

**TESTIMONY BEFORE THE
HOUSE COMMITTEE ON EDUCATION AND LABOR,
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"The Protecting the Right to Organize Act: Deterring Unfair Labor Practices"

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Thank you for this opportunity to testify before you today about the Protecting the Right to Organize Act of 2019. This is a special privilege for me because I have spent half of my forty-year career working with the National Labor Relations Board, first as a lawyer, then ultimately as Board Member and Chairman. The National Labor Relations Board is the agency charged with enforcing the foremost labor law in the country, the National Labor Relations Act. This agency has, however, been hampered in effectively enforcing the Act because of the inadequacy of its remedies.

I started my career at the National Labor Relations Board's Buffalo, New York Regional Office. For the better part of 15 years I conducted representation elections for workers as an NLRB agent. I was a Hearing Officer who heard evidence and made determinations about objectionable conduct affecting an election, and, as a Field Attorney and District Trial Specialist, I investigated and prosecuted violations of the National Labor Relations Act. I then worked with two private law firms in Buffalo, one of which I co-founded. These firms were counsel to numerous local unions and several national unions in a variety of industries. In April of 2010 I was honored to be appointed by then-President Barack Obama to the National Labor Relations Board as Board Member, and later designated Chairman. I served in these positions for over eight years.

While with the law firms and as an information officer with the NLRB, I spent a significant amount of my time advising the public and clients who had been subjected to unfair labor practices. I would advise workers of their rights under the National Labor

Relations Act and the consequences of their employers' conduct. In every instance, I encouraged workers to rely the Act's protections despite employer intimidation, misrepresentation, and abuse. All too often, because of a protracted process and virtually toothless respondent sanctions for unfair labor practices, victimized workers seeking and awaiting justice would lose their jobs. They might be blackballed and go through extended periods of unemployment. They would lose the support of their friends. Their families would suffer and become dysfunctional. Ultimately, these victimized workers lose hope.

After I became a Board Member, I observed how cases would be tied up for years on appeal, how vacancies on the Board would cause case processes to grind to a halt, and how efforts to provide the public with relief during periods of loss of quorum and political gridlock were curtailed and often reversed as a result of judicial intervention. As a Board Member, I did all I could to ensure that the Act was fully enforced, but given the age of the Act and the many judicial opinions construing its terms, the Board is constricted in how it interprets many of the Act's important provisions. That's why statutory change is needed to update the law to reflect today's workplace.

Inadequate Remedies for Violations

The Act's inadequate remedies for unlawful conduct not only fail to deter or fully remedy violations, but in fact incentivize unlawful practices. The National Labor Relations Act provides only limited remedies for violations. Section 10(c) of the NLRA limits the remedies to a cease-and-desist order and, in the event of an unlawful firing, reinstatement with back pay, along with a required notice posting. By comparison, victims of race- or sex-based discrimination are eligible for compensatory and, in some cases, punitive damages under Title VII of the Civil Rights Act. And, individuals who are owed unpaid wages or overtime can recover both lost wages and liquidated damages when they file claims under the Fair Labor Standards Act.

I have found that the lack of effective remedies under the NLRA is of obvious importance for individual workers who are fired for organizing a union or engaging in other protected activity under Section 7 of the NLRA. Because employers often calculate that noncompliance is less costly, the Board's limited remedies stand in the way of its ability to fulfill its statutory mission to "encourag[e] the practice and procedure of

collective bargaining” and “protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing[.]” 29 U.S.C. § 151. Although the Board has made several important improvements to remedies, because of limitations in the current statutory scheme, it is economically rational for employers to violate the Act. The PRO Act addresses this important issue by updating the statute to ensure that violations will be adequately deterred.

I recall a particular example of a respondent’s flagrant pattern of flouting the NLRA in light of the NLRB’s inadequate remedies was the 2014 case *Pacific Beach Hotel*.¹ In that case, the Respondents had engaged in egregious unfair labor practices over the span of 10 years. The Board found that the Respondents had violated multiple provisions of the Act and engaged in objectionable conduct that interfered with elections on two occasions. In addition, the Respondents were subject to two Section 10(j) injunctions and had been found to be in contempt of court for violating a Federal district court’s injunction. Nevertheless, in 2014 the Board in faced Respondents which still had not complied with the remedial obligations imposed on them after the Board’s prior decisions. Rather, the Respondents continued to engage in unlawful activity, some of which repeatedly targeted the same employees for their protected activity and detrimentally affected collective bargaining. For example, after the Board held that the Respondents unlawfully imposed unilateral increases to housekeepers’ workloads in 2007, the Respondents briefly restored the lower workloads only to unilaterally raise them again. Similarly, the Respondents unlawfully disciplined, suspended, and then discharged an employee a second time for his protected activity, after he was reinstated pursuant to a Federal district court order of interim injunctive relief. Respondents continued making unilateral changes to work rules, taking adverse actions against employees for supporting the Union, placing employees under surveillance, undermining the Union, threatening and intimidating Union agents, and in many other manners interfering with employee rights under the Act—all contrary to the Board’s prior orders.

¹ *HTH Corp., Pacific Beach Corp., and KOA Mgmt., LLC, a single employer, d/b/a Pacific Beach Hotel*, 361 NLRB 709 (2014).

Faced with a flagrant violator of the Act of such magnitude, the Board, cognizant of its limitations in terms of fashioning remedies, tried to do its best with the authority it had. Among other remedies specific to these violations, the Board ordered the Respondents to cease and desist from engaging in the recidivist behavior described previously and ordered reinstatement with back pay to the affected employees. It also ordered a 3-year notice-posting period and required mailing of the notice, the Decision and Order, and an additional Explanation of Rights to current and former employees and supervisors, as well as provision of the material to new employees and supervisors for a period of three years. These notices had to also be published in local media of general circulation. Because its past orders were not self-enforcing and required the General Counsel and the Charging Party to incur additional litigation costs by seeking federal court enforcement, the Board majority also ordered that the multiple years of litigation costs be awarded to the General Counsel and Union, as well as certain other costs incurred by the Union as a direct result of the Respondents' unfair labor practices. It should be noted that the remedy of litigation costs was, however, struck down by the Court of Appeals for the District of Columbia Circuit because the Board lacked the statutory authority to impose such sanctions.²

Given the Act's significant remedial limitations, employers are commonly willing to flout the law by intimidating, coercing, and firing workers because they engage in protected concerted activity or attempt to organize a union. As the Board's experience in *Pacific Beach Hotel* shows, when employers discover that the cost of noncompliance is so low, they sometimes violate the law frequently over the course of many years. It isn't difficult to understand why. Without a credible deterrent, employers weighing the consequences of violating the law face a choice that all but incentivizes such serious interferences with employees' rights. It is for this reason that one-third of employers fire workers during organizing campaigns,³ and 15 to 20% of union organizers or activists may be fired as a result of their activities in union campaigns. And although the NLRB obtained 1,270 reinstatement orders for workers who were illegal fired for exercising their rights in fiscal year 2018 and collected \$54 million in back pay for

² *HTH Corp. v. NLRB*, 823 F.3d 668, 678-81 (D.C. Cir. 2016).

³ Josh Bivens et al., "How today's unions help working people."

workers,⁴ even when the Board is able to timely intervene and order reinstatement and backpay, it is not always enough to prevent employer lawbreaking.

During my time as Chairman, the NLRB modified its approach to calculating backpay in an effort to better fulfill the agency's dual remedial mandate to ensure that discriminatees are actually made whole and to deter future unlawful conduct. In *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enf'd in relevant part, 859 F.3d 23 (D.C. Cir. 2017), the Board modified its standard make-whole remedy to require respondents to fully compensate discriminatees for their search-for-work expenses and expenses they incurred because they were victims of unlawful conduct. Previously, the Board had treated search-for-work and interim employment expenses as an offset that would reduce the amount of interim earnings deducted from gross backpay, an approach which I and the other members who joined the majority in *King Soopers* argued unfairly prevented discriminatees from being made whole and amounted to a subsidy of employers' violations of the law.

While *King Soopers* marked a significant improvement that has helped the Board come closer to making employees who suffer unlawful termination whole, even the prospect of paying a full back pay award is often not a sufficient deterrent for employers. The PRO Act comes even closer to accomplishing a full make-whole remedy by providing that backpay is not to be reduced by interim earnings. And by making including provisions for front pay, consequential damages, and liquidated damages, the PRO Act would help the Board more effectively deter violations by making compliance with the law more economically rational for employers. I see a particular need for the enhanced remedies the PRO Act would provide when employers violate Section 8(a)(4) of the Act, which makes it an unfair labor practice to discharge or discriminate against employees because they have "filed charges or given testimony" in a Board proceeding. 29 U.S.C. § 158(a)(4). Without the assurance that they will be fully protected when they file charges and participate in Board hearings, employees will be fearful about coming forward to tell their stories or testify on behalf of their unions or fellow employees, which threatens the viability of the whole remedial scheme the Act contemplates.

⁴ National Labor Relations Board, NLRB Performance Reports—Monetary Remedies/Reinstatement Offers, accessed February 2019.

Procedural Obstacles to Relief

As Chairman, I did my best to streamline and expedite Board processes, recognizing that in the context of workplace issues, as in so many areas of the law, justice delayed can be justice denied. However, I often ran up against the limitations of the statutory scheme. As I expressed before, when workers file charges with the NLRB, they are often left to wait for a significant period of time. Proving that an employer has unlawfully terminated an employee or otherwise significantly interfered with that employee's rights under the NLRA can be a very lengthy process. Ordinarily, such charges must be investigated by an NLRB regional office, after which there is a hearing before an administrative law judge. After the administrative law judge renders a decision, employers typically file appeals and await decisions by the National Labor Relations Board, after which they often refuse to comply with the Board's orders and appeal those orders to the federal Courts of Appeals. By the time the Board's order is enforced, several years may have elapsed, and a fired worker has frequently found a new job. For this reason, although 1,270 employees were offered reinstatement in fiscal year 2018, only 434 accepted such offers.⁵ The PRO Act would reduce the likelihood of employers pursuing meritless appeals for the sake of delay by making the NLRB's orders self-enforcing, like the orders of many other comparable federal agencies.⁶

Even though Section 10(j) of the NLRA permits the Board to seek an injunction in Federal district court when an employer fires workers for organizing a union or engaging in protected concerted activity, the Board only uses this authority sparingly. In fiscal year 2018, the Board only authorized 22 injunctions, despite employers' frequent interference with employees' right to organize unions.⁷ By contrast, during my years as Chairman, the Board authorized an average of 43 injunctions per year. In addition, the NLRA requires the Board to seek an injunction whenever a union engages in unlawful picketing or strike activity. See 29 U.S.C. § 160(l). I commend the PRO Act for

⁵ See <https://www.nlr.gov/news-outreach/graphs-data/remedies/reinstatement-offers> (last accessed 4/30/19).

⁶ See *Report of the Committee on Judicial Review in Support of Recommendation No. 10*, available at <https://www.acus.gov/sites/default/files/documents/1969-02%20Judicial%20Enforcement%20of%20Orders%20of%20the%20NLRB.pdf> (last accessed 5/2/19).

⁷ See <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/nlrpar2018508.pdf> (last accessed 4/30/19).

attempting to create greater parity and predictability by making injunctive relief in the event of employer unfair labor practices mandatory in a greater number of cases.

Sadly, what I have just described often represents the best-case scenario for a worker who must go through the full process of litigating an unfair labor practice charge. In recent years, procedural infirmities have all too frequently compromised the Board's ability to act, further prolonging the delay workers must endure before finally enjoying the remedies they are due. Political gridlock has often prevented the NLRB from operating with the full five-member complement contemplated by the statute, with resulting paralysis due to a lack of quorum.⁸ During such periods of disruption, workers who file charges with the NLRB are unable to rely on the agency that Congress authorized to safeguard their rights. By creating an avenue for workers to bring a civil action in Federal district court, the PRO Act would ameliorate the consequences of the procedural obstacles to justice employees sometimes face during tumultuous times at the NLRB.

Similarly, I am encouraged by the PRO Act's provisions to address the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 584 U.S. ___ (2018). During my time as Chairman, the NLRB issued *D. R. Horton, Inc.*, 357 NLRB 2277 (2012) and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014). In these cases, the Board found that an employer violates Section 8(a)(1) when it requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment claims. The many cases involving mandatory arbitration agreements that followed in the wake of *D. R. Horton* and *Murphy Oil* stood as a testament to the prevalence of employers' efforts to preemptively stifle concerted activity. And though the Seventh and Ninth Circuit Courts of Appeals agreed with the NLRB's view that arbitration agreements that require employees to forego their Section 7 rights are invalid under the Federal Arbitration Act's saving clause,⁹ the Supreme Court read the Federal Arbitration Act differently. As dissenting Justice Ruth Bader Ginsburg recognized, the "inevitable result of [the majority's] decision will be the

⁸ *NLRB v. Noel Canning*, 573 U.S. 513 (2014); *New Process Steel, LP v. NLRB*, 560 U.S. 674 (2010).

⁹ See *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9th Cir. 2016); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016).

underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.” By restoring employees’ rights to pursue their employment claims on a class or collective basis, the PRO Act would empower workers to join together to protect themselves and each other and to seek vindication when they have been wronged at work.

Finally, the PRO Act addresses one of the NLRA’s shortcomings by paving the way for employers to post notices in the workplace that set forth the rights and protections employees are afforded by the NLRA. Because the NLRB does not have the authority to begin investigations on its own initiative, it relies on members of the public who know their rights to file charges when violations of the law occur. During my time as a Board Member and as Chairman, the NLRB promulgated a rule that would have required employers to notify employees about their rights,¹⁰ just as other statutes that protect workers require, but the rule was enjoined.¹¹ By clarifying that the Act allows the NLRB to ensure that employees are aware of their rights, the PRO Act would help the agency more effectively redress injustices in the workplace.

Strengthening Protections during the Bargaining Process

As the workers involved in the *New Process* and *Noel Canning* episodes learned through hard experience, employer unfair labor practices that aim to undermine employees’ chosen bargaining representative can have corrosive effects in the workplace that linger for years. Even after the Board finds that an employer has unlawfully refused to bargain, the remedy is an order to return to the bargaining table and do what the law required in the first place. The challenges associated with protecting the integrity of the bargaining process are particularly acute when parties are negotiating a first contract. As Kate Bronfenbrenner’s research has shown, within one year after an election, only 48% of newly organized units have obtained first collective-bargaining agreements. By two years, that number rises to 63%, and by three years to 70%. Even after three years,

¹⁰ *Notification of Employee Rights under the National Labor Relations Act*, 76 Fed. Reg. 54006 (Aug. 30, 2011).

¹¹ See *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013); *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

only 75% of units have reached a first contract.¹² These delays can erode workers' support for their bargaining representative, sometimes culminating in decertification efforts. During my time at the NLRB, I frequently encountered stories that demonstrated an urgent need for better protection for workers during their first-contract negotiations. One representative example is a case called *1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center*, 357 NLRB 1866 (2011), enfd sub nom. *1621 Route 22 West Operating Co., LLC v. NLRB*, 725 Fed. Appx. 129 (3d Cir. 2018). In that case, a union won an NLRB election in 2010 and was certified in 2011. The Respondent refused to bargain as a means of testing the certification of the union. The Board ordered bargaining in 2011, but because the Respondent filed a petition for review, the case continued for almost seven more years before the Third Circuit Court of Appeals finally enforced the Board's order. I welcome the PRO Act's proposal to strengthen protections for employees when they are in the vulnerable position of negotiating a first contract.

While the negotiation of a first contract presents unique difficulties for ensuring the process of collective bargaining envisioned by the Act operates as intended, parties' bargaining relationships can also be threatened when their efforts to negotiate collective-bargaining agreements break down. The Act protects employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," including strikes. 29 U.S.C. § 157.¹³ And although the Act provides that none of its provisions "shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right," 29 U.S.C. § 163, the reality has been more complicated. Notably, , the Supreme Court has taken the position that it is lawful to permanently replace economic strikers for the purpose of continuing operations during a strike, and¹⁴ in *Hot Shoppes*,

¹² See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Economic Policy Institute Briefing Paper #235 (May 20, 2009), available at <https://www.epi.org/files/page/-/pdf/bp235.pdf>.

¹³ As the Supreme Court has recognized, the Act is premised on both the "necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms," which "exist side by side." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 489 (1960).

¹⁴ *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Notably, the Court's initial statements about permanent replacement in *Mackay Radio* were dicta; the Court has never had occasion to squarely address the lawfulness of permanent

Inc., 146 NLRB 802, 805 (1964), the NLRB established a presumption, not present in the Supreme Court decisions, that an employer may permanently replace strikers to continue its business during a strike unless there is evidence that the employer had an “independent unlawful purpose” for doing so. This presumption has had the effect of whittling away the right to strike and preventing employees from relying on the protections of the Act.

During my time as Chairman, the Board was presented with a case that raised the issue of what constitutes an “independent unlawful purpose” as that term is used in *Hot Shoppes*. See *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13 (2016). In that case, the majority found evidence of an “independent unlawful purpose” in the Respondent’s decision to permanently replace striking workers to punish them and to avoid future strikes. While the employees who struck in that case were therefore protected against replacement, *Hot Shoppes* requires a fact-intensive inquiry that can yield unpredictable results and has virtually nullified the Act’s protection of the right to strike. By creating a uniform standard that assures workers that their right to strike will not be abridged, the PRO Act clarifies a notoriously complicated area of the law and would facilitate the process of collective bargaining.

Unfair Labor Practices against Undocumented Workers

Employers who hire undocumented workers and then fire them when they organize a union or protest unsafe or unfair working conditions should be accountable under federal labor law. Unfortunately, however, the Supreme Court has created a perverse incentive for unscrupulous employers to violate the NLRA by holding that the NLRB is prevented from awarding back pay to undocumented workers who are fired in violation of the law. The PRO Act fixes this egregious problem and thus provides an incentive to all employers to comply with both labor and immigration law.

In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984), the Supreme Court held that undocumented workers are “employees” within the scope of Section 2(3) of the Act. However, the United States Supreme Court in *Hoffman Plastic Compounds, Inc. v.*

replacement. See Mark Kaltenbach, *All Mackay Says: Why the National Labor Relations Board Should Replace Its Hard-to-Justify Interpretation of the “Mackay” Rule*, ON LABOR Working Paper (April 2015), available at https://onlabor.org/wp-content/uploads/2015/04/kaltenbach_all-mackay-says_final-1.pdf.

NLRB, 535 U.S. 137 (2002), also made it clear that Board lacked “remedial discretion” to award backpay to an undocumented worker who, in contravention of the Immigration Reform and Control Act (IRCA), had presented invalid work-authorization documents to obtain employment. While a respondent may be found liable for such unlawful conduct, victimized undocumented employees are prohibited from receiving the make-whole remedies of back pay and/or reinstatement, which are commonly ordered as a remedy for such violations of the law. Consequently, because of the limitations in the statute, violators are merely obliged to post a notice committing to cease and desist from such conduct. This is tantamount to a slap on the wrist of flagrant violators of the law. I joined former NLRB Chairman Wilma Liebman in articulating the inadequacy of this remedy in *Mezonos Maven Bakery, Inc.* 357 NLRB No. 47 (2011), a post-*Hoffman Plastics* Board decision. Among the concerns former Chairman Liebman and I expressed are the following:

1. *Precluding backpay undermines enforcement of the Act.* Although the primary purpose of a backpay award is to make employee victims of unfair labor practice whole, the backpay remedy also serves a deterrent function by discouraging employers from violating the Act.
2. *Precluding backpay chills the exercise of Section 7 rights.* Provided it is severe enough, one labor law violation can be all it takes. The coercive message—that if you assert your rights, you will be discharged (and, perhaps, detained and deported)—will have been sent, and it will not be forgotten.
3. *Precluding backpay fragments the work force and upsets the balance of power between employers and employees.* Protecting collective action is the bedrock policy on which the Act rests, as was recognized by the Supreme Court when it upheld the Act’s constitutionality. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (“Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers

opportunity to deal on an equality with their employer.”) (citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921)).

4. *Precluding backpay removes a vital check on workplace abuses.* The very employers most likely to be emboldened by a backpay-free prospect to retaliate against undocumented workers for concertedly protesting their terms and conditions of employment are the ones most likely to impose the worst terms and conditions.

Both former Chairman Liebman and I recognized that an award of backpay to undocumented workers is beyond the scope of the Board’s authority under the Court’s decision in *Hoffman*. We nevertheless remained convinced that an order relieving the employer of economic responsibility for its unlawful conduct can serve only to frustrate the policies of both the Act and our nation’s immigration laws.

Although untested, we suggested in *Mezonos* that a remedy requiring payment by the employer of backpay equivalent to what it would have owed to an undocumented worker would not only be consistent with *Hoffman* but would advance federal labor and immigration policy objectives. Such backpay could be paid, for example, into a fund to make whole victimized workers whose backpay the Board had been unable to collect. The novelty of such a remedy would likely cause it to be tied up in court challenges, thereby delaying justice for an untold period. However, the PRO Act would bring forth a clear and expedient resolution to the consequential inequities presented by the current state of the law.

Conclusion

Thank you very much for giving me the opportunity to testify before the Committee today. I applaud you for thinking carefully about how best to ensure that working people in this country can enjoy full freedom of association. The PRO Act would significantly improve the effectiveness of our nation’s labor law by:

- Creating stronger, more complete remedies for violations of the National Labor Relations Act.
- Eliminating procedural obstacles to the vindication of employees’ rights.

- Strengthening the bargaining process by creating new mechanisms to facilitate good-faith negotiations.
- Preventing unscrupulous employers from avoiding their obligations under labor and immigration law.