WRITTEN TESTIMONY OF

FRED FEINSTEIN

BEFORE THE SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

HEARING ON:

H.R 2346, “SECRET BALLOT PROTECTION ACT”

and

H.R. 2347, “REPRESENTATION FAIRNESS RESTORATION ACT”

Wednesday, June 26, 2013

Good morning Committee Chairman Roe, Ranking member Andrews and members of the Committee. I am pleased testify again before the Committee I was privileged to serve as a staff member for 17 years from 1977 to 1994. My name is Fred Feinstein. For the past thirteen years I have been a senior fellow at the University of Maryland School of Public Policy's Executive Programs department. During this period I have also been a consultant to unions and worker centers on issues of labor and immigration policy. I am currently a member of the UAW public review Board and am on other advisory boards. During the Clinton Administration I served as General Counsel of the National Labor Relations Board (NLRB) for nearly six years. Today I appear expressing my own views on the issues raised in this hearing and not as a representative of any of the organizations with which I have been affiliated in the past or present.

In my view enactment of the bills under consideration by the Committee today would undermine important principles that have been part of the labor law for decades. They would erode employee protections and the collective bargaining process. Passage of the bills would impose legislatively mandated rules that would erode flexibility and limit the ability of employees, employers and the NLRB to make decisions about workplace conditions. They overrule provisions of the law enforced and endorsed by the courts and the Board through decades of both Republican and Democratic administrations.

Enactment of HR 2346 would prevent employers and employees from reaching an agreement on how to determine majority support for collective bargaining at a worksite. Instead it would require that the NLRB to conduct an election in every case before a collective bargaining relationship could be established. Today, under long existing law, employees can seek to demonstrate majority support for unionization through a petition or other approved methods and employers can exercise the choice to collectively bargain with its employees if it is satisfied there is majority support. The legislation would substitute these existing choices, with the

mandate that the only way employees and employers can determine majority support is through an NLRB election.

Since the NLRA was enacted more than 75 years ago, employers and employees have had the ability to exercise these choices. In my view one of the NLRA's strengths is an underlying premise that workplace relations are best left to be worked out by employees and employers. The law encourages the efforts of employers and employees to resolve workplace concerns through consultation and negotiation with as little outside interference as possible. NLRB case law has consistently relied on this principle and it is one the strengths of the collective bargaining process. HR 2346 is not consistent with this longstanding principle and would weaken successful workplace relations.

Too frequently contentious campaigns against union representation lead to a deterioration in workplace relations that both employees and employers come to regret. One way to avoid this deterioration is an agreement between employers and employees about how to respectfully express their views on collective bargaining and an agreement on how to determine majority support for representation. There is evidence that these mutual agreements are more likely to result in successful labor relations than more contentious campaigns that often precede NLRB representation elections. (e.g. See Kreisky and Eaton, 2001) Enactment of HR 2346 would preclude the possibility of agreements that often result in successful workplace relations.

Part of the rationale offered in support of H.R. 2346 is that determining majority support for union representation in a way other than an NLRB election can lead to abuse and sometimes results in distorting the true wishes of employees. Current law contains provisions that prohibit such abuse. While I believe the provisions prohibiting abuse are usually effectively enforced, those who believe otherwise might suggest how to improve the protections against abuse rather than what is proposed in H.R. 2346 which would eliminate important choices available to

employers and employees today. There is extensive evidence that significant abuses occurs during the course campaigns leading to NLRB elections, but I am confident the supporters of H.R. 2346 would not support addressing such abuse by eliminating NLRB elections.

The second bill under consideration, HR 2347, would substitute the judgment of Congress for the expertise of the agency that for 75 years Congress has relied on to balance and assess how best to enforce the principles of labor law. When Congress enacted the NLRA, the NLRB was given the important responsibility of deciding how to apply the law of labor management relations to continually changing workplace realities. Exercising that responsibility has meant updating and adjusting Board holdings to reflect new workplace conditions. Unit determinations in particular have required adjustment as the structure and organization of diverse workplaces has inevitably evolved.

During Republican and Democratic administrations, the NLRB has been able to focus its expertise on developing policies that apply the principles of the law to evolving workplace conditions. The Board has modified its interpretations based on new evidence that provides a better understanding of workplace practices. Evaluating the effect of prior Board rulings has at times been the Board's rational for updating its rules. The Board has also updated or modified its rulings because new Board members have a different view on how to most effectively administer the Act.

In determining whether a unit of employees is appropriate for bargaining, the Board has traditionally applied a multifactor test to determine whether the employees share a community of interest and whether that interest is sufficiently distinct from those of other employees to warrant a separate bargaining unit. H.R. 2347 codifies some of those factors but leaves out other important relevant factors that have long been taken into consideration by the Board, including similarities in skills and training; geographical proximity; and the desires of affected employees.

The new standard in H.R. 2347 for unit determinations is a significant departure from the longstanding "community of interest" test. It would give substantially less weight to the wishes of employees and greater weight to factors controlled by employers. It is inconsistent with a fundamental right of employees under the NLRA to choose their collective bargaining representative and would undermine a central objective of the Act to encourage the process of collective bargaining.

I am also concerned that if this bill were to be enacted, as workplace conditions and the preferences of employees and employers inevitably evolve, the factors proposed in HR 2347 could only be adjusted through yet another legislative enactment. In my view, current mechanisms in the law are a more effective means of responding to workplace changes and keeping the implementation of labor polices up to date.

A good example of how the Board's approach to cases can evolve is the reconsideration in *Specialty Healthcare* of the Board's 1991 holding in *Park Manor*. In *Park Manor* the Board first applied a "pragmatic or empirical community of interests approach" to nursing homes. After examining the evidence, the Board stated that experience suggested the *Park Manor* standard had caused confusion and had not given the parties sufficient guidance. It also found the nursing home industry had undergone significant change since the early 90's and the approach suggested in *Park Manor* was based on "facts and analysis already over two decades out of date." (*Specialty Health, page 6*) This is an appropriate and time tested way to help assure that the implementation of the law keeps up with changing workplace realities.

I understand that at least part of reason for today's consideration of HR 2347 is a misplaced concern that the Board's decision in *Specialty Healthcare* constituted a major change in the Board's traditional test for determining appropriate units. While my primary concern with HR 2347 is placing Congress in the role of legislating unit determinations, I believe that the Board's decision in *Specialty Healthcare* was an appropriate reaffirmation of its longstanding "community of

interest principle" and not the dramatic change in law that some have suggested. The Board decision did no more than restore the community of interest standard to unit determinations in nursing homes and other non-acute care facilities.

One of the major misconceptions about the *Specialty Healthcare* decision is that would lead to a proliferation of small "micro-units." But Board statistics affirm that this has not been the case. Prior to *Specialty Healthcare*, the average size of the bargaining units found to be appropriate by the Board was 24 employees, a figure that has been relatively consistent. Since Specialty Healthcare, the average size of bargaining units has actually slightly increased, to 27.

To the extent that there has been a decline in the size of bargaining units over the decades the law has been in effect, it is likely to have been caused by changes in work organizations, the nature of the industries in which collective bargaining is more likely to prevail and perhaps the changing nature of work. Over this period, essentially the same community of interest test has been in place so the Board's standard would not been a significant cause for the changes in the size of collective bargaining units.

Future Boards will have the opportunity to consider these standards in light of changes in the industry and the effectiveness of applying the traditional community of interest standard to nursing homes. In my view, the current mechanism for making such assessments is how the application of the law should evolve. It would be a mistake for Congress to jump in to the day-to-day process of unit determination and mandate a legislated standard that could only evolve with future Congressional enactments.

Taken together I believe both bills under consideration today would have a significant adverse effect on our system of labor management relations. The bills propose substantial and one sided changes that appear intended to favor the interests of employers at the expense of employees. Enactment of the bills would

weaken important principles and employee rights that would undermine the ability of employees to engage in collective bargaining.

Finally I cannot resist pointing out that while today this Committee is considering amendments to the NLRA, currently pending before Congress is a question that will have profound impact not only on the issues under consideration here, but on all labor-management relations in this country. I refer to the possibility of the NLRB being unable to function because of the deadlock over the appointment of members.

There is already a cloud of uncertainty over the agency because of the issue of recess appointments pending in the courts. In August, when current Board member terms expire, if the Senate has not confirmed new members to the Board, the agency's ability to function will be severely compromised. There would be significant uncertainty and confusion not only about the Board's ability to act on unit determinations and the resolution contested elections, but on the Board's ability to act on all the day to day issues the agency is called upon to resolve.

While the two bills before this Committee raise important issues, my primary concern today is the confusion and uncertainty about the NLRB's ability enforce all aspects of labor relations law that failure to confirm members to the Board would cause. It would significantly undermine the rule of law in matters of labor management relations and I certainly hope it can be avoided.

Thank you again for the opportunity to appear before this distinguished Committee.