Statement
of
The Honorable J. Michael Luttig
Executive Vice President and General Counsel
The Boeing Company
before
The Committee on Health, Education, Labor and Pensions
United States Senate
May 12, 2011

Thank you Chairman Harkin, Ranking Member Enzi and Members of the Senate Committee on Health, Education, Labor and Pensions, for inviting me to testify before the Committee today.

The complaint filed by Acting General Counsel Lafe Solomon of the National Labor Relations Board ("NLRB") against "The Boeing Company" that is at issue before the Committee arises from Boeing's selection of North Charleston, South Carolina, as its location for a second final assembly facility for the 787 Dreamliner. The Dreamliner is Boeing's revolutionary new wide-body commercial airplane that will be significantly more energy efficient than comparably sized airplanes, with advanced electric systems. The assembly of the 787 began (and continues) in Everett, Washington, at the site where Boeing builds its other twin-aisle commercial airplanes, including the 747 and the 777. In response to extraordinary customer demand for the 787, Boeing decided in 2008 to create significant new production capacity by establishing a second 787 assembly line.

The decision to place the second line in North Charleston was one of the more important decisions in Boeing's recent history, and was made only after extensive deliberation by the Company's senior management. Boeing was predisposed to place the second assembly line in Everett, where the Company could draw upon a pre-existing, skilled work force and benefit from the lower construction costs of expanding its existing footprint. But there were also good reasons to consider locating the second assembly line in North Charleston. South Carolina offers an exceptional business environment for manufacturing companies, which in this case included a significant package of financial incentives in its effort to persuade Boeing to build the new line there. Further, North Charleston would provide Boeing, for the first time, with desirable geographical diversity for its commercial airplanes operations. Boeing's desire to protect the future stability of the Dreamliner's global production system was also a significant factor in its decision-making process. An International Association of Machinists and Aerospace Workers ("IAM") strike in 2008 shut down 787 production, costing the Company more than a billion

dollars and damaging Boeing's reputation for reliability with its airline customers, suppliers, and investors.

Boeing's collective bargaining agreement with IAM authorizes it to place work at locations of its choosing. The Company, however, recognized the potential advantages of locating the second line in Everett and invited the IAM to discuss the issue during the time that Boeing was evaluating several key issues that would ultimately frame the business decision as to where to place the second line. Boeing's intense discussions with the IAM continued for more than a month, and focused on Boeing's interest in obtaining a long-term contract, with a no-strike clause, which would ensure future production stability for the 787. The IAM, however, would not agree to a long-term extension of the collective bargaining agreement unless Boeing would agree to material changes in the contract, including significant guaranteed wage and benefit increases, an assurance that all future commercial aircraft work be placed in the Puget Sound area, and a commitment that Boeing would remain neutral in future IAM organizing efforts in other parts of the country. Those conditions were unacceptable to Boeing. At about the same time that the IAM provided Boeing with its final position, South Carolina confirmed Boeing's eligibility for several hundred million dollars in incentives were it to locate its second line in North Charleston. Weighing the business case presented by the two alternatives, Boeing decided to build the second line in North Charleston.

Contrary to what Acting General Counsel Solomon's complaint asserts, Boeing's conduct in selecting South Carolina for the second line did not violate the NLRA for two independently sufficient reasons. First, the law unambiguously requires a showing of an adverse employment action caused by the challenged action. Again contrary to what the Acting General Counsel says in the complaint, Boeing's decision concerned the placement of *new* work, not the movement of existing work to North Charleston. No IAM member in Puget Sound was (or will be) laid off, or saw (or will see) a reduction in his or her benefits, as a result of the Company's decision. And Boeing's right to place new production capacity at a location of its choosing is not only permissible under settled Board doctrine; it is *expressly authorized* by Boeing's collective bargaining agreement with the IAM, and has been for over 45 years. Far from any IAM member suffering an adverse employment action from Boeing's decision to place the second line in Charleston, Boeing has already hired new employees and plans to hire additional employees in the Puget Sound area as the rate of production of the 787 and other airplanes increases over time. The new employees will become members of the IAM bargaining unit in the Puget Sound area. That even *more* IAM employees might have been hired if all production were in Everett could not possibly result in an adverse employment action with respect to any current IAM member.

Second, even if the Board were to conclude—contrary to clear precedent and supported by none—that locating the second 787 final assembly line in North Charleston somehow resulted in an adverse employment action, the Board would still be required to establish that Boeing's actions were "inherently destructive" of protected activity, or that Boeing was motivated by anti-union animus. Neither conclusion can plausibly be drawn from the facts. Boeing was predisposed to place the second line in Everett, and it would have done so had the business case

been superior (or at least equal) to locating the new facility in North Charleston. While Boeing did consider the need for future 787 production stability in making its decision, that was only one factor in the decision process. Even if analyzed in isolation (which is certainly not the test), that business consideration was entirely consistent with settled precedent. The Board and the Supreme Court have long held that an employer is fully entitled to make business decisions that may blunt the effectiveness of future strikes. And, as Boeing's choice of production sites is explicitly allowed by the IAM's collective bargaining agreement, that consequence cannot reasonably be viewed as inherently destructive toward the Union.

Nor can it be credibly claimed that Boeing's actions and business decisions show anything resembling anti-union animus. Quite the contrary: The placement of the 787 second line was a multi-billion-dollar decision—one that Boeing must live with for decades to come. The decision was about economic reality and the future of the Company. Indeed, the Company's decision to negotiate with the IAM as part of the decision-making process—a step the Company was not required to take under its collective bargaining agreement—as well as Boeing's plan to expand work for IAM members in the Puget Sound area shows that Boeing was and is trying to work with the IAM, not to punish it, as the complaint incorrectly alleges.

For these reasons, which are discussed in detail below, the unfair labor practices alleged in the complaint make no sense on the facts and constitute a sweeping departure from clearly established law. The theory espoused by the complaint is tantamount to a claim that no American corporation may permissibly decide to locate future work at any location other than the one where union work is currently being performed, and never in a Right-to-Work state.

I.

Among other products, Boeing makes large jet airplanes for customers around the world. Boeing is the Nation's largest exporter with $29 billion in overseas sales in 2009.

Boeing's latest generation of commercial aircraft is the 787 Dreamliner. Built with lightweight composite materials, the 787 is one of the most fuel-efficient, technologically advanced passenger airplanes in the world. In addition to novel materials and technologies, the 787 is manufactured through a new production process involving a global supply chain. In 2003, when selecting the site for the first Dreamliner final assembly line, Boeing considered several possibilities. In addition to Everett, Washington, where the first line ultimately was placed, Boeing seriously considered other locations, including the Charleston, South Carolina area. In choosing the site for final assembly, Boeing considered a variety of factors, including construction costs, labor costs, supply chain logistics, and the overall business climate. After weighing these factors carefully, Boeing chose Everett, and began operation of the first Dreamliner final assembly line there in 2007.

The 787 became the fastest-selling airplane in aviation history. Since the 787 was first announced, customers have placed orders for almost 850 airplanes valued at a list price of up to

$150 billion. This has produced a backlog of orders extending through approximately 2020. At the same time, Boeing has faced challenges in the 787 program that have resulted in significant delays in the airplane's delivery. To execute on its large backlog for the 787, and in an attempt to mitigate the risk of additional delays to its customers, Boeing decided in 2008 to significantly expand 787 production capacity. To that end, it decided to establish a second final assembly line.

As it had done when establishing the first final assembly facility, Boeing considered multiple locations for the second line, including both Right-to-Work and non-Right-to-Work States. After extensive study of potential sites, the choice came down to the Puget Sound area, where all of Boeing's commercial aircraft are currently assembled, and North Charleston, where the aft and mid-body sections of the 787 are constructed and assembled and where, as a result, Boeing had already established a significant manufacturing footprint.

In making its decision, Boeing considered a wide range of factors designed to ensure the long-term competitiveness of the 787 program. In addition to construction and labor costs, logistics, and general business climate, Boeing factored in the particular economic incentives available in South Carolina, the benefits associated with geographic diversity in its final assembly capability, and its ability to maintain the stability of the 787 production system in the event of future strikes.

Boeing's concern for production stability was far from hypothetical. Boeing's workforce in the Puget Sound area is heavily unionized. The IAM represents approximately 25,000 Boeing employees in the Puget Sound region and has represented Boeing's production and maintenance workers there since 1934. All the assembly line workers at Boeing's various Puget Sound facilities are represented by the IAM. The IAM has struck Boeing seven times at its Puget Sound facilities since 1934, and four times since 1989. In 2008, when the IAM's last collective bargaining agreement expired, union members—including those assigned to the 787 production line—went on strike for 58 days.

At the time of the 2008 strike, the Dreamliner program was already fifteen months behind schedule and under severe stress, in significant part because of "traveled work" from suppliers—work that should have been completed by suppliers before shipment, or was completed improperly, which Boeing then had to fix and address as an ongoing matter with the challenged suppliers. Given the stress on the production system, the 2008 strike had a cascading effect, delaying 787 construction and delivery far more than the 58-day duration of the strike. The 2008 strike also cost Boeing $1.8 billion in lost revenues that year, and decreased all aircraft deliveries by 105 for 2008. Boeing's airline customers were upset, and in some cases publicly critical, including suggesting that the lack of production stability at Boeing could affect future orders.

For example, Virgin Blue Group CEO and Boeing customer Richard Branson succinctly described the consequences of the delay caused by the IAM strike as "catastrophic," and stated that "if there's a risk of further strikes in the future, he may not buy Boeing again." *See* Dominic Gates, *Boeing's top customer predicts big production cuts*, Seattle *Times* (Feb. 6, 2009). Mr.

Branson explained the effect the strike had on his airline because planes were not available: "It was a horrible mess that Boeing was on strike. We messed up tens of thousands of passengers over Christmas . . . . We had to buy tickets on other airlines and scramble to get seats which weren't available." *Id.*; *see also* Bill Virgin, *Boeing, unions should listen to Richard Branson*, Seattle *Post-Intelligencer* (Feb. 9, 2009).

In assessing its options for the second final assembly line, Boeing was legitimately concerned with, among other factors, the economic impact of potential future IAM strikes, the delivery delays that might be caused by such strikes, and the perceptions of its commercial airline customers that could affect future orders.

A.

In considering different locations for the additional assembly line (as well as sites for the second line's component and interior parts manufacturing facilities), Boeing relied on its right in Section 21.7 of the collective bargaining agreement with the IAM. Section 21.7 has been in place in every collective bargaining agreement with the IAM for the last 45 years, since at least 1965. It gives Boeing the right to "***designate the work to be performed by the Company and the places where it is to be performed***" (emphasis added), without any obligation to bargain with the IAM.

Boeing nevertheless negotiated with the IAM regarding placement of a second line in Puget Sound. Boeing recognized the benefits of locating the second line in the Puget Sound area, which included a skilled work force, Boeing's deep roots in the area, and the lower construction costs of expanding an existing footprint. Notwithstanding the significant business climate, economic incentives, geographic diversity, and labor advantages associated with the potential North Charleston location, Boeing believed the balance would tip in favor of Everett if, among other things, it could stabilize 787 production with a longer-term collective bargaining agreement that would prevent strikes for an extended period. Boeing also wanted to slow the growth of future wage increases and benefit costs. As the President and CEO of Boeing Commercial Airplanes, Jim Albaugh, said in a later interview, his predisposition was to locate the expansion in Puget Sound, not Charleston.

Boeing first mentioned the second line to the IAM in the summer of 2008. In June 2009, Boeing notified the IAM that a decision on the placement of the second assembly line was forthcoming. The IAM agreed to discuss the issue, and negotiations began in earnest that August. Representatives of the IAM and Boeing met seven times between August 27 and October 21. Boeing made clear from the start that, regardless of the outcome, the issue needed to be resolved by October 15 because Boeing needed to start construction on the second line, whether in Everett or in North Charleston.

At the request of the IAM, neither party took notes of the extensive discussions, but the IAM did submit a written offer to Boeing that reflects the distance between the parties on key issues. The Union was willing to agree to extend the existing collective bargaining agreement

only through 2020 (not 2022 as Boeing wanted), but set forth, among others, the following conditions:

- Boeing would have to select Everett as the site for the second 787 final assembly line.
- Boeing would have to notify the Union six months before making any decisions on where to place new production capacity for any "next generation" product. If the parties did not reach agreement at the end of the six month negotiation period, the IAM could terminate the collective bargaining agreement, relieving it of the no-strike obligation.
- Boeing could not move any bargaining unit work currently being performed by IAM members or contract with a supplier to perform the same type of work being performed by IAM members.

In addition, though not listed in the written set of conditions, the IAM's negotiators consistently insisted that any agreement would also require that Boeing remain neutral in all IAM organizing or decertification campaigns. Boeing told the IAM that it could not accept such significant changes to Section 21.7 and its right to make major entrepreneurial-level decisions. The IAM's insistence on neutrality in organizing and decertification campaigns was also identified early on as a roadblock to moving forward. But Boeing continued to negotiate with the IAM, hoping to reach a mutually acceptable agreement. As Boeing CEO Jim McNerney said in a contemporaneous interview, Boeing's goals remained production stability and a slowing in wage growth. Mr. McNerney also said that the tone of the then-ongoing negotiations was constructive.

As the October 15 deadline for making the final decision approached, Boeing agreed to an IAM request for a one-week extension of the deadline so that the Union could submit its "best and final offer." On October 20, the eve of the last scheduled meeting, Boeing's representatives made specific suggestions about what the Company would likely accept, so as to better inform the IAM in preparing its proposal. Among other things, Boeing's representatives suggested that the Company could accept (1) a guaranteed annual wage increase of 2%; (2) a cost of living formula of 1.5%; (3) cost sharing of increase in health care costs; and (4) a 2% annual increase in pension benefits. Boeing's representatives stressed to their IAM counterparts that the Company could not accept "neutrality" or a "guarantee" to locate future work in the Puget Sound area.

The IAM's final offer came the next afternoon, October 21. In exchange for extending the existing contract to 2020 (again, not 2022, as Boeing wanted), the IAM continued to demand that (1) existing bargaining unit work could not be moved; (2) Boeing would be precluded from setting up additional or "dual" sources for 787 component production and support; and (3) the IAM would have the right to terminate the collective bargaining agreement and strike if new work were not placed in the Puget Sound area. Boeing's nationwide neutrality in any future union organizing campaigns was an "absolute necessity," according to the IAM.

The IAM's offer fell short on other grounds as well. Among other things, the IAM required three lump-sum bonuses of $5,000 or 10 percent of earnings, whichever was greater, in 2009, 2013, and 2016. It requested an annual pension increase of $2.50 per month for the life of the agreement, as well as general wage increases of 3 percent on top of cost-of-living adjustments.

B.

Boeing made its decision concerning the placement of the second line in late October, 2009. Given its significance, the decision involved the most senior members of management undertaking a thorough comparison of the business cases for each site—Everett and North Charleston. The Company's inability to reach agreement with the IAM on a mutually agreeable approach to ensure long-term production stability in Everett was an important consideration in the discussion, and it made the overall business case for North Charleston more persuasive, as did the general business climate, the desire for geographical diversity in final assembly, labor costs, and South Carolina's willingness to make available hundreds of millions of dollars of incentives. After considering those factors and others, the Company chose North Charleston. Boeing publicly announced its decision on October 28, 2009.

Shortly after making its announcement, Boeing began to build the second assembly line in North Charleston on an aggressive construction schedule, and to hire workers to staff it. This was one of the most massive construction projects in the country in recent years. On November 6, 2009, Boeing awarded a contract to BE&K Building Group and Turner Construction to design, build, and deliver the 1.2 million square foot North Charleston assembly line facility, which would include the final assembly line, a delivery center, a welcome center, a central utilities building, and a support building.

Boeing estimates that it has committed over $1 billion to date to its North Charleston operations. Construction on the second final assembly line is now virtually complete. Boeing expects to start 787 production in North Charleston by July 2011, and to deliver the first airplanes in 2012. Well over 1,000 employees have already been hired to work in the North Charleston final assembly facility and plans are in place to hire more in the next few months. A large team of managers and employees—many of whom have moved to the North Charleston area from other parts of the country—have been working tirelessly to staff the new facility.

C.

In March 2010, following a delay of five months after Boeing announced its decision, and with construction in Charleston well underway, the IAM filed an unfair labor practice charge with the Board. The IAM alleged that Boeing had, *inter alia*, violated Section 8(a)(3) by "beginning the process of transferring work . . . to a new plant employing non-union workers in retaliation for bargaining unit workers' protected concerted activity." In late 2010 and early 2011, Boeing representatives had discussions with NLRB officials, including Acting General Counsel Lafe Solomon, about the charge. Although Boeing believed it had reached an

agreement with Solomon to resolve the matter, the Acting General Counsel ultimately directed that a complaint be issued.

On April 20, 2011, the complaint was issued, charging that Boeing had violated Section 8(a)(3) of the National Labor Relations Act.[1] The complaint focused on Boeing's allegedly unlawful actions in deciding to place its second assembly line in North Charleston, as opposed to the Puget Sound area, and in describing that decision to employees. According to the complaint, Boeing actions were taken in retaliation for IAM-represented employees for having gone on strike in 2008 and for having the continued ability to go on strike in the future.

The complaint alleged that Boeing had "decided to transfer" its second Dreamliner production line and its sourcing supply program "because [IAM-represented] employees assisted and/or supported the Union by, *inter alia*, engaging in the protected, concerted activity of lawful strikes." *See id*. at ¶¶ 7-8. According to the complaint, these actions violated Sections 8(a)(3) of the Act by "discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization." *See id*. at ¶ 10. The complaint found the Company's actions "inherently destructive" of employees' rights. *See id*. at ¶¶ 7-8. *See id*. at ¶ 12. The key remedy sought by Acting General Counsel Solomon was "an Order requiring [Boeing] to have the [IAM] operate [Boeing's] second line of 787 Dreamliner aircraft assembly production in the State of Washington." See id. at ¶ 13(a).

II.

Before exposing the fatal legal defects of the complaint, a correction of the factual errors, mischaracterizations, and misquotations upon which the complaint is based is in order.

A.

As an initial matter, the complaint repeatedly alleges that Boeing "*removed* work" from Puget Sound (¶6), "decided to *transfer* its second 787 Dreamliner production line" to South Carolina (¶7(a)), and "decided to *transfer* a sourcing supply program" to South Carolina (¶8(a)).

In fact, no work was "removed" or "transferred" from Everett. The second line for the 787 is a new final assembly line. As it did not previously exist in Everett or elsewhere, the second assembly line could not have been "removed" from Everett, or "transferred"

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[1] The complaint also claimed that Boeing had violated Section 8(a)(1) of the NLRA, alleging the Boeing executives made "coercive" statements to IAM-represented employees, threatening to remove work from the Puget Sound area because employees had struck in the past, and that the Company would move work in the event of future strikes.

or otherwise "moved" to North Charleston. Simply put, the work that is and will be done at Boeing's North Charleston final assembly facility is new work, required and added in response to the historic customer demand for the 787. No member of the IAM in the Puget Sound area has lost his or her job, or otherwise suffered any adverse employment action, as a result of the placement of this new work in the State of South Carolina.

The Regional Director, whose office has been tasked with prosecuting this case, understands that, and has accurately and publicly described the matter. As the Seattle *Times* reported last year, "Richard Ahearn, the NLRB regional director investigating the complaint, said it would have been an easier case for the union to argue if Boeing had moved existing work from Everett, rather than placing new work in Charleston." Dominic Gates, *Machinists File Unfair Labor Charge Against Boeing over Charleston*. Seattle *Times*, June 4, 2010.

Since no work was "transferred," NLRB officials now appear to be transforming the theory of the complaint, via public statements, to say that the building of airplanes in South Carolina constitutes "transferred" or "removed" work because Boeing committed to the State of Washington that it would build all of the Company's 787s in that state. For example, on April 26, an NLRB spokeswoman, Nancy Cleeland, apparently told a news organization that "the charge that Boeing is transferring work away from union employees stems from the company's original commitment to the State of Washington that it would build the Dreamliner airplanes in this state."

The premise underlying that assertion—that Boeing committed to the State of Washington to build all of the Company's 787s there—is false. Boeing fully honored all of its contractual commitments to the State of Washington long before the decision to locate the Company's new production facility in South Carolina. The notion that Boeing had somehow committed to Washington State to build all 787s in that state is neither mentioned nor even suggested either in the IAM's charge or in the complaint.

B.

The complaint alleges that senior Boeing executives showed a purpose to "punish" union employees and to "threaten" them for their past and possible future strikes. These allegations and other public statements by NLRB officials to the same effect, which are based on misquotations, selective quoting, and mischaracterizations of statements by Boeing executives, are groundless.

For example, the complaint alleges that Boeing Commercial Airplanes CEO Jim Albaugh stated that Boeing "decided to locate its 787 Dreamliner second line in South Carolina because of past Unit strikes, and threatened the loss of future Unit work opportunities because of such strikes." (Complaint ¶6(e).) In addition, the NLRB's website offers a "fact sheet" that quotes Mr. Albaugh as saying "the overriding factor" in transferring the line was work stoppages. In fact, Mr. Albaugh's full statement shows that he was referencing two "overriding factors," only one of which was the risk of a future strike, and that far from seeking to punish the

union, Mr. Albaugh's predisposition was to place the second line in Washington State.

Mr. Albaugh's full statement on this point was:

> Well I think you can probably say that about all the states in the country right now with the economy being what it is. But again, the overriding factor was not the business climate and it was not the wages we're paying people today. It was that we can't afford to have a work stoppage every three years. *We can't afford to continue the rate of escalation of wages as we have in the past. You know, those are the overriding factors. And my bias was to stay here but we could not get those two issues done despite the best efforts of the Union and the best efforts of the company*.

The italicized sentences, omitted from the Complaint and the NLRB's website, are critical omissions that directly contradict the NLRB's apparent theory of this case. No reasonable reader of Mr. Albaugh's interview would depict it as part of a "consistent message" that Boeing sought to "punish" its union employees. When not misquoted, it is apparent from the interview statement that if Mr. Albaugh had a bias, it was in favor of Puget Sound as the place for the second assembly line; that the company's preference was to locate the new line in Everett; and that both the company and the union made good-faith efforts to accomplish that shared objective. On these facts, it is not even arguable that Mr. Albaugh's statement constitutes a "message" of "punishment" to the union for past or future strikes.

The complaint also attempts to depict a statement during an earnings call by Jim McNerney, Boeing's Chairman and Chief Executive Officer, as a threat to punish union employees. The complaint alleges that Mr. McNerney "made an extended statement regarding 'diversifying [Boeing's] labor pool and labor relationship,' and moving the 787 Dreamliner work to South Carolina *due to* 'strikes happening every three to four years in Puget Sound.'" (Complaint ¶6(a) (emphasis added).

He did not say that at all. First, Mr. McNerney was *not* making an "extended statement" about *why* Boeing selected North Charleston; indeed, the decision about where to locate the new line had not even been made at the time he participated in that earnings call. He was responding to a reporter's question about the cost of potentially locating a new assembly line in North Charleston, and he answered only the question regarding comparative costs that was asked. Thus, in the passages misquoted and mischaracterized in the complaint, he discussed the relative costs of a new facility in a location other than Everett, versus the potential costs associated with "strikes happening every three to four years in Puget Sound." He did not say, as the NLRB alleged, that Boeing selected North Charleston "due to" strikes.

Nor did Mr. McNerney remotely suggest that what would later turn out to be the decision to open a new line in North Charleston was *in retaliation for* such strikes. His answer simply cannot be cited in support of the complaint's legal theories, much less in support of the sweeping statement made by Mr. Solomon to the New York *Times* about Boeing's "consistent message" that the Company and its executives sought to "punish" their union employees.

Finally, Mr. McNerney's answer to a reporter's question was not "posted on Boeing's intranet website for all employees," much less posted for the purpose of sending an illegal message under the NLRA, as the complaint incorrectly and misleadingly suggests.

Nor do any of the other statements cited in the complaint remotely suggest an intent to "punish" the Company's unionized employees. Quite the contrary: these statements show, at most, that the Company considered (among multiple other factors) the risk and potential costs of future strikes in deciding where to locate its new final assembly facility. In fact, Boeing reached out to the IAM in an effort to secure a long-term agreement that would have resulted in placing the second line in Everett. Although those negotiations were not successful, that effort completely undermines the proposition that Boeing executives sent a "consistent message" that Boeing's decision was intended to "punish" the union for past strikes.

C.

The complaint seeks an order directing Boeing to "have the [IAM] operate [Boeing's] second line of 787 Dreamliner aircraft assembly production in the State of Washington." Notwithstanding that, the NLRB has said on its website that its complaint would not have the effect of closing the North Charleston facility. As a practical matter, however, if the Board were to order Boeing to produce in Everett the additional three 787s per month that are planned for Charleston, that would of course require the production of all planned 787 capacity in Everett, leaving North Charleston with nothing to do.

III.

The principal allegations of the complaint and the significant remedy sought—that the second line should be moved to Everett, Washington—pertain to the claim that Boeing violated Section 8(a)(3) of the NLRA. To establish a Section 8(a)(3) violation, the Board must, under its own precedents as confirmed by the courts, show:

> (1) that "an employee's employment conditions were adversely affected"; and
>
> (2) that the adverse employment action "was motivated by" the employee's "union or other protected activities."

Wright Line, 251 N.L.R.B. 1083, 1083 (1980); *see also Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 104 (D.C. Cir. 2003). As a factual and legal matter, it is not even arguable that these elements can be established here.

A.

An adverse employment action is one that discriminates in the "hir[ing] or tenure of employment or any term or condition of employment." *See* § 8(a)(3). An employer's conduct constitutes an "adverse employment action" only if it "actually affect[s] the terms or conditions

of employment." *NLRB v. Air Contact Transport Inc*., 403 F.3d 206, 212 (4th Cir. 2005); *Lancaster Fairfield Community Hosp*., 311 N.L.R.B. 401, 403–04 (1993)

An employer's decision to build a new factory—unaccompanied by layoffs, a reduction in wages or benefits, or another change in working conditions at existing facilities—does not constitute an adverse employment action and thus cannot form the basis for a Section 8(a)(3) complaint. *See, e.g.*, *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 491 (11th Cir. 1982) ("A runaway shop exists when an employer, in retaliation against union activities, transfers work from the closed facility to another plant or opens a new plant to replace the closed plant. If no transfer of work has taken place . . . then there has been no unfair labor practice."); *see also* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 Tex. L. Rev. 921, 943 n.80 (1993) ("I have been unable to locate any decisions holding that a withholding of capital investment from a union plant, or a decision not to place new or expanded operations at the plant, was discriminatory under § 8(a)(3). It appears to be necessary under Board law to show that existing unit work was eliminated, subcontracted, or relocated.").

No IAM employees were or will be laid off, demoted, relocated, suffer a reduction in wages, benefits, or work hours, or have their job duties changed as a result of the decision to locate the second 787 assembly line in North Charleston. And the complaint does not allege that any of those adverse employment actions have happened or even that they are likely to occur in the future. The lack of any adverse employment action against IAM members is fatal to the Section 8(a)(3) claim. The NLRA, by its plain terms, does not grant unions the unbargained right to have potential new work put in a unionized plant. Neither a court nor the Board has ever held otherwise.

Nor can an "adverse employment action" be based upon some sort of "diffuse" injury to a union, such as "chilling" support for the union, as opposed to a tangible injury to identifiable employees. There is simply no precedent for that novel theory suggested in the complaint. Indeed, such a standard would effectively eliminate the adverse-action element of a Section 8(a)(3) violation, and would allow the Board to find an unfair labor practice based upon *any* employer action—even actions that are expressly permitted by the collective bargaining agreement, and harm no employees—that may nevertheless have the *effect* of reducing union bargaining power, or have incidental effects on unionization.

In addition to being contrary to the plain language of the statute—which speaks in terms of concrete enumerated actions—the interpretation suggested would effectively conflate the "adverse action" requirement with the provision's distinct motive element. If that were permitted, essentially any action that is even arguably adverse to the union's interests could be dubbed an unfair labor practice. "Chill" is plainly not a substitute for the threshold adverse action element. *See Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

As the D.C. Circuit has explained, the fact that an employer's action may chill or diminish a union's relative bargaining power "can have *no bearing* on the lawfulness of the

employer's [action]" under Section 8(a)(3) because "it is not the role of the NLRB, and certainly not that of the courts, to regulate the bargaining power of the parties to a labor dispute." *Int'l Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756, 766 (D.C. Cir. 1988) (emphasis added) (citing *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309 (1965)). Were it otherwise, companies would have to be neutral regarding unionization (which is not the law), neutral towards unions in selecting job sites (which is not the law), and neutral regarding the effects of future strikes (which is not the law).

Accordingly, Boeing's decision to place an additional 787 final assembly facility in Charleston was not an adverse action under the plain language of the statute and clearly settled law.

B.

Separate and apart from showing an adverse action, the Board also must establish either that (1) Boeing's choice of North Charleston was "inherently destructive" of protected activity, or (2) was motivated by anti-union animus. The Acting General Counsel's complaint fails here, as well. Boeing's decision to place the second line in North Charleston was based upon the Company's overall assessment of the business cases for each of the two locations, and was made only after extensive *voluntary* negotiations with the IAM. Boeing's desire to maintain long-term production stability for the 787 was a significant consideration, but there were other important factors, including a large economic incentive package. There is simply no case to be made for a single-minded focus upon the IAM, much less a single-minded, vindictive focus to punish the Union.

Even if it had been the case that Boeing's decision had been based solely on its concern regarding future strikes—for which there is not a single shred of evidence—such consideration would not be unlawful or even illegitimate. To the contrary, it is established law that an employer has the right to make legitimate business decisions in an effort to limit the impact of future strikes, and such decisions are—as a matter of law—not "inherently destructive" of protected activity and do not provide evidence of any "anti-union animus." Further, there is no legitimate claim that Boeing violated the collective bargaining agreement. Thus, even if the focus were limited solely to how Boeing factored into its decision the potential economic impact of future union actions, there would have been no resulting violation of the NLRA.

1.

To the extent that Boeing considered labor stability issues in its decision-making process, it is beyond question that, as a matter of law, such consideration does not constitute "inherently destructive" conduct. An employer's conduct qualifies as inherently destructive only if it "carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose." *Am. Ship Bldg. Co.*, 380 U.S. at 311–12. The conduct must be "so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act." *NLRB v. Brown*,

380 U.S. 278, 286 (1965). Such cases are "'relatively rare.'" *Boilermakers*, 858 F.2d at 762 (quoting *Loomis Courier Serv., Inc. v. NLRB*, 595 F.2d 491, 495 (9th Cir. 1979)). Where, as here, the governing collective bargaining agreement expressly permits the challenged action, an exercise of that agreed-upon contract right by the employer cannot be "inherently destructive" of protected rights.

The Supreme Court has made it clear that there is a "wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership." *Am. Ship Building*, 380 U.S. at 311 (citing *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938)). And the Court in *American Ship Building* also made clear that "there is nothing in the [NLRA] which gives employees the right to insist on their contract demands, free from the sort of economic disadvantages that frequently attend bargaining disputes." 380 U.S. at 313. Indeed, the Act "do[es] not give the Board a general authority to assess the relative economic power of the adversaries and to deny weapons to one party or the other because of [the Board's] assessment of that party's bargaining power." *Id.* at 317. But that is precisely what the complaint against Boeing seeks to do, overturning forty-five years of policy and precedent. In order to protect the right of IAM employees to strike to obtain their collective agenda, Acting General Counsel Solomon would deny to Boeing well-established and legitimate defensive actions long available to employers.

Boeing's decision to put the second 787 line in North Charleston, grounded in part in an interest to mitigate the effects of a future IAM strike on 787 production, is precisely the sort of defensive employer action that does not violate Section 8(a)(3). In *Brown*—still a leading case in this area—the Supreme Court held that there was no "inherently destructive" conduct where an employer, in response to a strike, locked out its regular employees and used temporary replacements to carry on business. In discussing the legitimate defensive measures that an employer may take, the Court noted "the Board['s] conce[ssion] that an employer may legitimately blunt the effectiveness of an *anticipated* strike" by, among other tactics, "transferring work from one plant to another, even if he thereby makes himself 'virtually *strikeproof*.'" 380 U.S. at 283 (emphasis added). The Court repeated that rule in much the same words in *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 416 n.9 (1982) ("[An employer can] try to blunt the effectiveness of an anticipated strike by," *inter alia*, "transferring work from one plant to another.").

If "transferring work from one plant to another" is *not* "so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act," then choosing to locate *new* work at one site (North Charleston), *without* reducing work at another (Everett)—and in fact increasing work at that other site—could not possibly be "inherently destructive" either. *See Brown*, 380 U.S. at 284, 287.

It comes as little surprise, then, that Boeing's actions do not fall within the two established categories of "inherently destructive" conduct. The first involves clear-cut discrimination between workers "based on their participation (or lack of participation)" in

protected union activity. *Esmark, Inc. v. NLRB*, 887 F.2d 739, 748 & 749 n.14 (7th Cir. 1989) (collecting cases). Boeing plainly did not apply differential punishments or rewards to Puget Sound area employees based on their varying degrees of union activity.

A second, narrower category of inherently destructive action involves conduct that "discourages collective bargaining in the sense of making it seem a futile exercise in the eyes of employees." *Boilermakers*, 858 F.2d at 764. There is no authority for treating an employer's exercise of its contractual right to add new production wherever it chooses as "inherently destructive" under that category—and considerable contrary authority. Indeed, under the Board's own decision in *Milwaukee Spring II*, 268 N.L.R.B. 601 (1984), *enf'd*, *Auto Workers v. NLRB*, 765 F.2d 175, 179 (D.C. Cir. 1985), even a work *relocation* is not "inherently destructive" of protected rights if consistent with the employer's rights under the governing collective bargaining agreement. The Acting General Counsel's complaint would set aside that longstanding precedent as well.

2.

While Boeing's decision was based on a number of factors, including business climate, incentives, geographical diversity, labor and construction costs, and production stability, to the extent the potential impact of future strikes was considered among those factors, the facts here do not support a claim that the Company's decision was motivated by anti-union animus. As previously discussed, the statements of Boeing executives cited in the complaint fall far short of evidencing anti-union animus, however much the complaint takes those statements out of context, misquotes others, and selectively quotes still others. Statements of concern about future strikes are simply not evidence of anti-union animus as a matter of law. And neither do these statements reflect a backward-looking desire to punish the IAM for the 2008 strike. Instead, these statements reflect Boeing's forthright acknowledgement that production setbacks caused by strikes are economically damaging to its aircraft manufacturing operation, and that its economic need—and its customers' demands—for future production stability contributed to its choice of North Charleston, after the IAM's demands in exchange for a long-term extension of the existing collective bargaining agreement proved unacceptable. Boeing operates in a highly competitive industry that runs on long-term production commitments. That business reality was one consideration in Boeing's decision to build a new production facility in a location that will allow some 787 production to continue during any future IAM strike in Everett.

That Boeing considered as one part of its business decision the benefits of improving production stability by avoiding strikes is not improper anti-union animus. Both Supreme Court precedents and the consistent position of the Board since 1965 make plain that an employer's interest in avoiding or mitigating the economic harm caused by anticipated strikes is a legitimate business objective. In its brief to the Supreme Court in *American Ship Building*, the Board said that an employer's decision "transferring work from one plant to another" was a "legitimate defensive measure[]," even if doing so makes the employer "virtually 'strikeproof' during the period following the expiration of a contract." Brief for the NLRB at 17, *Am. Ship Building Co. v. NLRB*, 380 U.S. 300 (1965) (No. 255). As previously noted, the Court in *Brown* embraced

and adopted the Board's view, 380 U.S. at 283, as the Court did again in *Charles D. Bonanno Linen Service, Inc.*, 454 U.S. at 416 (employers may legitimately "try to blunt the effectiveness of an anticipated strike"). *See Birkenwald Distributing*, 282 N.L.R.B. 954 (1987) (employer motivation to avert economic damage caused by anticipated strike was legitimate); *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268, 285 (1951) ("[An employer] has, and needs, the right to protect himself by reasonable measures from harmful economic or operative consequences of a strike."). The complaint filed by the Acting General Counsel simply ignores the Board's own precedents and the controlling Supreme Court decisions.

Boeing's public statements explaining its reasons for choosing North Charleston are consistent with legitimate defensive actions that the courts and the Board have held that employers may take without violating Section 8(a)(3), and are protected statements under Section 8(c) of the NLRA, not to mention the First Amendment.[2] And those statements cannot be viewed as pretexts for anti-union motivation. It is simply implausible, on both economic and labor-relations grounds, that Boeing would undertake a multi-billion-dollar expansion in North Charleston simply to retaliate against the IAM for *past* strikes, rather than to improve *future* production stability for the 787. Moreover, Boeing's decision did not involve a transfer of *any* work from its existing operations and by no means made the Company "strikeproof." Boeing remains heavily invested in, and committed to, the Puget Sound area, where all of its commercial aircraft are currently assembled, and where the IAM represents 25,000 members of the bargaining unit.[3]

Indeed, that Boeing reached out to the IAM to try to negotiate a long-term contract before it made its decision as to where to place the new 787 assembly line wholly undermines any suggestion that the Company wanted to punish the IAM. Significantly, the complaint fails to mention Boeing's efforts in that regard, although the Acting General Counsel and his staff were fully aware of those negotiations. First, Boeing had no obligation to negotiate with the IAM about the location of the second final assembly line; Section 21.7 of the collective bargaining agreement gave Boeing the unilateral right to decide where the work would be placed. In fact,

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[2] Those statements are neither threats nor attempts to coerce or restrain IAM members from engaging in protected activities and do not violate Section 8(a)(1), notwithstanding the complaint's contrary allegations.

[3] The IAM voted to strike Boeing's St. Louis facility, and other unions have struck Boeing's other facilities, since Boeing announced its decision to place the second line in North Charleston. Boeing is unaware of any objective or subjective evidence of decreased interest in union activity by employees at Puget Sound or elsewhere. Indeed, the IAM's membership in the Puget Sound area is about 25,000 strong, with hiring continuing, and the bargaining unit works on building component parts for and assembling Boeing's 737, 747, 757, 767 and 777 airplanes. In those circumstances, even without control of *all* Dreamliner production, the IAM's bargaining power remains massive.

Boeing's decision to invite the IAM to negotiate, even when it was not contractually required to do so, raises an almost irrefutable inference of *good* faith and a desire to cooperate with the Union. *See Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 887 (D.C. Cir. 1978) ("[T]he fact that the companies informed the union that they were considering leasing and 'invited discussion before their final decision' evinces a greater commitment on their part to the collective bargaining process than was reflected by the Union."). Even if Boeing had not negotiated with the Union and had merely exercised its rights under the collective bargaining agreement, and following its decision, simply announced it was locating a second line in North Charleston, that alone would not even arguably be evidence of punishment.

Second, Boeing's conduct during the course of the negotiations with the IAM similarly does not support an inference of animus. Boeing could not reach agreement with the IAM due to the Union's demands for, among other things, a neutrality agreement and a modification of Section 21.7 that would require Boeing to place future work in Puget Sound or face a perhaps-crippling strike by the IAM. Because of the timeline for reaching a decision on the second line, Boeing reasonably asked the IAM for its last, best offer and even gave it additional time to make that offer. That Boeing did not accept the IAM's best and final offer was simply Boeing's exercise of its right not to agree to a tradeoff that was materially adverse to the interests of its shareholders, customers, and employees.

No inference of anti-union animus can plausibly be drawn from the fact the IAM was unsuccessful in its negotiation to have the second 787 assembly line established in Puget Sound. At most, an inference can be drawn that Boeing was only willing to agree to place the second line in Everett on terms it found acceptable. But where, as here, "the intention proven is merely to bring about a settlement of a labor dispute on favorable terms, no violation of § (a)(3) is shown." *Am. Ship Building*, 380 U.S. at 313. Put another way, the NLRA is not so slanted in favor of unions that a union's failure to achieve its goals at the bargaining table establishes that the employer was acting from anti-union animus, rather than for legitimate business reasons. And that is true even if the failure to achieve a favorable result lessens the union's bargaining power. As the D.C. Circuit explained on this very point:

> It is clear . . . that any effect on the parties' relative bargaining power—so long as it does not substantially impair the employee's ability to organize and to engage in concerted activity—is simply outside the scope of proper inquiry under Sections 8(a)(1) and (3).

Boilermakers, 858 F.2d at 765. The notion that Boeing's contractually-sanctioned decision—an action that does not affect any terms or conditions of a current IAM member's employment—could somehow cause "substantial impairment" of the IAM's 25,000-strong Puget Sound bargaining unit's ability to organize and function, is simply not credible.

Boeing considered many factors in making its decision. And Boeing's taking into account the economic effects of a potential future strike, as one element of that analysis, was

entirely proper under the law. Boeing considered the importance of ensuring stable production of the 787, not whether the IAM should be punished for past conduct.

IV.

Boeing's business decision to construct a new 787 production facility in Charleston was based on a number of legitimate considerations, all of which were plainly permissible under the relevant collective bargaining agreement and established law. To the extent Boeing considered the possibility of future strikes by the IAM among many other factors, Boeing was entitled to rely on the provisions of its contract with the IAM and settled precedent under the NLRA in making an economic decision where to place the second 787 final assembly line.

At bottom, the Acting General Counsel is seeking to change radically the balance between management and unions struck by the NLRA, as the Act has been interpreted for the last 75 years. He seeks to change the law so that what a union cannot achieve at the bargaining table it will be able to achieve through the Board. But the Act simply does not provide the Board or the courts with the authority to "assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of [the Board's] assessment of that party's bargaining power." *Am. Ship Building,* 380 U.S. at 317. To do so would amount to "the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced." *Id.* at 317–18.

Again, thank you. I will be glad to answer any questions the Committee may have.