

**UNDERSTANDING PROBLEMS IN FIRST CONTRACT
NEGOTIATIONS: POSTDOCTORAL SCHOLAR
BARGAINING AT THE UNIVERSITY OF CALIFORNIA**

FIELD HEARING

BEFORE THE

COMMITTEE ON

EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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C O N T E N T S

| | Page |
|---|------|
| Hearing held on April 30, 2010 | 1 |
| Statement of Members: | |
| Lee, Hon. Barbara, a Representative in Congress from the State of California | 5 |
| Miller, Hon. George, Chairman, Committee on Education and Labor | 1 |
| Prepared statement of | 3 |
| Questions submitted for the record | 78 |
| Woolsey, Hon. Lynn C., a Representative in Congress from the State of California | 4 |
| Prepared statement of | 5 |
| Statement of Witnesses: | |
| Burton, Hon. John L. (ret.), former Representative in Congress from the State of California | 43 |
| Prepared statement of | 44 |
| Duckett, Dwaine, vice president of human resources, University of California | 37 |
| Prepared statement of | 39 |
| Responses to questions submitted for the record | 80 |
| Ferguson, John-Paul, assistant professor, Stanford University Graduate School of Business | 51 |
| Prepared statement of | 53 |
| Additional submission—"The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004," Industrial and Labor Relations Review, Oct. 2008 | 86 |
| Kampas, Bradley W., Jackson Lewis, LLP | 45 |
| Prepared statement of | 47 |
| Miller, Michael, International Representative International Union, UAW .. | 11 |
| Prepared statement of | 12 |
| Tyler, Ludmila, Ph.D., postdoctoral researcher, University of California, Berkeley | 8 |
| Prepared statement of | 9 |

**UNDERSTANDING PROBLEMS IN FIRST
CONTRACT NEGOTIATIONS: POSTDOCTORAL
SCHOLAR BARGAINING AT THE
UNIVERSITY OF CALIFORNIA**

**Friday, April 30, 2010
U.S. House of Representatives
Committee on Education and Labor
Washington, DC**

The committee met, pursuant to call, at 11:00 a.m., in the auditorium at Berkeley City College, 2050 Center Street, Berkeley, California, Hon. George Miller [chairman of the committee] presiding.

Present: Representatives Miller and Woolsey.

Also Present: Representative Lee.

Staff Present: Jody Calemine, General Counsel; Gordon Lafer, Senior Labor Policy Advisor; Alexandria Ruiz, Administrative Assistant to Director of Education Policy; and Jim Paretti, Minority Workforce Policy Counsel.

Chairman MILLER OF CALIFORNIA. A quorum being present, the Committee on Education and Labor will come to order for the purposes of conducting a hearing to examine the challenges posed by the first contract negotiations at the University of California, an issue of long concern to this Committee in many other settings.

The Chair will recognize himself for the purpose of making an opening statement and then I will recognize Congresswoman Woolsey and then Congresswoman Lee.

Today we will explore the issue and using a particular case study, the first contract bargaining of Postdoctoral Scholars at the University of California. Over the last several years my Committee has been collecting testimony and information about the erosion of American workers' fundamental rights to organize and bargain for a better life. We have learned that workers face immense obstacles when they try to form and join a union. And we have learned that even when they succeed in getting representation there is an entire new gauntlet to run when they try to reach the first contract with their employer. While parties in a labor negotiation are obliged to bargain in good faith, the applicable law often provides no effective enforcement of that duty. Federal labor laws give wide way to someone to stall and frustrate the bargaining. In fact, a recent study found that 34 percent of the union election victories have not resulted in a first contract after two or even three years of bargaining. This is unacceptable to those workers.

As the Committee has learned, some employers have used delay as a tactic because after a year of bargaining without a contract to show for it, a newly recognized union can be decertified. Both federal and California law gives the parties 12 months to reach the first contract before decertification of the union may occur.

Originally, it was thought that a year was more than enough time for an employer and a union acting in good faith to settle a contract. However, we're seeing an increasing number of cases where the negotiations last well beyond a year. This is one reason why a majority of the Congress agrees that the federal law needs to be reformed in order to encourage all parties to come to an agreement in a reasonable amount of time. The Employee Free Choice Act would do just that. If after 90 days a first contract has not been finalized, either party can request mediation assistance. If mediation does not help bring the parties together in 30 days, then the mediation can be referred to binding arbitration. That bill, however, amends Federal labor law. It applies to the private sector only, not the public sector bargaining like the case before us today.

Public sector organizing and bargaining can present its own challenges, but many of the basic rights, obligations and issues remain the same.

We seek today to learn more about the first contract negotiations in a particular case, why they have gone on so long without reaching an agreement and to see what lessons can be drawn from this case. In 2008, after three years of organizing, postdoctoral scholars at the University of California won certification for their union, the UAW, the United Auto Workers before the State Public Employees Relations Board. Although negotiations began November 2008, the University of California system and the postdoctoral scholars have been unable to reach agreement on a first contract. But for more than a year, the postdoctoral scholars have bargained and been unable to get a first contract.

What is discouraging is that there is nothing novel about collective bargaining on university campuses. There have been graduate student unions for 40 years, and faculty unions for nearly a century. In fact, the University of California system recognizes and successfully bargained with the University researchers and graduate student unions. These scholars work hard. Their contribution to the University and to the nation is, indeed, invaluable.

After 18 months of talk these scholars deserve a contract. After 18 months of talk these scholars deserve a say over the terms and conditions under which they work day in and day out.

Today we will hear from witnesses involved in the current negotiations, from witnesses experienced in past negotiation and from experts on the broader policy issues of first contract negotiations. And while this hearing comes in the context of an ongoing dispute, I want to emphasize that we are here today to learn and understand the issues, not to mediate them.

I would like to thank Congresswoman Barbara Lee for hosting this hearing on this important topic in her District. And I am glad that you and Congresswoman Woolsey, the Subcommittee Chair on our Committee on Education and Labor, have joined me today.

And personally, I want to thank all of the witnesses for taking time out of their schedule and lending to us their expertise, and

their knowledge and their experience in these issues. And I look forward to all of your testimony.

And with that, I would like to recognize Congresswoman Lynn Woolsey, the Subcommittee Chair of Worker Safety Committee.

[The statement of Mr. Miller follows:]

**Prepared Statement of Hon. George Miller, Chairman,
Committee on Education and Labor**

The Committee on Education and Labor meets this morning in Berkeley to examine the challenges posed by first contract negotiations, an issue of long concern to the committee.

Today we will explore this issue using a particular case study—the first-contract bargaining for post-doctoral scholars at the University of California.

Over the last several years, my Committee has collected testimony and information about the erosion of American workers' fundamental right to organize and bargain for a better life.

We have learned that workers face tremendous obstacles when they try to form or join a union.

And we have learned that, even when they succeed in gaining representation, there is an entire new gauntlet to run when they try to reach a first contract with their employer.

While the parties in a labor negotiation are obligated to bargain in good faith, the applicable law often provides no effective enforcement of that duty.

Federal and many state labor laws give wide leeway for someone to stall and frustrate bargaining.

In fact, a recent study found that 34 percent of union election victories had not resulted in a first contract after two or even three years of bargaining.

This is unacceptable.

As the Committee has learned, some employers have used delay as a tactic because, after a year of bargaining without a contract to show for it, a newly recognized union can be decertified.

Both federal and California law gives the parties 12 months to reach a first contract before decertification of the union may occur.

Originally, it was thought that a year was more than enough time for an employer and a union acting in good faith to settle a contract.

However, we are seeing an increasing number of cases where negotiations last well beyond a year.

This is one reason why a majority of Congress agrees that the federal law needs to be reformed in order to encourage all parties to come to an agreement in a reasonable amount of time.

The Employee Free Choice Act would do just that. If after 90 days, a first contract has not been finalized, either party can request mediation assistance. If mediation does not help bring the parties together in 30 days, then the mediation can be referred to binding arbitration.

That bill, however, amends federal labor law. It applies to the private sector only, not to public sector bargaining—like the case before us today.

Public sector organizing and bargaining can present its own challenges. But many of the basic rights, obligations, and issues remain the same.

We seek today to learn more about why first contract negotiations in a particular case have gone on so long without reaching an agreement, and to see what lessons can be drawn this case.

In 2008, after three years of organizing, post-doctoral scholars at the University of California won certification for their union, the UAW, before the state Public Employment Relations Board.

Although negotiations began in November 2008, the University of California system and the post-doctoral scholars have been unable to reach agreement on a first contract.

But, for more than a year, post-doctoral scholars have bargained and been unable to get a first contract.

What is discouraging is that there is nothing novel about collective bargaining on university campuses. There have been graduate student unions for forty years, and faculty unions for nearly a century.

In fact, the University of California system recognizes and has successfully bargained with university researchers and graduate student unions.

These scholars work hard. Their contributions to the University, to the nation, and, indeed, to the world can be invaluable.

After 18 months of talks, these scholars deserve a contract.

After 18 months of talks, these scholars deserve a say over the terms and conditions under which they work, day in and day out. Today, we will hear from witnesses involved in the current negotiations, from witnesses with experience in past negotiations, and from experts on the broader policy issues of first-contract negotiations.

And, while this hearing comes in the context of an ongoing dispute, I want to emphasize that we are here today to learn and understand the issues, not to mediate them. I would like to thank Congresswoman Barbara Lee for requesting this hearing on an important topic in her district. I am glad that you and Congresswoman Woolsey have joined me today.

Finally, I thank the witnesses for taking time out of their schedule to be here. I look forward to everyone's testimony.

Ms. WOOLSEY. Thank you, Mr. Chairman.

Thank you for holding this hearing on this very difficult problem that has been posed by the first contract negotiations under current law. We have a lot to learn about the situation in general, but also using what is going on right here in our own region as a good test case.

This issue is important to the entire Bay Area; there is no question about it. In fact, we have together and individually met with and contacted those involved in the first contract negotiations here in our area. I mean, we are not taking this lightly. We know it is important.

It has been 18 months since negotiations began for our first contract between the University of California and the postdoctoral fellows, which are represented by UAW.

The California Delegation has been urging Mark Yudof, the President of the University of California, to reach a first contract since May of 2009. When President Yudof and I spoke last summer, I urged him to negotiate a contract as soon as possible. I told him I had confidence that he would do that because the entire situation is just causing disruption instead of going ahead with the important work of the University and our postdocs.

So, 10 months later it certainly appears that this is not happening. And I would worry that the University is dragging its feet.

About 10 percent of all postdoctoral scholars in the United States work at the University of California; 10 percent. And the research work they do has helped this University become a world renown research institution. These 6,000 scholars have helped bring millions and millions of dollars in Federal grants and contracts to the University of California from such agencies as the National Institute of Health, the National Science Foundation and the Department of Energy, among others. And even though the postdocs pay for themselves through these grants, they are underpaid by universities. That is why they have banded together in the first place.

We certainly appreciate the budget constraints the University is under. But I do not think it can be blamed on the state cutbacks since it is a separate situation. In the 18 months it has been negotiating the first contract it has not made a convincing case that University funds are even impacted by the wages and benefits of postdocs.

Mr. Duckett is here on behalf of the University. And I am going to be very, very interested in what you have to say, Mr. Duckett, about the relationship between the University's budget and re-

search funds. I think we need to know where one starts and the other ends.

I am looking forward to hearing all of you witnesses. You have a lot for us to talk about, and we will learn a lot from you. And we have to get involved; we are. We need to evolve this first contract negotiation situation so it actually it becomes meaningful instead of meaningless.

Thank you, Mr. Chairman.

[The statement of Ms. Woolsey follows:]

**Prepared Statement of Hon. Lynn C. Woolsey, a Representative in
Congress From the State of California**

Thank you Chairman Miller for holding this hearing on the difficulties posed by first contract negotiations under current law.

It has been eighteen (18) months since negotiations began for a first contract between the University of California and the postdoctoral fellows, represented by the United Auto Workers (UAW).

The California delegation has been urging Mark Yudof, president of the University of California, to reach a first contract since May of 2009.

When President Yudof and I spoke last summer, I urged him to negotiate a contract as soon as possible.

Some ten months later, it certainly appears that the university is dragging its feet.

About ten percent of all postdoctoral scholars in the United States work at the University of California, and the research work they do has helped the university become a world-renowned research institution.

These 6,000 scholars have helped bring millions and millions of dollars in Federal grants and contracts to the University of California from such agencies as the National Institutes of Health, the National Science Foundation, and the Department of Energy.

And even though these post-docs pay for themselves through these grants, they are underpaid by the university—which is why they banded together in the first place.

We all appreciate the budget constraints the university is under due to state cut-backs, but in the eighteen months it has been negotiating this first contract, it has not made a convincing case that university funds are even impacted by the wages and benefits of the post-docs.

Dwaine Duckett is here on behalf of the university, and I will be very interested in hearing what he has to say about the relationship between the university's budget and research funds.

I am looking forward to hearing the testimony of our other witnesses as well: it is time to shine a light on the problems that have evolved with regard to first contract negotiations.

Chairman MILLER OF CALIFORNIA. Thank you.

As I noted earlier, we are holding this hearing on Congresswoman Barbara Lee's District. And I want to thank her for joining us. Her participation, it is not just this hearing but she has been involved in this issue for a considerable period of time. And I would like now without objection to recognize Congresswoman Lee for opening remarks.

Ms. LEE. Thank you very much. Thank all of you for being here. And thank you first, Chairman Miller, for your continued support for not only workers, but for students and families that has provided really for the real health care reform, for our student loan overhauls, and also for equal pay for equal work. So I appreciate your hosting this hearing here. And thank you for your leadership on these issues, and so many issues.

Also let me thank my good friend and colleague, Congresswoman Lynn Woolsey who Chairs the Subcommittee on Workforce Protec-

tions. And thank you for being here and for your hard work and your leadership each and every day.

As you know, Congresswoman Woolsey continues to inspire us all with her unwavering support for economic justice, security, global peace and worker rights and uses her role as Chair of this Subcommittee for these issues.

I want to thank all of you, all of our witnesses, for being here today.

And I want to thank, again, all of you for coming and not only today, but for your diligent work and vision, and commitment to workers rights and to equal pay each and every day.

This is one of the most ethnic, diverse and most progressive Districts in the country. And I am proud to have you here, Chairman Miller and Chairwoman Woolsey, to see the richness of the 9th Congressional District.

I am privileged to serve on the Appropriations Committee. I am on the Labor Health and Human Services and Education Subcommittee of the Committee on Appropriations.

On this Subcommittee, I have been able to push for what I see as equal rights under the law and worker protection, and fair wages and equal pay. And so as institutions bring their budget requests to this Subcommittee, that is how I view these requests. This is one of the prisms upon which I look at these budget requests.

So the ability for workers to have a voice in their wages, benefits and engagement with management as well as employers to be able to maintain fair labor practices without being pushed out of business, this is extremely important as a member of the Appropriations Committee. It is this fine balance that I believe makes the collective bargaining process work so well.

Now given our current financial climate, I believe that we must be even more steadfast in pushing for a living wage for all Americans. I just believe that. I have worked to address issues such as higher wages and benefits, modern whistleblower protections and to push for the passage of the Employee Free Choice Act, thanks to Chairman Miller and Chairwoman Woolsey. And I tell you, I have to say that I am disappointed to learn that these negotiations continue to drag out for such a long period of time.

Over the years we have fought to protect the rights of employees to organize, bargain collectively and to engage in other legally protected activity, and the right to organize a union.

The right to organize is not limited to Federal workers or the automobile industry. It is supposed to be open and available to those who fall under the protection of the Public Employment Relations Board as well. And so these scholars, they played by the rules. They receive, if you ask me, very low wages for the important work that they do. And they should be treated fairly.

I am a proud alumnus of the University of California. And for the life of me, I really do not understand why my alma mater is dragging its feet. And so I look forward to the hearing today.

Thank you very much for being here. And I look forward to the witnesses presenting their testimony.

Thank you again.

Chairman MILLER OF CALIFORNIA. Thank you. Thank you very much, Barbara.

I am going to introduce the witnesses in a moment. But first, I just want to say that this is an official hearing of the Education and Labor Committee, and we are going to conduct it in the manner in which we ordinarily conduct Committees. That is, you may hear things that you agree or disagree with, and that is fine. But we ask that the hearings not be disrupted.

I also want to encourage people who are here, many of you are involved in this issue, many of you have experienced it from both sides. And there will be facts stated and positions stated; if you have some expertise, you want to make that available to the Education and Labor Committee, the record will be held open for emails, or for letters, or however you want to send it, in what form you want to send it to the Education and Labor Committee. And we will go about that after the hearing.

So, thank you again for your attendance and your participation, and your interest.

Our witnesses this morning, we will begin with Dr. Ludmila Tyler, who is employed as a postdoctorate researcher at University of California at Berkeley since the fall of 2006. Dr. Tyler earned her PhD in biology from Duke University.

Mr. Mike Miller is the international representative of the United Auto Workers and is responsible for working with local unions throughout Region V of the United Auto Workers. Mr. Miller currently serves as the Chief Union Negotiator for the Postdoctoral Scholar Bargaining Unit at the University of California at Berkeley.

Mr. Dwaine Duckett is the Vice President for Human Resources at the University of California at Berkeley. Prior to his tenure at UC Berkeley, Mr. Duckett was Vice President for Human Resources Heinz North America and at AT&T Cingular Wireless.

The Honorable John Burton today is before us as one of California's most experienced legislative leaders. Congressman Burton served as a State Assembly member, member of the U.S. Congress and President Pro Tempore of the California State Senate and currently Chairs the California Democratic Party, which makes it difficult for us on this side of the agenda to know whether we call him Senator, Assemblyman, Congressman or Chairman. But anyway, thank you for your service to the State.

Mr. Bradley W. Kampas is a partner of the San Francisco office of Jackson Lewis. Mr. Kampas practices labor and employment law representing and advising employers on labor relations.

And Dr. John-Paul Ferguson is Assistant Professor of Organizational Behavior at Stanford University Graduate School of Business. He is an economic sociologist and has written extensively about labor law and trade union formation.

Dr. Ferguson, welcome to this side of the Bay.

So welcome, and again thank you for your time and your expertise.

We have a lighting system in this Committee on those little boxes before you on the table. When you begin your testimony, a green light will go on. You will have five minutes for your testimony. After four minutes, one minute, an amber light will go on

and we suggest that you consider wrapping up your testimony. We do, however, want you to finish in a manner that you deem coherent and making your final points as you do wrap up. Then there will be a red light and we will ask that you stop your testimony so we can make sure that we have time, not only to hear from all the witnesses but for the questions from the members of the panel.

Dr. Tyler, we will begin with you. Welcome, and thank you so much for being here.

STATEMENT OF DR. LUDMILA TYLER, POSTDOCTORAL RESEARCHER, PLANT AND MICROBIAL BIOLOGY DEPARTMENT, UNIVERSITY OF CALIFORNIA AT BERKELEY

Ms. TYLER. So, good morning, Chairman Miller—

Chairman MILLER OF CALIFORNIA. I think we are going to ask you to pull that microphone a little closer to you, if you can.

Ms. TYLER. Certainly. If you cannot hear me at any point, just say so.

Chairman MILLER OF CALIFORNIA. Thank you.

Ms. TYLER. So, Chairman Miller, Congresswoman Woolsey, Congresswoman Lee, thank you very much for holding this hearing and inviting me to testify.

My name is Ludmila Tyler. I am a postdoctoral researcher in Plant and Microbial Biology at UC Berkeley. My research focuses on improving plants used to make biofuels. And I am really excited about my work and the chance it gives me to contribute to the development of green energy.

I have been a postdoc at UC Berkeley since the fall of 2006. My colleagues and I are dedicated to our work and we are committed to being part of the University community.

We found it necessary to unionize in order to improve our professional lives so that we can better support ourselves and our families. Specifically, we hope to achieve significant, regular and transparent salary increases, longer and more stable appointments, improved health benefits and more family-friendly policies.

I will try to explain with a few personal examples why these changes are so critically important.

I have two bachelor's degrees, a Duke University PhD, and three-and-a-half years of experience beyond the PhD. My current salary is \$37,400 a year. That is the minimum of the UC postdoc pay scale in spite of my years of experience.

Those of you who live in the Bay Area will appreciate it is really hard to cover your basic expenses with \$37,000 a year. That challenge grows when you have a child. I have an 18 month old son, and I do not want my scientific career to be a disadvantage for him.

As a postdoc, I have had appointments of nine months, 11 months, two months, another nine months and now finally 12 months. The short duration of these appointments creates tremendous insecurity in my life. I can never predict whether I am going to have a job in a few month's time.

In fact, after less than two years at Berkeley, I unexpectedly lost my job. That was a shock because about a year after I started working at UC, my supervisor approved a pay increase for me. A pay raise in my department after one year is usually awarded for

outstanding job performance. Several months later my supervisor stated very clearly that there was at least 18 more months of funding for my position. And so we discussed long term project plans.

I was hesitant to tell my employer that I was pregnant, but given the positive evaluation and the assurance about funding, I made the announcement. Shortly afterwards, my supervisor told me that there had been a change. There was no longer funding for my position. She assured me that it had nothing to do with my performance, there was simply no longer funding for me.

So, I immediately tried to find out what my options were. What was going to happen to my health insurance, things like that. And when I explained the situation to a Berkeley administrator, his response was "oh, Lord." And then he said "You should focus on finding another job. Don't cause trouble."

Fortunately, I did find another job. Another lab hired me as a postdoc at UC, but my time off disappeared. And the week I got home from the hospital after having my son, it was an emergency delivery, the University sent me an email and said "Your sick leave is drastically reduced. Please plan accordingly."

I was able to fight that and get my sick leave back. The time off just disappeared. And so did a significant portion of my pay.

It is important to note that this statement is not about my previous supervisor, or my department, or even about me. These issues of low pay, job insecurity, poor benefits and a lack of family-friendly policies affect all UC postdocs and they are forcing us to ask: Can I afford to continue along this career path? Will I be able to support myself and my family?

So a first contract will not be a magic fix, I think we all appreciate that. But it will be a concrete step in the right direction.

So, with that I will say thank you for holding this hearing. Thank you for your interest in UC postdocs. And I would love to see the University of California, which has had a first class reputation, live up to that reputation.

[The statement of Dr. Tyler follows:]

**Prepared Statement of Ludmila Tyler, Ph.D.,
Postdoctoral Researcher, University of California, Berkeley**

Good morning Chairman Miller, Congresswoman Lee and Congresswoman Woolsey. Thank you for holding this hearing and for inviting me to testify. My name is Ludmila Tyler. I am a postdoctoral researcher in the Plant and Microbial Biology Department at UC Berkeley. My research focuses on a grass species, with the goal of improving plants used to make biofuels. I am excited about my work and the opportunity to contribute to the development of green energy.

I have been a postdoctoral researcher at UC Berkeley since the fall of 2006. My colleagues and I are dedicated to our work and committed to being part of the University community. We have found it necessary to unionize in order to improve our working conditions and to create more stability in our postdoctoral appointments. Specifically, we hope to achieve significant, regular, and transparent salary increases, so that we can support ourselves and our families; longer and more stable appointments, to ensure job security for more than a few months at a time; improved health benefits for ourselves and our families; and more family-friendly policies such as better child-bearing, parental and family leaves. I will try to explain, with examples from my own experience, why these changes are critically important to postdocs.

I have two Bachelor's degrees, a Duke University Ph.D., and three-and-a-half years of experience beyond the Ph.D. My current salary is \$37,400 per year. Although I have been a postdoc at UC Berkeley for three-and-a-half years, my salary only meets the minimum of the UC postdoctoral pay scale. Especially in places like the Bay area, where the cost of living is high, it is challenging to cover basic ex-

penses with \$37,400 a year. The challenge grows when one is providing for a child. I have an 18-month-old son, and I do not want my pursuit of a career in science to be a disadvantage for him.

As a postdoc, I have had appointments of nine months, eleven months, two months, another nine months, and now—finally—twelve months. The short-term nature of these appointments creates tremendous insecurity in my life, because I can never predict with confidence whether I will have a job in a few months' time.

In fact, after less than two years at Berkeley, I unexpectedly lost my job. Approximately a year after I started my first postdoctoral position, my supervisor approved a pay increase for me; in my department, a pay raise of this type, i.e. after one year instead of two, is generally reserved for outstanding job performance. Several months later, my supervisor stated that my position would be funded for at least another 18 months, and we discussed correspondingly long-term project plans. I was hesitant to tell my employer that I was pregnant, but given her positive evaluation of my work and her assurance concerning funding, I made the announcement. Shortly thereafter, my supervisor told me that there had been a change: there was no longer funding for my position; it would end on the last day of the month (June 30, 2008). When pressed, my supervisor assured me that the decision had nothing to do with my performance, which she maintained was excellent. She said that there was simply no longer funding for me.

I immediately attempted to find out what my options were—for example, what would happen to my health insurance. When I explained my situation to an administrator at Berkeley, his response was first “Oh, lord” and then “You should focus on finding another job. Don't cause trouble. The scientific community is very small, and you're likely to regret it if you burn your bridges.”

Fortunately, the head of another lab hired me as a postdoc, but my accumulated time off disappeared and my sick days were drastically reduced. The university informed me of the reduction in sick days the week I came home from the hospital and instructed me to “please plan accordingly.” I was able to fight to have the sick days reinstated but lost several weeks of time off. Because I could not use the time off I had previously saved to cover part of my maternity leave, I lost a significant portion of my pay. Changing postdoctoral positions also disrupted my health insurance coverage, causing additional stress.

When I returned to work after maternity leave, I wanted to continue feeding my infant son but, to do so, needed access to a private room. I was given a dusty, vacant office with a defective door lock and a glass wall opening into the main administrative office. I had to clean the unused space myself, arrange to have the lock fixed, and buy a curtain to cover the glass.

It is important to note that this statement is not about any one individual. It is not about my previous supervisor (to whom I wish only the best) or about a particular administrator or department. It is not even about me. I am here today because the issues of low pay, job insecurity, poor benefits, and a lack of family-friendly policies affect all UC postdocs. The hardships created by these conditions force far too many of us to ask: “Can I afford to continue on this career path? Will I be able to support myself? Will I be able to support my family?” Each month that UC does not agree to a fair contract with the union, these questions persist.

Postdocs are some of the nation's best-educated workers. Yet, one of the biggest leaks in the scientific pipeline is at the postdoctoral level, particularly for women. At a time when the US is trying to improve its global competitiveness, can we really afford to have that leak?

Settling a first union contract will not solve all the problems experienced by postdocs. It is not a magic fix. I am, however, hopeful that a union-negotiated contract will prevent many of the regrettable circumstances which currently confront UC postdocs and will also provide a mechanism for addressing problems when they do occur. A fair contract will be a significant, concrete step in the right direction.

Thank you very much for taking an interest in University of California postdocs and our efforts to improve our professional lives by negotiating a collective bargaining agreement.

Chairman MILLER OF CALIFORNIA. Thank you very much.
Mr. Miller.

**STATEMENT OF MICHAEL MILLER, INTERNATIONAL
REPRESENTATIVE INTERNATIONAL UNION, UAW**

Mr. MILLER. Thank you. Good morning, Chairman Miller, Congresswoman Lee and Congressman Woolsey.

Thank you for holding this hearing. Thank you for supporting scientific research, the University of California and postdoctoral scholars.

My name is Mike Miller. I have been an international representative with the UAW for ten years. I am currently Chief Union Negotiator and bargaining a first contract covering 6,000 postdoctoral scholars throughout the UC system.

I am also a proud alum of UCLA, where I earned a master's degree in political science, worked as a teaching assistant and helped organize the union for 12,000 teaching assistants, readers and tutors at UC statewide.

The Postdoctoral Scholar bargaining unit was certified in November of 2008. Since then, bargaining has dragged on 56 days without settling a contract that as we have heard in Ludmila's previous testimony, would greatly improve the work lives of such critical and deserving employees.

Based on my experience negotiating contracts with UC, University of Washington, and the California State University, 56 days over 18 months greatly exceeds the amount of time needed to settle a first contract if the parties want to do so. The evidence here, however, suggests that UC does not want to settle the postdoc contract.

UC's chief negotiator, Gayle Saxton, and several administrators in the UC Office of the President, have repeatedly maintained that the California budget crisis prevents UC from agreeing to reasonable salary increases and health benefit improvements for postdoctoral scholars. At least three sets of facts, however, undermine UC's position:

First, over 90 percent of postdoctoral scholars are compensated from research contracts and grants that come from federal sources allocated by Congress, not state general funds. UC's revenue from research contracts and grants is growing significantly, increasing 113 percent since 1997, including a 4.3 percent jump at the height of the state budget crises. These funds, moreover, may not legally be used to cover losses in state funding and show signs of growing even more in the future.

Second, in February of this year UC agreed to a contract with another union representing 10,000 researchers and technicians who work side-by-side with and are funded by the very same contracts and grants as postdoctoral scholars. This contract includes significant compensation increases in each of the next three years.

Third, in addition to using the California budget crisis as pretext for not settling the postdoc contract, Ms. Saxton also contends that the University is philosophically opposed to providing experience-based pay increases to postdoctoral scholars because they are academic employees who, according to UC, should only be eligible for merit not experience-based raises. Yet UC provides experience-based salary increases to thousands of resident physician whom it also classifies as academic employees.

Moreover, because of the high rate of turnover among postdoctoral scholars, who cannot work in this job more than five years, establishing a system of experience-based step increases would represent a one time, relatively low cost to UC. As UC's own records indicate, 72 percent of postdoctoral scholars already receive a salary or stipend which based on their years of experience is at or above the rates we are proposing.

While the union and UC settled nearly 30 issues in the first nine months of bargaining, we have not resolved a single issue since October 2009. This hold up is attributable to UC's delays in responding to the off the record proposals we made in October and what UC admitted have been the unreasonable nature of their responses.

UC has repeatedly delayed providing information we have requested, and then used its own failure to do so as an excuse to delay bargaining.

The claim that one of the most sophisticated research universities in the world lacks the information technology to track its employees is as revealing of UC's motivation not to reach a contract, as it is ridiculous. Such a claim is even more revealing, however, when viewed in the context of UC's efforts to encourage decertification of the UAW. On at least three campuses the UC administration has disseminated a website promoting decertification of the UAW and encouraged postdoctoral scholars to review it.

Moreover, in December of 2009 Ms. Saxton provided a list of postdoctoral scholars to an individual seeking to decertify the union. While UC is more interested in decertification than postdoctoral scholars are, these actions further demonstrate UC's desire to delay or even avoid reaching an agreement on a contract.

In conclusion, I would like to point out that while the first UAW contract for teaching assistants at UC only settled after unfair labor practice charges by the union, strikes, intervention by the Governor and legislative leaders, and the personal involvement of the UC President, the UAW and UC did establish a cooperative and productive bargaining relationship for a number of years after that. Rather than building on that relationship and bargaining constructively toward an agreement for postdoctoral scholars, however, UC appears intent on delaying and derailing bargaining to reach this historic first contract.

UC will hopefully change course, avoid such unnecessary and unproductive acrimony and settle this contract swiftly and equitably.

Thank you again for the opportunity to testify.

[The statement of Mr. Miller follows:]

**Prepared Statement of Michael Miller, International Representative
International Union, UAW**

Good morning Chairman Miller, Congresswoman Lee and Congresswoman Woolsey. Thank you for holding this hearing. Thank you for supporting scientific research, the University of California and Postdoctoral Scholars.¹ My name is Mike Miller. I have been an International Representative with the UAW for ten years. I am currently chief union negotiator in bargaining a first contract covering 6,000 Postdoctoral Scholars throughout the UC system. I am also a proud alumnus of UCLA where I earned a Masters degree in Political Science, worked as a Teaching Assistant and helped organize the union for 12,000 Teaching Assistants, Readers and Tutors at UC statewide.

The Postdoctoral Scholar bargaining unit was certified in November 2008. Since then, bargaining has dragged on 56 days without settling a contract that, as we

have heard in previous testimony, would greatly improve the work lives of such critical and deserving employees.

Several bargaining issues are still pending. Please see Exhibit D. Unfortunately, no issues have been resolved since October 2009.

Based on my experience negotiating contracts with UC, University of Washington, and the California State University System, 56 days over 18 months greatly exceeds the amount of time needed to settle a first contract if the parties want to do so.

Negotiations for a first contract for Teaching Assistants at UC took only nine months in 1999-2000 during which the Union filed dozens of unfair labor practice charges and struck and the Governor as well as Legislative leaders intervened in bargaining leading to the direct involvement of the UC President in settlement; the first contract for Teaching Assistants at the CSU system took 6 months during 2004-2005; and the first contract for Teaching and Research Assistants at the University of Washington took only seven weeks in 2004.

The evidence in the case of Postdoctoral Scholars' bargaining, however, suggests that UC does not want to settle the contract. This is particularly unsettling since, after a great deal of struggle and rancor to negotiate the first Teaching Assistant contract ten years ago, we established a cooperative and productive bargaining relationship with UC for a number of years. Rather than building on that relationship and bargaining constructively toward an agreement for Postdoctoral Scholars, UC appears to be trying to delay and derail bargaining.

UC Using State Budget Crisis as Pretext to Deny Increases

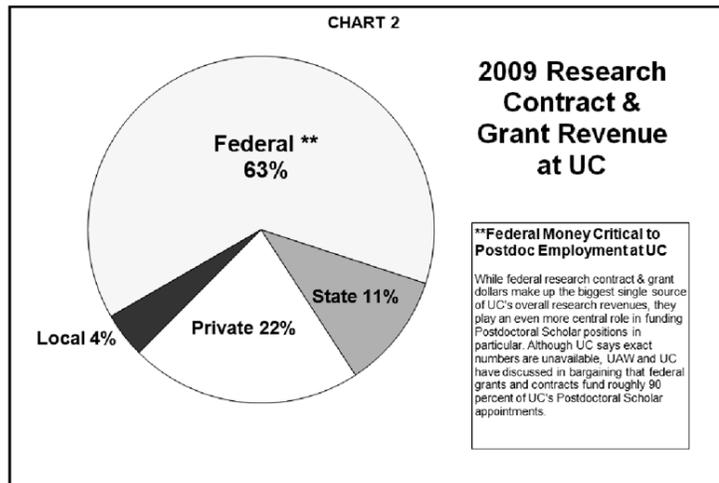
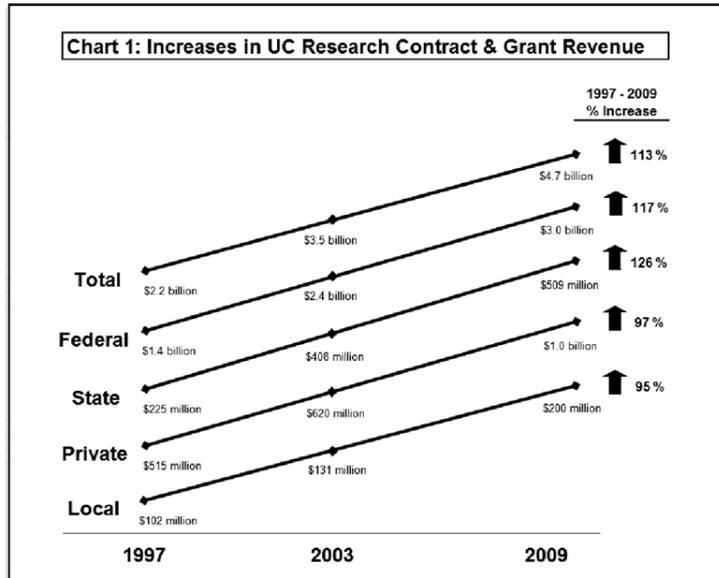
UC's chief negotiator, Gayle Saxton, and several administrators in the UC Office of the President, have repeatedly maintained that the California state budget crisis prevents UC from agreeing to increased salaries or improved health benefits for Postdoctoral Scholars. At least three sets of facts undermine UC's position.

Postdoctoral Scholars are Paid from Expanding Research Revenue, not Shrinking State General Funds

Over 90 percent of Postdoctoral Scholars are compensated from research contracts and grants that come from federal sources allocated by Congress, not state general funds.² Moreover, according to UC's budget office: "UC cannot legally transfer funds from restricted sources, such as state and federal research grants, and use the money to make up for cuts in state funding."³

These grant and contract revenues that fund Postdoctoral Scholar salaries and benefits have also been expanding dramatically in recent years. According to UC's audited financial statements, the University's overall research contract and grant revenue—including federal, state, local and private sources—has more than doubled in recent years, growing from \$2.2 billion in fiscal year 1997 to \$4.7 billion in 2009.⁴ Even in the midst of California's current budget crisis, UC's overall research contract and grant revenue increased 4.3 percent from 2008 to 2009—including a 3.4 percent expansion of state research funds.⁵ (See Chart 1)

Moreover, this increase in research contract and grant revenue only shows signs of accelerating in the future. Much of this increase will come from federal sources, especially given the recent re-prioritization of science under the Obama administration. The federal government (through agencies such as NIH, NSF, DOE, DOD, and NASA) provides by far the largest single portion of UC's research funding, contributing roughly two-thirds of the University's overall annual research contract and grant dollars, and is especially important to Postdoctoral Scholar positions. (See Chart 2) While federal sources are the largest source of UC's contract and grant revenues, the fact remains that all categories of research contract and grant revenues at UC—including from the state of California—have grown significantly in recent years and show no sign of waning.



In fact, a number of the UC campuses have been touting their unprecedented recent growth in contract and grant revenue. UC Davis recently announced, for example, its expectation that it would set a record this year for research revenues and underscored the significance of that fact in the context of the current state budget crisis. "Despite the difficult budget situation, UC Davis is on a steep upward curve—doubling our research income in less than a decade," says UC Davis Chancellor Linda Katehi. Similarly, UCLA recently announced that its research operations were bringing in a record-setting \$4 million per day so far in fiscal year 2010.⁶

This growth in contract and grant revenue at UC should only make easier UC's existing capacity to provide economic improvements for Postdoctoral Scholars. "The University has the capacity within its research budgets to agree to fair salary increases," notes Norman Ellstrand, Professor of Genetics at the University of California, Riverside and recent recipient of a Guggenheim Fellowship. "Funding agen-

cies, as well as the University administrators who oversee grant proposals, expect that grant budgets include salary increases each year and budget accordingly. Given these facts, and the tremendous value Postdoctoral Scholars bring to the institution, the University's bargaining team should be able to reach an agreement with fair wage increases and benefits quickly."⁷

UC Has Agreed to Substantial Compensation Increases with Similar Employees

Second, in February of this year, UC agreed to a contract with another union representing nearly 10,000 Researchers and Technicians on a contract that includes significant compensation increases in each of the next three years.⁸

In the agreement with UPTC-CWA, UC will provide Staff Research Associates and Technicians a \$1,000 lump sum for the 2009-10 year, and combined general and step increases of 4.5 percent, 5 percent, and 5 percent in fiscal years 2010-11, 2011-12, and 2012-13, respectively, a 15.2 percent compound increase.⁹ Not only do these researchers and technicians work side-by-side with Postdoctoral Scholars, but they are also funded by the same contracts and grants.

UC has also agreed to provide substantial increases to Resident Physicians over the next few years. Resident Physicians will receive combined general and step increases of 6.0 percent to 7.9 percent in each fiscal year, 2009-10, 2010-11, and 2011-12.¹⁰

UC "Philosophically Opposed" to Experience-Based Pay Increases for Postdoctoral Scholars

In addition to using the California budget crisis as pretext for not settling the Postdoctoral Scholar contract, Ms. Saxton contends that the University is "philosophically opposed" to providing experience-based pay increases to Postdoctoral Scholars because they are "academic" employees who, according to UC, should only be eligible for merit-based raises. Yet, UC pays thousands of Resident Physicians, whom it also classifies as academic employees and who have similar levels of education and training, experience-based salary increases every year.

Additionally, the NIH, the agency providing the single largest source of federal funding for research grants to UC sees fit to reward its own NIH Postdoctoral Fellows with experience-based step increases. The NIH Kirchstein program, one of the most academically prestigious in the world, ensures that Postdoctoral Scholars on this fellowship receive annual experience-based step increases to recognize and reward their experience level. Pursuant to NIH regulations, UC already applies these increases to the 400-500 Kirchstein Postdoctoral Fellows who are part of the UAW bargaining unit.¹¹ A number of departments and labs at UC also follow this standard already for non-NIH Kirchstein Postdoctoral Scholars to track the national standard.¹²

Moreover, because of the high rate of turnover among Postdoctoral Scholars (who cannot work in this job more than five years), establishing a system of experience-based step increases would represent a one-time, relatively-low cost to UC. As UC's own records indicate, 72 percent of Postdoctoral Scholars already receive a salary or stipend at or above the rate we are proposing, based on years of experience.¹³

Delaying Bargaining by Hiding Behind UC's Own Alleged Inability to Provide Information

UC has repeatedly delayed providing information we have requested and then used its own failure to provide the information as an excuse to delay bargaining.

Relevant to the outstanding bargaining topics, we have requested information regarding historical salary/stipend rates, source of stipend, salary/stipend increases and the reasons for those increases, years worked as a Postdoctoral Scholar, the number of Postdoctoral Scholars laid off in recent years, examples of and information regarding grants and contracts, health insurance premium information for Fellows and Paid Directs. As of yet, we have only received a tiny fraction of the information requested.¹⁴

The claim that one of the most sophisticated research universities in the world lacks the information technology to track its employees is as revealing of UC's motivation not to reach agreement as it is ridiculous.

As an example, on April 15, 2010, UC for the first time asserted that there were alleged restrictions from funding sources of a small fraction of Postdoctoral Scholars—those in the Postdoctoral Scholars—Fellow and Postdoctoral Scholars—Paid Direct titles—that prevent UC from agreeing to salary increases and health benefit improvements in 2010 as well as any salary increases and health benefit improvements in any subsequent year of a contract.

When pressed for the number of Postdoctoral Scholars whose funding source may pose such a problem or the cost of the alleged liability for UC, Ms. Saxton stated that she does not and cannot know because UC does not keep track of this informa-

tion in any centralized way. Ms. Saxton also has not produced a single agreement with a funding agency that contains the restrictions she alleges prevent increases in salary and benefits. But, most ridiculous of all and clearly reflecting their strategy of delay, when UC proposed the next day that we postpone bargaining salaries and benefits for future years to October 2010, they also proposed a one-time across-the-board 1.5 percent increase for all Postdoctoral Scholars in July 2010—completely contrary to Ms. Saxton’s claim about restrictions on salary increases. This contradictory position suggests very strongly that UC’s alleged inability to provide information is simply pretext for not reaching agreement for as long as possible.

UC Wasting Valuable Public Resources Avoiding a Contract

The use of University resources—whether from the \$825 million UC received last year in Facilities and Administration costs from grants and contracts, general funds, or tuition revenues—to engage in these delays has not gone unnoticed. “We have been watching these negotiations for roughly 15 months now and are disappointed to see UC once again continuing its pattern of dragging out negotiations for as long as possible,” says Victor Sanchez, President of the University of California Student Association, representing over 200,000 students across the UC system, “especially since some part of our rapidly increasing tuition and fees goes to pay the administrators in charge of these negotiations.”¹⁵

Rather than settle a multi-year contract with reasonable salary increases and benefits each year, UC is proposing to bargain over salary and benefits in October 2010 and each subsequent October if no multi-year agreement can be reached. Unnecessarily prolonged bargaining wastes resources.

Attempting to Support Decertification Effort

On at least three campuses, the UC administration has disseminated a website promoting decertification of the UAW and encouraged Postdoctoral Scholars to review it. Moreover, in December 2009, Ms. Saxton provided a list of Postdoctoral Scholars to an individual seeking to decertify the Union.

On December 10, 2009, in a UC San Francisco Academic Senate Graduate Council meeting at which Postdoctoral Scholars were present, a University administrator discussed positively as an “item of interest” and provided the address for the website advocating decertification of the UAW while giving a report on the ongoing negotiations. A University bargaining team representative was in attendance and made no efforts to stop the administrator from providing this report and the website.

While UC is clearly more interested in decertification than are Postdoctoral Scholars, these actions further demonstrate UC’s desire to delay reaching agreement on a contract.

Conclusion

From the evidence presented emerges a pattern of delay and obstruction by UC with the apparent goal of stalling and/or avoiding all together a collective bargaining agreement that would significantly improve the lives of the 6,000 Postdoctoral Scholars who make UC such a great research University. The first Teaching Assistant contract and the most recent Researcher and Technician contract only settled after unfair labor practices and strikes and we’d like to avoid that. UC will hopefully change this pattern, avoid such unnecessary and unproductive acrimony and settle this contract swiftly and equitably.

EXHIBIT A: TESTIMONY OF NORMAN ELLSTRAND

I am Norman Ellstrand, Professor of Genetics at the University of California, Riverside, and recent recipient of a Guggenheim Fellowship. I have been a UC faculty member for three decades and have employed a several Postdoctorals over those years, in addition to other researchers and graduate students.

Postdocs have been critical to my research projects. The Postdoctoral scientists that I have hired have conducted research that has lead to many of the key publications of my career. And many of those scientists have gone on to become research leaders elsewhere. For example, my first three postdocs are now faculty at University of New Mexico, University of Pittsburgh, and University of Washington at Seattle.

Thus, I am well-aware that postdocs play a crucial role both in maintaining UC’s reputation as a world leader in innovative research and in generating the science that propels UC’s continually expanding research budget. Postdocs not only perform the research for existing grant projects, but they also do much of the work in developing new projects and grant proposals.

The University has the capacity within its research budgets to agree to fair salary increases. Funding agencies, as well as the University administrators who oversee grant proposals, expect that grant budgets include salary increases each year and budget accordingly. Given these facts, and the tremendous value Postdoctoral Scholars bring to the institution, the University's bargaining team should be able to reach an agreement with fair wage increases and benefits quickly.

EXHIBIT B: TESTIMONY OF ROBERT DUDLEY

My name is Robert Dudley. I am a Professor of Integrative Biology at the University of California, Berkeley. I have been at UC Berkeley since 2003. My research focuses on the mechanics and evolution of animal flight, particularly in insects and hummingbirds.

The Berkeley campus and UC generally are the envy of the world when it comes to higher education and scientific research. Postdocs are a critical component of our world-renowned research programs.

As faculty, it is in our own best interests to advocate on behalf of Postdocs. Improving working conditions for Postdocs enhances our overall research capacity and helps us to attract and retain the scientific prowess necessary to maintain our academic reputation.

What is also at stake is the preeminent position of the United States in scientific progress and technological innovation. Post-WWII US economic and scientific progress has derived substantially from our ability to attract the best workers and researchers from around the nation and the globe. To this end, improved postdoctoral support must be an integral component of ongoing efforts to maintain the nation's scientific and engineering infrastructure.

EXHIBIT C: TESTIMONY OF VICTOR SANCHEZ

My name is Victor Sanchez. I am the President of the University of California Student Association, representing over 200,000 students across the UC system. We have been watching these negotiations for roughly 15 months now and are disappointed to see UC once again continuing its pattern of dragging out negotiations for as long as possible, especially since some part of our rapidly increasing tuition and fees goes to pay the administrators in charge of these negotiations. Postdocs do much of the work that makes UC such a premiere research institution and, as such, they deserve a fair contract. The thousands of undergraduates who work in the labs on campus benefit tremendously from the supervision and mentoring of Postdocs. These undergraduates are the potential Postdocs of tomorrow, but watching how UC is approaching these negotiations will make many of them question whether or not to go into science as a career after graduating.

EXHIBIT D: OUTSTANDING BARGAINING TOPICS

| UAW PROPOSALS | UC PROPOSALS |
|---|---|
| <p>HEALTH INSURANCE Lower costs and improved coverage for healthcare</p> <ul style="list-style-type: none"> Maintain percent of premiums paid by Postdocs (like UC is doing for other staff plans at UC) and ensure paid coverage for all Postdocs; improve preventive coverage (which may well reduce UC's long term costs) and reduce annual out-of-pocket costs | <p>No Improvements to health insurance</p> <ul style="list-style-type: none"> Maintain benefits and premium structure for 2010 (meaning Fellows and Paid Directs have no guarantee of paid health insurance) Wait until October 2010 to negotiate health insurance benefits for future years |
| <p>SALARIES Salary increases consistent with funding agency standards</p> <ul style="list-style-type: none"> \$1,000 lump sum for 2009 General Range adjustment of 4 percent upon ratification and each October 1 after 2010 Experience-based increases based on NIH Kirchstein program | <p>Meaningful increases postponed</p> <ul style="list-style-type: none"> One-time 1.5 percent across-the-board increase in 2010 No experience-based increases Wait until October 2010 to negotiate any future increases |
| <p>APPOINTMENT LENGTH/SECURITY</p> <ul style="list-style-type: none"> Postdocs shall have 5-year appointments UC pays health insurance for six months before COBRA begins | <ul style="list-style-type: none"> Postdoc appointments will normally be one year COBRA begins at layoff |
| <p>NO STRIKES Postdocs have same rights as Teaching Assistants</p> | <p>Postdocs have fewer rights than Teaching Assistants</p> |

EXHIBIT D: OUTSTANDING BARGAINING TOPICS—Continued

UAW PROPOSALS

UC PROPOSALS

- Protect right of individual Postdocs to exercise their conscience in support of other employees' strikes
- Deny the right of individual Postdocs to exercise their conscience in support of other employees' strikes

EXHIBIT E

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
OFFICE OF THE GENERAL COUNSEL

ADD
FILE

SEP 09 2008



1111 Franklin Street, 8th Floor • Oakland, California 94607-5200 • (510) 987-9800 • FAX (510) 987-9757

Charles F. Robinson
VICE PRESIDENT AND GENERAL COUNSEL

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E-mail: lealie.vanhouten@ucop.edu

September 5, 2008

Regional Director Anita Martinez
Public Employment Relations Board
1330 Broadway, Suite 1532
Oakland, CA 94612-2514

Re: University Response to PRO/UAW Request for Recognition - PERB No. SF-RR-914-H

Dear Ms. Martinez:

This letter is the University of California's (the "University") response to the petition for representation, Case No. SF-RR-914-H, filed on July 1, 2008, by the Postdoctoral Researchers Organization/United Auto Workers ("PRO/UAW" or the "Union"). The University files this response pursuant to PERB Regulation 51080.

Pursuant to that Regulation, the University responds as follows:

Format B: Denial of Recognition

- (1) Name, address and telephone number of the employer, and name, address and telephone number of the employer agent to be contacted:

| | |
|--|--|
| <p>University Counsel Leslie L. Van Houten Office of the General Counsel Regents of the University of California 1111 Franklin Street, 8th Floor Oakland, CA 94607 (510) 987-9800</p> | <p>Executive Director Howard Pripas Labor Relations University of California Office of the President 300 Lakeside Drive Oakland, CA 94612 (510) 987-0196</p> |
|--|--|
- (2) Attach a copy of the request for recognition: (See attached);

Regional Director Anita Martinez
September 5, 2008
Page 2

- (3) **Reasons for Denial of Recognition:** The University denies the request for recognition on the grounds that the unit petitioned for is not appropriate.

I. **INTRODUCTION**

The PRO/UAW has petitioned for the following unit:

All Postdoctoral Scholars and Postdoctoral Fellows in title codes including but not limited to:

Postdoctoral Scholars - Employee (Title Code 3252);

Postdoctoral Scholars - Fellow (Title Code 3253);

Postgraduate Researcher - FY (Title Code 3240);

Postgraduate Researcher - AY State Funds (Title Code 3243);

Postgraduate Researcher - AY Extramural Funds (Title Code 3245); and

Visiting _____ - Postdoc (Title Code 3370)

in a statewide unit at all University of California campuses, research programs and units.

SHALL EXCLUDE:

Postdoctoral Scholars - Paid Direct; employees defined by HEERA as managerial, supervisory and/or confidential; student employees whose employment is contingent on their status as students; and all employees of Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory and Los Alamos National Laboratory.

The University objects to the unit on the grounds that one of the titles sought to be excluded, the Postdoctoral Scholar - Paid Direct, Title Code 3254 ("Paid Directs"), is properly within the unit. As will be shown below, the Paid Directs have a community of interest with the two petitioned

Regional Director Anita Martinez
 September 5, 2008
 Page 3

for titles, the Postdoctoral Scholars - Employee, Title Code 3252 ("Employees") and Postdoctoral Scholars - Fellow, Title Code 3253 ("Fellows").¹

It is not clear why the Union excluded the Paid Directs from the unit. This choice is particularly interesting because the Paid Directs are very similar to the Fellows as both groups of Postdoctoral Scholars receive their funding from outside agencies. In the case of the Fellows, the funds are funneled through the University, and the Fellows receive either a paycheck or a payment from accounts receivable depending on campus practice. Paid Directs receive their pay, as the name aptly suggests, directly from the funding agency. Additionally, the University urges PERB to take judicial notice of the representation petition filed by the Union in 2006, SF-RR-888-F. In that petition, the Union considered the Paid Directs to be appropriately within the unit.

The discussion below will establish that the exclusion of the Paid Directs from the unit is an artificial one and not based on sound policy or legal grounds.

II. THE EMPLOYEE POSTDOCTORAL SCHOLARS, THE FELLOW POSTDOCTORAL SCHOLARS, THE PAID DIRECT POSTDOCTORAL SCHOLARS

A. Policies

In July 2003, the University promulgated a new policy covering the Postdoctoral Scholars throughout the University. APM 390 states:

390-0 Policy

This policy defines and sets forth terms and conditions relating to the appointment of Postdoctoral Scholars. It applies to both (1) Postdoctoral Scholars who are employees of the University and (2) Postdoctoral Scholars who are appointed as fellows and are paid stipends by extramural agencies either directly or through the University.

The policy acknowledges that there are three different types of Postdoctoral Scholars and the difference is their source of funding. However, other than the source of funding and in some

¹ Please note that four of the petitioned for titles, 3370 (Visiting Postdoctoral Scholar) and 3240, 3243 and 3245 (Post Graduate Researchers) are being phased out and the titles will be eliminated in 2010. There are no incumbents in 3243 and 3245. No one new has been appointed to 3240 or 3370 since 2004. For purposes of this response, the University will refer to the petitioned for titles as only the Employee and Fellow Postdoctoral Scholar titles. However the University does not dispute that title code 3370 and 3240 belong in this unit with the understanding that those titles will be eliminated in 2010. (See APM 390, Transition Guidelines, No. 5.)

Regional Director Anita Martinez
 September 5, 2008
 Page 4

instances eligibility for certain benefits, all of their terms and conditions of employment are the same.²

390-8 Titles

The title of a Postdoctoral Scholar appointment is determined by the requirements of the funding agencies.

a. Postdoctoral Scholar – Employee

An appointment is made in the title "Postdoctoral Scholar – Employee" when (1) the agency funding the salary requires or permits the appointee to be an employee of the University, or (2) whenever General Funds, Opportunity Funds or other University discretionary funds are used to support the position.

b. Postdoctoral Scholar – Fellow

An appointment is made in the title "Postdoctoral Scholar – Fellow" when the Postdoctoral Scholar has been awarded a fellowship or traineeship for postdoctoral study by an extramural agency and the fellowship or traineeship is paid through a University account.

c. Postdoctoral Scholar – Paid Direct

An appointment is made in the title "Postdoctoral Scholar – Paid Direct" when the Postdoctoral Scholar has been awarded a fellowship or traineeship for postdoctoral study by an extramural agency and the agency pays the fellowship or traineeship directly to the Postdoctoral Scholar, rather than through the University. Such appointments shall have a "without-salary" status.

² All total there are approximately 5,500 Postdoctoral Scholars in these three titles. There are approximately 4,600 Employee Postdoctoral Scholars; approximately 600 Fellows and approximately 300 Paid Directs. Some of the Paid Directs have a dual appointment and hold an Employee Postdoctoral Scholar title as well. These employees are in both titles because it is the University's policy to ensure that all Postdoctoral Scholars receive the same pay. Thus, if a Paid Direct's stipend is not sufficient to meet the University's salary scale, the Paid Direct will receive the difference and be appointed to the Employee title at an appointment rate based on the salary differential. (See APM 390-184.)

Regional Director Anita Martinez
 September 5, 2008
 Page 5

- d. Postdoctoral Scholars may be assigned to more than one Postdoctoral Scholar title concurrently depending on University and extramural funding agency requirements.

Other than APM section 390-8, there are no sections of APM 390 that treat Paid Directs differently from Postdoctoral Fellows. There are policy distinctions between Postdoctoral Employees on the one hand and Postdoctoral Fellows and Paid Directs on the other, as follows:

390-18 Salary and Stipend

- e. The effective date of merit increases shall be established by the campus. Increases to "Postdoctoral Scholars - Fellow" and "Postdoctoral Scholars - Paid Direct" should be provided in accordance with the provisions of the extramural funding agency.

390-60 Sick Leave

- a. "Postdoctoral Scholars - Employee" are eligible for paid sick leave of up to twelve days per twelve-month appointment period. Unless the extramural funding agency has different sick-leave requirements, "Postdoctoral Scholars - Fellow" and "Postdoctoral Scholars - Paid Direct" are also eligible for paid sick leave of up to twelve days per twelve-month appointment period.
- b. For "Postdoctoral Scholars - Employee," unused sick leave shall be carried forward to subsequent Postdoctoral Scholar appointments. Unless the extramural funding agency has different requirements, the unused sick leave of "Postdoctoral Scholars - Fellow" and "Postdoctoral Scholars - Paid Direct" shall be carried forward to subsequent Postdoctoral Scholar appointments.

390-61 Time Off

Postdoctoral Scholars do not accrue vacation. "Postdoctoral Scholars - Employee" are expected to take time off each academic year in the intercession and recess periods (which constitutes about four weeks, excluding University holidays) between the beginning of Fall Term and the end of Spring Term.... Unless the extramural funding agency contains provisions to the contrary, "Postdoctoral Scholars - Fellow" and "Postdoctoral Scholars - Paid Direct" are eligible to take time off under these same conditions. Postdoctoral

Regional Director Anita Martinez
September 5, 2008
Page 6

Scholars will remain on pay status during intersession and recess periods or their alternatives.

390-62 Childbearing, Parental and Family and Medical Leave

- a. Postdoctoral Scholars are eligible for childbearing leave, parental leave, and active service-modified duties as provided in APM - 760 and for family and medical leave as provided in APM - 715. ...
- c. Childbearing, parental, and family and medical leave policies for "Postdoctoral Scholars - Fellow" and "Postdoctoral Scholars - Paid Direct" are subject to the requirements of the Postdoctoral Scholar's extramural funding agency.

390-75 University of California Retirement Plan Membership

"Postdoctoral Scholars - Employee" contribute to the University of California Defined Contribution Plan as Safe Harbor participants and are not eligible for the University of California Retirement Plan. "Postdoctoral Scholars - Fellow" and "Postdoctoral Scholars - Paid Direct" are not eligible for either plan.

Furthermore, there are numerous sections that deliberately treat Paid Directs as equivalent to and no different from the other two types. Examples include:

390-17 Terms of Service

- b. The total duration of an individual's postdoctoral service may not exceed five years, including postdoctoral service at other institutions.

390-18 Salary and Stipend

- f. Except as provided in APM - 390-18-e for salaries paid above scale, the sum of stipend and salary may not exceed the maximum of the scale and must be consistent with campus criteria for determining the appropriate pay level of an individual Postdoctoral Scholar. [The exception in "18-c" is that Chancellors may approve above-maximum salaries for any Postdoctoral Scholar.]

Regional Director Anita Martinez
September 5, 2008
Page 7

390-19 Appointment Percentage

- a. Appointments to the Postdoctoral Scholar title are full time, based on the expectation that the Postdoctoral Scholar will be fully involved in scholarly pursuits. In special cases, upon written request of the appointee and concurrence of the mentor, an exception may be granted.

When a reduced-time appointment has been approved, the mentor and Postdoctoral Scholar shall sign a written agreement specifying the reduction in hours of work and concomitant responsibilities.

390-21 Notice of Appointment

A Postdoctoral Scholar shall be provided a written notice of appointment.

390-40 Grievances

- a. A Postdoctoral Scholar may present a grievance according to the following procedures.

390-50 Corrective Action and Dismissal

- a. The University may impose corrective action or dismissal when, in its reasoned judgment, the Postdoctoral Scholar's performance or conduct merits the action.

Interestingly enough, as this policy review establishes, there is much in common between the Fellows, who the Union has determined should be in the unit, and the Paid Directs, who the Union has excluded from the unit. As will be established below, not only is there a community of interest between the Fellows and the Paid Directs, there is a community of interest among the Employee Postdoctoral Scholars, the Fellows and the Paid Directs.

B. What is a Postdoctoral Scholar?

A Postdoctoral Scholar, be she an Employee Postdoctoral Scholar, a Fellow or a Paid Direct, is a recently-minted Ph.D. who is electing to receive further training prior to going into an academic and/or research career. All Postdoctoral Scholars must have a Ph.D.

All Postdoctoral Scholars conduct research under the direction of faculty advisors. The faculty advisor is doing research which is compatible with the Postdoctoral Scholar's areas of research

Regional Director Anita Martinez
 September 5, 2008
 Page 8

interest. The faculty advisor is generally the Principal Investigator (PI) on a grant and runs the laboratory or research project where the Postdoctoral Scholar pursues her research and where she works.

Postdoctoral Scholars work in the PI's laboratory or on the research project with other University employees including faculty and other research staff. Many actually supervise other staff working in the laboratory or on the project. Postdoctoral Scholars are expected to publish and otherwise participate in the research life of the University.

Many have different sources of funding throughout their postdoctoral experience. For example, one quarter a Postdoctoral Scholar may be appointed as an Employee Postdoctoral Scholar and the next year, she may be a Fellow and the following year, a Paid Direct. To further complicate matters, an individual may have a dual appointment as a Paid Direct and an Employee Postdoctoral Scholar at any given time. Thus, a Postdoctoral Scholar may stay in the same laboratory, working for the same PI, doing the same research and nothing will change except her source of funding.

C. The Paid Directs

The Paid Directs all have sponsoring agencies which fund their postdoctoral experience. The following are some of the representative agencies currently supporting Postdoctoral Scholars at the University: UC Mexus-Conacyt, the Fulbright Foreign Scholarship Board, the Hewitt Foundation, the Japan Society for Promotion of Science, Deutsche Forschungsgemeinschaft, the National Science Foundation, Ben Gurion University, National Academies, European Molecular Biology Organization (EMBO), the Swiss National Science Foundation, Wellcome Trust, International Human Frontier Science Program (HFSP), University Corporation for Atmospheric Research (UCAR), the National Science Foundation, the Natural Sciences and Engineering Research Council for Canada (NSERC) and the China Scholarship Council.

Some sponsoring agencies are very specific about the relationship between them and the Postdoctoral Scholar.³ Some state that the Postdoctoral Scholar is not an employee of the sponsoring agency. For example the EMBO form notes: "The fellow is not, therefore, an employee of EMBO which cannot accept liability for his/her actions, liability, health, safety or research expenditures." The Wellcome Trust's documents also contemplate that there will be an employer-employee relationship between the University and the Wellcome fellow. The operative document notes: "Dr. x's full employment costs: these comprise the Fellow's basic salary as determined by the Host Institution, It is a condition of the award that the Fellow should be granted the status and prerogatives of other academic staff. . . ." The HFSP also

³ And for some, we cannot tell because we do not have translations of the operative documents.

Regional Director Anita Martinez
 September 5, 2008
 Page 9

disclaims any employer relationship. Its documentation notes: The fellowship should not be considered as a "work contract between HFSPO and the holder of the fellowship."

A few others actually note that there is some kind of continuing employment relationship between the sponsoring institution and the Postdoctoral Scholar. The Kosia University College of Medicine in its affidavit of financial support notes: "[The postdoctoral scholar] is presently associate professor at Department of Neurology. Dr.[x] will receive his regular salary. . . ." It also appears that the UCAR contemplates an employer-employee relationship as its letter to the postdoctoral scholar says: "UCAR offers a comprehensive benefits package including group health, dental, life insurance, sick leave, paid time off (PTO) and mandatory participation in the UCAR TIAA/CREF retirement plan."

This random sampling of the Paid Directs' sponsoring institutions' operative documents reveals that the vast majority are silent on the issue of any employment relationship between them and the Postdoctoral Scholars they sponsor. Others disavow any employment relationship and still others make it clear that the Postdoctoral Scholar retains an employment relationship with the sponsoring institution. However, none of these relationships impair the ability of the Union to bargain with the University about the terms and conditions of employment within the control of the University even if the Postdoctoral Scholar has an employment relationship with a sponsoring institution.

III. LEGAL ANALYSIS

A. Community of Interest

Government Code section 3579 sets forth the criteria to be examined when making unit decisions. The criteria for examining the community of interest are set forth in section 3579(a)(1).⁴

1. The Extent to Which Employees In Question Perform Functionally Related Services or Work Towards Established Goals

All Postdoctoral Scholars, Employees, Fellows and Paid Directs, are involved in doing the research of the University. While the subject matters and the research itself vary, the service all

⁴ Government Code Section 3599(a)(1) says:

The normal and occupational community of interest among the employees, including, but not limited to, the extent to which they perform functionally related services or work toward established common goals, the history of employee representation with the employer, the extent to which the employees belong to the same employee organization, the extent to which the employees have common skills, working conditions, job duties, or similar educational or training requirements, and the extent to which the employees have common supervision.

Regional Director Anita Martinez
 September 5, 2008
 Page 10

Postdoctoral Scholars perform is research related. As the University of California, Office of the President's website states:

The University of California's reputation as a research powerhouse is built not only upon the strengths of its faculty researchers and scholars, but is due in large measure to the achievements of its students, both graduate and undergraduate. In addition, post-doctoral researchers play key roles in many laboratories, departments and research units, generating much of the leading-edge research that helps to keep California in the forefront of science and technology.

<http://www.ucop.edu/research/ucres.html> (Emphasis added.)

All Postdoctoral Scholars perform the same type of work, research, and they all work towards the same goal – engaging in leading edge research.

2. The History of Employee Representation With the Employer/The Extent to Which the Employees Belong to the Same Employee Organization

Other than the representation petition filed by the Union in 2006, there is no history of representation for any of the three titles at issue.

3. The Extent to Which the Employees Have Common Skills, Working Conditions, Job Duties, or Similar Educational or Training Requirements

The Postdoctoral Scholars, Employees, Fellows and Paid Directs, all have the same background requirements. The following is from the University of California, Berkeley website, <http://yspa.berkeley.edu/#postdoc>, and is typical of the requirements at other University campuses. Please note that the same requirements apply regardless of the Postdoctoral Scholar's title.

Postdoc Definition

Applicants must satisfy all of the following specifications:

- possess a Ph.D. or foreign equivalent conferred *less* than five years ago (however, extenuating circumstances, including health and family care, will allow for exceptions to this requirement);
- proposed appointment may not total more than five years of service including previous postdoctoral experience at other institutions;

Regional Director Anita Martinez
 September 5, 2008
 Page 11

- have an institutional source of funding, e.g., fellowship, traineeship, or equivalent external support;
- pursue a program of research and training under the direction of a faculty member with approval of an academic department or organized research unit (ORU) and registration with the VSPA Program;
- may not have been employed as an assistant professor, associate professor, or professor; and
- the appointment term must be at least one month in duration.

4. **The Extent to Which Employees Have Common Supervision**

Since each Postdoctoral Scholar is assigned to a faculty mentor, each will have a different faculty advisor who also serves as the supervisor. The common thread is that each Postdoctoral Scholar has a faculty supervisor and this is the same for all Postdoctoral Scholars regardless of their title.

To determine whether a community of interest exists among employees, the Public Employment Relations Board ("PERB" or the "Board") considers, among other things, the qualifications, training and skills, contact and interchange with other employees, and job functions. (San Diego Community College District (2001) PERB Decision No. 1445; Rio Hondo Community College District (1979) PERB Decision No. 87; Office of the Santa Clara County Superintendent of Schools (1978) PERB Decision No. 59.) In considering whether a community of interest exists, "PERB eschews the use of a checklist approach and instead considers the totality of circumstances." (San Diego Community College District, supra, PERB Decision No. 1445, citing Monterey Peninsula Community College District (1978) PERB Decision No. 76.) The focus of the inquiry concerns whether employees share "substantial mutual interests." (*Id.*) Because the only essential difference between a Paid Direct and the other two titles is the fund source, when all of these factors are examined, there can be no doubt that the Paid Directs share a "substantial mutual interest" with the two other Postdoctoral Scholar titles.

Additionally, the other tests for unit appropriateness are met. For example, it will be more efficient for the University to have one set of terms and conditions of employment for all the Postdoctoral Scholars. Furthermore, having all the Postdoctoral Scholar titles in one unit will avoid fragmentation of a homogeneous employment group. See Government Code Section 3579 (a) (2)-(5). This is especially important for two reasons: (1) many of the Postdoctoral Scholars move from title to title as their source of funding changes, and (2) many Postdoctoral Scholars hold dual appointments as Employee and Paid Direct, Postdoctoral Scholars. It would be unworkable to have an individual doing one body of work covered by different terms and conditions of employment. Inclusion of the Paid Directs in the unit is consistent with the HEERA unit determination criteria.

Regional Director Anita Martinez
 September 5, 2008
 Page 12

B. Other Legal Issues

To reiterate, the University does not know why the PRO/UAW now seeks to exclude the Paid Directs from the unit when in 2006, the Union considered them to be part of the unit. The only apparent difference between the Paid Directs and the Employee Postdoctoral Scholars is that an outside agency supports the Postdoctoral Scholar. However, that fact is the same for the Fellows who also have their support originating outside of the University. Moreover, that distinction not only fails as a matter of fact, it fails as a matter of law.

As we know, the majority of sponsoring agencies are either silent on the issue of employment status or specifically state that there is no employment status. For the vast majority of the Paid Directs, the University is the only employer. The sponsoring agencies merely provide the money to support or help support the Paid Directs. Since the University controls all other terms and conditions of the appointments of Paid Directs, it is the employer. See *Alameda County Board of Education*, PERB Dec. No. 323 (1983) (finding the key inquiry in determining whether an entity is an employer under EERA is whether the alleged employer had "sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.")

It appears that there are a few agencies which maintain an employment relationship with Postdoctoral Scholars. PERB has adopted the following test to determine joint employer status: "where two or more employers exert significant control over the same employees -- where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment -- they constitute joint employers." *Unified Public Employees v. Public Employment Relations Board*, 213 Cal. App. 3d 1119, 1128 (1989); *NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982). "A finding that companies are 'joint employers assumes in the first instance that companies are 'what they appear to be' -- independent entities that have merely 'historically chosen to handle jointly . . . important aspects of their employer-employee relationship.'" *Browning-Ferris*, 691 F.2d at 1122. Thus for the Postdoctoral Scholar who maintains his academic position with the Kossin University and for the UCAR Paid Directs, some of their terms and conditions of employment are controlled by their host institutions and others, such as control of their day to day work, are controlled by the University. These Paid Directs are joint employees of their sponsoring institution and the University, and the University and the sponsoring agency are joint employers.

However that joint employment relationship does not defeat the argument that these Paid Directs should be in the unit. California public sector labor law is clear on this point. In joint employment relationships, employees have more than one employer setting his or her terms and conditions of employment. *Unified Public Employees v. Public Employment Relations Board*, 213 Cal. App. 3d at 1128. Consequently, more than one bargaining relationship may exist covering the employees of joint employers or the employees of the joint employers may be

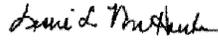
Regional Director Anita Martinez
 September 5, 2008
 Page 13

unrepresented with respect to certain terms and conditions of employment. This does not mean that they cannot be represented. In such a situation, each employer is charged with bargaining over only those employment terms it controls. Even when one employer falls under PERB jurisdiction and the other does not, the public employer still has a duty to bargain. See *Fresno Unified School Dist.*, PERB Decision No. 82 (1979); *The Regents of the University of California*, PERB Order No. Ad-293-H; *Engineers & Architects Assn.*, Unfair Practice Case No. LA-CE-12-M (2002) (overturned on other grounds in PERB Decision No. 1637-M). Thus, even if the sponsoring agency controlled some of the terms and conditions of the Paid Directs' appointments, it would not prevent the Union from bargaining with the University over the other terms and conditions of employment.

IV. CONCLUSION

The University respectfully requests that the Paid Directs be included in the proposed unit. Their inclusion is in concert with the HEERA unit determination, criteria and the Paid Directs share a "substantial mutual interest" with the Fellows and Employee Postdoctoral Scholars. There is no good factual, policy or legal reasons to exclude them from the proposed unit.

Very truly yours,



Leslie L. Van Houten
 University Counsel

la

cc: Dennis Dudley
 Myron Okada
 Howard Pripas
 Mark Westleye

NOTICE OF REQUEST FOR RECOGNITION

PERB CASE NUMBER: SF-RR-914-H

DATE NOTICE WAS POSTED: _____

ON July 1, 2008 THE Regents of the University of California
(Date) (Employer)

RECEIVED FROM UAW International
(Employee Organization)

A REQUEST TO BE RECOGNIZED AS THE EXCLUSIVE REPRESENTATIVE OF EMPLOYEES
IN THE UNIT DESCRIBED ON THE REVERSE OF THIS NOTICE.

THE REQUEST IS BASED ON THE CLAIM THAT A MAJORITY OF THE EMPLOYEES IN THE
PROPOSED UNIT WISH TO BE REPRESENTED BY THE ABOVE NAMED EMPLOYEE
ORGANIZATION.

NOTICE IS HEREBY GIVEN THAT ANY OTHER EMPLOYEE ORGANIZATION DESIRING TO
REPRESENT ANY OF THE EMPLOYEES IN THE UNIT DESCRIBED IN THIS REQUEST FOR
RECOGNITION HAS THE RIGHT, WITHIN 15 WORKDAYS FOLLOWING THE DATE OF
POSTING OF THIS NOTICE, TO FILE WITH THE EMPLOYER AN INTERVENTION SUPPORTED
BY AT LEAST 30% OR AT LEAST 10% OF THE EMPLOYEES IN THE UNIT REQUESTED OR
OF THE EMPLOYEES IN A UNIT CLAIMED TO BE APPROPRIATE.

THE LAST DATE FOR FILING AN INTERVENTION IS: _____

SEE THE REVERSE OF THIS NOTICE FOR THE NAMES, ADDRESSES AND TELEPHONE
NUMBERS OF THE EMPLOYER, THE INCUMBENT EXCLUSIVE REPRESENTATIVE (IF ANY),
AND THE PETITIONER.

THIS NOTICE MUST REMAIN POSTED UNTIL: _____

BY: _____
(SIGNATURE OF EMPLOYER'S AUTHORIZED AGENT)

PERB Regulation 21025 requires that this Notice be conspicuously posted on all employee traffic boards in each facility of the employer in which members of the proposed unit are employed. The Notice should be posted as soon as possible but in no event later than 10 days following receipt of this petition. The Notice must remain posted for at least 15 workdays.
PERB-4105 (02/01)

**ATTACHMENT A
DESCRIPTION OF PROPOSED UNIT**

SHALL INCLUDE:

All Postdoctoral Scholars and all Postdoctoral Fellows in titles and title codes including but not limited to:

Postdoctoral Scholars – Employee (Title Code 3252);

Postdoctoral Scholars – Fellow (Title Code 3253);

Postgraduate Researcher – FY (Title Code 3240);

Postgraduate Researcher – AY State Funds (Title Code 3243);

Postgraduate Researcher – AY Extramural Funds (Title Code 3245); and

Visiting _____ - Postdoc (Title Code 3370)

in a statewide unit at all University of California campuses, research programs and units.

SHALL EXCLUDE:

Postdoctoral Scholars – Paid Direct; employees defined by HEERA as managerial, supervisory and/or confidential; student employees whose employment is contingent on their status as students; and all employees of Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory and Los Alamos National Laboratory.

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Alameda
State of California. I am over the age of 18 years and not a party to the within entitled
cause. The name and address of my residence or business is 2885 Telegraph Avenue, Suite 305
Berkeley, CA 94705

On June 30th, 2008, I served the HEERA Representation Petition, including
(Date) (describe document(s))

Attachment A and Cover Letter

on the parties listed below (include name, address and, where applicable, fax number) by (check
the applicable method or methods):

placing a true copy thereof enclosed in a sealed envelope for collection and delivery
by the United States Postal Service or private delivery service following ordinary business
practices with postage or other costs prepaid;

personal delivery;

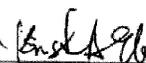
facsimile transmission in accordance with the requirements of FERB Regulations
32090 and 32135(d).

Regents of the University of California
Office of the General Counsel
1111 Franklin Street, 5th Floor
Oakland, CA 94607

510 - 987 - 9600
510 - 987 - 9220

I declare under penalty of perjury that the foregoing is true and correct and that this
declaration was executed on June 30th, 2008 at Berkeley, California

Kristin Ebers
(Type or print name)


(Signature)

1 PRO/UAW Request for Recognition

Filed 7/1/08

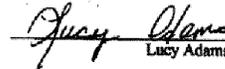
2 DECLARATION OF SERVICE BY MAIL

3
4 I, the undersigned, say: I am over the age of 18, employed in Alameda County,
5 California, in which county the within-mentioned mailing occurred, and not a party to the subject
6 cause. My business address is 1111 Franklin Street, 8th Floor, Oakland, California 94607-5200. I
7 served the attached: UNIVERSITY RESPONSE TO PRO/UAW REQUEST FOR
8 RECOGNITION by placing a copy thereof in a separate envelope for each addressee named
9 hereafter, addressed to each such addressee respectively as follows:

10 Margo A. Feinberg, Attorney
11 Schwartz, Steinsapir, Dohrmann & Sommers
12 6300 Wilshire Boulevard, Suite 2000
13 Los Angeles, CA 90048

14 Each envelope was then sealed and, with the postage thereon fully prepaid,
15 deposited in the United States mail at Oakland, California on the date set forth below.

16 I declare under penalty of perjury under the laws of the State of California that the
17 foregoing is true and correct: Executed September 5, 2008 at Oakland, California.

18
19 
20 Lucy Adams

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24 93702.1
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EXHIBIT F: TESTIMONY OF STANTON GLANTZ

My name is Stanton Glantz. I am a Professor of Medicine and American Legacy Foundation Distinguished Professor in Tobacco Control at UC San Francisco, since I joined the faculty in 1977 following a postdoctoral fellowship here from 1975-7. I am also a member of the UCSF Cardiovascular Research Institute, Institute for Health Policy Studies and co-director of the UCSF Comprehensive Cancer Center Tobacco Program. I have enjoyed strong research support from both the National Institutes of Health as well as state agencies and foundations. I am also a past chair of the University of California Systemwide Committee on Planning and Budget and am familiar with a broad range of financial issues facing the University of California and higher education in general.

During my time at UCSF, I have also supervised dozens of researchers, including Postdoctoral Scholars, working on numerous projects in my areas of specialty, cardiovascular research and tobacco control. I am the program director for a postdoctoral training program in tobacco control currently funded by the National Cancer Institute.

UC San Francisco is a world-class research university. In fiscal year 2009, for example, UCSF won more National Institutes of Health research grant money than any other public institution in the nation. As a whole, the University of California system has been a world leader in research and scientific innovation for decades.

Postdoctoral Scholars play a central role in making UC such a top-notch research institution, working on topics ranging from heart and cancer research to public policy issues surrounding health care reform to climate change. They do much of the day-to-day work on our cutting-edge research projects happening and are the source of some of our best and most innovative ideas. Postdoctoral scholars also help train graduate and undergraduate student researchers, and contribute to writing the grant proposals that continue to generate UC's robust research revenues. Without Postdoctoral Scholars, UC would not be the world-class research university it is.

A world-class research university such as UC needs to pay stipends and salaries to the researchers that match the quality of the pivotal work they do. UC's salaries tend to be low, so I am confident that funding agencies (who pay the great majority of stipends and salaries for Postdoctoral Scholars) would approve research grant budgets that include fair increases in salaries and benefits to these front-line researchers as long as they are approved by the University. The granting agencies expect these costs; indeed, the University will not permit faculty to submit grants unless the budgets allow for anticipated increases in salaries and benefits.

Not only does UC have the capacity to agree to fair increases for Postdoctoral Scholars, but it is also critical to establish and maintain competitive salaries and benefits that will attract the best and brightest researchers to UC and help us continue to be a world leader in the realm of science.

ENDNOTES

¹ UC received \$2.98 billion in grants and contracts from federal sources in fiscal year 2009. See UC Consolidated Audited Annual Financial Reports, available at <http://www.universityofcalifornia.edu/reportingtransparency/>. Also see Chart 1.

² While UC receives research funding from a variety of sources, and although UC says exact numbers are unavailable, UAW and UC have discussed in bargaining that federal grants and contracts fund roughly 90 percent of UC's Postdoctoral Scholar appointments (See Chart 2).

³ See "How the Budget Works," on the University of California Budget News webpage, which can be viewed at <http://www.universityofcalifornia.edu/budget/?page-id=1120>

⁴ See UC Consolidated Audited Annual Financial Reports, available at, <http://www.universityofcalifornia.edu/reportingtransparency/>.

⁵ Ibid.

⁶ For UC Davis, see "Research funds hit new high, top half-billion dollars," at <http://www.universityofcalifornia.edu/news/article/22536>. For UCLA, see "UCLA researchers bring in \$4M a day in research contracts, grants," at <http://www.today.ucla.edu/portal/ut/researchers-bring-in-4m-a-day-111993.aspx>.

⁷ See Exhibit A, Statement from Professor Norman Ellstrand.

⁸ See <http://www.upte.org/rx-tx/ulp/index.html> for UPT-CWA's description of charges filed prior to their one-day ULP strike on September 24, 2009. For a description of the labor board's response to the charges, see UPT-CWA's January 2010 newsletter at <http://www.upte.org/rx-tx/01-10CAW.pdf>. For examples of UPT-CWA's public relations campaign against UC, see <http://www.upte.org/rx-tx/execpay.pdf> or <http://www.peopleorprofit.org/>.

⁹ See <http://www.upte.org/publication-ebulletin/2010-02-19.html> for a summary; and see the contract at <http://www.ucop.edu/atyourservice/employees/policies-employee-labor-relations/collective-bargaining-units/technical-tx/contract-articles/tx-contract-0410draft.pdf>.

¹⁰ The Resident Physician contract can be viewed at <http://www.ucop.edu/atyourservice/employees/policies-employee-labor-relations/local-agreements/ucsd/SDHSA-MOU-Final-09-12.pdf>. See <http://meded.ucsd.edu/assets/6/File/housestaff/Salary percent20Scale percent2009-10 percent20& percent2010-11.pdf> for their salary scales that will take effect July 1, 2010. Salary scale changes that took effect on July 1, 2009, can be viewed at <http://www.ucop.edu/acadadv/acadpers/0910/table22.pdf>.

¹¹ While UC has not provided specific information on stipend source for Postdoctoral Scholars, they have communicated in bargaining that roughly 400-500 NIH Kirchstein Fellows are currently working at UC.

¹² See <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-10-047.html> for the NIH Kirchstein stipend scale based on years of experience as a Postdoctoral Scholar.

¹³ According to a costing document from April 2009 payroll records that UC provided to the Union, 4,029 of the 5,578 individuals were paid at least the equivalent of what they would make on an NIH fellowship.

¹⁴ The Union requested these items starting on December 19, 2008, and continuing on February 6, 2009, March 10, 2009, April 17, 2009, July 17, 2009, August 26, 2009, March 17, 2010, and April 20, 2010. More specifically, starting on December 19, 2008, and numerous times since then, the UAW has requested source of stipend for each Postdoctoral Scholar, which UC has yet to provide. The Postdoctoral Scholars Saxton now says may pose a problem are all in the Fellow or Paid Direct titles, which receive a fellowship stipend rather than a salary. As of July 17, 2009, we also requested a number of pieces of information regarding Fellows and Paid Directs, including, but not limited to: any agreements between funding agencies and the Univer-

sity regarding Fellows or Paid Directs (including those referenced in the University's September 5, 2008, letter to PERB (See Exhibit E) as the basis for arguing to include Paid Directs in the bargaining unit), description of how the University determines the overall stipend/salary rate for Fellows and Paid Directs, and a description of the process for setting up the appointment at the University.

¹⁵While the claim that UC lacks the information technology to track its employees seems implausible, credulity is strained even further by the fact that last year alone UC received \$825 million in Facilities & Administration (F & A) costs from grants and contracts. F & A costs are recovered by UC as a percentage of every dollar awarded by a granting agency for the direct costs—salaries, benefits, etc.—of performing the research project. For federal grants and contracts at UC, for example, UC receives roughly 53 percent, or an additional 53 cents spent on every dollar of research. One of the main purposes of this money is, according to the NIH, to pay for "indirect costs associated with the overall management of an organization, e.g., President's Office, Human Resources Office, Accounting Office, office supplies, etc." See <http://oamp.od.nih.gov/dfas/faqIndirectCosts.asp#difference>.

Chairman MILLER OF CALIFORNIA. Thank you.
Mr. Miller, if you would pass the microphone over to Mr. Duckett.
Mr. Duckett.

STATEMENT OF DWAIN DUCKETT, VICE PRESIDENT OF HUMAN RESOURCES, UNIVERSITY OF CALIFORNIA, OFFICE OF THE PRESENT

Mr. DUCKETT. Thank you,
Mr. Chairman, members of Congress and the Committee. I'm Dwaine Duckett, Vice President of Human Resources for the University of California.

Thank you for this opportunity to talk on this topic, and your interest.

We are pleased to be here today to talk about the collective bargaining process between the University and the UAW postdoctorate scholars.

I want to point out that the University has a solid track record that might get alluded to a little bit earlier, of concluding first party contracts. An unbroken line of successful negotiations over a quarter of a century. There is no reason to believe that the postdoc negotiations with the UAW will be any different this time.

In the public employment context that we have if the parties don't reach an agreement, the state law here directs a mediation and an impasse process that both sides have sought to avoid thus far. This negotiation is a proceeding in accordance with prior university first party negotiations and, we have reached agreement on 29 of 35 articles during the period of time that negotiations have gone on.

We are currently bargaining a handful of issues that remain. They are difficult issues that remain, but none are outside of the normal bargaining process.

Rest assured that we have an interest in making sure that this contract gets settled also. A settlement provided the University with certainty, stability, predictability and labor peace due to the enactment of grievance and arbitration processes to resolve issues. And the state law backstops this process where bargaining reaches impasse, as I mentioned before.

On terms of talking about state funds, they do not in and of themselves basically influence the negotiations. The primary issues that make this process long and difficult have to do with the na-

ture of this particular bargaining unit and what is at stake for both sides if we do not get this right.

Let me talk a little bit about the complexity of negotiations. I know that the first negotiation is the hardest. And this is a diverse group with a variety of unique job descriptions ranging from some of the items that Dr. Tyler works on to things like examining manuscripts, working on nuclear energy, et cetera. So none of these jobs are the same in and of themselves. This creates a complexity in the bargaining that does not exist with other units in private industry and even at UC.

These postdoctoral scholars, as another complication, come from all over the world to complete their training and research. They usually stay for a short period of time. And for example, they work on a staggering array of projects like I talked about earlier.

Funding comes from a variety of different sources, including federal contracts, grants and grants from state and foreign governments as well as private sources. These are all regulated differently.

It is difficult to implement a across the board wage increases, which is one of our biggest remaining bargain articles that the UAW has asked for. Fund resources restrict how these funds are spent.

For example, this means that a faculty advisor with fellows working in her lab but not directly on the research for her work, cannot use particular grant money to pay an increase for a postdoctoral scholar. What's at stake here is that if we miscalculate or fail to account for each funding scenario that exists for each postdoc, there is no direct funding source for compensation increases except through the core University budget, which has been severely impacted by the loss of millions of dollars in state funding.

As you can see, the unique characteristics of this group also means that we cannot just import language from other contracts to expedite the process. But despite these complexities and challenges, we have made great progress.

There are existing complexities when you talk about the difference between national labor law and HEERA, which governs these particular proceedings. Bargaining at the University is different than it is in the private sector because we are subject to these state laws and not the National Labor Relations Act.

There is an incentive for both sides to settle. And fair mediator opinions usually have provisions within all of them that both sides could find particularly unattractive. Thus far, both sides have sought to avoid getting into a situation where we are at impasse.

If the mediator cannot settle a contract, the neutral fact finders assigned conducts the investigator and renders a recommendation about consensual settlement.

As mentioned, we've come to agreement on 29 of 35 issues to date, and hopeful that we can reach agreement without needing to consider HEERA's impasse procedures. We are confident that in the spirit of negotiation that we showed in the past, and continuing to bargain in good faith, that we will do so.

We have a history of collective bargaining success, and we have consistently been able to do this. Our optimism arises out of existing long-standing relationships with the UAW, of which Mike al-

luded to a little bit earlier, in that they have represented our graduate students for over ten years. We have negotiated a first contract with them successfully in multiple successor agreements.

We have also had a track record that makes it very clear that we have bargained in good faith and that these successor agreements have been executed, for the most part, without any major hiccups.

Adding to our complexity, we have 13 system-wide and 12 local unions. They represent over 78,000 of our employees and we reach successful agreements with each of those when we are called upon to do so.

Although this has been slow going for both sides, in every case we have completed negotiations and reached fair first contracts.

We look at the glass being 80 percent full in this case. We want to push to close the remaining issues. UC will do everything it responsibly can to reach an agreement with the UAW that meets the needs of both the University and the postdoctoral scholars.

In conclusion, I would like to thank you for the opportunity to be here to share the University's perspective on the complex nature of these proceedings and these groundbreaking deliberations. We hope this gives you and the Committee insight to help you guide policy decisions that you alluded to earlier, and again, we thank you for the opportunity to be here.

[The statement of Mr. Duckett follows:]

**Prepared Statement of Dwaine Duckett, Vice President of
Human Resources, University of California, Office of the President**

Mr. Chairman, and members of Congress, I am Dwaine Duckett, Vice President of Human Resources at the University of California. I am pleased to be here today to discuss the collective bargaining process to date between the University and the United Auto Workers union, which represents Postdoctoral Scholars at the University. With me today is Gayle Saxton, Director of Labor Relations, who is responsible for executing the collective bargaining negotiations at the University. She is also the University's chief negotiator in the negotiations with the UAW for the Postdoctoral Scholars unit.

The University and the UAW have made great progress in these negotiations. At this point, we have resolved 29 articles, ranging from union security to professional development and time off work. There are six articles outstanding including appointments, benefits, compensation, duration of agreement, layoff, and strikes. These are key issues to be resolved, but we feel confident in each side's commitment to good faith bargaining and desire to reach agreement. We will continue to work hard to reach an agreement that meets the needs of both the University and the Postdoctoral Scholars.

Before discussing the details of these negotiations, I would like to provide some background information about the University and its collective bargaining history. I believe this information provides important context for understanding the negotiations between the University and the UAW.

The University of California consists of ten campuses and five medical centers, and is involved in the management of three national laboratories on behalf of the federal government. The UC system includes more than 220,000 students and employs more than 135,000 faculty and staff. In fact, the University is one of the State of California's largest employers.

The National Labor Relations Act of 1934 regulates private sector employer-employee relations and exempts government employers. Like many states, California has adopted its own labor laws for public sector employers. The University of California, as a higher education employer, is governed by California's Higher Education Employment Relations Act, or HEERA.¹ HEERA guarantees employee rights related to joining and participating in employee organizations, and requires employers and employee organizations to bargain in good faith over wages, hours, and other terms

¹ California Government Code sec. 3560-3599

and conditions of employment.² California's Public Employment Relations Board (PERB) enforces and administers HEERA.³

Although many similarities exist between the National Labor Relations Act and HEERA, there are some significant differences as well, particularly in the area of resolving bargaining impasses. Under HEERA, once the parties reach an impasse in bargaining, PERB appoints a mediator. If mediation does not result in a settlement, then the impasse may be referred to a fact-finding panel that may conduct hearings and investigations, make findings of fact, and issue advisory recommendations regarding potential settlement terms.⁴ Impasse resolution procedures are not complete until the parties have considered the fact-finding report in good faith. Impasse under HEERA is a continuation of dispute resolution efforts. Under the statutory timeframes built into HEERA, the impasse procedures usually take a minimum of two months' time to complete, and occur only after the parties have engaged in a robust bargaining process and concluded that further meetings would be futile. We have not reached impasse in the negotiations involving the Postdoctoral Scholars, and we hope to avoid impasse and work toward our goal of a settled contract.

In the 30 years since HEERA's passage, the University of California has recognized a number of different unions as the exclusive representative of thousands of University employees. Currently, the University has 13 system-wide bargaining units covering 78,000 employees as well as a number of local bargaining units at each location covering, for example, employees in the skilled crafts. The University entered into its first collective bargaining agreement in 1984, and has successfully negotiated many agreements with its unions since that time. In every case involving first contracts, the University has a track record of completing negotiations and reaching agreement with the union. We are optimistic about our ability and committed to reaching agreement in these initial negotiations with the UAW for the Postdoctoral Scholar unit.

The University and the UAW already have a long-standing and positive relationship as a result of the UAW's representation of many of the University's graduate students. The UAW became the exclusive representative for the graduate student bargaining unit in 1999. The University and the UAW completed their negotiations for an initial contract in 2000 after more than a year of bargaining, and have bargained two successor agreements since that time.

The UAW initially sought to represent the Postdoctoral Scholars in 2006, but withdrew its petition for recognition. It filed another petition with PERB in 2008. Following the submission of valid authorization cards, PERB certified the UAW as the exclusive representative on October 30, 2008. Formal negotiations began in February 2009.

The University of California is one of the world's preeminent public research university systems, and Postdoctoral Scholars are important contributors to the research enterprise. Postdoctoral Scholars hold temporary appointments, usually lasting one to three years, which are designed to give them opportunities to conduct research under the guidance of faculty mentors. The University limits the time in the Postdoctoral Scholar title to five years, which follows the nationwide standard. The time spent as a Postdoctoral Scholar is in preparation for career progression in academe, industry, government, or the nonprofit sector. For many, especially those in the physical and life sciences, Postdoctoral Scholar work is a critical step in securing future employment. All Postdoctoral Scholars must have a doctoral-level degree.

The University has approximately 6,500 Postdoctoral Scholars in three different titles, each of which is exclusively represented by the UAW. The difference in titles arises primarily from their source of funding.

- The first category is an Employee Postdoctoral Scholar, which is a person who receives funding from a University source that provides discretionary funds in support of the training of Postdoctoral Scholars, or from an agency that requires or permits the person to be a University employee. The majority of Employee Postdoctoral Scholars are funded through federal contracts and grants such as the National Institutes of Health, the National Science Foundation, and the Department of Energy. Other sources include the State of California, private grants and private foundations. The Employee Postdoctoral Scholar is paid through the University payroll system. About 77% of the bargaining unit are in the Employee title.

- The second type of Postdoctoral Scholar is a Fellow. Fellows have been awarded funding by an extramural agency and the funding, which flows through the University, is paid as a stipend rather than as pay. Many of these awards carry restric-

² California Government Code sec. 3565, 3567

³ California Government Code sec. 3563-3563.3

⁴ California Government Code sec. 3590-3594

tions about the Fellow holding appointments supported from other fund sources. The majority of Fellows in the life sciences are supported by NIH funds, although other sources of support for non-life science Fellows include private grants or other private sources.

- The third type of Postdoctoral Scholar is known as a Paid Direct. Paid Directs receive funding from an extramural agency or country, which pays the funding directly to the scholar rather than through the University.⁵ The funding/payment does not flow through the UC system and cannot be tracked by the University.

Postdoctoral Scholars must publish and participate in the research enterprise of the University. Postdoctoral Scholars come from all over the world to engage in research under the direction of faculty advisors. The faculty advisor is the Principal Investigator (PI) on the grant, runs the laboratory or research project where the Postdoctoral Scholar pursues his or her research, and assumes responsibility for the conduct of the approved funded research. In some cases, the University selects the Postdoctoral Scholar to support the research conducted by the faculty advisor because the person's skills and areas of expertise benefit the University's research. In some cases, Fellows and Paid Directs seek out positions at the University to work with particular faculty advisors. These Fellows and Paid Directs are often funded from sources different than those administered by their PI, and may or may not work directly on the research funded by the PI's grant.

Ongoing across-the-board approaches for Postdoctoral Scholar salary increases are difficult, in part because many Postdoctoral Scholars have different sources of funding throughout their term at the University. For example, a Postdoctoral Scholar may be appointed as an Employee Postdoctoral Scholar one quarter, and a Fellow the next. In some cases, a person may have a dual appointment as a Paid Direct and an Employee Postdoctoral Scholar. Salaries for Fellows and Paid Directs are set by the funding agency. Fund sources often place restrictions on how funds are spent.

- For example, grants awarded by the federal government will only allow that grant's funding to be spent on research directly related to the grant. Because grant funding cannot be moved between research projects, federal funds cannot be pooled to provide across-the-board salary increases in a case where a particular grant may not have sufficient funds available for that purpose.

- Most of the training grants that fund research through the PIs (generally funding Postdoctoral Scholars in the "Employee" title, or research to which no Postdoctoral Scholar is assigned) require that the grant funds be spent only on research and materials directly associated with the research funded by that grant. Thus, a PI who has two Fellows working in her or his laboratory but not directly on the research for which the grant was issued cannot use her/his grant money to fund a wage increase for the Fellows.

- Some fellowships disallow the use of use of federal funds to supplement the fellowship. As such, other fund sources, such as University or State of California funds, must be found for such supplementation. As we know, both the University of California and the State have a significant budgetary shortfall, and such funds are not available.⁶

Proposals on wages also pose a significant risk to the University if a type of increase is disallowed under a certain type of grant/funding arrangement. Any shortfalls would be covered by state funds that are scarce and shrinking.

The different categories of Postdoctoral Scholars, the incredible diversity of discipline-specific research projects, the wide variety of funding sources, the external restrictions on many of the fund sources, and the fact that almost all Postdoctoral Scholars have a different faculty advisor, create a level of complexity in the negotiations between the UAW and the University that is unique to this bargaining unit. This complexity has required a commitment by both sides to learn about and understand the Postdoctoral Scholar relationship with the University, the limitations placed upon the advisor/Principal Investigator, the differences within the Postdoctoral Scholar unit, and the differences between Postdoctoral Scholars and graduate students who are already represented by the UAW. Both bargaining teams rose to this challenge admirably, engaging in detailed discussions, analysis and evaluation of the issues presented.

⁵Some of the representative agencies currently supporting Paid Direct Postdoctoral Scholars at the University include the Fulbright Foreign Scholarship Board, the Hewitt Foundation, the Japan Society for Promotion of Science, European Molecular Biology Organization, Wellcome Trust, the Natural Sciences and Engineering Research Council for Canada, and the China Scholarship Council.

⁶The University has lost millions of dollars of funding from the State of California, which loss has required measures such as furloughs and salary reductions for large segments of its workforce. These furloughs and salary reductions did not apply to the Postdoctoral Scholars.

In spite of the enormous learning curve we all confronted, the negotiations proceeded at a brisk and productive pace. The University and the UAW met often, typically for two to three days at a time, and at regular intervals of approximately twice a month or more. From the early stages of negotiations, we engaged in open and often lengthy discussion of the reasons behind the proposals being made by both parties, and demonstrated flexibility in addressing each others' concerns. The University and the UAW have successfully negotiated all but six of what will be 35 separate articles. The remaining articles are Wages, Benefits, Appointments, Layoff, No Strikes, and Duration.

Some of the issues required solutions unique in the bargaining environment. One example pertains to the issue of "time worked and time off." In most labor agreements, these provisions are fairly standard. However, Postdoctoral Scholars are not only professionals exempt from Fair Labor Standards Act overtime requirements, but they are also individuals who come to this University (and any other University) with the objective of obtaining as much knowledge and completing complicated research as soon as possible in order to move on to other—permanent—employment. As a result, the parties had to move away from "normal" hours of work rules. We worked collaboratively to incorporate language that acknowledges the over-40 hours per week research standard and also protects the Postdoctoral Scholar against abuse.

In these negotiations, each party also had issues of critical importance that required flexibility and a willingness to compromise.

- One critical issue for the UAW was the matter of union security. Under HEERA, represented employees who are not active union members must pay a fair share fee to the union, and the University must deduct that fee from the employee's paycheck. However, two categories of Postdoctoral Scholars do not receive a paycheck from the University: the Fellows and the Paid Directs. This presented significant challenges in finding a workable solution that would address the UAW's interest in receiving membership dues or fair share fees from those Postdoctoral Scholars in the bargaining unit. The NIH does not consider Fellows (who are paid a stipend) to be "employees" and has regulations concerning the application of "employee" rules to Fellows. The automatic deduction of fees from a Postdoctoral Scholar's stipend would not be permissible under the NIH rules. To address the UAW's interest, the University consulted with the NIH and developed a process by which the UAW dues or fair share fee deductions could be made for the Fellows as a mandatory service to them by the University. The University also agreed to allow the UAW on-the-job access to the Paid Directs to collect contributions.

- A critical issue for the University, on the other hand, has been the preservation of "academic judgment" as applied to research and mentoring because it could affect the faculty's ability to set academic goals and performance. Academic judgment pertains to the various decisions made by faculty in their oversight and supervision of research and scholarly activities. The UAW expressed its concern that Postdoctoral Scholars should have some protections built into the contract to ensure the fair exercise of academic judgment. After many lengthy discussions on this topic, the parties agreed to establish the processes that faculty should follow in the exercise of their academic judgment, while agreeing that the judgment itself would remain exclusive to the faculty.

This commitment by the University and the UAW to the bargaining process and to sharing information and interests resulted in a large number of tentative agreements over the course of eight months of regular bargaining even though the parties could not simply import language from other contracts and apply it to this group. Every article of the contract required extensive consideration and evaluation to ensure that the language crafted would accurately reflect the realities of how Postdoctoral Scholars perform their work. Every article also required extensive consultation with the faculty to ensure that any contract language being considered did not unduly interfere with the research enterprise.

Despite these complexities and challenges, we have made great progress in these negotiations. After many months of regular meetings, in October 2009, we mutually agreed to a hiatus in bargaining over the holiday period, with a commitment to return to the table in January 2010. UC contacted the UAW and proposed to meet in January, but the UAW was not available. In February, the parties changed a bargaining session to an informal session, in an effort to explore settlement opportunities. Formal bargaining meetings recently occurred on April 15, 16 and 23 and the negotiations are now focused on the six remaining issues. The University will continue with the same strong commitment to good faith bargaining and resolution of these matters as we work through these final articles.

Again, while there are key issues to be resolved, the University remains confident in each side's commitment to good faith bargaining and desire to reach agreement.

We will continue to work hard to reach a mutually acceptable agreement for both the University and the Postdoctoral Scholars.

Thank you to the Committee for the opportunity to join you here today and discuss first contract negotiations with the UAW for the Postdoctoral Scholar bargaining unit. I look forward to answering any questions that you may have.

Chairman MILLER OF CALIFORNIA. Thank you.
Congressman Burton.

STATEMENT OF HON. JOHN L. BURTON, (RET.), A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. BURTON. Thank you, Mr. Chairman.

My experience is a little bit different than what I heard from the representative of the University. And I was very instrumental in getting recognition for the teaching assistants. I took President Dick Atkinson to have several meetings in my office, too.

I let Dick, who is a very fair man, know how serious I was and how serious the legislature was going to look at this. But every time President Atkinson agreed to something, and I am sorry that I do not remember the name, but the woman who was the Human Resource person, every time Dick left the room and I thought we had a deal, they moved two steps backwards. And it happened after every meeting that we had with President Atkinson and with the HR person present in the room. And finally I had to call Dick and ask whether she worked for him or he worked for her. And he said "What do you mean." And I told him. And I said I need you to show up one more time with a Human Resources person there and tell her this is what you agree to, this is what is going to be implemented and do not go backwards. And that is how it happened. So it was not an easy go.

The UAW was organized as an industrial union, which mean janitors in the plant, the skilled workers. So you had many crafts, many pay levels, many identifiable things as to who got what. And I do not see that much difference in the University.

And in the time that they have been working on this, they ought to be able to say these are the categories. This is a manuscript reader, this is a person who discovered this medicine, or discovered the precursor to something that provided great monies to both the grant maker and to the University.

The money does not come from the state general fund. The money comes from outside things. And it would be a very easy thing to figure it out and say this is the proposal. If you are making so much money and it is an across the board percentage increase; the low paid workers are getting only five percent of what they get and the higher paid should get five percent of that. So, you know, if they're asking for a flat fee, then maybe the lower people get more and the upper people get less.

But I also mediated at the suggestion of Regent Blum and AFSCME, with the University when they were dealing with the problem with one of the AFSCME locals, and I had to shuttle back and forth. And I will have to say this: I told AFSCME that their first demands were somewhat sweet. But I went back to the University and they came up, their negotiator came up with such—it was insulting, and I said I will not bring this back to AFSCME.

And when I walked in, they said "What did they say?" And I said I will not tell you. And they said "What did they say?" I said I will not tell you. And one of them said "You have to tell us." So I made them all stand up, cross their heart, swear to God that they would not throw a fit when I told them. I told them about what I considered to be an insult. And one of them started to raise up and the other said "No, we promised we would not do this."

So I point that out for so much bargaining in good faith.

Now, we have had this problem over the years with farm workers and we were able to pass a bill for farm workers when after a certain amount of negotiation it went to kind of an oxymoron, but it was binding mediation. And that has worked. I do not know if that is possible with the University or not. But I think as Congresswoman Lee said "When they come looking for money before the Appropriations Committee, they probably should have one hand out for the money and the other hand out for possibly a proposed contract." Because you are not going to get the University and not so much demand the bureaucracy to do something. As I said time and time again, President Atkinson said that is fine, the person who was HR started over like we never had the meeting. And I think that that is what happens. And I think that it would be important that the policymaker and the ultimate person, and I have not met the new President, would give direction that they ought to do something about this. If you dealt with 29 out of 35, you got six to go, ought to be a piece of cake.

But again, UAW has been an industrial union. They had everything from the crafts to the janitors, skilled, unskilled and they did not all get the same money, they did not all get the same hourly wage, but they did get the same job protection. And I do not think anybody in the UAW plant today could get fired because they are going to have a kid. So, I mean, that is kind of my point. But my experience is they were dragged in the teaching assistants. It was not, "boy, we are happy to do this" and if it was not for President Atkinson's leadership, we would still be talking about that instead of this.

[The statement of Congressman Burton follows:]

Prepared Statement of Hon. John L. Burton, (Ret.), Former Representative in Congress From the State of California

I am honored that the U.S. House of Representatives Education and Labor Committee has asked me to testify in a hearing to understand better the issues surrounding post-doctoral scholar bargaining at the University of California (UC). I want to thank the Committee for coming out to California to hold the hearing.

I have some experience with these issues that may shed further light on this particular case study of first contract negotiations. In 1999-2000, while serving as President Pro Tempore of the California State Senate, I was drawn into oversight responsibilities and mediation efforts with respect to an earlier first contract being negotiated between the UC and its graduate student employees.

Such negotiations were difficult for various reasons. For example:

1. It was difficult to coordinate within the different offices of the UC during the contract negotiation. For instance, the Office of the UC President and the UC Labor Relations staff members were not in agreement over negotiation stance.

2. The contract that was negotiated between 1999-2000 was the first for graduate students in the entire UC system. There were concerns over the contract's implication for graduate education, such as union work rules overruling academic judgment. Such concerns were shown not to be valid on hindsight.

I am happy to answer any questions that the Committee may have. Thank you.

Chairman MILLER OF CALIFORNIA. Thank you.
Mr. Kampas.

STATEMENT OF BRADLEY W. KAMPAS, JACKSON LEWIS, LLP

Mr. KAMPAS. Good morning, Mr. Chairman, members of the Committee.

Thank you for the opportunity to speak here today. My name is Brad Kampas. I have been actively involved in collective bargaining on behalf of employers for over 25 years, including many first contract settings.

My testimony today will concern the process of collective bargaining and why first contract negotiations are often times consuming.

First contracts are of great importance. They are of great importance to employees who have never been represented before. They are of great importance to the union which has adopted the responsibility to negotiate on behalf of these employees. And they are of great importance to the employers, shareholders, customers, students, taxpayers and other stakeholders who are impacted by that contract.

I would like to put the length of bargaining in context with our federal and state labor laws.

Under federal law, in 1935 Congress passed the National Labor Relations Act, the first federal law regulating collective bargaining on a broad basis. It obligated the parties to bargain in good faith demanding that the parties approach the negotiations with a sincere purpose to find a basis for agreement. The law recognized its role as to facilitate private agreement, not dictate results. Notably, the law does not require the parties to actually reach agreement, or does it impose specific terms of employment.

The United States Supreme Court has acknowledged in its seminal case ruling on the constitutionality of the National Labor Relations Act that the free opportunity for negotiation is likely to promote industrial peace over other methods.

So why do contracts take so long in the first setting? They are often difficult and time consuming.

They seek multi-year contracts. The average contract is three years. The employer that adopts a collective bargaining agreement is bound by the cost structure while sacrificing flexibility. It commits to future expenses when there's no guarantee regarding revenue, funding or competitiveness in the marketplace.

For example, the University is being sought to commit to wage increases that are not yet funded by federal grants. And long-term care wide do a lot of collective bargaining, the parties relied on the state statutory system to negotiate significant wage increases for nursing home employees, only to find the State of California this year imposed a freeze on Medi-Cal rate increases that were going to pay for those, as well as federal cuts in Medicare.

The solution. Have the Federal Government give everyone more money. Certainly the State of California is not in a position to do so.

The process is, of necessity, prolonged. Bargaining starts with information requests by unions. They have a right to information re-

garding those who they seek to represent. They impose significant information requests that can take weeks to comply with.

Sometimes employers also make information requests. Unions seek to have employees inserted in multi-employer pension plans. Many of these are grossly under funded. A 2009 report by an independent California actuary, the Seigel Company, found that 39 percent of multi-employer plans are not even funded to the 80 percent level. Congress was forced to intervene with the Pension Protection Act of 2006. This law imposed additional employer contributions that were never even contemplated in the bargaining process.

Health insurance is another complex area. Some unions bargain every single time of the health insurance plan and their contracts may span dozens of pages on health insurance alone. The parties are required to negotiate over future increases in health insurance which no one realistically knows what percentage increases they will be.

The first contract also is a very significant contract. It will be in place for decades as part of the relationship. As any experienced labor practitioner knows, it is very difficult to modify even simple language in subsequent contract negotiations as parties become fixed.

The Labor Board has recognized that collective bargaining requires a great investment of time. It uses the concept of impasse, the point at which the parties have exhausted the prospects of concluding an agreement would be fruitless. There are remedies under the law should the employer not bargain in good faith.

Some of the unions and labor supporters have suggested binding interest arbitration if the parties cannot agree. Chairman Miller referred to the Employee Free Choice Act which is currently being debated in Congress, which would impose mandatory interest arbitration within 20 days after negotiations. That would fundamentally alter our American system.

Arbitrators are frequently unprepared to deal with different environments where they have a hearing over a couple of days where the parties have spent weeks and weeks discussing the issues that are involved. Opponents of compulsory arbitration are concerned about the arbitrator's ability to evaluate and determine appropriate wage and benefit increases. If the arbitrator guesses it wrong, the employee suffers as many of them are laid off.

Arbitrators are required to deal with minutia. Unions frequently bargain every single work rule. Some defer to management under management rights. There are issues of constitutionality in a government imposed contracts through interest arbitration.

The parties need to bargain in good faith and compromise. Very frequently, unions fail to compromise because they have over estimated their bargaining power. Interest arbitration is viewed as a way to get that which they could not otherwise get at the bargaining table. Other times, unions have problems with telling employees no after they've made promise to them in bargaining in the election process.

I conclude my remarks. Thank you.

[The statement of Mr. Kampas follows:]

**Prepared Statement of Bradley W. Kampas,
Jackson Lewis, LLP**

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 give 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.

Chairman MILLER OF CALIFORNIA. Thank you.
Dr. Ferguson.

STATEMENT OF DR. JOHN-PAUL FERGUSON, ASSISTANT PROFESSOR, STANFORD UNIVERSITY GRADUATE SCHOOL OF BUSINESS

Mr. FERGUSON. Chairman Miller, members of the Committee, thank you for inviting me across the Bay this morning to give testimony on first contract negotiations.

My name is John-Paul Ferguson. I hold a PhD from the MIT Sloan School of Management where my research focused on the dynamics of trade union organizing. I am currently an Assistant Professor at Stanford University's Graduate School of Business.

Others in today's lineup have more experience with the specific case at hand. I will limit my remarks to a general point about first contract negotiations.

I became aware of the current bargaining impasse between the University of California and its postdoctoral union when I was informed that someone affiliated with the University administration had quoted my research which showed that extended delays in contract bargaining were widespread in this country, as evidence that nothing unusual was going on in this case. The research in question is an article entitled "The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1990-2004" that appeared in the Industrial and Labor Relations Review in 2008. I've entered a copy as evidence.

In that study, I tracked more than 22,000 organizing drives through as many stages of the process for which we have data, from filing an election petition with the NLRB to holding, and perhaps winning that election, to negotiating a first contract with the employer. I found that in the cases where the union won the representation election, only 38 percent received a contract with the employer within the one year contract bar.

So, point of fact, long delays in reaching contracts and high rates of not reaching contracts are, indeed, not unusual. Nowhere in that study do I suggest that because these delays are common, there is nothing wrong with this state of affairs. Quite the contrary. The figures in my study should be cause for alarm, not for complacency. The point of my study is that you can model contemporary union organizing like a screening process where only those who made it through an earlier screen have a chance to clear the present screen.

There are four main screens in an organizing drive:

Getting enough signatures during the card drive to file an election petition with the NLRB;

Actually holding that election;

Winning the election, and;
Negotiating a first contract.

To quote from the study's conclusion. "While the NLRB election procedure can be modeled as a screening process, it was not designed to function this way. As designed, there were two screens: The signature requirement and the election. All of the cases observed here by definition met the signature requirement. The period before the election was not supposed to last for months or years, nor were one of every three organizing drives to be abandoned before an election was held." And directly pursuant to this case, "There were certainly not supposed to be attrition rates surpassing 40 percent in the interval between recognition and contract agreement."

Hopefully this is enough to make clear my own opinion: Such delays are not unusual and that this is a bad thing.

I should say why I think that the low rate of speedy first contract agreement is evidence of a problem. I stress that all I, or anyone can give you is evidence. The simple fact is that our national data on such negotiations are not very good. I have argued elsewhere that anyone who is seriously interested in this issue should support mandating the relevant agencies to collect better data and giving them the resources to do so. That so many people use the absence of labor market data to imply the absence of a labor market problem, however, shows how serious their interest really is.

There are two common arguments why negotiating delays might not be a problem. The first is that the issues over which the parties are bargaining are simply more complicated these days.

The second is that increased turnover of negotiators, particularly on the management side, combined with lower rates of unionization means that parties are often well intentioned but less experienced at bargaining.

There are inherent problems with both of these arguments which I would be happy to address during questioning. For now, I will just refer back to my own research which has shown that longer bargaining delays and lower agreement rates have happened in concurrence with more petition withdrawals, more unfair labor practice charges against employers and increased use of professional union avoidance consultants by employers.

If bargaining delays were increasing in isolation, it would be easier to credit well meaning but unexperienced negotiators who are dealing with hard problems. Given these other trends in the data, though, I think that the burden of proof ought to lie on the employer to demonstrate that good faith bargain is taking place. Thus, when I see negotiations dragging on, as they have here, I tend to think that the most plausible explanation is that delay is part of a broader effort by the employer to depress, demoralize or decertify its newly organized employees, an effort in effect to nullify the employees' stated preference and to get rid of the union through bad faith bargaining.

Thank you.

[The statement of Dr. Ferguson follows:]

**Prepared Statement of John-Paul Ferguson, Assistant Professor,
Stanford University Graduate School of Business**

Chairman Miller, members of the Committee, thank you for inviting me to give testimony on first-contract negotiations. My name is John-Paul Ferguson. I hold a PhD from MIT's Sloan School of Management, where my research focused on the dynamics of trade-union organizing. I am currently an Assistant Professor at Stanford University's Graduate School of Business.

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The point of my study is that you can model contemporary union organizing like a screening process, where only those who made it through an earlier screen have a chance to clear the present screen. There are four main screens in an organizing drive: getting enough signatures during the card drive to file an election petition with the NLRB; actually holding that election; winning the election; and negotiating a first contract. To quote from the study's conclusion:

While the NLRB election procedure can be modeled as a screening process, it was not designed to function this way. As designed, there were two screens: the signature requirement and the election. All of the cases observed here by definition met the signature requirement. The period before the election was not supposed to last for months or years. Nor were one of every three organizing drives expected to be abandoned before an election was held. * * * There certainly were not supposed to be attrition rates surpassing 40% in the interval between recognition and contract agreement (p. 16, emphasis added).

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I should say why I think that the low rate of speedy first-contract agreement is evidence of a problem. I stress that all that I or anyone can give you is evidence. The simple fact is that our national data on such negotiations are not very good. I have argued elsewhere that anyone who is seriously interested in this issue should support mandating the relevant agencies to collect better data and giving them the resources to do so. That so many people use the absence of labor-market data to imply the absence of a labor-market problem however shows how serious their interest really is.

There are two common arguments why negotiating delays might not be a problem. The first is that the issues over which the parties are bargaining are simply more complicated these days. The second is that increased turnover of negotiators, particularly on the management side, combined with lower rates of unionization means that the parties are well intentioned but less experienced at bargaining. There are inherent problems with both of these arguments, which I would be happy to address during questioning. For now I will just refer back to my own research, which has shown that longer bargaining delays and lower agreement rates have happened in concurrence with more petition withdrawals, more unfair labor practice charges against employers and increased use of professional union-avoidance consultants by employers. If bargaining delays were increasing in isolation, it would be easier to credit well-meaning but inexperienced negotiators who are dealing with hard problems. Given these other trends within the data, though, I think that the burden of proof ought to lie on the employer to demonstrate that good-faith bargaining is taking place. Thus when I see negotiations dragging on as they have here, I tend to think that the most plausible explanation is that delay is part of a broader effort

by the employer to depress, demoralize or decertify its newly organized employees—an effort in effect to nullify the employees' stated preference and to get rid of the union through bad-faith bargaining. Thank you.

Chairman MILLER OF CALIFORNIA. Well that's a lot to think about. Usually you call a time out and go to the bench and figure out what to do.

We are going to start questioning now from members of Congress. And, John, I know you have some time constraints. So I just would say to my colleagues if you want to ask a question of Congressman Burton, I would have you do it. Why do not just do that?

And I guess I would ask a little bit in conjuncture with Mr. Miller, and that is in first contracts it seems to me that one of the inherent problems you have is that in most instances it would appear that the information is with one party. Because those who are seeking the union do not necessarily have access to all the information because there may not have been a reason, or they simply couldn't get access because they had no standing to get that information. And then the question is of whether or not that information is being used in good faith to reach an agreement or not. And I don't know if you want to comment and Congressman Burton from his experience in this situation.

Mr. MILLER. Okay. Well, there is certainly a lot of information we have requested from the University starting in December of 2008 that we have yet to receive.

The most troubling component of that, though, is that in the middle of April 2010 the University used their failure to provide that information, especially about two job titles, as a reason that they could not provide us with a reasonable proposal or any proposal on salary increases in a second or third year of the contract.

Chairman MILLER OF CALIFORNIA. John?

Mr. BURTON. I mean, the information is really important. And I think going back to Marvin Miller who was the research guy for the steel workers and then hired by the baseball players, and when he started doing research and he got a lot of money to be doing this with, you know salaries went from \$30,000 minimum up to God knows what because he had the numbers and the information which they showed.

But one of the things that I want to get to, not to answer this, Mr. Chairman, but the fact that management is trying to decertify the union, if that is in fact the case, is proof to me that they are not bargaining in good faith. I mean, why would you want the other; if you really want a contract, you do not try to decertify unless you want to decertify before somebody enters into a contract. As I say, not that it is stated, but I will pass that.

Chairman MILLER OF CALIFORNIA. Dr. Ferguson, both you and Mr. Miller referred to that in your testimony that there may be an active effort to decertify or a guerrilla effort to decertify within the University administration. What do we know about that?

Mr. FERGUSON. I will defer to Mr. Miller on the specifics of this particular case as far as what's going on with the University.

Chairman MILLER OF CALIFORNIA. Mr. Miller?

Mr. MILLER. We know that, as I mentioned in my testimony, on at least three University campuses, San Francisco, Davis and at

Riverside, University administrators have forwarded a website advocating decertification of the UAW to postdocs, and encouraged them to look at it.

We also know that the University's chief negotiator provided a list of all the postdocs to an individual who requested the list so that he could try to decertify the union.

We know those things.

Chairman MILLER OF CALIFORNIA. Thank you.

Ms. Woolsey.

Ms. WOOLSEY. Thank you.

John?

Mr. BURTON. Yes?

Ms. WOOLSEY. I was going to call you the honorable, I was trying to come up with the title.

Mr. BURTON. 225-5161.

Ms. WOOLSEY. That is our number.

Chairman MILLER OF CALIFORNIA. Nevermind.

Ms. WOOLSEY. I see his seat in the Congress, and I do know that.

In listening to——

Chairman MILLER OF CALIFORNIA. The phone number goes with the office, not with the member.

Ms. WOOLSEY. Oh God.

In listening to Mr. Kampas, I started thinking, you know it sounds like from where he was coming that writing a first contract is like giving birth. But, you know, each birth although it is unique has a whole bunch of similarities. I mean, so it's not look oh gee, we are going to have a first contract. We have to go back and start all over.

So, why and where do you think there is enough overlap? I mean, why are we not using the experience of the TAs and the grad students? I mean, there has to be enough overlap of successes and in common and it works because they have the same broad—go ahead.

Mr. BURTON. I mean, I would think so. But again, just sitting here and only because of my past experience, I mean I have a theory about the HR people at University. But there could be some validity that it is a little bit different, but also it could be an excuse. And if you take the totality of what has been going on, it seems like a stall. And I do not know what the six issues are, that it was like if the 29 are like Washington's birthday off and the six issues are bread and butter.

Chairman MILLER OF CALIFORNIA. Mr. Kampas, could you move the microphone over to Mr. Burton?

Mr. BURTON. I am sorry. If the six issues are bread and butter issues, are the main issues and we could throw out the other 29, then it is a problem. But I mean I could see there is a point because it is different. But the University in my mind would have to know how many people read manuscripts, how many do research on this drug or that drug, how many people are doing this and that. And that is a category just like with AFSCME they said that they know how many are janitors, how many are clerical, how many are doing this. I mean, you know the information has got to be there. It may be a little bit more difficult than the other, but

they sure as hell have to know who is who and what is what because they are sending them paychecks.

Chairman MILLER OF CALIFORNIA. Ms. Lee, you want to ask Mr. Burton a question?

Ms. LEE. Yes. I would like to ask John this question. Certainly you have much institutional memory. I actually served with John in the early '90s on the Public Safety Committee in the Assembly when he was Chair and then moved on into the State Senate where he became President Pro Tem. And even before the early '90s when I was on his Committee in the Assembly, he came to that position with a lot of memory about a lot of stuff.

And so you've seen a lot, John. And I just want to ask this question, big picture. If in fact we see a decertification process moving forward, and I know for a fact that many efforts to contract out services and I think members of the Committee know that, this panel knows that, contract out services at the University; what does this mean in terms of the historical memory that you have and where the University could be going in the future?

Mr. BURTON. Well, I do not want to be bad for morale at the University because these people chose to do something. And if you are stalling to make everybody unhappy what do you need this meeting for. But I can go back, and the Chairman's father was chairing the Committee in the Senate when somebody had for the first time a bill to organize people in the University and have the dues check-off. And I remember the lobbyist for the University system at that time, the great Jay Michael, stood up and it was right after the free speech movement, and said these funds will go to pay for the anarchy that's going on at the Berkeley campus now, which some people on the Committee bought, some did not. And I never talked to Jay Michael after that because, I mean, it was just so bogus. But I do not know if it was a mind-set of the University then, although I think it was still Clark Kerr who, despite all, was a fairly decent guy. But it was the lobbyist.

But the University now finally, I mean they understand the fact. They know they have to negotiate with various unions with the professors, with the academic senate, with everybody. But it just seems to me when they are looking at teaching assistants, which are like you know, who are they? Well, the ones that teach the course while the professors are doing something else. And now the postdocs, it seems as if they do not want to do it. I mean, it may be difficult. And I do not know this, and do not say after I go. But here is the problem we have: How do we figure out the manuscript readers and the ones that are researchers, how to do that? I think it is doable. But the other thing is I would hope one of the 29 things agreed to was that if somebody is pregnant and has a child, you know it is not what the Speaker called a prior existing situation where she had to fight to get her time back, she had to fight to take advantage I guess of the state law on maternity leave. But, I mean, those are again basic things but it shows a mind-set either in that department or the University bureaucracy that these people do not merit common decency.

I mean, and I am just sitting here, I have no idea. But again, I think that some of these questions are great questions to ask when they are coming up to Congress and saying we need another

\$130 million to research this. Well, who is going to research it? How many postdocs and who is getting the benefit of this?

Just a personal thing. I know a doctor who researched a drug that is the precursor of more TV ads than you ever want to see without naming the drug. And I told him, I said "Man, you must be rich." And he said "No, I ain't rich. The University got the money." Somebody got rich because, I mean you cannot watch your football game or see Mike Ditka and Bob Dole, or anybody else on the thing.

So anyway, I mean that is my comment. Thank you for the time of letting me come, Mr. Chairman.

Chairman MILLER OF CALIFORNIA. Thank you.

Mr. BURTON. And Barbara and—

Chairman MILLER OF CALIFORNIA. I appreciate you being here.

Ms. LEE [continuing]. Juneteenth.

Ms. WOOLSEY. For sure.

Chairman MILLER OF CALIFORNIA. Dr. Tyler, the funding for your various postdocs was from what sources? Can you tell us that or do you want to submit it for the Committee?

Ms. TYLER. Yes. My positions have been funded, as most postdoc positions are, through federal grants.

For example, National Science Foundation and Department of Energy.

Chairman MILLER OF CALIFORNIA. That is the source for you mentioned a number of different positions you held, it was from either of those two?

Ms. TYLER. Yes, I believe so. But these are grants to the lab. And a particular lab will have usually multiple grants from different agencies. National Institutes of Health is another one.

Chairman MILLER OF CALIFORNIA. Your work is, in theory, restricted to that grant that is funding your principal investigator?

Ms. TYLER. Yes. Yes, that's correct.

Chairman MILLER OF CALIFORNIA. And this is your research and you are working on that particular research, is that correct?

Ms. TYLER. Yes. We discuss the project plans and say, okay, these are the goals for the grant proposal. This is what we need to get done for the taxpayer's money.

Chairman MILLER OF CALIFORNIA. Thank you.

Mr. Duckett, in your testimony you say that the difference in titles of the various postdocs, of some 6,500 postdocs, I am on page 3 of your testimony, that the differences in titles arise primarily from their funding. And you have the first category of the employee postdoc. Can you walk through for me for the types you are referring to here?

As I see it, you have fellows, you have the employee postdoc scholar and then you have something called paid direct?

Mr. DUCKETT. That is correct.

Just so in terms of walking through those, I will take an excerpt from the written testimony.

The first category being the postdoctoral scholar. It is a person who receives funding from a university source that provides discretionary funds in support of training of postdoctoral scholars or from an agency that requires or permit the person to be a university employee.

The majority of postdoctoral scholars are funded through federal contracts and grants, like the National Institutes of Health. The National Science Foundation and Department of Energy are also others.

Chairman MILLER OF CALIFORNIA. Okay. And then the second type is what?

Mr. DUCKETT. The second type is a postdoctoral scholar fellow. The fellows have been awarded funding by what we call an extramural agency outside of the university. And a lot of this money flows through the university is paid as a stipend rather than pay. And these awards carry a lot of restrictions about the fellow holding certain appointments at certain times and working on other funds.

The majority of fellows in the life science are supported, again, by NIH funds. And although other sources are used in terms of the non-life sciences those sources.

Chairman MILLER OF CALIFORNIA. And the third type?

Mr. DUCKETT. The third type being a paid direct. paid directs basically bring their own money with them to conduct research. They can be from an extramural agency, it could be a private source, it could be a foreign country.

Chairman MILLER OF CALIFORNIA. So they come self-contained?

Mr. DUCKETT. Yes, they do.

Chairman MILLER OF CALIFORNIA. Does the university contribute anything to them ever?

Mr. DUCKETT. No.

Chairman MILLER OF CALIFORNIA. So if their wages are not sufficient for the cost of the program, what happens?

Mr. DUCKETT. Well if their wages aren't sufficient in terms of the cost of the program, then any gap in terms of what they are supposed to be paid, the work that they are doing, et cetera, will need to be made up from state funds if those grants do not cover everything that they are supposed to do in terms of research.

Chairman MILLER OF CALIFORNIA. Okay.

Mr. DUCKETT. That is about ten percent of the population or so, as I understand it.

Chairman MILLER OF CALIFORNIA. And if I am correct, the suggestion in your paper is these various classifications make this a very complex negotiations between you and UAW?

Mr. DUCKETT. Absolutely. Each one of these types of individuals is working on a particular grant or fund source which is usually contained in a very thick paper file. All of the provisions of that particular grant have to be accounted for to make sure that the research is being done properly and the person is going to be paid appropriately out of the designated fund source.

Chairman MILLER OF CALIFORNIA. And that is all done today and was done last year, and the year before, and the year before that?

Mr. DUCKETT. Yes.

Chairman MILLER OF CALIFORNIA. So where are we in the costing exercise to assess the economic impacts of the UAW proposal?

Mr. DUCKETT. Well, there have been several requests for information, which we have noted the difficulty in pulling together. We are still working hard to pull together that information, although

as I mentioned before, it resides in ten campuses across the entire State of California and is mostly in paper files.

Chairman MILLER OF CALIFORNIA. Mr. Duckett, that request was made in May of last year. President Yudof sent me a letter and said that was one of the reasons why he thought in his report on the status of negotiations, why he told me that these negotiations were going forward and that he would keep me informed of that. It has now been almost a year, I guess it is a year tomorrow, so where are we on the costing exercise? Do we know what the problems are with paid directs?

Mr. DUCKETT. We have identified some of the problems with paid directs.

Chairman MILLER OF CALIFORNIA. You identified those when you took your first paid direct five years ago, three years ago, or whenever, right? Did they come with a series of conditions?

Mr. DUCKETT. They come with a series of conditions that are tied to their grants. But again, there are thousands of them and they are all individual grants.

Chairman MILLER OF CALIFORNIA. Have you worked out your problems with the NIH or the postdocs, first category?

Mr. DUCKETT. We have a clearer path with regard to some of those categories, yes.

Chairman MILLER OF CALIFORNIA. Can you make that information available by clear path to the Committee? In correspondence to us a year ago?

Mr. DUCKETT. Well, in terms of making it available in this setting, that would be difficult to do to walk through and explain it. But we would be happy to—

Chairman MILLER OF CALIFORNIA. No, no. I am not talking about you walking through it now. I want to know if the information has been developed. I want to know if we have been misled that these exercises are, in fact, going on on an ongoing basis. These are the reasons why apparently people have not been ready to meet in these organizations and you have the information, and we are awaiting it.

Mr. DUCKETT. We would be happy to provide what we have so far.

Chairman MILLER OF CALIFORNIA. With the paid directs, where are we with the paid direct, I mean with the fellows?

Mr. DUCKETT. At a lesser stage of completion, but further along than we would be—

Chairman MILLER OF CALIFORNIA. Why is that? What stage did you say you are at?

Mr. DUCKETT. Incomplete.

Chairman MILLER OF CALIFORNIA. Why is that?

Mr. DUCKETT. It is very difficult to gather this information across the thousands of grants and postdocs on campuses.

Chairman MILLER OF CALIFORNIA. But do you not in fact have to agree to the terms and conditions of those grants when you accept those individuals in each and every one of these categories?

Mr. DUCKETT. In each individual case, the principal investigator and the research department at that particular university and within that particular department does have to agree to those terms.

Chairman MILLER OF CALIFORNIA. And one of the terms of, I believe, the postdocs is that they have cost of living increase adjustments in those contracts, is that correct?

Mr. DUCKETT. In some instances, yes.

Chairman MILLER OF CALIFORNIA. In how many are there not?

Mr. DUCKETT. Again, we do not have a complete accounting of that information.

Chairman MILLER OF CALIFORNIA. We are just asking now who does and who does not.

Mr. DUCKETT. We do not know. We do not know overall—

Chairman MILLER OF CALIFORNIA. Because this is a major problem to the settlement and reaching agreements, but you do not know?

Mr. DUCKETT. Absolutely. But we continue to research it and continue to try to find the answer.

Chairman MILLER OF CALIFORNIA. How many paid directs have you contributed state money to?

Mr. DUCKETT. That we know of at this point, none.

Chairman MILLER OF CALIFORNIA. None?

Mr. DUCKETT. That we know of.

Chairman MILLER OF CALIFORNIA. So what happens when that grant is insufficient to cover its cost? You have not had any of those?

Mr. DUCKETT. I would imagine we have had some—

Chairman MILLER OF CALIFORNIA. And what happened in those instances?

Mr. DUCKETT. I do not know on each individual case.

Chairman MILLER OF CALIFORNIA. That is suggested again as a major problem of the complexity of these negotiations, but you do not know?

Mr. DUCKETT. This is true. We do not have a complete picture, but we continue to research it.

Chairman MILLER OF CALIFORNIA. Do you really expect me to believe this?

Mr. DUCKETT. It is the truth.

Chairman MILLER OF CALIFORNIA. Well then there is something very wrong here in the representations to those of us, I think almost the entire delegation has written to President Yudof, about his representation about how these negotiations are going, your representations of how these negotiations are going. And if this is the basic informational base that is lending to the complexity that in more than a year's time and having many of these same issues raised with the graduate students that this University cannot develop this information; it really raises a question of whether or not this University knows what, in fact, they are doing with these grants.

Mr. DUCKETT. In each individual grant I can assure you that people know exactly what it is that they are doing—

Chairman MILLER OF CALIFORNIA. Then why can you not answer these questions? You mean, there is nobody in the University administration that can compile this information in a year's time? Nobody? No team of people with all of the computer—nobody can develop a spreadsheet? Nobody can develop a spreadsheet?

Well, I would ask the audience to restrain because this is a very serious problem. In theory you are in compliance with every one of these grants because all of them bring special conditions. And you know what they are. You know what they are to recite them as a problem, but you do not know what they are to provide them as a solution.

That information has now been requested by the UAW, it has been requested by the Congress of the United States and we have not seen it in a year. That raises some very serious credibility problems about these negotiations.

I am going to turn to my colleagues, but I just want to ask you one question. In that context, because again it is raised, you talk about complexity and then on page 4 you say "proposals on wages also pose a significant risk to the University." How do you know that?

Mr. DUCKETT. They pose a risk because we do not know the impact of these increases across all these grants and fund sources.

Chairman MILLER OF CALIFORNIA. It is a conclusion? It is a conclusion that these proposals pose a significant risk? You do not know? They might possibly pose some risk to the University, but you do not know that?

Mr. DUCKETT. We know if we fail to account for all of the money, that there is nowhere else to go outside of those grants.

Chairman MILLER OF CALIFORNIA. That is why you would start to pull these grants apart in response to the need for information from the bargaining unit, from the people who won the contract. And somehow this University cannot develop that information. You can work on new green sources of energy, you know look it, we are talking about one of the smartest universities in the country, smart personnel. I do not know, maybe the administration is lacking. But this is a real serious credibility problem, especially when we see the discussions and the presentation materials about decertification. You know, somebody is going into a stall here so the calendar, because it is now a year, and that presents problems.

Congresswoman Woolsey.

Ms. WOOLSEY. Now there is an act to follow, okay.

Mr. Duckett, I have 20 years of experience as a Human Resources Director in private industry in high tech where we grew a company from 13 people to over 800 in a ten year period. And I would relate what I called my engineers with your postdocs because, you know, each one was unique, each one had what they were responsible for. So because of this, my experience, I cannot restrain myself from getting in the weeds here. So I am coming down to ask some questions that are probably in the weeds, not out there rhetorical at all.

So because of the complexity, because of the uniqueness of each postdoc personnel in the system, and because it does not sound like you really know what the raises could be, should be, what the funding is, how much is set aside for that activity, I am concerned how do the principal investigators know what they are doing? Are they trained and are they skilled? And do they know how to evaluate their employees one at a time? Do they want to do that, or would they rather be doing the work of the program?

You know, a lot of engineers I found out at my company was that they are really good engineers, but they really were not administrators. They had no desire to be an administrator.

So, and are these principal investigators, are they evaluated on how well they take care of their workers, of the people they hire to be part of their program?

I mean, how do you ensure if you will not have an across the board step raise program, how do you ensure that these individual postdoc employees get any attention?

Mr. DUCKETT. Well, each principal investigator is accountable to their department in the research organization that they are working within. So in terms of them not performing critical aspects of their job, they would be accountable for not doing that well.

Ms. WOOLSEY. Well, I would suggest we are looking at those that do well and how are they rewarded for it? Because it does not sound like from the interaction I have had with the postdocs that they think they are being taken care of at all. So now where does the responsibility fall? On the principal investigator, the person that wrote the contract who is probably a really good scientist, he or she on their own? I mean, how do you know as an institution that they know how to do this?

Mr. DUCKETT. Well the principal investigator is responsible for administering all aspects of that research. And I would assume that if the University or that principal investigator did a poor job at it, they would not get additional grants.

Ms. WOOLSEY. No. I do not think that is the end result. I mean, you have got these amazing smart, talented postdocs that are doing their job for very little wages, I believe, and then they can get fired if they get pregnant, which is ridiculous. So you can finish a contract because, as a matter of fact, there are a lot of postdocs in fewer and fewer jobs from what I have read in all the testimony.

They would not want to organize if they thought they were being taken care of by their employer, the University. So that is what I am—and I do not think you know if their bosses, their managers, their administrators—and I am not mad at PIs. They probably are just great, great people. But that does not mean they know how to do what you want them to do for individual reviews.

Mr. DUCKETT. Well quite honestly, that is another benefit that the University sees in terms of getting a settlement with regard to these negotiations and getting a contract. And I do want to point out that it has come up several times, and prominently, time off is one of the articles that we do have resolved and ready to go in the event of a settlement. But quite honestly, one of the benefits of getting this contract resolved is that we would have more structure around the exact types of issues that you have outlined.

Ms. WOOLSEY. So then that makes it even more important that that contract go forward, right?

Mr. DUCKETT. We absolutely we want to get done as fast as we can.

Ms. WOOLSEY. Yes.

Mr. DUCKETT. Responsibly.

Ms. WOOLSEY. Okay. Thank you, Mr. Chairman.

Chairman MILLER OF CALIFORNIA. Congresswoman Lee?

Ms. LEE. Thank you very much.

Let me first ask Dr. Tyler a couple of questions.

You know, I asked a staff to write down, I just wanted to know what \$37,400 a year was based on an hourly wage. The information on the numbers that we have, and I want to thank you very much for this. Okay. If you work 40 hours a week it is \$18 per hour. Sixty hours a week is about \$12 per hour. And, of course, many postdocs work much longer hours.

This is not even a living wage in the Bay Area, first of all. And I know that postdoc positions and postdoc scholars are not doing this for the money. But I also know that, and you shared your story, that you have to be able to live a decent life and take care of your families. And I am sure the University gets that and understands that.

And so what concerns me now especially is what kind of competitive destination is the University of California for postdocs? Do you know? Are you aware of any movement of postdocs or recent PhDs to want to avoid UC Berkeley now based on this type of treatment?

Ms. TYLER. Well, Congresswoman Lee, you have brought up some very good points. I have done those calculations, and I instantly try to forget how much I might potentially make per hour. It is incredibly depressing.

It is a high cost of living area in the Bay Area. And because you are asking about comparisons, I will make a few.

Mr. Duckett has brought up the NIH, and my apologies but since he brought it up, I would mention that NIH fellowships place restrictions on postdocs. I have to point out that the NIH guidelines for a person with my experience and my qualifications would give me about \$5,000 more per year than I currently make. Okay.

NIH is taken as a national standard for postdoc pay. That means that nationally UC does not look so good.

Let me give you another example locally. My husband is also a postdoc. We graduated with PhDs, both of us from the same department at Duke University on the same day. We are in the same field. We do the same job. It is slightly different, it is a different aspect of plant science, but he works at Stanford. This year he is going to make \$10,000 more per year than I will.

So in terms of reputation, let me ask this. If you could do the same job with the same qualifications, live in the same geographic area and make \$10,000 more by going to Stanford than UC Berkeley, where would you go?

Ms. LEE. Yes. Yes. So let me ask Mr. Duckett. Thank you very much, Dr. Tyler.

Mr. Duckett, okay. Now you heard that. It is my understanding, and I wanted to ask you first of all if NIH knows what is going on, first of all. Because, you know, we do have a new Administration. And this Administration is very clear on the right to organize and union contracts, and fair wages.

UC gets an overhead rate of 53 percent on federal contracts, which means that for every \$1 million in federal funding for a specific professor's lab research, we provide an additional \$530,000 that goes into the University's unrestricted operating budget. In other words, 53 cents for every dollar is added to the University's grant for postdoc scholars.

Since they do most of the research on these federal grants, I believe it is 90 percent of UC postdocs are paid by federal grants, their work is not only paying for themselves, but is bringing in substantial income, mind you substantial income to the University's operating expenses. So how is it that you've taken this revenue generating function, how do you take this into account in terms of the dollars and cents when you bargain with the union? What is the deal?

Mr. DUCKETT. Well, in terms of those numbers that you stated, not all of the overhead is accounted for for each individual. Those amounts vary by grant. They also can change going forward.

Ms. WOOLSEY. So give me what is the estimate then?

Mr. DUCKETT. I could not—

Ms. WOOLSEY. A median?

Mr. DUCKETT. I could not estimate across the board. There is—

Ms. WOOLSEY. Ten percent, 15, 20?

Mr. DUCKETT. I really could not responsibly estimate.

Ms. WOOLSEY. Okay. Well, we would like to get some information on it.

Chairman MILLER OF CALIFORNIA. I do not understand the answer. She asked about the difference in the grants you said not all of the grants account for all the cost or all the overhead. I do not understand.

Mr. DUCKETT. Not all the grants account for all the costs dollar-for-dollar, or all the overhead dollar-for-dollar and can change in subsequent years.

Chairman MILLER OF CALIFORNIA. So the conclusion is what?

Mr. DUCKETT. The conclusion is there is a significant amount of unpredictability in terms of what those dollars are and if they are going to continue to come into the University?

Chairman MILLER OF CALIFORNIA. Do you have a reserve fund among the \$800 million? Do you have a reserve fund for contingencies in the overhead fund?

Mr. DUCKETT. We do not have a reserve fund in terms of contingencies like that, no.

Chairman MILLER OF CALIFORNIA. So this is a problem, but we do not set aside any money?

Mr. DUCKETT. We would always get exactly what we have asked for and/or agreed to via the grant. These numbers change.

Chairman MILLER OF CALIFORNIA. So Congresswoman Lee's 53 percent is an average or that is of every grant, or some grants?

Ms. WOOLSEY. Yes. Where does it come from?

Mr. DUCKETT. In terms of the number that Congresswoman Lee is referencing, if I could get on the same page as you. If this is something that we provided, I would like to see the source.

Ms. WOOLSEY. Well, it is based on information that we have, okay?

Mr. DUCKETT. Okay.

Ms. WOOLSEY. And I want you to tell me what you have, this 53 percent.

Mr. DUCKETT. Okay.

Chairman MILLER OF CALIFORNIA. This is what the University staff gave to the Committee staff.

Ms. WOOLSEY. And that is the information that we have. And so if it is not 53 percent, what is it?

Mr. DUCKETT. The number varies, as I have said.

Ms. WOOLSEY. From what to what? I mean, if you give us 53 percent, that is what we are operating under. I am sure that is what everyone is assuming. But if that is not accurate, then can you give us closer to what the percentage would be?

Mr. DUCKETT. As I mentioned, the numbers do change depending on whether the grant is renewed at the same level year-to-year.

Ms. WOOLSEY. Mr. Chairman, would NIH have that information?

Chairman MILLER OF CALIFORNIA. I do not know what the arrangement is, how they figure out the overhead. We get a better deal from Blackwater than we get from here.

Ms. WOOLSEY. Yes. Okay. Well, I would like to get a formal response to the panel in terms of what the overhead rate is.

Ms. LEE. Mr. Chairman, will you yield to me for a minute for a question?

Chairman MILLER OF CALIFORNIA. Yes.

Ms. LEE. Well, Mr. Duckett, don't you negotiate each of your contracts individually on the overhead?

Mr. DUCKETT. Yes. Right now in terms of the questions around how grants are funded and what level at which overhead is accounted for across the system, and whether we actually get all the money that we ask for in each individual grant, that is really out of my realm of expertise. That would be more suitable to the research apparatus of the organization—

Ms. WOOLSEY. Well it is either individual or there is an across board, like the NIH and University of California is 53 percent. I mean, I have heard that some of the Ivy League schools their overhead is 70 some percent. And you cannot tell us that?

Mr. DUCKETT. The research organization would be better suited to answer that question.

Ms. LEE. Well, they do not have any answers.

Ms. WOOLSEY. Well then, Mr. Chairman, I am going to assume it is 53 percent.

Chairman MILLER OF CALIFORNIA. That is the information that was given to the Committee.

Ms. LEE. Thank you very much.

Mr. DUCKETT. Thank you.

Chairman MILLER OF CALIFORNIA. Mr. Duckett, going back a little bit to why this is so complicated. The question of the paid directs, we have what? 6,500, is that Mr. Miller, roughly about 6,500 people?

Mr. MILLER. Yes.

Chairman MILLER OF CALIFORNIA. And my understanding is that the paid directs are about 300?

Mr. MILLER. Yes.

Chairman MILLER OF CALIFORNIA. And then the fellows are about 600?

Mr. MILLER. Yes, 600 or 700, about that, yes.

Chairman MILLER OF CALIFORNIA. So while this is complex, it is not complex for the bulk of the people being employed like Ms. Tyler?

Mr. MILLER. That is correct, yes.

Chairman MILLER OF CALIFORNIA. There is a fairly standard contract, is it not, from NIH or DOE? I mean, we have been doing this a long time. We have, obviously, stepped up the pace with the Recovery Act. But we have been doing this a long time.

Mr. MILLER. Yes.

Chairman MILLER OF CALIFORNIA. And those contracts, if I understand them correctly, contain a cost of living, I assume for the contract not just for wages, but the contract to get it through if it is a three year—I do not know how long these contracts run?

Mr. MILLER. Yes. It is typically called an escalator.

Chairman MILLER OF CALIFORNIA. An escalator for the overall contract?

Mr. MILLER. I—

Chairman MILLER OF CALIFORNIA. Or just for wages and benefits?

Mr. MILLER. It is broken out for different things. Wages and benefits, but also for other factors, equipment and things like that.

Chairman MILLER OF CALIFORNIA. So if they put in an escalator for Dr. Tyler's wages in the gross amount, the University would take 53 percent of that money out of that contract?

Mr. MILLER. Yes. Well, they do not take out of the contract. It is in addition to the contract. So in addition to, let us say that the contract was for \$1 million, in Congresswoman's Lee's example the University would get that \$1 million to fund what they call direct costs, salaries, equipment, et cetera, benefits. And then they would get an additional \$530,000 in indirect costs or overhead, or facilities and administration costs.

Chairman MILLER OF CALIFORNIA. So is that contract for a million and half, or is that a net million?

Mr. MILLER. A million and a half.

Chairman MILLER OF CALIFORNIA. A million and a half? So when we had a conference at Princeton with the research university and they talked about setting up a million dollar lab, that was the cost of that lab. But we could expect that there would be another half a million dollars attached to that to administer that lab?

Mr. MILLER. Yes, I believe so.

Chairman MILLER OF CALIFORNIA. So now we know that that money is taken off and used for general purposes in the university?

Mr. MILLER. Yes.

Chairman MILLER OF CALIFORNIA. Is that right, Mr. Duckett? There is no restrictions on that money?

Mr. DUCKETT. I am trying to think through so I can give you—

Chairman MILLER OF CALIFORNIA. Well, let me ask it another way. That money is not exclusively used for the administration of that particular lab?

Mr. DUCKETT. That money is not used for the particular—

Chairman MILLER OF CALIFORNIA. If it is given for overhead and administration? It is costing the taxpayer 53 percent to loan a million dollars for a lab, we were told that sort of the average of these would be about a million dollars to set them up in the context of the Recovery Act. And that is why we went forward. And nobody mentioned at that conference of the research universities that there was an add-on if what you are saying is correct, that that is on top of. And I just want to know then is that money used for the admin-

istration of Dr. Tyler's lab? Does that half million dollars go to administer that lab that her principal investigator is running with the other personnel that are part of that?

Mr. DUCKETT. If the question is, is the overhead tied to that particular grant, yes.

Chairman MILLER OF CALIFORNIA. Yes, is it used for that purpose? I know it is tied to that.

Mr. DUCKETT. To my knowledge, yes.

Chairman MILLER OF CALIFORNIA. I think the information given to the Committee staff is that it is for the general purpose uses of the University.

Mr. DUCKETT. For people working on those grants.

Chairman MILLER OF CALIFORNIA. I do not think so. We will check it again. But I do not think that is the case at all. These would be really rich labs at that point.

Ms. WOOLSEY. And they should get—

Chairman MILLER OF CALIFORNIA. Again, on the complexity issue, my understanding is that when the University went before the Public Employees Relations Board, is it that they insisted that the paid directs be included in this unit. And that they said that none of these relationships, referring to the paid directs relationships with their employers, impair the ability of the union to bargain with the University about terms and conditions of employment in control of the University.

So, you did not see that as a complex problem when you insisted they be part of this bargaining unit, but now they are complex problem, again for the solution and reaching an agreement.

Mr. DUCKETT. As we have gone through the process we have learned more about this particular group. And learned that the complexity—

Chairman MILLER OF CALIFORNIA. You have been working with these people for years. The paid directs apparently are not a mystery. In many instances, are they not foreign governments? They send people here because they would like to have them come attend the University of California and participate and get into the community of their area of research or expertise. So, I mean, it's a good—we get their brains, and they get the exposure that they are seeking. So this has been going on a long time. But now all of a sudden they become a problem and now when we look at their individual contracts. But that goes on all the time. I mean, they are intermingled in these other labs, but their sources of funding are restricted and who can contribute to those sources, I understand are restricted. But that is a known entity. That is the way these programs have been set up. And there is only 300 of them.

Mr. DUCKETT. Our numbers are a little different. We estimate it is more like nine percent.

Chairman MILLER OF CALIFORNIA. Yes, this is your number in filing before the Public Employees Board. It is not my number. This is on the University of California letterhead, signed by whoever made the petition.

Mr. DUCKETT. We estimate our current numbers to be about nine percent.

Chairman MILLER OF CALIFORNIA. So we are doing better than we thought? Okay. In attracting these people?

Excuse me one minute here.

So again, just quickly, on the paid directs as far as you know no state monies have been used to augment those contracts if they are found lacking? I do not think they have access to the federal money. I think that is prohibited by the terms of their contract or the use of the federal money. I think that is correct, is that right? Excuse me.

Mr. Miller, you are shaking your head.

Mr. MILLER. I do not think that that is correct, no. I think there is a number of paid directs, you know often times you will have a partial appointment as a paid direct and then you will have an appointment as a postdoctoral scholar employee, the first category in Mr. Duckett's testimony of postdocs. And those folks are typically when you are drawing a salary as a postdoctoral scholar employee, you draw a salary as a direct cost off the contractor or grant. The overwhelming majority of funding that goes to pay for postdocs comes from federal contracts and grants.

And it is extremely unlikely that the pay would ever come from State of California general funds. It may come from a State of California research contractor grant. But most likely, it is going to come from a federal contractor grant. And we have not seen a case yet, although we have asked for it a number times, of a postdoctoral scholar paid direct being funded with State of California general fund money.

Chairman MILLER OF CALIFORNIA. You have not see that?

Mr. MILLER. No, we have not.

Mr. DUCKETT. If I may ask?

Chairman MILLER OF CALIFORNIA. Yes.

Mr. DUCKETT. The prospect of across the board increases for all postdocs being done at a certain level, as a more or less one size fits all approach, does raise a risk of that happening and us having a situation where we have funds that are scheduled by the contract to be paid out to paid directs that are not accounted for in paid directs' contracts that would have to be made up by some other source.

Chairman MILLER OF CALIFORNIA. I appreciate you saying that, but you present the one size fit all, but you can continue to present the one size fits all on the basis that no information has yet been delivered, so that then the negotiators could make a determination of whether or not this has to be a different kind or perhaps unique contract taking into consideration federal restrictions, foreign funding restrictions, state restrictions. However, but we do not get to know that at this point. So you can keep throwing that up, but you are the one that holds the information. And withholding the information and then continuing to say this is just about one size fits all really does disservice to the idea of good faith bargaining. You just can't continue to hold it out.

You know, it seems to me that the information again that we are looking at is what are the restrictions and sources of funding for these postdocs. How the raises might affect those categories? What is allowed, what is not allowed? And what is the impact supposedly because there is some threat to the University finances, although you got \$800 million in overhead, how does that affect the University's finances?

Apparently there is insufficient evidence on the table so people can have a discussion about those facts. We have to have this discussion in the absence of those facts.

A year ago the President of the University tells me that that is all coming along fine; the costing exercises I think is the term.

Congresswoman Woolsey.

Ms. WOOLSEY. I am ready. Thank you. You can catch your breath.

Chairman MILLER OF CALIFORNIA. No, I just—

Ms. WOOLSEY. It is depressing.

Dr. Tyler, my questions are mostly for you, but I am sure Mr. Duckett, you will be part of this.

I am the author of legislation in the Congress called Go Girl. Because I want to get more women into science, math, technology and engineering. I cannot imagine why Go Girl is not really to get more women into gardening. I mean, they make a lot more money than what you are telling us. So, I mean, I am really finding this frustrating. It is like, what am I doing to these young women.

So the world is changing slightly. For heaven sakes, in health care being a woman is no longer a preexisting condition, and our Speaker made that happen. So we are glad of that.

Now we want being a woman not being a negative condition in employment as well. I mean, we are in the 21st century. Why are we even talking like this, this is what I cannot believe.

Your husband's \$10,000 more salary, equivalent everything between the two of you except for two different institutions and you are a female and he is a male. Is his higher salary, does it have anything to do with his being a male? Are your male colleagues at UC paid what you are paid?

Ms. TYLER. Yes. And that is part of the point that it is not just me, and it is not just women, although my husband certainly did not have to take a leave and a huge pay cut because he had to give birth to a child and recover from that. but it is an issue for everybody.

My male counterparts in similar positions are paid the same. And so what if you have two parents who are UC Berkeley postdocs? That is really hard.

And the thing is that I have colleagues, male and female, who say maybe I should just quit science and go work at Home Depot. Because I have heard they are a pretty good employer. And the sad thing is, they are only half joking.

And so I really appreciate all of the initiatives and the programs and encouragement that young women in science get these days. Unfortunately, we cannot promise them very much. Do we really tell them you get to slog through graduate school for five, six, seven years, who knows how long, and then you get to be a postdoc. And you get to pray that you get a job, a decent job in your field.

So these policies do not take that into account. They do not take into account who postdocs are. They are people with PhDs, and that means for those of us who have decided to have children, we have usually waited until we finish graduate school. If we wait much longer, biologically speaking, it can be too late.

From another perspective, I am in my mid-30s. I do not earn Social Security credits. I am not eligible for my employer's retirement

plan. We do have a defined contribution plan, but that is entirely different. If I lose my job, I am not eligible for unemployment benefits. My salary is so low that I cannot afford to save for those things on my own.

So what are we telling the young men and women who are thinking about science as a career? We are saying to them get a PhD and in terms of financial independence and security, you will be about a decade behind your peers who started working right out of college. That is not very attractive.

Ms. WOOLSEY. Mr. Chairman, I will end. I cannot have anything to ask beyond that.

Chairman MILLER OF CALIFORNIA. Congresswoman Lee?

Ms. LEE. You know, this is pretty demoralizing, to say the least. Because, you know over the years I have been involved in a lot of labor negotiations in many industries. And I have found that when negotiations are just about money, it is usually possible to reach a compromise. But where negotiations do bog down, it is not mostly about money, but about power, about ideology, maybe ego. And so I am wondering about UC in terms of some ideology maybe behind all of this. And is it really not about just the money? And are there some areas where you just will not compromise on, or is it really about affordability?

Now, we talked about, and you mentioned 29 of the 35 areas have been resolved. But you know what? Let me just read the remaining issues that are outstanding, though.

I wish John were here to hear this.

Wages is one of those that is outstanding.

Health benefits.

Appointment rights.

Job security, that is an outstanding issue.

And the right to respect other union's picket lines.

Now if these are the outstanding issues then I cannot figure out what the other 29 were.

And so can you kind of walk us through very quickly the University's perspective on these specific negotiations, and then I guess in general? Because we have seen again, as I mentioned earlier, contracting out, decertification processes possibly taking place. What is going on at my alma mater?

Mr. DUCKETT. Well, let me just comment. And again, I will point out that one of the articles that is settled that we have talked about a lot related to the birth of a child is time off from work, which is very important. I think we all acknowledge that.

We have resolved things like union security, making sure that the union is acknowledged and can collect dues.

We have done professional development in making sure that people have the ability to move through the organization to a higher level.

We have resolved discipline; the reasons why you can sort of be disciplined or ultimately keep your job or be dismissed from your job, which is very important also.

And we have also resolved the essential piece of most contracts, which is the grievance and arbitration procedure.

So those are just examples.

So the articles that we have resolved are not small. And acknowledging that we do have a way to go, and some of the ones that you have mentioned are very important to people; wages or money and benefits being another form of currency or money is important also. Layoffs, again, money and/or strike provisions, which is another item.

In terms of asking about the University of California's position with regard to collective bargaining and unions, employees have the right to choose a third party representative. This particular group of employee has chosen the UAW to represent them. And that question as it relates to actions by the University, whether or not the University is trying to decertify a union.

And by the way, the University cannot decertify a union and cannot decertify the UAW in the postdocs. That is a employee choice and it is driven by employees. We are neutral, absolutely neutral on terms of the right for people to be represented by a union and make that choice, and to make the choice not to be represented.

Ms. LEE. Excuse me, Mr. Duckett. I think I have seen a pattern of practice here in the past. Continue.

Mr. DUCKETT. Well, I will point to our pattern of having resolved contracts and closed contracts with most of our unions. And with regard to the UAW having negotiated a successful first contract for the graduate students and successor agreements after that. So there is no fundamental ideological or philosophical opposition to unionization within the University of California. We continue to bargain in good faith. We are continuing in good faith with regard to this process. And we will continue in good faith with regard to this particular negotiation going forward.

Ms. LEE. Thank you, Mr. Chairman.

Chairman MILLER OF CALIFORNIA. Thank you,

Mr. Miller, was there some dissemination of the list of the bargaining unit around this issue of decertification?

Mr. MILLER. Yes.

Chairman MILLER OF CALIFORNIA. What happened?

Mr. MILLER. In early December 2009 an individual contacted Gayle Saxton, the University's chief negotiator, and according to Gayle talking to me, to inform her that he intended to try to decertify the UAW as the union for postdocs. And she gave him the list.

Chairman MILLER OF CALIFORNIA. This was a member of the bargaining unit?

Mr. MILLER. Yes.

Chairman MILLER OF CALIFORNIA. Is that normal? I do not know how it plays out ordinarily.

Mr. MILLER. That is the first time I have experienced that.

Chairman MILLER OF CALIFORNIA. I mean, is that a normal and neutral position? Mr. Duckett, just referred—

Mr. MILLER. No, I do not think it is a neutral. I certainly would not give—if I were bargaining with the union, putting myself in their position, I would not just hand over the list to someone who wanted to decertify the union. If I wanted to engage in cooperative productive collective bargaining with them, no, I would not do that.

Chairman MILLER OF CALIFORNIA. How does that person go about getting a list? If a member of the unit decides they want to decertify the union, how would they ordinarily do that?

Mr. MILLER. Well, they could get the information themselves. Part of what the University communicated to this individual is that they could find—they said here's the list of postdocs, and you can find their email in most University directories. So you could go and find the people in the University directory.

You could also file an information request with the University's Public Information Office under the California Public Records Act. And that is a process that typically takes, you know weeks if not months, and you have to fill out the right forms and dot your I's and cross your T's to get information under that statute.

Chairman MILLER OF CALIFORNIA. Mr. Ferguson, I know you do not have all of the facts here in this group. But it would seem to me that any discussion of participation in decertification by one side to the negotiations, I mean the purpose of decertification is sort of the elimination of the other side and then you go on about your business. I mean, when an employer decides that they have had enough, they try to get rid of that unit and then somebody else will have to try to get a first contract or get the rights to seek that.

But what is typical here?

Mr. FERGUSON. This is rare. It is not common for an employer that is committed to neutral bargaining. So consider the case, for example, of the University of California where there is a process for requesting public information, like a list of postdocs. You know, it makes sense that an employer that was insistent on having a neutral position in such bargaining would refer someone to that public process to get the information on the list of postdoctoral candidates. In that case, the University is complying with its procedures, but it is not taking any exceptional steps to help that person with their request to decertify the union.

Seeing the University go above and beyond that, I will stress that I am not a lawyer, but that is at least unusual in the context of a bargaining situation where you are trying to maintain your own neutrality.

Chairman MILLER OF CALIFORNIA. Thank you.

Barbara, do you have any further questions you want to ask?

Ms. LEE. Well, one question. Let me just ask Mr. Duckett again, the contract with your 12,000 graduate student employees granted graduate students the right to respect a union's picket lines. And so I am trying to understand why this same issue is still one of the outstanding issues and a stumbling block?

Mr. DUCKETT. I do not know if I would characterize it as a stumbling block in and of itself. It is just another issue that we have to go through and negotiate on.

Ms. WOOLSEY. That cannot be taken off the table then? Okay. I got it. I understand.

Chairman MILLER OF CALIFORNIA. Thank you.

Mr. Miller, let me ask you a question. Have you been told by the University that the data that in fact relates to these costing exercises and these various different research funding sources, that that data is simply not available?

Mr. MILLER. Yes. Well, that it is not collected and tracked in any sort of central—

Chairman MILLER OF CALIFORNIA. They do not know how to retrieve it?

Mr. MILLER. Right. Correct.

Chairman MILLER OF CALIFORNIA. So because of their inability to retrieve this information, where do we go from here? Why did they not say this a year ago?

Ms. WOOLSEY. Mr. Duckett?

Mr. DUCKETT. First off, I do not think we have said that it is impossible to get. What I have tried to emphasize is that we continue to work to get it, and will continue to work to get it.

Chairman MILLER OF CALIFORNIA. Yes. But we are looking for cold fusion too.

Mr. Miller, what is the conversation you have had?

Mr. MILLER. Well, when this was raised to us on the session that we had on April 15th and April 16th, I said it was unbelievable that this would come up this late in the process, that this issue would come up this late in the process. So I raised the fact that the University insisted that the paid directs be put in the unit back in 2008. And that given that insistence, we had assumed that they had started tracking this information at that point in time.

The University negotiator, Ms. Saxton, said well we did not and it is incredibly complicated to do that, and it costs a lot of money and you know what a difficult time the University has been having financially over this period of time. We just do not have the resources to put together the system to track that information.

Chairman MILLER OF CALIFORNIA. What about the overhead in administration of the grants, would this be a proper line item for that \$800 million?

Mr. MILLER. In my opinion, yes.

Chairman MILLER OF CALIFORNIA. My understanding is sitting in Washington, and we hear it all the time, that this is a big deal to secure these grants.

Mr. MILLER. Yes.

Chairman MILLER OF CALIFORNIA. And so that \$800 million is a major source of revenue for some purposes, we have a little dispute here, but our understanding is it can be used for any general purpose of the University.

Mr. MILLER. Yes. If I may, Mr. Chairman, the whole thing feels to me a lot like an excuse. It just does not seem that difficult to get this information and to get it quickly.

You know, there is a person, as Mr. Duckett pointed out, in every department or research organization on campus that keeps track of this. For example, they have to when a postdoctoral paid direct comes into the University, someone has to make the determination, even according to the University's current policy, is the amount of money you are getting from your extramural funding agency sufficient, does it meet our minimum salary threshold? If the answer is yes, then the University does not have to contribute what they call a supplement to bring that individual up to that standard.

If what they are getting from their extramural agency is below the minimum threshold established by UC policy, the University then has to go into the payroll system and give the person a supplement in a different title to bring them up to that level.

So somewhere, somebody is making that determination in every department and research organization on every campus.

Mr. Duckett is a powerful man. Mr. Duckett, if he wanted to, could direct all those people on all those campuses through the HR office on each campus, which are coordinated by his office at the Office of the President, to collect that information. And they do not need to build a sophisticated fancy payroll system to do it or information system to do it, they could put it on a spreadsheet. They could put it on a Goggle doc on the internet. And each person in each department could just go on that spreadsheet, put in the person's name, their employee ID number, whatever other identifying information they need, and put their salary and whatever other relevant information is deemed necessary. That could be done in a week's time.

Chairman MILLER OF CALIFORNIA. I always worry when a lot of euphemisms enter a system. And politics is a great one for this. But this idea that there is somehow 53 percent of the overhead for the administration and expenses of these grants and after decades of being engaged with these grants, we cannot get basic information on what the status is of these individuals, and that is now used to suggest that we cannot go forward in the bargaining.

I appreciate you never admit you cannot go forward. But if you cannot provide the information in the complex—and you used “complexity” in your testimony, how complex this is and that it is a threat to the University system; if you do not have the information, how do you go forward if that is the threat to the University that we cannot do this because this is such a terrible threat. And I think from the Washington side I want to know if we are awarding grants to people who cannot tell us anything about the grants, the administration of the grants, what the hell are they doing with the 53 percent overhead? I mean, I think it is fundamental.

You know the Speaker tasked me almost four years ago with an innovation agenda. And we met with major universities all over country, and we have gathered people all over. And we have prepared ourselves for the Recovery Act. And we made the largest increase in research and development for labs like Dr. Tyler's in the history of this country. But little did we, I guess, recognize, and maybe I am not on the committee of jurisdiction, but I did not know that Ms. Tyler was not going to get Social Security credits. I thought these were things that we sort of settled decades ago. But we will have to go back and look at it from the Washington side. Because something is very, very wrong here.

Congresswoman Lee raised this issue at the beginning of this hearing, and I just have to concur in that.

Let me just ask, because again this goes to President Yudof's representation to our delegation, to the California Delegation. Mr. Miller, when the UAW asked the UC system to provide samples of funding agreement and language contained in this because of this so called problem, have you received any of those to date?

Mr. MILLER. No, I do not think so.

Chairman MILLER OF CALIFORNIA. When the UAW asked for data quantifying the number of postdocs affected by this problem and the dollar amounts involved, they told you there is no way to make that calculation now?

Mr. MILLER. Yes, that is true.

Chairman MILLER OF CALIFORNIA. That is the conversation you are referring to earlier?

Mr. MILLER. Yes.

Chairman MILLER OF CALIFORNIA. When you first requested the information in December 2008 regarding the postdoc salary and stipend rates broken down by source, and funding language, and outside funding agreements, history of salary agreements, and various categories of the funders or more, that request has been repeated numerous times by you, I believe it was also repeated by our delegation, that has not been forthcoming?

Mr. MILLER. We have gotten a very small fraction of that information on a few campuses but nothing comprehensive for the entire unit, no.

Chairman MILLER OF CALIFORNIA. It is not sufficient to go forward in the negotiations, or it is, or can you—

Mr. MILLER. We think that it is sufficient to go forward. We do not, you know think it is such a big deal to settle the contract. I mean, the University just settled a huge contract with another union, the CWA, who represents the researchers and the techs who work side-by-side with the postdocs and get funded off the same grants as the postdocs. And they were able to, you know with all the complexity of all the different labs and all the different projects that those people work on right along with the postdocs, they were able to settle that with significant guaranteed salary increases across the board and steps in each of the next three years. So if it is easy enough to figure out in that context, it is easy enough to figure out in this context.

Chairman MILLER OF CALIFORNIA. In his response to us, President Yudof says that “the union’s proposals carry substantial financial implications for the University at this time. We are already severely strained, underfunded like many public agencies across California.” The suggestion is that somehow this has impacts related to the state funding and puts that at jeopardy because of the cost of this, again even though most of these grants carry escalators with them. And in fact, it is insisted by the University that they be written with an escalator in them and it is insisted by them coming the other way, that they have an escalator. So this money theoretically is in these grants if you can deal with it under the constraints of how the grants are used and how people are funded, is that correct?

Mr. MILLER. Yes.

Chairman MILLER OF CALIFORNIA. So I just want you to know you are not alone, because the Committee, the staff has been asking for direct information from the University, from the President’s office, from the rest of the University administration exactly how the issues under negotiation would impact state general funds. Just so you know you’re not alone, we have not received an answer in two months. And yet this is constantly thrown out in the press that this is somehow a grave risk to the University. And I say that recognizing two different stories here. One where the University is taking these grants and taking that overhead and using it to subsidize the rest of the operation because of the state funding problems, or as Mr. Duckett points out, it cannot be used. And I do not

know what in the hell they are doing with it, in a trust account or something, i do not know.

But the fact of the matter is apparently wherever you come to get information, you cannot get it. And I do not know, maybe we have to go to the subpoena operation. Because I think this raises serious questions of integrity by these grants and the administration of these grants. And I am deeply concerned about this, because I am in such strong favor of funding people like Dr. Tyler. And so many people who have such talent. And the excitement in the research universities when we made this, when the Administration and the Congress made this proposal and it became law about what this would mean to our economic future, to our scientific discovery, to innovation and to economic growth, that that is where it all comes from. It comes from the discovery and the innovation and resulting growth. And now to see that this is how this is being administered, I think it would be a grave disappointment to people. And I am just so disappointed because it is my alma mater too, that this University is riding the point on this kind of issue, of this issue of public trust. It is just beyond the pale, as far as I am concerned.

And to continue to use the complexity and the lack of information, and then to find out a year later not only we cannot get the information, you cannot get the information, they cannot get the information. They just waited a year to tell you. And then we see perhaps subtle efforts at decertification.

This is really disingenuous. It is really an outrage for the taxpayers. It is an outrage for policy makers. And certainly for people at the University, the postdocs who are working at this.

Congresswoman Lee?

Ms. WOOLSEY. Chairman, I know we are bringing this to a close.

I think that it is very clear. We are on to what is going on, and it has to change. Because, you see, there are a lot of universities that want grants from the Federal Government. And we want those grants to go to the programs that are going to take care of their employees.

So, make it happen. You can. I know you can.

Ms. LEE. Yes. Mr. Chairman, let me just first in closing my remarks, thank you very much for this hearing and for giving us the opportunity to dig deeper. And I hope that we have learned from today as a part now of the public record, will really provide the impetus for you getting this resolved. Otherwise, there are a variety of efforts that we need to discuss as we leave this hearing.

It is so disappointing for many of us for many reasons. Of course, first, just in terms of fairness and justice. That is not being served. \$18 an hour for a postdoc scholar is just outrageous. And I agree, Congresswoman Woolsey, your Go Girl legislation, we got to go back to the drawing board unless we can get this resolved as quickly as possible.

Finally, let me just say, some of us do not even go to our own alma mater. We will not go on campus. I have not been on campus in several years. And really it pains me not to be able to go on my own campus because of not only this issue, but many issues that have not been resolved yet. And so I hope we can take this one off the table soon and just work down through the list so that we can

return to our great university. Because until then, we just will not go, unfortunately.

I just want to take a moment to thank my colleagues.

And also, let me just thank the Berkeley City College. This is a beautiful green facility. Dr. Betty Inclan is the President.

And all of you for being here today. Because this is an example of what we have to do, as not only legislators in Washington, D.C., but really as members of Congress who love their constituents deeply, who love their universities and who want to see these universities continue to be the most outstanding in the world. And issues like this really can tarnish that reputation.

So thank you again, Chairman Miller.

Chairman MILLER OF CALIFORNIA. Thank you.

I want to join you in thanking Berkeley City College and certain all the staff of the Committee on both sides of the aisle for their participation, for the witnesses and for many in the audience who sat through this.

When we started this case study, as you heard in our initial statements, it was a study about first contracts and it continues to remain so. But clearly today raises many policy considerations beyond the question of the first contract. And I find them deeply disturbing.

As Chairman of the Education Committee and the Chair of the Democratic Policy Committee I meet all of the time with leaders from the research university community, from the overall higher education community, with business leaders from all different sectors of the economy, with economists and all of them tell us that the key to America going forward is we have to increase the numbers, the skills and the talent of people going into science and engineering and mathematics. And that is a goal of this Administration. It is a goal of the Congress with the COMPETES Act. We took the wonderful work done by Mr. Augustine and "Rising Above the Storm" and really placed a bet here. And I am deeply concerned that this is playing out almost in a labor market where while they tell us we have to dramatically increase the numbers of people in this country that graduate and go on to advanced degrees, that it appears almost that there is an excess when it comes to the idea of what you are going to pay these individuals to go through a very important portal in terms of their career opportunities later on. This is a big deal to have a postdoc. But then to suggest that somehow when we keep saying how are we going to encourage people to go in to the STEM field, how are we going to recruit them, how are we going to retrain them, how are we going to have them go forward? Well certainly if more of them knew Ms. Tyler's case and other postdoc's case, it would be much more difficult. And it is almost as if we are toying with some of the brightest, most talented, skilled people in our society because they are in a position where there is a bit of a surplus for those particular positions. Not overall in the economy, and not everybody is going to get to be a postdoc. That is not the issue here.

But I really worry that the University's participating in that kind of treatment. And it is not just this University. And I say this very guardedly. I was in the Congress when this became an issue once before, and it was not pretty. But this raises serious questions

about the underlying policy with respect to the issues that I have raised, that my colleagues have raised about health care, about Social Security, about pensions, about liveable wages. And if the suggestion is we are going to subsidize the acceleration of America's excellence and talents on the backs of these very talented individuals, something is very upside down in the university community. Very upside down.

And we plan to continue to pursue this on both fronts, both from the case study of the difficulty of first contracts. It is not unique to the university setting. It is in the private sector. It is in other public settings. And that is part of the jurisdiction of this Committee.

The policy questions around the use and abuse of these grants I think is a larger issue for the Congress beyond just this Committee of the Congress.

Finally, housekeeping. If anybody lost their keys in the bathrooms, in one of the bathrooms, check your pockets. Last chance. They're up here on the table.

Thank you very much for your contributions.

Without objection, the witnesses will have 14 days to submit additional materials for questions of the hearing from members of Congress.

And again, I also said that people who are hearing this or are here in the audience, we would certainly welcome your submissions of information and fact that might be helpful to the Committee.

Thank you very much. Thank you, my colleagues.

[Questions submitted for the record and their responses follow:]

[VIA E-MAIL],
U.S. CONGRESS,
Washington, DC, May 7, 2010.

Mr. DWAIN B. DUCKETT, *Vice President of Human Resources,*
University of California, Oakland, CA 94607

DEAR MR. DUCKETT: Thank you for testifying at the Friday, April 30, 2010, Committee on Education and Labor field hearing on "Understanding Problems in First Contract Negotiations: Post-Doctoral Scholar Bargaining at the University of California" in Berkeley, California.

I have additional questions for which I would like written responses from you for the hearing record:

1. On September 5, 2008, UC submitted to the PERB a 13-page brief discussing the intricacies of Paid-Directs' funding and compensation, and insisting that they were so similar to other postdocs that they must be included in the bargaining unit, despite UAW objections to the contrary. The UC's memo goes through every major issue of compensation—including salary and stipend; sick leave; time off; child-bearing, parental and family medical leave; retirement; terms of service; and appointment percentage—and, one by one and in detail, explained why there is no significant difference between Paid Directs and other postdocs in terms of these issues.

UC's General Counsel emphasized that "[University] policy acknowledges that there are three different types of Postdoctoral Scholars and the difference is their source of funding. However, other than the source of funding and in some instances eligibility for certain benefits, all of their terms and conditions of employment are the same." UC obviously conducted an intensive examination of Paid Directs' funding sources and the agreements governing their compensation—exactly the type of information the University now claims to lack—in preparing its September 2008 PERB brief. UC identifies by name sixteen representative sources of Paid Direct funding and quotes repeatedly from the documents governing postdoc payments by these sponsoring agencies. UC concludes this detailed analysis by proclaiming that "none of these relationships impair the ability of the Union to bargain with the University about the terms and conditions of employment within the control of the university." (emphasis added)

When asked at the field hearing about the apparent change in UC's position from its PERB filing about the differences between paid directs and other postdoc scholars, you stated that, as UC has gone through the bargaining process, UC learned more about this group of postdocs.

Please explain what specific pieces of information the University has acquired since September 2008, not known at the time of UC's submission to the PERB, that make it unable to stand by its brief.

2. In its September 2008 brief to the PERB, UC stated that there are a total of 5,500 Postdoctoral Scholars, including approximately 300 Paid Directs.

At the field hearing, you stated that UC estimates that Paid Directs constitute 9 percent of the total postdoc workforce.

(a) What is the total number of Paid Directs currently employed at UC?

(b) Of that number, what is the number for which UC has collected information needed for bargaining purposes to date?

3. In its September 2008 brief to the PERB, UC explained that "some of the Paid Directs have a dual appointment and hold an Employee Postdoctoral Scholar title as well. These employees are in both titles because it is the University's policy to ensure that all Postdoctoral Scholars receive the same pay. Thus, if a Paid Direct's stipend is not sufficient to meet the University's salary scale, the Paid Direct will receive the difference and be appointed to the Employee title at an appointment rate based on the salary differential." Since no witnesses were aware of any state general funds ever being used to raise Paid Direct's compensation to the University's salary scale, we understand that such individuals receive their salary augmentations through other funding.

(a) Please confirm whether state general funds have ever been used in the last ten years to provide the differential for any Paid Direct's compensation.

(b) What number of Paid Directs currently hold dual appointments as Employee Postdoctoral Scholars?

4. On May 19, 2009, UC President Yudof wrote to me that UC's bargaining "team continues to make every effort to address the issues raised by the UAW." He also said, "This set of negotiations for an initial contract requires careful review * * *" and that UC looked forward to reaching an agreement "in a cooperative and timely manner." On July 2, 2009, UC Vice President for Federal Governmental Relations Gary Falle wrote to me with an update on the negotiations. There, he said, "In late May, the UAW presented the University with detailed wage and benefits proposals. The University is in the process of conducting a preliminary review and costing exercises to assess the economic impact of these proposals." In a June 2009 update on bargaining, UC told the public that it was "costing the Union's demands and will have responses to the Union's proposals after the costing is done." As of the field hearing, nearly a year after these statements, it appears that these cost exercises remain unavailable.

(a) Have these costing exercises actually begun?

(b) When did these costing exercises actually begin?

(c) Were these costing exercises underway as of June 2009 or July 2, 2009?

(d) If so, how were they underway?

(e) Were these costing exercises abandoned at any point?

i. And if so, when was the decision made to abandon such exercises?

ii. And why was no announcement of that decision made to the union, the community or the Congress?

(f) If such costing exercises were or are underway, please explain who requested the costing exercises and which offices and individuals were directly responsible for carrying them out.

i. Please explain what information has been compiled and what calculations made as part of those exercises.

ii. Please explain how often, between June 2009 and today, the party responsible for carrying out the exercises has issued reports on those exercises.

5. With respect to grants under which postdocs work, what oversight does the University conduct, specifically what data is regularly collected and what reports are regularly compiled, and by which offices within the University, to (1) account for all grants received, (2) account for the terms and conditions imposed upon use of grant money by each grant, and (3) account for how the money is spent on each grant?

Please send your written response to Gordon Lafer of the Committee on Education and Labor staff at gordon.lafer@mail.house.gov by COB on Friday, May 14, 2010—the date on which the hearing record will close. If you have any questions, please

contact Mr. Lafer at 202-225-3725. Once again, we greatly appreciate your testimony at this hearing.

Sincerely,

GEORGE MILLER,
Chairman.

UNIVERSITY OF CALIFORNIA

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May 14, 2010

The Honorable George Miller
U.S. House of Representatives
Committee on Education and Labor
2181 Rayburn House Office Building
Washington, DC 20515-6100

Dear Chairman Miller:

Thank you for the opportunity to testify at the Committee on Education and Labor's field hearing on April 30, 2010, about "Understanding Problems in First Contract Negotiations: Post-Doctoral Scholar Bargaining at the University of California." I am writing to follow up on certain issues that were discussed at the hearing and to reply to your request for a written response to additional questions for the hearing record.

A. Information on Fund Sources for Paid Directs and Fellows

First, I want to apologize for the delay in providing the Committee with the fund source information that was requested for the Fellow and Paid Direct Postdoctoral Scholars. President Yudof has directed that we expeditiously produce the material, and to that end we are working with the campuses to elevate this project to high priority. The University's Vice President for Research and Graduate Studies has communicated with the Vice Chancellors for Research and the Graduate Deans at all ten campuses. A person at each campus knowledgeable in postdoctoral salary and funding practices is working with the University's labor relations staff to obtain information about Fellow and Paid Directs that includes fund source, fund type, information about cost escalators or annual salary increases and any restrictions on them, and institutional allowances, if any. We have set a deadline for producing, verifying and analyzing this data by June 30, 2010.

Gathering this information requires manual review of files and records at each campus because there is no uniform, centralized collection system for salary and fund source information for Fellow and Paid Direct Postdoctoral Scholars at the University of California system. Instead, this information is retained locally at each of the 10 campuses, often at the Principal Investigator departmental level or even by individual Principal Investigators.

While the University is still working to obtain detailed funding source information for the Fellows and Paid Directs, it is important to note that the University has worked with the UAW over the course of these negotiations to provide information responsive to the UAW's many information requests covering a wide variety of matters. The UAW has submitted requests for information on over 90 items with multiple subparts, often seeking specific information that resides only in the hundreds of departments across the University system. The University has provided, and is continuing to provide, extensive amounts of information in response to the UAW's requests. To date, the University has provided 90% of the requested data; the remaining data represents the most decentralized records in the system.

When the UAW initially requested detailed funding source information for the Postdoctoral Scholars for a multi-year period, the University recognized that the decentralized nature of the University's records would require significant time and effort to respond. The University's negotiators, as a result, looked at options for providing the UAW with information that would address their questions about funding matters in a focused way. The University and the UAW agreed that representatives from the University of California, Berkeley campus and the Office of the President Contracts and Grants Office would attend negotiations to explain funding issues and to answer the UAW's questions. This meeting occurred in April 2009. At that time, the University and the UAW had agreed that they would defer discussion of wage and benefit issues while addressing other articles of the contract. By end of this meeting the University's bargaining team believed that this presentation reasonably satisfied the union's request for information about funding issues. The union until very recently gave no indication to the contrary.

B. Indirect Cost Recovery in Federal Awards

Second, I wanted to follow up on the discussion during the hearing regarding indirect costs in federal awards. Although I do not oversee research grants and contracts, I consulted with the Vice President of Research and Graduate Studies on the issue of indirect cost recovery in federal awards.

By way of background, the cost of conducting research consists of both "direct costs" (which can be attributed directly to a specific research project) and Facilities and Administrative costs (or "indirect costs"). Indirect costs are institutional costs that benefit and support research. Indirect costs cannot easily be attributed directly to any one project, but are nevertheless real and necessary to conduct research. They include items like laboratory space and utilities, hazardous waste disposal, libraries, administrative services, and compliance with government rules governing the conduct of research.

The federal government recognizes that indirect costs are a real and necessary part of conducting research. Each institution has an indirect cost rate established through negotiation with its cognizant federal agency (which, in the case of UC campuses, is the Department of Health and Human Services), following rules set out by the Office of Management and Budget's Cost Principles for Higher Education (formerly known as Circular A-21).

The federal government does not make an award to an institution and subsequently "add in" the institution's indirect cost amount. Rather the government *makes an award inclusive of the direct costs* of conducting that project at the institution, and the associated indirect costs. The project budget would list all of the direct costs, with a separate line item for the indirect cost amount based on the agreed-upon federally-negotiated rate. So, an award in the amount of \$100,000 to an institution with an indirect cost rate of 50% would not result in the government committing funding in the amount of \$150,000, since the

\$100,000 award would include the indirect costs for the project. The amount of these overhead costs is deducted from the grant total.

A 50% indirect cost rate is often misunderstood to mean that half the total costs of a research project are devoted to indirect costs. That is not the case. In the above example, assuming a very simplified model in which the 50% indirect cost rate is applied to the entire amount of direct costs, the \$100,000 award would consist of \$66,667 in direct cost and \$33,333 in indirect costs (which is 50% of the total direct costs). Thus, the direct cost recovery would comprise 33% (not 50%) of the award.

However, the indirect cost rate is rarely if ever applied to the full amount of the direct research costs. Rather, under federal rules, the base on which the rate is applied must first be modified to exclude certain cost categories (e.g., equipment, capital expenditures, tuition remission, scholarships, and fellowships). Thus, it is likely that in this example, indirect cost recovery would comprise less than 33% of the award.

While there may be a perception that the University's receipt of funding for indirect costs somehow provides "extra" funding to UC, that is simply not the case. Indeed, the extramural research funding the University receives, even from the federal government, does not fully cover the costs of conducting research associated with those awards. For various reasons, there is a shortfall in indirect cost recovery at the University. Sometimes the maximum rate permitted by the sponsor is far below our negotiated rate. Indeed, on average, universities only recover approximately 70% - 90% of their actual overhead costs on federal awards (Reference: Paying for University Research Facilities and Administration, RAND Science and Technology Policy Institute). In fiscal year 2009, UC only recovered 82% of our indirect costs on federal research awards, and 67% of our indirect costs from all research sponsors.

This loss of indirect cost recovery has a real impact on University financing, as indirect costs are real costs to the research enterprise. As described above, indirect costs include laboratory space, libraries, radiation and occupational safety measures, administrative activities and compliance with increasingly complex government rules associated conducting research. These activities are neither optional nor frivolous and under-recovery of these costs means that these activities must be paid for from other sources which usually means (state general) funds. If the University were to use a portion of the indirect costs recovered to pay for salary increases for Postdoctoral Scholars, this would effectively increase the direct costs of research projects, and result in an even greater gap in the amount required for the operation and maintenance of the general infrastructure that supports the research enterprise.

C. Answers to Additional Questions

Third, you asked that the University respond to additional questions for inclusion in the hearing record. The University responds to these questions as follows:

1. PERB Brief Regarding Inclusion of Paid Directs In the Unit

It has been suggested that the University, by identifying as a challenge in these negotiations the UAW's proposal for ongoing across-the-board salary increases for the entire group of Postdoctoral Scholars, has changed its position with respect to the inclusion of Paid Directs in the bargaining unit. This arises from the University's request to the California Public Employment Relations Board (PERB), during the recognition process, that Paid Directs be included in the bargaining unit. The University submitted a brief to PERB in support of that request in September 2008. You have asked what the University has learned in the bargaining process that makes the University now "unable to stand by its brief."

The University has not changed its position from that which is contained in the PERB brief. As background, the UAW initially petitioned to represent the Postdoctoral Scholars in 2006, but later withdrew the petition. In that first petition, the UAW asked to include the Paid Directs along with the Employees and Fellows in the bargaining unit. In 2008, the UAW again submitted a petition for recognition, but did not include the Paid Directs. The standard used by PERB to assess what is an appropriate bargaining unit is whether the employees share an internal and occupational community of interest. In reviewing this standard, the University believed that the Paid Directs met PERB's standard for inclusion in the unit because they shared substantial mutual interests with other Postdoctoral Scholars, particularly Fellows, which the UAW had petitioned to represent.

Even though the University believed that PERB's community of interest requirements were met, it also was clear in its brief that there were indeed differences between Paid Directs and other types of Postdoctoral Scholars -- including that the Paid Directs' funding did not flow through the University. For example, the University acknowledged that there are differences in funding sources and benefit eligibility. It also stated that the sponsoring agencies of the Paid Directs may control some of their terms and conditions of employment, but that "would not prevent the Union from bargaining with the University *over the other terms and conditions of employment*" that the University did control. The fact that the University and the UAW have reached agreement on 29 articles of a new contract that are equally applicable to Employees, Fellows and Paid Directs demonstrates this to be the case.

The University's position that Paid Directs should be included rather than excluded from the bargaining unit is not inconsistent with its position that across-the-board compensation approaches for all Postdoctoral Scholars creates challenges in these negotiations. The various funding sources differ in whether they contain guaranteed salary increases and if so at what level; if not, then funding for multiple year, guaranteed across-the-board increases must come from another source. We know, for example, that some federal contracts and grants covering our Employee Postdoctoral Scholars contain these built-in increases while others do not. Finding other available funding sources is challenging, particularly in these difficult economic times, and again poses a risk that significant shortfalls that could impact (state/general) funds..

In sum, the University requested that the Paid Directs be included in the bargaining unit because it believed that they met PERB's community of interest test. PERB agreed, concluding that Paid Directs should be in the unit. In that process, the University recognized and acknowledged that there were also differences between Paid Directs, Fellows and Employee Postdoctoral Scholars, including in their funding sources.

2. Number of Paid Directs at the University

You also have asked for the number of Paid Directs currently employed at the University and the number for which the University has collected information needed for bargaining purposes to date.

There are 368 Postdoctoral Scholars appointed solely in the Paid Direct title code. In addition, another 179 hold a dual appointment as Paid Direct and Employee Postdoctoral Scholar.

As explained in section A. above, the information about Paid Directs is being collected by the campuses. The campuses will provide their information to the Director of Labor Relations. Once all the information is provided by the 10 campuses we will update these numbers for the Committee.

3. Use of General Funds for Paid Directs

You have requested confirmation whether state general funds have been used in the last ten years to supplement any Paid Direct's compensation to ensure that it meets the University's minimum salary requirements. At the hearing I stated that I was not aware if state general funds had been used to supplement Paid Directs' stipends. I have since been able to confirm that state general funds have been used in this way. For example, in the current fiscal year, as of April 2010, 30 individuals that we know of have held dual appointments as a Paid Direct and Employee Postdoctoral Scholars and received compensation from state general funds. These payments, fiscal year to date, totaled just over \$300,000 in state general funds earnings. As additional information is gathered over the next few weeks we can update this information.

4. Costing Of the UAW's Wage Demands

You also have asked a number of questions about costing of the UAW's wage and benefit proposals, referring to correspondence from President Yudof on May 19, 2009 that describes the University's efforts to reach agreement in a cooperative and timely manner, and from Vice President for Federal Government Relations on July 2, 2009 that references a preliminary review and costing of the UAW's proposals.

Regarding the costing of the UAW's proposals, the UAW submitted a detailed wage proposal on May 13, 2009. At that time, the UAW asked for an assurance that negotiations over wages would not occur until after the outstanding language issues were addressed and the University agreed. The University began to assess the cost of the union's wage demand shortly after we received the detailed proposal, utilizing the data from the system provided to the union via File Transfer Protocol (the FTP data). This data is generated from a payroll database and, as such, did not contain Paid Direct information. In July 2009, the University concluded this initial assessment of the cost of the UAW's proposal and discussed it at the bargaining table. On request by the UAW, the University shared its preliminary costing worksheets. This information was provided to the UAW in Excel format, thereby enabling the UAW to use the information to perform its own calculations. It included, for all Employees and Fellows:

1. Postdoctoral Scholar Name,
2. Location
3. Date of Appointment to Postdoctoral Scholar title (needed to calculate the proposed experience steps),
4. Annual Pay Rate (using April 2009 data)
5. The resulting step pay rates set in 5% increments, as proposed by the UAW;
6. The resulting salaries of individuals if the movement to the new experience step (based on appointment date in #3 above) resulted in at least a 5% increase,
7. For individuals who would not receive an automatic 5% increase if the step system was adopted, their new pay rates if the University accepted the UAW proposal to ensure that each individual Postdoctoral Scholar received at least 5%;
8. The percent difference between current salary and the new salary if all elements of the UAW proposal were adopted.

It should be noted that the University had provided the UAW with the same data it used in order to perform this costing exercise.

5. Grant Oversight

Finally, you asked about the University's oversight with respect to grants under which Postdoctoral Scholars work. The Contract & Grant Offices on each campus are responsible for maintaining records on all grants received. The Principal Investigator is responsible for ensuring that his or her department maintains records of all expenses and reports. The Contract & Grant Office is responsible for negotiating and approving the award. They coordinate with Extramural Funds Management (EFM) offices and the department and Principal Investigator conducting the work. EFM acts as an advisor whenever accounting issues are raised by other offices, and performs an after-the-fact checks and balances function. Prior to the submission of required financial reports, and periodically throughout the life of the award and upon closeout, EFM may check expenses for allowability and applicability. If there are questionable items, EFM contacts the department or Principal Investigator for resolution. EFM maintains copies of the ledger of expenses for each unique fund. Ultimately, the Principal Investigator is responsible for assuring compliance with the award terms with the help of departmental administrators.

D. **Conclusion**

Thank you again for the opportunity to address the Committee and provide this information in follow up to the April 30, 2010 hearing. The University will continue to work to reach a fair contract that meets the needs of the Postdoctoral Scholars and the University.

Sincerely,



Dwaine B. Duckett
Vice President of Human Resources

cc: President Yudof
Executive Vice President Brostrom
Senior Vice President Dooley
Vice President Beckwith
Associate Vice President Falle
Director of Labor Relations Saxton

[Additional submission of Mr. Ferguson follows:]

THE EYES OF THE NEEDLES: A SEQUENTIAL
MODEL OF UNION ORGANIZING DRIVES, 1999–2004

JOHN-PAUL FERGUSON*

This paper models three stages of the union organizing drive, using a new dataset covering more than 22,000 drives that took place between 1999 and 2004. The correlated sequential model tracks drives through all of their potential stages: holding an election, winning an election, and reaching first contracts. Only one-seventh of organizing drives that filed an election petition with the NLRB managed to reach a first contract within a year of certification. The model, which controls for the endogeneity of unfair labor practice (ULP) charges, finds that a ULP charge was associated with a 30% smaller cumulative chance of reaching such a contract. ULP charges had less effect on the votes cast than on the decision to hold an election and the ability to reach a first contract. A sequential model such as this one could be extended to test between some competing theories about the determinants of union organizing.

Industrial relations research has produced numerous studies of the conditions under which unions are formed and grow. In the United States and other countries with union-election regimes, this work has overwhelmingly focused on election results. Yet elections are but one step in a longer process rife with opportunities for success or failure. Since during an election it is the workers rather than the union (as an organization) or the employer who determine success or

failure, our theories of union formation have given more weight to things that shape individual preferences for unionization than to the influence of the organizational process. This paper incorporates elements of that organizational process by treating the election as only one of the needles' eyes through which workers must pass to join a union.

The focus on elections has stemmed in part from missing data for the other stages of the process. To date, nationally representative data have never been assembled to calculate the likelihood that an effort to unionize through the formal NLRB election procedure will reach its ultimate goal. This paper assembles the data to do so. Since employer resistance to unionization has long been a central topic of industrial relations research (Flanagan 2005; Freeman 2005), this paper examines how the presence of an unfair labor practice (ULP) charge affects the probability of reaching different stages of the organizing process. I use ULP charges by individuals or unions against the employer as the main independent variable for two reasons. First, they are an important indicator of the health of the industrial-rela-

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The raw data used in this paper are available from the National Labor Relations Board and the Federal Mediation and Conciliation Service. Copies of the computer programs used to construct and analyze this dataset can be obtained from the author at the Massachusetts Institute of Technology, Sloan School of Management, 50 Memorial Drive, E52-533, Cambridge, MA 02142; jpfERG@mit.edu.

tions system. Second, despite the intuitive importance of ULP charges, prior work has found conflicting associations between them and representation election outcomes.

Organizing drives in the United States must clear more than one hurdle: through them, unionists must win the right to hold a representation election, win the election, and then negotiate a contract with the employer. By gathering data for each of these stages and estimating success in each stage separately, I am able to identify factors that affected whether elections were held, whether (and by what margin) an election resulted in a win for the union, and whether a first contract was reached after electoral victory. Not all factors affect success in all of these stages. An organizing drive need only fail in one stage to fail completely, however, so understanding when and why different factors impinge on success is important for any planning to improve the election process.

My ultimate goal in this paper is not to uncover all the determinants of organizing success at all stages of the process but rather to gather and present recent and nationally representative data on phases of the organizing process for which such data have not previously been available. The resulting analysis shows that at least some important determinants of union-organizing success, such as ULP charges, seem to matter more in the buildup to and aftermath of elections than in the voting itself. I calculate the cumulative likelihood of surviving an organizing campaign and then estimate the cumulative impact of a ULP charge. Finally, I offer some speculation about how a sequential approach could be used to extend research on union organizing.

The Union Organizing Drive

There are three ways to form a union under the National Labor Relations Act (NLRA). First, an employer and the employees' chosen representative can voluntarily negotiate a collective-bargaining agreement without informing the National Labor Relations Board (NLRB). Second, employees can vote for a union in a secret-ballot election that the NLRB certifies. Third, the NLRB can

require an employer to bargain with a union when the board determines that actions by the employer have made it all but impossible for a free and fair secret-ballot election to take place. The third means has become extremely uncommon. The first means, so-called voluntary recognition, accounts for a growing share of organizing drives (Brudney 2005). Yet voluntary recognition is limited to cases in which the employer either does not oppose unionization or has agreed to it in the face of strong public pressures, such as corporate campaigns. Election is the procedure that is embedded in the law and that gives employees a way to organize even if the employer is opposed. It is the means with the widest scope and thus the best indicator of the health of the system as a whole.

For most employees, a union is a means to the end of changing the terms and conditions of work. That end requires a collective-bargaining agreement, or contract. In countries where such contracts are negotiated at the industry level, the adoption of contract terms can follow almost automatically from union recognition. In the United States, where most unions negotiate a contract with a single employer or even with a single establishment, the one need not follow the other: "Because a sizable number of employers refuse to accept unions even after an NLRB election and have the economic strength to resist union efforts, there is a leakage from elections to contracts" (Freeman and Medoff 1984). Thus, when the outcome of interest is a change in employment relations, the representation election is not a final outcome. Instead, it is an intermediate step in a process that begins with the organizing drive and ends with a contract.

The most common steps in that process are shown schematically in Figure 1.¹ A group of workers decide to try to form a union, either on their own or through the instigation of a sympathetic union. The organizers then start a "card drive." To petition the NLRB to hold an election, the petitioners must submit proof, most often in the form of signed

¹This diagram has been adapted from the summary in DiNardo and Lee (2004).

cards, that at least 30% of the employees in the proposed bargaining unit desire such an election. In practice, most organizers gather cards from two-thirds or more of the employees, since the share of cards is a signal of likely election success (Fiorito 2003:200). If the organizers gather enough signatures to submit a petition, then the NLRB rules on, *inter alia*, the appropriateness of the suggested bargaining unit. Assuming that the NLRB goes forward with the unit as suggested or modified, the parties then come to an agreement on the type and date of election. Within seven weeks on average after the petition has been filed, the NLRB holds an election at the workplace. A simple majority of the votes cast is necessary for a win. If the union wins and there are no objections to the conduct of the election, then the NLRB certifies the union as the representative for the bargaining unit. The employer is then obligated to bargain “in good faith” with the union for at least one year. After an average of ten months, the two sides agree on the terms of a first contract. Such first contracts cover three years, on average.

Lengthy as it is, the above is an idealized process. It can break down at several points, the most important four of which are noted as choices in Figure 1. The organizers can fail to gain enough signed cards to file an election petition. They can choose to withdraw their petition rather than to hold the election. They can lose the election. Even if they win the election, they may not reach a first contract with the employer.

Sequential Model

Breaking the organizing drive down into stages shows how it resembles a screening process, where only some of the cases in each stage advance to the next. As shown in Figure 1, of 22,382 organizing drives that filed an election petition, only a projected 3,180—one-seventh—reached a first contract within a year of certification. Furthermore, Table 1 shows that cases that experienced a pre-election ULP charge were screened out at higher rates than other cases at each stage.

There are four mutually exclusive outcomes for organizing drives that have filed

Figure 1. Major Steps to First Contract When Organizing through an NLRB-Certified Election, with Sample Numbers.

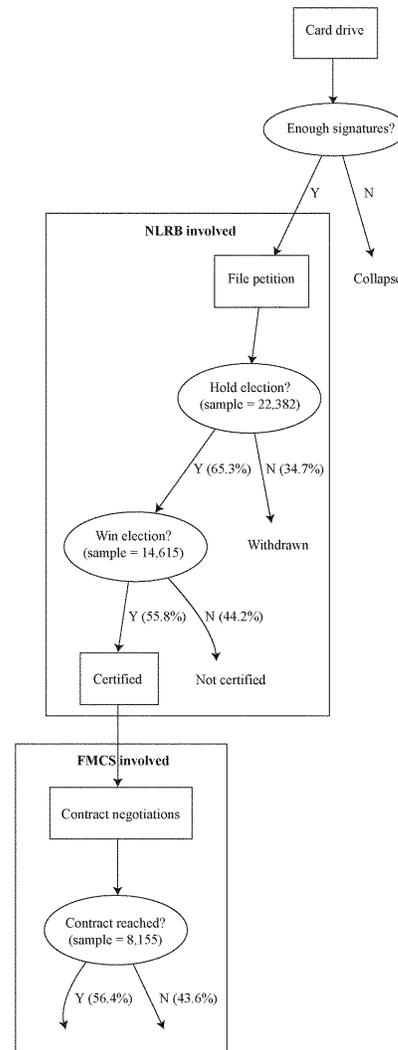


Table 1. Survival Rates for Stages of the Organizing Process

| Stage | Cases | Rate | Non-ULP | ULP | Non-ULP:ULP |
|------------------------------|--------|------|---------|-------|-------------|
| Election Petition Filed | 22,382 | N.A. | 18,429 | 3,953 | 4.7:1 |
| Election Held | 14,615 | .65 | 12,410 | 2,205 | 5.6:1 |
| Election Won | 8,155 | .56 | 7,053 | 1,102 | 6.4:1 |
| Contract Agreed ^a | 3,180 | .38 | 2,777 | 403 | 6.9:1 |

^aProjected. This figure is based on dividing the 1,940 FMCS records with contract agreements within one year by 0.61, the share of the total victorious election cases with matched FMCS records: $N_{proj} = 1,940/.61 = 3,801$. The figure is for contracts concluded within one year, the span of the contract bar. The rate for contracts agreed to within two years is .56.

petitions with the NLRB:

A. The union can withdraw its election petition before an election is held ($Y_1 = 0$).

B. The union can go through with the election and lose ($Y_1 = 1, Y_2 = 0$).

C. The union can win the election but fail to secure a first contract with the employer ($Y_1 = 1, Y_2 = 1, Y_3 = 0$).

D. The union can secure a first contract ($Y_1 = 1, Y_2 = 1, Y_3 = 1$).

The organizing drive can be modeled as a chain of binary variables $Y_1, Y_2,$ and Y_3 that are realized sequentially. Stages 1, 2, and 3 represent the three screens—holding an election, winning that election, and reaching a contract—through which a drive must pass. Later stages are subject to selection in earlier stages. Prior research on similar multi-stage processes (Lillard and Willis 1994; Upchurch et al. 2002) has modeled the outcomes of each stage as realizations of a latent variable. If y_j^* is the latent variable for stage j , then

$$y_j^* = x_{ij}'\beta_j + u_{ij}, \text{ and } \begin{cases} y_{ij} = 0 & \text{if } y_j^* \leq 0 \\ y_{ij} = 1 & \text{if } y_j^* > 0, \end{cases}$$

where i indexes organizing drives, $x_{i,j=1,2,3}$ are vectors of covariates, and $\beta_{j=1,2,3}$ are vectors of parameters to be estimated. Some covariates, such as the unemployment rate, may be included in all three stages, while others, such as what type of election agreement is signed, may only appear in certain stages. The parameters on particular covariates can but need not vary across stages.

The probabilities of each of the four outcomes A through D can then be written as

$$(1) \quad P(A) = P(u_{i1} \leq -x_{i1}'\beta_1) = \Phi(-x_{i1}'\beta_1)$$

$$(2) \quad P(B) = P(u_{i1} > -x_{i1}'\beta_1, u_{i2} \leq -x_{i2}'\beta_2) \\ = \Phi_2(x_{i1}'\beta_1, -x_{i2}'\beta_2 | \Omega_1)$$

$$(3) \quad P(C) = P(u_{i1} > -x_{i1}'\beta_1, u_{i2} > -x_{i2}'\beta_2, \\ u_{i3} \leq -x_{i3}'\beta_3) = \Phi_3(-x_{i1}'\beta_1, x_{i2}'\beta_2, -x_{i3}'\beta_3 | \Omega_2)$$

$$(4) \quad P(D) = P(u_{i1} > -x_{i1}'\beta_1, u_{i2} > -x_{i2}'\beta_2, \\ u_{i3} > x_{i3}'\beta_3) = \Phi_3(-x_{i1}'\beta_1, x_{i2}'\beta_2, x_{i3}'\beta_3 | \Omega_2),$$

where $\Phi, \Phi_2,$ and Φ_3 are cumulative univariate, bivariate, and trivariate normal densities, respectively. The Ω matrices require a brief explanation.

If the three stages were mutually independent, then each stage could be estimated with a separate probit, and the probability of passing through the entire process would equal the product of the probabilities of passing through each of the stages (Lahiri et al. 1995).² Yet there are strong reasons to expect the outcomes across stages of the organizing drive to be correlated. If, for example, the union's decision to withdraw depends on the likelihood that the union will win the election, then the error terms of $P(B)$ and $P(C)$ will be correlated.³ This is similar to assuming that $u_{ij} = \delta_i + \epsilon_{ij}$ with $\delta_i \sim N(0, \sigma^2)$ and $\epsilon_{ij} \sim N(0, 1)$, and interpreting δ_i as unobserved favorable (unfavorable) conditions in a workplace that make an organizing drive more (less) likely to succeed. Specifically, this would imply that (u_{i1}, u_{i2}, u_{i3}) follows a multivariate normal distribution with mean zero and variance Ω :

²That is, $P(D) = \Phi(x_{i1}'\beta_1)\Phi(x_{i2}'\beta_2)\Phi(x_{i3}'\beta_3)$.

³I am grateful to an anonymous reviewer for detailing the possible sources of correlation.

$$(u_{i1}, u_{i2}, u_{i3})' \sim N \left(\begin{pmatrix} 0 \\ 0 \\ 0 \end{pmatrix}, \begin{pmatrix} 1 & \rho_{21} & \rho_{31} \\ \rho_{21} & 1 & \rho_{32} \\ \rho_{31} & \rho_{32} & 1 \end{pmatrix} \right)$$

The variances of the error terms are assumed to equal 1 so that the ρ_{ij} s can be interpreted as correlations across stages (Gao et al. 2001).⁴ The matrices Ω_1 , Ω_2 , Ω_3 are then defined as follows:

$$\Omega_1 = \begin{pmatrix} 1 & \rho_{21} \\ \rho_{21} & 1 \end{pmatrix}$$

$$\Omega_2 = \begin{pmatrix} 1 & -\rho_{21} & \rho_{31} \\ -\rho_{21} & 1 & -\rho_{32} \\ \rho_{31} & -\rho_{32} & 1 \end{pmatrix}$$

$$\Omega_3 = \begin{pmatrix} 1 & -\rho_{21} & -\rho_{31} \\ -\rho_{21} & 1 & \rho_{32} \\ -\rho_{31} & \rho_{32} & 1 \end{pmatrix}$$

I therefore model the organizing drive as a three-stage correlated sequential probit. The correlation among the stages' error terms means that a joint marginal likelihood function must be maximized. (For details concerning the procedure, see the technical appendix to Upchurch et al. [2002].)⁵

The advantage of such a model can be seen, for example, when considering the effect of a ULP charge against the employer (denoted U) at some point between petition and election.⁶ Even if a single-stage model, $P(C) = \Phi(x'_{i2}\gamma_2)$, gives an unbiased estimate of $\hat{\gamma}_2^U$, the total impact of the ULP charge consists not just of its effect on electoral success but also of the changed likelihoods of holding an election ($\hat{\beta}_1^U$) and reaching a first contract ($\hat{\beta}_3^U$). Worse, the single-stage model is likely to give biased estimates of $\hat{\gamma}_2^U$ for the reasons discussed here. A single-stage election model is thus likely to misstate the effect of the ULP charge on the final outcome of interest, a

change in employment relations symbolized by a first contract, by $\hat{\beta}_1^U \hat{\beta}_3^U \rho_{12} \rho_{23} \rho_{13}$.

Modeling the organizing process as a single stage introduces two further problems. First, it forces the covariates' parameters to be the same at each stage. This is unlikely to hold in reality. Three choice processes are at work in these drives. Some criteria will be relevant to the decision-makers at one stage and not to those at another, and so the coefficients should change. Second, a single-stage model either excludes observations that never reached contract negotiations or uses the covariates on cases that were screened out earlier to determine coefficients for the later outcome. A multi-stage model addresses both of these problems by allowing coefficients to vary between stages and by only considering the population of interest at each stage.

The Study Data

Data Sources

Figure 1 shows that two federal agencies, the NLRB and the Federal Mediation and Conciliation Service (FMCS), become involved at different stages of the organizing drive. The NLRB formally oversees all election drives from the filing of the election petition to the certification of the election results. The FMCS *can* be involved in first-contract negotiations; pursuant to its interest in labor peace, in recent years it has tried to gather data on all first-contract negotiations. Freedom of Information Act requests were filed with both agencies, to request all of the NLRB's representation and ULP cases that were closed between October 1, 1999, and June 1, 2005, and all of the FMCS's first-contract cases over the same period. October 1, 1999 was chosen as the starting date because in 1999 the NLRB switched to a new database system that complicated comparisons to previous records, and because the FMCS's effort to obtain information on all first-contract negotiations (discussed below) aimed to enter data back to that date. Because union certification directs the employer and employees' representative to bargain in good faith for one year before decertification or other actions can be proposed, this study uses

⁴This is also a necessary restriction for the model to be identified (Waelbroeck 2005).

⁵The correlated model is estimated using aML (Lillard and Panis 2003).

⁶For a detailed description of ULPs, see McGuinness and Norris (1986:10–17).

NLRB cases closed through June 1, 2004, so that the FMCS records will contain the year's negotiations. After duplicated records and other data-entry errors were removed, the NLRB records yielded data for 22,382 cases.⁷ The representation cases' recording of ULP charges is incomplete. I therefore matched the representation cases with the case data for all the ULP charges closed during the same period. I found a ULP charge associated with just over one-fifth of the representation cases.

To anyone familiar with union organizing in the United States, a one-in-five chance of a ULP charge might sound low. The figure is an artifact of when these drives become observable in the NLRB's records. The NLRB opens a representation case when a union, individual, or employer submits a petition to hold an NLRB-certified representation election. To file such a petition, as described above, the filer must first have signed proof of at least 30% support among the employees in the proposed bargaining unit. The NLRB's records thus cover only those organizing drives that passed through the signature screen. Any ULP charges during a card drive will show up as ULP cases, but if the drive ends without a petition filing, there will be no representation case to match it to. The share of drives that end in this early stage is difficult to estimate, but several researchers have cited anecdotal evidence that up to half of all organizing drives do end early—when, for example, the prompt firing of a vocal union supporter stands a good chance of nipping the drive in the bud (Fiorito and Bozeman 1997; Cohen and Hurd 1998).⁸ The one-in-five figure should be interpreted thus: in one-fifth of the organizing drives *in which*

an election petition was filed, one of the parties subsequently filed a ULP charge.

I then matched these NLRB records with the FMCS's records on first-contract negotiations. The records that are needed to track the full organizing process have not been combined before, despite efforts up to and including the Dunlop Commission's work during the Clinton administration (Dunlop Commission 1994). Shortly after the Dunlop Commission issued its report in 1994, the NLRB and the FMCS resolved to cooperate to improve the services they provide to first-contract cases. As part of that cooperation, the NLRB agreed to give the FMCS copies of certifications issued by the Board and regional offices, and the FMCS agreed to assign those cases to mediators upon receipt. For several years the agencies traded paper records, which delayed action. In 2003, the two agencies established a monthly computer transfer of all newly certified units from the NLRB's records to the FMCS. The first transfer included the NLRB's recorded certifications back to October 1, 1999, when they switched to their new database. The FMCS began incorporating those records into its own case-tracking database, disseminating the relevant records to its field offices and assigning mediators. Meanwhile, Washington staff began back-filling the information for earlier certifications by cross-checking their own records and contacting bargaining units.

The FMCS had mixed success involving mediators in first-contract negotiations. In most cases, the mediator merely called the parties to determine whether a contract had been reached. For this study's purposes, this limited involvement is actually useful. In the past, FMCS contact with first-contract negotiations occurred only when the parties asked the agency for help; this obviously produced a self-selected sample of cases. These data, in contrast, reflect the FMCS's effort to make contact in all cases.

The FMCS's efforts to gather case information for all first-contract negotiations are still incomplete; of all the representation cases that ended with certification of the union, I found a corresponding case in the FMCS's records for only 61%. To explore whether

⁷Virtually all the 14,002 eliminated records were duplications. When the NLRB added information to a case, the result was often the appearance of a new record in the database, rather than overwriting of the less-complete record. I removed fewer than 100 cases with other errors. The final number of cases, 22,382, is less than half the number found for a similar period 25 years earlier (Heneman and Sandver 1983:537).

⁸The NLRB staff members who helped me assemble the data also said that they handled about as many complaints related to card drives as to later stages in the process.

the remaining 39% of cases were unmatched at random, I performed a selection test on the observables in both datasets. I found no statistically significant differences. Although this is the strongest test for sample-selection bias I can perform using the available data, it is admittedly weak, because there is relatively little information in the NLRB records.

Data for additional controls come from several sources. The unemployment rate for each county-month in the sample comes from the Local Area Unemployment Statistics gathered by the Bureau of Labor Statistics. The data on the union density of each Metropolitan Statistical Area (MSA) come from Hirsch and Macpherson's analyses of the Current Population Survey (Hirsch and Macpherson 2004). Industry identifiers for all years were coded to be consistent with the 1997 NAICS (North American Industry Classification System) codes published by the BLS. Party control of the NLRB was determined by the NLRB's list of board members since 1935. The presence of right-to-work laws was confirmed by checking the records of the National Right to Work Foundation.

The resulting dataset, which contains 14,754 cases with data present for all variables, paints a fuller picture of union gestation and birth than has heretofore been available on a national scale. The records track proposed bargaining units from the earliest point for which we have data through election to first-contract negotiation. In particular, most studies that have looked at the early effects of unionization have not had data on whether a first contract was *reached*, but only on whether a first contract *expired* (DiNardo and Lee 2004:256–57). Relying on contract expiration would be useless here, since all such cases must have reached a first contract. Gathering data on the first-contract negotiations avoids this censoring problem.

Variables

Since the model covariates change in each stage, they are grouped here by the stage in which they are introduced. Similarly, the reported results in Table 3 include summary statistics for each covariate among the population of interest in that stage.

In stage 1 the dependent variable is whether the union organizers held an election or withdrew the election petition. The main independent variable of interest is whether the organizers filed a ULP charge before the election. There are several types of ULP charges. An 8(a)(1) charge corresponds to attempts to “interfere with, restrain, or coerce employees in the exercise of their rights to engage in concerted or union activities or refrain from them,” and an 8(a)(3) charge corresponds to attempts “to discriminate against employees for engaging in concerted or union activities or refraining from them.” 8(a)(3) charges are often associated with firings for union activity. Together, these two charges account for 88.4% of the ULP charges filed. The remainder are in the “other charge filed” category.

ULP charges are an awkward measure of illegal activity by employers, because union organizers can file them for strategic reasons even when no illegal activity has taken place. Although there is no fool-proof way to tell whether illegal activity actually took place, one indication is whether the NLRB found the charge meritorious. Thus the model also includes six indicator variables: all 8(a)(1) charges; all 8(a)(3) charges; all “other” charges; and, within each of those three categories, the subset of charges that were found meritorious. Table 2 shows the resulting breakdown of cases. The comparison group is cases in which no ULP charges were filed.

Stage 1 also includes delay, measured as the log number of days between the filing of the petition and either the election or withdrawal. Because unions have some control over the election date through their choice of when to file the petition, most research has assumed that they strike while the iron is hot (Freeman and Kleiner 1990). Delays therefore are intervals during which employers can campaign against the union (Riddell 2004) and doubt can form in the employees' minds (Montgomery 1989). Yet the negative relationship between delays and organizing success has rarely been attributed to delay itself but rather to unfavorable events, such as employers' filing clarification charges about the scope of the bargaining unit, that both

Table 2. Breakdown of Cases by Experience of Pre-Election and Post-Certification ULP Charges.

| | | ULP Filed, 2,627 | | | | No ULP Filed, 12,127 |
|--------------------------------------|----------------|------------------|----------------|-------|--------------|-------------------------|
| 8(a)(1) | 8(a)(1), Merit | 8(a)(3) | 8(a)(3), Merit | Other | Other, Merit | |
| 644 | 749 | 387 | 165 | 519 | 163 | |
| <i>Won Certification Election</i> | | | | | | |
| 124 | 145 | 85 | 26 | 145 | 40 | 5,356 |
| <i>Post-Certification ULP Charge</i> | | | | | | |
| 40 | 20 | 10 | 6 | 20 | 5 | 591 |

Notes: Total number of cases, 14,754. The sample of cases broken down here includes all cases used in subsequent analyses.

produce delay and make victory less likely (such charges take time to resolve, may be spurious, and when not may either exclude pro-union employees from or group anti-union employees in the electorate). Here, therefore, delay is included as a control, to try to capture the impact of ULP charges distinct from other conditions that would produce delays.⁹ Since all organizing drives take a certain amount of time between petitioning and election, the effect of delay is expected to be positive but decreasing.

Larger bargaining-unit size has long been hypothesized to lower the likelihood of organizing success (see, for example, Flanagan 1989). For this stage, I measure size using the log number of employees on the election petition, because the NLRB's determination of the specific boundary of the bargaining unit happens later, and indeed may not happen at all for a drive that ends in withdrawal of the petition. The unemployment rate is assumed to be inversely related to organizing success, since workers have less fear of termination or other employer retaliation in tight labor markets (Hoxie 1923). The effect of union density in a given area (here, the MSA) has been debated: Lipset et al.

(1956) argued that the relationship would turn negative as unions moved from the easy to more difficult drives, but most researchers have assumed that union density proxies for a pro-union climate and thus will have a positive effect (Hurd and McElwain 1988). The presence of right-to-work laws is often used as a proxy for an anti-union climate (Montgomery 1989), though the mechanism by which the laws would lower success rates has rarely been specified (Wessels 1981). The model includes two time-period indicators, for whether the organizing drive took place under the Bush administration with (a) a Democrat-controlled Board or (b) a Republican-controlled Board.¹⁰ The comparison group is cases from the Clinton administration. Finally, the model controls for union and three-digit industry. The comparison group is SEIU organizing drives in the nursing industry.¹¹

Most of these variables' effects have been proposed in terms of predicting election outcomes. Farber (2001), for example, suggested that large units would be less likely than smaller ones to vote for a union because votes follow a binomial distribution, and

⁹The average case that went to election did so in 41 days, and 95% of elections were held within 75 days of filing. The tail, however, is quite long; the maximum delay before election recorded in the data is 1,705 days. The relationship between delay and withdrawal is noticeable when all cases, not just those that went to election, are considered. The average time to election or withdrawal was 50 days, and cases in the 95th percentile were open for 234 days.

¹⁰Democrats controlled the Board during Bush's first year in office; retirements and new appointments in January 2002 gave control to the Republicans.

¹¹The SEIU and nursing are the second most common union and industry, respectively, in the data. The Teamsters and specialty construction are the most common. To give the union and industry coefficients some more substantive meaning, I chose a group that was relatively generalizable on both dimensions. The SEIU has been active in many industries, and many unions have tried to organize nursing employees.

thus anything that lowered (or raised) the underlying average propensity to vote union would have a larger effect on outcomes in larger units. If the negative effect of unit size really is just an artifact of the underlying vote distribution, then we would not necessarily see any such effect of unit size *before* elections. Right-to-work laws are normally posited to reduce union-organizing success by reducing employees' incentive to join a union whose benefits they will in either case receive. If employees are aware of such laws and their effects, then they should be unenthusiastic about organizing drives in general. In this case, then, the effects would be *more* likely to show up before elections. By examining this earlier stage, we can look for different effects of these and other controls.

In stage 2 the dependent variable is a binary variable recording union election victory. This is the stage that most previous studies have modeled (see, for example, Cooke 1983). The main independent variables remain the existence of various pre-election ULP charges. Bargaining-unit size is here measured as the log number of eligible voters. The model controls for whether an election agreement was signed and whether that agreement was a "consent" or "stipulated" agreement (Cooke 1983; Peterson et al. 1992).¹² Stage 2 also includes delay and the other controls from stage 1. Because all members of the population considered in stage 2 go to election, the initial positive effect of delay from stage 1 should not appear; instead, the negative effect should dominate.

In stage 3 the dependent variable is reaching a first contract with the employer. The FMCS followed newly certified units for up to two years and noted both whether and when a contract was negotiated in that time span. For the purposes of the law, however, the important question is whether the two parties negotiated a contract within one year of certification—the "contract bar" period during which neither the employer nor other unions may challenge the certified union's

status as the employees' representative. Thus the contract variable is coded one when a contract is reached within one year of certification and zero otherwise.¹³

ULP charges are more complicated in this stage. This is because the parties can file new ULP charges, typically 8(a)(5) charges over the employer's refusal to bargain, during contract negotiations. The model therefore includes an indicator of whether a ULP charge was filed after certification.¹⁴ It also includes interaction terms between the post-certification ULP charge and any earlier ones, to determine whether the combined effect is stronger than the two effects in isolation.

Stage 3 also includes *certification* delay, measured as the log number of days between the election and the NLRB's final certification of the union. Here again, delay is a proxy for other factors that are likely to influence the tenor of the negotiations.¹⁵ The unit size can now be measured directly. Other controls are implemented as in stages 1 and 2. Table 3 reports the summary statistics for the covariates in each stage.

Data Analysis

Table 4 reports the regression results. It shows two models. In the first, the three stages have been estimated independently of one another. In the second, the error terms across the stages have been allowed to be correlated, to help account for endogeneity between the stages.

¹²Consent elections were extremely rare in this period; only 1.13% of the cases in which election agreements were signed also saw the signing of consent agreements.

¹³Two-thirds of the recorded contracts in the data were reached within one year; 95% were reached within two years. Coding all contracts reached in the data, regardless of time between certification and contract, produces similar results. Tables showing this more generous specification of the dependent variable and other analyses are available from the author upon request.

¹⁴The bulk of evidence for these charges came from the FMCS's records, where the relevant section of the NLRA is not cited. Therefore I do not distinguish different types of post-certification charges.

¹⁵At the certification stage, as at the other stages, delays tended to be either nonexistent or quite long. Half of all cases were certified within one and a half weeks of the election, and three quarters within three weeks; but those in the 95th percentile were not certified for more than five months, and the longest wait was eighteen months after the election.

Table 3. Summary Statistics for Regressions.

| Variable | Stage | | |
|------------------------------------|--------|--------|--------|
| | 1 | 2 | 3 |
| Election Held | .672 | | |
| Election Won | | .559 | |
| Contract Reached | | | .383 |
| 8(a) (1) Charge Filed | .044 | .041 | .033 |
| 8(a) (1) Charge with Merit | .051 | .041 | .039 |
| 8(a) (3) Charge Filed | .026 | .025 | .024 |
| 8(a) (3) Charge with Merit | .011 | .008 | .010 |
| Other Charge Filed | .035 | .028 | .028 |
| Other Charge with Merit | .011 | .009 | .011 |
| Post-Certification ULP Charge | | | .138 |
| Log Employees on Petition | 3.210 | | |
| Log Eligible Voters | | 3.297 | |
| Log Bargaining-Unit Size | | | 3.133 |
| Consent Agreement | | .008 | |
| Stipulated Agreement | | .880 | |
| Log Election Delay | 3.522 | 3.738 | |
| (Log Election Delay) ² | 12.983 | 14.113 | |
| Certification Delay | | | 2.734 |
| (Certification Delay) ² | | | 8.144 |
| Unemployment Rate | 5.330 | 5.283 | 5.154 |
| MSA Density | 10.965 | 10.988 | 11.156 |
| Right-to-Work State | .170 | .167 | .167 |
| Bush Admin, Dem. Board | .173 | .171 | .208 |
| Bush Admin, Rep. Board | .554 | .544 | .450 |
| Observations ^a | 14,754 | 9,919 | 3,613 |

^aThe reported number of observations corresponds to that in the regression model where the variable first appears.

The strong and statistically significant correlation between the first two stages' errors (ρ_{en} in Table 4) suggests that endogeneity is present in the process—most likely, that unions' decision to withdraw their petitions is based in part on their expectations of election success. And while the signs and significance levels are largely unchanged across the two models, the point estimates do differ between them, suggesting that the coefficients in model 1 may suffer from endogeneity bias. I therefore focus on the coefficients reported in model 2 and compare them to the model 1 coefficients when appropriate.

All ULP charges, both those that were found meritorious by the NLRB and those that were not, were significantly and negatively correlated with holding an election, and meritorious charges were generally associated with stronger negative effects, as expected. Some idea of the magnitude of these effects can be gained by calculating the change in the probability of holding an election associ-

ated with the presence of a ULP charge. The likelihood that an SEIU organizing drive in nursing (the comparison category) that faced the mean delay and unemployment held an election is .624. Following Petersen (1985), we can calculate the change in probability of holding an election given a meritorious 8(a) (3) charge (denoted F) as

$$\Delta P = \frac{P(B|F=1) - P(B|F=0)}{P(B|F=0)}$$

$$= \frac{\phi(x'\beta_1 - \beta_1^F) - \phi(x'\beta_1)}{\phi(x'\beta_1)},$$

where β_1^F is the coefficient on a meritorious 8(a) (3) charge given in model 2 of Table 4 and ϕ is a standard normal distribution.¹⁶ In this case, the change in probability is equal

¹⁶ The same procedure is used to interpret coefficients elsewhere in the paper.

Table 4. Independent and Correlated Sequential Probit Results for Holding and Winning Elections and Reaching First Contracts.

| Covariate | Model 1: Without Endogeneity | Model 2: With Endogeneity | Covariate | Model 1: Without Endogeneity | Model 2: With Endogeneity |
|---|------------------------------|---------------------------|--|------------------------------|---------------------------|
| <i>Stage 1: Holding Election (N = 14,754)</i> | | | | | |
| Constant | -14.9254*** (0.2440) | -20.8003*** (0.3340) | Bush Admin., Dem. Board | -0.0005 (0.0400) | 0.0208 (0.0572) |
| 8(a) (1), Non-Merit | -0.4089*** (0.0595) | -0.5880*** (0.0840) | Bush Admin., Rep. Board | 0.0204 (0.0354) | 0.0267 (0.0499) |
| 8(a) (3), Non-Merit | -0.2582*** (0.0759) | -0.3959*** (0.1069) | Three-Digit NAICS Union | | Yes Yes |
| Other ULP, Non-Merit | -0.7139*** (0.0615) | -1.0399*** (0.0877) | <i>Stage 3: Reaching Contract (N = 3,613)</i> | | |
| 8(a) (1), Merit | -0.5158*** (0.0550) | -0.7149*** (0.0773) | Constant | -1.5862*** (0.3171) | -2.1434*** (0.5449) |
| 8(a) (3), Merit | -0.6624*** (0.1118) | -0.9980*** (0.1592) | 8(a) (1), Non-Merit | 0.0290 (0.1287) | 0.0985 (0.1993) |
| Other ULP, Merit | -0.4540*** (0.1237) | -0.6841*** (0.1775) | 8(a) (3), Non-Merit | -0.1169 (0.1646) | -0.1563 (0.2345) |
| Log Employees on Petition | 0.0029 (0.0119) | 0.0023 (0.0166) | Other ULP, Non-Merit | -0.2556 (0.1577) | -0.3229 (0.2404) |
| Log Election Delay | 7.5366*** (0.1024) | 10.4961*** (0.1387) | 8(a) (1), Merit | -0.2579** (0.1277) | -0.3026 (0.1928) |
| (Log Election Delay) ² | -0.8610*** (0.0111) | -1.1965*** (0.0149) | 8(a) (3), Merit | 0.5316** (0.2822) | 0.6712 (0.4084) |
| Unemployment Rate | -0.0256*** (0.0095) | -0.0350*** (0.0132) | Other ULP, Merit | 0.3713* (0.2164) | 0.5129 (0.3137) |
| MSA Density | 0.0039 (0.0038) | 0.0064 (0.0054) | Post-Certification ULP | -0.5361*** (0.0783) | -0.7616*** (0.1336) |
| Right-to-Work State | 0.0342 (0.0435) | 0.0496 (0.0612) | Interaction: Post ULP Times, 8(a) (1), Non-Merit | -0.8755* (0.5096) | -1.2440* (0.7142) |
| Bush Admin., Dem. Board | -0.0838** (0.0405) | -0.1088** (0.0569) | 8(a) (3), Non-Merit | 0.3575 (0.5141) | 0.5546 (0.7385) |
| Bush Admin., Rep. Board | -0.0226 (0.0367) | -0.0336 (0.0516) | Other ULP, Non-Merit | -0.1196 (0.5216) | -0.0946 (0.7398) |
| Three-Digit NAICS Union | | Yes Yes | 8(a) (1), Merit | -0.1499 (0.5185) | -0.2450 (0.7250) |
| <i>Stage 2: Winning Election (N = 9,919)</i> | | | | | |
| Constant | 3.7781*** (0.5829) | 11.1359*** (2.0162) | 8(a) (3), Merit | -0.1640 (0.8117) | -0.1256 (1.1347) |
| 8(a) (1), Non-Merit | -0.2270*** (0.0660) | -0.1347 (0.1075) | Other ULP, Merit | 60.2688 (0.0000) | 60.2688 (0.0000) |
| 8(a) (3), Non-Merit | -0.0360 (0.0812) | 0.0516 (0.1142) | Log Bargaining-Unit Size | 0.0001 (0.0006) | 0.0250 (0.0516) |
| Other ULP, Non-Merit | -0.1206 (0.0794) | 0.1038 (0.1419) | Log Certification Delay | 0.6971*** (0.1830) | 0.9847*** (0.3038) |
| Merit | -0.0300 (0.0680) | 0.1338 (0.1111) | (Log Certification Delay) ² | -0.1270*** (0.0281) | -0.1762*** (0.0469) |
| 8(a) (1), Merit | -0.0719 (0.1415) | 0.1383 (0.2065) | Unemployment Rate | 0.0240 (0.0166) | 0.0282 (0.0252) |
| 8(a) (3), Merit | 0.1391 (0.1394) | 0.3784* (0.2000) | MSA Density | 0.0068* (0.0064) | 0.0087 (0.0092) |
| Other ULP, Merit | 0.0061* (0.0033) | -0.2332*** (0.0167) | Right-to-Work State | 0.0047 (0.0767) | 0.0138 (0.1105) |
| Log Eligible Voters | 0.2395 (0.1679) | 0.2910 (0.2212) | Bush Admin., Dem. Board | -0.0659 (0.0609) | -0.0768 (0.0871) |
| Consent Agreement | 0.3131 (0.1955) | 0.3541 (0.2888) | Bush Admin., Rep. Board | -0.3189*** (0.0531) | -0.4713*** (0.0784) |
| Stipulated Agreement | -1.4963*** (0.2720) | -4.4184*** (0.9501) | Three-Digit NAICS Union | | Yes Yes |
| Log Election Delay | 0.1507*** (0.0317) | 0.4950*** (0.1112) | ρ_{en} | | -0.8649** (0.3539) |
| (Log Election Delay) ² | 0.0344*** (0.0098) | 0.0521*** (0.0137) | ρ_{ev} | | -0.0113 (0.1862) |
| Unemployment Rate | 0.0039 (0.0036) | -0.0016 (0.0051) | ρ_{vw} | | -0.5017 (0.5220) |
| MSA Density | -0.0318 (0.0430) | -0.0051 (0.0610) | Log-Likelihood | -1,505.52 | -1,421.58 |

Notes: Asymptotic standard errors are in parentheses. All models include controls for 3-digit industry and union. $P_1 = .65$, $P_2 = .56$, $P_3 = .38$. A longer table showing all industry and union coefficients is available from the author upon request.
*Statistically significant at the .10 level; **at the .05 level; ***at the .01 level.

Table 5. Changes in the Probability of Holding an Election Based on ULP Charges.

| Charge Type | Merit | ΔP (%) | N |
|-------------|-------|----------------|-------|
| 8(a)(1) | N | -16.5 | 644 |
| 8(a)(3) | N | -2.6 | 387 |
| Other | N | -44.1 | 519 |
| 8(a)(1) | Y | -25.6 | 749 |
| 8(a)(3) | Y | -39.4 | 165 |
| Other | Y | -21.8 | 163 |
| Mean | | -24.6 | 2,627 |

Notes: Results are based on a correlated sequential probit. A model without endogeneity produces a mean effect of -34.1%.

to -.394; thus, elections are nearly 40% less likely in cases with meritorious 8(a)(3) charges than in those without.

Table 5 shows results for similar calculations for all types of ULP charges as well as the mean effect across types. The mean effect is a 25% higher chance of withdrawal. The smaller magnitude of this effect than of that estimated using the independent sequential models (34%) lends further credence to the idea that some labor organizations that both withdraw their bid for an election and file ULP charges do so with the expectation of poor performance in the election. The independent model attributes that negative effect to the charge and thus overstates its impact. Still, the negative effect is statistically significant and substantial even after correcting for endogeneity.

Most of the controls are statistically significant in the expected directions. The effect of delay is curvilinear, and the positive effect peaks at day 80, which is well within the sample but after most drives that ultimately go to election have done so. Raising the unemployment rate by a percentage point lowers the probability of holding an election by almost 15%—non-trivial, but smaller than the effect of most ULP charges. Unit size, MSA density, and right-to-work status are not statistically significant at this stage. The first two years of the Bush administration, with a Democrat-controlled Board, were less likely to see drives go to election than were earlier or later periods.

In stage 2 the effects of ULP charges

were not statistically significant.¹⁷ This is consistent with earlier findings (Ahlburg 1984; Cooke and Gautschi 1982) and with the assumption that organizers self-select into election. The negative effect of unit size appears here as it did in earlier studies: a one-standard-deviation increase in the log number of voters (from a mean of 27 to 97) reduces the likelihood of electoral success by 38%. Delay here is negative and decreasing, with a minimum at 88 days. Unemployment, somewhat surprisingly, is positively correlated with election victory, though this too jibes with organizers' deciding to press on with elections rather than withdraw despite the unemployment rate. There are no statistically significant period effects.¹⁸

In stage 3, delays in certification did have positive and then negative effects, peaking at 12 days. Since half of all units were certified within 10 days of a victorious election, it makes sense simply to think of any delays in certification as being negatively correlated with reaching a contract. Also in this stage, as in stage 2, the direct effect of ULP charges was not statistically significant.¹⁹ ULP charges filed after certification, however, had a large negative effect: organizing drives with such charges were 77.7% less likely to reach a first contract than were those without them. The negative impact was even larger—89%—in cases where 8(a)(1) charges had been filed before the election. One further and worrying effect in the model is the declining likelihood of reaching a first contract over time.

¹⁷In cases where "other" charges were found meritorious, organizers were more likely to win elections. There is no obvious explanation for this effect, given the composite nature of the category.

¹⁸Electoral, the SEIU is one of the most successful unions. Using it as the comparison group is thus a conservative test for ULP effects. Including interaction terms for all the unions requires too many variables for most programs to estimate. Estimating a model with no union controls (available upon request) produces weakly significant negative effects for 8(a)(1) charges with and without merit, which suggests that there is further fallout from such charges during elections for some unions.

¹⁹In both stages the independent model shows negative effects for 8(a)(1) charges, but these effects disappear when correlation between the events is accounted for.

Table 6. Likelihood of Success in Different Stages, by Presence and Type of ULP Charges, Including Average and Cumulative Effects of a ULP Charge.

| Was a ULP Charge Filed before Election? | Likelihood of Success at a Given Stage | | | | Cumulative Likelihood | Change in Cumulative Likelihood (%) |
|---|--|------------------|--------------------|-----------|-----------------------|-------------------------------------|
| | Holding Election | Winning Election | Reaching Contract: | | | |
| | | | No Later ULP | Later ULP | | |
| No ULP Filed | .624 | .558 | .410 | .093 | .129 | |
| 8(a)(1) Filed, n.m. | .521 | .558 | .410 | .045 | .085 | -34 |
| 8(a)(3) Filed, n.m. | .608 | .558 | .410 | .093 | .126 | -3 |
| Other ULP Filed, n.m. | .349 | .558 | .410 | .093 | .071 | -45 |
| 8(a)(1) Filed, m. | .464 | .558 | .410 | .093 | .095 | -26 |
| 8(a)(3) Filed, m. | .378 | .558 | .410 | .093 | .071 | -45 |
| Other ULP Filed, m. | .488 | .625 | .410 | .093 | .104 | -52 |
| Average ULP | .491 | .562 | .410 | .081 | .091 | -30 |
| Average Change in Likelihood of Success (%) | -25 | 1 | 0 | -13 | -30 | |

Note: All probabilities and calculations used to produce this table are available in an appendix from the author upon request.

Representation cases that were concluded under the Republican-majority Board were considerably less likely to reach agreement than comparable cases earlier in the study period.

Modeling the process this way allows us to calculate the cumulative relationship between ULP charges and the final outcome, to see where in the process ULP charges “bite.” This is done by conditioning later outcomes on the estimated probability of achieving earlier outcomes. Table 6 shows the likelihood of success in each stage, varying by the presence and type of ULP charge. The top row, “No ULP Filed,” shows the likelihood of success in the absence of a pre-election ULP charge. The *cumulative likelihood* of success can then be calculated as the product of these likelihoods, with one caveat: because later ULP charges can occur, the probability of reaching a contract is a weighted average of the probabilities of reaching a contract when there is and is not a later charge.²⁰ Thus for a union with no pre-election ULP charges, the likelihood of eventually reaching a contract with the employer within the first year after

certification is 12.9%. The other rows show the likelihoods of success given various ULP charges. Their cumulative likelihoods are calculated similarly.

The impact of a ULP charge at each stage and the cumulative impact vary considerably by the type of charge filed. The most common type of charge, the 8(a)(1), is associated with lower likelihoods of success in the first and third stages and a 34% lower likelihood of passage through the entire process. In only 8.5% of such cases is the process seen through to completion. The effect is of similar size whether or not the NLRB found the charge meritorious. On the other hand, 8(a)(3) charges show striking differences depending on merit findings. While non-meritorious charges had very little effect on the final outcome, meritorious charges reduced the likelihood of success by almost half.

The bottom two rows of Table 6 show the *average likelihood* of success given a ULP charge, defined as the sum of the likelihood of success given each type of charge times the probability that a charge was of that type. In practice there is no such average charge, but this figure gives an estimation of the expected effect of a ULP charge of indeterminate type. Thus, for example, a ULP charge is associated with a 25% lower likelihood of holding an election, as Table 5 also showed. These average effects yield

²⁰Here, $P(D) = P(B) \times P(C) \times [P(D|U=0) \times P(U=0) + P(D|U=1) \times P(U=1)]$, where U is a post-certification ULP charge. For cases with no pre-election ULP charges, $P(U=1) = .124$.

a cumulative likelihood of 9.1% for passing through the entire process. This is 30% lower than the 12.9% rate for organizing campaigns with no ULP charges. Furthermore, the bulk of this reduction comes from two places: the reduction in the likelihood of holding an election and the increased likelihood of exposure to ULP charges after certification. A post-election ULP charge was experienced in 12.9% of cases without pre-election ULP charges, but in 18.5% of cases with pre-election charges.

Discussion

Consistent with a view of union organizing as a multistage process, this study of organizing drives that took place between 1999 and 2004 reveals evidence that covariates had different effects on the “sifting and sorting” (Fernandez and Weinberg 1997) of cases at different points in the process. Unit size, for example, does seem to have mattered in determining election outcomes, but not in the decision to hold elections or in the likelihood that contract negotiations would succeed. ULP charges meanwhile bit where unit size did not. The data also demonstrate a worrisome recurrence of ULP charges: in cases where charges were filed yet the union went ahead with and won the election, employers did not appear to be deterred.

Some limitations of this study should be noted. ULP charges are a noisy measure of unfair labor practices—there is a risk of false positives and false negatives. Yet that measurement error should bias the coefficients on charges toward zero. There is little reason to think that measurement error has inflated the coefficients reported here. Endogeneity, on the other hand, could bias the coefficients upward (Lawler 1984; Freeman and Kleiner 1990; Koeller 1992). Comparison of the independent and correlated sequential models suggests that endogeneity *is* an issue, particularly in the relationship between petition withdrawals and electoral success. Union organizers almost certainly withdraw based on their expected performance in the election; if organizers in that position are also likely to file ULP charges, then the impact of those charges will be overestimated.

Similarly, employers probably commit unfair labor practices when they think doing so will have the greatest effect. Weaker drives will thus be exposed to ULPs more often, but it will be the weakness of the drive that provokes the ULP and not vice-versa.²¹ It is notable that calculating the average cumulative effect of ULP charges using the results from the independent model (available on request) suggests a 58% reduction in the likelihood of final success, rather than the 30% reduction yielded by the correlated model. Half the effect, in other words, is an artifact of endogeneity. Yet the 30% reduction that remains after allowing for endogeneity is still daunting, particularly when applied to an already small likelihood of success.

A central policy implication of this study is that the organizing process is broken. If workers who have expressed interest in voting whether to have a union have only a one-in-five chance of ultimately reaching a first contract, or a one-in-eleven chance when there is a ULP charge, they will quite rationally decide that the union certification process is not a worthwhile investment. While the NLRB election procedure can be modeled as a screening process, it was not *designed* to function this way. As designed, there were two screens: the signature requirement and the election. All of the cases observed here by definition met the signature requirement. The period before the election was not supposed to last months or years (Miller and Leaming 1962). Nor were one of every three organizing drives expected to be abandoned before an election was held, given the workers’ stated preference for holding one. There certainly were not supposed to be attrition rates surpassing 40% in the interval between recognition and contract agreement. Yet even this study’s upper-bound estimate of a 56% contract agreement rate within two years is lower than the rate estimated more than a decade ago (Dunlop Commission 1994).

The second policy implication is not new: policies geared to change or support work-

²¹In this second case, the “true” effect of the ULP charge would still be negative, for it is precisely because they think that their actions will encourage withdrawal that employers would choose to act.

ers' preferences for or against unions may be misdirected. The high rates of withdrawal and deadlock during contract negotiations imply both that workers who want unions often get no chance to express that desire, and that many workers who have chosen unionization are effectively blocked from implementing it. Consequently, policy reforms or union tactics that increase the likelihood that a worker will vote for unionization should be considered as a part of this longer process. Tempering any celebration of a 10% increase in voting, for example, must be the recognition that there is only about a 62% chance of coming to election at all and a 38% chance of negotiating a contract. Relatedly, any appraisal of the intrinsic value of elections should be qualified by consideration of how many workers never get the chance to vote in one. This work poses no definitive support for either position in the current debate over card-check versus electoral recognition, but it does suggest that, *ceteris paribus*, substantially more workers would have been organized into unions between 1999 and 2004 if the signature screen were the final one.²² Furthermore, support for elections, on whatever grounds, should be backed up by support for additional reforms that will raise workers' chances of *holding* elections.

A tactical implication is that union organizers who choose to hold elections despite having filed ULP charges may be too optimistic about their long-term relationship with the employer. While it is true that pre-election ULP charges seem to have no effect on election outcomes, they are associated with nearly 50% higher odds of new ULP charges being filed during contract negotiations. The contract-agreement rate for this group is a dismal 25.4%. Given the difficulty of reaching a contract in all other drives, it is questionable whether these acrimonious negotiations are a good use of scarce union resources. Unions may have other reasons for pushing

such drives, and will probably continue to do so; but it is worth considering this additional cost when evaluating the relative benefits of such perseverance.

The central research implication of this study is that union organizing in America is a process both more complex and more strategic than previous work that focused on the elections might have led us to suppose. Much of the research on worker preferences for unionization trained a behavioral lens on organizing and tried to determine what forces would influence individuals' voting (Getman et al. 1976). This study suggests that such an approach overstates the influence of workers' preferences. In the stages before and after elections, unionization can be thwarted despite workers' strong preferences for it. Thus this study supports other recent work that has tried to consider individual employees' preferences as well as the opportunity structure in which those preferences can be expressed (Riddell 2004).

There is a parallel here with the evolution of status-attainment research in sociology, where the focus shifted over time from individual-specific determinants of financial or social success, like education, to organizational characteristics that influenced the opportunities that any given individual faced (Baron and Bielby 1980, 1985). Certainly we need accurate and current understanding of what precisely employees want from their relationships with their employers (Freeman and Rogers 1999), but without knowing the legal and organizational hurdles that must be cleared to build such relationships, we cannot fully explain the gap between preferences and outcomes in the workplace.

A sequential approach like the one used here complicates earlier research findings. If there are multiple mechanisms by which ULPs could influence organizing success, depending on the stage of the process considered, then there may also be multiple mechanisms by which corporate characteristics (Maranto 1988), unit size (Farber 2001), attitudes and normative pressures (Montgomery 1989), or other determinants have their effects. In particular, the fact that the group making the relevant decisions changes from stage to stage (from union organizers in stage

²²This point should be tempered by the realization that, were the signature screen the final bar to union recognition, we would almost certainly see earlier employer resistance. It is wrong to say that *all* the organizing drives seen here to pass the signature bar would have done so under a card-check regime.

1, to workers in stage 2, to business agents in stage 3) means that many effects will be stable across stages only insofar as they work through different agents in the same way. Yet this approach also offers a way to resolve some of those complications. Future research could test between alternative explanations that make identical predictions at one stage, if those explanations make different predictions at another stage. This study provides, for example, a crude test for evaluating some competing theories of unit size. Larger units are less likely to win elections but no less likely to hold them. Theories based on free-riding (Olson 1965) and theories based on the probability distributions of votes (Farber 2001) both predict that larger units will win elections at lower rates, but a free-rider theory should also predict that larger units would hold elections at lower rates. Thus the results presented here tentatively lend more support to a probabilistic explanation for unit size's effect than to the free-rider explanation. Similar tests could be implemented to judge between other proposed mechanisms.

There is one other, more specific, research implication. Cases in which 8(a)(3) charges were filed during this period appear to have been quite different from those studied in earlier periods (compare Kleiner 1984). Why non-meritorious 8(a)(3) charges had so little effect compared to meritorious ones is a mystery, particularly given the more comparable effects of non-meritorious and meritorious 8(a)(1) charges.

Conclusion

Two developments encouraged the quantitative study of union-organizing drives. The first was the NLRB's and the AFL-CIO's systematic collection of administrative data on representation drives (Miller and Leaming 1962; Rose 1972). The second was the steady erosion of union success in those drives, from the mid-1970s onward. Thirty years after Getman et al. (1976) sparked the first long debate about why and how workers choose to join or avoid unions, it seems that interest in the administrative details of union representation campaigns has faded. The difficulties confronting union organizers in

the United States are so obviously tied up with broader systemic problems that focusing on procedural failings may seem pedantic.

This study rejects such a view. To understand *which* systemic problems have the greatest impact on the growth and decline of the trade union movement, we need theory and models of where and how those problems interact with the union-organizing process. This will require an extended institutional model of process, one that includes successively earlier and later stages. As this study shows, such work will raise new questions even as it offers answers to old ones. By assembling national data for a larger portion of the organizing process than has heretofore been susceptible to close examination, by accounting for the endogeneity that characterizes choice-based selection models (Ben-Akiva et al. 1997), and by demonstrating sequential, cumulative effects over the course of that process, this study takes the first step in that direction.

Future research could move forward on three fronts. First, of course, more controls could be added. The goal of doing so would not be to increase the share of total variance explained as much as it would be to judge whether competing "determinants," such as national union characteristics and individual organizers' tactics, have different effects at different points in the process.

Second, the scope of the process could be broadened. For example, this paper does not model the card drive, on which no systematic data are collected. While the card drive is beyond the purview of the NLRB, individual unions often have records of their abortive organizing drives. These records could be appended to the main dataset, resulting in a subset of data containing information for the earliest organizing stage. We should, in any event, be wary of drawing a simple dichotomy between "formal," NLRB-supervised and-certified organizing drives and "informal" ones. Even the "formal" drives have an informal component—the card drive—that is poorly documented and researched. "Informal" voluntary-recognition drives, in turn, may be more common after formal organizing drives have failed. For example, are ULP charges in an earlier period associated with

corporate campaigns and neutrality agreements in a later period? The basic logic of extending the scope of the process remains the same here, and suggests a way to model shifts from one type of organizing effort to another.

Third, measures of institutional stability or decline could be added to the data. If we think that union decline results in part from larger transformations in the economic, legal, or regulatory environment, then we should be able to hypothesize both whether a particular institutional change should affect organizing drives' prospects and at what point in the process the effects should be felt. This third front would have to be the hardest-fought, inasmuch as the theory and empirics are the least developed, but it holds the most potential for tying our theories of

organizing success and failure into wider discussions of changes in the employment relationship (Osterman and Burton 2004; Powell 2001).

The decline of unionization may have implications beyond labor-management relations. Markets rely on a constellation of institutions, some informal but many formal and legal, to function (Polanyi 1944; Granovetter 1985; World Bank 2002). If union decline involves the erosion of other social and economic institutions, such as the rule of law or regulation in the economy, then that decline should be cause for broader worry. To the extent that the presence of ULP charges signals institutional erosion, a better understanding of exactly where they affect the organizing process will help us decide how concerned we should be.

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[Whereupon, at 1:21 p.m. the Committee was adjourned.]

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