Boeing ULP Labor Law Backgrounder
May 3, 2011

The NLRB's Case Against Boeing

Background

On April 20, 2011, the National Labor Relations Board issued a complaint against The Boeing Company relating to Boeing's plan to transfer airplane assembly jobs away from its unionized workforce in the Seattle area to a non-union facility elsewhere.[1] The complaint cited admissions by Boeing executives that the movement of work was motivated by its workers' exercise of protected rights in Washington state. It alleges that Boeing's retaliatory work transfer chills and has chilled the future exercise of workers' collective bargaining rights, and that Boeing's conduct was "inherently destructive" of these federally protected rights.[2]

This complaint comes after a year-long investigation into charges filed by the International Association of Machinists and Aerospace Workers ("IAM") District 751. District 751 filed the charge in March 2010 after Boeing's commercial aircraft CEO publicly admitted that Boeing transferred the jobs for the 787 second line in order to avoid its machinist employees' legally protected collective activity.[3]

Boeing's 787 Dreamliner excited the aerospace industry for its innovative design. In 2003, Boeing accepted public subsidies from the State of Washington in exchange for building the 787 there. Shortly thereafter, Boeing announced that it would embark on a new strategy for producing the 787: it would now merely assemble the airplanes in one place, using components manufactured and shipped in from all over the world.

This outsourcing strategy failed, as parts came in defective or late, requiring extensive out-of-sequence work and adding to the time and cost for each plane. While Boeing originally promised the first 787 delivery by May 2008, not one has yet been delivered (although today about 40 787s are near completion). Unlike the phenomenally successful 737 program,[4] Boeing's 787 program is stunted and delayed due to its failed outsourcing strategy.

Nonetheless, the 787 program is on the rebound.[5] Boeing now promises that despite the NLRB's complaint, it will continue its breakneck speed to assemble a 787 in South Carolina.[6] That image – a 787 assembled at Boeing's newly non-union facility in South Carolina – is a powerful one for a worker in any state considering whether to exercise the legally protected right to strike.

Additional material on the facts or legal issues addressed in this paper are available by contacting IAM General Counsel Christopher Corson at (301) 967-4510.

The NLRB's Legal Case Against Boeing

The NLRB is the federal agency responsible for the enforcement of the National Labor Relations Act (the "Act"), including Section 7, which provides, in part, that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[7]

Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7.[8] Section 8(a)(3) prohibits employers from retaliating against workers for exercising those collective bargaining rights.[9] The NLRB's complaint alleges that Boeing violated Section 8(a)(1) and (3) of the Act when it admittedly transferred work away from a workforce in order to avoid those workers' future protected collective activity.

The government's legal theory of the case is straightforward. There is no dispute that Section 7 of the NLRA protects collective activity by workers and extends to striking, if the activity is otherwise lawful. It does not matter if workers are part of a union or not; these rights belong to the individual worker. These collective bargaining rights have been recognized and protected since the Act was adopted in 1935.

Long settled case law establishes that the Act prohibits employers from retaliating against workers for having engaged in collective bargaining activity in the past.[10] It is also well established that an employer may not retaliate against workers due to anticipated future collective activity.[11] Transferring away work opportunities and jobs in retaliation for exercising collective bargaining rights, as Boeing has admitted here, is also unlawful and warrants a restoration remedy.[12]

In a case where, as here, the employer has *admitted* its unlawful motive, the failure of the NLRB to issue a complaint would raise serious questions about the continued right of America's workers to engage in collective activity. The complaint makes clear that it does "not seek to prohibit [the company] from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility."[13]

The Evidence of Unlawful Retaliatory Motive

In its complaint, the NLRB cited Boeing officials' interviews with newspapers, memos from managers, and public statements made by top executives to investors, elected officials, and workers that constituted admissions of its unlawful motive to transfer the work away from workers who had exercised, and might exercise again, their collective bargaining rights. The Board noted that "a senior Boeing official said in a videotaped interview with the Seattle Times newspaper: 'The overriding factor (in transferring the line) was not the business climate. And it was not the wages we're paying today. It was that we cannot afford to have a work stoppage, you know, every three years.'"[14]

Boeing's Defenses

Boeing's top attorney publicly called the NLRB's action to issue the complaint "radical," despite its foundation upon well established case law. Boeing is misrepresenting the law. The two cases relied upon by Boeing are clearly inapplicable since they concern employer lockouts arising during a labor dispute over an expiring agreement.[15]

There is no case law for the proposition Boeing advances here, that long after a strike is over, and an agreement with a no-strike pledge is in effect for at least three more years, an employer may discriminate against union employees it deems more likely to strike again. As the Fifth Circuit recognized in *National Fabricators, Inc. v. NLRB*, 903 F.2d 396, 400 (5th Cir. 1990), to permit an employer to take economic action against its employees due to a generalized fear of collective activity in the future "would allow an employer to systematically discriminate against all union employees on the grounds that they are more likely to engage in protected activities than nonunion employees."

Although legally irrelevant, Boeing argues that it attempted to bargain a new contract with the IAM that would have assured that it would not transfer the second 787 line to South Carolina. Although the parties met in September 2009, during the four sessions, Boeing never made any proposals and refused to make any counterproposals.

Another illegally irrelevant argument by Boeing is that the Board waited too long to take action. However, the Board granted Boeing's repeated requests for delays in the investigation. Boeing itself caused the delay that it complains of today.

Other Arguments Raised By Boeing And Its Surrogates

Boeing also belatedly now argues no one is harmed by its discriminatory job movement, pointing to the upswing in work in the Puget Sound area for machinist workers. Setting aside the economic harm caused by the transfer of jobs and the lost work opportunities, the chilling impact on each worker's freedom to organize and bargain for a better life is injury enough to sustain the complaint. In any event, Boeing has announced that once the dust settles on its production problems, thousands of jobs on Boeing's latest generation aircraft will be in South Carolina, not here. In the cyclical aircraft manufacturing world, Boeing's decision to transfer the work to South Carolina will eventually mean the loss of thousands of jobs in its union facility in Washington.

Today, at least 1,500 of the new jobs on the 787 Dreamliner program in the Puget Sound are temporary and will be eliminated when out-of-sequence work is complete. Boeing again confirmed last week that it intends to shut down the second "surge" line in Everett once South Carolina is running. Boeing's attempt to create a legitimate business reason for its move, in light of its own acknowledgements of the financial risks it undertook in moving the entire second 787 line to South Carolina,[16] is therefore unconvincing.

Some of the media has focused on confused statements made by South Carolina elected officials about so-called state "right-to-work" laws. As the Board explained, these laws are "expressly permitted by the National Labor Relations Act" and the "complaint has nothing to do with state right-to-work laws."[17] These state laws enable some workers to avoid paying union dues even when they are represented by that union. However, the issue here is an individual worker's right to engage in collective activity. As the NLRB explained, "[t]he result would have been the same had the line been moved to a non-union facility in any location." *Id.*

South Carolina elected officials have also stated that the complaint seeks to close Boeing's South Carolina facility or to prohibit Boeing from making a non-discriminatory decision to do work in that state. This is not true, as the complaint expressly permits Boeing to transfer work for any lawful reason.

Next steps:

The case is scheduled to be tried before an administrative law judge at Region 19 of the NLRB in Seattle, Wash., on June 14, 2011. Boeing may appeal an adverse ruling.

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[1] The NLRB's complaint is available at http://www.nlrb.gov/sites/default/files/documents/443/cpt_19-ca-032431_boeing__4-20-2011_complaint_and_not_hrg.pdf.

[2] NLRB fact sheets are available at http://www.nlrb.gov/node/443.

[3] *See e.g.*, http://seattletimes.nwsource.com/html/nationworld/2011237525_albaughvideo.html.

[4] The 737 is the top selling commercial aircraft in the world, with more than 6,000 planes delivered since 1967.

[5] Boeing has now pulled much of the 787 back in-house, with more than 2,900 workers at its Everett plant, plus the thousand or so it says will do assembly at its South Carolina facility.

[6] Boeing enthusiastically assisted in the decertification of the Machinists union at its South Carolina facility in 2009, just prior to deciding to move the second 787 line there.

[7] 29 U.S.C. § 157 (also provides that employees have the right to refrain from exercising these rights).

[8] 29 U.S.C. § 158(a)(1).

[9] 29 U.S.C. § 158(a)(3).

[10] *See e.g., Erie Resistor Corp.*, 132 NLRB 621 (1961), *enforced*, 373 U.S. 221 (1963) (unlawful to grant super-seniority to strike replacements); *Molon Motor and Coil Corp. v. NLRB*, 965 F.2d 523 (7th Cir. 1992) (discharge of employee for engaging in protected work stoppage is an unfair labor practice); *Reno Hilton Resorts*, 326 NLRB 1421 (1998), *enforced*, 196 F.3d 1275 (D.C. Cir. 1999) (contracting out security wok in reprisal for strike violated NLRA); *Direct Transit, Inc.*, 309 NLRB 629 (1992) (decision to close a facility two days after a newly formed union demanded recognition unlawful).

[11] *See e.g., General Electric*, 215 NLRB 520 (1974) (threats to "provide more and better job opportunities at nonunion plants than at organized plants... is the plainest kind of discriminatory conduct"); *Lear Siegler Inc.*, 295 NLRB 857 (1989) (company discriminatorily transferred work to another location to avoid unionization); *WestPac Electric, Inc.*, 321 NLRB 1322 (1996) (unlawful to punish employee with isolated assignment to avoid collective activity); *Kentucky Tennessee Clay Co.*, 343 NLRB 931 (2004), *enforced*, 179 Fed. Appx. 153 (4th Cir. 2006) (threat to fire employees who struck unlawful); *Parexel Int'l, LLC*, 356 NLRB No. 82 (2011) (firing employee to prevent future concerted activity unlawful); *National Fabricators, Inc. v. NLRB*, 903 F.2d 396 (5th Cir. 1990) (employer may not discriminate against certain employees because it anticipates they will act collectively).

[12] *Adair Standish Corp.*, 290 NLRB 317 (1988), *enforced*, 875 F.2d 866 (6th Cir. 1989), *enforcement granted in part, vacated in part*, 912 F.2d 854 (6th Cir. 1990) (employer must restore equipment which had been discriminatorily diverted from union plant because diversion aimed to reduce job opportunities for workers who exercised collective bargaining rights); *Cold Heading Co.*, 332 NLRB 956 (2000) (employer unlawfully transferred work away from unionized workforce to avoid collective activity; "usual practice in cases involving the discriminatory relocation of operations to require the employer to restore the operations in question"); *St. Vincent Medical Center*, 349 NLRB 365 (2007) (employer ordered to restore discriminatorily contracted out respiratory care department); *Titan Tire Corp.*, 333 NLRB 1156, 1160 (2001) (employer ordered to restore and resume discriminatorily relocated operations).

[13] See complaint, *supra*, at FN 1.

[14] See NLRB factsheet at http://www.nlrb.gov/node/443.

[15] *NLRB v. Brown*, 380 U.S. 278 (1965) and *American Ship Building v. NLRB*, 380 U.S. 300 (1965). Indeed the Court later explicitly confirmed that *Brown*'s reference to the ability to "blunt the effectiveness" of strikes is limited to cases when the employers are "maintaining the stability of the multiemployer unit," a situation not present here. *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 419 (1982).

[16] Boeing's October 21, 2009, shareholders earnings teleconference: "there would be executive challenges associated with that choice [to move the second 787 line to Charleston]... some of the modest inefficiencies, for example, associated with the move to Charleston, are certainly more than overcome by strikes happening every three or four years in Puget Sound."

[17] Stephanie Armour, Bloomberg.com, *U.S. Labor Board Urged by States to Drop Boeing Complaint*, April 28, 2011.