Testimony of
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before the
Subcommittee on Labor, Health and Human Services, Education and Related Agencies
of the
Committee on Appropriations
United States Senate
on
"NLRB Representation Elections and Initial Collective Bargaining Agreements:
Safeguarding Workers' Rights?"

April 2, 2008

Chairman Harkin, Ranking Member Specter, and Members of the Subcommittee:

Thank you for inviting me to testify today about the National Labor Relations Board (NLRB) and its activities.

I am pleased to appear before you today. I began my service on the Board more than ten years ago, in November 1997. Before joining the Board, I served for several years at the Federal Mediation and Conciliation Service (FMCS), first as Special Assistant to the Director and then as Deputy Director. I began my legal career as a staff attorney for the NLRB in 1974, and later served on the legal staffs of two labor unions, the International Brotherhood of Teamsters and the Bricklayers and Allied Craftsmen.

As you may know, consistent with their duty to impartially apply the law as it is, members of the NLRB have a tradition of refraining from discussions of legislative proposals to amend the National Labor Relations Act. I respect that tradition and will abide by it.

Nevertheless, I certainly know that the Act is an aging statute, that it is under scrutiny, and that its interpretation by the Board has become controversial. Indeed, I recently have addressed the current state of labor law in Congressional testimony[1] and in published articles.[2]

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[1] On December 13, 2007, I testified at a joint hearing of Senate and House subcommittees, called to examine recent decisions of the NLRB. *See* Statement of Wilma B. Liebman, Member, National Labor Relations Board, before the Subcommittee on Employment and Workplace Safety, Committee on Health Employment, Labor and Pensions, United States Senate, and the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and Labor, United States House of Representatives on "The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights" (Dec. 13, 2007).

[2] *See* Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 Berkeley J. Employment & Labor L. 569 (2007); Wilma B. Liebman, *Labor Law Inside Out*, 11 WorkingUSA: The Journal of Labor and Society 9 (2008).

There, I observed that "that National Labor Relations Act, by virtually all measures, is in decline…."[3] I cited the Board's plummeting case intake, noting that "labor unions have turned away from the Board, and especially from its representation procedures" and pointing out that "[t]his disenchantment has intensified in recent years as the Board, in case after case, has narrowed the statute's coverage, cut back on its protections, and adopted an increasingly formalistic approach to interpreting the law."[4]

Consistent with my previously-expressed views -- but without recommending any particular statutory changes or commenting on pending legislation -- I would welcome comprehensive re-examination of a law that has not been substantially revised for more than 60 years. As one scholar puts it, American labor law is "ossified."[5] Given the many changes in American society, and in the global economy, it seems desirable -- whatever our policy preferences might be -- to make sure that our labor law evolves and that the rights it protects do not become illusory.

I understand that the focus of today's hearing is on the Board's election procedures and initial collective-bargaining agreements, i.e., first contracts. The overriding aim of the National Labor Relations Act, a goal that was *not* renounced by the Taft-Hartley Act in 1947, is to equalize bargaining power between employers and employees by, in the words of Section 1 of the statute, "encouraging the practice and procedure of collective bargaining and … protecting the exercise by workers of full freedom of association … for the purpose of negotiating the terms and conditions of their employment."[6] To that end, it is fair to ask whether the Act is working: whether the law actually makes it possible for workers who want to be represented by a union, and who want the benefits of collective bargaining, to achieve those ends.

As income inequality continues to rise,[7] there are troubling signs that the Act is *not* working. And these signs are not new. Nearly 25 years ago, an eminent labor law scholar, Professor Paul Weiler of the Harvard Law School, lamented that "[c]ontemporary American labor law more and more resembles an elegant tombstone for a dying institution."[8] He pointed to the steady decline in the percentage of workers represented by unions, which he attributed, in large part, to the "skyrocketing use of coercive and illegal tactics … by employers determined to prevent unionization of their employees."[9] Professor Weiler argued that our labor-law system was at fault, for permitting such tactics to succeed.[10] In 1983, when Professor Weiler's article appeared, only 16.5 percent of private-sector workers belonged to a union. In 2007, the figure

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3 Liebman, *Decline and Disenchantment*, supra, at 572.

4 Id. at 571 & nn. 13-15.

5 Cynthia Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527 (2002).

6 29 U.S.C. §151.

7 See, e.g., Greg Ip, *The Gap Is Growing Again for U.S. Workers*, Wall St. J., Jan. 23, 2004 (describing the declining power of unions as a factor in widening income disparities).

8 Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 Harv. L. Rev. 1769, 1769 (1983).

9 Id. at 1770.

10 Id. at 1771.

was even smaller: a mere 7.5 percent.[11] There are surely many reasons for this trend, but it seems obvious that our labor-law system is one important factor.

Notably, in the past decade, the Board has experienced a dramatic, and unprecedented, decline in case filings. In my view, this steep drop reflects a loss of confidence in the Board and its processes. (I say that with regret, because I have the greatest respect for the Agency and its history.) Between fiscal years 1997 and 2006 the number of representation petitions filed dropped from 6,179 to 3,637, a 41% decline. (From 2005 to 2006 alone, the representation case intake dropped by 26%.)[12] More and more, unions are seeking to negotiate recognition in the workplace, rather than use the Board's election machinery.[13] The Board's procedures are seen as taking too long, leaving workers vulnerable to coercion by employers, and generating campaign animosity that can taint a new bargaining relationship.[14]

It is difficult to quarrel with this perception. For example, union access to workers on the job is sharply limited under current law, which permits employers to exclude non-employees from their property under ordinary circumstances.[15] Employers, meanwhile, have great freedom to campaign against unionization, using means such as captive-audience meetings.[16] Although workers are often economically dependent on their employers, and so very sensitive to what they hear from the boss, the law permits employers to vocally oppose union representation, so long as they do not make threats or promises to employees.[17] Of course, what constitutes a threat is open to interpretation. In several recent decisions, for example, the Board (over a dissent) has permitted intimidating employer statements during organizing campaigns.[18] Worse, discharges

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11 The cited figures are drawn from the Current Population Survey conducted by the Bureau of Labor Statistics and are available in historical chart form ("Union Membership, Coverage, Density, and Employment Among Private Sector Workers, 1973-2007") at www.unionstats.com.

12 For the same period, unfair labor practice charges dropped from 33,439 to 23,091, a 31% decline. These statistics are drawn from the Board's annual reports. *See Seventy-First Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2006* 3 (Chart 1), available at www.nlrb.gov.

13 *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819 (2005).

14 For a scholar's critical examination of representation procedures under the NLRA, see Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495 (1993).

15 *See Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

16 Member Walsh and I cataloged some of the means available to employers in our dissent in *Harborside Healthcare, Inc.*, 343 NLRB 906, 917 & n. 14 (2004).

17 See Section 8(c) of the National Labor Relations Act, 29 U.S.C. §158(c).

18 *See, e.g.*, *Medieval Knights, LLC*, 350 NLRB No. 17 (2007) (finding that consultant's statement that hypothetical employer could lawfully "stall out" contract negotiations was not threat that electing union would be futile); *TNT Logistics North America, Inc.*, 345 NLRB No. 21 (2005) (finding that supervisor's unsupported statement that employer would lose only customer if employees unionized was lawful expression of personal opinion); *Manhattan Crowne Plaza Town Park Hotel Corp.*, 341 NLRB 619 (2004) (finding that employer's statement recounting mass discharge of recently-unionized employees at another employer's hotels was not threat of

of employees that are designed to nip organizing drives in the bud are nothing unusual,[19] while remedies for such unlawful firings are notoriously weak -- and getting weaker.[20] Remedies that fail to make workers whole, and that fail to deter unlawful employer conduct, undermine the law's effectiveness. Unions, in turn, face special problems as the result of two recent, divided-Board decisions: In the *Harborside* case, the Board reversed precedent and made it easier to set aside a union's election victory, based on *pro-union* supervisory conduct (such as collecting signatures on union-authorization cards), even where the employer's *anti-union* stance is clear.[21] Because it is often difficult to determine whether a worker is, in fact, a statutory supervisor, *Harborside* creates a dilemma for unions in seeking supporters. That dilemma was compounded by the Board's *Oakwood* decision, which interpreted the statutory definition of a supervisor and expanded the universe of potential supervisors.[22]

It is one thing for workers to win union representation; it is another for their new union to win a first contract from the employer. In 1994, the Dunlop Commission, a blue-ribbon federal advisory committee reporting to the Secretary of Labor and the Secretary of Commerce, examined this issue. It found that one-third or more of newly-certified unions failed to reach a first contract, a sharp increase from the earliest available estimate in the late 1950's, when the figure was 14 percent.[23] The Commission observed that "roughly a third of employers engaged in bad faith 'surface' bargaining with the newly-elected union representative," a factor that "significantly reduces the odds that employees will secure an initial agreement from their employer."[24] The Commission also pointed to the nature of union-representation elections, which it described as "highly conflictual for workers, unions, and firms" -- meaning that "many new collective bargaining relationships start off in an environment that is highly adversarial."[25]

Accordingly, the Dunlop Commission "encourage[d] employers and unions who desire a cooperative relationship to agree to determine the employees' majority preference via a 'card

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reprisal); *Curwood, Inc.*, 339 NLRB 1137 (2003) (finding that employer's letter stating that customers viewed unionization negatively was lawful).

[19] See, e.g., *California Gas Transport, Inc.*, 347 NLRB No. 188, slip op. at 8-9, 10-11 (2006) (discussing discharges and other violations designed to stop organizing drive), enfd. 507 F.3d 847, (5th Cir. 2007).

[20] *See St. George Warehouse*, 351 NLRB No. 42, slip op. at 11 (2007 (dissent) (discussing limitations of backpay remedy and dissenting from decision reversing precedent and placing burden on General Counsel to produce evidence concerning discriminatee's job search, when employer demonstrates availability of jobs).

[21] *Harborside Healthcare*, supra, 343 NLRB at 909-912. Member Walsh and I dissented.

[22] *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2007).

[23] Commission on the Future of Worker-Management Relations (Dunlop Commission), *Fact Finding Report* 73 (May 1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/276/. *See also* Commission on the Future of Worker-Management Relations, *Final Report* 44 (December 1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2/.

[24] Dunlop Commission, *Fact Finding Report*, supra, at 74.

[25] Dunlop Commission, *Final Report*, supra, at 38.

check.'"[26] Under long-established law, an employer is free to recognize an employer voluntarily – rather than demanding that the Board conduct an election – if the union is able to demonstrate that it has uncoerced majority support among employees, typically by collecting signatures on authorization cards.[27] The Board, however, has recently created a new obstacle to voluntary recognition. The Board's *Dana* decision now requires employers who voluntarily recognize a union to post a notice informing employees that it has done so and telling them how they can get rid of the union.[28] That posting opens a 45-day window period during which employees – provided they marshal 30 percent support among their co-workers – may petition the Board for an election to decertify the union. Dissenting in *Dana*, Member Walsh and I pointed out that this new mechanism frustrates voluntarily-established bargaining relationships.[29] During the window period, unions will be under great pressure to produce results for employees, yet employers will have little incentive to bargain seriously, if they cannot be sure the relationship will continue. It is now debatable, then, whether voluntary recognition is still a "favored element of national labor policy."[30]

Meanwhile, new research on the difficulty of reaching a first contract is being conducted by John-Paul Ferguson and Thomas Kochan, scholars at the Sloan School of Management of the Massachusetts Institute of Technology. They point to the series of obstacles facing workers who want to engage in collective bargaining -- in their metaphor, workers confront the difficulty of passing through not just one, but several, needles' eyes, beginning with the filing of an NLRB representation-election petition. Their preliminary study, based on data obtained from the NLRB and the FMCS, suggests that an election petition leads to a first contract in only one out of five cases.[31] Forty-four percent of newly-certified unions failed to win a first contract. Unfair labor practices significantly reduce the chances both of getting to an election and of securing a contract.

The Board's recent decision in *Garden Ridge Management* illustrates what can happen after a union's election victory.[32] There, the union won and began bargaining for a first contract. The employer repeatedly refused the union's requests to meet more often. Just over a year after the union was certified, with no contract reached, employees presented the employer with a

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[26] Id. at 42.

[27] *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596-597 (1969) (discussing history of voluntary recognition under NLRA Section 9(a), proving that representatives may be "designated or selected" by a majority of employees, without specifying means).

[28] *Dana Corp.*, 351 NLRB No. 28 (2007). Such a notice-posting requirement is unprecedented. Employers, for example, are not generally required to post notices to employees informing them of their labor-law rights. Only if the employer commits an unfair labor practice is notice-posting required, as part of the Board's remedial order.

[29] Id., slip op. at 14.

[30] *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir. 1981).

[31] See John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004* (March 25, 2008) (unpublished working paper). *See also* Thomas A. Kochan, *Updating American Labor Law: Taking Advantage of a Window of Opportunity*, 28 Comparative Labor Law & Policy Journal 101, 111-112 (2007) (discussing data).

[32] *Garden Ridge Management, Inc.*, 347 NLRB No. 13 (2006).

petition saying they no longer wanted to be represented by the union. The employer promptly withdrew recognition. A Board majority found that the employer should have met more often with the union, but otherwise found that the employer had bargained in good faith and that it was free to stop recognizing the union. I dissented, arguing that the Board should use extra care in monitoring first-contract bargaining and that the evidence showed that the employer had never intended to bargain in good faith with the employer.[33] On that score, I cited statements made by the employer's officials before the election, telling employees that even if the union won, the employer would simply tie it up at the bargaining table indefinitely and would never reach an agreement. Under the circumstances, it was predictable that the union would lose support. Indeed, it seems that some labor consultants advise employers to go through the motions of bargaining, with no intention of reaching a contract, precisely so the union will lose support, essentially undoing its election victory.[34] Surface-bargaining violations are hard to prove (as *Garden Ridge* illustrates) and hard to remedy effectively. An employer who has bargained in bad faith is simply ordered to cease-and-desist its unlawful conduct, to start bargaining in good faith, and to post a notice advising employees of what it has been ordered to do.[35] For an employer bent on continuing its campaign to defeat the union at the bargaining table, the deterrent effect is negligible.

The problem of achieving first contracts has not escaped the Government's attention. The Federal Mediation and Conciliation Service places special emphasis on first-contract negotiations, recognizing that such negotiations are "critical because they are the foundation for the parties' future labor-management relationship" and "are often more difficult than established successor contract negotiations, since they frequently follow contentious representation election campaigns."[36] (FMCS mediation is purely voluntary, of course.) I gained familiarity with this problem when I served at the FMCS.[37]

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[33] Id., slip op. at 5.

[34] See Martin J. Levitt, *Confessions of a Union Buster* 204-225 (1993). Describing his own experience as a consultant, Levitt writes:

> The negotiation of a first contract is very delicate, so the process is highly controlled by labor law. Company executives who have just been forced to recognize a union – after spending tens of thousands of dollars to defeat it – rarely walk into their first bargaining session with open arms…. The purpose of the rules is to impede management from undermining negotiations…. As with most labor laws, however, the rules are largely ineffective. Worse, the hands of a union buster can quite easily twist those rules into a precision weapon against the union.

Id. at 204.

[35] *See, e.g., Dish Network Service Corp.*, 347 NLRB No. 69 (2006).

[36] Federal Mediation and Conciliation Service, *Fifty-Seventh Annual Report* 18 (2004), available at www.fcms.gov.

[37] See John Calhoun Wells & Wilma B. Liebman, *New Models of Negotiation, Dispute Resolution, and Joint Problem Solving*, 12 Negotiation Journal 119, 124-125 (1996).

The NLRB's current General Counsel has followed suit, launching a remedial initiative that focuses on unfair labor practices that occur after a union is certified and bargaining for a first contract is, or should be, under way.[38] He has cited NLRB data showing that unfair labor practice charges alleging employer refusal-to-bargain "are meritorious in more than a quarter of all newly-certified units."[39] And he has observed that unfair labor practices during this "critical stage" may have "long-lasting deleterious effects on the parties' collective bargaining and frustrate employees' freely-exercised choice to unionize."[40]

Whether the initiatives of the FMCS and the NLRB General Counsel will make a difference, within the existing statutory framework, is an open question.

Unfortunately, the Board itself has not been as vigorous in protecting workers and unions from the effects of unfair labor practices committed during first-contract bargaining. Cases involving the remedy when employers fail to bargain in good faith with newly-certified unions are one example. By way of background: The doctrine known as the "certification-year bar" is designed to give unions a fair chance to succeed before their status can be challenged: for one year after a union is certified, an employer is required to recognize and bargain with the union, even if the union appears to have lost majority support among employees.[41] Without such an insulated period, the Supreme Court has observed, a union would "be under exigent pressure to produce hothouse results or be turned out."[42] As a corollary to this rule, the Board may extend the certification year, by as much as another 12 months, if the employer does not bargain in good faith.[43] As part of his current first-contract-bargaining remedial initiative, the General Counsel has emphasized the importance of seeking adequate certification-year extensions.[44] But, as the General Counsel notes, a divided Board has recently rejected such extensions in some cases.[45] I dissented in one of those cases (the only one in which I was on the panel), objecting to the

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38 NLRB General Counsel Memorandum GC 06-05, *First Contract Bargaining Cases* (April 19, 2006), available at www.nlrb.gov (endorsing use of Section 10(j) injunctions and special remedies). *See also* NLRB General Counsel Memorandum GC 07-08, *Additional Remedies in First Contract Bargaining Cases* (May 29, 2007), available at www.nlrb.gov (endorsing additional remedies, including requiring bargaining on a prescribed or compressed schedule, requiring periodic reports on bargaining status, minimum six-month extensions of the certification year protecting unions' representative status, and reimbursement of bargaining costs).

39 General Counsel Memorandum GC 06-05, supra, at 1.

40 General Counsel Memorandum GC 07-08, supra, at 1.

41 *See Ray Brooks v. NLRB*, 348 U.S. 96, 101-103 (1954).

42 Id. at 100.

43 *See Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

44 *See* General Counsel Memorandum GC 07-08, supra, at 4-5.

45 Id. at 4 n. 10, citing *United Electrical Contractors Assn.*, 347 NLRB No.1 (2006) (rejecting extension of certification year, over dissenting view of Member Walsh); *Mercy, Inc. d/b/a American Medical Response*, 346 NLRB 1004 (2006) (rejecting full extension, over my dissent); *St. George Warehous*e, *Inc.*, 341 NLRB 904 (2004) (rejecting extension, over dissent of Member Walsh).

majority's invocation of the statutory rights of employees who might *oppose* union representation. As I said there, "[w]e should not be so quick to vindicate the employees' right to refrain from union representation when we have not first vindicated the employees' initial choice of union representation."[46]

The Board's split July 2007 decision in *Badlands Golf Course* is another example.[47] That case involved an employer who had unlawfully withdrawn recognition from a union, after expiration of the certification year, but before a first contract had ever been reached. The Board ordered the employer to bargain, which it did, for six months and three weeks, before withdrawing recognition *again*. The issue posed was whether *this* withdrawal was lawful, under the Board's rule in *Lee Lumber*, a 2001 decision, which established a six-month minimum insulated period, and one-year maximum insulated period, for such remedial bargaining.[48] The *Lee Lumber* Board had emphasized that one important factor in determining the required period for remedial bargaining was whether the parties were negotiating a first contract.[49] "It is not unusual," the Board observed, for first-contract bargaining "to take place in an atmosphere of hard feelings left over from an acrimonious organizing campaign."[50] Although *Badlands Golf Course* involved first-contract bargaining, a single remaining contract issue, and the absence of a bargaining impasse, a Board majority permitted the employer to withdraw recognition from the union, finding that it had bargained for a reasonable period of time. The majority relied not only on bargaining conducted in compliance with the Board's initial order, but – remarkably -- on the bargaining that culminated in the employer's first, and unlawful, withdrawal of recognition. Member Walsh and I dissented, arguing that the majority had erred in several respects, including by "grossly miminiz[ing] the fact that the parties were bargaining for an initial contract."[51]

As a Member of the Board, and a frequent dissenter in recent years, I have pointed out that the Board's decisions may exacerbate disenchantment with the Act. If employees and labor unions, for example, turn away from the Board because they lack confidence in it, then the Board's effectiveness is necessarily diminished. Even if I am not in a position to suggest what should be done, I fully understand why the Subcommittee and the Congress would be concerned.

I would be happy to answer your questions.

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46 *American Medical Response*, supra, 346 NLRB at 1007.

47 *Badlands Golf Course*, 350 NLRB No. 28 (2007).

48 *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002).

49 Id. at 403.

50 Id.

51 *Badlands Golf Course*, supra, 350 NLRB No. 28, slip op. at 5.