LEGISLATIVE HEARING ON H.R. 2346, SECRET BALLOT PROTECTION ACT, AND H.R. 2347, REPRESENTATION FAIRNESS RESTORATION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH,
EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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C O N T E N T S

LEGISLATIVE HEARING ON H.R. 2346, SECRET BALLOT PROTECTION ACT, AND H.R. 2347, REPRESENTATION FAIRNESS RESTORATION ACT

Wednesday, June 26, 2013
U.S. House of Representatives
Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:06 a.m., in room 2175, Rayburn House Office Building, Hon. David P. Roe [chairman of the subcommittee] presiding.

Present: Representatives Roe, Wilson, Price, Guthrie, Bucshon, Brooks, Andrews, Scott, Tierney, Grijalva, Courtney, and Wilson.

Also present: Representatives Kline and Miller.

Staff present: Katherine Bathgate, Deputy Press Secretary; Casey Buboltz, Coalitions and Member Services Coordinator; Owen Caine, Legislative Assistant; Molly Conway, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Senior Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Jody Calemine, Minority Staff Director; John D'Elia, Minority Labor Policy Associate; Daniel Foster, Minority Fellow, Labor; Eunice Ikene, Minority Staff Assistant; Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director; Michael Zola, Minority Deputy Staff Director; and Mark Zuckerman, Minority Senior Economic Advisor.

Chairman ROE. A quorum being present, the Subcommittee on Health, Employment, Labor, and Pensions will come to order.

Good morning. I would like to thank our witnesses for being with us today. Some have traveled a great distance to share their personal experiences with the committee and we are grateful for your time.

A story in the Wall Street Journal summed up the economic challenges many continue to face. In an article entitled "Some Unemployed Keep Losing Ground," reporter Ben Cassleman writes, "The recession ended 4 years ago, but for many job seekers, it hasn't felt like much of a recovery."

Despite recent progress in the job market, Cassleman notes, "The trouble is that the place is still far too slow to fill quickly the huge hole created by the recession."

We all want to turn the page on the economy where 12 million Americans are searching for work and families are living paycheck-to-paycheck, and I read just the other day, over 70 percent of our people in this country are living paycheck-to-paycheck.

Reforming federal laws, especially those with a significant effects on the workforce, is vitally important to meeting that goal, which brings us to the focus of our hearing.

The National Labor Relations Act affects the lives of virtually every private-sector worker and job creator across the country. The legislative proposals we are examining today will help strengthen the law's protections.

First, the Representation Fairness Restoration Act will preserve unity and harmony in workplaces by rolling back the NLRB's Specialty Healthcare decision.

Union leaders have long wanted to organize small groups of employees as a first step toward organizing an entire workplace. For years the NLRB rejected those efforts by requiring employees that share a community of interest to be included in the proposed union; only employees with distinct interests were not included.

The board is now imposing a radically different approach. Under its new standard, the NLRB will approve almost every group of employees selected by the union, no matter how small.

As a result, labor bosses will gerrymander workplaces, employers will be buried in union red tape, and employees will have fewer opportunities to advance their careers.

Introduced by Representative Tom Price, H.R. 2347 would restore the traditional standard for determining which workers are included in a bargaining unit. The NLRB will have to do more than rubber stamp the list of employees picked by union leaders.

The NLRB will have to consider factors such as wages, skills, working conditions, and job functions when determining which unit of employees is appropriate just as it did before the Specialty decision. The policies reflected in the bill worked well for decades and should continue to govern union organizing efforts.

As before the committee today is the Secret Ballot Protection Act. As the title of the bill suggests, it would require a secret ballot election before a union can be certified or decertified.

This will eliminate the threat posed by past attempts to expand the flawed card check scheme where workers are pressured to publicly declare their support or opposition to union representation. We can all imagine the chilling effect this has on workers.

My name has appeared on numerous ballots in recent years. While my wife swears she votes for me, I will never be able to be sure and be able to prove it because it is a secret ballot.

That is because a secret ballot affords everyone the freedom to vote their conscience in privacy without fear of retribution or coercion. We owe it to every hard-working American to ensure this fundamental right is preserved in the workplace.

I want to thank the senior Democratic member for his comments at a hearing last year on a similar proposal. Mr. Andrews said it

was in his view that the bill introduced last Congress did not apply equally to union certification and decertification.

He always makes a strong case, and I appreciate his concerns. Workers are just as susceptible to intimidation when disbanding a union as they are when they are forming one. The bill before us has been amended to ensure that regardless of the circumstances, workers enjoy the protections of a secret ballot.

The comments offered by my colleague last year highlight the importance of this hearing. Our witnesses play an invaluable role in that effort, as does every member.

With that, I will now recognized my distinguished colleague, Mr. Tierney, the senior Democratic member on this subcommittee for his opening remarks.

[The statement of Chairman Roe follows:]

Prepared Statement of Hon. David P. Roe, Chairman, Subcommittee on Health, Employment, Labor and Pensions

Good morning. I would like to thank our witnesses for being with us today. Some have traveled a great distance to share their personal experiences with the committee; we are grateful for your time.

A story in the Wall Street Journal summed up the economic challenges many continue to face. In an article entitled "Some Unemployed Keep Losing Ground," reporter Ben Cassleman writes: "The recession ended four years ago. But for many job seekers, it hasn't felt like much of a recovery." Despite recent progress in the job market, Cassleman notes, "The trouble is that the pace is still far too slow to fill quickly the huge hole created by the recession."

We all want to turn the page on an economy where 12 million Americans are searching for work and families are living paycheck to paycheck. Reforming federal laws—especially those with a significant effect on the workforce—is vitally important to meeting that goal, which brings us to the focus of our hearing. The National Labor Relations Act affects the lives of virtually every private-sector worker and job creator across the country. The legislative proposals we are examining today will help strengthen the law's protections.

First, the Representation Fairness Restoration Act will preserve unity and harmony in workplaces by rolling back the National Labor Relations Board's Specialty Healthcare decision. Union leaders have long wanted to organize small groups of employees as a first step toward organizing an entire workplace. For years the NLRB rejected those efforts by requiring employees that share a community of interest be included in the proposed union; only employees with distinct interests were not included.

The Obama board is now imposing a radically different approach. Under its new standard, the NLRB will approve almost every group of employees selected by the union—no matter how small. As a result, labor bosses will gerrymander workplaces, employers will be buried in union red tape, and employees will have fewer opportunities to advance their careers.

Introduced by Representative Tom Price, H.R. 2347 would restore the traditional standard for determining which workers are included in a bargaining unit. The NLRB will have to do more than rubber stamp the list of employees picked by union leaders. The NLRB will have to consider factors such as wages, skills, working conditions, and job functions when determining which unit of employees is appropriate—just as it did before the Specialty decision. The policies reflected in the bill worked well for decades and should continue to govern union organizing efforts.

Also before the committee today is the Secret Ballot Protection Act. As the title of the bill suggests, it would require a secret ballot election before a union can be certified or decertified. This will eliminate the threat posed by past attempts to expand the flawed card check scheme where workers are pressured to publicly declare their support—or opposition—to union representation. We can all imagine the chilling effect this has on workers.

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The comments offered by my colleague last year highlight the importance of this hearing. Our witnesses play an invaluable role in that effort, as does every member. With that, I will now recognize my distinguished colleague Rob Andrews, the senior Democratic member of the subcommittee, for his opening remarks.

Mr. TIERNEY. Well, thank you very much, Mr. Chairman. Your wife has weighed in, by the way, and told us that she never did vote for you. [Laughter.]

Good morning, and I want to thank all of our panel of witnesses for testifying here today.

You know, union rights have paved the way to the middle class for millions of Americans over the last century. On average, workers with union representation earn higher pay and have greater access to employer-provided health and pensions than other workers.

Through its support and advocacy for the 40-hour work week, minimum and overtime wages, safe and healthy working conditions, pensions and social security, family and medical leave, expanded educational opportunities, and landmark civil rights protections, the labor movement had has an immeasurable positive impact upon the standards of living for all working people.

Apprenticeship and journeymen programs run by unions are often the gold standard for job preparation; recruiting and training Americans for high-wage, high-skilled jobs of the future in the strengthening our economy.

Unfortunately, today's hearing is one more example of a special interest-driven anti-worker agenda. Rather than pursuing policies to raise wages and put Americans back to work, Committee Republicans are pushing two bills that would lower wages, impede workers' right to associate freely, and threaten the economic security of the middle class.

H.R. 2346, the Secret Ballot Protection Act, is an extreme piece of legislation that actually discourages employers and employees from working together to make a business more productive, profitable, and safe.

So for example, this bill would make unlawful voluntary agreements that many responsible employees, such as Kaiser Permanente and Daimler Chrysler, have entered to allow employees to choose by majority sign up whether to have a union.

These companies have found that majority sign up is an effective way to gauge workers' free choice, and it results in less hostility and polarization in the workplace.

The majority believes that even where a majority of employees and employer both desire to freely and in a mutually beneficial way allow a union, Washington, D.C., knows better and such agreements would be prohibited under law.

Committee Republicans will argue that requiring secret ballots protects workers by enabling them to vote their conscience without fear of reprisal. They will claim that secret ballots protect workers

from intimidation and harassment and threats by unions who want them to sign authorization cards.

However, the National Labor Relations Act and Board, the law strictly prohibits coercion by unions or employers in card signing and one of our witnesses here today is a poster child for that very case, that the law already exists to prohibit that kind of conduct which they, Republicans, say is feared.

Ironically, while this House Republican bill would make the NLRB election process workers' only path to a union, Senate Republicans are threatening to incapacitate the NLRB by filibustering Board nominees.

Also, H.R. 1120, a bill which would have effectively shut down the NLRB, passed this Committee in the House just a few weeks ago. Employee choice, whether by majority sign-up or by an NLRB election, is clearly under attack.

H.R. 2347, the Representation Fairness Restoration Act, reverses decades of precedent on how an employee bargaining unit is formed and instead gives employers substantial control over which employees must choose for their own bargaining unit.

The bill creates a presumption that employers are free to add employees to a petitioned-for a bargaining unit unless employees can show the additional employees have a sufficient, distinct community of interest from the group petitioning for the union.

The most significant change however is that the bill requires the board to choose the largest possible bargaining unit with a community of interests rather than simply an appropriate bargaining unit which is the standard under current law.

This unprecedented undemocratic shift gives employers instead of employees the dominant voice in determining the composition of bargaining units.

Republicans contend that this change is necessary because without it the recent NLRB decision in Specialty Healthcare will lead to the proliferation of micro units.

However, the NLRB data reveals that since the Specialty decision, the median size of election units has actually increased and I direct people's attention to the chart which shows exactly that.

The true purpose of H.R. 2347 is to allow employers to gerrymander bargaining units in order to prevent or sway the outcome of union elections, frustrating workers' efforts to associate freely and exercise their rights under the NLRA.

Both of these bills trump worker choice and even employer choice with new dictates from Washington attacking the freedom of association and the freedom of contract.

I look forward to the witnesses' testimony today, and thank you for the opportunity to speak.

[The statement of Mr. Tierney follows:]

Prepared Statement of Hon. John F. Tierney, a Representative in Congress From the State of Massachusetts

Good morning. I would like to thank our panel of witnesses for testifying today.

Union rights paved the way to the middle class for millions of Americans over the last century. On average, workers with union representation earn higher pay and have greater access to employer-provided health care and pensions than other workers.

Through its support and advocacy for the 40-hour work week, minimum and overtime wages, safe and healthy working conditions, pension and social security, family

and medical leave, expanded educational opportunities and landmark civil rights protections, the labor movement has had an immeasurable, positive impact upon the standards of living for all working people.

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H.R. 2346, the Secret Ballot Protection Act, is an extreme piece of legislation that actually discourages employers and employees from working together to make a business more productive, profitable and safe. So for example, this bill would make unlawful voluntary agreements that many responsible employers, such as Kaiser Permanente and DaimlerChrysler, have entered to allow employees to choose by majority sign-up whether to have a union.

Those companies have found that majority sign-up is an effective way to gauge workers' free choice—and it results in less hostility and polarization in the workplace. The majority believes that even where a majority of employees and an employer both desire to freely and in a mutually beneficial way allow a union, Washington D.C. knows better and such agreements should be prohibited under law.

Committee Republicans will argue that requiring secret ballots protects workers by enabling them to vote their conscience without fear of reprisal. They will claim that secret ballots protect workers from intimidation, harassment, and threats by unions who want them to sign authorization cards. However, the National Labor Relations Act and Board law strictly prohibit coercion by unions or employers in card signing.

Ironically, while this House Republican bill would make the NLRB election process workers' only path to a union, Senate Republicans are threatening to incapacitate the NLRB by filibustering Board nominees. Also, H.R. 1120, a bill which would have effectively shut down the NLRB, passed this Committee and the House just a few weeks ago. Employee choice—whether by majority sign-up or by an NLRB election—is clearly under attack.

H.R. 2347, the Representation Fairness Restoration Act, reverses decades of precedent on how an employee bargaining unit is formed, and instead gives employers substantial control over which employees must choose for their own bargaining unit.

The bill creates a presumption that employers are free to add employees to a petitioned-for bargaining unit, unless employees can show the additional employees have a "sufficiently distinct" community of interests from the group petitioning for the union. The most significant change, however, is that the bill requires the Board to choose the largest possible bargaining unit (with a community of interest), rather than simply an appropriate bargaining unit which is the standard under current law.

This unprecedented, undemocratic shift gives employers, instead of employees, the dominant voice in determining the composition of bargaining units. Republicans contend that this change is necessary because without it, the recent NLRB decision in Specialty Healthcare will lead to the proliferation of "micro-unions."

However, NLRB data reveals that since the Specialty decision, the median size of election units has actually increased.

The true purpose of H.R. 2347 is to allow employers to gerrymander bargaining units in order to prevent or sway the outcome of union elections, frustrating workers' efforts to associate freely and exercise their rights under the NLRA.

Both of these bills trump worker choice and even employer choice with new dictates from Washington—attacking the freedom of association and the freedom of contract.

I look forward to the witnesses' testimony. Thank you.

Chairman ROE. I thank the gentleman for yielding.

Pursuant to committee Rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record, and without objection, the hearing record will remain open for 14 days to allow such statements and other extra-

neous material referenced during the hearing to be submitted for the official hearing record.

It is now my pleasure to introduce our distinguished panel of witnesses, and thank each and every one of you for being here.

First, Mr. Jerry Hunter. He is a partner in the law firm of Bryan Cave, LLP in St. Louis, Missouri. He served as general counsel of the National Labor Relations Board from 1989 through 1993.

Welcome, Mr. Hunter.

Mr. Eric Oppenheim is the chief operating officer, Republic Foods in Rockville, Maryland.

Thank you for being here.

Mr. Fred Feinstein is a senior fellow at the University of Maryland and resides in Takoma Park, Maryland. He previously served as the general counsel for the National Labor Relations Board from 1994 until 1999.

Welcome.

Mrs. Marlene Felter is a medical records coder in Costa Mesa, California.

Welcome, Mrs. Felter.

And Mr. Glenn Taubman is a staff attorney for the National Right to Work Legal Defense Foundation in Springfield, Virginia.

Before I recognize you to provide your testimony, let me briefly explain our lighting system. You have 5 minutes to present your testimony. When you begin, the light in front of you will turn green. With 1 minute left, the light will turn yellow.

When your time is expired, the light will turn red. At that point, I will ask you to wrap up your remarks as best as you are able. As everyone else—as everyone has testified, members will each have 5 minutes to ask questions and we will try to stick to that.

And without that, we will begin with Mr. Hunter.

STATEMENT OF JERRY HUNTER, PARTNER, BRYAN CAVE, LLP

Mr. HUNTER. Good morning, Chairman Roe, Ranking Member Andrews, and members of the subcommittee. Thank you for inviting me to appear here before the subcommittee to testify today. It is certainly an honor for me to give some remarks concerning H.R. 2347 and the NLRB decision especially health care.

As the Chairman Roe indicated, I had the pleasure of serving as general counsel of the National Labor Relations Board from November 1989 through November 1993.

I also had the pleasure to start my career out of law school as a Field Attorney with the National Labor Relations Board in St. Louis, Missouri where I worked from June 1997 until June 1990—June 1979, and following that service as an attorney with the NLRB, I had the pleasure of serving as a trial attorney and senior trial attorney for the U.S. Equal Employment Opportunity Commission from June 1979 until November 1982.

Mr. Chairman, I request that the entirety of my written testimony be entered into the record of this hearing. My statements in my—materials in my statement are heartfelt. I feel a strong kinship—well, had felt a strong kinship with the NLRB since that was the first job I had following my legal education.

As I indicated, my testimony addresses H.R. 2347, the Representation Fairness Restoration Act and issues raised by the NLRB decision in Specialty Healthcare and Rehabilitation Center of Mobile.

In Specialty Healthcare, the board, former Chairman Liebman and Members Becker and Pearce with former Member Hayes dissenting, decided that a regional director must find that any unit that the union petition for is appropriate if the employees perform the same tasks or earn the same or similar pay.

This decision will enable unions to organize multiple small bargaining units within one facility, thereby balkanizing an employer's operation and literally making it impossible for an employer to carry out decisions concerning hiring, promotions, employee transfers, and related decisions.

Employers will be subjected to considerable increase in operational costs as they may be forced to deal with many unions which may be certified to represent very small bargaining units.

Under the board's decision in Specialty Healthcare, a regional director employed by the board would generally be forced to hold a representation election in any unit requested by the union.

It should be noted that before the board issued its decision in Specialty Healthcare and at the time the board was giving due consideration to the case, that no party to the case requested that the board overturn the board's 1991 decision in Park Manor Care Center; nor did any party request that the Board consider the Park Manor standard, which had been the applicable law for 20 years and which had been applied by board members appointed by both republican and democratic presidents.

And Mr. Chairman, on a personal note, I have to say is that former General Counsel Feinstein, who is here, who succeeded me as general counsel applied Park Manor, and Park Manor was not even overturned under the board appointed by President Bill Clinton.

Notwithstanding that neither party requested that the board consider the viability of Park Manor, the board on its own volition posed the question of whether Park Manor should continue to be the applicable standard for the parties to follow. Thereafter the board proceeded to overturn Park Manor.

Additionally, even more troublesome, the board created a disturbing new element to the community of interest test which the board uses to determine the composition of bargaining units.

In early cases, and clearly was the case when I started out as a field attorney in the regional office with the board in St. Louis in 1977, the board considered whether employees had a community of interest when defining bargaining units.

The factors that the board generally considered in unit determinations included degree of functional integration, common supervision, the nature of employee skills and functions, interchangeability, and contact among employees, work situs, general working conditions, compensation, and fringe benefits.

The board and Specialty Healthcare in effect jettisoned this whole analysis when it issued its decision and basically provided that the unit requested by the union as long as the board determined that it would be appropriate should be upheld notwith-

standing that there are other employees who share a community of interest with of the employees in the petition for a unit.

The board not only overturned a standard for appropriate unit determinations in the non-acute health care industry, which had been the standard for 20 years, but it also changed its long-standing community of interest test by boldly stating that the board would no longer address whether the petition for a unit is sufficiently distinct to warrant a separate unit.

The latter part of the board's holding reversed the 30-year-old standard, which had been acquired by boards appointed by both democratic and republican presidents, and that the current board had cited with approval as recently as the year 2010.

Although this board has overturned long-standing NLRB precedent, unlike any other board—and particularly unlike any other boards—appointed by either democratic or republican presidents, the decision in Specialty Healthcare may be one of the most significant reversals in the history of the agency.

Chairman ROE. Mr. Hunter, I will ask you to wrap up your testimony.

Mr. HUNTER. Okay. And I say this because Specialty Healthcare will not only be applied to non-acute care facilities but it will and has been applied to other industries outside of the non-acute care or nursing home industry and there are board cases in the rental car industry and the engineering sector and in other sectors where the board has applied a Specialty Healthcare to find basically that the smallest unit petitioned for by the union is an appropriate unit.

And unless the employer can show that other employees have an overwhelming community of interest with the petitioned for unit that the other employees cannot be included in that bargaining unit.

Thank you, Mr. Chairman, for inviting me to participate in this hearing.

[The statement of Mr. Hunter follows:]

Prepared Statement of Jerry M. Hunter, Partner, Bryan Cave LLP

Good morning, Subcommittee Chairman Roe, Ranking Member Andrews, and Members of the Subcommittee, thank you for inviting me to appear before this Subcommittee and testify today. It is certainly an honor for me to appear before this Subcommittee as a witness. My name is Jerry M. Hunter and I am a partner with the law firm of Bryan Cave LLP in St. Louis, Missouri. Prior to joining Bryan Cave, I served as the General Counsel of the National Labor Relations Board from November, 1989 through November, 1993. Earlier in my career, I worked as a Field Attorney with the Region 14 office of the NLRB in St. Louis from June, 1977 until June, 1979. I was also employed as a Trial Attorney and Senior Trial Attorney by the U.S. Equal Employment Opportunity Commission from June, 1979 until November, 1982.

My testimony today should not be construed as legal advice as to any specific fact pattern or circumstances which may form the basis for any case which may be filed with the NLRB. Additionally, my testimony is based on my own personal views in light of my previous employment as a Field Attorney and the General Counsel by the NLRB and does not necessarily reflect the views of Bryan Cave or any of its attorneys. I have been in the field of labor and employment law since I graduated from law school during May, 1977. My experience as a labor and employment law professional includes, as stated above, having been employed as an attorney by the NLRB Regional Office in St. Louis and the EEOC District Office in St. Louis, employed as labor counsel by a St. Louis Fortune 500 Corporation, served as Director of the Missouri Department of Labor and Industrial Relations, served a four year term as General Counsel of the NLRB, and employed by Bryan Cave LLP since January, 1994 where I represent management in labor and employment law.

On May 24, 1995, I was appointed by the Leadership of the United States Congress (Senate Majority Leader Robert Dole, Minority Leader Tom Daschle, Speaker of the House Newt Gingrich and Minority Leader Richard Gephardt) to serve a four year term as a member of the Board of Directors of the Office of Compliance. The Office was established by the Congressional Accountability Act of 1995 to administer the eleven statutes in the areas of civil rights and labor laws made applicable to the legislative branch by the Act. The five-member Board is responsible for administering the Office, carrying out an educational program for the House and Senate, adapting rules and regulations to implement the new laws, and serving as the appeal body for administrative complaints under the Act. A copy of my biographical sketch is attached to my written testimony as Exhibit A.

Mr. Chairman, I request that the entirety of my written testimony be entered into the record of the hearing.

Mr. Chairman, my testimony this morning addresses H.R. 2347, the Representation Fairness Restoration Act, and issues raised by the National Labor Relation Board's decision in Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (Aug. 26, 2011). In Specialty Healthcare, the Board (former Chairman Liebman and Members Becker and Pearce, with Member Hayes dissenting) decided that a Regional Director must find that any unit that the union petitions for is appropriate, if the employees perform the same tasks or earned the same or similar pay. This decision will wreak havoc on employers. This decision will enable unions to organize multiple small bargaining units within one facility, thereby balkanizing an employer's operation and literally making it impossible for an employer to carry out decisions concerning hiring, promotion, employee transfer and related decisions. Employers will be subjected to a considerable increase in operational costs as they may be forced to deal with many unions which may be certified to represent very small bargaining units. Organized Labor's ability to carve out small bargaining units will not only adversely impact employers but will also have the concomitant effect of eliminating promotional opportunities for employees since union work rules generally discourage and/or prohibit cross-training and transfer of employees from one bargaining unit to another bargaining unit. Under the Board's decision in Specialty Healthcare, a regional director employed by the Board would generally be forced to hold a representation election in any unit requested by the union.

It should be noted that in Specialty Healthcare, no party to the case requested that the Board overturn the Board's 1991 decision in Park Manor Care Center, 305 NLRB 872 (1991); nor did any party request that the Board consider the Park Manor standard, which had been the applicable law for twenty years and applied by Board Members who had been appointed by both Republican and Democratic Presidents. Interestingly, the only issue before the Board which was raised by the party seeking review was a request that the Board consider whether the regional director erroneously failed to apply the standard at all. See 357 NLRB No. 83, at p. 18. Notwithstanding that neither party requested that the Board consider the viability of Park Manor, the Board, on its own volition, posed the question of whether Park Manor should continue to be the applicable standard for the parties to follow. Thereafter, the Board proceeded to overturn Park Manor. Additionally, even more troublesome, the Board created a disturbing new element to the "community of interest" test which the Board uses to determine the composition of bargaining units. In early cases, the Board considered whether employees had a "community of interest" when defining units. The factors that the Board generally considered in unit determinations included degree of functional integration, common supervision, the nature of employee skills and functions, interchangeability and contact among employees, work situs, general working conditions, compensation, and fringe benefits. See, e.g., NLRB v. Paper Mfrs. Co., 786 F.2d 163 (3rd Cir. 1986). Difference in supervision is not a per se basis for excluding employees from an appropriate unit. Texas Empire Pipeline Co., 88 NLRB 631(1950). The Board has historically stated that the important consideration is still the overall community of interest among the several employees. See, United States Steel Corporation, 192 NLRB 58 (1971). By considering whether or not an employer's work enterprise was integrated and the employee shared an overall "community of interest", the Board, prior to the decision in Specialty Healthcare, avoided separating employees into small groups from other employees who performed similar or related tasks and who received the same or similar pay, where the only purpose for carving out a small group of employees would be to enhance the union's organizing efforts.

Former Member Hayes, in dissenting from the majority opinion in Specialty Healthcare, stated as follows:

Finally, as to the majority's claim that the difference between the Park Manor test and the traditional community-of-interest test is not understandable, I profess some skepticism. The Board has applied Park Manor for approximately two decades

without apparent misunderstanding by the parties. The number of contested cases to come before the Board under this test is quite few. The majority sua sponte chose to raise the issue whether the Board should adhere to this test, and it found little support for overruling it in briefs filed by the parties and amici.

All of this is of little consequence to my colleagues. They know full well that a petitioned-for CNA unit would ordinarily be found inappropriate under the Park Manor test, but it serves their greater purpose to overrule that test in order to get to the issue they really want to address, a reformulation of the community-of-interest test.

Id. at 18. As stated above, the Board not only overturned the standard for appropriate unit determinations in the non-acute healthcare industry which had been the standard for twenty years, but it also changed its longstanding community-of-interest test, by boldly stating that the Board would no longer address whether the petitioned-for unit is "sufficiently distinct" to warrant a separate unit. The latter part of the Board's holding reversed a thirty year old standard which had been applied by Boards appointed by both Democratic and Republican Presidents and that the current Board cited with approval as recently as 2010. Interestingly, the Board's prior approval of the community-of-interest standard included an affirmative vote by former chairman Wilma Liebman. See Wheeling Island Gaming, 355 NLRB No. 127, p. 1, fn. 2 (Aug. 27, 2010) (citing, Newton Wellesley Hospital, 250 NLRB 409, 411-12 (1980)). Although the Obama-appointed Board has overturned longstanding NLRB precedent unlike any previous Board, Republican or Democratic appointed, the decision in Specialty Healthcare may turn out to be one the most significant reversals of precedent in the history of the Agency. The Board's decision could very well lead to a multiplicity of small and fragmented bargaining units in virtually every employer's workforce in every industry in this nation. Former Member Hayes noted in his dissent that the employer in Specialty Healthcare in addition to being required to recognize a union that represents only its certified nurse anesthetists, could also find itself having to deal with a union for separate bargaining units of registered nurses, licensed practical nurses, cooks, dietary aides, business clericals, and residential activity assistants. See 357 NLRB No. 83, p. 19. Critically, all of these units would be very small, with the dietary aides having only ten members, the cooks having three members, and the activity directors having only two employees as bargaining unit members. The multiple bargaining units or microunits which likely will result from the Board's decision in Specialty Healthcare will not only make it more costly for an employer to operate, but may also result in layoffs and possible closure of the employer facility. Multiple units or microunits which could occur at one facility would also likely result in work protection clauses being included in any collective bargaining agreement which the employer may ultimately have to agree to (i.e., unit in women's shoe department and unit in men's shoe department), which would prohibit the employer from transferring employees from one department to another and, in effect, drive up the employer's operation costs.

Beyond facing these administrative burdens, employers would find themselves at increased risks of work stoppages at the hands of multiple unions which represent multiple units, each of which could halt the employer's operations if their bargaining demands were not met. Thus, an employer balkanized into multiple units faces not only the costly burden of negotiating separately with a number of different unions, but also with the attendant drama and potential work disruption, coupled with a threat that its operations could be shut down by various fractions of the workforce. Such risk is particularly high for small businesses, which almost certainly would lack the long-term reserves to withstand a shutdown.

An increase in the proliferation of bargaining units also limits the rights of employees within the workforce. Allowing the type of narrow units approved by Specialty Healthcare creates the risk that the workforce will fracture based on the communities of interest as defined by a regional director, rather than on the underlying functional realities of the positions. It is very troubling, however, by the potential freezing effect that fragmented units would have on employee advancement. As the different collective bargaining agreements inevitably will have differing provisions on transfers, promotions, seniority, position posting and preferences, etc., it will be extremely difficult, if not impossible, for an employee whose unit is limited to his or her unique job description to develop his or her career.

Only months after the Board's decision was issued in Specialty Healthcare, the business community's fears became a reality. In DTG Operations, Inc., 357 NLRB No. 175 (Dec. 30, 2011), a Board majority (Chairman Pearce and Member Becker, with Member Hayes dissenting) overruled a Regional Director's finding that the smallest appropriate unit was a wall-to-wall unit. The union had petitioned for a unit of rental service and local rental service agents and the employer sought a broader unit. The Board majority of Chairman Pearce and Member Becker found

that the employees, whom the employer would have added, did not share an overwhelming community-of-interest with the employees petitioned for and that those employees sought by the union are an appropriate unit.

The Board's decision creates real threats not only to labor relations, but also to the ability of employers to remain competitive in what has clearly become a worldwide economy. Since I believe that the Board's decision in Specialty Healthcare may violate the admonition in Section 9(c)(5), 29 U.S.C. § 159 ("[I]n determining whether a unit is appropriate for the purposes specified in Subsection (b) [of this section] the extent to which employees have organized shall not be controlling"),[1] the Subcommittee should seriously consider whether the type of legislative relief proposed by H.R. 2347 is needed to correct the problems created by the Board's decision in Specialty Healthcare.

Chairman ROE. Thank you, Mr. Hunter.

Mr. Oppenheim?

STATEMENT OF ERIC OPPENHEIM, CHIEF OPERATING OFFICER, REPUBLIC FOODS, INC.

Mr. OPPENHEIM. Good morning, Chairman Roe, Congressman Tierney, and distinguished members of the subcommittee.

My name is Eric Oppenheim. I am the chief operating officer of Republic Foods in Rockville, Maryland. I appear before you today on behalf of the Society for Human Resource Management, or SHRM, and its more than 260,000 members.

Thank you for the invitation today.

I have been a human resources professional since 1997, and I am the co-lead for SHRM's Special Expertise Panel on Labor Relations. In addition, I am a Burger King franchisee, and I have been in the restaurant business for over 15 years.

SHRM supports balanced management labor relations. SHRM recognizes the inherent rights of an employee to quorum, join, assist in, or refrain from joining a labor organization, but SHRM also believes that HR professionals have a responsibility to understand and champion employment related actions and that are in the best interests of their organizations, their employees with regard to third-party representation by labor unions.

SHRM is very concerned that the 2011 National Labor Relations Board decision in NLRB v. Specialty Healthcare is not a balanced approach. We are concerned that the application in Specialty decision will needlessly harm employee morale, deprive employees of valuable training and development, and compel employers to manage unnecessarily small bargaining units of similar employees. Therefore, we are very supportive of H.R. 2347 introduced by Congressman Price.

My family and I own and operate 19 Burger King Restaurants in Maryland and Washington, D.C. Our industry is ultracompetitive, and we operate on a very slim profit margins. Our profit per employee is one of the lowest in the industry.

We are not one-percenters, Mr. Chairman.

Our restaurants currently employ 531 people most of whom are crew members who perform a wide variety of job functions. These

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[1] In conformity with this statutory limitation, the Board has held that a unit based solely or essentially on extent of organization is inappropriate. New England Power Co., 120 NLRB 666 (1958). See also, NLRB v. Morganton Hosiery Co., 241 F.2d 913 (4th Cir. 1957); Metropolitan Life Insurance Co. v. NLRB, 380 U.S. 438 (1965); Motts Shop Rite of Springfield, 182 NLRB 172 (1970) (Section 9(c)(5) prohibits the Board from establishing a bargaining unit solely on the basis of extent of organization).

job functions include our cashiers who take orders from our customers, porters who clean our facilities, guest ambassadors who maintain our dining room cleanliness and field customer requests, expediters who deliver food to our customers at the front counter, kitchen prep who prepare stock in our kitchens, line cooks who prepare food for our guests, and shift leaders who manage crewmember activities.

Each of these job functions is distinct, but it is very common for our crew members to perform many of these roles on any given shift. For example, during a busy meal hour, a line cook may need to work on a register or take meal orders from customers. Conversely, a cashier may need to work in the kitchen preparing food for our guests.

Thus, cross training and multitasking is critical for our employees to effectively serve customers and gain the necessary job skills to advance.

It is very concerning that the Specialty decision's new standard for determining bargaining units may change our ability to cross train employees and cover necessary work.

The new Specialty standard is allowing labor organizations to form micro bargaining units by permitting them to target only subsets of employees who are most likely to support a union.

At our restaurants, the Specialty decision could eventually mean that our workforce becomes needlessly fragmented. To refer to my earlier example, if a union organized the line cooks into a micro union, the line cook may be contractually prohibited from covering for a cashier working at a register during busy time.

Such restrictions would be counterproductive and endlessly maddening for employees and supervisors.

Then there is the time and expense associated with negotiating and administering multiple collective bargaining units covering only a few employees. Small businesses like ours with thin profit margins can't afford the time, the expense, and frustration required to negotiate and manage similar employees working under different contracts.

Furthermore, workforce fragmentation caused by Specialty may deprive employees' autonomy at work. Employees want to take on new duties. They want to progress professionally, but micro bargaining units may restrict their ability to perform their roles and build on their job experience.

The Specialty decision would also be detrimental to employees trying to balance life and school or work. This is because smaller, superfluous bargaining units will mean fewer shifts available to employees.

Finally, there is employee morale. The Specialty decision may compel HR professionals and employers to manage multiple bargaining units of similarly situated employees who have different wages, hours, and working conditions. This will create moral problems between employees working side-by-side.

For these reasons, SHRM supports H.R. 2347 to restore the standard from prior to the Specialty decision for determining which employees will vote in election.

Mr. Chairman, thank you again for allowing me to share SHRM's views on the Specialty Healthcare and our support for H.R. 2347.

[The statement of Mr. Oppenheim follows:]

Prepared Statement of Eric Oppenheim, SPHR Chief Operating Officer and Franchisee, Republic Foods, Inc., Rockville, MD, on Behalf of the Society for Human Resource Management

Chairman Roe, Ranking Member Andrews and distinguished members of the Subcommittee, my name is Eric Oppenheim. I am Chief Operating Officer and Franchisee at Republic Foods of Rockville, Maryland, and I appear before you today on behalf of the Society for Human Resource Management (SHRM). I have been a human resource professional and a member of SHRM since 1997, and I am the co-lead for SHRM's Special Expertise Panel on Labor Relations. In addition to being a human resource professional, I am a Burger King franchisee and have been in the restaurant business for over 15 years. My family and I own and operate 17 Burger King restaurants in Maryland and two in Washington, D.C. Thank you for the invitation to appear before you on behalf of SHRM's more than 260,000 members in over 140 countries.

SHRM is the world's largest association devoted to human resource (HR) management. The Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

SHRM is very concerned that the August 2011 National Labor Relations Board (NLRB or the Board) decision in NLRB v. Specialty Healthcare will needlessly harm employee morale, deprive employees of valuable training and development and compel employers to manage unnecessarily small bargaining units of similar employees. In my testimony, I will outline SHRM's views on employee rights under federal labor law, provide background about Republic Foods' restaurants and workforce, and share SHRM's serious concerns about the NLRB's imbalanced Specialty decision and strong support for H.R. 2347, the Representation Fairness Restoration Act.

SHRM views on employee representation

Enacted in 1935, the National Labor Relations Act (NLRA) is the principal statute governing collective bargaining activities in the private sector. The NLRA was enacted to ensure the right of employees to assemble and collectively bargain with employers on matters of workplace welfare, including wages, hours, working conditions and benefits.

SHRM supports balanced labor-management relations. SHRM recognizes the inherent rights of employees to form, join, assist in or refrain from joining a labor organization. Employee NLRA rights to form, join, assist or refrain from joining a union without threats, interrogation, promises of benefits or coercion by employers or unions must be protected. SHRM believes an employee's decision on unionization should be based on relevant information and free choice, and that representation without a valid majority of employee interest is fundamentally wrong.

Ultimately, SHRM believes that HR professionals have a responsibility to understand, support and champion employment-related actions that are in the best interests of their organizations and their employees with regard to third-party representation by labor unions.

The restaurant industry and Republic Foods, Inc.

As a business owner, my goal is to be profitable so that my restaurants can prosper and create jobs. Traditionally, restaurants are an ultra-competitive industry and operate with very slim profit margins. We rely on a large number of customers to fill our restaurant seats and our drive-thrus to be profitable. There is great pressure on our product pricing because our customers have many restaurant options and they are looking for value when they enter our restaurants. Yet, especially in the sluggish economy of the past several years, any cost increases in food and ingredient prices, labor expenses, or new regulations cause restaurants—especially a small business like ours with thin margins—to raise prices, reduce services, eliminate jobs or potentially close their doors.

Republic Foods, Inc. is a franchise of Burger King Corporation and was established in 1982. We greatly value our employees, and they represent a broad spectrum of individuals. Our restaurants currently have 531 employees, including 54 restaurant managers or assistant managers, 8 administrative and supervisory personnel and 469 restaurant crew members. About one-third of our employees work over 35 hours per week, about one-third work between 25 and 35 hours per week, and one-third work less than 25 hours per week. Each restaurant has about 30 crew members.

Our restaurant crew members perform a wide variety of job functions. These job functions include cashier (individuals who field meal orders from customers), porter

(clean facilities and equipment), guest ambassador (maintain dining room cleanliness and field customer requests), expediter (deliver food to customers at the counter), kitchen prep (keep food, paper goods and other supplies stocked and filled), line cook (cook and prepare food in kitchen) and shift leader (manage flow of business and crew member activities).

Cross-training and multitasking is critical for our employees to effectively serve customers. Each of the job functions described above is distinct, but it is very common for crew member employees to perform multiple roles and job functions in a given shift. For example, during busy meal hours, a line cook may need to work at a register and take meal orders from customers or, conversely, a cashier may need to work on the line and prepare food in the kitchen.

Working in our restaurants is many individuals' first employment experience. While some of our employees have worked in restaurants for more than 20 years, others are high school students who joined our team within the past week and look to work their way up to higher-paying jobs in the future. Since we employ so many entry-level individuals, we have significant employee turnover, similar to the larger restaurant industry. Of Republic Foods' 531 crew members, nearly half have been employed for less than 90 days. As a consequence of our high turnover, we spend a great deal of time training our employees. It is essential that our employees have good communication skills and the flexibility to learn and perform multiple job functions (or cross-train) to serve our customers.

Concerns with the NLRB's Specialty Healthcare decision

Union density has declined for decades in America. According to the Bureau of Labor Statistics, only 11.3 percent of wage and salary workers were members of a union in 2012, compared to 20.1 percent in 1983.[1] Labor organization leaders have long argued that current laws on union representation favor management and hinder employees' ability to organize a union. However, SHRM and others cite the NLRB's 2012 operations report that reveals that the median time from a representation petition to an election was 38 days as proof that the period is generally reasonable for employees to weigh the important choice of whether or not to unionize.[2]

The Obama Administration has advanced significant labor-management relations policy through the regulatory process. In particular since 2011, the NLRB and U.S. Department of Labor have been very active issuing case decisions and substantive regulations.

One of the NLRB's most significant decisions was NLRB v. Specialty Healthcare and Rehabilitation Center of Mobile (Specialty) on Aug. 26, 2011, in which the Board overruled the established Park Manor precedent for determining appropriate bargaining units. In Specialty, the Board established a new standard in which the Board will find that a unit is appropriate unless the employer demonstrates that employees in a larger unit share an "overwhelming" community of interest with those in the petitioned-for unit. Meeting this new standard is a significant burden for employers, and thus the Specialty decision allows labor organizations to form "micro-bargaining units" by permitting them to target only subsets of employees who are most likely to support the union.

SHRM is very concerned the Specialty decision may compel HR professionals and employers to manage multiple bargaining units of similarly situated employees who have different wages, hours and working conditions. A proliferation of unnecessarily small bargaining units will burden employers with significant time, expense and employee morale challenges associated with administering a number of different contracts covering only a few of its employees.

At Republic Foods stores, the Specialty decision could eventually mean that our workforce becomes needlessly fragmented. Currently, our restaurant crew members regularly perform the job functions of cashier, porter, guest ambassador, expediter, kitchen prep, line cook and shift leader often during the same shift as the flow of work may demand. Our employees cross-train on multiple job functions and cover for one another during busy hours without hesitation in order to effectively serve customers. HR professionals and business owners like me are very concerned that the Specialty decision may complicate how we cover various job functions by restricting our ability to train and manage our employees. As an example, a line cook may be contractually prohibited from covering for a cashier and working at a register during a busy dinnertime rush. Such restrictions would be endlessly frustrating for employees and supervisors.

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[1] Bureau of Labor Statistics, U.S. Department of Labor (2012). *http://www.bls.gov/news.release/union2.nr0.htm*

[2] National Labor Relations Board (2013). Summary of Operations, Fiscal Year 2012. January 11, 2013.

Furthermore, the workforce fragmentation caused by Specialty may deprive employees of autonomy at work. Employees want to take on new duties and progress professionally, but micro-bargaining units may restrict their ability to perform other job functions and impose unnecessary barriers to employee training and professional development opportunities. What's more, the Specialty decision would be detrimental to employee work-life balance because smaller, superfluous bargaining units will mean fewer shifts available to employees.

The impact of Specialty may also have a negative impact on employee morale. Collective bargaining contracts determine virtually every aspect of a covered employee's compensation, benefits and working conditions. If employees are fragmented into smaller units, then employees working side-by-side may have different wages or benefits and have animosity about the disparities.

For these reasons, SHRM supports H.R. 2347, the Representation Fairness Restoration Act, which was introduced by Rep. Tom Price of Georgia. The bill would reinstate the 20-year-old standard from prior to the Specialty decision for determining which employees will vote in a union election. SHRM believes the pre-Specialty standard was balanced for employees, employers and labor unions and should be restored.

Conclusion

Mr. Chairman, thank you again for allowing me to share SHRM's views on Specialty Healthcare and our support for H.R. 2347, the Representation Fairness Restoration Act. SHRM is very concerned that the micro-union standard established in the NLRB's Specialty decision is imbalanced and may harm employee morale, deprive employees of professional development opportunities and compel employers to negotiate with, and manage, unnecessarily small bargaining units of similar employees. Small businesses like ours with thin margins can't afford the time and expense required to negotiate and manage crew members working under different collective bargaining contracts. The costs of Specialty may unfortunately compel employers of all sizes to raise prices, reduce services or eliminate jobs.

We urge support for H.R. 2347. I welcome your questions.

Chairman ROE. Thank you, Mr. Oppenheim.

Mr. Feinstein?

STATEMENT OF FRED FEINSTEIN, SENIOR FELLOW, UNIVERSITY OF MARYLAND

Mr. FEINSTEIN. Thank you. Good morning, Chairman Roe, Ranking Member Andrews, and distinguished members of the committee.

I am pleased to testify again before the committee that I was privileged to serve as a staff member for 17 years. You have my further background. I was general counsel for nearly 6 years to the NLRB, and I too was a field attorney as my first—to the NLRB as a similar to Mr. Hunter right out of law school.

I do request that my entire statement be made a part of the record, and I will summarize it as best I can. In my view enactment of the bills under consideration by the committee today would undermine important principles that have been part of labor law for decades.

They would erode employee protections and the collective bargaining process. First, enactment of H.R. 2346 would prevent employers and employees from reaching an agreement on how to determine majority support for collective bargaining at a worksite and require that an NLRB election be held in every case before collective bargaining could begin.

Today, under long existing law—goes back to the enactment of the law, employees can seek to demonstrate majority support for unionized nation for a petition or other approved methods and em-

ployers can accept that evidence of majority support if they so wish.

The legislation today would substitute these existing choices that have been part of labor relations for decades with a mandate that the only way employees and employers can determine majority support is through an NLRB election.

In my view, one of the strengths of the NLRA is an underlying premise that workplace relations are best left to be worked out by employees and employers. H.R. 2346 in limiting this long-standing principle I am afraid would weaken successful workplace relations.

Supporters of the bill states needed because unless there is a board election, there can be abuse that sometimes results in distorting the true wishes of employees.

The current law contains provisions that prohibit just such abuse, which in my view work fairly well, not always perfectly, but they work well. Those who believe otherwise might suggest perhaps how to improve those protections against abuse rather than what is proposed in this legislation and eliminate the important choices available to employees and employers today.

By analogy, there is extensive evidence that significant abuses occur during the course of campaigns leading to an NLRB election, but I would—I am confident that the supporters of 2346 would not suggest addressing such abuses by eliminating NLRB elections.

The second bill under consideration, H.R. 2347 would substitute the judgment of Congress for the expertise of an agency that for 75 years Congress has relied on to balance and assess how best to enforce the principles of labor law.

During republican and democratic administrations, the NLRB has been able to focus its expertise on developing policies that apply the principles of the law to evolving workplace conditions. Unit determinations, in particular, have required adjustment as the structure and organizations of workplaces has inevitably evolved.

I am concerned that if this bill were to be enacted as workplace conditions change and evolve, the factors proposed in H.R. 2347 could only be adjusted through yet another legislative enactment.

In my view, the current mechanisms in the law are a far more effective means of keeping the implementation and enforcement of labor law policies up-to-date.

In determining an appropriate bargaining unit, the board has traditionally implied a multifactor test to determine whether employees share a community of interest. The bill codifies some of those factors but leaves out important, relevant factors that have long been taken into consideration.

The new standard is a significant departure from the long-standing community of interest test. It would substantially add less weight to the wishes of employees and greater weight to factors controlled by employers, and so it is inconsistent with the fundamental right of employees under the NLRA to choose their representative.

I understand there is this concern, which we have heard today, that Specialty Healthcare constituted a major change in the board's traditional test for determining appropriate bargaining units that would result in the proliferation of micro units.

But rather than a dramatic change, I believe Specialty Healthcare did no more than restore the community of interest standard to unit determinations in nursing homes and other non-acute facilities and most telling is the data that we have before us today.

Since Specialty Healthcare, the average size of bargaining units has actually slightly increased. Taken together I am concerned that both of these bills into consideration today would have a significant adverse effect on our system of labor relations.

Finally, I cannot resist pointing out that while today we are considering important amendments to the NLRA, currently pending before Congress is a question that will have a profound effect not only on today's issues but on all of labor management relations.

I refer to the possibility that the NLRB might be unable to function because of the deadlock over appointments of members. Failure to confirm new members of the board in August would significantly undermine the rule of law in matters of labor relations, and I certainly hope that it can be avoided.

Thank you again for this opportunity to appear before this a distinguished committee.

[The statement of Mr. Feinstein follows:]

Prepared Statement of Fred Feinstein, Senior Fellow, University of Maryland

Good morning Committee Chairman Roe, Ranking member Andrews and members of the Committee. I am pleased testify again before the Committee I was privileged to serve as a staff member for 17 years from 1977 to 1994. My name is Fred Feinstein. For the past thirteen years I have been a senior fellow at the University of Maryland School of Public Policy's Executive Programs department. During this period I have also been a consultant to unions and worker centers on issues of labor and immigration policy. I am currently a member of the UAW public review Board and am on other advisory boards. During the Clinton Administration I served as General Counsel of the National Labor Relations Board (NLRB) for nearly six years. Today I appear expressing my own views on the issues raised in this hearing and not as a representative of any of the organizations with which I have been affiliated in the past or present.

In my view enactment of the bills under consideration by the Committee today would undermine important principles that have been part of the labor law for decades. They would erode employee protections and the collective bargaining process. Passage of the bills would impose legislatively mandated rules that would erode flexibility and limit the ability of employees, employers and the NLRB to make decisions about workplace conditions. They overrule provisions of the law enforced and endorsed by the courts and the Board through decades of both Republican and Democratic administrations.

Enactment of HR 2346 would prevent employers and employees from reaching an agreement on how to determine majority support for collective bargaining at a worksite. Instead it would require that the NLRB to conduct an election in every case before a collective bargaining relationship could be established. Today, under long existing law, employees can seek to demonstrate majority support for unionization through a petition or other approved methods and employers can exercise the choice to collectively bargain with its employees if it is satisfied there is majority support. The legislation would substitute these existing choices, with the mandate that the only way employees and employers can determine majority support is through an NLRB election.

Since the NLRA was enacted more than 75 years ago, employers and employees have had the ability to exercise these choices. In my view one of the NLRA's strengths is an underlying premise that workplace relations are best left to be worked out by employees and employers. The law encourages the efforts of employers and employees to resolve workplace concerns through consultation and negotiation with as little outside interference as possible. NLRB case law has consistently relied on this principle and it is one the strengths of the collective bargaining proc-

ess. HR 2346 is not consistent with this longstanding principle and would weaken successful workplace relations.

Too frequently contentious campaigns against union representation lead to a deterioration in workplace relations that both employees and employers come to regret. One way to avoid this deterioration is an agreement between employers and employees about how to respectfully express their views on collective bargaining and an agreement on how to determine majority support for representation. There is evidence that these mutual agreements are more likely to result in successful labor relations than more contentious campaigns that often precede NLRB representation elections. (e.g. See Kreisky and Eaton, 2001) Enactment of HR 2346 would preclude the possibility of agreements that often result in successful workplace relations.

Part of the rationale offered in support of H.R. 2346 is that determining majority support for union representation in a way other than an NLRB election can lead to abuse and sometimes results in distorting the true wishes of employees. Current law contains provisions that prohibit such abuse. While I believe the provisions prohibiting abuse are usually effectively enforced, those who believe otherwise might suggest how to improve the protections against abuse rather than what is proposed in H.R. 2346 which would eliminate important choices available to employers and employees today. There is extensive evidence that significant abuses occurs during the course campaigns leading to NLRB elections, but I am confident the supporters of H.R. 2346 would not support addressing such abuse by eliminating NLRB elections.

The second bill under consideration, HR 2347, would substitute the judgment of Congress for the expertise of the agency that for 75 years Congress has relied on to balance and assess how best to enforce the principles of labor law. When Congress enacted the NLRA, the NLRB was given the important responsibility of deciding how to apply the law of labor management relations to continually changing workplace realities. Exercising that responsibility has meant updating and adjusting Board holdings to reflect new workplace conditions. Unit determinations in particular have required adjustment as the structure and organization of diverse workplaces has inevitably evolved.

During Republican and Democratic administrations, the NLRB has been able to focus its expertise on developing policies that apply the principles of the law to evolving workplace conditions. The Board has modified its interpretations based on new evidence that provides a better understanding of workplace practices. Evaluating the effect of prior Board rulings has at times been the Board's rational for updating its rules. The Board has also updated or modified its rulings because new Board members have a different view on how to most effectively administer the Act.

In determining whether a unit of employees is appropriate for bargaining, the Board has traditionally applied a multifactor test to determine whether the employees share a community of interest and whether that interest is sufficiently distinct from those of other employees to warrant a separate bargaining unit. H.R. 2347 codifies some of those factors but leaves out other important relevant factors that have long been taken into consideration by the Board, including similarities in skills and training; geographical proximity; and the desires of affected employees.

The new standard in H.R. 2347 for unit determinations is a significant departure from the longstanding "community of interest" test. It would give substantially less weight to the wishes of employees and greater weight to factors controlled by employers. It is inconsistent with a fundamental right of employees under the NLRA to choose their collective bargaining representative and would undermine a central objective of the Act to encourage the process of collective bargaining.

I am also concerned that if this bill were to be enacted, as workplace conditions and the preferences of employees and employers inevitably evolve, the factors proposed in HR 2347 could only be adjusted through yet another legislative enactment. In my view, current mechanisms in the law are a more effective means of responding to workplace changes and keeping the implementation of labor polices up to date.

A good example of how the Board's approach to cases can evolve is the reconsideration in Specialty Healthcare of the Board's 1991 holding in Park Manor. In Park Manor the Board first applied a "pragmatic or empirical community of interests approach" to nursing homes. After examining the evidence, the Board stated that experience suggested the Park Manor standard had caused confusion and had not given the parties sufficient guidance. It also found the nursing home industry had undergone significant change since the early 90's and the approach suggested in Park Manor was based on "facts and analysis already over two decades out of date." (Specialty Health, page 6)

This is an appropriate and time tested way to help assure that the implementation of the law keeps up with changing workplace realities.

I understand that at least part of reason for today's consideration of HR 2347 is a misplaced concern that the Board's decision in Specialty Healthcare constituted a major change in the Board's traditional test for determining appropriate units.

While my primary concern with HR 2347 is placing Congress in the role of legislating unit determinations, I believe that the Board's decision in Specialty Healthcare was an appropriate reaffirmation of its longstanding "community of interest principle" and not the dramatic change in law that some have suggested. The Board decision did no more than restore the community of interest standard to unit determinations in nursing homes and other non-acute care facilities.

One of the major misconceptions about the Specialty Healthcare decision is that would lead to a proliferation of small "micro-units."

But Board statistics affirm that this has not been the case. Prior to Specialty Healthcare, the average size of the bargaining units found to be appropriate by the Board was 24 employees, a figure that has been relatively consistent. Since Specialty Healthcare, the average size of bargaining units has actually slightly increased, to 27.

To the extent that there has been a decline in the size of bargaining units over the decades the law has been in effect, it is likely to have been caused by changes in work organizations, the nature of the industries in which collective bargaining is more likely to prevail and perhaps the changing nature of work. Over this period, essentially the same community of interest test has been in place so the Board's standard would not been a significant cause for the changes in the size of collective bargaining units.

Future Boards will have the opportunity to consider these standards in light of changes in the industry and the effectiveness of applying the traditional community of interest standard to nursing homes. In my view, the current mechanism for making such assessments is how the application of the law should evolve. It would be a mistake for Congress to jump in to the day-to-day process of unit determination and mandate a legislated standard that could only evolve with future Congressional enactments.

Taken together I believe both bills under consideration today would have a significant adverse effect on our system of labor management relations. The bills propose substantial and one sided changes that appear intended to favor the interests of employers at the expense of employees. Enactment of the bills would weaken important principles and employee rights that would undermine the ability of employees to engage in collective bargaining.

Finally I cannot resist pointing out that while today this Committee is considering amendments to the NLRA, currently pending before Congress is a question that will have profound impact not only on the issues under consideration here, but on all labor-management relations in this country. I refer to the possibility of the NLRB being unable to function because of the deadlock over the appointment of members.

There is already a cloud of uncertainty over the agency because of the issue of recess appointments pending in the courts. In August, when current Board member terms expire, if the Senate has not confirmed new members to the Board, the agency's ability to function will be severely compromised. There would be significant uncertainty and confusion not only about the Board's ability to act on unit determinations and the resolution contested elections, but on the Board's ability to act on all the day to day issues the agency is called upon to resolve.

While the two bills before this Committee raise important issues, my primary concern today is the confusion and uncertainty about the NLRB's ability enforce all aspects of labor relations law that failure to confirm members to the Board would cause. It would significantly undermine the rule of law in matters of labor management relations and I certainly hope it can be avoided.

Thank you again for the opportunity to appear before this distinguished Committee.

Chairman ROE. Thank you, Mr. Feinstein.

Ms. Felter?

STATEMENT OF MARLENE FELTER,
MEDICAL RECORDS CODER

Ms. FELTER. Sorry. Good morning, Chairman Roe and distinguished committee members.

Thank you so very much for the opportunity to appear today and express the views of an employee and American citizen who found

herself thrust into the middle of a stealthy and vicious union card check organizing campaign.

My name is Marlene Felter. I am a medical records coder at Chapman Medical Center in Orange, California. I have been with the corporation since 1982. Our small community hospital has never had a union and has never had any major workplace problems.

My first experience with unions came in 2004 when SEIU filed with the NLRB for a secret ballot election to unionize the Chapman workforce. As soon as I heard of SEIU's efforts, I began to educate my coworkers about the negative effects of unionization including forced union dues, initiation fees, and other internal rules.

The evening before the secret ballot at 3 a.m. in the morning we received a fax from SEIU organizers stipulating that they would not be appearing and they would lose the election. The NLRB accepted SEIU's withdrawal and canceled the election.

Some years after this, Chapman entered into a secret card check neutrality agreement again with SEIU. Although Chapman employees have never been shown this secret neutrality agreement or why it was signed, I understand that part of this agreement required Chapman to give SEIU organizers physical access to our cell phones, our phone numbers, lists of addresses, and phone numbers, everything; work numbers.

This agreement also waived all NLRB supervised secret ballot elections and allowed SEIU to become our representative by the card check method. I note again, there were no employees consulted about any of this.

No employees were asked if they wanted their private information turned over to officials, no employees were asked if a secret ballot election would be waived, and no employees, to my knowledge, ever sought SEIU's representation.

On July 2011, SEIU began its efforts to convince and coerce Chapman workers to sign union cards using the power granted to it by neutrality agreement. From July to November 2011, my coworkers reported that SEIU operatives were calling them on their cell phones, coming to their homes starting at 6:30 in the morning, sometimes ending up at 9:30 at night; stalking them, harassing them, in the parking lot, at lunch, even offering to buy them meals at restaurants and convincing them to sign sign-in cards. The sign-in cards would then count as a vote if they signed up for this lunch.

In response to this aggressive organizing activity, I led a campaign to encourage Chapman employees to sign letters and petitions stating that they did not wish to be represented by the union. On our own time, we collected from a majority of Chapman employees' letters, petitions opposing SEIU representation, which I delivered to Chapman management.

A small sample of those signatures are attached. Despite having signatures against SEIU representation from a majority of employees, a private arbitrator was hired by SEIU and Chapman conducted a nonpublic card count in November 2011 and declared SEIU to be employees' majority representative.

In reaching this result, the private arbitrator disallowed and refused to count many of the anti-SEIU cards and petitions I had collected, which SEIU had won by one vote.

After this rigged card count was conducted, Chapman officially recognized SEIU as our exclusive bargaining agent and began bargaining for a first contract that surely would have included a clause compelling employees to pay dues to SEIU or to be fired, which is part of the employment.

I was outraged by this secret card check process that gave away our legal rights. I contacted the NLRB, which provided me with free legal assistance to undo this wrongful and shameful forced representation by a union that was not elected to represent any of the employees.

On February 3, 2012, my attorney, Glenn Taubman, filed an unfair labor practice charges with the NLRB. The NLRB took my statement and issued a subpoena to the SEIU to get underlying documents to verify for itself whether the card count was valid or fraudulent.

Instead of responding to the subpoena, SEIU filed a meritless petition to revoke the subpoena as a delaying tactic. The NLRB opposed SEIU's deceitful attempt to revoke the subpoena.

Chairman ROE. Ms. Felter, I am going to ask you to go ahead and wrap-up your testimony. You are over the time. Just wrap that up.

Ms. FELTER. Okay, I am sorry. Okay, I am just going to go to the last page.

Okay. In conclusion, I ask how can this happen in America? How was SEIU allowed to become Chapman employees' representation through an abusive card check process when in a secret ballot election it lost overwhelmingly?

How can Congress allow card checks to be used to push workers into unions when they are so easily abused by unscrupulous unions like SEIU?

There are HIPAA laws to protect hospital patients yet why is there no HIPAA laws to protect employees' private information from greedy union officials?

These unwanted tactics and lack of professional ethics are happening all over the country. I am pleading with this committee to rectify this unjust practice and mandate only secret ballot elections.

Thank you very much.

[The statement of Ms. Felter follows:]

Prepared Statement of Marlene Felter, Medical Records Coder, Chapman Medical Center, Orange, CA

CHAIRMAN ROE AND DISTINGUISHED COMMITTEE MEMBERS: Thank you for the opportunity to appear today and express the views of an employee and American citizen who found herself thrust into the middle of a stealthy and vicious union card check organizing campaign.

My name is Marlene Felter. I am a medical records coder at Chapman Medical Center ("Chapman") in Orange, California. I have worked at Chapman since 1997, and before that I worked for Chapman's predecessor corporations since 1982. Our small community hospital has never had a union, and has never had any major workplace problems.

My first experience with unions came in 2004, when SEIU filed with the NLRB for a secret-ballot election to unionize the Chapman workforce. As soon as I heard of SEIU's efforts, I began to educate my co-workers about the negative effects of unionization, including forced union dues and initiation fees, and other internal union rules. (Copy attached as Exhibit 1). The evening before the secret-ballot vote was to be held, SEIU union organizers knew that they had no support and would

lose the election, so they sent a fax to Chapman withdrawing their election petition. The NLRB accepted SEIU's withdrawal and cancelled the election. (Exhibit 2).

Some years after this, Chapman entered into a secret "card check and neutrality" agreement with SEIU-UHW ("SEIU"). Although Chapman employees have never been shown this secret neutrality agreement or told why it was signed, I understand that part of this agreement required Chapman to give SEIU organizers physical access to the hospital and to provide them with lists of employees' home addresses and phone numbers. This agreement also waived all NLRB-supervised secret ballot elections, and allowed SEIU to become our representative by the "card check" method. I note that no employees were consulted about any of this. No employees were asked if they wanted their private information turned over to SEIU officials, no employees were asked if secret-ballot elections should be waived, and no employees to my knowledge ever sought SEIU's representation at Chapman.

In July 2011, SEIU began its efforts to convince or coerce Chapman workers to sign union cards using the power granted to it by neutrality agreement. From July to November 2011, my co-workers reported that SEIU operatives were calling them on their cell phones, coming to their homes, stalking them, harassing them, and even offering to buy them meals at restaurants to convince them to sign union cards.

In response to this aggressive organizing activity, I led a campaign to encourage Chapman employees to sign letters and petitions stating that they did NOT wish to be represented by the union. On our own time, we collected from a majority of Chapman employees letters and petitions opposing SEIU representation, which I delivered to Chapman management. (A small sample of those signatures is attached as Exhibit 3).

Despite having signatures against SEIU representation from a majority of employees, a private "arbitrator," hired by SEIU and Chapman, conducted a non-public "card count" in November 2011, and declared SEIU to be the employees' majority representative. In reaching this result, the private arbitrator disallowed and refused to count many of the anti-SEIU cards and petitions I had collected. (See Exhibit 3).

After this rigged "card count" was conducted, Chapman officially recognized the SEIU as our exclusive bargaining agent and began bargaining for a first contract that surely would have included a clause compelling employees to pay dues to SEIU or be fired. I was outraged by this secret "card check" process that gave away our legal rights. I contacted the National Right to Work Legal Defense Foundation, which provided me with free legal assistance to undo this wrongful and shameful forced representation by a union that did not represent a majority of employees.

On February 3, 2012, my attorney, Glenn Taubman, filed unfair labor practice charges with the National Labor Relations Board. (Exhibit 4). The NLRB took my statement and issued a subpoena to the SEIU to get the underlying documents, to verify for itself whether the card count was valid or fraudulent. (Exhibit 5). Instead of responding to the subpoena, on April 9, 2012, SEIU filed a meritless Petition to Revoke the Subpoena, as a delaying tactic. (Exhibit 6). The NLRB opposed SEIU's deceitful attempt to revoke the subpoena (Exhibit 7), and on May 23, 2012, the NLRB in Washington unanimously denied SEIU's effort to revoke the subpoena. (Exhibit 8).

Once SEIU union officials complied with the subpoena and the NLRB examined all of the records, it found merit to my unfair labor practice charges and agreed that the card count was erroneous, if not totally fraudulent. The NLRB was preparing a formal complaint against both Chapman and SEIU, to force them to undo their illegal recognition. However, to avoid litigation and its attendant publicity, both SEIU and Chapman agreed to a formal NLRB settlement that forced them to renounce the card check recognition and cease bargaining for a new contract. (Exhibit 9).

But this was by no means the end of our battle. SEIU essentially refused to leave Chapman (see Exhibit 10) and was so sure that it could take over our hospital that, on October 29, 2012, it filed a certification petition with the NLRB and scheduled a second secret ballot election. (Exhibit 11). But this time the election was held. In that election, which was held on November 28, 2012, SEIU lost overwhelmingly, by a vote of 90-48. (Exhibit 12). On election day SEIU "challenged" the ballots of 35 voters who were known to be opposed to it, so if those ballots had been counted the tally would have been even more lopsided against the union.

But again, the battle was not over. On December 5, 2012, SEIU filed 45 separate Objections to the Conduct of the Election. (Exhibit 13). These objections ranged from the mundane to the frivolous. This is shown by the fact that Chapman was still bound by the SEIU neutrality agreement during the election, and did not campaign against SEIU or lift a finger against it, so how could it have committed "objectionable" conduct that tainted the election? SEIU then conducted a 12-day trial before

the NLRB to try to prove its frivolous objections. But on May 31, 2013, the NLRB's hearing officer issued a 106-page opinion refusing to set aside the election and dismissing all of the union's objections as unsubstantiated. (Exhibit 14). SEIU has now wasted an enormous amount of its own money, Chapman's money, and the taxpayer's money, all in an attempt to rope employees into forced unionization and forced dues.

CONCLUSION: And so I ask, "how can this happen in America?"

How was SEIU allowed to become Chapman employees' "representative" through an abusive card check process, when in a secret-ballot election it lost overwhelmingly?

How can Congress allow card checks to be used to push workers into unions when they are so easily abused by unscrupulous unions like SEIU?

How can companies like Chapman be coerced into neutrality and card check agreements that allow employees to be harassed and stalked by union operatives collecting signature cards? In our case, SEIU operatives followed employees to the floors in the hospital, harassed them to get signatures, and caused workplace disruptions and even a decline in the quality of patient care. Many employees complained about these tactics.

There are HIPPA laws to protect hospital patients' private information, yet

there appear to be no laws protecting employees' private information from greedy union officials!

These unwanted tactics and lack of professional ethics are happening all over the USA. I am pleading with this Committee to rectify this unjust practice and mandate only secret-ballot elections. Thank you.

[The information referred to may be accessed at the following Internet address:]

http://www.gpo.gov/fdsys/pkg/CPRT-113HPRT87653/pdf/CPRT-113HPRT87653.pdf

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Chairman ROE. Thank you, Ms. Felter.

Mr. Taubman?

STATEMENT OF GLENN TAUBMAN, STAFF ATTORNEY, NATIONAL RIGHT TO WORK LEGAL DEFENSE FUND

Mr. TAUBMAN. Chairman Roe and distinguished committee members, thank you for the opportunity to appear today. I have been practicing labor and constitutional law for 30 years on behalf of individual employees only at the National Right to Work Legal Defense Foundation.

Marlene Felter is my client, and I am proud to have represented her in her battle to rid her workplace of an unwanted union that used an underhanded and rigged card check process to try to gain representation rights and forced union dues from hundreds of workers.

Sadly, Ms. Felter's story is far from unique. Employees trying to refrain from unionization or decertify an unwanted union, face a daunting array of NLRB and union tactics to keep them unionized or to thrust unionization on them against their will.

I would like to address two issues today; the first is the need for secret ballots in the union selection process, and the second is the need to reform the way in which the NLRB allows unions to game the system and cancel decertification elections when employees want to get rid of a union.

The NLRB's current rules, called blocking charges, allow unpopular incumbent unions to remain in power for years after they have lost employees' support.

In the Tenneco case highlighted in my written statement just recently decided by the D.C. Circuit, 77 percent of the employees wanted the union out but the NLRB refused to conduct an election leading to 7 years of litigation before the union was finally ousted.

Far too often, the NLRB acts as an incumbent protection squad shielding unions from any challenge to their representational authority. Now secret ballots are needed because card check and neutrality agreements destroy employee rights.

Today, union officials subvert the system of organizing contemplated by the NLRA. They use neutrality and card check agreements to organize from the top down.

Unions today organize employers not employees and they do so by coercing employers to agree in advance to which particular union is to represent the employees and agree to waive secret ballot elections.

Companies, browbeaten by union corporate campaigns, eventually agree to work with one specific union to unionize their employees.

Once the neutrality and card check agreement is signed, the employer and the exclusively-favored union work together, irrespective of the employees' actual preferences.

For example, as in Marlene's case, employers' signatories to a neutrality agreement provide the union with favored access, lists of employees' home addresses, phone numbers, and personal information.

Employees are rarely, if ever, asked to consent to the release of their private information to union officials, nor are they ever shown the terms of the neutrality agreement.

Indeed, the NLRB general counsel has specifically held that employees have no right, no legal right to see a copy of the neutrality agreement that their employer and this union signed targeting them; no legal right, and that is Exhibit 2 to my statement. Employees cannot see the secret backroom agreement that the union and their employer signed.

In fact, I am happy to say that the Supreme Court just agreed to hear a national right to work case called Mulhall v. Unite Here challenging common neutrality provisions as illegal things of value.

We are optimistic that the Supreme Court will next term declare much of the shady backroom deals to be illegal things of value.

In short, secret-ballot elections are necessary in union certification campaigns to combat the abuses that flow from neutrality and card check agreements. Employees' rights should not be a bargaining chip between power hungry union officials and employers desperate to avoid a corporate campaign.

I also want to address the second issue which I raise is the blocking charge policies of the National Labor Relations Board that are used by unions to prevent employees from getting a decertification election.

I am certainly all for secret ballot elections in decertification cases as well; however, the NLRB should actually conduct the decertification elections and not allow them to be blocked by union blocking charges which prevents these elections from occurring for months or years.

If Congress is going to mandate secret ballot elections, which it should, it should also mandate that the NLRB actually hold these elections and not wrongly and arbitrarily allow union officials to delay and cancel them at their whim.

Again, I site the Tenneco case which is an exhibit to my testimony in which the D.C. Circuit said that the NLRB should have in essence allowed a secret ballot election and not let that case drag on for 7 years while employees were trying to get out from an unpopular union.

Blocking charges are regularly misused by union officials who know that the NLRB will permit them to delay or cancel decertification elections. Using these tricks to game the system, union officials can remain as the employees' exclusive representative even if the vast majority want them out.

In conclusion, Mr. Chairman, I urge you to protect the secret ballot and to make sure that the NLRB is reformed so that the rules for secret ballot elections apply fully and equally to decertifications as well.

Thank you for your attention.

[The statement of Mr. Taubman follows:]

Prepared Statement of Glenn M. Taubman,
National Right to Work Legal Defense Foundation

Thank you for the opportunity to appear today. I have been practicing labor and constitutional law for 30 years, on behalf of individual employees only, at the National Right to Work Legal Defense Foundation. (My vitae is attached as Exhibit 1). I believe that I have a unique perspective that comes from three decades of representing thousands of employees who are subject to the National Labor Relations Act.

Marlene Felter is my client, and I am proud to have represented her in her ongoing battle to rid her workplace of an unwanted union that used an underhanded and rigged card check process to try to gain representation rights and forced union dues from hundreds of workers. Sadly, Ms. Felter's story is far from unique. Employees trying to refrain from unionization, or decertify an unwanted union, face a daunting array of union and NLRB tactics to keep them unionized, or to thrust unionization on them against their will.

I would like to address two issues today: the first is the need for secret ballots in the union selection process, and the second is the need to reform the way in which the NLRB allows unions to "game the system" and cancel elections when employees want to decertify the union. The NLRB's current rules allow unpopular incumbent unions to remain in power for years after they have lost employees' support. These NLRB rules often prevent employees from ever having a decertification election. In the Tenneco case highlighted later in my statement, 77% of the employees wanted the union out but the NLRB refused to conduct an election, leading to 7 years of litigation before the union was finally ousted. Far too often, the NLRB acts as an "incumbent protection squad," shielding unions from any challenge to their representational authority, thereby cramming unwanted representation onto unwilling employees.

I. Secret ballots elections are needed

a. Card check and neutrality agreements destroy employee rights

Secret-ballot elections are desperately needed because of the rise of "neutrality and card check" agreements (often called euphemistically "voluntary recognition" or "labor peace" agreements) that abuse employees and destroy their right to free choice in unionization matters.

The basic theory of the NLRA is that union organizing is to occur "from the shop floor up." In other words, if employees want union representation, unions will secure authorization cards from consenting employees and either present those cards to the Board for a certification election or, if a showing of interest by a majority is achieved, present them to the employer with a post-collection request for voluntary recognition. The employer may refuse to recognize the union (as is its legal right under Linden Lumber Division, Summer & Co. v. NLRB, 419 U.S. 301 (1974)), and,

in either case, the union's proper course is to submit to an NLRB supervised secret-ballot election held under "laboratory conditions." General Shoe Corp., 77 NLRB 124, 127 (1948).

Today, however, union officials subvert the system of organizing contemplated by the NLRA. They use "neutrality and card check" agreements to organize from the "top down." Unions now organize employers, not employees, and they do so by coercing employers to agree in advance which particular union is to represent the employees, and to agree to waive secret-ballot elections. Companies, browbeaten by union "corporate campaigns," eventually agree to work with one specific union to unionize their employees. These neutrality and card check agreements are common in a host of industries, e.g., healthcare, lodging, textiles, automotive. *http://www.nrtw.org/neutrality/info;* Daniel Yager and Joseph LoBue, Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century, 24 Emp. Rel. L.J. 21 (Spring 1999); Symposium: Corporate Campaigns, 17 J. Lab. Res., No. 3 (Summer 1996). In effect, employers are coerced to create an exclusive organizing arrangement with a particular union even though not a single employee has weighed in on whether he or she desires that particular union as the representative, or desires any representation at all.

Once the neutrality and card check agreement is signed, the employer and the exclusively-favored union work together, irrespective of the employees' actual preferences. For example, employer signatories to a neutrality agreement provide the favored union with significant assistance and advantages—all prior to the union's solicitation of even a single authorization card. This assistance usually includes lists of employees' home addresses, phones numbers and other personal information; special access to the workplace for union organizers; and an agreement to recognize only that union. Employees are rarely, if ever, asked to consent to the release of their private information to union officials, or are they shown the terms of the neutrality agreement. Indeed, the NLRB General Counsel has specifically held that employees have no right to see a copy of the agreement targeting them for unionization. Rescare, Inc. & SEIU Local Dist. 1199, Case Nos. 11-CA-21422 & 11-CB-3727 (Advice Memo. Nov. 30, 2007). (Copy attached as Exhibit 2).

Top-down organizing is repulsive to the central purposes of the NLRA. See Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 632 (1975) ("One of the major aims of the 1959 Act[1] was to limit 'top-down' organizing campaigns * * *"); Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 663 n.8 (1982) ("It is undoubtedly true that one of the central aims of the 1959 amendments to the Act was to restrict the ability of unions to engage in top-down organizing campaigns.") (citations omitted). Top-down organizing tactics, such as the pre-negotiation of neutrality and card check agreements, create the likelihood for severe abuse of employees' Section 7 rights to join or refrain from unionization. 29 U.S.C. § 157.

In fact, at least one United States Court of Appeals has recognized that neutrality agreements and the exchange of favors between an employer and a union can be an illegal "thing of value" under 29 U.S.C. § 302, the equivalent of a bribe that should be condemned. Mulhall v. Unite Here Local 355, 667 F.3d 1211 (11th Cir. 2012); see also Zev J. Eigen & David Sherwyn, A Moral/ Contractual Approach to Labor Law Reform, 63 Hastings L.J. 695, 725-31 (2012) ("We believe that card-check neutrality agreements violate Section 302 and the NLRA and therefore should not be enforced."). (Copy attached at Exhibit 3).

Indeed, there exists a long history of cases in which employers and unions cut secret back-room deals over neutrality and card check and then pressured employees to "vote" for the favored union by signing authorization cards.[2] See, e.g., Duane

[1] The "1959 Act" is the Labor Management Reporting and Disclosure Act of 1959.

[2] Cases where an employer conspired with its favored union to secure "recognition" of that union are legion. See, e.g., Fountain View Care Center, 317 NLRB 1286 (1995), enforced, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619 (2d Cir. 1994), enforcing 310 NLRB 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); Kosher Plaza Super Market, 313 NLRB 74, 84 (1993); Brooklyn Hosp. Ctr., 309 NLRB 1163 (1992), aff'd sub nom. Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2nd Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); Famous Casting Corp., 301 NLRB 404, 407 (1991) (employer actions unlawfully supported union and coerced the employees into signing authorization cards); Systems Mgt., Inc., 292 NLRB 1075, 1097-98 (1989), remanded on other grounds, 901 F.2d 297 (3d Cir. 1990); Anaheim Town & Country Inn, 282 NLRB 224 (1986) (employer actively participated in the union organizational drive from start to finish); Meyer's Cafe

Continued

Reade, Inc., 338 NLRB 943 (2003), enforced, No. 03-1156, 2004 WL 1238336 (D.C. Cir. 2004) (employer unlawfully assisted UNITE and unlawfully granted recognition based on coerced cards). A common thread running through the many "improper recognition" cases compiled in note 2, supra, is that the favored union did not first obtain an uncoerced showing of interest from employees and thereafter ask for "voluntary" recognition from the employer. Rather, the union and employer first made a secret neutrality agreement, and only then were the employees "asked" to sign cards for that anointed union.

Employers have a wide variety of self-interested business reasons to enter into neutrality agreements. This primarily includes avoiding the "stick" of union pressure tactics, and/or obtaining the "carrot" of favorable future collective bargaining agreements. Other reasons for which employers have assisted union organizing drives include: (1) the desire to cut off the organizing drive of a less favored union, see Price Crusher Food Warehouse, 249 NLRB 433 (1980); (2) the existence of a favorable bargaining relationship with the union at another facility, see Brooklyn Hospital Center, 309 NLRB 1163 (1992), aff'd sub nom. Hotel, Hospital, Nursing Home & Allied Services, Local 144 v. NLRB, 9 F.3d 218 (2d Cir. 1993); or (3) a bargaining chip during negotiations regarding other bargaining units, see Kroger Co., 219 NLRB 388 (1975).

As is self-evident, none of these union or employer motivations for entering into neutrality and card check agreements takes into account the employees' right to freely choose or reject unionization. Union officials and employers seek and enter into these agreements to satisfy their own self-interests, not to facilitate the free and unfettered exercise of employee free choice.

In short, secret-ballot elections are necessary in union certification campaigns to combat the abuses that flow from neutrality and card check agreements. Employees' rights to a secret-ballot election should not be a bargaining chip between power hungry union officials and employers desperate to avoid a corporate campaign.

b. Conduct that would be considered objectionable and coercive in a secret-ballot election is inherent in every "card check" campaign

When conducting secret-ballot elections, the NLRB is charged with providing a "laboratory" in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. See General Shoe Corp., 77 NLRB 124, 127 (1948); NLRB v. Gissel Packing Co., 395 U.S. 575, 601-02 (1969). In contrast, the fundamental purpose and effect of a "neutrality and card check agreement" is to eliminate Board-supervised "laboratory conditions" protecting employee free choice, and to substitute a system in which unions and employers have far greater leeway to pressure employees to accept union representation.

The contrast between the rules governing a Board-supervised, secret-ballot election and the "rule of the jungle" governing "card checks" could not be more stark. In an NLRB-supervised secret-ballot election, certain conduct has been found to violate employee free choice and warrant overturning an election, even if that conduct does not rise to the level of an unfair labor practice. General Shoe, 77 NLRB at 127. Yet, a union engaging in the identical conduct during a card check campaign can attain the status of exclusive bargaining representative under current NLRB rules. Worse still, some conduct that is objectionable in a secret-ballot election, and would cause the NLRB to set aside the election, is inherent in every card check campaign!

For example, in an NLRB-supervised, secret-ballot election, the following conduct has been found to upset the laboratory conditions necessary to guarantee employee free choice, thus requiring the invalidation of the election: (a) electioneering activities, or even prolonged conversations with prospective voters at or near the polling place;[3] (b) speechmaking by a union or employer to massed groups or captive audiences within 24 hours of the election;[4] and (c) a union or employer keeping a list

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& Konditorei, 282 NLRB 1 (1986) (employer invited union it favored to attend hiring meeting with employees); Denver Lamb Co., 269 NLRB 508 (1984); Banner Tire Co., 260 NLRB 682, 685 (1982); Price Crusher Food Warehouse, 249 NLRB 433, 438-49 (1980) (employer created conditions in which the employees were led to believe that management expected them to sign union cards); Vernitron Elec. Components, 221 NLRB 464 (1975), enforced, 548 F.2d 24 (1st Cir. 1977); Pittsburgh Metal Lithographing Co., 158 NLRB 1126 (1966).

[3] See Alliance Ware, Inc., 92 NLRB 55 (1950) (electioneering activities at the polling place); Claussen Baking Co., 134 NLRB 111 (1961) (same); Bio-Med. Applications, 269 NLRB 827 (1984) (electioneering among the lines of employees waiting to vote); Pepsi Bottling Co., 291 NLRB 578 (1988) (same).

[4] Peerless Plywood Co., 107 NLRB 427 (1953).

of employees who vote as they enter the polling place (other than the official eligibility list).[5]

Yet, this conduct occurs in every "card check campaign." When an employee signs (or refuses to sign) a union authorization card, he is likely not to be alone. To the contrary, it is likely that this decision is made in the presence of one or more union organizers soliciting the employee to sign a card, and thereby "vote" for the union.[6] This solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech. In all cases, the employee's decision is not secret, as in an

The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.

Milchem, Inc., 170 NLRB 362, 362 (1968). Union soliciting and cajoling of employees to sign authorization cards is incompatible with this rationale.

election, because the union clearly has a list of who has signed a card and who has not.

Indeed, once an employee has made the decision "yea or nay" by voting in a secret-ballot election, the process is at an end. By contrast, a choice against signing a union authorization card does not end the decision-making process for an employee in the maw of a "card check drive," but often represents only the beginning of harassment and intimidation for that employee. (One of my former clients, Clarice Atherholt, testified under oath in Dana Corp., 351 NLRB 434 (2007), that "many employees [in her shop] signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them"). Like Marlene Felter, employees frequently report harassment and intimidation by union officials collecting signature cards. (Attached as Exhibit 5 are a small sample of written statements provided by Marlene Felter's co-workers at Chapman Medical Center who complained about SEIU's harassing and unwanted home visits, which they likened to being stalked. The witnesses' identities have been redacted to protect their privacy).[7]

If done during a secret-ballot election, conduct inherent in all card check campaigns would be objectionable and coercive and grounds for setting aside the election. For example, in Fessler & Bowman, Inc., 341 NLRB 932 (2004), the Board announced a prophylactic rule that prohibits union officials from performing the ministerial task of handling a sealed secret ballot during a mail-in election—even absent a showing of tampering—because, where "ballots come into the possession of a party to the election, the secrecy of the ballot and the integrity of the election process are called into question." Id. at 933.

But in card check campaigns, the union officials do much more than merely handle a sealed, secret ballot as a matter of convenience for one or more of the employees. In these cases, union officials directly solicit the employees to sign an authorization card (and thereby cast their "vote"), stand over them as they "vote," know with certainty how each individual employee has "voted," and then physically collect, handle and tabulate these purported "votes." The coercion inherent in this conduct is infinitely more real than the theoretical taint found to exist in Fessler & Bowman.

Accordingly, even a card check drive devoid of conduct that may constitute an unfair labor practice does not approach the "laboratory conditions" guaranteed in a Board-conducted election. As every American instinctively knows, the superiority of Board-supervised, secret-ballot elections for protecting employee free choice is beyond dispute.

II. Reform of the NLRB's "blocking charge" rules

I also want to highlight two recent decertification cases that I have been involved with, to demonstrate the unfairness of the NLRB's "blocking charge" rules. These

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[5] Piggly-Wiggly, 168 NLRB 792 (1967).

[6] The NLRB's justification for prohibiting solicitation immediately prior to employee voting in a secret-ballot election is fully applicable to the situation of an employee making a determination as to union representation in a card check drive.

[7] Most card check campaigns are fraught with union coercion, intimidation and misrepresentations that do not necessarily amount to unfair labor practices. See HCF Inc., 321 NLRB 1320, 1320 (1996) (union held not responsible for threats to employee by authorization card solicitor that "the union would come and get her children and it would also slash her car tires"); Levi Strauss & Co., 172 NLRB 732, 733 (1968) (employer was ordered to recognize the union even though the Board had evidence of union misrepresentations to employees as to the purpose and effect of signing authorization cards). In Dana Corp., 351 NLRB 434 (2007), employees testified to relentless harassment by union officials intent on securing a card majority.

rules allow unions to delay or even cancel employees' efforts to hold secret-ballot decertification elections, yet no comparable procedures exist to halt or delay union certification elections. If Congress is going to mandate secret-ballot elections, it should also mandate that the NLRB actually hold those elections and not wrongly and arbitrarily delay or cancel them at the whim of union officials.

The first case involves Tenneco employees in Grass Lake, Michigan. The UAW had represented employees at this facility since 1945. But over time, more and more employees became disenchanted with the union's representation. The union lost touch with the employees and declared a disastrous strike in 2005. Many Tenneco employees resigned from the union and returned to work, and the strike was then marred by union harassment and picketing of nonstriking employees' homes.

One brave employee, my client Lonnie Tremain, attempted to exercise his rights under the NLRA by spearheading two employee-driven decertification campaigns. The first was filed with the NLRB on February 10, 2006, in Case No. 7-RD-3513. That decertification petition was supported by 63% of the bargaining unit employees, but the UAW managed to halt the election by filing unfair labor practice "blocking charges" against Tenneco, and the NLRB refused to conduct the election sought by 63% of the employees.

Ten months later, feeling ignored and disrespected by the NLRB, Mr. Tremain and his co-workers launched their second decertification effort. This time, 77% of the Tenneco employees signed the decertification petition. Because the NLRB steadfastly refused to conduct a decertification election, Mr. Tremain and his fellow employees asked Tenneco to withdraw recognition of the unwanted union. Based on the overwhelming employee opposition to UAW representation and the passage of time between the two decertification petitions, Tenneco withdrew recognition of the union in December 2006.

Of course, the UAW filed new unfair labor practice charges, and the NLRB General Counsel issued a complaint claiming that Tenneco's unfair labor practice charges had tainted the employees' petition. On August 26, 2011, the NLRB issued a "bargaining order," mandating that Tenneco re-recognize the union and install it as the Tenneco employees' representative, despite the decertification petition signed by 77% of the employees. Tenneco, 357 NLRB No. 84 (2011).

Tenneco appealed to the U.S. Court of Appeals for the District of Columbia Circuit, and Mr. Tremain filed a brief in support. On May 28, 2013, the D.C. Circuit, in a unanimous opinion written by Judge Harry Edwards, ruled that Tenneco did nothing to taint the employees' decertification petition, and that the Board was wrong to issue a bargaining order to foist the union back onto the employees. (Copy attached as Exhibit 4).

In summary, it took Mr. Tremain more than seven (7) years of uncertainty, litigation and NLRB "bargaining orders" before he and his co-workers were finally rid of the UAW. The promise of a secret-ballot election under NLRA Section 9(a) was a cruel joke to Mr. Tremain and his co-workers, because the NLRB refused to hold any election based on union "blocking charges" that even Judge Edwards held were completely unrelated to the employees' desire to decertify the union.

A similar story recently occurred in California. Chris Hastings is employed by Scott Brothers Dairy in Chino, California. On August 17, 2010, he filed for a decertification election with Region 31 of the NLRB, in Case No. 31-RD-1611. He was immediately met with a series of union "blocking charges" that the NLRB used to automatically delay his election, just as the union knew the Board would.

Officially, the NLRB's rules say this about the "blocking charge" policy (Casehandling Manual 11730):

The * * * blocking charge policy * * * is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition. Rather, the blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process.

However, such blocking charges are regularly misused by union officials, who know that the NLRB will permit them to delay—or cancel—the decertification election. Using these tricks to "game the system," union officials can remain as the employees' exclusive bargaining representative even if the vast majority of employees want them out. Even worse, the NLRB recently ruled in WKYC-TV, 359 NLRB No. 30 (Dec. 12, 2012), that compulsory dues must continue to flow to the union even after the collective bargaining contract has expired, giving union officials even more incentive to "game the system" and block decertification elections. Indeed, union officials' desire to block decertification elections is predictable, as which incumbent would ever want to face the voters (and see his income cut off) if he didn't have to?

In Mr. Hastings' case, the Teamsters were able to "game the system" and delay the decertification election—with the NLRB's approval—for a full year. When the

election was finally held after one year of delay, in August 2011, the union lost by a vote of 54-20. In effect, by filing "blocking charges," the Teamsters bought themselves an extra year of power and forced dues privileges with the connivance of the NLRB.

In conclusion, I urge you to protect the secret ballot, and to make sure that the NLRB is reformed so that the rules for secret-ballot elections apply fully and equally to decertification elections as well. Thank you for your attention.

[The information referred to may be accessed at the following Internet address:]

http://www.gpo.gov/fdsys/pkg/CPRT-113HPRT87654/pdf/CPRT-113HPRT87654.pdf

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Chairman ROE. I thank the panel.

And I will start the questioning by just making a couple of statements.

One is, I think the single most important thing we have in America is the secret ballot. That is how the President of the United States was elected. That is how each one of us was elected. That is how union representatives are elected is by a secret ballot.

It doesn't allow coercion by anyone. All of these things right here that we have heard today both employee and employer union pressure or employer pressure to either have or not have a union can be done away with completely with a secret ballot.

You simply go behind and let the merit speak for themselves and cast your ballot in a non-intimidating way. We had a voting rights act passed for that in 1965, so that people couldn't be intimidated.

It would seem that—and I was reading in, Mr. Feinstein, one of your comments you said the legislation would substitute these existing choices with a mandate that the only way employees and employers can determine a majority support is through an NLRB election. It is called democracy.

That is what you do in a free country. You vote and you have an election and whoever wins, wins, and that is the way we play. That way it levels the playing field.

So having said that, Ms. Felter, I know you are in the midst of—and have a very important job at your hospital and I would like to ask you, did you feel like or did you have any way to know what was going on? In other words, when you found out, you talked to your fellow workers, and you felt that a majority of them didn't support this and yet you found out you were then represented by a union and did you know how it happened? Were you informed along the way how it was happening?

Ms. FELTER. Actually, I was informed by other employees that had approached me regarding that the union was knocking on their door and the union was talking to them in the parking lot, calling them on their cell phones. And actually, they were following them into the units, buying them lunch, bringing them lunch, interrupting with patient care, and the quality of patient care.

Chairman ROE. I think you made a point a minute ago about HIPAA which is a very important point, and you are a coder, so you are very aware of those things as I am as a doctor. I am very aware of those HIPAA restrictions to protect people's privacy and

I think you bring—you make a great point about your privacy is not being protected.

Ms. FELTER. Ours were not protected.

Chairman ROE. So you had your phone number, address, whatever——

Ms. FELTER. They had our cell phone numbers. They had our work numbers. They were asking—I actually received a call one night what my hours were, how much I made, if I was on salary.

Chairman ROE. So some pretty personal information.

Ms. FELTER. Very personal information, and then they would leave messages and when you go to call them back, number unavailable.

Chairman ROE. But when you had a secret ballot and you had a chance to vote, you voted overwhelmingly to not certify it, but you could have voted, too, if you had the——

Ms. FELTER. No, I was off the list. What they did is they picked and choosed who they wanted to vote and who they didn't. And human resources actually received a list of patient—of employees that were allowed to vote.

Chairman ROE. I am going to go to Mr. Taubman.

You make a point just a moment ago about the employees and they have no legal right to know what agreement is being done behind closed doors. Is that correct?

Mr. TAUBMAN. That is right, Mr. Chairman, and it is Exhibit 2 to my statement.

In various cases and unfair labor practice charges that I have filed for employees like Ms. Felter, I have always said to the National Labor Relations Board; isn't it a violation that the secret agreements can be made and the employees who are the targets of the agreements have no legal right to demand a copy?

And the answer from the NLRB general counsels, two of whom are sitting here through the years the answer has been, no, these employees have no legal right to a copy of this agreement. And I just find that to be outrageous.

Under the law, they would have a right to the collective bargaining agreement if the union and the employer agreed to one, but yet they don't have a right to the agreement that targets them for unionization?

Chairman ROE. One—very—I have very little time left.

Mr. Oppenheim, you made some very good points about cross-training. We do that in hospitals all the time. You train people to do various jobs and if you can't do that, your shop doesn't function. Could you quickly comment on that?

Mr. OPPENHEIM. Yes, you know, we are many individuals' first employer and they come to us with limited skills, new skills, and we look at our role as providing them the ability to move up in the workforce, to gain the skill sets necessary to improve their wages and their quality of life, and we need the flexibility in order to do that, and we fear that the Specialty decision would inhibit their ability and flexibility to gain new skills to move up in the workforce.

Chairman ROE. Okay.

My time has expired.

Mr. Tierney?

Mr. TIERNEY. Thank you on that.

Mr. Feinstein, I just want to ask you a question. If I look at H.R. 2347, the Representation Fairness Restoration Act, could you give us a little bit of the history of the law? Was the NLRB really changing the law or going to a law that had existed over a period of time?

Mr. FEINSTEIN. You are talking about the 2247?

Mr. TIERNEY. Right.

Mr. FEINSTEIN. In my view, the case is fairly clear on this and frankly, I am somewhat surprised at some of the assertions as to what this case says that it is restoring the traditional community of interest test to nursing home facilities.

There had been, this period earlier in 1991, an earlier case where the board had tried a test which relied some on a fact-finding process that they had had on all acute care hospitals, not nursing homes, but the whole health care industry, which were required by legislation that it passed covering the health care industry, and they attempted to apply a test that took into account some of the factors that have come out during this rulemaking process earlier.

So they adopted a test specifically for nursing homes which said community of interest but also recognizing some of the factors that have come out in our examination of the health care industry.

Twenty years later when they were deciding Specialty Healthcare, they went back and looked at the 20 years of experience and they decided that it, the test really wasn't working well, that the parties weren't really clear on what that test meant, and the factors that that case had suggested might be relevant were out of date.

They were more than 20 years old, and so they said no, we are not going to—we are going to decide not to rely on that special test for nursing homes. Instead, we are not going—they didn't say we have a whole brand-new idea of what unit determinations are. Instead, we are going to go back to the traditional community of interest test that applies across the board and that will be our standard.

They did nothing more than reinstitute a traditional standard and they spelled it out in the decision, all of the factors, it certainly is more factors than similar pay and similar task as has been asserted.

There is a whole list that has been part of the NLRB jurisprudence for decades. And they said, this is what we are going to go back to, and this is a test that has withstood scrutiny in the courts.

In fact, much of the language that they use in re-describing what this—in describing what this test is relies on circuit court decisions. So in my view, this was not a dramatic change.

It was—in fact, it was simply taking a well-established principle and applying it to facilities that for a particular reason they hadn't previously. So no, this was a very modest decision that simply reinstated an old test.

Mr. TIERNEY. And we have heard a lot of speculation about what might happen as a result of it in terms of fracturing into the different representation groups, but as the chart shows, isn't it actually true that after the Specialty decision, no such thing happened?

Mr. FEINSTEIN. That certainly seems to be the case. The evidence is quite clear here, and you know, the question and some of the concerns I have heard expressed about micro units, I just don't see how that is a concern that arises out of this case, and I think the evidence suggests that that in fact is true.

Mr. TIERNEY. Now with respect to Ms. Felter's case on that, you made mention during your remarks that in fact, the current system allows for card checks to be challenged and somebody who doesn't want to go, Ms. Felter who apparently has not been favorably disposed towards unions since at least 1984, was able to get a free lawyer from the NLRB and challenge it and be successful.

So would you say that the system as it is currently composed, gives people the opportunity to challenge the card check already and be successful in that venture?

Mr. FEINSTEIN. Yes, I think—I mean, I certainly sympathize with concerns about how the process can take long and so forth, but it does seem from what I understand happened in that case—there were allegations of abuse, the NLRB agreed, it set aside the process, and it did what it does in those situations. It conducted an election.

So this is a situation in which their—apparently the board felt like the process wasn't working as it intended because the NLRB clearly does prohibit abuse in both—in all kinds of campaigns—in campaigns that lead to elections and campaigns that don't lead to elections and this does seem to be—I have to say that there is overwhelming evidence of the very extensive abuse in the context of situations in which a majority status is determined through an election.

So abuse can occur unfortunately, that is why we have laws. That is why we have an agency that is there to be the umpire, to perform the sometimes difficult task of stepping into the situations and making sure that the established rules are followed, and in this instance, it does seem like that system worked.

Chairman ROE. The gentleman's time is expired.

Dr. Bucshon?

Mr. BUCSHON. Thank you, Mr. Chairman.

I grew up in an area of Illinois, a coal mine country in Illinois, which has a deep history as it relates to the development of the UMWA and I have direct experience with my grandfathers both being union members starting back in the 1940s.

My father is a United Mine worker and I have first-hand accounts of what intimidation is all about when it comes to that industry I can speak to. And you will find no one else here that doesn't support the rights of the individual workers more than I do.

To me, this is about the workers and even though some people want to say that worker intimidation is mostly historical, if you really want to go back to the days when my great-grandfathers and grandfathers were involved in those movements in central Illinois, take away secret ballots.

I would be interested to know if members of the minority would like their own personal election to be taken by non-secret ballot. Utter chaos would ensue. And so the standard for me is about the workers and what their rights are.

Mr. Feinstein, a quick question. In your oral testimony at least, you implied that Congress should yield to the NLRB because they know better about what to do about workers' rights.

You said that directly, that essentially, Congress—why is Congress trying to be involved in anything related to the NLRB when clearly, the people at the NLRB know what is right when it comes to workers and businesses.

You recognize the fact that the NLRB members obviously have to have confirmation by the Congress, the Senate, and that in a democracy, elected officials like members of Congress do have a role, and I would like you to clarify your statement where you said that Congress should step out of the way and be brief because I have a questions.

Mr. FEINSTEIN. Yes. Respectfully, Congressman, I think what I was suggesting was not that Congress doesn't have a role to play; Congress is the lawmaker. Congress sets the rules. Congress sets the policies.

What I was suggesting is that the NLRB is involved in every single case; the 40,000 or more cases that come before the agency, and the framework that Congress has created, the statutory framework is that Congress sets the law and sets the policies, but the day-to-day application of that law, the day-to-day interpretation of that law works better if there is an agency with some expertise and some continuity——

Mr. BUCSHON. Okay. I get that——

Mr. FEINSTEIN [continuing]. That could understand the particulars of any given case, and that I think that it creates problems when you have a legislative body trying to weigh into the more direct day-to-day interpretation of the law that I am afraid——

Mr. BUCSHON. You recognize one of the other major roles of Congress is oversight, correct?

Mr. FEINSTEIN. Absolutely.

Mr. BUCSHON. And that is what we are doing here today. That is one of our major roles. We don't only just pass laws, but when agencies are doing things that are what Congress doesn't feel consistent is totally appropriate for Congress to weigh in on that even on individual cases like Specialty Healthcare.

I am going to move on.

Mr. Taubman, why in your experience do employers—why would they agree to recognize a union without a secret ballot?

Mr. TAUBMAN. I think most of the time when employers agree to recognize a union without a secret ballot it is because they have been subject to some kind of top-down, organizing, coercive campaign.

As I said in my remarks, unions organize employers today. They don't organize employees. They didn't come to Marlene and say, "Would you like to join our union?"

They got a neutrality card check agreement from her employer after various forms of coercion and intimidation of the employer. You know, the threat that we will picket you. We will put out all kinds of bad PR about your hospital and so on and so on. So that is why many employers sign these neutrality and card check agreements.

And it has nothing to with the employees because nobody asked the employees if they wanted to be subject to this deal, which by the way, the NLRB says you can't have a copy of the deal.

Mr. BUCSHON. Yes, and in closing, Mr. Chairman, I would just like to say I can't see why anyone on either side of the aisle after the testimony that we have heard today who says that they are here in Congress on behalf of the workers of America, all workers, could not have significant problems with what the NLRB is trying to do right now.

It is unbalanced in my view, and Congress does have an oversight role, and Congress will continue to play an oversight role when we see this type of unbalanced approach at the NLRB.

I yield back.

Chairman ROE. I thank the gentleman for yielding.

Mr. Andrews?

Mr. ANDREWS. I thank you, Mr. Chairman. I apologize for being late.

I thank Mr. Tierney for his noble efforts to help us out during that time. Just a comment on balance. There are five witnesses in the hearing, four of them are on one side of the question, one is on the other. We have had one person who tells a very compelling story.

Ms. Felter, we are glad you are here—tell her side of the story.

Ms. FELTER. Thank you.

Mr. ANDREWS. There are certainly hundreds of workers who could tell a very different story in a different setting, but I want to ask Mr. Hunter a question.

In your testimony, you say that the Specialty Healthcare decision will quote—"wreak havoc" on employers. "The decision will enable unions to organize multiple small bargaining units within one facility thereby balkanizing an employer's operation and literally making it impossible for an employer to carry out decisions concerning hiring, promotion, employee transfer, and related decisions."

But as the chart shows, since the Specialty Healthcare decision was rendered, the median size of the bargaining unit in union elections has actually has gone up by a little bit, not down. So if the problem was that there was going to be this outbreak of organizing of these balkanized units, why hasn't it happened?

Mr. HUNTER. Congressman Andrews, I can't—obviously, I am not familiar with of that chart. I have no way of knowing if the data that chart relies on is accurate.

Mr. ANDREWS. The source, Mr. Hunter, is from the National Labor Relations Board's records, and I would invite you to check it out yourself——

Mr. HUNTER. Okay. I can cite to you several cases right after—just a few months after the Specialty Healthcare decision, the board reversed a decision by the regional director in Denver.

She had refused to uphold a unit that only would include rental leasing agents at the Denver Airport. The board overturned her decision and found that that unit just with the rental service agents and the lead rental service agent was appropriate even though the regional director had found that that unit was not appropriate and there are a number of other cases——

Mr. ANDREWS. I am sure that is true. I am sure that is true that there are a number of other cases, but you know, by definition, those cases are outliers or else the median number would have gone—and this is not the average, it is the median.

The median number would have gone down dramatically if those were not the outliers, so I think that you are asking us here to legislate by anecdote based upon—this bill looks to me like a solution in search of a problem.

I want to ask you a question, Mr. Taubman. You said a few minutes ago that quote—"Most of the time," the reason that companies sign neutrality agreements is they have been coerced or subject of a campaign to coerce them. What is the source of that conclusion on your part? Do you have any data for that?

Mr. TAUBMAN. The data is that for 30 years I have been representing employees like Ms. Felter, and when I go to these companies and unions and say, "Can she have a copy of the agreement, they——

Mr. ANDREWS. No, I read your testimony. I understand that. I asked you a different question though. I didn't ask you about Ms. Felter's case. I know that you know that very thoroughly, as does she.

I asked you, you said, "Most of the time," that employers sign a neutrality agreement they had been pressured to do so. What is the source, other than you say 30 years of your own observation, which is fine, but is there a compilation of data—is there a list of neutrality agreements that have been signed and has anyone done an academic study of why people have signed them?

Mr. TAUBMAN. In my written remarks, I cite some law review articles that talk about corporate campaigns and how unions use corporate campaigns to coerce neutrality agreements out of employers through all of the obvious methods. You know, we will sully your name in public—okay, so I am answering your question——

Mr. ANDREWS. Well, no you are not.

I looked at those law review articles, and I don't see any data. What I see are legal theories about anecdotes about why this happened. I don't dispute that those anecdotes are true, but I want to hold the record of the hearing opening for you, Mr. Taubman, to show us of the proof for the statement that you made that most of the time neutrality agreements result from coercive practices.

And the second thing I would ask you to do is tell us how many times some legal action has been initiated by the corporations that play into the victims of these actions; whether it is NLRB complaints or tortious interference, lawsuits, or civil RICO matters. We will hold the record open, maybe you can supplement the record and try to justify your conclusion.

I would yield back.

Chairman ROE. Thank the gentleman for yielding.

Dr. Price?

Mr. PRICE. Thank you, Mr. Chairman. I want to thank you for holding this hearing, and I want to commend the ranking member for once again his repeated arguments about trying to prove a negative and as we all know, that just tends to be an impossibility but it is used by the other side with reckless abandon.

Ms. Felter, I want to thank you so much for your testimony.

Ms. FELTER. You are welcome. It was my pleasure.

Mr. PRICE. How remarkably compelling the information that you provided in a very, very personal way, and within that testimony you commented, how can this happen in America.

So many of us on this panel and so many of us in Congress and many folks across this country are now looking to Washington and say how can this happen in America?

How can we have these kinds of rules that are put in place. So I want to commend you. The intimidation of workers is phenomenal, and I hear it over and over——

Ms. FELTER. It is not only in our workplace, it is happening all over.

Mr. PRICE. Exactly. And I want to——

Ms. FELTER. And it needs to stop——

Mr. PRICE. Amen.

Ms. FELTER. And we need to do something about this.

Mr. PRICE. Amen.

Mr. Feinstein, have you ever worked in a nursing home?

Mr. FEINSTEIN. No, sir.

Mr. PRICE. Have you ever cared for patient in a nursing home?

Mr. FEINSTEIN. No, sir. I have had family members——

Mr. PRICE. As a physician, I can tell you that the challenges of long-term care are astounding and to have labor law dictate how folks who are caring for patients at their most critical time, and make it so that the opportunity to care for patients in a positive way to provide them the highest quality care is limited because of micro unions is astounding to me.

Why anybody can believe that that is the way we ought to go. When a patient begins to go bad in a nursing home, it is all hands on deck. And with this ruling, the Specialty Healthcare ruling provides I would suggest to you and to my friends on the other side is that it is no longer all hands on deck.

Mr. HUNTER. That is correct.

Mr. PRICE. It is anybody who the union allows to come to help the patient. Well that is not caring. That is not the way we ought to be moving forward as a nation.

Mr. Feinstein states in his testimony that the Specialty Healthcare decision isn't as great a change as you may think.

Mr. Oppenheim, what do you think about that?

Mr. OPPENHEIM. Well, obviously it is a big concern for us. You know, we are job creators out there. We operate on very tight margins and we need the flexibility in our organizations in order to grow jobs, provide employees with opportunities that they so desperately need.

Our employees come to us wanting responsibility, they want to grow, and they don't want to be impeded, and if we had a fragmented job situation in our restaurants, we wouldn't be able to provide them with those opportunities to grow.

Mr. PRICE. Tell me—put some flesh on those bones. Tell me why that is. What is it about the fragmentation that micro unions would create at that decreases the ability of employees and workers to grow?

Mr. OPPENHEIM. Well, obviously we are not talking about nursing facilities here. We are talking about restaurants——

Mr. PRICE. I understand.

Mr. OPPENHEIM. But in my statement I gave an example of someone who works front cashier and we cross-train all of our employees and give them the ability to work in the back, to go into the dining room and mop the floor, to service our guests, whatever needs they are, and if we had a fragmented, you know, job market, we wouldn't be able to give them the ability or ask them to go out and do a job task that wasn't within their scope.

So the other thing that we believe it would do it would cause a lot of tension within the job market as you would have different employees with different wages. They would have different job scopes, and it would cause a lot of tension with different bargaining units within a small restaurant of only 30 employees.

Mr. PRICE. So the ability of an employee or a worker to actually improve themselves to move on up in the chain is actually diminished.

Isn't that correct Mr. Hunter?

Mr. HUNTER. Yes, Congressman Price. That is correct because with work rules, I think you said, earlier the union is going to argue that the work should go to members of the bargaining unit and if anyone else outside of that bargaining unit try to come in and do that work, the union is going to file a grievance with the employer and even a charge with the NLRB.

Mr. PRICE. Mr. Oppenheim, you mentioned in your testimony that the autonomy of a worker is actually limited by the Specialty Healthcare decision. Why do you draw that conclusion?

Mr. OPPENHEIM. Well, as I mentioned previously, flexibility is critical in our workforce. We need to have the ability to encourage our employees to take on different tasks to work different parts of our facility and we believe the Specialty Healthcare decision would impede them from doing that.

Mr. PRICE. Thank you.

Thank you, Mr. Chairman.

Chairman ROE. Thank you. The gentleman's time has expired.

Mr. Grijalva?

Mr. GRIJALVA. Thank you very much, Mr. Chairman.

Mr. Oppenheim, let me—I have been following with a great deal of curiosity and interest this campaign the organizing campaign that is going on in various parts of the country here in Washington about low-wage workers and an attempt to organize those workers especially in the fast-food national chain issue.

You being the—having 19 franchises, I think you mentioned, are any of those 19 presently being represented—those employees represented by a union?

Mr. OPPENHEIM. No.

Mr. GRIJALVA. So—let me follow up. So where—so the points that you spoke to are what you would project would happen because at this point, there is no frame of reference, but—so where do you get the evidence that the Specialty decision would lead to the formation of all these micro bargaining units? What is the evidence to that?

Mr. OPPENHEIM. My testimony is on behalf of 240,000 human resources professionals from across the country.

Mr. GRIJALVA. Well, I am asking you for your practical day-to-day hands-on 19 franchises experience as well.

Mr. OPPENHEIM. Yes, I have not worked in a union environment.

Mr. GRIJALVA. And no particular interest in doing so in the future I see, but I ask that question because a lot of it is conjecture. If this happens, this is going to happen, and the evidence that we have is to the contrary—that instead of a proliferation of micro units, there seems to be a bigger consolidation of the units that exist in terms of size and membership.

I asked that question because I think that your frame of reference as a practical frame of reference is important.

Mr. FEINSTEIN. Congressman, if I can——

Mr. GRIJALVA. Quickly because I was going to——

Mr. FEINSTEIN. Yes. I think that to some extent it feels like we are talking past each other here.

The board in the Specialty Healthcare decision didn't say we are now in favor of micro units. In my view, they didn't say anything which would encourage micro units, so I am not here today defending micro units.

The point is that this is a decision that does not in any apparent way endorse it and the evidence suggests that as well.

Mr. GRIJALVA. I—going back to Chapman and the adjacent facilities, health facilities provided in the area, Western Medical, Kaiser; where Kaiser and Anaheim represented by a—by a union and the difference in the pay that has been in Kaiser goes from a minimum of $4 for a bidding representative more than that is happening at Chapman; $12 for a respiratory therapist more than its—and on down all the categories seems that the employees at these two health providers as a consequence of some representation have a salary scale from a minimum of $4 to a maximum of $16 increases above and beyond what is being paid at Chapman.

So my question, Ms. Felter, is, I understand your opinion of unions and your effort at the facility you work in, is there—how do you explain the markedly different hourly rates between unionized facilities that are adjacent to and providing essentially the same services and Chapman which is markedly lower and has no representation?

Is that an outcome that is a positive one for the people that work there?

Ms. FELTER. As I stipulated before, we are a very, very small hospital; 300 employees. Our evaluations are based on job performances.

Mr. GRIJALVA. Well—I——

Ms. FELTER. Our evaluations are based——

Mr. GRIJALVA. The hourly ratio doesn't bother you or bother any other of the 300 that work with you?

Ms. FELTER. Well, obviously not because we, you know, we are happy with it. We are happy with what is going on there. We are happy with an open door policy. We are happy with no initiation fees.

Mr. GRIJALVA. I know. I——

Ms. FELTER. We are happy without any union dues.

Mr. GRIJALVA. I know, I—you must be a much better person than me because if I was working in the same job classification doing the same thing——

Ms. FELTER. You know, I prefer the open door policy where you still have that communication with the managers.

Mr. GRIJALVA. I like to be paid for what I work. I don't like to be paid less than.

Chairman ROE. The gentleman's time is expired.

Mr. GRIJALVA. Thank you.

Chairman ROE. I thank the gentleman.

Mrs. Brooks?

Mrs. BROOKS. Thank you, Mr. Chairman.

This is to Mr. Oppenheim. I, prior to joining Congress, I was at our state's community college system leading a division of the college that focused on workforce training and worked with a huge number of employers to try to raise the skill level of their employees.

So that those, for instance, whether they were in a nursing home or a hospital that maybe started it working in the kitchen and had a desire to begin to work at a higher level in patient care would have that opportunity to do that and would get that training and be provided that training.

I want to go back to what we were talking about with respect to how in your view Specialty Healthcare affects employees and their opportunities to advance and their opportunities to make more money within the organization and improve their skills.

Can you please expand upon how your view is that Specialty Healthcare impedes not just in your own business and fast food business which many, many people get their start as it is often their first job, and particularly within retail as well; it is often many young people's first job.

And a lot of retailers in particular want to have the opportunity to give young people a lot of cross training so that they can advance within the organization and keep those employees. Can you talk about why you are concerned that Specialty Healthcare stunts professional growth?

Mr. OPPENHEIM. Thank you, Congresswoman. First of all, I want to thank you for recognizing the fact that our industry does provide a lot of first-time employment for a lot of our youth and we are very proud of that. I will answer your question with a quick story.

Yesterday, I sat down with two of my employees who started out as crew members, started out in the kitchen making more than minimum wage believe it or not, and worked their way up over a number of years and now next week I will be putting them into management where they will actually be more than doubling their wages by going into a supervisory role.

I believe that could not have happened in an environment where we had fragmentation in the workforce. I don't believe that that would happen if we didn't have the ability to cross train them, work them in multiple job scopes, and give them the ability to move up in the workforce to gain the necessary skills to move into management.

Not every employee wants to do that, but we want to create an environment where that opportunity is there for every one of our

workers, and we feel that under the Specialty decision, that may not happen.

Mrs. BROOKS. And are there other—you indicated you were here representing other organizations. Can you give us a general idea? I have a number of logistics organizations in my—or logistics companies—in my district and they are very concerned specifically about this decision.

Are there other kinds of categories of employers that you have talked to that have the same concern?

Mr. OPPENHEIM. Absolutely. As a representative for the Society for Human Resource Management, we represent the views of all employees, and as HR professionals, we view ourselves as bridging the gap between management and employees, and that role is very important to us.

And so we gather a lot of data, alot of anecdotal stories of what is going on in organizations to help train employees and move them up the economic ladder, and again, we feel that this decision would impede our role as human resources professionals to be that important cog in organizations.

Mrs. BROOKS. How many members does SHRM have?

Mr. OPPENHEIM. Roughly 240,000 members.

Mrs. BROOKS. And do you take surveys of those members on a regular basis?

Mr. OPPENHEIM. Yes, I believe SHRM does, yes.

Mrs. BROOKS. And does SHRM also come up with their legislative agendas for each congressional session or each legislative session?

Mr. OPPENHEIM. Yes, and I feel very privileged to work with their legislative team. They are great professionals.

Mrs. BROOKS. And can you close out by what you believe the morale would be if people in your organizations were not allowed due to micro units in their organizations—what would happen to the morale in your employer organizations—employee organizations?

Mr. OPPENHEIM. Yes, we would be very concerned that employees wouldn't have the ability to earn a fair wage, to move up the economic scale, to gain new skills, and there would be less communication within the restaurant because all of these employees would be functioning within the narrow scope of employment and wouldn't have the ability to work other jobs and other positions and we feel that that would have a negative impact on the overall environment and the employee/employer relationship in the workforce.

Mrs. BROOKS. And when those kinds of employees aren't happy, the customers usually aren't happy. Is that fair to say?

Mr. OPPENHEIM. That is correct, yes.

Mrs. BROOKS. Thank you.

I yield back.

Chairman ROE. Gentlelady yields back.

Mr. Courtney?

Mr. COURTNEY. Thank you, Mr. Chairman.

And thank you to all the witnesses for being here today.

Mrs. Felter, I was again reading your amazing story and your testimony here and one sort of part of the story sort of jumped out at me which was the successful effort by you and your attorney to

block the subpoena issue with SEIU, and I noted that it was a unanimous decision by the NLRB in May, which you succeeded to make that case. Is that correct?

Ms. FELTER. Yes, it was.

Mr. COURTNEY. Yes.

Now, Mr. Feinstein, just to sort of build on that, obviously the NLRB when it hears cases it is not always unions who are petitioning for relief under the National Labor Relations Act.

I mean it also is individuals who again challenge union behavior and union actions. Isn't that correct?

Ms. FELTER. I understand——

Mr. COURTNEY. I asked Mr. Feinstein that question.

Ms. FELTER. [Off mike.]

Mr. FEINSTEIN. Yes, that is correct. I don't remember the specific numbers, but it is somewhere, 20 to 25 percent of the cases are cases initiated by employees or others challenging union conduct.

Mr. COURTNEY. And, you know, when we are talking about the whole issue of national relations act and where it is today, with all due respect to my colleagues on the majority side, these bills are going nowhere. I mean, they may pass the house, but you know, it is headed for the circular file at that point.

The real issue that exists around the National Labor Relations Act, the true uncertainty that exists for employers and for the Ms. Felters in the world is the fact that we have a board which is on the verge of just collapsing into paralysis because of the obstructionism in the Senate to approve nominees.

Isn't that correct, Mr. Feinstein?

Mr. FEINSTEIN. Yes. I certainly share that concern as I suggested and it is not only a question of the rights that are vindicated by the board; are individuals like Ms. Felter and others on all sides of these questions and all of that would be up for grabs, but it is the confusion, the uncertainty.

Regardless, you know, people have different views of how the law has functioned and how it has worked, but I think it is hard to argue that having a framework, having a basic set of rules for how labor-management relations and workplace conduct should be carried out, having a referee is needed.

I mean, nobody has seriously suggested let's do away with all of this, and I think there is a real concern that if this agency collapses on some level if there are no members that the uncertainty, the instability that it would cause in effect, no rule of law on these issues around the country would have a seriously destabilizing effect and who knows what those implications would be for job creation and for growth and for employers' solvency and profitability if some of these disputes are—there is no mechanism for resolving them.

So I think, yes, this is a huge concern and certainly as I said, I think we all hope that it doesn't come to pass.

Mr. COURTNEY. Because again, the case that Ms. Felter brought, again, I think the kind of remarkable aspect of it was a unanimous vote by the NLRB whose nominees are picked by Democrats and Republicans so the notion that it somehow this polarized agency that lines up in lockstep based on party nomination with unions or

employers. In fact, her case demonstrates the opposite that they really do follow the rules, and they apply the law objectively.

Mr. FEINSTEIN. Yes, and I don't know what the current numbers are, but I have seen in the past, and I think this is true now as well that the majority of cases that the board handles, a significant majority, are decided unanimously with all of the members.

In fact, there was a period of time that when there were just two members of the board, this subsequently the Supreme Court said that they didn't have the authority to act, but they were two members of the board, one Democrat, one Republican and they decided amongst themselves that they would decide the cases on which they could agree and that turned out to be most of the cases which they considered over that period.

So, yes, I mean, sometimes we focus on the contentious cases, the divisive cases, but as I say, the majority of cases, the significant majority of cases are decided unanimously.

Mr. COURTNEY. Well, again, one of my colleagues mentioned earlier that one of our tasks is oversight, and I couldn't agree more. That is the problem right now. I mean, you know, you look at the landscape of contested organizing issues right now.

The real question is are we going to have a referee that creates some set of expectations so people can negotiate settlements or actually get resolution and this mindless application of a 60-vote rule in the Senate, which again has never been the case in prior, you know, congresses—I mean, it has never been applied across the board the way the minority is abusing it right now is the real threat to labor stability in this country.

I yield back the balance of my time.

Chairman ROE. I thank the chairman for yielding.

Mr. Guthrie?

Mr. GUTHRIE. Thank you, Mr. Chairman. Thank you for this meeting.

I know companies have different unions representing under the same company. You would have a friend of mine, my college roommate's dad was a warehouseman for Jordan Marsh and he was a Teamster, and I am sure that the Jordan Marsh warehouse is represented by the Teamsters. I am not sure the retail clerks at the Jordan Marks store were, but they were kind of separate business entities and separate units.

And if you go to a Ford Motor Company plant, whether you are a millwright, a tool and die maker, or a laborer on the assembly line represented by the UAW, you understand how that keeps harmony within the plant because you don't have different—so I think the concern is that, I guess—I was in another hearing, Mr. Oppenheim, your restaurants are fast food restaurants that you have?

Mr. OPPENHEIM. Yes, that is correct.

Mr. GUTHRIE. Like—do you mind saying the brand?

Mr. OPPENHEIM. Burger King.

Mr. GUTHRIE. Burger King? Okay. I know Burger King. I go—we go to Burger King.

So would your concern be that it is inside the store level, not that you are talking about Burger King truck drivers of versus Burger

King people working in the store but that unions could organize a Burger King.

I think all of us can think about like the people who worked the cash register versus—they can come in and say there are four people that cook everyday, so we are going to organize the cooks.

Mr. OPPENHEIM. That is correct.

Mr. GUTHRIE. My guess is your cook one day may run the cash register the next. So the Specialty case you think would actually get to that level? That is a real fear that you have as a business owner?

Mr. OPPENHEIM. Yes, that is our concern. We are a small family business. We operate on very tight margins and our concern is that with a average restaurant having 30 employees that you could theoretically be dealing with three or four or five different bargaining units within one restaurant.

And that is where that fragmentation would inhibit our ability to operate our business as well as inhibit our employees' ability more importantly to gain the necessary skills they need, the job skills to move up the economic ladder.

Mr. GUTHRIE. Because I think it has always been like a common interest that they have looked beyond, so like at the store level is a common interest. At the—my example earlier if you are a warehouse or a huge department store chain you are separate then you are from the people who work in the department store that you were—your—I guess Mr. Feinstein, I know you are—do you think that—Feinstein is it, Feinstein? Feinstein. I apologize.

Do you—would the Specialty case allow, I think we can all in our minds picture who—go into a Burger King you got people checking and people back packing the hamburgers, somebody working the window that it would actually could get with inside a store at the employee—at a smaller level?

Not just the store level, but finding something that will let groups of people within the store if they are packing bags or if they are running a register could call themselves a bargaining unit?

So if he has 30 employees inside a store, that five or six who daily run the register can make themselves a bargaining unit?

Mr. FEINSTEIN. Right. I should start by saying that I am for upward mobility. I am for cross-training. I am for flexibility within the workplace. And I also believe that that frequently unionization, union representation are things that enhance and contribute to those things because employees have a voice, and I think you know we can point to many examples where you have an organized workforce, which is a model workforce because of all those things.

Mr. GUTHRIE. I agree with you, and I know that you want people to move upward. I am not—that wasn't even where I was going. But can there be micro units do you think within a Burger King? Can that happen?

Mr. FEINSTEIN. Well again, the test that would be applied by the agency is the test that they have applied for decades and that is, is there a community of interest and there is a list of several other factors. Is this an appropriate unit?

Do the employees share a community of interest, and I think it is difficult to give a specific answer because it depends on the specific facts. What do people do? How do they relate to each other?

But my point is the determination, the test that the agency would apply is the test that they have always applied, that Specialty Healthcare didn't change that. Specialty Healthcare said endorsed in the context of nursing homes, the test that applies to all workplaces and would apply in this situation and again, it is multifaceted.

Mr. GUTHRIE. So it is possible. That is just the concern that I would—and I have worked in a union facility, and it does have like these jobs are this certain bargaining unit and these jobs are—and this was a 400-person facility and it kind of makes sense that some were hourly, some were salary, and you could come——

It was UAW so everybody was under the same rules or whatever, but I could see if you started saying our tool and die makers are under this rule, our industrial maintenance are under this rule, our line workers are under this rule, that it would be difficult to manage, and those are things we really need to be concerned about.

Mr. FEINSTEIN. Yes, and I don't, I mean, I don't know this for a fact, but my guess is that if a union were organizing in the context of this, that their preference would be a wall-to-wall unit as well because, you know, it might be the appropriate unit. It might work well. I don't know that for a fact but I, you know, my experience suggests that that would probably be their first choice.

Chairman ROE. The gentleman's time is expired.

Ms. Wilson?

Ms. WILSON of Florida. Thank you, Mr. Chairman, for holding this hearing.

My question is for Mr. Taubman. On page three of your testimony you say that companies across the nation are being browbeaten and coerced into accepting a voluntary agreement with their employees to accept a union.

Can you provide me a list of companies in the past 5 years that signed such an agreement and now claim they were browbeaten by their employees?

Mr. TAUBMAN. I can provide you a list, Congresswoman, of companies that have signed such agreements, but I would imagine that they wouldn't want to publicly admit at this point now that they are saddled with the union that they were browbeaten into it.

I don't think that they would want to publicly say it that way, but that is a fact, and the Supreme Court case that was just granted cert, Unite Here versus Mulhall is going to bring out quite a bit of amicus briefs and other briefs from companies that are going to talk about how they were pressured through illicit corporate campaigns and threats of bad PR and all of this whole array of tactics to sign these neutrality agreements.

And again, what we are talking about here is did anybody ask the employees of any of these companies if they wanted secret ballot elections waived? Did anyone ask them if they should have their private phone numbers given up to union organizers? No.

So a company is going to admit that? Many won't, but that is the fact, and there is a record and if you want——

Ms. WILSON of Florida. It seems——

Mr. TAUBMAN. If you want me to provide more evidence, I will do my best——

Ms. WILSON of Florida. Please.

Mr. TAUBMAN [continuing]. To put it together.

Ms. WILSON of Florida. Okay. A good deal of your testimony seems to be critical of employers who want to cooperatively work with employees to create a union. In fact, you seem to suggest over the years there is some kind of a vast conspiracy of employers and unions cutting secret backroom deals.

Are you really saying to this committee that one of the nation's top problems is the labor peace is breaking out as employers choose to enter into voluntary agreements with their employers?

Are you saying to us that America's employers are not powerful or smart enough to enter into mutually beneficial agreements with their employees? I don't think that is true. Do you? Do you think that is true?

Mr. TAUBMAN. I think employers are perfectly capable, generally, of taking care of themselves, and I represent employees only. So I see the fallout of this. I am not an employer attorney. They have to deal with their own problems.

But I will cite you Exhibit 3 of my testimony which is a recent law review article by two law professors at Hastings Law School who I would put on let's say the liberal side of the spectrum, and they agree with my analysis that neutrality agreements provide illegal top-down support from employers to unions and they agree with my analysis that these sorts of neutrality agreements violate Section 302 because there are illegal things of value given from employers to unions.

That is the issue that the Supreme Court will be deciding next term. So there is plenty of empirical evidence out there about these things and it doesn't just come from me and the national right to work. These are neutral to let us say more liberal scholars that are writing that there is something wrong here.

Ms. WILSON of Florida. Thank you.

Mr. Feinstein, Feinstein, isn't there evidence that unions formed voluntarily have a better chance of being harmonious meaning more satisfying for the employees and more productive for the employers than hotly contested ballot elections?

Mr. FEINSTEIN. Yes, there is evidence, and I cite specifically some of that in my written testimony. I think that what those who have studied this matter find is that when this process of unionization is conducted in a manner that is respectful where the employer and the employees through the union agree to be respectful, agree to have a balanced approach letting both sides presented their case that sometimes the union wins, sometimes it loses.

But when the employees vote for unionization, the kind of labor relations that ensues, the relationship between the employees, is more productive, is considered to be more successful when it arises out of this more kind of a respectful process where the employer and the employees have agreed to these kinds of agreements.

There is also considerable evidence of the opposite, that is when the campaign is very contentious, when there is great hostility, when there is no kind of a prior understanding of how this campaign will be ensued that frequently again, win or lose, the relations and the success of that workplace suffer.

Chairman ROE. Gentlelady's time has expired.

I would like to again thank the witnesses for taking your time to, and in many cases travel across the country to testify before the committee.

I will now yield to our ranking member, Mr. Andrews, for closing remarks.

Mr. ANDREWS. Thank you, Mr. Chairman.

I would like to thank the witnesses for their preparation and their time this morning for traveling to be with us and for our members on both sides for participating.

I am not sure what the official count is, but I think we are still in the neighborhood of 8 million to 9 million unemployed people in our country officially, and that is the number one problem in the country as far as I am concerned that the Congress on both sides should be paying attention to. But we didn't today.

And there is a problem in labor law, a monumental problem, and that is that the agency that Ms. Felter was able to get relief from was able to be successful in essentially can't operate today because it doesn't have a quorum on its board and doesn't have a quorum on its board because the Senate is unable to take a vote on the people who have been nominated to lead that board.

It is not a matter of whether the Senators agree or disagree with President Obama's nominees, it is that they won't even put them up for a vote so we can have them considered.

So when you hear a story like Ms. Felter's, and you realize that the agency has to operate so it can hear the facts and render a judgment as it has in her efforts. Can't do that today because of the paralysis in the Senate.

Then we have two claims. One from Mr. Taubman that most of the corporate—most of the neutrality agreements result—are the result of coercive practices, but there is no record to back that up other than his personal anecdotes, which are rich, but not complete by any stretch of the imagination.

Then we have Mr. Hunter alleging that the Specialty Healthcare decision is going to wreak havoc on small employers because there is going to be this outburst of micro bargaining units, but the record since the decision shows that in fact, the median size of the bargaining units has gone up, not down.

It is one thing to focus on a problem and get it right, but that is not what happened here today because a lot of the discussion went off in a different direction, but I think that we are kind of focusing on the wrong problem.

The real issue is whether or not we have investment, entrepreneurial growth, and more jobs for our country, and I would just respectfully suggest that hearings like today don't really contribute very much to that although the witnesses certainly contributed a lot to our understanding of this problem, and I appreciate their participation.

Thank you.

Chairman ROE. I thank the gentleman for yielding, and I agree with my ranking member, Mr. Andrews, that jobs are the single most important issue and we will have an opportunity this week to vote on two energy bills, and I hope you will support those because they will create jobs.

I also put a uniform on 40 years ago this year, left this country, and served just south in the demilitarized zone in second infantry division in Korea.

I got a chance to see a country that didn't have a democracy when I was there that had a military dictator and now they have a freely-elected Prime Minister president and they have a free country with 50 million free people. Why? Because they have a secret ballot now. They can vote with whom they want. They have just elected their first female president in that country; 50 million free people.

The president of the United States was elected with a secret ballot. The senators, the congressman, the union officials are elected with a secret ballot. Why can't employees elect to have or not have a union using a secret ballot?

I cannot understand the argument, and it is a false narrative to say that you can't carry on a respectful campaign and have a secret ballot. I have carried on several respectful campaigns in my district with—and been respectful to my Democratic opponents and was able to convince people to vote for me.

The unions win most of these elections; the majority of them. So there should be no fear. There should be embracement, embracement of a secret ballot in this nation. It is the most precious thing we have that when you walk behind that curtain you can vote your conscience.

I would certainly appreciate the members of the panel today. You have done a terrific job.

And I thank my ranking member as always; does a terrific job.

And having nothing further, this meeting is adjourned.

[Whereupon, at 11:49 a.m., the subcommittee was adjourned.]

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