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## Article

# Boeing, the IAM, and the NLRB: Why U.S. Labor Law Is Failing

Julius G. Getman<sup>†</sup>

### INTRODUCTION

In April 2011, the National Labor Relations Board's (NLRB's) Acting General Counsel, Lafe Solomon, issued a complaint against The Boeing Company (Boeing).<sup>1</sup> The complaint alleged that Boeing violated the National Labor Relations Act (NLRA) by shifting assembly work on its 787 Dreamliner from Everett, Washington, to North Charleston, South Carolina.<sup>2</sup> According to the complaint, the company decided to shift work from Everett to North Charleston to retaliate against workers in Everett for past strikes—activity protected by the NLRA.<sup>3</sup>

The NLRB has been under constant attack ever since. Many of the Board's critics have claimed to discern a conspiracy with "big labor"<sup>4</sup> to further the political fortunes of President Obama. Others accused the agency of having an anti-business, job-endangering agenda.<sup>5</sup> Joe Nocera, writing in the *New York Times*, stated, "Seriously, when has a government agency ever tried to dictate where a company makes its products? I can't ever remember it happening. . . . I've become mildly obsessed

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1. Complaint and Notice of Hearing at 1, 10, Boeing Co., No. 19-CA-23431 (Nat'l Labor Relations Bd. June 20, 2011) [hereinafter Complaint].

2. *Id.* at 1, 5.

3. *Id.* at 6.

4. See, e.g., Editorial, *NLRB Favors Unionized States*, ARIZ. REPUBLIC, Dec. 14, 2011, <http://www.azcentral.com/arizonarepublic/opinions/articles/2011/12/13/20111213editorial1214-nlr-b-favors-unionized-states.html>.

5. Joe Nocera, Op-Ed., *How Democrats Hurt Jobs*, N.Y. TIMES, Aug. 23, 2011, at A25.

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with the Boeing affair. Nothing matters more right now than job creation.”<sup>6</sup>

In this article, I will show that the National Labor Relations Board (Board) has done nothing to warrant the torrent of criticism. The General Counsel’s action was consistent with the language of the NLRA and supported by precedent. It posed no serious threat to Boeing’s well-being, or even to its decision to assemble 787 Dreamliners in South Carolina. Properly understood, the clamor over Boeing’s right to make corporate business decisions demonstrates the weakness of the NLRB and not its rampant power. Indeed, the entire campaign against the Board appears to be part of a political effort aimed at organized labor and the last remnants of the New Deal legislation that created the NLRB. What is now needed is an effort to recreate the NLRB into the agency it was intended to be.

#### I. THE FACTUAL BACKGROUND LEADING TO THE BOARD’S COMPLAINT

In the fall of 2009, Boeing faced a serious problem. Its new, lightweight, fuel-efficient 787 Dreamliner had elicited orders from all over the world, but Boeing did not have enough planes to meet promised time schedules.<sup>7</sup> Much of the problem was caused by Boeing’s decision to outsource the manufacture of components to partner companies around the world and to adopt a “just-in-time” inventory system requiring that components be delivered according to a precise schedule.<sup>8</sup> Several of the suppliers and partners that were supposed to produce the components were years behind schedule, contributing to Boeing’s backlog of nearly 900 orders.<sup>9</sup> When Boeing finally received the necessary parts, it was understandably under pressure to speed up assembly.<sup>10</sup>

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6. *Id.*

7. Peter Cohan, *For Boeing, It’s Finally Time to Test-Fly the 787 Dreamliner*, DAILY-FINANCE (Dec. 13, 2009, 11:00 AM), <http://www.dailyfinance.com/2009/12/13/will-boeing-finally-test-fly-the-787-dreamliner>.

8. For a discussion of Boeing’s manufacturing model, see Debby Arkell, *The Evolution of Creation*, BOEING FRONTIERS (Mar. 2005), <http://www.boeing.com/news/frontiers/archive/2005/march/mainfeature1.html>. Boeing later admitted that outsourcing too much of the work to suppliers was a serious mistake. Jad Mouawad & Christopher Drew, *New Problems with Boeing’s 787 Revive Concerns About Its Reliability*, N.Y. TIMES, Dec. 11, 2012, at B1, B4.

9. See Cohan, *supra* note 7.

10. See David Kesmodel, *Boeing’s Dreamliner Makes Its Way to Japan: Executives Say They Plan to Nearly Double Jet’s Production Within Six*

Boeing's initial plans for the Dreamliner called for assembly by its skilled unionized employees in Everett, Washington, part of Boeing's Puget Sound complex.<sup>11</sup> Before committing to assembly in Everett, Boeing had obtained financial incentives of over \$3 billion from the Washington State Legislature.<sup>12</sup> A production line capable of producing about seven Dreamliners per month was established in 2007.<sup>13</sup> The Puget Sound unit, comprised of approximately 18,000 employees, had historically performed the final assembly of all Boeing planes.<sup>14</sup>

The assembly line workers in Puget Sound were represented by Local Lodge 751 of the International Association of Machinists and Aerospace Workers (IAM).<sup>15</sup> Relations between Boeing and the union were complex and often confrontational. Three of the previous five contract negotiations (in 1995, 2005, and 2008) had resulted in strikes.<sup>16</sup> The two-month strike in 2008 was particularly bitter.<sup>17</sup> Boeing's stock tumbled in its af-

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*Months*, WALL ST. J., Sept. 27, 2011, <http://online.wsj.com/news/articles/SB10001424052970204422404576595193592207856>.

11. In late 2003, Boeing announced that it would place the assembly line for the Dreamliner in Everett, Washington, after the Washington State Legislature passed a tax and subsidy incentive package totaling more than \$3.2 billion. See James Wallace, *Boeing, State Make It Official—7E7 is Everett's*, SEATTLE POST INTELLIGENCER, Dec. 19, 2008, <http://www.seattlepi.com/business/article/Boeing-state-make-it-official-7E7-is-Everett-s-1132611.php>.

12. *Id.*

13. See Dominic Gates, *Boeing's Dreamliner Is Fastest-Selling New Jet*, SEATTLE TIMES, Apr. 4, 2007, [http://seattletimes.com/html/boeingaerospace/2003650223\\_boeing04.html](http://seattletimes.com/html/boeingaerospace/2003650223_boeing04.html).

14. Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, Nat'l Labor Relations Bd., to Richard L. Ahearn, Reg'l Dir., Region 16, Nat'l Labor Relations Bd., at 3 (Apr. 11, 2011) [hereinafter NLRB Advice Memo], available at <http://www.nlr.gov/news-outreach/fact-sheets/fact-sheet-archives/boeing-complaint-fact-sheet/boeing-documents> (follow "Advice Memo" hyperlink).

15. See *IAM-Boeing Contract*, IAM DISTRICT 751, <http://www.iam751.org/pages/boeingcontract.htm> (last visited Apr. 4, 2014).

16. See Darrin Hoop, *IAM Strike Back on at Boeing*, SOCIALIST-WORKER.ORG (Sept. 5, 2008), <http://socialistworker.org/2008/09/05/strike-back-on-at-boeing>.

17. On October 6, 2008, Boeing's CEO Jim McNerney sent a long e-mail to Boeing employees about the strike. NLRB Advice Memo, *supra* note 14, at 3 ("McNerney stated that . . . '[t]he issue of competitiveness as it relates to this strike is a big deal[.]' He also tied labor disputes to problems with Boeing's customer relationships. After asserting that the union had recommended that its members reject contract offers and go on strike four of the last five negotiations going back to 1995, he wrote, 'We believe this track record of repeated union work stoppages is earning us a reputation as an unreliable supplier to our customers—who ultimately provide job security by buying our airplanes.'").

termath.<sup>18</sup> During the summer of 2009, Boeing publically announced that it was considering opening a second production line for the Dreamliner line at its new facility in North Charleston rather than Everett because of its concern over strikes.<sup>19</sup> However, Boeing spokesmen indicated to Washington state officials that it would prefer to use Everett because of the skill and experience of its workforce, as long as it could be assured that the union would not strike.<sup>20</sup>

Boeing had acquired its North Charleston facility from Vought Aircraft, with which Boeing had previously contracted to manufacture the rear sections of the Dreamliner fuselage.<sup>21</sup> The decision to purchase Vought came after Boeing had identified Vought as a “problem partner” because it had failed to deliver on schedule.<sup>22</sup> According to Bloomberg News, “incomplete work at the facility had contributed to two years of delays for the new plane.”<sup>23</sup> Early in July 2009, Boeing announced that it planned to purchase Vought for the avowed purpose of speeding up production of parts for the 787.<sup>24</sup> At the time of the purchase, Vought employees were represented by the IAM.<sup>25</sup>

Boeing announced that it had completed its purchase of Vought on July 30, 2009.<sup>26</sup> That same day, a Vought employee filed a petition with the NLRB, asking the Board to decertify the incumbent machinists’ union.<sup>27</sup> A short time later, the NLRB scheduled a vote on whether the workers wished to retain the IAM as their bargaining representative.<sup>28</sup> Boeing actively opposed the union in the campaign that preceded the decertification vote.<sup>29</sup> According to the NLRB Advice Memo:

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18. *Id.*

19. *Id.* at 4 (“[On October 17], Boeing’s Vice President for Government and Community Relations Fred Kiga spoke at an aerospace conference. . . . He reportedly also told the conference that ‘labor unrest’ could drive Boeing’s decision on where to build planes in the future.”).

20. See *Boeing Balks at Strikes*, SPOKESMAN REV. (July 9, 2009), <http://www.spokesman.com/stories/2009/jul/09/boeing-balks-at-strikes>.

21. Susanna Ray, *Boeing Agrees To Buy Vought Aircraft 787 Operations* (Update4), BLOOMBERG (July 7, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVShtocbHO4E>.

22. *Id.*

23. *Id.*

24. NLRB Advice Memo, *supra* note 14, at 4–5.

25. *Id.* at 5.

26. *Id.*

27. *Id.*

28. See *id.* at 6.

29. *Id.* at 5–6.

During August, Boeing denied the Union access to the employees in the North Charleston plant and wrote a memorandum to the employees stating that it preferred to “deal with employees directly without intermediaries.” Boeing also issued a FAQ document to the employees stating that the mass layoffs that took place at the Vought plant in late 2008 were due to the “unique situation created by the Everett strike.” Meanwhile, the South Carolina press was reporting that a decertification decision could influence where Boeing located the second 787 assembly line.<sup>30</sup>

The employees voted decisively 199 to 68 in favor of decertification.<sup>31</sup> Boeing now had a facility in which it could complete assembly of the Dreamliner without concern about strikes; although the earlier production problems at Vought made clear that a great deal of training would be necessary for its workers to play a key role in assembly of the 787.<sup>32</sup>

Given the great backlog of 787 orders, it would have made sense for Boeing to establish new lines in both Everett and North Charleston.<sup>33</sup> However, instead of proceeding on both paths simultaneously, Boeing announced that it would establish a second line either in Everett or in South Carolina.<sup>34</sup> It thereby publicly placed Washington State and South Carolina in competition for assembly work on the 787. Boeing was able to use the competition to obtain additional tax breaks and revenue from South Carolina.<sup>35</sup> In so doing, Boeing also explicitly pressured the IAM for a no-strike promise with regard to assembly of the 787<sup>36</sup> and implicitly expressed its displeasure with the union’s past strikes.

In October 2009, after several rounds of negotiations involving the union and officials of both Washington State and

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30. *Id.*

31. Dominic Gates, *Boeing Charleston Decertifies Machinists Union*, SEATTLE TIMES, Sept. 11, 2009, [http://seattletimes.com/html/boeingaerospace/2009843246\\_boeing11.html](http://seattletimes.com/html/boeingaerospace/2009843246_boeing11.html).

32. *See id.*

33. Had it done so there would have been no basis for legal complaint by the union. The workers in Everett had no legal claim to be the only facility assembling Dreamliners. *See Boeing v. NLRB*, A.B.A. LAB. & EMP. L. FLASH (Oct. 2011), [http://www.americanbar.org/content/newsletter/groups/labor\\_law/ll\\_flash/1110\\_aball\\_flash/1110\\_aball\\_flash\\_boeing\\_nlr.html](http://www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/1110_aball_flash/1110_aball_flash_boeing_nlr.html) [hereinafter A.B.A. FLASH].

34. Dominic Gates, *Boeing, Union Deadlocked in Secret Talks over New 787 Line*, SEATTLE TIMES, Oct. 22, 2009, [http://seattletimes.com/html/boeingaerospace/2010113362\\_boeing22.html](http://seattletimes.com/html/boeingaerospace/2010113362_boeing22.html).

35. *See* NLRB Advice Memo, *supra* note 14, at 9.

36. Don McIntosh, *Boeing Uses Jobs to Pressure Government, Union for Concessions*, NW. LAB. PRESS (Oct. 16, 2009), <http://www.nwlaborpress.org/2009/1016/10-16-09IAM.html>.

South Carolina, Boeing announced that it would open its second line in South Carolina.<sup>37</sup> Boeing officials stressed in a series of statements that the decision was based on its desire to avoid strikes such as those which had previously occurred at its unionized facilities.<sup>38</sup>

## II. THE UNFAIR LABOR PRACTICE CHARGES

In March 2010, Local Lodge 751 filed unfair labor practice charges against Boeing on behalf of the workers at Everett.<sup>39</sup> The union charged violations of sections 8(a)(3) and 8(a)(1) of the NLRA.<sup>40</sup> Section 8(a)(3) prohibits penalizing employees because they exercise their section 7 rights,<sup>41</sup> which includes the right to strike.<sup>42</sup> Section 8(a)(1) makes it an unfair labor practice to threaten employees for exercising their rights under the Act.<sup>43</sup> The union claimed that by choosing to assemble planes in North Charleston rather than Everett, Boeing was punishing its workers in Everett because of their past strikes.<sup>44</sup> It also alleged that statements Boeing officials made concerning its decision were unlawful threats of retaliation based on union activity.<sup>45</sup>

Under the NLRA, the NLRB's General Counsel, acting on the basis of investigation by his or her staff, makes the initial decision as to the legal validity of a charge.<sup>46</sup> If the charge is deemed to be factually and legally sufficient, a complaint is issued in the name of the General Counsel, which sets the stage for a hearing before an administrative law judge and review by the NLRB members.<sup>47</sup>

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37. NLRB Advice Memo, *supra* note 14, at 10.

38. *Id.* at 10–12.

39. *Union Files NLRB Charges to Stop Illegal Intimidation*, 751 AERO MECHANIC (Int'l Ass'n of Machinists & Aerospace Workers, Dist. 751, Seattle, Wash.), Apr. 2010, at 2 [hereinafter *Union Files Charges*], available at [http://www.iam751.org/aero/April\\_2010\\_Aero.pdf](http://www.iam751.org/aero/April_2010_Aero.pdf).

40. See A.B.A. FLASH, *supra* note 33.

41. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (2012).

42. See *id.* § 7, 29 U.S.C. § 157.

43. *Id.* § 158(a)(1).

44. *Union Files Charges*, *supra* note 39, at 2. The union claimed that various statements by Boeing before and after choosing Charleston were intended to let its workers in Everett know that they would pay a price for exercising their rights under the NLRA. See *id.*

45. *Id.*

46. National Labor Relations Act § 3(d), 29 U.S.C. § 153(d) (2012).

47. *Id.*

Acting General Counsel Solomon considered the charge against Boeing for over a year.<sup>48</sup> He repeatedly urged the parties to settle the dispute through negotiation.<sup>49</sup> Although he did not make a formal settlement recommendation, Solomon made clear that a sensible settlement would be in everyone's interest and could be achieved best by the establishment of two new assembly lines, one in Everett and one in North Charleston.<sup>50</sup> Boeing officials did not offer to settle the case on this basis.<sup>51</sup>

During the course of his investigation, as is typical in politically sensitive and legally complex cases, Solomon submitted the issue for study to the agency's Advice Branch, which responded with a memorandum that included a detailed statement of facts and a careful analysis of the law. The April 11, 2011 "Advice Memo" concluded that Boeing had violated the law based on the "Employer's coercive and threatening statements and . . . the Employer's decision to locate the second line at a nonunion facility and to establish a dual-sourcing supply program in retaliation for protected activity."<sup>52</sup> The memo cited several Board cases holding that actions in effect punishing former strikers could not be justified on the basis of concern over future or past protected activity.<sup>53</sup>

On April 20, 2011, with no settlement in sight, General Counsel Solomon issued a complaint based on the legal analysis contained in the memo.<sup>54</sup> In accordance with the law and long-standing NLRB practice, Solomon acted independently of the five members of the NLRB, who act as the agency's adjudicatory arm.<sup>55</sup> Several statements from Boeing officials were cit-

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48. See A.B.A. FLASH, *supra* note 33.

49. See Aubrey Cohen, *Judge Urges Settlement of NLRB Complaint Against Boeing*, SEATTLE POST INTELLIGENCER, June 14, 2011, <http://www.seattlepi.com/business/article/Judge-urges-settlement-of-NLRB-complaint-against-1423811.php>.

50. Telephone Conversation with Lafe Solomon, General Counsel, National Labor Relations Board (Fall 2012).

51. Melanie Trottman, *Boeing Rejects Union on Plant*, WALL ST. J., June 10, 2011, <http://online.wsj.com/news/articles/SB10001424052702304259304576375940769488316>.

52. NLRB Advice Memo, *supra* note 14, at 1.

53. *Id.* at 14–16, 18–19.

54. Complaint, *supra* note 1, at 5 ("In or about October 2009 . . . Respondent decided to transfer its second 787 Dreamliner production line of 3 planes per month from the Unit to its non-union site in North Charleston, South Carolina.").

55. E-mail from Nancy Cleeland, Dir. of Pub. Affairs, Nat'l Labor Relations Bd., to Tom Bettag, Exec. Producer, State of the Union (Apr. 27, 2011,



ed in the complaint.<sup>56</sup> To remedy the alleged violation, the complaint called for an order “requiring Respondent [Boeing] to . . . operate its second line of 787 Dreamliner aircraft assembly production in the State of Washington, utilizing supply lines . . . in the Seattle, Washington, and Portland, Oregon, area facilities.”<sup>57</sup>

Contrary to many subsequent accusations, the complaint did not order or suggest shutting down the South Carolina facility.<sup>58</sup> In fact, it specifically stated that “the Acting General Counsel does not seek to prohibit Respondent 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.”<sup>59</sup>

A complaint by the General Counsel is the first step in a complex, often protracted legal process.<sup>60</sup> It is followed by an evidentiary hearing before an administrative law judge (ALJ), who makes suggested findings of fact and conclusions of law.<sup>61</sup>

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3:52 PM), <http://causeofaction.org/assets/uploads/2012/04/NLRB-FOIA-U00002880.pdf> [hereinafter Cleeland Correction Email].

56. Complaint, *supra* note 1, at 5 (“[In] its October 28, 2009, memorandum entitled ‘787 Second Line, Questions and Answers for Managers,’ [Boeing] informed employees, among other things, that its decision to locate the second 787 Dreamliner line in South Carolina was made in order to reduce Respondent’s vulnerability to delivery disruptions caused by work stoppages. . . . [On] December 7, 2009, [Boeing Vice President Ray] Conner and [Spokesman Jim] Proulx in an article appearing in the Seattle Times, attributed Respondent’s 787 Dreamliner production decision to use a ‘dual-sourcing’ system and to contract with separate suppliers for the South Carolina line to past Unit strikes. . . . [On] December 8, 2009, Conner in an article appearing in the Puget Sound Business Journal, attributed Respondent’s 787 Dreamliner production decision to use a ‘dual-sourcing’ system and to contract with separate suppliers for the South Carolina line to past Unit strikes. . . . [On] March 2, 2010, [Boeing’s CEO of Commercial Airplanes Jim] Albaugh, in a video-taped interview with a Seattle Times reporter, stated that Respondent decided to locate its 787 Dreamliner second line in South Carolina because of past unit strikes.”). Boeing sent a memo to its managers explaining its decision: “In the final analysis, this came down to . . . diversifying the company to protect against the risk of production disruption . . . .” NLRB Advice Memo, *supra* note 14, at 10 (quoting a Boeing memo from Oct. 28, 2009).

57. Complaint, *supra* note 1, at 7–8.

58. Cleeland Correction Email, *supra* note 55.

59. *Id.* at 8.

60. See LEE MODJESKA & ABIGAIL COOLEY MODJESKA, 1 FEDERAL LABOR LAW: NLRB PRACTICE 38 (2013).

61. *Id.* at 56–58. The evidentiary hearing was held on June 14, 2011 and lasted for several days. See *Get the Facts on NLRB v. Boeing*, IAM DISTRICT 751, <http://www.iam.org/nlrb> (last visited Apr. 4, 2014). The ALJ never issued a decision, however, because the parties reached a settlement before he could

The ALJ report is subject to review by a panel of Board members.<sup>62</sup> If the Board panel decides that an unfair labor practice has been committed, it issues an order requiring the charged party to take steps to remedy its illegal actions.<sup>63</sup> But the Board's order is not legally binding on a party until it is "enforced" on review by a Court of Appeals.<sup>64</sup> The entire process, if played out to the end, is likely to consume several years. The complaint may be rejected at any step in the process.<sup>65</sup> The Dickensian delays inherent in the process are often alleviated by settlement,<sup>66</sup> since the parties in most cases prefer compromise to uncertainty. There is little doubt that the parties could have easily reached a settlement in this case by agreeing to create new lines both in North Charleston and in Everett. Boeing needed all the production it could get.

Solomon knew that issuing the complaint would be controversial. He had already been warned by Senator Lindsey Graham of South Carolina that if a complaint was filed, Graham was going after the NLRB "full guns a-blazing."<sup>67</sup> Solomon did not, however, anticipate the furor which followed.<sup>68</sup>

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do so. Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES, Dec. 9, 2011, <http://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html>.

62. MODJESKA & MODJESKA, *supra* note 60, at 57.

63. *Id.* at 60–62.

64. *Id.* at 92.

65. See *Unfair Labor Practice Process Chart*, NLRB, <http://www.nlr.gov/resources/nlr-process/unfair-labor-practice-process-chart> (last visited Apr. 4, 2014).

66. *Facilitate Settlements*, NLRB, <http://www.nlr.gov/what-we-do/facilitate-settlements> (last visited Apr. 4, 2014).

67. Kevin Bogardus, *Senator Threatened Labor Board Before Boeing Complaint*, THE HILL, Nov. 9, 2011, <http://thehill.com/business-a-lobbying/192737-sen-graham-threatened-labor-board-before-boeing-complaint-was-filed>. When questioned by *The Hill*, Graham explained but did not disavow the comments. *Id.* "I meant that I would vigorously criticize the NLRB and actively work to protect the economic interests of South Carolina," he said in a statement. *Id.* "Those statements were made to convey to Mr. Solomon the political uproar that would occur both in South Carolina and nationally if the complaint was filed." *Id.*

68. Conversation with Lafe Solomon, Gen. Counsel, Nat'l Labor Relations Bd. (Winter, 2013).

## III. THE BOARD UNDER ATTACK

The first attacks were aimed at the complaint.<sup>69</sup> Shortly after it was issued, former NLRB Chairman Peter Schaumber described Solomon's action as "unprecedented,"<sup>70</sup> a claim that was regularly repeated by critics.<sup>71</sup> He added that "if the claim is upheld, it could jeopardize any company with unionized workers that wants to expand to a right-to-work state."<sup>72</sup> He did not explain why this was so.

On May 12, 2011, the House Committee on Oversight and Government Reform wrote to Solomon advising him that the committee was investigating his decision to issue a complaint.<sup>73</sup> Solomon was ordered to provide the Committee with "all documents and communications referring or relating to the . . . investigation of Boeing."<sup>74</sup>

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69. See, e.g., Stephanie Armour & Susanna Ray, *Republicans Rally Behind Boeing Over Labor Board Complaint*, BLOOMBERG, May 5, 2011, <http://www.bloomberg.com/news/2011-05-05/republicans-rally-behind-boeing-over-u-s-labor-board-complaint.html>; Allen Smith, *NLRB's Boeing Complaint Targeted*, SOC'Y FOR HUMAN RES. MGMT. (May 27, 2011), <http://www.shrm.org/legalissues/federalresources/pages/boeingcomplaint.aspx>.

70. Judson Berger, *Ex-Labor Board Chairman: Union-Backed Case Against Boeing 'Unprecedented'*, FOXNEWS.COM (Apr. 26, 2011), <http://www.foxnews.com/politics/2011/04/26/ex-labor-board-chairman-union-backed-case-boeing-unprecedented/#i>. Presidential candidate Mitt Romney made Schaumber one of his labor advisors later that year. Josh Eidelson, *New Trouble for Ex-Romney Aide*, SALON, May 3, 2012, [http://www.salon.com/2012/05/03/new\\_trouble\\_for\\_ex\\_romney\\_aide/](http://www.salon.com/2012/05/03/new_trouble_for_ex_romney_aide/).

71. See Adam Shah, *Experts Say Allegations in NLRB Complaint Against Boeing Represent "Classic" Case of Labor Law Violations*, MEDIA MATTERS FOR AMERICA (May 14, 2011, 12:11 AM), <http://mediamatters.org/research/2011/05/14/experts-say-allegations-in-nlr-complaint-again/179638> (listing examples from media where complaint was critiqued as "unprecedented").

72. Berger, *supra* note 70.

73. Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, Trey Gowdy, Chairman, Subcomm. on Health Care, D.C., Census & the Nat'l Archives, & Dennis Ross, Chairman, Subcomm. on Fed. Workforce, U.S. Postal Serv. and Labor Pol'y, to Lafe E. Solomon, Acting Gen. Counsel, Nat'l Labor Relations Bd. (May 12, 2011), *available at* [http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3348/2011-05-12\\_dei\\_gowdy\\_ross\\_to\\_solomon-nlr\\_-\\_ogc\\_boeing\\_iam\\_due\\_5-27.pdf](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3348/2011-05-12_dei_gowdy_ross_to_solomon-nlr_-_ogc_boeing_iam_due_5-27.pdf).

74. *Id.* While Solomon agreed to testify at a Committee hearing, he contested the scope of the information requested. Press Release, Nat'l Labor Relations Bd., Acting General Counsel Lafe Solomon Testifies at Oversight Committee Field Hearing in South Carolina (June 17, 2011), *available at* <http://www.nlr.gov/news-outreach/news-story/acting-general-counsel-lafe-solomon-testifies-oversight-committee-field>. In a letter from Celeste Mattina, Acting Deputy General Counsel, Mattina took the position that "Your letter broadly seeks confidential and privileged information, internal deliberative materials, attorney work product and settlement communications . . ." Letter from Ce-

On May 13, 2011, eleven Republican members of the House of Representatives sent Solomon a letter in which they accused him of “sacrificing South Carolina jobs to further an activist agenda.”<sup>75</sup> The attacks soon were extended beyond the General Counsel to the agency generally. On May 14, George Will argued, “The NLRB has read a 76-year-old statute (the 1935 Wagner Act) perversely . . . [in a] reckless attempt to break a great corporation, and by extension all businesses, to government’s saddle . . . .”<sup>76</sup>

An article published by the Heritage Foundation claimed that that the “National Labor Relations Board is twisting the law to benefit unions at the expense of the rule of law and the nation’s economy.”<sup>77</sup> It attributed the complaint to the Board’s hostility to South Carolina because it is a “right to work state.”<sup>78</sup> *The Wall Street Journal* similarly claimed that “[t]he NLRB’s campaign against Boeing . . . is a government attempt to restrict the free movement of capital. It attempts to punish workers merely because their states passed right-to-work laws.”<sup>79</sup>

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leste J. Mattina, Acting Deputy Gen. Counsel, Nat’l Labor Relations Bd., to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, Trey Gowdy, Chairman, Subcomm. on Health Care, D.C., Census & the Nat’l Archives, & Dennis Ross, Chairman, Subcomm. on Fed. Workforce, U.S. Postal Serv. and Labor Pol’y (May 27, 2011), *available at* [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3348/may\\_27.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3348/may_27.pdf). Mattina’s position was strongly supported by Senator Harkin, Chairman of the Senate Committee on Health, Education, Labor, and Pensions. In a letter to Solomon and to Chair Wilma Liebman, Senator Harkin wrote, “Turning over the requested documents could violate the due process rights of parties in this case . . . . The Board must exercise caution to preserve the integrity of its administrative processes from inappropriate political interference.” Letter from Tom Harkin, Chairman, S. Comm. on Health, Educ., Labor & Pensions, to Wilma Liebman, Chair, Nat’l Labor Relations Bd. & Lafe Solomon, Acting Gen. Counsel, Nat’l Labor Relations Bd. (Aug. 11, 2011), *available at* <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3348/harken8-11-11.pdf>.

75. Letter from Joe Wilson, Rep., et al., to Lafe E. Solomon, Acting Gen. Counsel, Nat’l Labor Relations Bd. (May 13, 2011), *available at* <http://online.wsj.com/public/resources/documents/NLRBLetter.pdf>.

76. George Will, *The NLRB vs. Boeing: Obama Administration Puts Politics Before the Economy*, SEATTLE TIMES, May 14, 2011, [http://seattletimes.com/html/opinion/2015045500\\_will15.html](http://seattletimes.com/html/opinion/2015045500_will15.html).

77. HANS A. VON SPAKOVSKY & JAMES SHERK, THE HERITAGE FOUND., LEGAL MEMORANDUM NO. 66 ON LABOR, NATIONAL LABOR RELATIONS BOARD OVERREACH AGAINST BOEING IMPERILS JOBS AND INVESTMENT (2011).

78. *Id.*

79. Op-Ed., *The White House vs. Boeing*, WALL ST. J., July 28, 2011, at A16.

The governor of South Carolina, Nikki Haley, regularly repeated the charge and, going beyond those who called for amendment of the NLRA, challenged the very existence of the Board, saying, "Anything that would disband the NLRB, I'd be the biggest cheerleader for."<sup>80</sup> And former South Carolina Governor Mark Sanford, appearing on "FOX & Friends," somehow attributed the complaint to House Speaker Nancy Pelosi: "You got Pelosi now, somebody from the opposite coast of America, saying, you know, if they don't unionize, they need to shut the plant down. That goes against 200 years of tradition in America . . . ."<sup>81</sup> Yet another claim based on tradition was made by Boeing CEO Jim McNerney who, in a widely published press release, accused the NLRB of "a fundamental assault on the capitalist principles that have sustained America's competitiveness since it became the world's largest economy nearly 140 years ago."<sup>82</sup> On June 14, Newt Gingrich suggested that one of the things the Congress should do immediately is "defund the NLRB, which has gone into South Carolina to punish Boeing . . . ."<sup>83</sup>

On June 17, Solomon testified under subpoena before the House Oversight Committee about the decision to issue a complaint.<sup>84</sup> The hearing was held in North Charleston, and Governor Haley addressed the Committee in the afternoon.<sup>85</sup> She refused to be present during the morning while Solomon was present. In his opening comments, Committee Chair Darrell Issa implied that "Mr. Solomon's decision to issue a complaint was tailored to reward the President's powerful financial and

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80. Tanya Somanader, *South Carolina Gov. Haley Insists on Disbanding the "Un-American" National Labor Relations Board*, THINKPROGRESS (Sept. 2, 2011), <http://thinkprogress.org/economy/2011/09/02/311362/south-carolina-gov-haley-insists-on-disbanding-the-un-american-national-labor-relations-board/>.

81. *FOX & Friends: Mark Sanford Talks President's Jobs Bill* (FOX News television broadcast Nov. 7, 2011), available at <http://video.foxnews.com/v/1262155496001/mark-sanford-talks-presidents-jobs-bill/#sp=show-clips>.

82. Jim McNerney, Op-Ed., *Boeing Is Pro-Growth, Not Anti-Union*, WALL ST. J., May 11, 2011, <http://online.wsj.com/news/articles/SB10001424052748703730804576315141682547796>.

83. *Hearing Begins in Labor Complaint Against Boeing*, KING 5 NEWS, June 14, 2011, <http://www.king5.com/news/Hearing-to-begin-in-labor-complaint-against-Boeing-123814774.html>.

84. *Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 3 (2011). I was present as an expert witness for the Democrats on the Committee.

85. *Id.* at 136.

political supporters—big labor . . . .”<sup>86</sup> He spared few adjectives in his attack:

And finally, Mr. Solomon’s decision—which has been described as “loony,” “militant,” “retaliatory,” “unmerited,” “unprecedented,” and “the most politicized” decision in NLRB’s history—will doubtlessly cause collateral damage on the free movement of business and capital in the United States.<sup>87</sup>

Chairman Issa’s comments set the tone for the Republican members of the Committee, who continued the attack on Solomon.<sup>88</sup> Congressman Gowdy charged that “the NLRB has essentially become a sycophant for labor unions. . . . [T]he NLRB seeks to give unions a historically unprecedented level of influence.”<sup>89</sup> South Carolina Congressman Tim Scott suggested the complaint was an effort to “use union workers and their dues as a way to create a winning combination for a Presidential campaign.”<sup>90</sup>

In the aftermath of the hearing, leading candidates for the Republican presidential nomination joined in the criticism.<sup>91</sup> As they did so, the Republican charge against the NLRB expanded to include the assertion that the NLRB was seeking to prevent Boeing from opening a plant in South Carolina. Texas Governor Rick Perry was one of the first to sound the theme: “You see, President Barack Obama stacked the National Labor Relations Board with anti-business cronies who want to dictate to a pri-

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86. *Id.* at 3.

87. *Id.* at 5.

88. *See generally id.* Several of the Republicans argued that there could not be discrimination against the workers in Everett because none of them had lost work as a result of Boeing’s decision. *Id.*

89. *Id.* at 14.

90. *Id.* at 19. The Democrats on the Committee denied that the Board had done anything radical. Congresswoman Maloney denied that Boeing was being charged because it moved work to a right-to-work state. Congresswoman Norton argued that a hearing before the statutory process had been completed was improper interference with an independent agency. She pointed out that House and Senate members were “threatening subpoenas, demanding the privileged work product of counsel, and threatening to defund . . . the National Labor Relations Board, before it has made a decision or even heard the case.” *Id.* at 15.

91. *See* Amy Bingham, *Obama Breaks Silence About Boeing v. NLRB Labor Dispute*, ABC NEWS (June 29, 2011), <http://abcnews.go.com/blogs/politics/2011/06/obama-breaks-silence-about-boeing-v-nlrb-labor-dispute/> (“Nearly every Republican presidential candidate has spoken out against the [Boeing] case.”).

vate company, Boeing, where they can build a plant.”<sup>92</sup> This theme was quickly sounded by a variety of commentators.<sup>93</sup>

In a widely shown television ad, Governor Mitt Romney stated during the South Carolina primary, “The National Labor Relations Board, now stacked with union stooges selected by the President, says to a free enterprise like Boeing, ‘You can’t build a factory in South Carolina because South Carolina is a right-to-work state.’ That is simply un-American. . . .It’s political payback of the worst kind.”<sup>94</sup>

While the dispute raged, a series of bills to limit the Board’s authority was filed in the House of Representatives.<sup>95</sup> One of the most draconian was H.R. 2587, introduced in July 2011 by South Carolina Congressman Tim Scott, entitled the “Protecting Jobs from Government Interference Act.”<sup>96</sup> Its avowed purpose was to rescind the NLRB’s right to remedy un-

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92. Michael A. Fletcher, *Labor Board Flies into Political Scene*, J. GAZETTE, Sept. 4, 2011, <http://www.journalgazette.net/article/20110904/BIZ/309049970/-1/BIZ09>.

93. Romney made a claim similar to Perry’s at a Republican debate. *Bloomberg News/Washington Post Republican Debate at Dartmouth College*, N.Y. TIMES, Oct. 21, 2011, [http://www.nytimes.com/2011/10/11/us/politics/bloomberg-washington-post-republican-presidential-debate.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/10/11/us/politics/bloomberg-washington-post-republican-presidential-debate.html?pagewanted=all&_r=0).

94. Mitt Romney, *Free Enterprise*, YOUTUBE (Jan. 4, 2012), <http://www.youtube.com/watch?v=qytehw0vU9I>. In an op-ed, Gary Shapiro, president and CEO of the Consumer Electronics Association, expanded on the point:

Earlier this year the National Labor Relations Board (NLRB) took the unprecedented action of telling a company that it cannot open a new factory in South Carolina. Never mind that Boeing had spent more than one billion dollars on a plant that was going to create 1,000 new jobs. The NLRB rubber-stamped the Washington state union complaint that Boeing was somehow doing something illegal by adding a production facility in South Carolina rather than in Washington. So Airbus cheers as our own federal government stops an American company from hiring American workers and producing goods in the U.S.

Gary Shapiro, *How the Obama Administration Is Hurting Job Creation*, FORBES, Aug. 17, 2011, <http://www.forbes.com/sites/garyshapiro/2011/08/17/how-the-obama-administration-is-hurting-job-creation/>.

95. See Job Protection Act, H.R. 1976, 112th Cong. (2011), available at <https://www.govtrack.us/congress/bills/112/hr1976>; Tim Devaney, *House Panel OK’s Bill to Limit NLRB*, WASH. TIMES, Oct. 26, 2011, <http://www.washingtontimes.com/news/2011/oct/26/house-panel-oks-bill-to-limit-nlr/?page=all> (reporting on passage of H.R. 3094, “The Workforce Democracy and Fairness Act” in committee).

96. Protecting Jobs from Government Interference Act, H.R. 2587, 112th Cong. (2011), available at <https://www.govtrack.us/congress/bills/112/hr2587>.

fair labor practices by requiring employers to undo unlawful actions.<sup>97</sup> Its terms were sweeping:

[T]he Board shall have no power to order an employer (or seek an order against an employer) to restore or reinstate any work, product, production line, or equipment, to rescind any relocation, transfer, subcontracting, outsourcing, or other change regarding the location, entity, or employer who shall be engaged in production or other business operations, or to require any employer to make an initial or additional investment at a particular plant, facility, or location.<sup>98</sup>

If passed into law, this bill would have rendered the NLRB ineffective in many areas. For example, under current law, employers in unionized facilities are required to bargain to impasse before making unilateral changes in wages, hours, or conditions of employment.<sup>99</sup> If an employer is found to have violated his duty by unilateral action, the Board typically orders it to restore the status quo.<sup>100</sup> H.R. 2587 would have eliminated the standard remedy and left employers free to make basic unilateral changes—eliminate lines of work, hire subcontractors, and switch jobs to non-union facilities—secure in the knowledge that the Board could not remedy its actions.<sup>101</sup> The amendment thus would have run directly counter to the stated policy of the Act, “encouraging the practice and procedure of collective bargaining.”<sup>102</sup> Congressman Scott was appointed to the Senate by Governor Haley when Senator Jim DeMint resigned.<sup>103</sup> His role in defending Boeing and attacking the NLRB was widely noted in reports of his appointment.<sup>104</sup>

The majority report on H.R. 2587 stated that “[t]o ensure employees can continue to exercise their rights under federal

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97. *Id.*

98. *Id.*

99. See MODJESKA & MODJESKA, *supra* note 60, § 9:9 (explaining the basic principles of impasse).

100. See *id.* § 2:4 (discussing the NLRB’s remedial authority).

101. H.R. 2587.

102. National Labor Relations Act, 29 U.S.C. § 151 (2012). H.R. 2587 would similarly give tacit permission to employers to do away with a segment of their enterprise that chooses to unionize, and it provides employers with another reason for telling employees that choosing to unionize is risky. H.R. 2587, § 2. It would also undercut the right to strike by making it far easier for employers to punish striking units by eliminating or transferring out their work. *Id.*

103. Aaron Blake & Chris Cillizza, *Nikki Haley Appoints Rep. Tim Scott to Senate*, WASH. POST, Dec. 17, 2012, <http://www.washingtonpost.com/blogs/the-fix/wp/2012/12/17/nikki-haley-to-appoint-rep-tim-scott-to-senate>.

104. See Earl Capps, *Tim Scott: A Warrior for Worker Rights in the Senate*, FRONTPAGE MAG, Dec. 27, 2012, <http://www.frontpagemag.com/2012/earl-capps/tim-scott-a-warrior-for-worker-rights-in-the-senate>.



labor law, the NLRB will continue to have more than a dozen strong remedies against unfair labor practices to protect workers and hold unlawful employers accountable.”<sup>105</sup> The report failed to list any of the strong remedies, and none come to mind.<sup>106</sup> In fact, the Board’s remedial power under existing law is already severely restrained. The Board cannot impose sanctions.<sup>107</sup> It may not seek to punish wrongdoers.<sup>108</sup> It cannot impose fines.<sup>109</sup> It cannot require anything that would amount to a new contract between the parties.<sup>110</sup>

While the Board was under attack, the majority of Democrats, including President Obama, were silent.<sup>111</sup> When the President finally addressed the issue, his comments were notable for their attempt to create an impression of Presidential neutrality while simultaneously expressing sympathy towards Boeing’s entrepreneurial needs. According to ABC News:

The President today put distance between his administration and the labor board stressing that it is “an independent agency.”

“We can’t afford to have labor and management fighting all the time . . . .”

. . . .

“As a general proposition, companies need to have the freedom to relocate—they have to follow the law, but that’s part of our system,” Obama said. “What I think defies common sense would be a notion that we would be shutting down a plant or laying off workers because labor and management can’t come to a sensible agreement.”<sup>112</sup>

Nowhere in the President’s statement is there a hint of support for the Board’s actions. Indeed, President Obama’s statement, while lacking political vitriol, is consistent with Republican complaints about “shutting down a plant” and “laying off workers.”<sup>113</sup> The President not only took care to separate

105. JOHN KLINE, PROTECTING JOBS FROM GOVERNMENT INTERFERENCE ACT, H.R. REP. NO. 112-179, at 3 (2011).

106. *But see id.* at 5 (describing back-pay orders and bargaining orders as remedies that the NLRB would retain).

107. *See generally* 29 U.S.C. §§ 151–169 (2012).

108. *Id.*

109. *Id.*

110. *Id.*

111. I was asked by lawyers at AFL-CIO to draft a sign-on letter opposing Congressman Scott’s bill, for submission to Congress, pointing out the bill’s deficiencies. I did so and my letter in final form was quickly signed by over 200 academics. However, I was advised by savvy lawyers at AFL-CIO to edit my first draft because I focused too much on the Boeing case. “Many Democrats in Congress are uncomfortable with the issue,” I was told.

112. Bingham, *supra* note 91.

113. *Id.* The case against Boeing was made most strongly in pro-union

himself from the General Counsel's actions but also, while the debate raged, went out of his way to show support for Boeing. As the *Washington Times* reported during a subsequent trip to Asia by the President: "A good deal of Mr. Obama's trip has seemed like an effort to mend fences with the aerospace giant. Mr. McNerney [Boeing's CEO] served as moderator for Mr. Obama's question-and-answer session with business executives at the Asia-Pacific Economic Cooperation summit in Hawaii last weekend."<sup>114</sup> The ties between the Obama administration and Boeing were close before the controversy and remain strong. William Daley, then Obama's chief of staff, was on Boeing's board of directors when the company decided to open the second line in South Carolina.<sup>115</sup> Boeing's CEO, Jim McNerney, was Chair of the President's Export Council, and the President appointed John Bryson, the longest-serving director on Boeing's board, to be Secretary of Commerce.<sup>116</sup>

#### IV. THE SETTLEMENT

While the political attacks on the Board continued, Boeing and the IAM entered into secret negotiations.<sup>117</sup> The union's

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blogs. For example, on August 16, a post on Talking Union by Stan Sorscher argued that Boeing management was part of a campaign to destroy worker rights:

As the stakes continue to rise, it's becoming clear that Boeing has no intention of settling the case, or ever complying with the law. They've said they expect to lose their case before the NLRB. Their goal is to re-write the law. They will use this case to assert a new right for employers to intimidate workers who strike. This would shift power away from workers on a scale similar to Ronald Reagan using scabs to break the Air Traffic Controllers' strike in 1981.

Stan Sorscher, *Code of the Pirates: Boeing and the NLRB*, TALKING UNION (Aug. 16, 2011), <http://talkingunion.wordpress.com/2011/08/16/pirate-code>.

114. Dave Boyer, *Obama Backs Boeing in \$21.7B Deal*, WASH. TIMES, Nov. 17, 2011, <http://www.washingtontimes.com/news/2011/nov/17/obama-backs-boeing-in-217b-deal>.

115. See Press Release, Boeing, Boeing Director William M. Daley Resigns Board Seat (Jan. 10, 2011), <http://boeing.mediaroom.com/index.php?s=20295&item=1578> (reporting that Daley was a board member since 2006); see also Letter from Lindsey O. Graham, Senator, U.S. Senate, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (June 17, 2011), in *Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 9, 10 (2011) [hereinafter June 17 Graham Letter], available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg71079/pdf/CHRG-112hhrg71079.pdf>.

116. These connections are set forth in a letter of June 17, 2011 from Senator Lindsey Graham to Darrell Issa. June 17 Graham Letter, *supra* note 115.

117. Dominic Gates, *Boeing, Machinists Reach Sweeping Agreement*, SEATTLE TIMES, Nov. 30, 2011, <http://seattletimes.com/html/business>

chief negotiator was Vice President Rich Michalski.<sup>118</sup> Chief negotiator for Boeing was Raymond Conner, President of Boeing's commercial division.<sup>119</sup> Michalski quickly concluded that Boeing wanted to restore good relations with the union.<sup>120</sup> To the surprise of commentators, on November 30, 2011, the parties reached agreement on a new collective bargaining contract that increased wages and benefits for Boeing's unionized workers and assured them of continued employment.<sup>121</sup> In return, the union promised not to strike until 2016.<sup>122</sup> In the aftermath of the agreement, and at the urging of the Board's General Counsel, the ALJ dismissed the complaint against Boeing.<sup>123</sup> Boeing and the union publicly exchanged compliments.<sup>124</sup>

The agreement established a "Joint Union/Boeing Council," which meets "on a monthly basis, to review and discuss key elements of the business and workforce."<sup>125</sup> It also included a side letter which announced that "the Company will produce the 737NG models and 737MAX models in Renton" and that "[t]he fabrication work currently being performed by bargaining unit employees in support of the 737 production will be continued . . . in Puget Sound and Portland."<sup>126</sup> The side letter also

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technology/2016895323\_boeingmax01.html.

118. Press Release, Int'l Ass'n of Machinists & Aerospace Workers, Machinists to Vote on Deal to Land Boeing's 737 MAX (Nov. 30, 2011), available at <http://www.goiam.org/Ikea/index.php/news/press-releases/9543-machinists-to-vote-on-deal-to-land-boeings-737-max>.

119. Jon Ostrower, *737 Max to Be Assembled in Renton on Contract Approval*, FLIGHTGLOBAL (Dec. 8, 2011, 6:11 PM), <http://www.flightglobal.com/news/articles/737-max-to-be-assembled-in-renton-on-contract-approval-365734>.

120. Press Release, Int'l Ass'n of Machinists & Aerospace Workers, *supra* note 118.

121. William Rogers, *IAM and Boeing Reach Surprise Tentative Agreement*, LEFT LAB. REP. (Dec. 2, 2011), <http://leftlaborreporter.wordpress.com/2011/12/02/iam-and-boeing-reach-surprise-tentative-agreement>; see also COLLECTIVE BARGAINING AGREEMENT BETWEEN THE BOEING COMPANY AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO AND CERTAIN DISTRICTS AND LOCAL LODGES THEREOF (2011) [hereinafter COLLECTIVE BARGAINING AGREEMENT], available at <http://www.iam751.org/pages/xzIAM-BOEING%20CBA%20with%20LOUs.pdf>.

122. *Id.* at 75.

123. Jennifer Booton, *Case Closed: Union Drops NLRB Complaint Against Boeing*, FOX BUS. (Dec. 9, 2011), available at <http://www.foxbusiness.com/industries/2011/12/09/case-closed-union-drops-nlr-complaints-against-boeing/>.

124. See, e.g., Press Release, *supra* note 118.

125. COLLECTIVE BARGAINING AGREEMENT, *supra* note 121, at 176.

126. *Id.* at 178.

stated that “[t]he Company intends to continue production of wide-body airplanes in its Everett facilities.”<sup>127</sup> Once the agreement was approved by the union’s members, Boeing opened the anticipated “temporary” surge line in Everett.<sup>128</sup> Assembly of the 787 was thereafter done in three production lines: two in Washington and one in South Carolina.<sup>129</sup> The agreement quickly improved Boeing’s relationship with the machinists union, as it was intended to do.<sup>130</sup> In effect, the three-line option, which Solomon recognized as the likely way to settle the case,<sup>131</sup> had been adopted.

The settlement slowed, but did not stop, attacks on the Board. In the immediate aftermath of the settlement, leading Republicans, including the main candidates for the party’s presidential nomination, ignored the agreement and continued to attack the NLRB.<sup>132</sup> Prior to the South Carolina primary election, Rick Santorum stated that “[i]n South Carolina, the National Labor Relations Board intervened directly in Boeing’s business decisions. . . . [T]he threat to ‘all Americans’ economic freedom continues.”<sup>133</sup> Mitt Romney made the issue an important part of his campaign, regularly calling the members of the Board “labor stooges.”<sup>134</sup> Senator Graham announced that his campaign against the NLRB would continue.<sup>135</sup>

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127. *Id.*

128. John Gillie, *Boeing Opening Third 787 Dreamliner Assembly Line*, THE NEWS TRIB., Aug. 28, 2012, <http://blog.thenewstribune.com/business/2012/08/28/boeing-opening-third-787-dreamliner-assembly-line>.

129. *Id.*

130. Booton, *supra* note 123.

131. *Id.*

132. *See, e.g.*, Holly Rosenkrantz & Stephanie Armour, *U.S. House Passes Limit Labor Board Powers After Boeing Case*, BLOOMBERG BUSINESSWEEK, Sept. 15, 2011, <http://www.businessweek.com/news/2011-09-15/u-s-house-passes-limit-labor-board-powers-after-boeing-case.html>; Rick Santorum, *The Sunshine State Needs Jobs Not Big Government*, RED STATE (Jan. 29, 2012, 2:12 PM), <http://www.redstate.com/rjsantorum/2012/01/29/the-sunshine-state-needs-jobs-not-big-government>.

133. Santorum, *supra* note 132.

134. Rosenkrantz & Armour, *supra* note 132.

135. Lindsey Graham, *On President Obama’s Recess Appointments to the NLRB*, ABOUT SENATOR GRAHAM BLOG (Jan. 4, 2012), [http://www.lgraham.senate.gov/public/index.cfm?FuseAction=AboutSenatorGraham.Blog&ContentRecord\\_id=aac4307c-802a-23ad-43b7-58870c8590ff](http://www.lgraham.senate.gov/public/index.cfm?FuseAction=AboutSenatorGraham.Blog&ContentRecord_id=aac4307c-802a-23ad-43b7-58870c8590ff) (“The NLRB has become an out-of-control rogue bureaucracy. President Obama, by empowering this agency rather than reforming it, is making job creation even more difficult. I will continue to do everything in my power to put the brakes on the NLRB as currently constructed. I again encourage the appropriate House and Senate committees to investigate the contacts between the NLRB and Machinists Un-

Representative Scott<sup>136</sup> announced, “this outcome does not whitewash the fact that the NLRB has become a biased, politically-driven organization.”<sup>137</sup> Representative Issa stated that the settlement would not deter the committee because of “serious questions that remain[ed] unanswered.”<sup>138</sup> Attacks on the Board and its members persisted as a consistent theme of House Republicans and their supporters.

In February 2013, the *Wall Street Journal* published an opinion piece that applauded continuing congressional attacks on the NLRB and traced the conflict back to “the [B]oard’s outrageous action in [the Boeing] dispute.”<sup>139</sup> On January 31, 2013, Senators Scott and Blunt introduced a bill to shut down the Board pending a decision on the legality of interim Board appointments by President Obama.<sup>140</sup> In his press release on the bill, Senator Scott specifically traced his opposition to the Board back to the Boeing dispute.<sup>141</sup>

The political nature of the attacks is underlined by their lack of connection to the factual circumstances of the Boeing complaint. Governor Romney’s statements epitomize the inaccuracy of the attacks. As a graduate of Harvard Law School,<sup>142</sup> whose labor advisory committee included a former chairman of the NLRB, Romney should have known that the NLRB had taken no action and that a variety of hearings and reviews had

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ion in their complaint against The Boeing Company.”).

136. Scott has since been appointed to the Senate by Governor Haley to replace Senator Demint, who retired. Blake & Cillizza, *supra* note 103.

137. Raymond J. Keating, *Need to Rein in NLRB as Political Hot Spot*, THE ENTREPRENEURIAL VIEW (Dec. 8, 2011), <http://65.36.146.95/news/display.cfm?ID=4705>.

138. Keith Laing, *Issa: NLRB Withdrawal a ‘Victory,’ but Investigation Will Continue*, THE HILL (Dec. 9, 2011, 6:49 PM), <http://thehill.com/blogs/transportation-report/labor-employment/198429-issa-nlr-withdrawal-a-victory-but-investigation-will-continue->.

139. Bernie Marcus, *The National Labor Relations Board Goes Rogue*, WALL ST. J., Feb. 21, 2013, <http://online.wsj.com/news/articles/SB10001424127887324162304578302590637139214>.

140. Press Release, Senator Tim Scott, Senator Scott Joins Colleagues in Effort to Rein in NLRB, Reaffirm the Constitution (Jan. 31, 2013) (“Scott has been a leader in Congressional efforts to rein in the NLRB following the Board’s attempt to destroy jobs in South Carolina in 2011–12.”), *available at* <http://www.scott.senate.gov/press-release/senator-scott-joins-colleagues-effort-rein-nlr-reaffirm-constitution>.

141. *Id.*

142. Ari Shapiro, *At Harvard, Romney Wasn’t Your Typical Student*, NAT’L PUB. RADIO (May 21, 2012, 2:59 PM), <http://www.npr.org/2012/05/21/153197970/at-harvard-romney-wasnt-your-typical-student>.

to occur before one could speak of any action by the NLRB.<sup>143</sup> Neither the NLRB and its Board nor the General Counsel ever sought to prevent Boeing from opening a factory in South Carolina. In fact, as previously pointed out, Boeing already had a factory in South Carolina.<sup>144</sup> Furthermore, the complaint acknowledged that Boeing could transfer work to South Carolina.<sup>145</sup>

Governor Romney stated that the NLRB's actions were "political payback,"<sup>146</sup> but there is no evidence to support this allegation, which the Board's Acting General Counsel Life Solomon has vigorously denied.<sup>147</sup> Solomon, a career labor lawyer with no known political involvement and a reputation for honorable behavior, has served as legal advisor to both conservative and liberal Board members. It is not as though the decision to issue a complaint was a departure from established NLRB law.<sup>148</sup>

Finally, no statement by the General Counsel or any employee of the Board suggests that South Carolina's status as a right-to-work state played any part in the decision to issue a complaint.<sup>149</sup> The matter was not referred to in the Advice

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143. This point was stressed in the Oversight Committee hearings by the expert witness for the Republicans, Philip Miscimarra, a distinguished management lawyer. See *Capital Investment, Relocations and Major Business Changes Under the NLRA: Hearing Before the Comm. on Oversight and Government Reform*, 112th Cong. (2011), available at [http://www.morganlewis.com/pubs/MiscimarraStatement-CapInvstNLRA\\_17june11.pdf](http://www.morganlewis.com/pubs/MiscimarraStatement-CapInvstNLRA_17june11.pdf) ("The General Counsel does not decide these cases. . . . [T]he General Counsel identifies the cases that warrant being litigated for resolution by the NLRB."); see also *Unionization Through Regulation*, *supra* note 84 (statement of Philip Miscimarra) ("The Board's general counsel acts like a traffic cop. He can issue a citation, but he doesn't write the laws, and he doesn't decide the cases.").

144. See *supra* Part I.

145. Complaint, *supra* note 1.

146. Rosenkrantz & Armour, *supra* note 132.

147. *Unionization Through Regulation*, *supra* note 84 (statement of Life Solomon, acting general counsel, National Labor Relations Board).

148. Christy Concannon, *The EAJA and the NLRB: Chilling the General Counsel's Prerogative to Issue Unfair Labor Practice Complaints?*, 36 CATH. U. L. REV. 175, 186 (1986) ("In NLRB proceedings, the issuance of a complaint is the starting point for any litigation.").

149. It is not clear whom Romney had in mind when he used the phrase "labor stooges," or whether, indeed, he can differentiate among the Board members. See, e.g., Robert Behre, *Mitt Romney, in South Carolina, Takes Aim at NLRB*, POLITICO, Sept. 12, 2011, <http://www.politico.com/news/stories/0911/63252.html#ixzz2uTCmA3WO>. None of them can with any justification be deemed a "labor stooge." At the time, the right wing's most frequently targeted Board member was Craig Becker, who was the subject of an editorial in *The American Spectator*. W. James Antle III, *Craig Becker and Boeing*, THE

Memo that provided the legal basis for issuance of a complaint.<sup>150</sup> Most misleadingly, Romney's statement was aired throughout the South Carolina campaign with no acknowledgement of the fact that the case had already been settled to Boeing's clearly expressed satisfaction.

## V. THE LEGALITY OF THE COMPLAINT

In attacking the General Counsel's decision to issue a complaint in the Boeing case, none of the Board's critics seriously addressed the crucial question of whether Boeing actually violated the law by its actions. In fact, the case against Boeing in view of the language and basic policy of the NLRA is very strong.

Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer "by discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization."<sup>151</sup> Did Boeing's action in opening a new assembly line in South Carolina for the express purpose of avoiding the union constitute "discrimination under the NLRA"? The answer according to established precedent is yes. Boeing treated the union members differently than it would have treated them had they not engaged in activity protected by the NLRA. As I pointed out many years ago, the term "discrimination" does not require an employer to treat union members and non-union members differently; as long as it treats them differently than it would have had they not engaged in activity protected by the NLRA.<sup>152</sup> In this case, the term is particularly applicable because Boeing explicitly and publically distinguished between workers represented by a union and those not represented.

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AM. SPECTATOR, Oct. 3, 2011, <http://spectator.org/articles/36851/craig-becker-and-boeing> ("The Boeing case is arguably the biggest labor controversy of the Obama administration, and Becker is seen as emblematic of this White House's tilt in favor of unions against businesses in a challenging economic environment."). Becker is among the last people whom experts familiar with his work would refer to as a stooge. He is, among other things, a summa cum laude graduate of Yale and honors graduate of Yale Law School. *Craig Becker*, WASH. POST POLITICS, [http://www.washingtonpost.com/politics/craig-becker/gIQAmMDaAP\\_topic.html](http://www.washingtonpost.com/politics/craig-becker/gIQAmMDaAP_topic.html) (last visited Apr. 4, 2014). Earlier in his career, Becker was a well-respected legal scholar who taught at UCLA and the University of Chicago. *Id.*

150. See NLRB Advice Memo, *supra* note 14.

151. See 29 U.S.C. § 158(a)(3).

152. Julius G. Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 752–55 (1965).

Did Boeing's action "discourage membership" as that term is used in the NLRA? Once again, the answer is clearly yes, since the Supreme Court has long held that to "encourage or discourage membership" in a union means also to encourage or discourage participation in union activities.<sup>153</sup>

Boeing's actions were also directly contrary to the basic purpose of § 8(a)(3) of the NLRA, which the Supreme Court stated as "to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood."<sup>154</sup> It seems clear that Boeing violated both the spirit and the letter of the section by avowedly punishing its Everett employees for engaging in the basic union activity of striking. The clear line of authority supporting the issuance of a complaint was pointed out in the Advice Memo, which urged the Acting General Counsel to issue a complaint.<sup>155</sup> Similarly, there is little doubt under NLRB precedent, as set forth in the Advice Memo, that Boeing's statements, which explain its decision in terms of avoiding strikes, constituted a threat of retaliation under Board law in violation of § 8(a)(1) of the NLRA.<sup>156</sup> As several noted labor law professors have observed, the decision to issue a complaint was a correct one under existing Board case law.<sup>157</sup> At a minimum, Solomon had a "presentable case." Furthermore, as he has noted, part of his function is to "present important legal issues to the Board for resolution."<sup>158</sup>

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153. *Radio Officers' Union of the Commercial Tels., Union, A.F.L. v. N.L.R.B.*, 347 U.S. 17, 39–40 (1954).

154. *Id.* at 40.

155. See NLRB Advice Memo, *supra* note 14, at 17–23.

156. See *id.* at 14–17.

157. Adam Shah, *Experts Say Allegations in NLRB Complaint Against Boeing Represent "Classic" Case of Labor Law Violations*, MEDIA MATTERS FOR AMERICA (May 14, 2011, 12:11 AM), <http://mediamatters.org/research/2011/05/14/experts-say-allegations-in-nlr-complaint-again/179638>. I served as expert witness for the Democrats on the Committee. I sought to respond to the outrage of the critics by pointing out that labor law experts characterized the General Counsel's actions as being well within established NLRA jurisprudence. See *Unionization Through Regulation*, *supra* note 84 (statement of Julius Getman) ("The political commentators saw in this case something unparalleled, dangerous, very powerful, threatening essentially the capitalist system and the ability of employers to transfer work from one facility to another. . . . The law professors saw this as a fairly routine Section 8(a)(3) charge. . . . This is not in any way an earth-shaking case.")

158. *Unionization Through Regulation*, *supra* note 84 (statement of Lafe Solomon, acting general counsel, NLRB).



Although the Acting General Counsel properly followed NLRB precedent, as he was bound to do, it is less clear that the Board's violation would have been upheld by courts of appeals, which through the long history of the NLRA have been less supportive than the Board of the policy of insulating employee union activity from economic retaliation. In several important cases, courts of appeals have stated that it is legitimate for employers to take actions that harm workers based on efforts to forestall lawful but economically costly union activity.<sup>159</sup> For example, in *N.L.R.B. v. Lassing*, the Court of Appeals for the Sixth Circuit took the position that the "reasonably anticipated increased costs, regardless of whether this increased cost was . . . caused by the advent of the Union or by some other factor," justified the transfer of work.<sup>160</sup>

The General Counsel's case would have been even weaker in the courts of appeals on the issue of remedy. For example, in *Garwin Corp. v. N.L.R.B.*, an employer moved its base of manufacture from New York to Florida.<sup>161</sup> The Court of Appeals, in an opinion by Judge (later Chief Justice) Burger, accepted the Board's finding that that "there was no genuine economic motivation independent of the hostility toward the union" for the move.<sup>162</sup> *Garwin* is one of the few cases in which major transfer of work was held to be a violation of the NLRA. But the Court limited the remedy, holding that it had to be directed to making whole the affected employees who lost jobs because of the transfer.<sup>163</sup> In the Boeing case, this would have been a minor cost, since no employees actually lost their jobs as a result of the transfer, and computing possible financial loss would have been almost impossible. Lawyers for the union were aware that they were unlikely to have obtained a strong remedy if the case proceeded; they were eager to settle.<sup>164</sup> They believed that the

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159. *E.g.*, *N.L.R.B. v. Lassing*, 284 F.2d 781, 783 (6th Cir. 1960).

160. *Id.*; see also *N.L.R.B. v. Adkins Transfer Co.*, 226 F. 2d 324, 328–29 (6th Cir. 1955). See generally Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921 (1993).

161. 374 F.2d 295, 295 (D.C. Cir. 1967).

162. *Id.* at 299.

163. *Id.* at 304.

164. Conversation with David Campbell, Attorney, International Association of Machinists & Aerospace Workers (Fall, 2011); Conversation with Chris Corson, Attorney, International Association of Machinists & Aerospace Workers (Fall, 2011).

NLRB's General Counsel shared this view and was similarly motivated.<sup>165</sup>

## VI. THE NLRA AND EMPLOYER DISCRETION

Despite the language and policy of § 8(a)(3) of the NLRA, there was never any real doubt about Boeing's ability to assign the work as it chose. It could have avoided legal challenge by simply establishing the current three-line arrangement. Indeed, if Boeing actually wanted to reduce the role of its unionized workers and to transfer the assembly of the 787 to South Carolina to avoid the IAM, it could have done so without legal consequences, had its officials not explained the decision to open its second line in Charleston in terms of responding to past strikes or the need to prevent future strikes.<sup>166</sup> Its contract with the IAM specifically gave it the right to make such decisions in accordance with its business judgment.

Even the General Counsel's complaint acknowledged Boeing's ability to transfer work to South Carolina based on legitimate economic considerations.<sup>167</sup> Any management labor lawyer worth his or her salt could have phrased an announcement to attribute Boeing's actions to the economic advantages of South Carolina. In fact, Boeing could have transferred work to South Carolina in the course of business without press release or controversy.

This tactic has been used many times by many employers, without interference from the NLRB.<sup>168</sup> During the 19'50s and 19'60s, most of the garment industry moved from the northeast to the south with almost no interference from the law.<sup>169</sup> Similarly, in the 19'80s and 19'90s, the Board did not interfere to protect union jobs when employers such as Boeing transferred manufacturing work to other locations and countries.<sup>170</sup>

Although there are many examples of "runaway shops"—unionized businesses transferring all or part of their operations

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165. *Id.*

166. *See supra* Part I.

167. *See* Complaint, *supra* note 1.

168. *See* Estlund, *supra* note 160, at 946.

169. *Garment Industry*, THE ENCYCLOPEDIA OF CLEVELAND HISTORY, <http://ech.case.edu/cgi/article.pl?id=GI> (last visited Apr. 4, 2014).

170. *See* Richard B. Freeman, *What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?*, 26 A.B.A. J. LAB. & EMP. L. 327, 330 (2011) ("The unfair labor practice provisions of the NLRA have failed to deter firms from illegal actions to prevent unionization.").

to a non-union location—they have rarely, if ever, been explained in terms of the desire to get away from unions or worker rights. Instead, they have been justified, if at all, in terms of neutral economic advantages associated with the new location. Boeing could have done the same. Why, then, did Boeing, a company with top-flight counsel, ignore the traditional techniques for masking efforts to bypass union facilities?

The role of Boeing's lawyers in shaping Boeing's actions has puzzled many observers. Did they try to tone down the rhetoric used by management tying transfer of work on the 787 to past lawful strikes? If not, was Boeing, as Richard Epstein has suggested, the victim of bad lawyering?<sup>171</sup> Counsel for the union have wondered whether Boeing's lawyers were informed in advance and approved of the issuance of the statements that led to the charges and complaint.<sup>172</sup> In retrospect, it seems highly unlikely that all these statements were made without legal review. The number of statements made and the period of time over which they continued suggest that Boeing's lawyers knew and approved. But why would they do so? The likely answer is that Boeing was trying to prompt further concessions from the two rival states and simultaneously to issue a warning to its unionized workers that it was prepared to take drastic steps to avoid future strikes. Its lawyers probably concluded that it could do so without serious economic consequences.

The problems caused Boeing by the strikes were serious and costly. It obviously wanted to underline for its workforce in Everett that no matter how superior they were as workers, Boeing needed a period without strikes to meet the demand for the 787. There is little doubt that the message was received; Boeing's workers in Everett are now working at top efficiency and have promised not to strike until 2016.<sup>173</sup> In the meantime, Boeing is hoping to be able to train its workforce in Charleston to perform comparably.

In warning its Everett workers about the dangers of striking, Boeing's lawyers ran little risk. They were always in a position to terminate the legal challenge by coming to agreement

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171. *On Point: Boeing and the National Labor Relations Board*, NAT'L PUB. RADIO (Aug. 18, 2011), <http://onpoint.wbur.org/2011/08/18/nlrb>.

172. David Campbell, *supra* note 164; Chris Corson, *supra* note 164.

173. See COLLECTIVE BARGAINING AGREEMENT, *supra* note 121, at 75. Four strikes had been called between 1995 and 2011. Henry Knight, Angie Cowan Hamada & Thomas D. Allison, *Boeing v. NLRB*, A.B.A. (2011), available at [http://www.americanbar.org/content/newsletter/groups/labor\\_law/fl\\_flash/1110\\_aball\\_flash/1110\\_aball\\_flash\\_boeing\\_nlrb.html](http://www.americanbar.org/content/newsletter/groups/labor_law/fl_flash/1110_aball_flash/1110_aball_flash_boeing_nlrb.html).

with the IAM. And even if the unfair labor practice complaint was tried, the danger of a disruptive remedy was slight. As Solomon pointed out at the House Oversight Committee hearing, “Boeing will have every opportunity at the hearing to establish that it would be unduly burdensome for them to take the second line back to Washington State.”<sup>174</sup> If Boeing could do so—and it seems probable that it could—the Board, even if it found a violation, would do nothing to disturb the Charleston assembly line. If it found that Boeing in fact violated the NLRA, the Board would most likely have ordered Boeing to increase utilization of its Everett facility for assembly of the 787. This is what Boeing has chosen to do on its own and is what seemed from the first to be the likely solution of the issue. And even so mild a remedy might well have been rejected by a Court of Appeals. A broader Board order would have been most unlikely, and enforcement of such an order by the courts even more unlikely.

#### VII. THE CONSTANTLY WEAKENING ROLE OF THE NLRB

The Board’s critics portrayed it as a powerful and power-seeking agency capable of challenging and overturning major economic decisions by huge companies—threatening jobs and inhibiting job creators.<sup>175</sup> But to those of us who have studied the Board over the years, it is an agency with a mighty mandate, but with very little power and few allies. The Board cannot effectively protect the jobs of workers who support unions. It has no effective remedy when employers flaunt their duty to bargain in good faith with a union selected by their workers. The Board does not have the power to significantly strengthen the almost atrophied right to strike. And because of a series of court opinions giving employers the right to make captive audience speeches and denying the union a right of access,<sup>176</sup> its election processes will continue to favor employers. The free choice that the Act is meant to protect has long been illusory.<sup>177</sup>

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174. *Unionization Through Regulation*, *supra* note 84.

175. *See, e.g.*, Rosenkrantz & Armour, *supra* note 132; Santorum, *supra* note 132.

176. *See, e.g.*, N.L.R.B. v. United Steelworkers of Am., CIO, 357 U.S. 357, 361–63 (1958).

177. Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125 (2003).

The Supreme Court has led the way in rejecting interpretations of the NLRA that limit traditional employer powers. This practice began early in the Act's history and has remained a constant theme since. For example, the Court announced in 1938, without reference to the NLRA, that an employer could hire permanent replacement workers to take jobs previously held by strikers.<sup>178</sup> In the 1950s, the Court, overruling the Board, held that employers could make captive audience speeches to their employees during an organizing campaign and were not required to give the union a chance to respond.<sup>179</sup> This ruling was solidified in 1991, when the Court rejected the Board's efforts to apply a balancing test that would on occasion permit union organizers limited access to company property.<sup>180</sup> The Court has regularly overruled the Board to narrow the definition of employees under the NLRA.<sup>181</sup> It has created categories of employees not referenced in the statute who are not entitled to unionize.<sup>182</sup> It has denied the Board's ability to impose even non-controversial contract terms when employers refuse, in bad faith, to come to agreement with a newly selected union.<sup>183</sup> As a result, the Board is essentially powerless to remedy employer refusals to bargain in good faith.<sup>184</sup>

#### CONCLUSION

The anti-Board rhetoric of Republican candidates and right-wing commentators, while largely based on illusion, had a significant effect on public opinion.<sup>185</sup> It gained traction from the implied metaphor of the heavy hand of government stifling needed economic activity. The metaphor was implicit in the remarks of Representative Trey Gowdy: "An unelected execu-

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178. *N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938).

179. *United Steelworkers of Am., CIO*, 357 U.S. at 361–63.

180. *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527 (1991).

181. *See, e.g., N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 289 (1974). *But see N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711–12 (2001).

182. *See, e.g., N.L.R.B. v. Yeshiva Univ.*, 444 U.S. 672, 686–88 (1980).

183. *See, e.g., N.L.R.B. v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 408 (1952).

184. For a careful scholarly discussion of the Board's decline, see generally Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569 (2007).

185. Albert Milliron, *64% Say Boeing Should Be Allowed to Operate Non-Union Plant in South Carolina*, POLITISITE (Sept. 15, 2011), <http://www.politisite.com/2011/09/15/64-say-boeing-should-be-allowed-to-operate-plant-in-south-carolina>.

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tive branch entity spokesperson is telling a private company what it can make, where it can make it, and how much of it it can make.”<sup>186</sup>

The weak response by most Democrats, including the President, is perhaps attributable to the fact that they found no compelling counter-metaphor to justify the Board’s actions. Pro-union bloggers had their own image: that of a huge corporation stamping on the rights of workers.<sup>187</sup> It was an old-fashioned image, out of keeping with the moderate image of today’s leading Democrats, few of whom were willing to risk being condemned for class warfare by being critical of a corporation that was adding jobs in an economically weak state. Boeing is one of our last manufacturing champions, able to take on the world in the creation of highly sophisticated products, of which the Dreamliner is the most recent. To the uneasy yet silent Democrats and moderates, the complaint against Boeing must have been seen, at best, as reflecting the unfortunate costs to productivity and efficiency that come with activist government protection of unions.

Given that the NLRB never ruled on the complaint against Boeing and that the action of the General Counsel was preliminary, was non-binding, and never threatened to limit Boeing’s plans, it is surprising that the episode became the focus of so much commentary and hostility. Why was there such a powerful counterattack launched against a legal action that was so weak and relatively insignificant?

For Republicans and right-wing commentators, the case offered a chance to attack multiple enemies and simultaneously reinforce the image of corporations as job creators. A prominent strategy of the attackers was to suggest that the case revealed an anti-business cabal joining together the NLRB, the administration, and organized labor.<sup>188</sup> As part of a cabal with important government agencies, organized labor appears powerful and even threatening to the rights of ordinary workers. The government, because it is beholden to organized labor, is forced to oppose job creation, free choice, and the rule of law. These themes were struck repeatedly in the attacks against the

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186. *Unionization Through Regulation*, *supra* note 84 (testimony of Trey Gowdy, Representative, South Carolina).

187. *See, e.g.*, Rogers, *supra* note 121.

188. *See, e.g.*, Rosenkrantz & Armour, *supra* note 132; Santorum, *supra* note 132.

Board.<sup>189</sup> They are evident in the opening statement of Congressman Issa during the House Oversight Committee hearing, who, in the course of a few paragraphs, announced Boeing's innocence: "Evidence suggests Boeing's decision to build the new assembly plant in South Carolina was simply an act of managerial discretion."<sup>190</sup> He also stressed the political power of organized labor: "Any appearance that Mr. Solomon's decision was tailored to reward the President's powerful financial and political supporters—big labor—would be disturbing. The American people deserve to know if so-called independent regulatory agencies are exceeding their legal authority to pursue a partisan agenda."<sup>191</sup> And he implied the culpability of the Obama administration: "Why would the administration stand in the way of reindustrialization of the American work force[?]"<sup>192</sup> These comments, together with the anti-Board, anti-labor editorials and speeches, served to create an alternate universe, one in which unions are politically powerful, the Board a powerful activist agency, and large companies seeking to create jobs for workers. But the reality revealed by the battle over Boeing is far different. The weakness of the labor movement was shown by the failure of Democrats, including the President, to speak out. The Board became a fashionable punching bag without taking any action as an agency, and Boeing became an object of solicitude and admiration.

The weakness of the NLRB was revealed, but not caused, by the Boeing dispute. Numerous factors have contributed to the Board's decline, including the increasing activism of reviewing courts, and its own unsatisfactory performance, marked by its shifting maze of politically motivated decisions.<sup>193</sup> But it would be a mistake to simply do away with the Board. An agency to protect the rights of workers, one that commands the respect of employers and unions and the support of the courts, is still needed. It has been a long time since the Board in its current form played such a role. It is most unlikely that it will ever be able to create a labor policy based on properly conceived, consistently applied law and generally accepted princi-

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189. See Santorum, *supra* note 132.

190. *Unionization Through Regulation*, *supra* note 84 (statement of Darrell E. Issa, Chair, Comm. on Oversight and Government Reform, Representative, California).

191. *Id.*

192. *Id.*

193. See generally Liebman, *supra* note 184.

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pals without significant statutory change. It should, however, be possible to make the Board more expert and less political, and to make the process of judicial review more rational.

A starting point would be to end the current political focus of Board appointments. It would be possible to establish a roster of labor relations neutrals, approved by both labor and management, for possible appointment to the Board. For example, the National Academy of Arbitrators<sup>194</sup> includes many people who have earned through their decisions the respect of both union and management leaders.

The process of judicial review also needs amending. What is needed is a single reviewing appeals court, perhaps one composed of labor experts already on the bench; Judges Douglas Ginsburg and Marsha S. Berzon come to mind. A non-partisan expert labor Board whose opinions are reviewed by a single expert court could help to create, at this late date, the type of labor law system contemplated so many years ago by those who first fought to create the NLRA.

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194. See NAT'L ACAD. OF ARBITRATORS, <http://www.naarb.org> (last visited Apr. 4, 2014).