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TESTIMONY BEFORE THE U.S.HOUSE OF REPRESENTATIVES' COMMITTEE ON EDUCATION AND THE WORKFORCE, SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

HEARING ON NLRB OVERREACH: TRAMPLING ON WORKERS' RIGHTS AND FOSTERING UNFAIRNESS

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My name is Douglas P. Seaton. I practiced labor law on behalf of management and on behalf of employees in disputes with unions, from 1982 through 2018. I have also earned a Ph.D. in History, concentrating on labor history, taught college for several years and taught labor and employment law to attorneys for many more. I have been President of the Upper Midwest Law Center, a non-profit public interest law firm headquartered in a Minneapolis suburb since January 1, 2019, but am testifying as an individual, because I remain very concerned about the proper functioning of our U.S. labor law and labor relations system.

Senators Wagner, Taft and Hartley, I believe, would not recognize the current direction of the NLRB under the current Chair. The genius of the American NLRA and LMRA, as contrasted with other national labor laws and labor relations systems, is that our labor law and labor relations process are based on employee choice as to whether to be represented by a union, employer-based negotiations and disputes, rather than national boiler plate

arrangements and national strikes, as in France, and a careful balance of employer, union and employee rights and bargaining power. The first and third elements are under challenge at the NLRB today. U.S. labor law and labor relations, then, are distinct from the involuntary assignment of employees to unions and employers to trade associations for arrangements at a national level, as in many European countries. Our system is even further removed from the even less voluntary and less balanced arrangements in communist countries and in the former fascist countries.

Our system is decentralized, even though the rules are overseen by a national agency and the federal courts and is properly focused on individual employee, employer and union rights and obligations, with five objectives. The first objective is to empower employees' choice to support union representation, decline or withdraw that support. A second is assuring that unions only act on behalf of employees in labor relations by negotiating terms of employment, not pursuing political objectives. A third is to authorize unions to respond to market and competitive forces by moderating their positions in bargaining, strikes, etc., so as not to lose their members to the "no union" choice or their members' jobs by bankrupting the employer. A fourth objective is to incentivize employers to take care not to overreach, in their own position, so as not to lose employees to competitors or the entire business to an improvident bargaining or strike position, if the union is actually in the right, as far as the market is

concerned. The final objective is moderating disputes, channeling conflicting interests into productive compromises, within market realities, and avoiding violence.

This is a balanced system, and functions by returning to equilibrium whenever one group gets out over its skis. But when one of the parties involved, or, even worse, the agency itself, puts its thumb on the scales, it does not work in anyone's interest or the country's interest. Sen. Wagner and the drafters were very wise and we should value and preserve their work and the system this Congress and Senate created in 1935 and 1947. It is a significant feature in our social cohesion and prosperity.

I have grave concerns, however, that the current Board, under its current Chair, is not adhering to the spirit and purpose of the NLRA in several of its recent decisions and actions. The clear pro-union bias of the current Board and corresponding anti-employee and anti-employer animus are particularly disturbing, because, as the Subcommittee members will recall, unions only represent 6% of the U.S. private sector workforce, and even less when you consider the large number of independent contractor service providers who are not in an employee/employer relationship.

There are all too many examples of the NLRB's tilt toward the institutional interest of unions over the interest of employees, employers and the nation, but here are some examples:

1) Employee Free Choice as to Unions: Under Section 7 of the NLRA, employees have the right to decide whether or not to seek, decline or withdraw from union representation and cannot be required to become full union members, pay full dues, etc., even when represented by a union. Yet the current NLRB has modified, sought to overrule or has changed decisional NLRB law and procedures to limit the circumstances and times when employees can terminate or change union representation. Even when an employer is sold and the workforce and business mission are changed, the NLRB has limited the option to reopen union representation. The same has occurred when labor agreements terminate and/or impasses in bargaining occur. When employees petition the employer to end union representation, the NLRB almost always decides that the employer has "put them up to it" and disallows or stalls the process for confirming non-union status. *Starbucks Corporation (*03-RD-316974*; 372 NLRB No. 156) Buffalo, NY, November 15, 2023.*

2) Employee Protection from Racist and Sexist Insults: The discrimination laws protect employees from racial and sexual discrimination, harassment and hostile work environments, which can also subject employers to liability if not deterred, but the current NLRB has terminated the prior Board's vindication of employer discipline for racist or sexist insults against other employees, even when committed during "union activity," and has

restored the free pass for such conduct during union picketing and the like, one of many contradictions between the current NLRB and appropriate legal compliance under the discrimination laws. *Lion Elastomers LLC, 369 NLRB No. 88 (2020).*

3) Employee Confidentiality Protection in Complaint Investigations: The EEOC and State human rights departments recommend confidentiality in employer investigations of employee complaints of discrimination and harassment, and such protection is also the usual protocol for investigation of whistleblower and other employee complaints or inquiries. This is so employees and witnesses feel comfortable in answering questions so the employer can fully investigate and also protects employees from retaliation from the alleged discriminator or harasser. Here also, contradicting best practice in employee investigations, the current NLRB insists on disclosure of evidence from confidential investigations and of witnesses' identities, not only to its investigators, but to unions who may then retaliate against the witnesses who "finger" union supporters for bad conduct. Similar confidentiality breaches have been required in union requests for employees' personal information by the current NLRB. *Banner Estrella Medical Center, 362 NLRB 1108 (2015) was overturned by Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (Dec. 16, 2019)*, *supplanted by Stericycle, Inc., 372 NLRB No. 113 (2023)*, which largely invalidated such employer confidentiality policies, among

many other policies. This overriding of legitimate employer (and employee) confidentiality concerns is wrong-headed and symptomatic of the current Board's focus on union objectives to the exclusion of legitimate employee, employer and national policy interests.

4) Employer-Sponsored Employee Meetings on Labor Law and Union Pro's and Con's: The NLRB, for many years, has said that, although employers can be, unions are not sanctionable for lying to employees in the course of organizing. *El Monte Tool & Die Casting, Inc. v. NLRB, 633 F.2d 160 (9th Cir. 1980).* An example is telling employees that signing a union representation request card is "only a request for information" or "so we can have a pizza party." The rationale for this different rule is that unions are said not to be able to act on promises or threats, while employers are. As a consequence of the "OK to Lie Rule," employees often do not receive accurate information from unions about the law of labor relations and the pros and cons of union representation and collective bargaining. The only other employee source for information, practically speaking, is the employer. Yet the current NLRB is pursuing several cases in which it seeks to end the long-standing rule that employers may sponsor, pay for and require attendance at a meeting in which the employer teaches about labor law and labor relations practice, often from the NLRB's own materials on these subjects, so long as no improper threats or promises or other unfair labor practices occur. Their effort simply means that

employees will often not have adequate information about unions, labor law and labor relations, or only pro-union biased information, and is really anti-employee at its core.

5) Reduced Employee Rights Under the Current NLRB's New NLRB Election Procedural Rules: The current NLRB has revised election rules for union representation and decertification elections in several ways which diminish employee rights in an apparent effort, contra Section 7, to insulate unions from employee opposition. The Rules seek to make "card check" central, even though much evidence shows that the traditional NLRB secret ballot elections and employee-generated petitions, not union circulated representation "authorization cards" are the best means of assuring that actual employee wishes are followed, because of the effect of pressure and the "OK to Lie Rule." The Rules also shorten the time from a union filing for an election (which sometimes occurs only after a full year of "organizing") to an election, limits the ability of an employer (employees have no direct say in the procedure) to challenge the contours of a bargaining unit, or the inclusion or exclusion of disparate groups of employees, and nullifies rights by postponing hearings or appeals until after a *fait accompli* election, when it is futile. *NLRB Representation Case Procedures – 2023 Final Rule.*

6) Assault on Independent Contractor Status by the Current NLRB: Many service providers choose to work as independent contractors (ICs) rather

than employees, and have done so for decades in many cases. All are familiar with the Uber/Lyft model, but ICs dominate the trucking industry, and many professions and crafts have significant levels of IC involvement. This model provides many benefits for those working within it, but IC status has always meant such individuals are not employees under the NLRA. The current NLRB has sought every opportunity to override and undermine IC status, another significant assault on "employee choice" in my estimation, because many individuals freely choose IC status over employee status, but are often thwarted in doing so by the NLRB. This assault has occurred in individual NLRB decisions which have overridden IC arrangements voluntarily entered into by individuals and those retaining their services and unilaterally assigned employee status to those ICs, usually so a union could assert organizing claims over that group. The current NLRB is also pursuing a Rule which would accomplish the same purpose across-the-board in entire industries. *The Atlanta Opera, Inc. and Make-Up Artists and. Hair Stylists Union, Local 798, IATSE. Case 10–. RC–276292. June 13, 2023; NLRB Joint-Employer Standard – 2023 Final Rule.*

I believe that my testimony and the illustrative case decisions and Rule sections cited make the case that the current NLRB Chair and Board majority have strayed very far from the neutral, balancing role rightly expected of a government agency overseeing an often contentious arena, that of American

employee and labor relations. If I am correct, this NLRB all too often takes the extreme pro-union institutional position and sidelines the interests of the 94% of employees not represented by unions and all of the millions of independent contractors, as well as the interests of employers and the nation itself. Some would describe this as an extreme example of "agency capture" and it is a capture by only a small subset of those affected by NLRB decisions. I hope this Subcommittee, the Congress, the Senate and the Courts take appropriate action under the Constitution to restore the balance and neutrality of this important agency and the equilibrium of interests that the NLRA was intended to promote.

This concludes my written testimony. Thank you.