

New Federal Initiatives Project

**The NLRB vs. Boeing: Can Unionized Employers
Expand into Right to Work States?**

**By
Glenn M. Taubman***

May 26, 2010



*The Federalist Society
for Law and Public Policy Studies*

The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author or authors. We hope this and other publications will help foster discussion and a further exchange regarding current important issues.

www.fed-soc.org

The NLRB vs. Boeing: Can unionized employers expand into Right to Work states?

On April 20, 2011, the National Labor Relations Board's Acting General Counsel issued a complaint against the Boeing Company, alleging that the company's decision to assemble large commercial aircraft (787 Dreamliners) at a new final assembly plant in South Carolina violated the National Labor Relations Act. http://www.nlr.gov/sites/default/files/documents/443/cpt_19-ca-032431_boeing__4-20-2011_complaint_and_not_hrg.pdf. The complaint alleges that Boeing illegally "transferred" work from its unionized assembly plant in Seattle, Washington to this new South Carolina facility.

According to the complaint, Boeing's decision to assemble additional 787s at its newly acquired South Carolina facility, rather than in an existing unionized facility in Seattle, was made in retaliation for the Seattle-based employees' prior strikes. The complaint cites news articles and statements to the press Boeing officials reportedly made to unlawfully discourage future strikes and discriminate because of employees' protected union activity. The complaint seeks an order requiring Boeing to cease production of the 787s in South Carolina and instead produce them in Seattle.

In an unusual development, the Acting General Counsel issued two press releases and a "fact sheet" explaining his actions.

<http://www.nlr.gov/news/acting-general-counsel-lafe-solomon-releases-statement-boeing-complaint>

<http://www.nlr.gov/news/national-labor-relations-board-issues-complaint-against-boeing-company-unlawfully-transferring->

<http://www.nlr.gov/node/443>.

Boeing has forcefully denied the complaint's allegations.

https://www.nlr.gov/sites/default/files/documents/443/boeing_answer.pdf

<http://seattletimes.nwsourc.com/ABPub/2011/05/04/2014962951.pdf>

According to Boeing, no work has been transferred from Washington to South Carolina; no employee in Washington has lost any employment opportunities; the aircraft assembly work in Washington has continued to expand due to increased customer demand, even as the South Carolina plant opens; and the decision to open a new facility in South Carolina was made for legitimate economic and business reasons.

Boeing argues that legitimate business reasons may lawfully include a desire to diversify production away from facilities that are prone to strikes and other forms of economic pressure by unionized employees. Moreover, Boeing asserts that its contract with the machinists union allows it to open new facilities elsewhere, and that the company negotiated in good faith with the union before it decided to create this new facility, but was unable to reach a no-strike agreement with the union in Washington. Finally, Boeing asserts that the remedy sought in the complaint – a court order to transfer the assembly work to Seattle from South Carolina – is impermissibly punitive and would cause an undue hardship on Boeing, its employees, and the State of South

Carolina.

This case brings into focus several lines of NLRB cases. There are cases holding that employers may not unlawfully retaliate against employees' exercise of their protected rights. On the other side there are several salient points limiting these cases' reach, and other lines of cases protecting Boeing's right to locate new facilities anywhere it chooses.

First, "runaway shop" and retaliation cases generally deal with employers who close, or transfer work away from, the original facility to the detriment of existing employees. Here, Boeing claims that because of increased customer demand, the 787 assembly work is expanding in both Washington and South Carolina.

Second, Boeing asserts that employers are not powerless to combat unions' strikes and other economic warfare. For example, Boeing had the legal right to permanently replace all of the Seattle-based economic strikers, but apparently chose not to exercise that right. Boeing's decision to open a new production facility in a more tranquil labor environment appears to be a softer response to the union's strikes and economic pressure.

Third, Boeing supporters note that the NLRB General Counsel does not mention that Boeing has free speech rights under Section 8(c) of the National Labor Relations Act to reasonably predict the effect of union strikes, union economic warfare, and other union intransigence.

Finally, Boeing supporters suggest there is a long line of Supreme Court cases allowing employers the freedom to close, relocate, expand, or curtail their businesses without union permission. Such basic business decisions are not mandatory subjects of bargaining, and a union does not become a partner in running a business simply by virtue of its status as some employees' exclusive bargaining representative.

This case raises significant policy questions about the extent to which the federal government can prevent companies from taking labor costs, strikes, and union power into account in deciding whether to create or expand production facilities in other states, especially Right to Work states that often have much lower union density.

** Glenn M. Taubman is a Staff Attorney at the National Right to Work Legal Defense Foundation.*

Related Links

National Labor Relations Board Notice of Complaint and Hearing (April 20, 2011)

http://www.nlr.gov/sites/default/files/documents/443/cpt_19-ca-032431_boeing__4-20-2011_complaint_and_not_hrg.pdf

"National Labor Relations Board issues complaint against Boeing Company for unlawfully

transferring work to a non-union facility,” Office of Public Affairs, National Labor Relations Board, April 20, 2011

<http://www.nlr.gov/news/national-labor-relations-board-issues-complaint-against-boeing-company-unlawfully-transferring->

“Acting General Counsel Lafe Solomon releases statement on Boeing complaint,” Office of Public Affairs, National Labor Relations Board, May 9, 2011

<http://www.nlr.gov/news/acting-general-counsel-lafe-solomon-releases-statement-boeing-complaint>

“Boeing Complaint Fact Sheet,” National Labor Relations Board

<http://www.nlr.gov/boeing-complaint-fact-sheet>

National Labor Relations Board v. Boeing: Boeing Response (May 4, 2011)

https://www.nlr.gov/sites/default/files/documents/443/boeing_answer.pdf

Letter from J. Michael Luttig, Executive Vice President and General Counsel, Boeing, to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (May 3, 2011)

<http://seattletimes.nwsourc.com/ABPub/2011/05/04/2014962951.pdf>

“Republicans decry labor board over Boeing complaint,” by Kevin Bogardus, *The Hill*, May 10, 2011

<http://thehill.com/blogs/blog-briefing-room/news/160239-rand-paul-asks-if-white-house-has-enemies-list>

“National Labor Relations Board Overreach Against Boeing Imperils Jobs and Investment,” by Hans von Spakovsky and James Sherk, the Heritage Foundation, May 11, 2011

<http://www.heritage.org/research/reports/2011/05/national-labor-relations-board-overreach-against-boeing-imperils-jobs-and-investment>

“Machinists Hail NLRB Complaint over Boeing South Carolina Move,” by International Association of Machinists and Aerospace Workers (April 20, 2011)

<http://www.businesswire.com/news/home/20110420006707/en/Machinists-Hail-NLRB-Complaint-Boeing-South-Carolina>

“Obama’s Silence on Boeing Is Unacceptable,” by Gov. Nikki R. Haley (South Carolina), *The*

Wall Street Journal, April 29, 2011

“The answer to Boeing’s labor dispute,” by Stephen Pearlstein, *The Washington Post*, April 26, 2011