given us the entire 30. They have told us that when we have qualified bodies they will provide slots. They have kept the 25 residue under their control.

We have no objection to that. Obviously, just having 25 slots in our authority without the bodies to fill them would serve no useful purpose.

This is a thing that I think is the No. 1 problem of the Board at the moment. The figures that Howard gave you are quite correct, and I think they are illustrated by such things as this.

In 1974, for example, at the end of 1974 there were 450 cases docketed for trial. That is why we could give a 5- to 6-week trial date. You understand, I am sure, because I have said this before this committee, that the longer the trial date stretches out, the less chance that there will be settlements. Lawyers who are not going to have to face up to a trial for 5 to 6 months are not interested in discussing settlements today or tomorrow. They will see you on the courthouse steps. I am sure you have had that experience yourself, Senator.

As of August 1, 1978, there were 1,753 cases docketed for trial. That is why the present waiting period for trial is 5 months approximately.

We are now receiving 400 complaints per month for hearing. The General Counsel is issuing 400 complaints a month. We are therefore confronted with the possibility of something in the nature of 5,000 cases per year to schedule for hearing. So we are anxiously trying to get more judges.

I spoke before the American Bar Association, trying to recruit some judges. We speak among our own topflight legal personnel. We keep getting accused, of course, of inbreeding, when we hire one of our own lawyers to be a judge.

I have said in response to that that it seems to me a shame that an individual who joins us after law school, and spends the next 15 years becoming an expert lawyer in labor law, and then is told he is not eligible to become an administrative law judge, when he is probably the most qualified person in the country for that kind of spot.

I do not believe that inbreeding is a bad thing if you pick the right individual.

So we are recruiting, and we are trying, and we are going to have to recruit a lot more, because within the past 3 weeks we have lost two judges due to death. The Commission was very helpful in letting us bring back two retired judges to assign them to particular long cases so we would not take a regular judge out of circulation for an extended period of time.

But we have lost ground in terms of workload. In 1977, for example, we hired 11 judges. Four retired or died, and we ended up with a net increase of seven.

So far in 1978 we hired five; three died or retired, so we ended up with a net increase of two.

It is a very slow process. Of course, you have to be very careful, because as you know, once you hire a judge, once you appoint a judge, it is, practically speaking, for life. You have little control, there is little discipline, except their own personal discipline, so you try to pick someone you are satisfied will do a good job, do a very productive job.

So we are very selective. I am quite proud of the judges. I think they do a very fine job under very difficult circumstances.

I know I would hate to have to travel every other week to all parts of the country to hear cases, and then to have to come home and try to write them up and go out again. It is a grueling job.

The CHAIRMAN. All of the ALJ's are headquartered in the Washington area, is that correct?

Mr. FANNING. No; about 73 are headquartered in Washington, and about 24 or 25 are headquartered in San Francisco. We have been giving some thought to decentralization on the theory that that might save some traveltime, and other considerations. Of course you lose

control over judges when they are working out of Atlanta, New Orleans, or Chicago, or Denver, or wherever it may be.

Also, the bar gets used to doing business with the same judges all the time, and that may pose some familiarity problems that are not desirable.

It is a very complicated thing. We are studying it, and costing it out, to see if it will save money, and if it will speed up issuance of decisions. We have also issued guidelines to the judges on what we expect them to do, and there is still much to be done, however.

If I may add one thought, indicating the complications of life at the Board, the judges who are tenants of the Bureau of National Affairs, and have resided in their building for 10 years, have a housing problem.

The CHAIRMAN. I was going to ask you, what will the increase do to your housing situation?

Mr. FANNING. First, we do not have room for the whole 30 judges. We would need a total of 40,000 square feet. We have at the moment about 28,000 square feet.

The CHAIRMAN. I could arrange it for you to get over to Buzzards Point.

Mr. FANNING. Senator, you have been reading the newspapers.

Our lease expired at BNA. Understandably BNA wants their own building back. They have their own expansion plans. I think that is good for the economy, that they are going to be hiring more people and expanding.

It leaves us, however, in a predicament in the sense that we have no place to move to.

I told a few friends jokingly—maybe not so jokingly—that the next time you see a man in one of these sidewalk cafes with a typewriter on the table, instead of a bottle of beer, he is probably an NLRB administrative law judge.

But I have talked with Jay Solomon, and as you know, I have kept your office informed, and we think GSA is trying to get us adequately housed in places other than Buzzards Point. But it is an upsetting thing. Anything that upsets people causes production problems, but we are working on it.

We have not got desperate yet.

Senator JAVITS. May I ask a question, Mr. Chairman?

The CHAIRMAN. Yes.

Senator JAVITS. Do you gentlemen have any reason to feel that if this committee feels—well, we will put it up to the committee, if the chairman is willing—that the Civil Service Commission has not responded as it should with alacrity to the needs of this agency, that we insist that they do, and give this special attention.

I think the defeat of the labor law reform bill was partially, at least, attributable to doubts and questions about the NLRB.

Was it biased? Could it act fast enough? And so on.

Second, I personally believe that some of the reforms which we tried to make might be made if you have enough people to do the job, and could do the job more quickly and more decisively yourself by harder work at all levels, and by the addition of the administrative law judge you need.

So, the Chair and I just had a little word together, and I would be willing, if the Chair were willing, to join with the Chair in making a

very strong demand upon the Civil Service Commission that it stop holding up the works here, and get into it and give you the people you need.

The CHAIRMAN. Could I make one observation?

Mr. FANNING is talking about the General Accounting Office study. This will deal with this area, am I right?

Mr. FANNING. Yes.

The CHAIRMAN. There is something in development now. That is almost due, is it not, the GAO report?

Mr. FANNING. The report has been filed with the Congress, and I do not know the status of it before the Congress. But I assume that the appropriate committee is reviewing it.

The CHAIRMAN. I agree with Senator Javits that we should pursue this, and probably the first step will be the review of the report, and then see where we go.

Mr. FANNING. I think I could not be critical, sir, of the Civil Service Commission under the present regulatory setup. I think the system deters people from applying, and without the applicants, it just aggravates the system.

I think there is much good in the General Accounting Office report. We contributed some ideas, we did not write it, but we did contribute some ideas. We saw a preliminary copy of it. I have provided the Comptroller General with comments on it, and I have provided the Congress with some comments on it.

I assume, in due course, it will be scheduled for hearings, and at that time the Board will have more to say about it.

In the meantime, I think we have problems, but we are working on them, but I have no reason to suggest that the Commission is dragging its feet.

Senator JAVITS. I was not thinking so much of dragging its feet, but sometimes when heat rises, people find sections of the law, interim provisions, and ways of doing things that they never thought of before, and I hate complacency.

Mr. FANNING. I do, too, sir.

Senator JAVITS. That is the reason I said what I did.

Let us get them thinking.

Mr. FANNING. I agree with you, Senator.

Senator JAVITS. I consider this a very urgent area, and one in which delay is very harmful, very harmful to the trade union movement, and creates even more uncertainty for employers.

Mr. FANNING. I have previously testified that I will not be happy, and I do not really think we are doing our job, until we conduct elections in 30 days and dispose of unfair labor practice cases in 6 months.

Senator JAVITS. Hear, hear.

Mr. FANNING. We are not making fast enough progress. I think those are desirable objectives, and Howard and I both agree that is what has to be accomplished.

You see before you 35 years of Board experience, so if there are any avenues that can be looked into to accomplish that, I assure you the two of us will do it.

Senator JAVITS. We are going to do it, too. So there are a lot of helpers.

The CHAIRMAN. One final observation on that.

You mentioned that the regulatory requirements are part of the delay concerning civil service. Of course, that is their own making. These are their own regulations, are they not?

Mr. FANNING. Yes.

Mr. JENKINS. That is part of the reason, Mr. Chairman, that Senator Javits' comment I think is very pertinent. I do think while certainly we are not here to criticize the Commission, the plain fact is, as the Senator said, when people are forced to examine the procedures that they use, and the processes they employ, certainly they can find ways to improve, but so long as they say well, this is our system, and we have always done it this way, and we are going to continue to do it this way, there cannot be progress.

I quite agree with what the Senator said.

Senator JAVITS. Thank you.

The CHAIRMAN. This is an opportunity to inquire about the experience of some of the things we have done.

For example, in 1974 we extended coverage of the act to nonprofit health care institutions. In order to avoid any adverse effect on patient care which might result from an increase in the number of labor disputes in that industry, we established a special set of notice and mediation requirements, as you know, which had to be fulfilled before a labor organization would call a strike, and we directed the Board to avoid unit fragmentation in the industry.

Mr. Jenkins, I wonder, in your view, how well these amendments are working, and if there are any difficulties created by this, what they are?

Mr. JENKINS. Mr. Chairman, I personally think that the amendments have worked well. I think that historically the Board, without adequate guidance from the Congress, has made some rather peculiar jurisdictional choices. I think that we got caught up, you might say, in a puritan morality, charity problem, and began to see eleemosynary institutions one way and profitmaking institutions a different way. I do not think it was necessary that we do that.

I think that the 1974 amendments made it crystal clear that nonprofit hospitals should be treated in such a way as to bring within the sweep of the Federal labor laws those institutions, and provide for employees of those institutions the same rights that are afforded to employees of profitmaking institutions. This is what we have undertaken to do.

In following the guidance that we should avoid fragmentation of units, I think the Board has done that. We basically dealt with the unit problem in the nonprofit hospitals by having a technical unit, a professional unit, service and maintenance unit, and an office clerical unit, so that fundamentally there are about four units in the hospitals.

Personally, I think that works well. One problem area that has divided the Board is what to do about house staff, those persons who are either interns or residents in hospitals. I have one view, and Chairman Fanning has a different view. We have expressed that difference in our decisions.

The CHAIRMAN. You have been in both majority and minority on this issue, am I right?

Mr. JENKINS. I have been in the majority on the House staff question. I think the chairman may be referring to the maintenance unit question.

I have been on both majority and minority with regard to under what circumstances can a separate maintenance unit, separate from the service employees, be appropriate.

I view that much as I viewed maintenance units in the commercial sector that it all depends upon the facts. In some instances the maintenance people are so totally separated from other employees in the facility that they have a community of interest separate and apart from all other employees, in which case I would grant a maintenance unit.

If, on the other hand, the maintenance employees, though they do have some separate community of interest, are also employed throughout the hospital, and have a community of interest with service employees as well, then under those circumstances I do not see the basis for a separate maintenance unit.

So, sometimes I would come down on the side of separate maintenance unit, and sometimes I would not.

The CHAIRMAN. Well, on the question of the interns and residents, it was the Board that found congressional intent that we did not intend to include interns and residents within the act's definition of employees, was that right?

Mr. JENKINS. I do not mean to play on words, but I think a more precise description of what the holding is that we found, that because in our view the interns and residents are more like students than they are like employees, that they are continuing their graduate education, and their primary reason for being interns and residents is to complete their professional training, so they will then be qualified to move out and become full fledged doctors.

The majority of us saw those persons as being more like students, and therefore not within the employee category, to whom reference is made in legislative history in the 1974 amendments.

That is essentially our view.

Chairman Fanning wrote a vigorous dissent, in which he asserts that you cannot tell the difference between an intern or resident who is employed, 40, 60, 80 hours a week in the hospital, and being paid for it, and the physician who is employed by the hospital to perform essentially the same work.

The difference between us, I think, lies in whether or not one regards these individuals as having applied for and accepted employment in the hospital, or whether they are there as an adjunct to their professional training, which they received in the medical college, and they are continuing that education.

The CHAIRMAN. Well, into this picture came the second circuit, and said that in New York because of the preemption provisions of law, New York State had no authority, is that right?

Mr. JENKINS. That is correct.

The CHAIRMAN. And following that, the House did pass legislation to bring interns and residents under coverage, bring them into definition of employee, is that right?

Mr. JENKINS. That is correct.

The CHAIRMAN. Reported out of the committee. It has not passed.

Mr. JENKINS. I do not think the House has acted.

The CHAIRMAN. It is out of the committee, I think, by a big vote, as I recall.

Mr. JENKINS. Let me make this observation. If I am following your line of thinking, I think that this is clearly an area of legislative choice, and if the Congress, in its wisdom, decides that these interns and residents shall be treated as employees, then I think, I know I would, and I am sure my colleagues would immediately accept that choice and apply the act to these people.

There is no predisposition not to do so. It is simply a question of what was the legislative intent.

The CHAIRMAN. Well, that is the way it is now. I think we have come to the conclusion that you have, that if there is going to be coverage, it has to be legislative, even with that strong dissent from the chairman—

Mr. FANNING. My silence does not indicate that I necessarily agree with the observations of my colleague.

The CHAIRMAN. In our profession when you say a strong dissent, that is high commendation for your viewpoint, which was on the other side of the issue from Mr. Jenkins'.

A couple of other areas that I was going to deal with, if we could.

There are a couple of cases here. The 1969 Supreme Court decision in *NLRB v. Gissel Packing Company*, upheld the Board's authority to order the employer to recognize and bargain with the union if employer commits substantial unfair labor practices which undermine the possibility of holding a fair election.

The Board's subsequent application of that principle has been repeatedly attacked by employer groups on the grounds that secret ballot elections should be required in all cases, regardless of the nature of the employer's conduct.

In your view, is the Gissel bargaining order an important tool for promoting the effective administration of the act, and do you favor retention of its use?

Mr. JENKINS. Since 1969, when the Supreme Court decided Gissel Packing case in a series of cases, the Board has consistently, and for the most part, unanimously applied the doctrine that was enunciated by the Supreme Court.

One of the fundamental points of that decision is that elections, while preferable, are not the only way in which bargaining relationships shall be established. Prior to Gissel, the Board had, in many instances, along two different legal theories, required employers to bargain even if there had been no election, or in instances when there was an election, and the union lost. The Board nonetheless ordered the employer to bargain if it appeared either that the employer had interfered with the freedom of choice in such a manner as to destroy the union's majority status, or it had prevented the union from carrying out the bargaining relationship in an orderly fashion.

After Gissel, we then accepted the Supreme Court's differentiation, which of course we are required to do, and divided the cases into, generally speaking, two categories. Those in which the unfair labor practices were so heinous as to make the holding of an election impossible, and thus we would direct the employer to bargain either in the absence of an election, or even though an election had been held, and the union had lost.

The second category of cases are those in which the unfair labor practices are less severe, and it is possible to hold an election even

though there had been unfair labor practices, so a judgment call has to be made.

How serious are unfair labor practices? Are they so serious as to render the holding of election impossible? Has the employer so polluted the air that there can be no real freedom of choice?

These are the areas which you are going to have, and we are going to have differences of opinion.

One person's serious unfair labor practice is another person's misdemeanor type infraction.

We have to build a history, and since 1969, I think the Board in a series of cases has done so.

One other problem that remains in this area, one which confronts us now, is what about the situation where the employer's conduct is such that it is impossible for the union ever to acquire a majority? Should a bargaining order nonetheless be issued, even though the union is unable to demonstrate that at any point in time it did in fact represent a majority of the employees in a given unit? We are puzzling over that one now.

The CHAIRMAN. I am advised there are efforts—I misinterpreted this—there are efforts to really reverse the Gissel holding. You are still living with it and applying it?

Mr. JENKINS. Yes.

The CHAIRMAN. The efforts are not to go to the Supreme Court for the decision that would overturn the Gissel, but to do it legislatively through the absolute requirement of secret ballot through law.

We have had legislation introduced which is the Gissel override legislation.

Mr. JENKINS. That would be a decision for these bodies, a legislative decision.

The CHAIRMAN. Mr. Fanning, on this issue concerning the application of Gissel, do you live with it comfortably, and feel that this gives you appropriate administrative tool, the Gissel decision, and application to a factual situation?

Mr. FANNING. I can only speak for myself, sir, of course. I agree with everything Howard has said. I find Gissel very useful. I think there has been fairly good unanimity of thought, if I may venture that expression, amongst all the Board members.

We may disagree in a particular case, as Howard indicated. We may think that the unfair labor practices were not serious enough. That is a judgmental call, as he indicated.

I personally feel that Gissel has been useful in establishing a collective bargaining relationship in cases where otherwise there would be no collective bargaining relationship. I have had no difficulty with Gissel.

As a matter of fact, Gissel reflects several of my prior decisions.

The CHAIRMAN. Who wrote the opinion in that case in 1969, do you recall?

Mr. FANNING. In the Supreme Court?

The CHAIRMAN. Yes.

Mr. FANNING. I think possibly Mr. Brennan, but I am not sure, sir.

The CHAIRMAN. I am told it was Chief Justice Warren.

I have no other questions, except to make this observation, and then perhaps a question, Mr. Jenkins.

You were a graduate of Howard Law School in 1941?

Mr. JENKINS. University of Denver.

The CHAIRMAN. Then you went later to Howard, to teach?

Mr. JENKINS. That is correct, sir.

The CHAIRMAN. Were you a student of the National Labor Relations Board activities at that time?

Mr. JENKINS. Yes, sir. I pursued, both in teaching, and in some practice before the circuit—

The CHAIRMAN. In 1941 there was a rather dramatic division in the Board, as I recall, I cannot recall what the division on philosophical grounds were, but Leiserson and Madden were at odds, am I right?

Mr. JENKINS. You are absolutely right.

Mr. FANNING. One ended up as a Justice of the Court of Claims, and the other one stayed on the Board.

The CHAIRMAN. Leiserson won, or at least stayed on the Board?

Mr. FANNING. Leiserson stayed on the Board.

The CHAIRMAN. I wondered what the philosophical difference was at that time.

Mr. JENKINS. I do not recall what it was, Mr. Chairman. It did relate to the way in which the act should be administered, and it has been so long I really do not remember. I think their philosophical differences personally were more at the root than any philosophical jurisprudential difference. That is the reason I think it was wise that one went on the Court and one stayed on the Board.

The CHAIRMAN. Well, their offspring—William Leiserson's daughter is now the Mayor of Greenwich, Conn. She lost by a vote, and there was a recount, they had to have another election, and then she won by a large majority.

And Madden, young then Madden, is an attorney here in Washington. They were both at the college where I was going to college at the time of that division of their fathers. We heard a lot about it.

I have nothing further. I am very pleased of your coming on for another term.

Senator JAVITS. I have nothing further.

The CHAIRMAN. Thank you very much, Mr. Jenkins and Mr. Fanning.

Mr. JENKINS. Thank you.

Mr. FANNING. Thank you, Mr. Chairman and Senator.

The CHAIRMAN. That concludes the hearing.

[Whereupon, at 10:30 a.m., the committee adjourned, subject to the call of the Chair.]













