CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

July 24, 2009

The Honorable Edward M. Kennedy
Chairman
Committee on Health, Education,
Labor and Pensions
United States Senate
Washington, DC 20510

The Honorable Michael B. Enzi
Ranking Member
Committee on Health, Education,
Labor and Pensions
United States Senate
Washington, DC 20510

Dear Chairman Kennedy and Ranking Member Enzi:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, urges you to hold a hearing to thoroughly consider the president's nomination of Craig Becker to become a member of the National Labor Relations Board (NLRB or Board).

Mr. Becker is currently Associate General Counsel of one of the most aggressive unions in the United States, the Service Employees International Union (SEIU), which has a record of using questionable pressure tactics with the goal of forcing employers and workers to recognize unions without the democratic protection of secret ballot elections. This close association raises questions about Mr. Becker's ability to impartially judge cases that may come before the Board.

In particular, the Committee should assess whether Becker's role at the SEIU might prompt him to implement portions of the Employee Free Choice Act even if it is never enacted by Congress. Notwithstanding the SEIU's intense advocacy of this legislation, it has run into strong opposition in Congress, in significant measure because it would effectively mandate the SEIU's signature approach to organizing, i.e., the effective elimination of secret ballots in organizing campaigns. However, as reported in *Workforce Management Online*, former NLRB Chairman William Gould noted that a Board with Becker as a member could attempt to impose this provision of the legislation on its own, regardless of whether or not Congress has appropriately amended the National Labor Relations Act (NLRA).[1] Such a potential end-run around the legislative branch is of grave concern to the Chamber and, given Mr. Becker's prominent role with SEIU, should be of equal concern to the Committee.

In addition, Mr. Becker has expressed extreme views in public writings about the NLRA, the law he will be charged with administering and enforcing should he be confirmed. The Committee should take this opportunity to ascertain whether Mr. Becker still holds these views,

[1] Mark Schoeff Jr., *NLRB Decisions Could Make Card Check a Reality*, WORKFORCE MANAGEMENT ONLINE, July 2009.

and Mr. Becker should be provided an opportunity to explain his current thinking in a public forum before the Senate votes on his confirmation.

For example, in a *Minnesota Law Review* article, Mr. Becker writes that the "core defect in union election law … is the employer's status as a party to labor representation proceedings … ."[2] The solution, he says, is that "employers should be stripped of any legally cognizable interest in their employees' election of representatives."[3] In the same article, Mr. Becker writes that the Board should determine that "the only parties to both pre- and post-election hearings are employees and the unions seeking to represent them."[4] As such, he believes that employers should be banned from virtually all Board proceedings related to organizing elections, even in cases of unfair labor practice charges: "[E]mployers should have no right to be heard in either a representation case or an unfair labor practice case …."[5]

Mr. Becker's antipathy to the rights of employers leads him to conclude that employers should be prevented even from "rais[ing] questions" about fraud, misconduct, violence against workers or workplaces, eligibility to vote, or any other legal or ethical matter that pertains to a union organizing campaign:

> "Similarly, employers should have no right to raise questions concerning voter eligibility or campaign conduct. Because employers have no right to vote, they cast no ballots the significance of which can be diluted by the inclusion of ineligible employees. Nor, obviously, can employers be coerced in the exercise of a franchise they do not have. Because employers lack the formal status either of candidates vying to represent employees or of voters, they should not be entitled to charge that unions disobeyed the rules governing voter eligibility or campaign conduct. On the question of unit determination, voter eligibility, and campaign conduct, only the employee constituency and their potential union representatives should be heard."[6]

Because such views fall so far outside the accepted mainstream, the Committee would be well served by determining whether Mr. Becker's theories about disenfranchising employers reflect a possible interpretation of the NLRA as it stands today, or whether he believes they could only be implemented legislatively. On the other hand, Mr. Becker's views on "intermittent strikes," expressed in a *University of Chicago Law Review*, clearly reflect his opinion as to how the Act should be interpreted and applied today, and thus are another example that the Committee should explore.[7] While courts have long held that intermittent strikes are not protected by the NLRA,[8] Mr. Becker argues that NLRB should protect repeated grievance strikes, and has the authority to do so under the NLRA. As controversial as this idea is, the

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[2] Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINNESOTA LAW REVIEW, 495, 498-99 (1993).
[3] *Id*. at 500.
[4] *Id*. at 586.
[5] *Id* at 587.
[6] *Id* at 587-88.
[7] Craig Becker, *Better Than a Strike: Protecting New Forms of Collective Work Stoppages under the National Labor Relations Act*, 61 UNIVERSITY OF CHICAGO LAW REVIEW 351 (1994).
[8] *See* John E. Higgins, Jr., THE DEVELOPING LABOR LAW, chapter 19.III.A.3 and cases cited therein.

policy reason Mr. Becker uses to justify his unconventional interpretation is even more questionable. Mr. Becker seeks protection of repeated grievance strikes not merely to resolve grievances, but instead as a way to give labor unions greater power and leverage over employers in bargaining than the traditional strike.[9]

While the views articulated in these articles are alarming in and of themselves, what is especially troubling is that Mr. Becker does not necessarily believe that such changes require Congressional approval. Indeed, he appears to believe that the Board could implement them unilaterally[10] even though they stand in direct conflict with the NLRA as articulated by Board precedent and numerous court cases.

Because of the importance of these matters to the business community and to longstanding and broadly accepted interpretation of the NLRA, the Chamber urges the Committee to hold thorough hearings to carefully review the president's nomination of Craig Becker to the National Labor Relations Board before acting on his confirmation.

Sincerely,

R. Bruce Josten

Cc: The Members of the Senate Committee on Health, Education, Labor, and Pensions

[9] 61 U. OF CHI L. REV. at 402-08.
[10] *See, e.g id. at 419-20;* 77 MINN. L. REV. at 586.