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Lessons from the NLRB's Boeing Complaint

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On April 11, 2011, Acting General Counsel Lafe Solomon of the National Labor Relations Board filed a complaint against Boeing seeking to force Boeing to move its second line of Dreamliner production from South Carolina to Washington State and the jurisdiction of the International Association of Machinists. The complaint has drawn national attention as Republican Senators and Congressmen have condemned Solomon and the NLRB for filing the complaint, and the NLRB and Democrats have responded. The debate in Washington has focused on the impact of the complaint and the politics associated with the filing of the complaint.

Republicans recently filed a bill to amend the NLRA, entitled "The Job Protection Act." The likelihood of success in amending the NLRA before 2012 is remote, of course. Regardless of what happens in the future, there are significant lessons to be learned from the Boeing situation for both unionized and union-free employers.

Unions Restrict Management's Right to Make Decisions. The Boeing complaint is a perfect example of how a union can negatively affect management's right to make fundamental business decisions. The only right most employers obtain in a collective bargaining agreement is a no-strike provision. The remainder of the CBA limits rights that the employer had when it was union-free.

The Boeing complaint is not based on any limitation in the Boeing-IAM contract, however. In fact, Boeing reportedly obtained contract language in the last negotiations that allows it to determine where it places or locates work. The complaint is based on an alleged violation of the NLRA. The NLRA imposes many obligations and restrictions on employers beyond those set forth in a collective bargaining agreement.

The Alleged Violations of the NLRA. Citing the IAM's strikes against Boeing in 1977, 1989, 1995, 2005, and 2008, the complaint alleges that Boeing "made coercive statements to its employees that it would remove or had removed work from the [Bargaining] Unit because employees had struck and [Boeing] threatened or impliedly threatened that the Unit would lose additional work in the event of future strikes."

The complaint enumerates five specific occasions on which alleged threats were made. Then it alleges that Boeing "decided to transfer its second 787 Dreamliner production line to its non-union site in South Carolina . . . because the Unit employ-

ees assisted and/or supported the Union by, [among other things], engaging in the protected, concerted activity of lawful strikes and to discourage" employees from engaging in protected concerted activity in the future.

Resolution of Disputes with a Union Can Take Years. The complaint states that Boeing made the decision to transfer the production line to South Carolina in October 2009. The IAM filed its unfair labor practice charge against Boeing some five months later, in March 2010. The Acting General Counsel filed the complaint against Boeing approximately 13 months after the charge was filed, and 18 months after Boeing made the decision. Litigating this matter through the NLRB and the federal courts could take two to three additional years, or more. During this time Boeing will be incurring legal fees and other costs and, if it does not relocate the South Carolina work to Washington, its potential liability will be increasing significantly. In addition, senior members of Boeing management will be forced to spend significant time defending themselves and the Company in this case rather than focusing on managing their business.

Members of Management at Every Level Need Labor Law Training. The Boeing complaint specifically identifies eight Boeing vice presidents and the president, chairman and chief executive officer as having made unlawful statements. According to the complaint, the evidence includes (1) a call that was posted on Boeing's intranet that could be viewed by all employees; (2) a memorandum to employees; (3) a videotaped interview with a reporter; and (4) articles appearing in newspapers or business journals.

Most companies provide labor law training for first line supervisors and middle managers. This complaint points out the importance of ensuring that senior executives are fully aware of the potential pitfalls they face under the NLRA when discussing labor relations issues.

The NLRB is a Political Body with Significant Power. The NLRB is, in fact, a political body, shaped in large part by the political party in office. Its five members are appointed by the President and must be confirmed by the Senate, just as federal judges are. Absent Senate confirmation, the President can make a "recess appointment" for a limited period of time, as President Obama did with current Board Member Craig Becker. In contrast to federal judges, who have lifetime appointments, members of the NLRB are appointed for staggered five-year terms.

The NLRB has always been perceived by either employers or unions as biased. By tradition, three of the five members of the NLRB are from the President's political party. However, the Obama NLRB is one of the most aggressive in terms of support for unions, and its make-up leaves it more susceptible to claims of bias. Democrats have three of the four seats on the current NLRB, with a Republican seat unfilled. Democrat Becker was not confirmed by the Senate because of his bias, but he sits on the NLRB because he received a recess appointment by the President. In addition, Acting General Counsel Solomon, who filed the complaint, has not been confirmed by the Senate.

The remedy sought by the Acting General Counsel in the Boeing case illustrates the wide discretion that the NLRB exercises. Even if the alleged comments were made and were in fact unlawful, Boeing should be able to establish a lawful economic reason for its decision to build and develop the second production line in South Carolina. Moreover, if as reported the Union expressly agreed in the last contract to allow Boeing to decide where to locate work in the future, the proposed remedy is extreme at best. Even if the statements made were unlawful threats regarding protected concerted activity, the remedy should not include moving the South Carolina work to Washington State.

The Boeing Complaint Affects Every State and Unionized Employer's Decision to Locate Work. The politi-

cians and news media often portray the Boeing complaint as an attack on *right to work* states. That is understandable. South Carolina stands to lose more than 1,800 Boeing jobs if the Company is forced to move the work to Puget Sound.

The Union, of course, desperately wants the work moved because South Carolina is rightly known as an anti-union, right to work state. Union representation in South Carolina is sparse. Governor Nikki Haley is an outspoken supporter of Boeing and opponent of the IAM, and the IAM has sued Governor Haley over her comments. The state legislature passed a constitutional amendment requiring secret ballot elections before a union could be certified, and it was approved by more than 75 percent of the voters. The Acting General Counsel has threatened to sue the state over the secret ballot amendment.

The Boeing complaint is not legally based on Boeing's decision to locate the second line of production in a right to work state, however. Had Boeing located the second line of production in Illinois, Ohio, or any other state that has not enacted a right to work statute, the complaint could still have been issued based on the alleged facts – that is, alleged threats against employees for engaging in protected concerted activity. Employers in every state should be concerned and monitoring the Boeing case.

Stay tuned. This could be a long battle.