Statement of
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Committee on Health, Education, Labor and Pensions
United States Senate
October 8, 2025

Chairman Cassidy, Ranking Member Sanders, and Committee Members, thank you for your invitations to participate in this hearing. It is an honor to appear before you today.

My testimony today reflects my own views, which should not be attributed to Jackson Lewis or the National Labor Relations Board (NLRB).

I am a principal in the law firm, Jackson Lewis P.C. Prior to joining Jackson Lewis, I spent over 15 years in government service, starting in the Department of Labor's Office of Labor-Management Standards and ending as Chairman of the NLRB. During my time at the NLRB, I participated in over 900 decisions.

Today, I am here to discuss first contract collective bargaining under the National Labor Relations Act (NLRA). The NLRB is not a party to collective bargaining and does not dictate the terms of collective bargaining agreements. Instead, the NLRB establishes standards and imposes remedies to ensure employees, through their chosen representative, and employers bargain in good faith. This framework leaves the terms of the collective bargaining agreement in the hands of those with the best knowledge of the employees' needs and the economic condition of the employer while respecting the section 7 rights of employees. Like most things that matter, these negotiations take time. Additionally, the time it takes to reach an agreement depends on a number of factors, including the number and complexity of the issues, the parties bargaining experience, and current state of the business and economy. As such, the success or failure of collective bargaining should not be judged by the time it takes to reach an agreement.

A labor organization becomes the exclusive bargaining representative of a unit of employees under the NLRA either through voluntary recognition or certification. An employer may voluntarily recognize a labor organization as the exclusive bargaining representative of its employees if the labor organization provides evidence that a majority of the employees support it. Once recognized, the voluntary recognition bar protects the recognized labor organization from decertification for a "reasonable period" – six to 12 months – from the date of the first bargaining session.

If a labor organization or employer petitions the NLRB for a representational election and the labor organization receives a majority of the employee votes, then the labor organization is certified by the NLRB as the exclusive bargaining representative of those employees. Under the

certification bar, the NLRB will dismiss any petition for decertification for one year from the date of certification.

It should be noted that these bars fundamentally conflict with employees' section 7 right to choose whether or not to be represented by a labor organization. However, the insulation periods serve the overarching goal of the NLRA, labor stability. Tradeoffs must be made, but it is essential that the rights of employees are not ignored in the collective bargaining process.

The employer and the certified or recognized labor organization must bargain in good faith regarding terms and conditions of employment during the certification and recognition bar. This obligation persists until the employer has objective evidence that the labor organization has lost majority support, and either a collective bargaining agreement is not in effect or has expired.[1] Section 8(d) of the NLRA states:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The employer violates section 8(a)(5) of the NLRA if it fails to bargain in good faith. Similarly, the labor organization violates section 8(b)(3) of the NLRA if it fails to bargain in good faith.

To satisfy the good faith requirement, the employer and labor organization must negotiate with a "bona fide intent to reach an agreement."[2] However, the employer and labor organization are free to engage in hard bargaining and exert economic pressure, including strikes and lockouts.[3] Neither the NLRA nor the NLRB sets the frequency or duration of negotiations or the terms of the agreement. Instead, good faith is determined by the absence of bad faith or surface bargaining.

Among other things, the following actions have been considered per se refusals to bargain: 1) unilateral changes to mandatory subjects of bargaining,[4] 2) direct dealing with

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[1] *Levitz Furniture CO.*, 333 NLRB 717 (2001).
[2] *Atlas Mills*, 3 NLRB 10 (1937).
[3] *NLRB v. Insurance Agents*, 361 U.S. 477 (1960).
[4] *NLRB v. Katz*, 369 U.S. 736 (1962).

employees,[5] 3) refusing to confer,[6] 4) refusing to meet at reasonable times,[7] 5) insisting to impasse on permissive subjects of bargaining,[8] and 6) refusing to execute a written contract.[9]

Absent a per se refusal to bargain, the NLRB considers the "totality of the conduct" to determine whether the employer or labor organization has acted in bad faith. In the absence of conduct that amounts to an outright refusal to bargain, the NLRB considers overall conduct during bargaining. Conduct that the NLRB has determined is evidence of bad faith bargaining includes, among other things, engaging in surface bargaining (negotiating tactics meant to frustrate or avoid mutual agreement),[10] refusing to compromise,[11] failing to advance proposals,[12] the use of delay tactics,[13] committing unfair labor practices,[14] failing to provide relevant information,[15] and placing conditions on bargaining.[16] The remedy ordered by the NLRB for bad faith bargaining will depend on the type and severity of the conduct.

Section 10(c) of the NLRA empowers the NLRB to order a party that has committed an unfair labor practice to "cease and desist from such unfair labor practice, and to take such affirmative action…as will effectuate the policies of the Act…."[17] In almost all cases where the NLRB finds bad faith bargaining, the NLRB orders the offending party to cease and desist from refusing to bargain and bargain upon request. The NLRB may also issue a bargaining order, mandating a period in which bargaining must occur, and extending the certification or recognition bar. In more serious cases, the NLRB may issue a broad bargaining order that extends the bargaining order to cover all units employed by that employer that the labor organization represents.

The Act provides the Board with the flexibility to tailor remedies to address the conduct that led to the finding of bad faith bargaining. If deleterious unilateral changes are implemented, then the NLRB will order the employees to be made whole for any losses suffered and rescission of the deleterious unilateral changes. If a party refuses to provide relevant information, the NLRB will direct the party to provide the information. If a party engages in surface bargaining, the NLRB may order reimbursement of bargaining expenses.

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[5] *Americare Pine Lodge Nursing & Rehab. Ctr.,* 325 NLRB 98 (1997).
[6] *NLRB v. Katz,* 369 U.S. 736 (1962).
[7] *Caribe Staple Co.,* 313 NLRB 877 (1994).
[8] *NLRB v. Borg-Warner Corp. Wooster Division,* 356 U.S. 342 (1958).
[9] *Gadsden Tool Inc.,* 327 NLRB 164 (2000).
[10] *Atlanta Hilton & Tower,* 271 NLRB 1600 (1984).
[11] *Reed & Prince Mfg. Co.,* 96 NLRB 850 (1951).
[12] *Reichhold Chemicals*, 288 NLRB 69 (1988).
[13] *Teamsters Local 122*, 334 NLRB 1190 (2001).
[14] *Imperial Mach. Corp.,* 121 NLRB 621 (1958).
[15] *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149 (1956).
[16] *Fitzgerald Mills Corp.,* 133 NLRB 877 (1961).
[17] 29 U.S.C. §160(c).

In the event the offending party fails to comply with the order, the NLRB can petition the U.S. Court of Appeals for a judicial order enforcing its decision. A party that does not comply with the court's enforcement order may be held in civil or criminal contempt. NLRB remedies do not dictate the terms of a collective bargaining agreement; they are intended to ensure parties bargain in good faith.

In some cases, even when parties bargain in good faith, they may still be unable to reach an agreement. The NLRB defines this moment as impasse. At impasse, the employer may implement its last best final offer. The last best final offer is the employer's absolute best and final offer made with the understanding that no further negotiations will occur. Like bad faith bargaining, impasse is a question of fact and is evaluated under the totality of circumstances. Impasse merely suspends the duty to bargain. Changes in circumstances, such as acquiescence to a previously opposed provision of the collective bargaining agreement, can end the impasse.

Numerous studies have examined the time between recognition or certification and the signing of a first collective bargaining agreement. A 2009 study by Kate Bronfenbrenner, funded by the Economic Policy Institute and the American Rights at Work Education Fund and based on interviews with union organizers, found that 48% reached a first contract within one year and 30% had no contract after three years.[18] A 2021 analysis by Robert Combs found the average time-to-contract to be 409 days.[19] While these numbers may appear concerning, they do not indicate a breakdown in the system. The studies do not indicate that either employers or labor organizations are bargaining in bad faith. On the contrary, they are an acknowledgement that good faith bargaining takes time and in approximately 70% of cases an agreement is reached within three years.

The existing system leaves the terms of the collective bargaining agreement in the hands of those with the best knowledge of the employees' needs and the current economic condition of the business while preserving the section 7 rights of employees. There are egregious examples of bad faith bargaining, but the NLRB has effectively dealt with these situations. During my time on the NLRB, I regularly reminded myself not to allow bad facts to make bad law. I encourage everyone in this room to consider this before endorsing a significant shift in bargaining procedures under the NLRA.

I will conclude by saying the system works.

I look forward to answering questions from members of the Committee.

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[18] Bronfenbrenner, Kate, No Holds Barred: The Intensification of Employer Opposition to Organizing, EPI Briefing Paper (May 20, 2009), https://files.epi.org/page/-/pdf/bp235.pdf.
[19] Combs, Robert, (2021). Analysis: How Long Does It Take Unions to Reach First Contracts? https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-long-does-it-take-unions-to-reach-first-contracts. Retrieved October 5, 2025.

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