

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO OFFICE

THE BOEING COMPANY

and

Case 19-CA-32431

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS
DISTRICT LODGE 751, affiliated with the
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS**

**RULING ON RESPONDENT'S MOTION TO DISMISS COMPLAINT FOR
FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, TO STRIKE
THE INJUNCTIVE RELIEF SOUGHT IN THE COMPLAINT**

On June 14, 2011, the Respondent filed a motion to dismiss the complaint for failure to state a claim or, in the alternative, to strike the remedy sought by the complaint. The General Counsel of the National Labor Relations Board (the General Counsel) and the Charging Party filed oppositions to the motion on June 21, 2011. On June 27, 2011, the Respondent filed a reply brief in support of its motion.

Based on the filings¹ of the parties, the pleadings and on the basis of the entire record of the proceedings to date, I consider and rule as follows:

A. The Procedural and Legal Nature of the Motion

The Respondent asserts that the instant motion must be considered under the Federal Rules of Civil Procedure (FRCP) which are binding on the Board. The Respondent's Motion argues at 10:

Pursuant to Section 10(b) [of the National Labor Relations Act], this tribunal is obligated to conduct this hearing —under the rules of civil procedure for the district courts of the United States, including Fed. R. Civ. P. 12(b)(6). Under that rule, though “detailed factual allegations” are not required, a complaint must be dismissed if it does not allege sufficient factual matter that, if accepted as true, “state[s] a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). “Threadbare recitals of the elements

¹ On June 21, 2011, the General Counsel filed a separate motion to strike portions of the Respondent's motion.

of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Nor do statements that establish only “the mere possibility of misconduct.” *Id.* at 1950.

The General Counsel and the Charging Party contest that assertion, arguing rather that the Federal Rules of Civil Procedure are not binding on the Board. Board decisional law establishes that the Board looks to the FRCP as providing useful guidance, particularly where the Act or the Board’s rules and regulations do not set forth contrary procedures. For example, in *Brink’s, Inc.*, 281 NLRB 468, 468 (1986), the Board stated the Federal Rules of Civil Procedure “are not binding on this Agency.” Although they added that in appropriate cases they look to the FRCP to provide “useful guidance.”

Where the Board has its own procedures, that are established by the Act, by Board rule or Board decision, the FRCP does not apply to vary the Board practice. See, e.g. *Control Services*, 303 NLRB 481 (1991), holding that the Federal Rules of Civil Procedure do not apply respecting service requirements and means where the Board provides its own procedures.

It is therefore appropriate to look first to Board rule and precedent to establish the procedural context for ruling on the instant motion.

The Board’s Rule and Regulation 102.15 states in part:

The complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent’s agents or other representatives by whom committed.

From its earliest days the Board has established rules controlling its complaints which are different from the technical requirements of the FRCP.

The Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid Complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense. *NLRB v. Piqua Munising Wood Prods. Co.*, 109 F.2d 552, 557 (6th Cir. 1940).

Similarly, while the FRCP provides for motions for judgment on the pleadings, see FRCP Rules 12 and 56, the Board by rule has established its own procedures. Thus the Board’s Rules provide various procedures for motions including motions for summary judgment, for example Rules 102.24 through 102.27, which specifically deal with motions for summary judgment and motions to dismiss the entire complaint. The

Board has expressly ruled that its rules and not those of the FRCP apply to motions for summary judgment. *KIRO, Inc.*, 311 NLRB 745, 746 (1993);

Given all the above, it is appropriate to apply the Board rules, which are binding on me, to the instant motion. I note however that the Board's provisions are not so controlling or exhaustive in their requirements and specifications as to render the FRCP in essence of no application to the instant motion. Thus, where a specific Board rule or decision does not control, I look for elucidation, instruction and useful guidance from the Federal Rules of Civil Procedure and the decisional law illuminating it.

A dispute between the parties developed respecting attachments the Respondent filed with its motion. The General Counsel filed a motion to strike those attachments and to disregard other non-complaint factual assertions in the motion. I ruled on the General Counsel's motion by Order of June 28, 2011. That order directs that the contract discussed herein remain with the motion, but that the other documents and assertions, other than asserted background facts, have been stricken and will be disregarded.²

Apart from the technical and procedural aspects of a motion to dismiss in this context, the pre-evidentiary stage of the motion makes such motions difficult in most forums. Generally, when deciding a motion to dismiss for failure to state a claim, a court must accept as true all well-pleaded facts and draw all permissible inferences in the plaintiff's favor. There is a strong presumption against dismissal for failure to state a claim. This is so because granting the motion ends the claim before the parties have tried the case or issue involved. Simplistically, it may be helpful to consider that there are three states of the trial record at which time a judge may be asked to decide a matter in whole or in part. They are very briefly described below.

Most commonly, a case is decided after it has been heard. Thus the judge issues a decision after a case has been fully tried by the parties, that is after the moving parties (in this proceeding, the General Counsel, and the Charging Party) and the defending party (in this proceeding the Respondent) have put on all the proper evidence they desire and made all the arguments they feel are necessary. The record is complete. All has been said that was proper to be said. This is generally what an administrative law judge under the Act is called upon to do: create a complete record and then issue a decision in the case based on that record. Thus the Board's Rule 102.35 states in part:

² As discussed in my order on the General Counsel's motion to strike, it is undoubtedly true that the parties in their arguments will provide background information which other parties will dispute and intend to contest. I do not find prejudicial the fact that general background information is incorporated in argument even if certain facts are not necessarily agreed upon. I note that no findings of fact not expressly set forth in this order have been made herein and equally no determinations of admissible evidence have been undertaken other than what is specifically provided herein.

Sec. 102.35 *Duties and powers of administrative law judges; assignment and powers of settlement judges.*--(a) It shall be the duty of the administrative law judge to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint.

See also the Administrative Procedure Act, P. L. 89-554, 5 U.S.C. § 557.

On some occasions, during the course of a trial, at the point when the plaintiffs have concluded submitting their portion of the evidence, i.e. they have "rested", the defending party may – before putting on any evidence - move the judge to dismiss some or all the matters at issue in the trial because, the defendant argues, even taking all of the plaintiff's evidence already put into the record at full value, the plaintiff's evidence does not support a verdict against the defendant. Simply put, this is a claim by the defendant that "there is nothing the plaintiffs have said" that, even if fully credited and taken in the light most favorable to the plaintiffs, sustains a finding against the defendant. A judge who agrees may at that point dismiss the allegations involved. This is not common because looking at the plaintiff's unchallenged evidence and giving it full value will typically sustain the plaintiff's case. None the less the motion serves well to test the legality and adequacy of the plaintiffs' case. If the defendant loses such a motion, the defendant often elects to put on a defense. If the defendant prevails, there is no need for the defendant to adduce evidence and a certain judicial efficiency occurs.

The rarest of the three types of decisions in this little illustrative model occurs at the very beginning of a trial, before any evidence has been introduced, and, essentially, only the pleadings and uncontested matters are in the record. Through a motion asserting that the plaintiff in essence lacks any possible case, the defendant seeks all or part of the plaintiff's case be stricken because it fails to state a claim. In effect the defendant is asserting as to the plaintiff's case: "there is nothing the plaintiff could say or prove that would sustain the allegations he has made." Such a pre-evidentiary dismissal is rare for two reasons.

First, since such a motion cuts off the action before the trial really gets underway, and requires deciding the issues before the judge has even heard the plaintiff's evidence, the procedural rules and decisions of higher authority that guide ruling on such motions place the factual and legal hurdles for the defendant quite high. In essence such rules reflect a judicial disfavor of, in effect, cutting off the trial before it starts. And, second, the advantage to the plaintiff and the burden to the defendant of the evaluation process is obvious. The plaintiff is allowed to argue very broadly that evidence exists to sustain his or her claims and the defendant is in the very difficult position of asserting that in essence there is nothing possible under the sun that could carry the day for the plaintiff: Tough for the moving party indeed.

This third situation and type of motion is the difficult process the Respondent has invoked in the instant motion under consideration. And it is made even more difficult under Board practice and procedures as opposed to the forums controlled by

the Federal Rules of Procedure because the Board does not require complaints in unfair labor practice cases to be as detailed as those the FRCP requires. Thus the Respondent herein is less able to argue that evidence or additional detail should have been present in the General Counsel's pleadings and, if that material is not present, the Respondent may not argue that such facts should not be considered in ruling on the motion.

The General Counsel in his opposition, at 4-5, provides Board authority for this proposition:

A Complaint cannot be dismissed for failure to state a claim upon which relief may be granted when the allegations of the Complaint, if true, set forth a violation of the Act. *Children's Receiving Home of Sacramento*, 248 NLRB 308, 308 (1980). In considering a motion to dismiss, "the Board construes the Complaint in the light most favorable to the General Counsel, accepts all factual allegations as true, and determines whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief." *Detroit Newspapers*, 330 NLRB 524, 524, n. 1 (2000). There is a "powerful presumption against rejecting pleadings for failure to state a claim." *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002) (reversing district court's decision to dismiss RICO complaint for failure to state a claim). Granting a motion to dismiss is "a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Morse v. Regents of University of Colorado*, 154 F.3d 1124, 1127 (10th Cir.1998). Thus, in ruling on a motion to dismiss for failure to state a claim, it is not appropriate to look outside the pleadings themselves and consider additional facts alleged by the moving party. *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 88-89 (6th Cir.1997).

It is to this process that we now turn.³

³ The Charging Party in its opposition at 3 states:

Boeing filed its Motion to Dismiss on June 14, 2011, well past the deadline set forth in the Board's Rules and Regulations. See, 29 C.F.R. § 102.24 (requiring all motions for summary judgment and dismissal to be filed no later than 28 days prior to the scheduled hearing). Nonetheless, the ALJ set a briefing schedule, with Opposition Briefs due June 21, 2011, and Respondent's Reply Brief, if any, due June 24, 2011.

The Charging Party's assertion of a missed deadline relies on the portion of Board Rule 102.24(b) which asserts:

All motions for summary judgment or dismissal shall be filed with the Board no later than 28 days prior to the scheduled hearing.

The motion addressed herein was filed with the administrative law judge not the Board and the referred to rule which is expressly addressed to filings to the Board, does not pertain.

The Respondent's motion herein covers the entirety of the General Counsel's allegations of wrongdoing in the complaint and the General Counsel's requested remedy for those alleged violations of the Act. It seems best to consider the Respondent's assertions of the failures of the complaint separately as follows:

**1. The Alleged Failure of Claims of the Independent⁴
Violations of Section 8(a)(1) of the Act**

Section 8(a)(1) of the Act states:

It shall be an unfair labor practice for an employer--
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act].

Section 7 of the Act states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [of the Act].

The complaint sets forth its five allegations of independent violations of Section 8(a)(1) of the Act at complaint paragraphs 6, 9 and 11:

Paragraph 6.

On or about the dates and by the manner noted below, Respondent made coercive statements to its employees that it would remove or had removed work from the Unit because employees had struck and Respondent threatened or impliedly threatened that the Unit would lose additional work in the event of future strikes:

(a) October 21, 2009, by McNerney in a quarterly earnings conference call that was posted on Boeing's intranet website for all employees and reported in the Seattle Post Intelligencer Aerospace News and quoted in the Seattle Times, made an extended statement regarding "diversifying [Respondent's] labor pool and labor relationship, "and moving the 787

⁴ Section 8(a)(1) through 8(a)(5) of the Act lists employer committed unfair labor practices. Since unfair labor practices 8(a)(2) through 8(a)(5) are also derivatively violative of Section 8(a)(1) of the Act, unfair labor practices which are only violative of Section 8(a)(1) of the Act are known as independent violations of Section 8(a)(1) and/or as free standing allegations of wrongful conduct.

Dreamliner work to South Carolina due to "strikes happening every three to four years in Puget Sound."

(b) October 28, 2009, based on its October 28, 2009, memorandum entitled "787 Second Line, Questions and Answers for Managers," informed employees, among other things, that its decision to locate the second 787 Dreamliner line in South Carolina was made in order to reduce Respondent's vulnerability to delivery disruptions caused by work stoppages.

(c) December 7, 2009, by Conner and Proulx in an article appearing in the Seattle Times, attributed Respondent's 787 Dreamliner production decision to use a "dual-sourcing" system and to contract with separate suppliers for the South Carolina line to past Unit strikes.

(d) December 8, 2009, by Conner in an article appearing in the Puget Sound Business Journal, attributed Respondent's 787 Dreamliner production decision to use a "dual-sourcing" system and to contract with separate suppliers for the South Carolina line to past Unit strikes.

(e) March 2, 2010, by Albaugh in a video-taped interview with a Seattle Times reporter, stated that Respondent decided to locate its 787 Dreamliner second line in South Carolina because of past Unit strikes, and threatened the loss of future Unit work opportunities because of such strikes.

Paragraph 9.

By the conduct described above in paragraph 6, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.

Paragraph 11.

By the conduct described above in paragraphs 6 through 10, Respondent has engaged in unfair labor practices affecting commerce within the meaning of §§ 2(6) and (7) of the Act.

There is no dispute that the alleged agents of Respondent named in the quoted complaint sub-paragraphs were management agents of the Respondent at relevant times.

The Respondent argues respecting the statements quoted in complaint subparagraphs 6(a)-6(e), at Motion page 14:

When viewed in context—as Board precedent requires—the statements are plainly lawful. They accurately recite the factors Boeing was considering (in the

case of the October 21, 2009 earnings call) or had considered (in the case of the other four statements) in deciding where to locate its second 787 assembly line, including the company's pressing need for production continuity and the inability of the company to achieve that continuity in Everett [Washington]. The complaint conjures a violation of Section 8(a)(1) only by flagrantly misquoting and mischaracterizing the statements.

The General Counsel counters, at page 7 of its opposition:

Such statements, if proven, would clearly violate § 8(a)(1). See, e.g., *Detroit Newspapers*, 330 NLRB 524, 524, n.1 (2000). See also *General Electric Co.*, 215 NLRB 520, 520-21 (1974). Indeed, the Board has held that an employer violates § 8(a)(1) by threatening to withhold work opportunities because of employees' exercise of § 7 rights. See, e.g., *Dorsey Trailers, Inc.*, 327 NLRB 835, 851 (1999) (threat to close plant if employees went on strike), *enfd. in pertinent part*, 233 F.3d 831 (4th Cir. 2000); *Kroger Co.*, 311 NLRB 1187, 1200 (1993) (threat to put plan to build a new freezer facility on hold), *affd. mem.*, 50 F.3d 1037 (11th Cir. 1995). Further, employer "predictions" of loss of customers due to unionization or strike disruptions without any factual basis amount to unlawful threats. See, e.g., *Tawas Indus.*, 336 NLRB 318, 321 (2001) (no objective basis for prediction of loss of customers due to fear of strikes in the event that the employees' independent union affiliated with a particular international union).

The Charging Party emphasizes that in evaluating alleged 8(a)(1) statements the Board applies "the objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark, or on the success or failure of such coercion." *Dorsey Trailers, Inc. Northumberland, PA Plant*, 327 NLRB 835, 851 (1999), *citing Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995); *Miami Systems Corp.*, 320 NLRB 71 fn. 4 (1995).

The Respondent seemingly takes the position that the factual allegations of complaint paragraph 6 are taken out of context and that the totality of the remarks made when viewed fairly reveals misquotes and mischaracterizations which must be disregarded. From that perspective the Respondent argues the statements do not violate the Act. The General Counsel and the Charging Party argue that the issues of fact offered by the Respondent concerning complaint paragraph 6 are in serious dispute and the Respondent has not established any undisputed facts sufficient to establish the allegations should be dismissed.

I agree that the facts alleged in complaint paragraph 6 have not been established at this stage of the proceedings and, importantly, the context and circumstances applicable to the employees who heard/learned of the communications has not been addressed. Even though the Board, in evaluating allegations of improper statements to employees, applies an objective rather than subjective test of the impact of particular statements on employees, that objective standard applies to employees in

identified circumstances and with similar information and understandings. Such analysis thus looks to remarks in that setting specific context. *E.g. Rossmore House Hotel*, 269 NLRB 1176 (1984), *aff'd sub nom. Hotel & Restaurant Employees, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Here we have no evidence whatsoever of the employees' state of affairs and or the employees' knowledge of the issues underlying the 787 Dreamliner assembly line at relevant times.

The parties also argue at some length respecting Board and court precedent pertaining to the Section 8(a)(1) allegations in the complaint.⁵ Given the lack of evidence concerning the circumstances of the employees, as well as the potentially disputed details of the Respondent's agents' remarks, I find it is impossible to find that the General Counsel's allegations of Section 8(a)(1) of the Act do not state a claim and must be dismissed. Rather I find these allegations can only be properly evaluated as to their merits on the basis of a full evidentiary record. This being so, I find the allegations survive the Respondent's assertion that the complaint allegations of Section 8(a)(1) violations of the Act have each failed to state a claim. I further find that the Respondent's motion must be dismissed at this early stage of the proceeding before evidence has been offered in their support of the allegations.

2. The Alleged Failure of the Claim of Violations of Section 8(a)(3) of the Act

Section 8(a)(3) of the Act states in relevant part:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...

The complaint sets forth its allegations of violations of Section 8(a)(3) of the Act at complaint paragraphs 7, 8, 9, 10 and 11:

Paragraph 7.

(a) In or about October 2009, on a date better known to Respondent, but no later than October 28, 2009, Respondent decided to transfer its second 787 Dreamliner production line of 3 planes per month from the Unit to its non-union site in North Charleston, South Carolina.

⁵ Thus for example, the parties argued the applicability of such lead cases as *NLRB v. Gissel Packing Corp.*, 395 US 575 (1969), *NLRB v. Brown*, 380 U.S. 278 (1965) and *General Electric Company*, 215 NLRB 520 (1974). I find such arguments, no matters how skillfully presented, simply require more facts than are at hand at this stage of the proceeding to be relevant to an informative analysis of the merits of the allegations, let alone sufficient to support a resolution of the allegations of the complaint. Without additional facts, the complaint allegations may not fairly be resolved.

(b) Respondent engaged in the conduct described above in paragraph 7(a) because the Unit employees assisted and/or supported the Union by, *inter alia*, engaging in the protected, concerted activity of lawful strikes and to discourage these and/or other employees from engaging in these or other union and/or protected, concerted activities.

(c) Respondent's conduct described above in paragraph 7(a), combined with the conduct described above in paragraph 6, is also inherently destructive of the rights guaranteed employees by § 7 of the Act.

Paragraph 8.

(a) In or about October 2009, on a date better known to Respondent, but no later than December 3, 2009, Respondent decided to transfer a sourcing supply program for its 787 Dreamliner production line from the Unit to its non-union facility in North Charleston, South Carolina, or to subcontractors.

(b) Respondent engaged in the conduct described above in paragraph 8(a) because the Unit employees assisted and/or supported the Union by, *inter alia*, engaging in the protected, concerted activity of lawful strikes and to discourage these and/or other employees from engaging in these or other union and/or protected, concerted activities.

(c) Respondent's conduct described above in paragraph 8(a), combined with the conduct described above in paragraphs 6 and 7(a), is also inherently destructive of the rights guaranteed employees by § 7 of the Act.

Paragraph 9.

By the conduct described above in paragraph 6, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.

Paragraph 10.

By the conduct described above in paragraphs 7 and 8, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of §§ 8(a)(3) and (1) of the Act.

Paragraph 11.

By the conduct described above in paragraphs 6 through 10, Respondent has engaged in unfair labor practices affecting commerce within the meaning of §§ 2(6) and (7) of the Act.

The Respondent in various ways argues that the General Counsel has not, and cannot, prove the allegations in complaint paragraphs 7(a) and 8(a): that, in or about October 2009, the Respondent decided to transfer its second 787 Dreamliner production line of 3 planes per month from the Unit [in the Pacific Northwest] to its non-union site in North Charleston, South Carolina and that in or about October 2009, the Respondent decided to transfer a sourcing supply program for its 787 Dreamliner production line from the Unit [in the Pacific Northwest] to its non-union facility in North Charleston, South Carolina, or to subcontractors.

The General Counsel and the Charging Party argue, correctly, that the Respondent's challenge to these factual allegations must be resolved by the presentation of evidence and that the factual challenge does not in any manner support a motion to dismiss for a failure to state a claim.

The Respondent similarly challenges the factual allegations in complaint paragraphs 7(b), 8(b) and 10 that the Respondent as quoted above transferred the work in dispute because the Unit employees assisted and/or supported the Union by, *inter alia*, engaging in the protected, concerted activity of lawful strikes and to discourage these and/or other employees from engaging in these or other union and/or protected, concerted activities and has as a result been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization.

Again, the General Counsel and the Charging Party argue, correctly, that the Respondent's challenge to these factual allegations must be resolved by the presentation of evidence and the factual challenge does not in any manner support a motion to dismiss for a failure to state a claim.⁶

I find, based on the case citations and the Board's rules and regulations quoted earlier, that such factual challenges at this threshold stage of the proceedings do not support the Respondent's motion here.

The Respondent's argument however does not stop with denials of the essential factual underlay of the General Counsel's complaint. Rather counsel for the

⁶ The Respondent implicitly argues that the complaint allegations of violations of Section 8(a)(1) of the Act, discussed earlier, are the only evidence of anti-union animus the General Counsel can offer in support of the Section 8(a)(3) complaint allegations. The allegations of complaint paragraph 6 are allegations of wrongdoing, and are not evidence pled in support of the complaints Section 8(a)(3) allegations. Since, as noted earlier, under the Board's pleading rules, the General Counsel is not required to plead his evidence, it may not be presupposed that he has done so here. Further, even were such a presupposition appropriate, the complaint under the Board's rules need not contain all the General Counsel's evidence in support of the complaint Section 8(a)(3) violation. Given these facts, it is impossible at this stage of the proceeding to make any factual finding that the General Counsel's animus theory of a section 8(a)(3) violation is lacking in evidentiary sufficiency and hence the violation must be dismissed on that grounds.

Respondent make several arguments that, even if the facts of the subpoena are assumed to be true, certain elements of the complaint must fail. This is a proper argument to offer in support of the motion. These arguments will be taken up in turn below.

The Respondent argues that in the absence of allegations that an existing Northwest represented employee suffered some adverse employment action due to Boeing's decision to establish a new assembly line in Charleston, the complaint allegation of a violation of Section 8(a)(3) of the Act must be dismissed. Thus the Respondent argues in its motion at 20-21:

The Acting General Counsel's inability to allege any adverse employment action against any IAM employee forecloses his Section 8(a)(3) claim. None of the indicia of a change in IAM employees' terms or conditions of employment are present here: They have not been laid off, demoted, relocated, suffered a reduction in wages, benefits or work hours, or had their job duties changed as a result of the decision. Indeed, neither the Acting General Counsel nor the IAM can point to even one Unit employee who has been adversely impacted by Boeing's second-line and dual-sourcing decisions. Boeing's decision to place *new work* [Italics in original] in Charleston simply did not affect the IAM employees, and the complaint does not allege otherwise.

The General Counsel argues the Respondent's assertion above is fallacious. He argues in his opposition at 9:

As a preliminary matter, the Board's notice pleading requirements simply do not require a delineation of the specific effects of Respondent's conduct. See *Piqua Munising Wood Prods. Co.*, 109 F.2d at 557. Further, even if the full effects of Respondent's decision are not wholly felt at this time because the decision has not yet been completely implemented, Board law makes clear that a discriminatory decision about where to place work may alone constitute discrimination with respect to unit employees' terms and conditions of employment in violation of § 8(a)(3), even where there has been no actual financial loss, and even where there has been no *immediate* [Italics in original] impact on the discriminatees. *Pittsburg & Midway Coal Mining Co.*, 355 NLRB No. 197 (2010); *Adair Standish Corp.*, 290 NLRB 317, 318-19 (1988), *enfd. in pertinent part*, 912 F.2d 854 (6th Cir. 1990).

I find *Adair Standish Corp.*, 290 NLRB 317, 318-19 (1988), *enfd. in pertinent part*, 912 F.2d 854 (6th Cir. 1990), on point. In *Adair* the Board found that the employer violated Section 8(a)(3) of the Act when it cancelled the delivery of a new printing press and redirected the printing press to another location because of the employees' union activity. Although the press had never been at the facility and therefore no work that had been in place at the facility was lost, the fact that the new press work was wrongfully denied the unit was held to violate Section 8(a)(3) of the Act. The Board asserted at 290 NLRB 319:

This testimony raises an inference that diversion of the press from Standish could reasonably result in diversion of new work from Standish. Further, the installation of the new Goss press was intended to replace the older, apparently more difficult to run Color King press. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by its failure to install the Goss press at the Standish plant.¹⁰

¹⁰ The Judge's Order required that the press be moved from Dexter to Standish. This puts into effect what would have been the status quo ante, but for the discriminatory act of the Respondent. We find no merit in the Respondent's exception alleging the remedy is punitive.

This approach flows from the early Supreme Court decision in *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177 (1941), which held, *inter alia*, that Section 8(a)(3) of the Act could apply to an employer's wrongful failure to hire employees.

These cases convince me that if a work producing improvement such as a new press or expansion of assembly line is forgone or transferred away from the facility so that its benefit never arrives, in appropriate circumstances a violation of Section 8(a)(3) of the Act may be found. This being so, I reject the Respondent's argument that since only new or additional work was denied to what would have to have been new, i.e. as yet unhired, employees, Section 8(a)(3) of the Act could not have been violated as a matter of law.

The Respondent also makes a legal challenge to the complaint paragraphs 7(c) and 8(c), quoted in full above, which alleges that the Respondent's conduct in transferring the work to South Carolina because of the unit employees protected activities described above in paragraph 8(a), is inherently destructive of the rights guaranteed employees by § 7 of the Act. The concept of "inherently destructive" can be an important element in analysis of Section 8(a)(3) violation cases. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). The Respondent argues in its motion at 23:

Boeing's right to decide to expand 787 production, and to place a second final assembly line in another state, is expressly contemplated by the collective bargaining agreement. As a matter of both logic and common sense, it cannot be inherently destructive of collective bargaining rights for an employer to exercise its bargained-for right under a collective bargaining agreement.

The General Counsel answers in its opposition at 12:

It is settled law that "[an employer's] bargaining obligations to the Union are distinct from its legal duty not to discriminate against strikers ... the legal theories are fundamentally different." *Peerless Pump Co.*, 345 NLRB 371, 374 (2005).... It is also well established that an "employer cannot exercise contractual rights to punish employees for protected activity." *RGC (USA) Mineral Sands, Inc. v.*

NLRB, 281 F.3d 442, 450 (4th Cir. 2002); *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1281(D.C. Cir. 1999).

I agree at this pre-evidentiary stage that the relevant collective bargaining agreement does not limit the complaint. The aphorism that an employer may fire an employee for any reason or no reason but not for a reason protected against by the Act, seemingly applies here. A contract clause allowing an employer to locate work as it sees fit does not authorize that employer to do so for a reason prohibited by the Act.

3. The Respondent's Motion to Strike the Relief Sought in Complaint Paragraph 13(a)

Complaint paragraph 13 states in full:

(a) As part of the remedy for the unfair labor practices alleged above in paragraphs 7 and 8, the Acting General Counsel seeks an Order requiring Respondent to have the Unit operate its second line of 787 Dreamliner aircraft assembly production in the State of Washington, utilizing supply lines maintained by the Unit in the Seattle, Washington, and Portland, Oregon, area facilities.

(b) Other than as set forth in paragraph 13(a) above, the relief requested by the Acting General Counsel does not seek to prohibit Respondent from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility.

The Respondent makes several arguments. It argues initially in its motion at 25:

Board orders must be remedial, not punitive; the Board can only seek a return to the *status quo ante*. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The standard remedy in a Section 8(a)(3) case, even in cases finding a "runaway shop," is to order laid-off employees reinstated, with back pay. See, e.g., *Lear Siegler, Inc.*, 295 N.L.R.B. 857, 860 (1989). Thus, even assuming that Boeing "transferred" work to Charleston, the appropriate remedy would be for Boeing to re-hire and restore the terms and conditions of employment to those employees adversely affected by the "transfer."

Instead, the Acting General Counsel is seeking an order that Boeing "operate" the second final assembly line in Everett. Compl. ¶ 13(a). Such a remedy is untethered to any restoration of the hire, pay, or terms and conditions of employment of any individual employee. Ordering Boeing to "operate" the second line in Everett would also not be a return to the status quo—the second final assembly line never existed in Everett, no work has been lost in Everett, and no current employees have been harmed by Boeing's decision not to expand in Everett. And inasmuch as they already are employed, no current Unit members would benefit from the construction and operation of another assembly

line in Everett. Such an order might benefit the Unit by enlarging its membership, but it would have no impact whatsoever on the terms and conditions of the employment of current Unit members. Even if a violation were found, the remedy must be focused on those employees, not on Boeing's enterprise-level business decisions, such as what work will take place in Everett or in Charleston or how many 787s Boeing should make per month. The Board's remedial power is to restore the status quo of *employees*, not "work."

The Respondent further argues that the General Counsel's sought remedy is unduly burdensome. There is no question that the Board and reviewing authority consider the burdens involved in given remedies. The Respondent argues in its motion at 26:

The [remedy sought in the complaint] would impose immense economic burdens on Boeing: It would compromise a billion-dollar investment in South Carolina; it would require Boeing to invest many millions more to expand production capacity in Everett, and it would disrupt Boeing's global supply chain and almost certainly disrupt deliveries to customers. The totality of those costs would dwarf those imposed by orders stricken as unduly burdensome. See, e.g., *Frito-Lay*, 858 F.2d at 68 (several hundreds of thousands of dollars per year); *Townhouse TV*, 531 F.2d at 831-32 (roughly \$160,000). In financial terms it is doubtless the most burdensome remedy ever requested in an NLRB proceeding, much less affirmed.

And contrary to the complaint's suggestion, "operat[ing]" the second final assembly line in Everett [Washington] would require massive changes to the Charleston 787 line. See Compl. ¶ 13(b). That facility was designed and constructed to assemble 787s. Tens of millions of dollars of heavy tooling and equipment specific to the assembly of the composite 787 have been installed in the Charleston facility. The new workforce has been hired and specifically trained to build 787s. The manifest implication of the Board's remedy would require that all of Boeing's currently planned 787 production—ten planes a month—be done in Everett, meaning that none could be built in Charleston. The net effect of an injunction requiring Boeing to move the second-line work to Everett would be to idle the Charleston facility, with obvious implications for the employees now working there.

The Respondent, based on the above, seeks a finding that the proposed remedy may not be imposed as a matter of law in the instant case, irrespective of any possible merit determination on the unfair labor practice aspects of the case, and that the complaint paragraph seeking the remedy at issue should be stricken from the complaint.

The General Counsel and the Charging Party strenuously oppose the motion to strike the proposed remedy. The General Counsel notes that the remedy sought is not

unusual, but rather is traditional in runaway shop cases citing *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989). There the Board asserted at 295 NLRB at 86:

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, unless the respondent can demonstrate that restoration of the status quo ante is inappropriate.

The General Counsel does not challenge the Respondent's right to seek to defeat the remedy sought under *Lear Siegler's* "unduly burdensome" test, but argues that such a process necessarily requires a full record on both the violations found, and the status quo ante remedy and a complete record respecting the burdens associated with the remedy. The General Counsel asserts in its opposition at 14:

Regardless of Respondent's arguments to the contrary, § 10(c) of the Act authorizes the Board to order "such affirmative action ... as will effectuate the policies of [the] Act." The Supreme Court has explained that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." *MacKay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938). In other words, the Board has broad discretion to craft an appropriate remedy based on the facts of each case. *Excel Case Ready*, 334 NLRB 4,5 (2001).

The Charging Party advances the Board's decisions in *Kaumagraph Corporation*, 313 NLRB 623 (1994) and *Schnadig Corporation*, 265 NLRB 147 (1982) for the proposition that the Board not the General Counsel has full authority over Board remedies. In *Schnadig* the Board stated at 265 NLRB at 147:

Initially, we emphasize that whether counsel for the General Counsel seeks a backpay remedy is immaterial since we have full authority over the remedial aspects of our decisions. See, e.g., *Loray Corporation*, 184 NLRB 577 (1970); *N.L.R.B. v. Duncan Foundry & Machine Workers, Inc.*, 435 F.2d 612 (7th Cir. 1979); *N.L.R.B. v. WTVJ, Inc.*, 268 F.2d 346 (5th Cir. 1959).

The Charging Party further argues in its opposition at 26:

Boeing has not put forth any legal authority justifying its request that the ALJ strike, restrict or otherwise make a determination about the General Counsel's requested remedy before a decision has been made with respect to the merits of the underlying unfair labor practice charge. Counsel for the Union has found no such case. Boeing should not be allowed to circumvent the compliance stage of this unfair labor practice proceeding by foreclosing a requested remedy prior to the taking of any evidence. Boeing's improper Motion to Strike should therefore be denied.

Having considered the arguments of the parties as well as the cases cited and the broad discretion the Board exercises to determine remedies under Section 10(c) of the Act,⁷ I find the Board's determination of appropriate remedies for given cases is highly fact intensive. I also find the Board carefully matches the remedy for particular the unfair labor practices to all the circumstances of the case. Accordingly, it is particularly inappropriate for an administrative law judge to limit or prohibit at the pre-evidentiary stage of the unfair labor practice trial, the litigation of particular remedies sought by parties for particular violations of the Act. And, importantly, there is no Board support in rule or decision for the proposition that an administrative law judge at the pre-evidentiary stage of an unfair labor practice proceeding should eliminate any party's right to seek particular relief for the violations of the Act alleged in the complaint. From all the above I draw the conclusion that remedial possibilities should not be lightly circumscribed at the pre-evidentiary stage of the proceeding.

Applying that conclusion to the instant case and the remedy sought by the General Counsel, in ruling on the motion at hand, I find it inappropriate to limit the remedy sought by striking the complaint remedial paragraph or otherwise, directly or indirectly, limiting the making of a record on the remedy issue. This is particularly true where the remedy under attack is not contrary to general Board remedial policy and where, as here, the case involved presents unusual factual circumstances⁸. Accordingly I shall deny the Respondent's motion to strike the General Counsel's complaint paragraph 13(a).

4. Summary and Comment

I have considered the Respondent's argument and the General Counsel and the Charging Party's opposition to that argument that one or all of the independent allegations of violations of Section 8(a)(1) of the Act should be dismissed for failure to state a claim. As more fully set forth above, I found that at this pre-evidentiary stage of the proceedings the Respondent has not established that the General Counsel cannot sustain any or all of the complaint allegations of 8(a)(1) violations of the Act. I therefore conclude the motion to strike these allegations is without merit and should be denied.

⁷ Section 10(c) of the Act states in part:

... If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act ...

⁸ Indeed the Board in its Order of June 20, 2011, found the instant case presented "unique circumstances."

Further, I have considered the Respondent's argument and the General Counsel and the Charging Party's opposition to that argument that one or all the allegations of violations of Section 8(a)(3) of the Act should be dismissed for failure to state a claim. As more fully set forth above, I found that at this pre-evidentiary stage of the proceedings the Respondent has not established that the General Counsel cannot sustain the complaint allegations of 8(a)(3) violations of the Act. I therefore conclude the motion to strike these allegations is without merit and should be denied.

Finally I have considered the Respondent's argument and the General Counsel and the Charging Party's opposition to that argument that the General Counsel's complaint remedy request should be stricken and held inapplicable to the instant case. As more fully set forth above, I found that at this pre-evidentiary stage of the proceedings the Respondent has not established that the General Counsel's complaint sought remedy is totally inappropriate in the instant case and that its litigation should be foreclosed.

The Respondent, in both its initial motion and its reply in a scholarly and impassioned presentation, challenges the General Counsel's complaint language, e.g. Respondents reply at 4:

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.

The Respondent challenges Board cases as old or isolated. The Respondent advances various economic horrors both nationally and to itself from both the imposition of a remedy such as that advanced by the General Counsel here and through delay in resolving the case. All these arguments are significantly limited by the fact that the evidentiary stage of the proceedings has not begun.

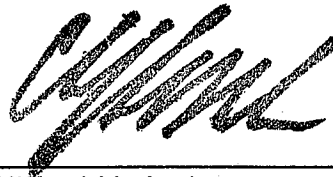
As discussed above, many of the Respondent's arguments made in support of its motion have been unsuccessful because the arguments have not been effective in light of the fact that no evidence has been introduced into the record on given issues and the motion at hand rests on pre-evidentiary arguments. Further, respecting the Respondent's arguments that Board policy and precedent must be clarified or changed, a full record has not been put before the Board for its evaluation and it is the Board which is charged under the statute with making policy determinations and changing precedent. Administrative law judges, including this one, do not make law, they apply it. We follow, we do not lead. This is not to suggest that, come a full record, these arguments or any particular argument offered by any party will prevail. Rather I suggest, in a manner different than has occurred herein under the setting specific procedures of a motion to dismiss based on a failure to state a claim analysis, the arguments of the parties at that time will be tested in a different manner appropriate to those circumstances, i.e. the circumstances of a complete evidentiary record. That record will not only be the basis of my own decision, but it will also be the record on review of the judge's decision, a review which will almost certainly come to pass. That complete record will allow the Board and reviewing authority thereafter, if invoked, to address the Board level policy and other Board-level aspects presented by the "unique circumstances" of the case.

Having considered the entirety of the Respondent's motion and found and concluded as noted above, I find the motion is without merit and should be denied in its entirety. Accordingly, based upon all the above, the pleadings and filings of the parties, and the record of the entire proceedings to date, I issue the following:

ORDER⁹

The Respondent's motion to dismiss the complaint for failure to state a claim or, in the alternative, to strike the remedy sought by the complaint, shall be and it hereby is, dismissed in its entirety.

Issued at San Francisco California, this 30th day of June, 2011.



Clifford H. Anderson
Administrative Law Judge

⁹ Appeals from administrative law judge rulings on motions are governed by the Board's Rule 102.26.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO, CA

THE BOEING COMPANY

and

Case 19-CA-32431

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS
DISTRICT LODGE 751, affiliated with the
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS

**SERVICE OF: Ruling on Responent's Motion to Dismiss and to Strike Injunctive Relief
by Judge Clifford Anderson dated 6-30-2011**

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO, CA

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Served by: Susan George, at 415 356-5255, June 30, 2011