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The Endangered Middle Class: Is the American Dream Slipping Out of Reach for American Families?

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My name is Sarah Fox and I am legal counsel to the AFL-CIO. For five years, from 1996 through 2000, I was privileged to serve as a member of the National Labor Relations Board and to participate in the administration of the National Labor Relations Act, a statute whose passage in 1935 contributed significantly to the creation and growth of a strong American middle class. I appreciate the opportunity to testify today regarding the rights established in the NLRA and the continuing relevance of those rights to any effort to reverse what has now been a decades-long slide in the fortunes of the middle class.

Let me begin with some comments about the context in which the NLRA was enacted and the significance of that context in light of present day circumstances. In 1935, the country was of course in the throes of the Great Depression. Then, as now, millions of workers were unemployed and wages were depressed. Then, as now, prospects for economic recovery were hindered by insufficient consumer demand attributable to the lack of consumer purchasing power. The NLRA, enacted as a response to the economic crisis, reflected a Congressional belief that equalizing bargaining power between workers and employers through the practice of collective bargaining would enable workers to obtain fairer wages and a better standard of living, which would in turn spur and support greater business activity and restore what Congress referred to as "the flow of commerce." In short, the Congress that enacted the NLRA viewed giving workers the right to form unions and bargain collectively not just as a benefit for individual workers, but as a positive economic strategy for the nation as a whole. That view is as valid today as it was in 1935.

As Congress explained in Section 1 of the NLRA, which sets forth the findings and policy concerns underlying the legislation:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate business depressions, by depressing wage rates and the purchasing power of wage earners in industry . . . .

29 U.S.C. § 151. Section 1 therefore goes on to declare that it is "the policy of the United States" to ensure the efficient functioning of the economy by "encouraging the practice and procedure of collective bargaining" and by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Id.

The new statute, as adopted in 1935 and subsequently amended in 1947, did four important things.

First, it formally established in what is now section 7 of the Act the rights of private sector employees to form and join unions of their own choosing, to collectively bargain with their employers, and to engage in strikes and other forms of concerted activity –and to refrain from such activities.

Second, it established an affirmative duty on the part of employers to recognize and bargain with representatives chosen by employees without employer interference.

Third, it defined and prohibited a series of "unfair labor practices" by employers and unions which interfere with or discriminate against employees on the basis of the exercise of rights protected by the Act.

Fourth, it established an independent agency overseen by individuals appointed by the President and confirmed by the Senate to administer and enforce the Act: These consist of a 5-member Board which, in the case of unfair labor practices, acts in an adjudicative body, and an independent, separately appointed General Counsel who, through representatives employed in Regional Offices around the country, investigates charges filed with the agency against employers and unions and, where it is determined that there is reasonable cause to believe an unfair labor practice has been committed, acts as a prosecutor in issuing complaints and prosecuting them before the Board.

Following the passage of the Act, and particularly after the end of World War II, millions of workers, by joining unions and exercising the right to collectively bargain provided by the Act, were able to win improvements in wages, benefits and working conditions that for decades put them at the vanguard of a steadily advancing and expanding middle class. Gains achieved at the bargaining table by union workers caused employers to raise wages for millions of non-union workers as well, and benefits such as health insurance and retirement plans, initially negotiated for union workplaces, became standard offerings by nonunion employers too. Prosperity was broadly shared by families at all income levels.

Today, however, as previous witnesses have compellingly testified, the middle class is in serious decline, with wages for the majority of workers stagnant or falling, increasing percentages of the workforce without access to health insurance or pension benefits, and more and more workers employed on a contingent basis, with no job security . Instead of broadly shared prosperity, we have levels of inequality unheard of for more than a century, with the percentage of total income captured by just the richest one per cent of Americans now exceeding 24% percent. Not surprisingly, these developments parallel a similar downward trend in the percentage of private sector workers covered by collective bargaining agreements, which is now back to its lowest point since the National Labor Relations Act became law.

The reasons for this decline are various, and include the hollowing out of the country's manufacturing base and the concomitant loss of manufacturing jobs; steep employment declines in other industries that have historically been highly unionized, such as mining and utilities; and the increasing percentage of the private workforce that has no right to unionize because of exclusions from statutory coverage. But there can be no question that a large part of the decline is due to fierce opposition to unionization by employers and weaknesses in the NLRA that allow employers to engage with impunity in intense and protracted anti-union campaigns—campaigns that are often accompanied by illegal threats, firings, and other forms of coercion, but even where conducted in accordance with current law, are typically designed to generate high levels of tension and conflict in the workforce that the employer can blame on the union and thereby dissuade workers from supporting a unionization drive.

The compelling case for reform of the NLRA has been made repeatedly before this Committee and elsewhere in the Congress in the context of the debate over the proposed Employee Free Choice Act, and it is not my intention to rehearse those arguments here. But in the absence of reform, it is certainly appropriate to expect that those protections for workers that do exist in the Act are fully and vigorously enforced. It is in that context that the recent and increasingly vehement attacks on agency personnel for simply carrying out their statutory obligations should be considered deeply disturbing. Since Mr. Luttig has appeared to testify today regarding the complaint recently authorized by the Acting General Counsel alleging that the Boeing Co. has committed unfair labor practices I refer in particular to the uproar that has been generated over that action.

The complaint in question was issued on April 11 of this year. Briefly summarized, it alleges that the company has violated sections 8(a)(1) and (3) of the NLRA in connection with an alleged decision to transfer the assembly work for some of the 787 Dreamliner airplanes it is producing from an existing Boeing facility in the State of Washington to a new company plant in South Carolina. These allegations are based on alleged statements by company officials that they would transfer or had decided to transfer the assembly work to South

Carolina because of past strikes engaged in by the workforce at the Washington State facility.

It is important to note at the outset that the issuance of the complaint does not constitute a finding by the agency that Boeing has violated the NLRA. It reflects only a conclusion by the General Counsel, after an investigation of charges against the company filed with the agency by the union representing workers at the Washington State, that there is reasonable cause to believe that a violation has occurred, which is the standard for initiating an enforcement action under the NLRA.

As Mr. Luttig's testimony makes clear, the company vehemently contests both the legal theory on which the case is based on and certain of the factual allegations on which the complaint is based--most notably whether the assembly work in question is work that the company plans to transfer from the Washington State facility to South Carolina or new work, as well as the complaint's assertions as to the company's motive for the decision. It is certainly not unusual for the Respondent in an unfair labor practice to deny the commission of unfair labor practices; indeed that is obviously true in every case that proceeds to a hearing. And like all other Respondents, Boeing will have a full opportunity at a hearing before an ALJ (which I understand has been scheduled for next month) to present its defense. If any aspect of the ALJ's decision is adverse to the company, it can file exceptions to the decision with the Board in Washington DC, and it will also have the right to appeal any subsequent decision by the Board to a federal Court of Appeals.

Contrary to many statements that have been made to the press and in other forums, the legal theory on which the complaint is based is neither novel nor exceptional. Section 8(a) prohibits employers from interfering with, restraining or coercing employees in the exercise of rights guaranteed by section 7 of the Act; section 8(a)(3) from discriminating against employees because of their exercise of section 7 rights. It is beyond question that the right to strike is among the rights guaranteed by section 7, and there is ample precedent in Board law for the proposition that the decision to transfer work from one facility to another because workers at the first facility have exercised a right protected by section or to prevent employees from exercising. There is even a name for this line of cases—it's called the "runaway shop" doctrine.

What is exceptional about this case is not the novelty of the legal theory, but the size and power of the company that has been charged, and the magnitude of the decision that is at issue. But there is no warrant in the NLRA for making enforcement decisions on the basis of such distinctions—or on whether a particular decision will be politically unpopular.

This is most emphatically not to say that I believe Boeing to be guilty of unfair labor practices, and I would not presume to make any such suggestion. That is a

judgment that can only be made by the ultimate decision maker after thorough examination of the facts as presented at the hearing before the ALJ, and careful consideration of the application of the law to that particular set of facts. And that is precisely why it is ultimately pointless—and destructive of the processes established by law for the resolution of such matters –for Boeing and others to attempt to litigate the case in the press or, for that matter, in Congress.

Two final points: First, the uproar in response to the NLRB's complaint has, not surprisingly, muddied the legal issues at stake. For instance, some critics are now claiming that this complaint is an attack on legally protected "right to work" laws, given that South Carolina is a right to work state. This is a red herring.

There is no question that states are expressly permitted by Section 14(b) of the NLRA to enact so-called right to work laws, which prohibit unions from requiring the payment of dues or fees from individuals in the bargaining whom the union is obliged to represent but who do not choose to actually join the union. However, the legal theory on which the complaint is based has nothing to do with the fact that South Carolina happens to be a right-to-work state.

Boeing could have moved this work to Oregon, Illinois, New York or any other non-right-to-work state and the analysis, as well as the Acting General Counsel's duty to enforce the Act, would be the same. The issue is not where the work was allegedly relocated to—indeed that is entirely irrelevant to the legal theory of the complaint. The issue here is why the work was relocated, and whether that reason involves considerations that are unlawful under the Act. .

Nor does the issuance of the complaint constitute unprecedented government intervention in legitimate business decisions. It is a commonplace among labor and employment lawyers to say that employers in this country are generally free to make business decisions affecting individuals' employment status for good reasons, bad reasons or no reasons at all. But an employer may not make such decisions based on considerations that Congress has declared to be impermissible as a matter of law. This is true whether the decision discriminates on the basis of race, of gender, or religion or because the individuals have exercised rights guaranteed by section 7. And where unlawful discrimination has occurred, it is standard to require the guilty party to restore the status quo ante. As the NLRB complaint specifically states, it "does not seek to prohibit [Boeing] from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility."

As I noted at the outset of my testimony, the ability of employees to exercise section 7 rights without fear of retaliation played an important role in the growth of collective bargaining and the expansion of the middle class throughout the 40's, 50's and 60's. It is time now for Congress to focus on revitalizing those rights as a key element of any strategy to restore the middle class.