UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

THE BOEING COMPANY and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	Case 19-CA-32431

REPLY BRIEF IN SUPPORT OF BOEING'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, OR, IN THE ALTERNATIVE, TO STRIKE THE INJUNCTIVE RELIEF SOUGHT IN ¶ 13(A) OF THE COMPLAINT

June 27, 2011

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INTRODUCTION

The exchange of briefs at the outset of these proceedings on Boeing's motion to dismiss has usefully clarified and framed the issues facing this tribunal. In particular, they make one thing quite clear: The legal theory of the Acting General Counsel's complaint simply cannot be sustained under existing law, and, accordingly, this case can and should be decided on purely legal grounds. Even if every fact now alleged by the Acting General Counsel were true, those facts would not amount to a violation of Section 8(a)(3), or Section 8(a)(1). Nor would there be any legal basis for the alleged *status quo ante* "restoration" remedy that the Acting General Counsel supposedly seeks. The complaint should be dismissed in its entirety for at least the following reasons.

First, the Acting General Counsel's opposition brief reveals that he does not intend to assert that Boeing's second 787 line in Charleston is a "runaway shop"—not, at least, in any sense in which that term previously has been used. Though his complaint alleges that Boeing "transfer[red]" its second 787 line and a sourcing supply program "from the Unit to its non-union site in North Charleston," Compl. ¶¶ 7(a), 8(a), the Acting General Counsel does not allege—even now, nearly ***two years*** after the second line decision was made—that an existing union employee in Everett has lost a job, lost a benefit, or experienced a change in work rules because of Boeing's decision to locate the second line in Charleston. Indeed, his opposition brief now seems to concede (as, in truth, it must) that neither Boeing's second 787 line nor the sourcing supply program for that line ever existed in the Unit, and therefore could not possibly be "transferred" from the Unit to Charleston. Instead, the Acting General Counsel now rests his Section 8(a)(3) claim—and rests it solely—on his contention that Boeing's decision to place the second line in Charleston "diverted" work "opportunities" away from "Unit employee[s] or prospective Unit employee[s]." AGC Opp'n 10.

The Acting General Counsel's theory of Section 8(a)(3) finds no support under existing precedents and, if accepted by this tribunal, would work a sweeping change in the law. His theory fails under the plain language of Section 8(a)(3) because guaranteed access to the future "opportunities" associated with the second 787 line is not a "term" or "condition" of any current Unit employee's employment, and Boeing's decision to locate those "opportunities" in Charleston has not otherwise affected the "terms or conditions" of any Unit employee's employment. The *only* case he cites as supporting the theory is *Adair Standish Corp.*, 290 N.L.R.B. 317 (1988), which involved an employer withholding a tangible benefit—access to a new printing press on the shop floor—from current, newly organized employees. It is a very different case, and no reasonable corporate decisionmaker could have read *Adair Standish* in 2009 and concluded that building a new Dreamliner final assembly line in Charleston, without affecting the daily work of a single current union member in Everett, could possibly implicate Section 8(a)(3).

And, if accepted, the Acting General Counsel's theory—that even in the absence of any present impact on current Unit *employees*, any circumstance that affects *the Unit's* likelihood of receiving future work constitutes a "term or condition of employment"—would fundamentally alter well-settled principles of labor law and have broad policy implications. That is because ***every*** decision by an employer to expand or invest outside its existing geographic footprint ***necessarily*** involves a "diversion" of the "opportunities" associated with that investment away from the existing footprint and to the new location. The Acting General Counsel's theory thus would make every enterprise-level decision to invest new capital, at least to the extent the employer makes that investment outside of an existing bargaining unit, a "term or condition of employment," so that a union disappointed with the employer's decision may allege a violation

of Section 8(a)(3). And the charge alone may be enough to derail the investment because, on the Acting General Counsel's view, placing such investments outside of a bargaining unit can be "inherently destructive" of rights protected under the NLRA. AGC Opp'n 10, 12. (Indeed, because Section 8(d) requires bargaining over terms and conditions of employment, the employer would be *legally obligated to negotiate* with the union over the investment decision.) The Acting General Counsel's theory would effect a seismic change to the current state of labor-management relations, and place profound new impediments before companies seeking to make rational investment decisions about the placement of new work.

Second, even if this tribunal does not dismiss the Section 8(a)(3) claim, it should strike the Acting General Counsel's requested remedy that the second 787 assembly line be "operate[d]" in Everett. Compl. ¶ 13(a). Because the second 787 assembly line was never before operated in Everett, the Acting General Counsel is wrong to argue that this remedy would restore the "*status quo ante*." AGC Opp'n 14. Rather, this remedy seeks to create a world that never was—a world that the Acting General Counsel believes "would have been . . . but for" alleged anti-union animus. *Id.* This "would have been" remedy is unprecedented and, as a legal matter, well outside the bounds of the Board's remedial powers under the NLRA. The remedy is the elephant in the room; it should not be ignored, and its reckoning should not be postponed. There is no basis for it under existing law, and it accordingly should be rejected.

Finally, the Section 8(a)(1) claim can readily be dismissed under controlling precedent. The statements alleged in the complaint describe nothing more than matters of historical fact, and cannot plausibly be construed as actionable threats or coercion under long-standing case law. The Acting General Counsel cites no authority suggesting that such statements of historical fact can violate Section 8(a)(1), and instead relies entirely on inapposite decisions involving forward-

looking statements regarding consequences of future union activity. Because the actual statements of Boeing's executives—as opposed to the complaint's tendentious characterization of those statements—cannot plausibly be construed as threats against future protected activity, the Acting General Counsel's Section 8(a)(1) claim must be dismissed.

In sum, the Acting General Counsel's theories in this case would require dramatic changes in the law. Only the Board—or Congress—possibly could enact them. Because there is no support in existing precedent for the Acting General Counsel's claims, Boeing respectfully submits that its motion to dismiss should be granted in its entirety. Dismissal of the Acting General Counsel's claims will still leave the Acting General Counsel with the option of bringing his novel theories to the Board, which can determine in the first instance whether his ideas are within the interstices of the NLRA that the Board is permitted to fill, and whether sound labor policy suggests that it should do so.

I. ARGUMENT

With respect to the proper standards to apply on Boeing's motion to dismiss, there are two different issues: the standard for notice pleading, and the appropriateness of reviewing documents cited in, but not attached to, the complaint.

Notice pleading. Depending upon which of the briefs filed by the Acting General Counsel one reads, there is a dispute over the appropriate standard of review for determining whether the complaint states a claim. *Compare* AGC Opp'n 3–5, *with* Mot. to Strike Respondent's Fourteenth Affirmative Defense 2. In opposing Boeing's motion, the Acting General Counsel notes that "[t]he Board has adopted a system of notice pleading for its complaints," AGC Opp'n 3 (citing *Smith Indus. Maint. Corp. d/b/a Quanta*, 355 N.L.R.B. No. 217 (2010), slip op. at 2). That is true but only half the story. What the Board has held is that, "[t]he Board, ***like the federal courts***, has adopted a system of notice pleading." *Quanta*, 355

N.L.R.B. No. 217, slip op. at 2 (emphasis added). There is no reason to conclude that the Board has adopted any other system of notice pleading than the federal court standard. Indeed, the Acting General Counsel acknowledges the correct standard when he seeks to strike a portion of Boeing's answer: "The standard used to assess sufficiency of the pleading was set forth by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007): does the pleading set forth 'enough facts to state a claim to relief that is plausible on its face'?" Mot. to Strike Respondent's Fourteenth Affirmative Defense 2. Boeing agrees that standard is controlling here. *See* Mot. to Dismiss 10.

Documents cited in the complaint. The Acting General Counsel also contends that Boeing improperly "attached inadmissible facts and documents to its Motion" that cannot be considered in conjunction with its motion to dismiss. AGC Opp'n 5; *see also* Mot. to Strike Respondent's Inadmissible Hearsay Including Exhibits A Though F to Its Motion to Dismiss. The "inadmissible . . . documents" to which the Acting General Counsel refers are Boeing's collective bargaining agreement with the IAM, referenced in ¶ 5(c) of his complaint, and the five assertedly coercive and threatening statements referenced in ¶¶ 6(a)–(e) of his complaint. Under the applicable federal standard for assessing the sufficiency of a complaint, all of those documents are appropriately considered, and the motion to strike is not well taken.[1]

The Supreme Court has said recently: "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6)

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[1] Irony, it seems, is in short supply in the Office of the Acting General Counsel. If the documents referenced in the Acting General Counsel's complaint were, in fact, "inadmissible hearsay," there would be no factual basis for the Acting General Counsel's otherwise conclusory allegation of anti-union animus. Fortunately for the Acting General Counsel, however, if the aforementioned documents are moved into evidence, they likely will not be hearsay both because they probably will not be offered for the truth of the matters asserted and also because they are statements of Boeing's officers. *See* Fed. R. Evid. 801(c), (d)(2).

motions to dismiss, ***in particular, documents incorporated into the complaint by reference***." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (emphasis added). As it turns out, the very case that the Acting General Counsel cites for the proposition that "it is not appropriate to look outside the pleadings themselves," AGC Opp'n 5 (citing *Weiner v. Klais & Co.*, 108 F.3d 86, 88–89 (6th Cir. 1997)), in fact states that "'[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.'" *Weiner*, 108 F.3d at 89 (alteration in original) (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)). The Acting General Counsel thus cannot rest simply on his complaint's ***characterization*** of statements and documents when the ***statements and documents themselves*** are available to review.

* * *

Under these standards governing motions to dismiss—applicable in this tribunal as elsewhere under federal law—the complaint in its entirety should be dismissed under settled law.

A. Under controlling precedent, the Section 8(a)(3) claim must be dismissed.

Neither the Acting General Counsel nor the IAM disputes that, to state a claim under Section 8(a)(3), the complaint must allege both that an employee's "term or condition of employment" has been adversely affected, and that the adverse employment action was intended to discourage union membership or protected activity. 29 U.S.C. § 158(a)(3); *see also Wright Line*, 251 N.L.R.B. 1083, 1083 (1980). The complaint fails to allege sufficiently either element. The Section 8(a)(3) claim accordingly should be dismissed.

1. The Acting General Counsel does not allege that any unit employee has suffered a change in terms or conditions of employment.

The Acting General Counsel does not allege that even one unit employee has lost his or her job, had his or her wages or hours reduced, or had his or her work rules changed as a result of Boeing's decision to place its second 787 final assembly line in Charleston. The complaint says work was "transferred," and in other forums the Acting General Counsel has opined as though Boeing ***relocated*** its second 787 line from Everett to Charleston, but those notions have now been abandoned. The Acting General Counsel's current contention, set forth in his brief, is instead that Boeing's "decision about where to place work" has "deprive[d] bargaining Unit employees of opportunities to work on [the final assembly of 787s]." AGC Opp'n 9–10. The IAM similarly contends that Boeing's "provision of job opportunities" in Charleston results in "the loss of future job opportunities arising from the expansion of work" for unit employees. IAM Opp'n 15, 25 (emphasis omitted).[2]

Those contentions raise a purely legal question that it is appropriate for this tribunal to consider at the outset of this proceeding: whether "future job opportunities arising from the expansion of work" are "term[s] or condition[s] of employment" within the meaning of the NLRA, such that an employee's "loss of future job opportunities," without more, may constitute an adverse employment action subject to Section 8(a)(3) scrutiny. Under controlling Supreme Court decisions interpreting the NLRA, the answer is flatly no. Indeed, the Acting General Counsel's understanding of the statutory language "term or condition of employment" not only

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[2] The IAM "vehemently disputes" that "Boeing's location of the second 787 final assembly line cost Unit employees no loss of work" and, citing nothing, claims that Boeing's second-line decision "has caused . . . significant economic and non-economic harm to Unit employees." IAM Opp'n 24. With all respect for the vehemence of the IAM's disputation, it is simply wrong on the facts. But in any event, "it is well established that the General Counsel's theory of the case is controlling, and that a charging party cannot enlarge upon or change the General Counsel's theory." *Zurn/N.E.P.C.O.*, 329 N.L.R.B. 484, 484 (1999).

would expand Section 8(a)(3)'s application beyond its proper scope, but would do the same with respect to Sections 8(a)(5) and 8(d)—thereby exposing decisions regarding new capital investments to unprecedented and undue interference from the government and labor unions.

As to Section 8(a)(3): An employer's "provision of job opportunities" (IAM Opp'n 15) in one location necessarily constitutes a "loss" of those same job opportunities as to the rest of the world. On the Acting General's theory, then, a unionized employer's choice to place new work or facilities outside of the bargaining unit necessarily would constitute an adverse employment action as to the unit employees, and thus would expose the employer to Section 8(a)(3) scrutiny. Characterizing future opportunities as terms and conditions of employment would grant extraordinary and unprecedented authority to the Acting General Counsel and the Board to intrude on enterprise-level capital investment decisions whenever an employer elects to make investments outside of an existing bargaining unit. With each decision, there would be second-guessing on pain of a "restoration" remedy as to why the investment—*e.g.*, a new factory, a new product, or even the acquisition of a new business—was not made inside the existing bargaining unit. This uncertainty would needlessly burden the ability of employers to achieve growth in what are already fragile economic circumstances.

As to Sections 8(a)(5) and 8(d): These sections provide that changes in the "terms and conditions of employment" are subjects of mandatory bargaining. Under the theory that future job opportunities are "terms" and "conditions" of employment under Section 8(a)(3), they must also be "terms and conditions" of employment under Section 8(d)—meaning that employers would be required to engage in mandatory collective bargaining before making a new capital investment creating any such job opportunities. Again, this novel reading of the NLRA would add substantial costs when employers seek to expand outside of a bargaining unit, and as

discussed above, would ultimately undermine the purposes of the NLRA by discouraging new companies from forming in locations with strong union movements in the first place.[3]

The Supreme Court has expressly declined to interpret the NLRA to allow the Board to intrude on employers' investment decisions. In applying the NLRA, the Supreme Court has recognized and protected "an employer's need for unencumbered decisionmaking" in areas "essential for the running of a profitable business." *First Nat'l Maint. Corp v. NLRB*, 452 U.S. 666, 679 (1981). Without "some degree of certainty beforehand as to when it may proceed to reach decisions" regarding deployment of capital, the Court explained, employers' investments necessarily would be tempered by "fear of later evaluations labeling its conduct an unfair labor practice." *Id.* So although the Congress left to the Board the power to fill ambiguities in the statutory phrase "terms and conditions of employment," "there is an undeniable limit to the subjects" encompassed by the phrase; "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise." *Id.* at 676. Accordingly, "'only issues that settle an aspect of the relationship between employer and

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[3] The Acting General Counsel asserts that Section 8(a)(5) is "irrelevant" because here "there is no refusal to bargain allegation." AGC Opp'n 12 n.3. This misses the point. Even cases relied upon by the Acting General Counsel and the IAM recognize that the statutory phrase "term or condition of employment" must carry the same meaning in Section 8(a)(3) as applies in Section 8(d). *See, e.g.*, *Dorsey Trailers, Inc. v. NLRB*, 233 F.3d 831, 842–43 (4th Cir. 2000). That is because "[t]he normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) (internal quotation marks omitted). Nothing in the Fifth Circuit's decision in *NLRB v. Adco Electric, Inc.*, 6 F.3d 1110 (5th Cir. 1993), is even remotely to the contrary. That decision does not discuss the statutory phrase "terms and conditions of employment" at all; no discussion was warranted because the employees at issue had been terminated. *See id.* at 1113–14. It certainly does not hold, as the Acting General Counsel suggests, that "cases that rely on an analysis of § 8(a)(5) obligations are irrelevant to complaints containing only §§ 8(a)(1) and 8(a)(3) charges." AGC Opp'n 12 n.3. What *Adco* actually found "irrelevant" was discovery into whether the union was an authorized representative, which the Court found could prove nothing in the absence of a Section 8(a)(5) claim. 6 F.3d at 1116.

the employees'" may be construed as within the Act's regulatory sweep. *Id.* (quoting *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)).

Applying that analysis in *First National Maintenance*, the Supreme Court held that the continuing existence of a part of a business was not a "term or condition of employment" and, therefore, that an employer's decision to shut down a worksite—as distinguished from the effects of the closure, *i.e.*, layoff of the employees—was not a subject of mandatory bargaining. 452 U.S. at 686 ("we hold that the decision itself is *not* part of § 8(d)'s 'terms and conditions'"). If a decision to ***shut down*** an existing facility itself does not implicate terms or conditions of employment, a decision to ***open*** a new facility cannot possibly do so. As in *First National Maintenance*, it is not the capital investment decision itself that is subject to NLRA scrutiny, but only the actual and present effects of that decision on the represented employees' employment.

Here, the Acting General Counsel has not alleged any such effects; he alleges no change in the relationship between Boeing and any of its IAM-represented employees. Indeed, there is nothing in the complaint to suggest anything other than the fact that the IAM-represented employees who were working for Boeing at the time Boeing made its second-line decision in October 2009 continue to work for Boeing under the same terms and conditions of employment today. The Acting General Counsel and IAM nevertheless suggest that a "decision about where to place work" that "could reasonably result in diversion of new work" from an existing unit constitutes an adverse change in the terms and conditions of employment subject to NLRA scrutiny. AGC Opp'n 9, 10 (internal quotation marks omitted).

The notion that a decision to place new work or invest capital outside an existing bargaining unit is a "term or condition of employment" subject to mandatory bargaining is absolutely incompatible with *First National Maintenance*, which explains why the Acting

General Counsel is at such great—but entirely futile—pains to make "term or condition of employment" mean something in Section 8(a)(3) that it does not in Section 8(d). *See supra* n.3.

The ***only*** authority that either the Acting General Counsel or the IAM can marshal in support of this revolution of the NLRA is the Board's 23-year-old decision in *Adair Standish Corp.*, 290 N.L.R.B. 317 (1988). One would think that if *Adair Standish* stood for a proposition as sweeping as the Acting General Counsel now urges, someone might have noticed in the near-quarter century since it was decided. No one has; and for good reason. The case cannot fairly be read as establishing that any circumstance affecting a union shop's ability to obtain new work constitutes a term or condition of the unionized employees' employment.

In *Adair Standish*, an employer withheld new equipment (a new printing press) that was about to be delivered to a factory, in response to the employees' decision to vote in a union. 290 N.L.R.B. at 319. The Board concluded the new press could be considered a "term or condition of employment" under Section 8(a)(3) because: (1) the new press would have a "beneficial effect on their jobs" because it was less "difficult" to use than the existing equipment, and (2) the employees "reasonably anticipated" they would receive this "beneficial effect" because the employer had "admittedly intended to install" the new press in their facility and it was, in fact, about to be delivered when the employer re-routed it upon learning of the organizing effort. *Id.* at 319, 332.

Neither circumstance critical to *Adair Standish*'s holding is present here. First, in *Adair Standish* the existing union employees were adversely affected because the employer denied them a tangible benefit—a machine—that would have immediately improved their working conditions. In this case, the Acting General alleges no tangible adverse impact whatsoever on the working conditions of existing employees in Everett. Second, in *Adair Standish* the

employees had a reasonable expectation that they would receive the benefit that the employer had promised. The employer had purchased the press in March 1985 and scheduled delivery for July, but delayed that delivery after union organizing efforts began in June. 290 N.L.R.B. at 318. Here, the Acting General Counsel has not alleged that unit employees had any reasonable expectation that Boeing would operate a second 787 assembly line in Everett. Nor could he, particularly because Boeing bargained for and received the right to make work placement decisions on a unilateral basis in Section 21.7 of the Boeing-IAM collective bargaining agreement. Mot. to Dismiss, Exh. A. Because *Adair Standish* is the only case on which the Acting General Counsel relies in support of his Section 8(a)(3) claim, and because it is not even remotely applicable, the complaint fails as a matter of law.[4]

Perhaps sensing that he has failed to plead the critical facts (as there may be none), the Acting General Counsel cryptically asserts that "the full effects of Respondent's decision are not wholly felt at this time because the decision has not yet been completely implemented." AGC Opp'n 9. However, the Supreme Court has held that "mere conclusory statements" such as this are insufficient to save a complaint from dismissal. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). And in any event, this is not merely a case where represented employees "have not yet experienced a financial impact" as a result of the investment decision. AGC Opp'n 10. It is entirely speculative that the location of the second line in Charleston ***ever*** will have a legally cognizable impact on a current IAM-represented employee's terms and conditions of employment. The fact that the Acting General Counsel's complaint points to no such impact on

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[4] Moreover, the employer's action in *Adair Standish* created an inequality between the union employees and the non-union employees. The non-union employees received a new printing press; the union employees did not. There is no inequality here. Both unionized employees in Everett and those who have elected not to join unions in Charleston are assembling 787s; it is the union that is insisting on the inequality, claiming that it has the right to assemble all 787s.

any bargaining unit employee ***almost two years after the decision was announced*** reinforces how unsustainable and speculative the Acting General Counsel's theory is.[5]

The Supreme Court precedent that the Acting General Counsel has embraced—albeit in his motion to strike Boeing's affirmative defense—makes clear that a complaint cannot proceed on "the mere possibility of misconduct." *Iqbal*, 129 S. Ct. at 1950 (citing *Twombly*, 550 U.S. at 556). Yet the Acting General Counsel alleges, at most, the mere possibility of the denial of "opportunities" to work on a new 787 final assembly line (even as they maintain the opportunities to work on the first final 787 assembly line in Everett). A Section 8(a)(3) violation cannot be predicated simply on speculation that an adverse employment action might happen at some point in the future. The Act does not require employers—or the Board—to look into the proverbial crystal ball. It instead imposes scrutiny on adverse employment actions only when they occur.[6]

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[5] Indeed, the Acting General Counsel highlights the absurdity of his claim that locating the second line in Charleston will impact current bargaining unit employees when he makes the alternative claim that Boeing's second-line decision will also harm "prospective Unit employee[s]." AGC Opp'n 10. Of course, it is impossible to take adverse employment action toward "prospective" employees—who do not yet have "terms" or "conditions" of employment, and perhaps never will—and the Acting General Counsel provides no support for this novel theory of Section 8(a)(3) liability.

[6] The Acting General Counsel erroneously cites the Board's decision in *Pittsburgh & Midway Coal Mining Co.*, 355 N.L.R.B. No. 197 (2010), for the proposition that a Section 8(a)(3) claim can proceed "even where there has been no *immediate* impact" on employees. AGC Opp'n 9. That case involved an employer's change to a bonus plan—specifically, a modification that forfeited employees' bonuses if the union engaged in activity that the Board concluded was not only protected but also specifically permitted by the parties' collective bargaining agreement. *See* 355 N.L.R.B. No. 197, slip op. at 4. The Board concluded that, if the union had engaged in the protected activity, the employees "would" "forfeit their entire bonus for the year," and they did not suffer that forfeiture only because the union did not thereafter engage in the protected activity. *Id.* at 5 n.8. The Board's conclusion that the employer's condition of bonus payments on the present withholding of contractually bargained-for and otherwise protected activity constitutes a present "change . . . adverse to employees' interests," *id*., offers no support for the

2. Even if the Acting General Counsel had sufficiently pleaded that an existing employee's terms or conditions of employment were adversely affected, the complaint still does not state a plausible claim that Boeing's second-line decision was made in retaliation for past strikes.

Adversely affecting a term or condition of employment is only the first element the Acting General Counsel must satisfy to establish a Section 8(a)(3) claim. He also must plead a set of facts plausibly demonstrating either that Boeing's decision to locate a new 787 final assembly line in Charleston was inherently destructive of Section 7 rights, or that it was motivated by anti-union animus. His failure to do so is another, independent reason that the Section 8(a)(3) claim must be dismissed.

a. An employer's decision to locate new work outside a bargaining unit is not inherently destructive of Section 7 rights.

In his complaint, the Acting General Counsel alleges that it would be unnecessary to prove anti-union animus in this case because Boeing's conduct was "inherently destructive" of Section 7 rights. Compl. ¶¶ 7(c), 8(c). In his opposition, the Acting General Counsel repeats that allegation, but does not even attempt to explain how it could possibly be true as a matter of law or fact. AGC Opp'n 10, 12. That is no surprise, because the proposition that Boeing's decision to open a new factory in Charleston was "inherently destructive" of the collective bargaining rights of employees in Everett is risible.

No authority even remotely supports the theory that opening a new plant, and thereby denying new work opportunities to union employees at an existing plant, is "inherently destructive" of Section 7 rights. Indeed, to the extent that Boeing's alleged conduct can be viewed as having any impact on collective bargaining rights, that impact is plainly less severe

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Acting General Counsel's notion here that Section 8(a)(3) regulates unspecified employment actions that may or may not take place in the indefinite future.

than the effects of conduct that the Board and courts have consistently held was not "inherently destructive." For example, the Board and courts have held that lockouts—which affect an employee's *present* work opportunities—are not inherently destructive of collective bargaining rights. *See, e.g.*, *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 312 (1965); *Local 702, Int'l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 16–17 (D.C. Cir. 2000), *aff'g* 326 N.L.R.B. 928 (1998); *Int'l Bhd. of Boilermakers v. NLRB*, 858 F.2d 756, 762–67 (D.C. Cir. 1988), *aff'g* 281 N.L.R.B. 593 (1986); *Lane v. NLRB*, 418 F.2d 1208, 1212 (D.C. Cir. 1969), *aff'g* 171 N.L.R.B. 801 (1968). The Board and courts have also refused to find "inherently destructive" conduct when an employer transferred or subcontracted existing work—even when those actions meant an eventual reduction in bargaining unit employment. *See, e.g.*, *FMC Corp.*, 290 N.L.R.B. 483, 486–87 (1988); *Inland Steel Container Co.*, 275 N.L.R.B. 929, 939 (1985); *Griffith-Hope Co.*, 275 N.L.R.B. 487, 487–88 (1985); *Milwaukee Spring Div.*, 268 N.L.R.B. 601, 604 (1984).

Moreover, the D.C. Circuit has held that permanently subcontracting existing work during a bargaining lockout is not inherently destructive. *See Int'l Paper Co. v. NLRB*, 115 F.3d 1045, 1048–51 (D.C. Cir. 1997). And the Supreme Court has even held that the closure of an entire business is not inherently destructive. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 & n.10 (1965) ("It is also clear that the ambiguous act of closing a plant following the election of a union is not, absent an inquiry into the employer's motive, inherently discriminatory."). If lockouts and transfers of existing work—and even the closure of an entire business—do not constitute "inherently destructive" conduct, "denials" of future work opportunities could not possibly be viewed as "inherently destructive," as a matter of law.

Moreover, the narrow range of conduct that courts have found to be "inherently destructive" bears no similarity to Boeing's alleged conduct here. Courts have found inherently

destructive conduct only in circumstances in which employers (1) distinguish between employees within the bargaining unit based on their union activity, or (2) take actions that make collective bargaining seem futile. *See Int'l Paper*, 115 F.3d at 1049. The first circumstance obviously is not present in this case. And there is no plausible argument that Boeing's decision about the location of new work could make future collective bargaining seem futile. Indeed, the Acting General Counsel's allegation is all the more absurd given that Boeing had the undisputed right under Section 21.7 of the collective bargaining agreement to "designate the work to be performed by the Company and the places where it is to be performed." Mot. to Dismiss, Ex. A. The IAM could hardly perceive Boeing's exercise of its right to make such enterprise-level decisions, ***which was secured through collective bargaining***, as evidence that future collective bargaining is futile.

Boeing's decision to open a new facility in South Carolina cannot reasonably be viewed as even approaching the level of conduct "inherently destructive" of Section 7 rights. The Acting General Counsel's contrary contention is utterly meritless, and his reliance upon that bankrupt allegation to support his Section 8(a)(3) claim should not be permitted to stand.

b. The statements alleged in the complaint establish, at most, the lawful desire to blunt the effectiveness of future strikes.

Because the complaint cannot credibly stand on an "inherently destructive" theory, the Section 8(a)(3) claim must be premised on an allegation that Boeing's conduct was motivated by "anti-union animus." But the complaint also fails to sufficiently allege such a motive. The complaint bases its allegation of illegal motives on five statements made between October 2009 and March 2010. These statements addressed why Boeing made its decision to locate its second 787 assembly line in Charleston. The most the Acting General Counsel possibly can extract from these statements is that the "why" included Boeing's desire to continue manufacturing 787s

in the event of a future strike in Everett—*i.e.*, to "blunt the effectiveness of an anticipated strike." *NLRB v. Brown*, 380 U.S. 278, 283 (1965). This desire is lawful—indeed, "legitimate[]"—as the Board itself told the Supreme Court in *American Ship Building*, and as the Supreme Court explained in *Brown* and reiterated in *Bonanno*. Brief for the NLRB 17, *Am. Ship Bldg.*, 380 U.S. 300 (No. 255); *Brown*, 380 U.S. at 283; *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 416 n.9 (1982).

The Acting General Counsel's and the IAM's attempts to limit *Brown* and *American Ship Building* are meritless. The Acting General Counsel asserts that, because *Brown* and *American Ship Building* involved "the actual likelihood of an imminent strike," it is illegitimate for an employer to take action to blunt the effectiveness of "wholly speculative future strikes." AGC Opp'n 11. That argument is wildly off the mark. The Acting General Counsel offers no explanation as to how or why employers like Boeing should be expected to draw impossible distinctions between strikes that are "imminent" and strikes that are "speculative" when making major capital investments. Nor does the distinction proposed by the Acting General Counsel find any support in *Brown* or *American Ship Building*. The Court in *Brown* stated that employers "may legitimately blunt the effectiveness of an anticipated strike," and did not remotely suggest that employers must wait until those anticipated strikes cross an unknowable line from "speculative" to "imminent." 380 U.S. at 283. And in *American Ship Building*, the facts were precisely the opposite of what the Acting General Counsel claims: The Board in that case held that the employer had no reasonable anticipation that a strike would occur; the Court decided the case on that basis, and held that "an employer violates neither § 8(a)(1) nor § 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate

bargaining position." 380 U.S. at 305–06, 318; *see also* Brief for the NLRB 6, 23, *Am. Ship Bldg.*, 380 U.S. 300 (No. 255) (arguing that the employer's anticipation of a strike was unreasonable).

The IAM's assertions that *Brown* applies only in the context of "negotiations for a successor collective bargaining agreement, a multi-employer bargaining group, a whipsaw strike, ***and*** a lockout," and that "no court has ever applied" it outside of that context, are similarly mistaken. IAM Opp'n 17–18 (emphasis added) (capitalization altered). *Brown* itself suggests that employers may take various steps to blunt the effectiveness of future strikes, including "stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another." 380 U.S. at 283. The Board similarly relied upon *Brown* in a non-bargaining, non-lockout Section 8(a)(3) context in *Serv-Air, Inc.*, 161 N.L.R.B. 382 (1966), adopting the ALJ's finding that "[i]f [under *Brown*] . . . an actual exclusion of employees from their work can thus be lawfully effected under certain conditions specified by the Court, *a fortiori*, the assignment of employees to specific work stations for the purpose of safeguarding against future strike action would be equally permissive." *Id.* at 413.

Boeing's statements about protecting its operations from the disruptions of future strikes expressed a motive that is entirely "legitimate[]" under *Brown*. 380 U.S. at 283. Because those statements express no improper animus as a matter of law, and because the complaint fails to plead any other evidence of anti-union animus, the complaint fails on this ground as well.

B. The Acting General Counsel's requested restoration remedy should be struck.

Even if this tribunal does not dismiss the Section 8(a)(3) claim outright, it still should strike the Acting General Counsel's requested remedy that the second 787 assembly line be "operate[d]" in Everett. Compl. ¶ 13(a). Though he claims to seek only to restore the "*status*

quo ante," AGC Opp'n 14, because the second 787 assembly line never existed in Everett, he in fact seeks the a creation of a world that never was—a world that the Acting General Counsel believes "would have been . . . but for" alleged anti-union animus. *Id.* This "would have been" remedy is both unprecedented and improper.[7]

The Acting General Counsel argues that this tribunal lacks authority to strike a remedy at this stage in the proceedings. AGC Opp'n 14. The Acting General Counsel relies upon *Kaumagraph Corp.*, 313 N.L.R.B. 624 (1993), where the Board held that the administrative law judge had erred in striking the "normal remedy in discriminatory relocation cases" of restoration and reinstatement. *Id.* at 624. But there is nothing "normal" about the remedy sought in this matter. Seeking to remedy a harm that never materialized, the Acting General Counsel conjures a *status quo ante*—a second line in Everett—that never existed. The NLRA does not permit the Board to issue remedies based on such "obviously conjectural" premises. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 901 (1984) (internal quotation marks omitted). Instead, remedies must be "sufficiently tailored to the actual, compensable injuries suffered by the discharged employees." *Id.* Remedies based on "pure speculation" do "not comport with the general reparative policies of the NLRA." *Id.*; *see also Page Lithio, Inc.*, 313 N.L.R.B. 960 (1994) (rejecting General

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[7] The remedy under Section 8(a)(3) is always limited to restoring injured employees to the *status quo ante*—which is unnecessary here because no employees in Everett have been injured. *See NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 602 (9th Cir. 1979); *see also Lear Siegler, Inc.*, 295 N.L.R.B. 857, 861 (1989) ("It is the Board's usual practice in cases involving discriminatory relocation of operations to require the employer to restore the operation in question and to reinstate all discriminatorily terminated employees . . . ."). Indeed, in the decision on which the Acting General Counsel relies to support his theory of liability under Section 8(a)(3), the Sixth Circuit vacated the "take it back" remedy ordered by the Board because (it was later determined) the union employees had substantially the same working conditions as non-union employees at another plant—meaning that the order was unnecessary to remedy any harm or restore the *status quo ante*. *See Adair Standish Corp. v. NLRB*, 912 F.2d 854, 867 (6th Cir. 1990); *Adair Standish Corp.*, 7-CA-25059, 1991 WL 1283089 (N.L.R.B. 1991) (decision on remand abandoning that remedy).

Counsel's proposed remedy because it required speculation about who would have been hired absent the violation, and due to the lack of a sufficient nexus between the violation and the proposed remedy).

It would never be appropriate for the Board to order a company to incur billions of dollars in costs to "restore" a *status quo ante* that never existed. It would be especially inappropriate to take that unprecedented step in a case where any harm to be remedied has not yet occurred and is entirely speculative. Speculative harms that are figments of the Acting General Counsel's imagination warrant no relief at all; they certainly do not warrant the most costly order in the Board's history. Accordingly, the "would have been" remedy proposed by the Acting General Counsel should be rejected.

C. Under controlling precedent, the Section 8(a)(1) claim must be dismissed.

The complaint also fails to state a claim for an independent violation of Section 8(a)(1). The NLRA provides that an employer does not violate that section by expressing his views if that expression "contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c); *see also Saginaw Control & Eng'g, Inc.*, 339 N.L.R.B. 541, 541 (2003) (statement violates Section 8(a)(1) only if it would "coerce a reasonable employee" (internal quotation marks omitted)). The statements by Boeing and its senior executives alleged in the complaint contained no such threat. Those statements were nothing more than true statements of historical fact and thus, under controlling Board precedent, did not violate Section 8(a)(1).

Both the Board and the federal courts have held that true statements of historical fact do not violate Section 8(a)(1) because they cannot reasonably be interpreted as threats of consequences in the event of future protected activity. In *Smithfield Foods, Inc.*, 347 N.L.R.B. 1225 (2006), for example, an employer "related to employees that the three previous occupants of the [employer's] facility had had work forces organized by the Union and had closed." *Id.* at

1226. The Board found that the employer's statements had simply "provided employees with relevant, factual information about the Union's history at the facility," and therefore "contain[ed] no threat." *Id.* (internal quotation marks omitted). "Such truthful statements," the Board concluded, "are protected by Section 8(c)." *Id.*

Following the Board's decision in *Smithfield Foods*, the union filed a petition for review. The D.C. Circuit denied that petition, adopting the same reasoning as the Board. *United Food & Commercial Workers Union Local 204 v. NLRB*, 506 F.3d 1078 (D.C. Cir. 2007). The D.C. Circuit observed that, in a case alleging unlawful employer speech under Section 8(a)(1), the initial consideration is whether the "employer predict[ed] adverse economic consequences as a result of unionization." *Id.* at 1081 (internal quotation marks omitted). "If not," the court explained, "*the inquiry ends*." *Id.* (emphasis added). The court then reiterated the Board's finding that the employer had "simply related indisputable historical facts." *Id.* at 1083. The court held that this finding, which it determined to be reasonable, was dispositive of the Section 8(a)(1) issue. *Id.* ("Under this interpretation of the record, case law requiring an employer to provide objective justification for a predicted plant closure . . . has no applicability to this appeal because here the managers never made such a prediction.").

The rule that true statements of historical fact do not violate Section 8(a)(1) follows from the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In that case, the Court held that an employer does not violate Section 8(a)(1) by making a prediction regarding the effects of unionization, so long as the prediction is "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization." *Id.* at 618. If an employer is permitted to make a statement predicting

future events based on objective fact, it follows *a fortiori* that an employer is permitted to make a statement describing undisputed past events. Such a statement is plainly based on "objective fact." *Id.* Indeed, the Supreme Court recognized as much in equating a prediction based on objective fact with a statement that "convey[s] a management decision already arrived at." *Id.*; *see also Textile Workers Union*, 380 U.S. at 274 n.20 (distinguishing between unlawful threats to close a plant and lawful announcements of "a decision to close *already reached*" by the company (emphasis added)). Thus, as the Board has recognized in numerous cases in addition to *Smithfield Foods*, an employer's true statements of historical fact are protected by Section 8(c) and cannot violate Section 8(a)(1).[8]

These controlling precedents are dispositive of the Acting General Counsel's claim under Section 8(a)(1). The statements on which the complaint bases its asserted Section 8(a)(1) violation were true statements of historical fact. Four of the five statements were made after the decision to locate the second 787 assembly line in Charleston had been made. Compl. ¶¶ 6(b)–(e). Each of those statements described how the decision had been made, and the fact that effects of work stoppages had been considered by the company in deciding where to locate the second line. *See id.* The fifth statement (by Jim McNerney during an earnings conference call on October 21, 2009) was made shortly before the decision on where to locate the second line. *See id.* ¶ 6(a). But that statement also described the factors that had been considered in the decision-

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[8] *See Stanadyne Auto. Corp.*, 345 N.L.R.B. 85, 89 (2005) (no Section 8(a)(1) violation based on statements "conveying events that had already occurred, as well as supplying the perspective of employees who had experienced some of those events"), *enforced in relevant part*, 520 F.3d 192 (2d Cir. 2008); *Miller Indus. Towing Equip., Inc.*, 342 N.L.R.B. 1074, 1076 (2004) (no Section 8(a)(1) violation based on "verifiable accounts of past events" and statements describing "actual occurrences"); *Manhattan Crowne Plaza Town Park Hotel Corp.*, 341 N.L.R.B. 619, 619–20 (2004) (no Section 8(a)(1) violation based on statements that "provided a recent, concrete example of a negative outcome for employees who were represented by the same union," and that "described a series of events . . . that resulted in the employees losing their jobs"); *Penn-Mor Mfg. Corp.*, 136 N.L.R.B. 647, 649 (1962).

making process up to that point, and thus was also a statement of historical fact. *See id.* None of the five statements discussed any future action by the company, much less suggested that future actions would be influenced by IAM protected activity. And other than erroneously characterizing them as inadmissible hearsay, the Acting General Counsel does not dispute the accuracy of any of these statements. Quite to the contrary, in his effort to argue that they demonstrated anti-union animus, the Acting General Counsel embraces these statements as entirely correct. But if they were correct, then they "simply related indisputable historical facts," *United Food & Commercial Workers*, 506 F.3d at 1083, and do not violate Section 8(a)(1).

The Acting General Counsel has introduced no authority for the proposition—because there is none—that backward-looking statements of historical fact, without any reference to the future consequences of future union activity, can reasonably be construed as a "threat" of reprisal in violation of Section 8(a)(1). Indeed, each and every one of the decisions on which the Acting General Counsel and the IAM rely is inapposite because those decisions found Section 8(a)(1) violations based not on statements of historical fact, but on statements that were explicitly directed to the consequences of future Section 7 activity. For example, in *General Electric Co.*, 215 N.L.R.B. 520 (1974), company officials held a meeting in which they "urge[d] the employees to vote against the [union] in the pending election." *Id.* at 520. The company expressed that remaining non-unionized "would be necessary to avoid a possible drop in employment at [the plant] *in the future*," and that the results of the election would be "an important, if not a decisive, factor in any company decision to choose that plant as the second manufacturing facility" for a new motor. *Id.* at 521 (emphasis added). The Board held that these statements, which plainly linked future company decisions to future Section 7 activity, constituted "threat[s]" of reprisals if the employees joined the union. *Id.* at 522.

The other decisions on which the Acting General Counsel relies are inapposite for the same reason. In *Dorsey Trailers, Inc.*, 327 N.L.R.B. 835 (1999), the Board held that Section 8(a)(1) had been violated when a supervisor told an employee: "If you guys go out on strike, you won't be coming back to work." *Id.* at 850; *see also id.* ("Youse [*sic*] people vote to go out on strike, Marilyn [Marks] said she will close the plant down, and that's not a threat, it's a promise, but you didn't hear it from me." (internal quotation marks omitted)). Similarly, in *Kroger Co.*, 311 N.L.R.B. 1187 (1993), a company official repeatedly told employees that "a new, large freezer facility had previously been approved for Atlanta, but had been put 'on hold' *pending the outcome of union unrest and labor disputes*." *Id.* at 1200 (emphasis added). Thus, the company linked its future decision whether to reinstate the freezer facility to the employees' decision to dispense with ongoing "union unrest." *Id.* And in *Tawas Industries, Inc.*, 336 N.L.R.B. 318 (2001), as in *General Electric*, the statements held to violate Section 8(a)(1) were made in the context of a pending vote on whether to affiliate with a union, and involved "predictions of adverse consequences of unionization." *Id.* at 321. These decisions provide no support for the Acting General Counsel's position that the backward-looking statements of historical fact by Boeing in this case can reasonably be construed as threats of reprisal.[9]

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[9] Decisions invoked by the IAM are inapposite for the same reasons. *See Coradian Corp.*, 287 N.L.R.B. 1207, 1207 (1988) (employer's statements "threatened to move or shut down its New York operations by stating quite clearly that only a vote for the incumbent Teamsters would allow it to meet its need to do business within the New York area" (internal quotation marks omitted)); *Rood Indus., Inc.*, 278 N.L.R.B. 160, 162 (1986) (during unionization campaign, company president made "remarks [that] contained a prediction of plant closure" if the employees unionized); *Marion Rohr Corp.*, 261 N.L.R.B. 971, 971 (1982) (employer "warned the employees that he could in the event of a strike close the doors of the plant and hire contractors to do the work"); *Patsey Bee, Inc.*, 249 N.L.R.B. 976, 976 (1980) (among other threats, supervisor stated that company's president "would shut the doors before he would accept a union," and that an employee "was going to lose her job if she voted for the Union" (internal quotation marks omitted)); *Anderson Cottonwood Concrete Prods., Inc.*, 246 N.L.R.B. 1090, 1090 (1979) (employer stated that it "would close or cut back if the Union got in"); *see also*

That history teaches lessons to those who study it cannot transform history into a threat. The Acting General Counsel's claim under Section 8(a)(1) should be dismissed.

CONCLUSION

For the foregoing reasons, Boeing respectfully requests that this tribunal grant Boeing's motion to dismiss. Boeing also respectfully requests oral argument on that motion.

Respectfully Submitted,

Dated: June 27, 2011

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Microimage Display Div. of Xidex Corp. v. NLRB, 924 F.2d 245, 251 (D.C. Cir. 1991) ("management was plotting a strategy to avoid a new union contract through whatever means" (internal quotation marks and brackets omitted)). The D.C. Circuit's decision in *Microimage* is also irrelevant to the Section 8(a)(1) claim here because the employer's statements in that case were "not . . . alleged to be unfair labor practices in and of themselves," and were instead considered "merely as evidence of the intent motivating the employer to take the actions charged as unfair labor practices." 924 F.2d at 251 n.2.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

THE BOEING COMPANY and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	Case 19-CA-32431

CERTIFICATE OF SERVICE

I certify that a copy of Respondent's REPLY BRIEF IN SUPPORT OF BOEING'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, OR, IN THE ALTERNATIVE, TO STRIKE THE INJUNCTIVE RELIEFSOUGHT IN ¶ 13(A) OF THE COMPLAINT was electronically filed on June 27, 2011 and sent by overnight mail to the following parties, as well as by electronic mail where emails are listed:

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