Testimony of Bradley W. Kampas
Before the House Committee on Education and Labor
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Mr. Chairman, Members of the House Committee on Education and Labor, thank you for the opportunity to speak to you today. My name is Bradley W. Kampas. I have actively participated in collective bargaining and labor contract administration for over 25 years. My experience includes negotiations on behalf of educational institutions, and I have negotiated in many first contract settings. While I am partner in the San Francisco office of Jackson Lewis LLP, my appearance and testimony today is on my own behalf and represent my own views, not those of the partnership.

I understand the sub-committee is reviewing the negotiations of the first collective bargaining agreement for post-doctoral staff at the University of California. My testimony today will concern the process of collective bargaining, especially as it relates to negotiations for a first contract.

A "first contract" is of great importance. It is vitally important to the employees who have never been represented before. It has great significance to the union which has adopted the responsibility to negotiate for those employees. Of course, it is also crucial to the employer. There are other interested parties in this process as well: shareholders, customers, students, taxpayers and more, depending on whether the employer is in the public or private sector.

Collective bargaining is both a practical and a legal process. It is a method of attempting to reach agreement between competing interests. My goal in the next few minutes is to explain the genius of our system of collective bargaining, and to discuss why first contract negotiations are often time-consuming.

In 1935, Congress passed the National Labor Relations Act ("NLRA") (a.k.a. the Wagner Act) and created the National Labor Relations Board ("NLRB") to enforce the NLRA. Where a union was recognized as the bargaining representative of employees, the Wagner Act obliged the parties to engage in good-faith bargaining, demanding that the parties approach negotiations with "a sincere purpose to find the basis of agreement." The purpose of the law was to provide a *mechanism* for labor and management to reach agreement. From the beginning, the law recognized that its role was to facilitate private agreement but not to dictate results.

Notably, the law did not require the parties to actually reach agreement. Nor did it impose terms of employment. The Supreme Court, in finding the NLRA constitutional in its seminal NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937), decision acknowledged this when it reasoned "that free opportunity for negotiation…is likely to promote industrial peace and may bring about the adjustment and agreements *which the [NLRA] itself does not attempt to compel*."

In 1947, Congress amended the NLRA with its passage of the Taft-Hartley Act. The amended version included Section 8(d) which further defined the nature and extent of the parties' obligation to bargain. The Congressional record on the passage of Taft-Hartley, which the

Supreme Court later cited in NLRB v. American National Insurance, 343 U.S. 395, 403 (1952), indicated that Section 8(d) was included out of Congress' concern that the NLRB was overreaching its purpose "in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . ." Later Supreme Court holdings have echoed that "while the Board does have power under the National Labor Relations Act to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." H.K. Porter v. NLRB, 397 U.S. 99, 101 (1970).

Section 8(d) provides that when a union is certified as the exclusive bargaining representative for a unit of employees, it is 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." The NLRA does not set a time limit for reaching an agreement. It does not even provide that the two parties must reach an agreement at all because the "obligation [to bargain] does not compel either party to agree to a proposal or require the making of a concession." In interpreting the obligation to bargain in good faith, the Supreme Court has concluded that the NLRA "does not compel any agreement whatsoever between employees and employers." Further, the Court stated that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."

The Supreme Court has consistently emphasized that the NLRB's role is limited to determining whether the parties are bargaining in good faith and does not extend to evaluating the merits of each party's substantive proposals. The Court's decision in H.K. Porter v. NLRB, supra, at 108, is instructive:

> Allowing the Board to compel agreement when the parties themselves are unable to agree would violate the **fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract**.

The NLRB continues to follow this approach. As it stated in Oklahoma Fixtures, 331 NLRB 1116, 1117 (2000), the NLRB examines proposals "only for the purpose of evaluating whether they were clearly designed to frustrate agreement." Where the parties are unable to reach an agreement through good-faith bargaining, **"it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement."** In short, the object of this Act is not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. See H.K. Porter at 103.

Negotiation of the first collective bargaining agreement is often difficult and time-consuming. There are unavoidable reasons why these first sets of negotiations are lengthy. A collective bargaining agreement is a multi-year contract binding both the employer and its

employees. A labor contract typically includes a wide array of provisions covering every aspect of working conditions.

When an employer adopts a collective bargaining agreement, it is bound to a cost structure while sacrificing flexibility. It commits to future expenses, but it receives no guarantees regarding the competitive market or its ability to remain profitable. The collective bargaining agreement is a document which will likely have profound implications for the future of the company. It is not an agreement that any prudent employer would entertain lightly.

The process is, of necessity, prolonged. It typically begins with extensive requests for information by both parties, in particular by the union, to inform their strategy for the negotiations. Unions are entitled to certain information about the employees whom they represent, namely any information about their wages, hours, and other terms and conditions of employment. Simply put, in order to bargain effectively regarding terms and conditions of employment, the union must know what these terms and conditions are. Unions can and do request payroll lists for prior years, scheduling information, staffing plans, health and retirement benefits information, and so forth.

The employer often makes similar requests from the unions regarding their finances. These requests continue throughout the bargaining process. The union may propose moving employees into their pension plan. In order to evaluate the union's proposal, the employer will request a copy of that plan to review its requirements and solvency. This is particularly important given the status of many multi-employer pension plans which are underfunded and, as such, have massive withdrawal liability when and if an employer seeks to withdraw from the plan. The company may propose a no-fault attendance policy. The union will request and review the attendance records of employees over the past three years to attempt to evaluate the effect such a policy will have on its membership.

Once parties have the necessary information and have gotten to know each other, they must turn to the task of negotiating every word of the contract. This is where the real investment of time comes in. There are a myriad of issues which must be decided even before the parties ever discuss wages. Health and retirement benefits alone can consume months of bargaining.

Congress is well aware of the crisis in our nation's pension and retirement plans. An increasing number of multi-employer pension plans are underfunded. A 2009 report by independent California actuarial and consulting firm, The Segal Co., Ltd., found that only 39 percent of its 400 multi-employer plan clients were even funded at 80 percent or higher. The Pension Protection Act was Congress' effort to address the growing problem of these underfunded plans. To a large degree, our pension problem was caused by unions and employers adopting retirement arrangements without adequate foresight. Today, employers are acutely aware of the risks to the company and to employees. This has caused negotiations to become increasingly detailed. Unions are continuing to propose that employers agree to enter their employees in these plans because they desperately need funding. While entry into them may have short-term financial benefits, employers must carefully consider the long-term impact of this decision. This certainly causes significant delay and study.

Health insurance is another area in which employers – and union-administered funds - must be increasingly careful in considering their liabilities. It is not yet at all clear how recent legislation will impact this area. With exploding health insurance premiums, employers and unions must carefully consider how best control costs or expenses two or three years down the road.

Apart from the complexity of the issues to be negotiated, there are other factors that explain the length of time necessary to reach a contract. In the weeks leading into a representation election, unions frequently make promises to employees about what they will get should the union win the election. They may point to contracts that they have negotiated at other companies (perhaps not indicating those companies have deeper pockets or a better market share). Even without direct comparisons, the union offers hope to many employees who feel that they are not being treated fairly by their employer. After the election is over and the employees have selected the union as their collective bargaining representative, the employees, like any other group of voters, expect their elected representative to deliver. If an employer is already paying its employees a competitive market wage, it may be difficult- if not financially impossible- to increase wages or offer benefits at a less expensive level. Further, an employer may be committed to a particular work rule or structure which employees are seeking to change. Or the employer may be committed to changing an existing practice which employees want to keep.

Good faith bargaining does not require either party to accept any specific proposal offered by the other. To require otherwise would encourage unrealistic proposals and lack of movement to the point of insisting that proposals are accepted. Unions often try to bargain the same or very similar contracts with different employers. When employers do not consent to terms in these pattern contracts, it is not necessarily a delaying tactic. Why should one employer simply agree to the terms and conditions of employment set by another employer? Similarly, if employers pointed to terms in employer-friendly contracts, it would not be "hard bargaining" if the union did not assent to all those terms.

First contracts form the framework for decades of future contracts. This adds considerable importance to the apparent minutia involved in drafting each article of a contract. Any experienced labor practitioner can attest to the difficulty in modifying existing language in second, third, or fourth contracts. In subsequent negotiations, parties focus on specific clauses which they would like modified or economic issues. They do not rewrite the entire contract. Entire articles from first contract will remain unchanged forever. Therefore, the parties must exercise great care in drafting language that will be acceptable not only for the term of the first contract, but for the length of the collective bargaining relationship. This, of course, adds considerable time to the process, but parties should not agree to terms in first contracts lightly- they must and do consider the lasting impact of the initial terms and conditions of employment created by the collectively bargained contract.

The National Labor Relations Board acknowledges that good faith bargaining requires a great investment of time. Under Board law, the parties are expected to negotiate until they reach agreement or reach impasse. "Impasse" is a term of art in labor law. The Supreme Court and the NLRB have defined impasse as "that point at which the parties have exhausted the prospects of

concluding an agreement and further discussion would be fruitless." Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete, 484 U.S. 539, 543 (1988); Badlands Golf Course, 350 NLRB 264, 273 (2007). There is no bright-line rule to determine whether bargaining impasse exists, but impasse is not reached easily. As an example, in Litton Microwave Cooking Products, 300 NLRB 324 (1990), the parties did not reach impasse until they had held forty-seven negotiation sessions for their initial contract. At that point, they still disagreed on fifty different issues. The NLRB will consider the bargaining history, the good faith of the parties in negotiations, the lengths of negotiations, the importance of the issues still to be determined, and the contemporaneous understanding of the parties as to the state of negotiations (i.e., do both parties believe that an impasse exists).

The number of bargaining sessions and the amount of time that the parties have engaged in bargaining is an important factor, but there is not dispositive amount of time after which an impasse is declared. However, the Board recognizes that it should be even more difficult and a longer process to reach impasse during bargaining for an initial contract than successor contracts. For instance, in MGM Grand Hotel, Inc., 329 NLRB 464, 466 (1999), the Board stated "where the parties are negotiating an initial contract, the Board recognizes the attendant problems of establishing initial procedures, rights, wage scales, and benefits in determining whether a reasonable time has elapsed."

Frustrated by their inability to reach first contract settlements quickly (or at all), many unions and labor supporters have suggested binding interest arbitration if the two parties cannot reach agreement within a certain time line. For instance, the proposed Employee Free Choice would require the parties to enter binding interest arbitration 120 days after negotiations began if settlement had not been reached. While the card-check provision of EFCA received most of the attention from the media and the public, compulsory interest arbitration would have an even greater impact on the business community, employees, and labor relations in general than the practical end of the secret ballot election.

Notwithstanding the unrealistic time pressures (and, in most circumstances, practical impossibility) of negotiating a first contract in four months, compulsory arbitration would completely alter the fundamental concepts of American labor law. It was never the intent of the drafters of the NLRA that the government (or government appointed arbitrators) would play any role in the delicate collective bargaining process. It was never the intent of the drafters that an arbitrator would set terms of conditions of employment to affect the workplace for years.

Supporters of compulsory arbitration point to its place in public sector collective bargaining. In the public sector, particularly in occupations relating to public safety, e.g., police, fire, etc., compulsory interest arbitration is frequently used because unions do not typically have the right to strike. For obvious reasons, it would be unwise to give a police or fire union the full range of economic weapons- namely the right to strike- during contract negotiations. Fear of a third party imposing terms and conditions of employment on an employer was believed to compensate for the inability to strike.

In addition to this practical reason, there are two important reasons why interest arbitration in these industries is, at least, understandable. First, a municipal fire department is a

monopoly. It would not be competitively disadvantaged (the town may be disadvantaged, but not the actual business) if an arbitrator imposed increases to wage and benefits that would make it difficult to compete with other fire departments. Second, if an arbitrator imposed increases, the employer has full-proof method of increasing revenue; it can raise taxes to pay for the increased labor costs borne by its citizens.

This is not to say that interest arbitration for these jobs is always effective. As most of us are aware, the city of Vallejo became insolvent in 2008. Skyrocketing wages and benefits of its municipal workers were, in part, to blame. Salaries and benefits for public safety workers accounted for 75 percent of the general fund budget. In addition, current and future pension outlays were literally bankrupting the city. The City Council sought concessions for the union, which they did not receive. Ultimately, the City filed for bankruptcy in 2009 and unions fought the modification of its collective bargaining agreements.

Many opponents of compulsory arbitration raise concerns about the arbitrator's ability (or inability) to set wages and benefits. Obviously, if an arbitrator does not understand a company's needs or the competitive environment in which it operates, he could increase wages and benefits to the point where the company is placed at a competitive disadvantage. Ultimately, this is bad for employees who may find themselves unemployed if the arbitrator fails to assess the impact of his award. Interest arbitrators tend to opt for "standard" wages and benefits levels. Such compensation standards may be highly problematic for some employers, especially given the state of the economy.

While an arbitrator creating wage and benefit scales that are detrimental to a company's success is the most dangerous outcome of interest arbitration, there are other major issues. For instance, work rules are a crucial feature of any collective bargaining agreement. An arbitrator would have to decide how overtime will be assigned: by seniority, by some kind of rotation, by a combination of the two. An arbitrator would have to decide if scheduling would be a management right to be changed at an employer's sole discretion, or will it be something that is negotiated every time an employer wants to make a significant change. Can schedule changes be permanent? An arbitrator would have to decide if promotions would go to the most qualified candidate or to the most senior employee or to the most senior employee who meets certain qualifications. After deciding the promotion criteria, the arbitrator would have to decide if promotion decisions would be subject to the grievance and arbitration provisions under the contract.

These examples are all major parts of the collective bargaining process. Some contracts permit sole management discretion in some areas, but not others. There is gave and take from both sides on these issues. It is extremely problematic that an arbitrator, with little knowledge about an employer's operations, will make decisions that will affect the day-to-day operations of a company. There are thousands of different industries. An arbitrator cannot possibly understand in a couple of days the needs of an industry. The problem will be then that the contracts imposed by even the best arbitrators may bare little resemblance to that which is necessary for a company to operate and for employees to work in a comfortable atmosphere.

Bargaining for first contracts is always a different and arduous process. For years, unions have expressed frustration with employer's "tactics" in this process. In my experience, most unions fail to conclude first contracts with employers because they do not properly assess their bargaining power. Employers must bargain and good faith and compromise with unions. Likewise, unions must know when to compromise and say yes. Unions that fail to reach first contracts tend to value their own national or regional interests as opposed to those of the members for whom they are negotiating. They fail to compromise because they have overestimated their bargaining power. Thus, unions want interest arbitration because they feel an arbitrator will give them that which they were unable to win at the bargaining table.

This concludes my remarks, and I request that my full remarks be submitted into the record. Thank you and I am happy to answer any questions you may have.