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

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

CHARGING PARTY'S OPPOSITION
TO RESPONDENT'S MOTION TO DISMISS AND MOTION TO STRIKE

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INTRODUCTION

The Charging Party, International Association of Machinists and Aerospace Workers District Lodge 751 ("District 751"), affiliated with International Association of Machinists and Aerospace Workers ("IAM"), hereby files this Opposition to Respondent'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" ("Motion to Dismiss") filed by Respondent, The Boeing Company ("Boeing"), on June 14, 2011.

At stake in this unfair labor practices proceeding is a worker's right to engage in collective action in order to achieve economic gains in the workplace. This right has been guaranteed to American workers since 1935, when the National Labor Relations Act ("NLRA" or "the Act") was first adopted. Section 7 of the NLRA guarantees the right of workers "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 also to refrain from collective activity. 29 U.S.C. § 157.

The NLRA protects not only an employee's right to strike but also the right to be free from discrimination and retaliation for having engaged in, or being ready to engage in, protected activities, including strikes. It is these important rights that Boeing violated when it decided to move a 787 commercial aircraft final assembly line away from its unionized workers to a new non-union facility. Boeing violated Puget Sound workers' rights when it told those employees that it decided to transfer the work to South Carolina because of their previous strikes and those workers' continued willingness to engage in concerted activity to protect their collective bargaining agreement.

Although Boeing denies nearly every allegation in the General Counsel's Complaint, creating numerous disputes of material fact, Boeing nonetheless seeks an Order dismissing the General Counsel's Complaint prior to the presentation of any evidence.[1] Short on law, but long on hyperbolic language, Boeing's Motion to Dismiss confirms that its primary defense to this action is actually a political one: the Boeing Company opposes the enforcement of 76-year-old federal labor law that protects workers' right to strike. Political objection to the enforcement of a law is not a legal defense to a violation of that law and cannot serve as a legitimate basis for dismissal.

Absent a demonstration by Boeing that 1) there are no material facts in dispute, and 2) that there is no basis in law for the federal government's Complaint, Boeing's Motion to Dismiss must be denied. Because Boeing itself concedes that material facts are in dispute, its Motion to Dismiss must fail. Even if Boeing could demonstrate that there are no material facts in dispute and that all necessary inferences of fact have been drawn in favor of the non-moving party as required by *Detroit Newspapers,* 330 NLRB 524, 525, fn. 7 (2000), there is no basis in law for Boeing's Motion to Dismiss. Therefore, for the reasons set forth herein, the Charging Party respectfully requests that the Judge deny Respondent's Motion to Dismiss in its entirety.

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[1] A motion to dismiss typically includes only the barest factual statements, as any disputes of material fact result in denial of the motion. Yet, Boeing includes 10 pages of unsupported, hotly contested and/or completely irrelevant factual assertions at the front of its Motion to Dismiss, without citation to an evidentiary record (because none yet exists), as well as additional unsupported facts throughout the brief. Boeing's reliance on such facts, replete with hearsay, and obviously contested by the face of the Complaint, is not only wholly inappropriate, but itself precludes dismissal.

PROCEDURAL BACKGROUND

The record opened in this case on June 14, 2011. Since then, the parties have primarily been engaged in off-the-record conferences aimed at narrowing issues in dispute concerning subpoenas and petitions to revoke. The evidentiary portion of the hearing has not yet commenced. Other than the admissions and denials in Respondent's Answer, no evidence has been offered, nor received, by the tribunal.[2]

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.

COUNTERSTATEMENT OF FACTS

As the evidence will show, Boeing's IAM-represented employees in the Puget Sound area of Washington State have exclusively assembled, and/or fully produced, Boeing's commercial airplanes for 76 years. In the past decade, the members of IAM 751 have twice struck Boeing in order to protect the economic terms of their collective bargaining agreement and the quality of their working conditions. By engaging in this collective activity, the workers have ensured that their collective bargaining agreement provides a middle class life for them and their families, including a guaranteed pension, cost-of-living wage increases, and affordable health care.

In March 2010, Boeing's CEO for its commercial aircraft division admitted that Boeing had decided, in order to avoid protected concerted activity by union workers in

[2] There are five Petitions to Revoke subpoenas pending before the ALJ; several of these involve demands, through subpoenas, for the production of relevant documents that will bear on Boeing's affirmative defenses, and Boeing's responses and objections to those subpoenas.

the Puget Sound, to build a new second 787 final assembly facility at a newly non-union facility rather than to use available capacity for 787 final assembly at its union facility. *Seattle Times* Reporter Dominic Gates interviewed Boeing CEO Jim Albaugh, who explained that "[t]he overriding factor" for the decision to move the second 787 final assembly line to South Carolina "was not the business climate" and "not the wages we are paying today. It was that we can't afford to have a work stoppage every three years. And we can't afford to continue the rate of escalation of wages."

Boeing contests the meaning and context of Mr. Albaugh's admission, as well as the meaning and context of the other statements contained in ¶ 6 of the Complaint.[3] The parties also contest the factual predicate underlying the numerous affirmative defenses asserted by Boeing. It is therefore impossible to dispose of either the 8(a)(1) or the 8(a)(3) claim by dispositive motion. The ALJ should reject Boeing's self-serving recitation of what it believes the facts to be, as well as its groundless contention that the Complaint can be disposed of as a matter of law. Instead, the ALJ should deny Boeing's Motion to Dismiss in its entirety and promptly commence with the evidentiary portion of this proceeding.

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[3] *See*, Boeing's Answer to the General Counsel's Complaint at ¶ 6.

LEGAL ARGUMENT

I. THE APPLICABLE LEGAL STANDARDS DIRECT THAT RESPONDENT'S DISPOSITIVE MOTION BE DENIED.

A. The General Counsel's Complaint Contains Facts Sufficient To Notify The Charged Party Of The Unfair Labor Practices Charged, And Those Facts, If Accepted As True As They Must Be On Motion to Dismiss, Are Sufficient To Support A Claim Under Sections 8(a)(1) and 8(a)(3) of the Act.

The Board's Rules and Regulations set forth the requisite contents of a complaint: "(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." 29 C.F.R. § 102.15.[4] "The sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, that he may have due notice and a full opportunity for hearing thereon." *American Newspaper Publishers Ass'n v. NLRB,* 193 F.2d 782, 800 (7th Cir. 1951), *citing NLRB v. Piqua Munising Wood Prod.,* 109 F.2d 552, 557 (6th Cir.). As explained in *Curtiss-Wright Corp. v. NLRB:*

> The propriety of a pleading is today judged by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought. '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.' Such a complaint need state only the manner by which the unfair labor practice has been or is being committed, the absence of specifics being tolerated when there has been no special showing of detriment.

347 F.2d 61, 72 (3rd Cir. 1965) (citations omitted).

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[4] The Rules set forth two requirements for a complaint. Notably, this language does not track the pleading requirements under the Federal Rules of Civil Procedure. *See*, FRCP 8.

Here, the Complaint plainly meets the notice pleading requirements of § 104.15, as it states with particularity the specific acts claimed to constitute unfair labor practices in violation of Sections 8(a)(1) and 8(a)(3) of the Act, including the identity of Respondent's agents who acted unlawfully, and the dates and circumstances surrounding their unlawful acts. As evidenced by the detailed factual and legal assertions contained in the Complaint and in Boeing's Motion to Dismiss, Boeing has received full notice "of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense." *Curtiss-Wright Corp.*, 347 F.2d at 72. The General Counsel has therefore met both the letter and the purpose of the Board's Rules for issuing complaints. 29 C.F.R. § 102.15. Therefore, Boeing's Motion to Dismiss must be denied.

Where, as here, the allegations in the complaint, if true, set forth a violation of the Act, the complaint survives a motion to dismiss. *Children's Receiving Home of Sacramento*, 248 NLRB 308, 308 (1980). "In ruling on a motion to dismiss under § 102.24 of the Board's Rules, 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, 525, fn. 7 (2000) (denying respondent's motion to dismiss). Section 10(b) of the Act provides that any unfair labor practice proceeding "shall, **so far as practicable**, be conducted in accordance with" the Federal Rules of Civil Procedure. 29 U.S.C. § 160(b) (emphasis added).[5] Where the Board's Rules and Regulations establish the notice pleading standard

[5] "In the rules and regulations promulgated by the Board to cover procedure before it, the Board recognized that the accomplishment of the broad purposes of the Act should not be hindered nor prevented by technicalities in procedure." *American Newspaper Publishers,* 193 F.2d at 800. "This is shown by the fact

applicable to a General Counsel complaint, *see*, 29 C.F.R. § 102.15, and that standard does not track the pleading requirements of FRCP 8, it is not practicable to interpret the NLRB Rules and Regulations as requiring the more stringent pleading standard applicable under the federal rules.

B. Boeing's Motion Must Be Denied As It Contains Numerous Genuine Issues Of Material Fact And As Such, Board Law Prohibits Summary Judgment.

Boeing's Motion to Dismiss relies on numerous material factual allegations and exhibits extraneous to the Complaint and the Answer; the ALJ should therefore treat the Motion as one for summary judgment rather than as a motion to dismiss.[6] The Board's Rules and Regulations do not provide for pre-trial discovery. The Board has thus held that summary judgment proceedings are governed by the Board's Rules and Regulations, not by the FRCP, and it has specifically rejected any summary judgment procedure similar to FRCP 56. *KIRO, Inc.*, 311 NLRB 745, 746, n.4 (1993); *Clark's Discount Dept. Store*, 175 NLRB 337, 340 (1969); *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, 495 (1966), *enfd.*, 379 F.2d 517 (7th Cir. 1967), *cert. denied,* 389 U.S. 1041 (1968).

Under the Board's Rules and Regulations, motions for summary judgment and dismissal should be denied where the pleadings indicate that there is a genuine issue of material fact. Board's Rules and Regulations § 102.24. The General Counsel and the Charging Party need not make a showing, through affidavits or other documentary evidence, that there is a genuine issue for hearing; rather, the Board may deny the motion where, as here, the motion itself and the parties' pleading indicate on their face that a genuine issue exists. *KIRO, Inc.*, 311 NLRB 745, 746 (1993); *United States Postal*

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that in these rules and regulations the Board provided that: 'These Rules and Regulations shall be liberally construed to effectuate the purposes and provisions of the Act.'" *Id.* (citing present-day 29 CFR § 102.121).

[6] Alternatively, this material should be stricken.

Service, 311 NLRB 254, 254 n.3 (1993). Instead, the General Counsel may rely upon the allegations in the Complaint, Respondent's denial of these allegations in its Answer, and general averments that factual issues exist requiring a hearing. *KIRO, Inc.*, 311 NLRB at 745-746, 745 n.3; *United States Postal Service,* 311 NLRB at 254.

Boeing has denied in its Answer virtually all material facts set forth in the Complaint.[7] The Charging Party, and presumably the General Counsel, strongly contests the veracity of the many factual allegations stated and relied on in Respondent's Motion to Dismiss. Where such disputes over material facts exist, Respondent's request for dismissal and/or summary judgment must be denied.

II. BOEING'S MOTION TO DISMISS MUST BE DENIED BECAUSE THE STATEMENTS ALLEGED IN THE GENERAL COUNSEL'S COMPLAINT STATE A CLAIM FOR VIOLATION OF SECTION 8(a)(1) AND ARE NOT PROTECTED BY 8(c) OF THE ACT.

An employer violates Section 8(a)(1) of the Act when it makes promises of or grants benefits, or threatens employees with economic hardship because they have engaged in protected activities. *Marion Rohr Corp.*, 261 NLRB 971 (1982); *General Electric Co.*, 215 NLRB 520 (1974); *Patsey Bee, Inc.*, 249 NLRB 976 (1980); *Anderson Cottonwood Concrete Products*, 246 NLRB 1090 (1979). The Board applies "the objective standard of whether the remark would reasonably tend to interfere with the free

[7] For example, Boeing claims in its Motion that someone at the General Counsel's office told someone else (the maker of this alleged out-of-court statement is never identified) that the General Counsel sought to "mothball" the South Carolina facility. Boeing provides no declaration supporting this assertion, nor does it point to any basic facts that would substantiate when or by whom such a statement was made. Notwithstanding Boeing's disingenuous statement that facts outside the Complaint contained in the Motion to Dismiss "are not necessary to a determination that the complaint fails to state a claim," Boeing's Motion not only sets forth countless unsubstantiated and hotly-contested statements of fact, but relies on those facts to argue that pre-hearing dismissal is warranted. If Boeing wishes to establish that its public statements, its siting decision for the second 787 final assembly line, and its dual sourcing decision did not constitute unfair labor practices, it must do so by putting evidence in the record through documents or testimony, so that the ALJ can determine the credibility, relevance and legal significance of such evidence.

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).[8]

Boeing argues that 8(c) of the National Labor Relations Act protects its agents' threatening and coercive statements.[9] However, section 8(c) does not apply to employer statements of "likely economic consequences" that are within its control or "'threats of economic reprisal to be taken solely on his own volition.'" *Gissel Packing,* 395 U.S. 575, 618-19 (1969), citing *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2nd Cir. 1967). An "employer is free to communicate to his employees... so long as the communications do not contain a threat of reprisal or force or promise of benefit." *Id.* at 617.

Boeing misunderstands *Gissel's* holding when it claims that the statements alleged in the Complaint, if made, are protected by 8(c). In *General Electric,* the Board considered *Gissel* when reviewing a challenge to an election because of employer threats made during a unionization campaign. *General Electric,* 215 NLRB at 522. The Board

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[8] In *Dorsey Trailers,* 327 NLRB at 851, *enforced partially in relevant part*, 233 F.3d 831 (4th Cir. 2000), the Board affirmed the ALJ's holding that the employer had violated Section 8(a)(1) by telling employees that it would close its plant because it had no time to waste negotiating an agreement, and that if employees went out on strike they would not be returning to work; by creating the impression that union activity was being kept under surveillance and threatening unspecified reprisals; and by telling employees that it would close the plant if they struck. However, the reviewing court refused to enforce the Board's remedial order for the violation of 8(a)(1), holding that a "restoration order is beyond the authority of the Board when the unfair labor practice does not involve the discriminatory closing of a company facility." *Dorsey Trailers, Inc,* 233 F.3d at 831, 835, 845. The court cited *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 957 (D.C.Cir. 1988) for this proposition, although that citation was not well founded because that case did not address the nature of remedies for 8(a)(1) violations. The refusal to order return to the *status quo ante* reflects the Fourth Circuit's hostility to restoration remedies which it termed "presumptively suspect." *Id.*, 233 F.2d at 245. *See also, Coronet Foods, Inc. v. NLRB*, 158 F.3d 782 (4th Cir. 1998), wherein the Fourth Circuit reversed a restoration order issued by the Board in a supplemental proceeding, which order had already been approved by the Court of Appeals for the District of Columbia Circuit in review of the original decision. *Cf., Yellow Freight System, Inc.*, 234 NLRB 912 (1978) (declining to order reinstatement for violation of 8(a)(1)).

[9] Although, at the same time, Boeing denies those paragraphs in the Complaint alleging that the threatening and coercive statements were made. As explained above, Respondent's denials of the statements alone create genuine disputes of material fact precluding dismissal or summary judgment.

analyzed the employer's statements under the "*Gissel* analysis" for Section 8(a)(1) violations and held that the employer unlawfully acted "to prevent organization efforts by threatening long-term loss of work [through setting up a duplicative production facility] merely because of the possibility of a strike at some speculative future date..." *Id.* at 522 n.6. GE's actions were not simply lawful "defensive action when threatened with an imminent strike," but rather threats of runaway shop discrimination:

> **General Electric's euphemistic references to a "two-source supply" are but a thinly veiled threat to provide more and better job opportunities at nonunion plants than at organized plants, which is the plainest kind of discriminatory conduct."** While General Electric might wish to be able to insure both itself and its customers against production interruptions which can sometimes result from employee concerted activity, no such insurance is legally possible, for the simple reason that employees have a federally protected right to engage in such activity. ... **That right may no more be interfered with by deliberately withholding job opportunities at represented plants than it can by "runaway shop" conduct which precedent has long been established as being illegal.** Threats to engage in such conduct cannot be hidden behind innocent sounding labels such as "two-source supply."

Id. (emphasis added).

The Board rejected G.E.'s defense that its remarks were protected by Section 8(c) and not objectionable in light of *Gissel's* explanations as to the extent to which employers may permissibly go in countering a union's pre-election or organizational campaign, explaining "[t]o make the threat of loss of jobs at Murfreesboro more explicit, General Electric made it clear to the employees that it was about to expand the production of its new motor through the use of a facility other than the currently I.U.E.-represented plant at De Kalb, Illinois, and/or one similarly represented, and that it sought to assign this product to a plant unencumbered by the presence of a collective-bargaining

representative. " *Id.* The Board found that employer speeches given to employees were intended to discourage protected activity in violation of § 8(a)(1). *Id.*

Similarly, statements of fact by Boeing executives, like those alleged in the General Counsel's Complaint, which threaten to move work elsewhere to avoid protected activity, are clearly outside the protection of § 8(c). *See also, e.g., Coradian Corp.,* 287 NLRB 1207, 1212 (1988) (no § 8(c) protection where employer's speech recounted history of labor unrest with union but strongly implied that the events would occur once again and render operations in the current location impossible without offering objective financial facts outside its control); *Rood Industries,* 278 NLRB 160, 162 (1986) (speech not protected by § 8(c) where employer's language strongly suggested he had already decided to remove machinery from plant and move location if the Union's organizing effort succeeded); *Microimage Display Div'n of Xidex Corp. v. NLRB,* 924 F.2d 245, 251 (D.C. Cir. 1991) (management conversations of "strategy to avoid a [new union] contract" do not represent the expression of "views, argument, or opinion" that § 8(c) covers); *see also, Kroger Co.*, 311 NLRB 1187, 1200 (1993), *enf'd by* 47 F.3d 1161 (3rd Cir. 1995) and 50 F.3d 1037 (11th Cir. 1995) (no 8(c) protection; employer violated § 8(a)(1) by telling employees that the company had put previous plans to build a freezer facility at the worksite on hold pending the outcome of company-wide labor disputes).

Accepting all factual allegations in the Complaint as true and construing the Complaint in the light most favorable to the General Counsel (as the ALJ must[10]), the Complaint alleges sufficient evidence of threats and coercion to support a claim for violation of 8(a)(1) of the Act and there is no basis in law to determine those statements are protected by 8(c) of the Act. Boeing's Motion to Dismiss should therefore be denied.

[10] *See Detroit Newspapers, supra,* 330 NLRB at 524, n. 7.

III. THE COMPLAINT ALLEGES FACTS SUFFICIENT TO STATE A CLAIM THAT BOEING VIOLATED SECTION 8(a)(3) OF THE ACT BY DIVERTING WORK OPPORTUNITIES FOR BARGAINING UNIT MEMBERS BECAUSE OF THOSE WORKERS' PAST AND POSSIBLE FUTURE STRIKE ACTIVITY.

A. It Is Unlawful For An Employer To Retaliate Against Employees Who Show A Willingness To Strike By Denying Them Work Opportunities; The Facts Alleged In The General Counsel's Complaint Establish That Boeing Openly Proclaims It Did So When It Moved Some 787 Assembly Line Work To Its Non-Union Plant.

It is well-settled that retaliation against employees due to their exercise of Section 7 rights is an unlawful motive that lies at the very core of the NLRA anti-discrimination law. As the U.S. Supreme Court has made plain, the Act "makes unlawful discrimination against employees who participate in concerted activities protected by § 7 of the Act." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983); *see also NLRB v. Erie Resistor Corp.*, 132 N.L.R.B. 621 (1961), *enf'd. sub nom.* 373 U.S. 221 (1963) ("Under § 8(a)(3), it is unlawful for an employer to discourage participation in concerted activities"); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 271 (1965) (discriminatorily denying job opportunities in order to influence the future exercise of Section 7 rights violates Section 8(a)(3)).

A long and unbroken line of Board and court precedents firmly establishes that an employer commits an unfair labor practice by retaliating against employees for engaging in strikes (indisputably a core Section 7 protected activity). *See, e.g., Erie Resistor Corp., supra.* (granting super-seniority to strike replacements violated § 8(a)(3)); *Molon Motor and Coil Corp. v. NLRB,* 965 F.2d 523, 526 (7th Cir. 1992) (discharge of employee for engaging in protected work stoppage is an unfair labor practice).

Nor may an employer discriminate against employees based on a possible future strike. *See, e.g., Kentucky Tennessee Clay Co.*, 343 NLRB 931 (2004), *enf'd. N.L.R.B. v. Kentucky Tennessee Clay Co.* 179 Fed. Appx. 153 (4th Cir. 2006) (holding that employer's threat to fire employees who later chose to strike and employer's surveillance of plans to strike violated the Act); *Lineback v. Printpack, Inc.* 979 F.Supp. 831 (S.D.Ind., 1997) (granting injunction to reinstate fired local union president based in part on the chilling effect of termination on other members' support for a strike).

Discriminatory relocation of work in reprisal for concerted activity, including strike activity, has consistently been found to violate Section 8(a)(3). *See, e.g., Reno Hilton Resorts*, 326 NLRB 1421 (1998), *enf'd.* 196 F.3d 1275, 1283 (D.C. Cir. 1999) (employer who contracted out security work in reprisal for strike by security workers violated §§ 8(a)(1) and 8(a)(3)); *Lear Siegler. Inc.*, 295 NLRB 857, 859-862 (1989) (holding that employer had discriminatorily transferred work to another location because employees were considering unionizing); *Direct Transit, Inc.*, 309 NLRB 629, n. 2 (1992) (decision to close a facility two days after a newly formed union demanded recognition was motivated by animus, and thus unlawful.)

In *Lear Siegler Inc., supra,* the Board affirmed the ALJ's holding that the company had discriminatorily transferred work to another location. The ALJ and Board rejected the employer's argument that it made the decision to move the work because of its concern that the union drive would cause it to lose contracts and result in financial ruin. Instead, the Board found that the employer's statements showed that the motive was union animus, and the employer's alleged business reasons for the move were merely a pretext. 295 NLRB at 859-862.

Similarly, in *NLRB v. Taylor Mach. Products, Inc.*, 317 NLRB 1187 (1995), 136 F.3d 507, 515 (6th Cir. 1998), the court held that substantial evidence supported the Board's decision that the employer's decision to relocate its secondary operations unit was motivated by union animus and thus violated the Act. In that case, the Board held that the employer violated the Act by "[r]elocating its secondary operations because the employees involved in those operations had become or remained members of the Union or given assistance or support to it, or because other employees had engaged in such activities." *Id.* at 1187.

The General Counsel's Complaint alleges facts showing that Boeing made no secret of the primary reason it moved the second 787 assembly line from Everett to its non-union plant in South Carolina. Boeing made it clear on numerous occasions – directly to its employees, and through the media – that it decided to transfer the 787 final assembly work to South Carolina because of its Puget Sound employees' previous strikes and their continued willingness to use the strike to protect their collective bargaining agreement. *See*, ¶ 6 of the General Counsel's Complaint, detailing Boeing's coercive statements that it would remove or had removed work from the Unit because the employees had struck and Boeing's threats or implied threats that the Unit would lose additional work in the event of future strikes:

- In a quarterly earnings conference in October 2009, a call that was posted on Boeing's intranet website for all employees and reported in the media, CEO Jim McNerney made an extended statement regarding "diversifying [Respondent's] labor pool and labor relationship" and moving work to South Carolina due to "strikes happening every three or four years in Puget Sound."

- In October 2009, Boeing informed employees, via a memorandum, 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.

- In December 2009, Boeing publicly attributed its 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.

- In March 2010, CEO Jim Albaugh explained to the media that Boeing decided to locate its 787 Dreamliner second line in South Carolina because of past Unit strikes, and threatened the loss of future Unit work opportunities because of such strikes.[11]

Assuming that these factual allegations are true (as the ALJ must on a dispositive motion), the Complaint adequately states claim for an 8(a)(3) violation, both because the alleged statements, along with Boeing's actual decision to transfer its second 787 Dreamliner production line from the Unit to its non-union site in South Carolina, are inherently destructive of the rights guaranteed employees by Section 7 of the Act and because the work transfer decision constitutes unlawful discrimination. To a worker in Puget Sound, Boeing's message could not be more clear: strike and we will punish you by moving work to non-union South Carolina.[12]

The facts alleged in the Complaint sufficiently allege Boeing's discriminatory and retaliatory motive in relocating the second 787 line to its non-union plant in South Carolina. The facts sufficiently allege that Boeing discriminated in the provision of job opportunities based on employees' exercise of Section 7 rights. The Complaint alleges that Boeing provided job opportunities to its non-union employees, while denying those job opportunities to its union employees who showed a continued willingness to engage in concerted activity to protect and enhance their collective bargaining agreement. Such discriminatory use of economic punishment and reward violates Section 8(a)(3) and the

[11]Albaugh stated that "the overriding factor" for the decision to move to South Carolina "was not the business climate" and "not the wages we are paying today. [The reason] was that we can't afford to have a work stoppage every three years."

[12] To a worker in South Carolina, the message is equally clear: do not engage in concerted action and you will be rewarded.

core purpose of the Act to empower employees to choose whether to collectively bargain free from coercion by their employer. *Darlington*, 380 U.S. at 271.

In a Section 8(a)(3) case such as this one, the Board uses the burden-shifting scheme set forth in *Wright Line* to determine whether an employer was unlawfully motivated. *Wright Line,* 251 NLRB 1083 (1980), *enf'd.* 662 F.2d 899 (1st Cir. 1981). Under *Wright Line,* the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. 251 NLRB at 1089. Circumstantial evidence is sufficient to establish anti-union motive. *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir. 1997). "To determine motive, the Board may rely on indirect evidence and inferences reasonably drawn from the totality of the circumstances." *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 42 (1st Cir. 2004). Motive cases are almost always highly fact dependent, precluding summary judgment.

Once the Counsel for the General Counsel has established a *prima facie* case of discrimination, Boeing will be tasked with demonstrating that the same action would have taken place even in the absence of protected conduct. Boeing cannot satisfy this burden at the pre-trial stage and secure dismissal through self-serving factual assertions without any evidentiary support. Rather, Respondent must prove its defense through reliable, admissible evidence. *See*, *Microimage*, 925 F.2d at 251-52, *citing NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963) (holding that under *Wright Line*, to avoid a finding of violation of Section 8(a)(3), the employer would have to "prove that it would

have undertaken the action alleged to be an unfair labor practice even in the absence of the antiunion sentiment"). Summary pre-trial dismissal of the 8(a)(3) claim would be error.

B. *Brown* and Other Lockout Cases Do Not Apply To The Allegations In The Complaint, And Boeing's Effort To Radically Expand *Brown* Is Not Supported By Any Legal Authority.

The Complaint alleges that Boeing violated Sections 8(a)(1) and 8(a)(3) by deciding to transfer a 787 production line and sourcing supply program to a non-union facility because Unit employees engaged in protected strike activity and to discourage future strikes. (Complaint, ¶¶ 7-11). Boeing contends that it is privileged to take efforts to blunt the effectiveness or impact of future strikes, citing a single decades-old lockout case that the Board has refused to expand beyond its narrow facts. For the reasons set forth below, Boeing's Motion to Dismiss based on the argument that, as a matter of law, its discriminatory and retaliatory motives were lawful, must fail.

1. *Brown* Only Applies In The Narrow Factual Situation Where There Are Negotiations for A Successor Collective Bargaining Agreement, A Multiemployer Bargaining Group, A Whipsaw Strike, And A Lockout. Boeing Has Not Alleged Any Of These Facts Exist Here And Thus *Brown* Is Inapposite.

Boeing cites *NLRB v. Brown*, 380 U.S. 278 (1965), in support of its misguided position that it is permitted to base a decision to move work on its employees past and future collective activity if it did so to "blunt the effectiveness of an anticipated strike." Motion at 21-22, citing *Brown*, 380 U.S. at 283. *Brown,* of course, involved a multiemployer bargaining group which locked out their employees in response to a whipsaw strike against one member of the group and continued operations with temporary employees. *Id.* at 281. The Court found that the lockout was "all part and

parcel of respondents' defensive measure to preserve the multiemployer group in the face of the whipsaw strike..." and "[was] concededly within the rule of *Buffalo Linen*." *Id.* at 284, 288.[13]

Brown is totally inapposite to the instant case, because it is not alleged, nor is it true, that Boeing is currently engaged in collective bargaining, acting to preserve a multiemployer group, acting in response to a whipsaw strike, or imposing a lockout. *See Brown*, 380 U.S. 278 (1965), and *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 419 (1982) ("[m]aintaining the stability of the multiemployer unit was the key to [the *Brown*] decision").

2. Even if Boeing Could Show the Necessary Factual Prerequisites for *Brown* to apply, *Brown* Never Applies Where There Is Evidence of Discriminatory Conduct By An Employer, As There Is Here In Abundance.

The courts and the NLRB have never construed *Brown* as Boeing suggests it should be by this ALJ. At most, *Brown* permits limited employer economic action (a lockout) only in the limited circumstances of that case. As to the dictum that Boeing relies on in *Brown,* no court has ever applied the dictum in *Brown* as Boeing suggests. To the contrary, the Board and the courts have recognized the limitations of *Brown* in a variety of cases.

For example, in *National Fabricators, Inc.*, 295 NLRB 1095 (1989), *enf'd*, 903 F.2d 396 (5th Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991), an employer "selected seven employees for a temporary economic layoff on the ground that they were likely to honor a union picket line that might be set up at the Respondent's establishment in the

[13] In the "*Buffalo Linen*" case, *NLRB v. Truck Drivers Union*, 353 U.S. 87 (1957), the Court "sustained the Board's finding that, in the absence of specific proof of unlawful motivation, the use of a lockout by members of a multiemployer bargaining unit in response to a whipsaw strike did not violate either s 8(a)(1) or s 8(a)(3)." *Brown, supra,* at 281 (citing *Buffalo Linen*).

near future." *Id.* at 1095.[14] The employer argued that its motive was lawful under *Brown* and other lockout cases – an argument that was flatly rejected by the Board.

> In *Brown*...the Court stressed that the lockout and hiring of temporary replacements, although having a remote tendency to discourage union membership, still were reasonably adapted to the effectuation of a legitimate business end – defending the integrity of the multiemployer bargaining association in the face of a whipsaw strike. 380 U.S. at 288.
>
> In contrast, the Respondent here offers no compelling reason why it had to implement its economic layoff by selecting those employees who it feared would honor a possible picket line. Unlike the employers in the lockout cases, the Respondent was not responding to a bargaining impasse, nor attempting to protect an employer bargaining association.

Id. at 1095-96. Thus, the Board held, "[w]e do not believe that the business justifications upheld in [the lockout] cases can be so easily transposed to the instant case." *Id.* at 1095.

Indeed, the Board found that the Employer's conduct of targeting the employees who were likely to engage in protected union activities "is the kind of coercive discrimination that naturally tends to discourage unionization and other concerted activity." *Id.* Enforcing the Board's order, the Fifth Circuit agreed that "[p]ermitting such conduct would allow an employer to systematically discriminate against all union employees on the grounds that they are more likely to engage in protected activities than nonunion employees." *National Fabricators, Inc. v. NLRB*, 903 F.2d at 400.

Likewise, in *International Paper Co.*, 319 NLRB 1253, 1269 (1995), *enforcement denied*, 115 F.3d 1045 (D.C. Cir. 1997), the Board found that *Brown* did not permit

[14] Much like the executives of Boeing did in the statements referenced in the General Counsel's Complaint, the plant superintendent in *National Fabricators* candidly admitted that its business decision was made for the purpose of avoiding future protected concerted activity, "[I]f you're going to string out for two or three weeks and carry these people on your payroll and invest money in them, if they're going to quit anyhow a week later, why in the hell are you going to put money into them, lay them off." *Id.* at 1096. The ALJ found that "he was referring to the likelihood that the alleged discriminatees would refuse to cross a union picket line when he testified that they were going to quit." *Id.* at 1097.

permanent subcontracting, but rather only applied to temporary replacements in a valid lockout. The Board reasoned:

> The use of permanent subcontracting here would do more than **merely influence the outcome of the substantive terms of the instant labor dispute**. The Respondent's conduct rather would result in permanent job loss, as well as additional employee dislocation, serving to **chill the future exercise of employee rights by remaining unit members**. The Respondent's conduct would accordingly have **a continuing effect on the future exercise of employee rights**—on both employees who returned to work and those who did not—**well beyond the settlement of the instant dispute** that "stands as an ever-present reminder of the dangers connected with ... union activities."

Id. at 1270-1271 (emphasis added) (citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963)).

The Complaint alleges not that the replacement of unit employees is temporary, as in *Brown*, but that the 787 work opportunities are permanently lost through the placement of the second 787 line elsewhere. Like in *International Paper*, Boeing's conduct has "a continuing effect on the future exercise of employee rights...well beyond the settlement of the instant dispute." *Id.*

In addition, the lockout cases are inapplicable because, as the evidence will show, the parties are midterm on an executed agreement and are not currently in bargaining. *American Ship Building*, 380 U.S. 300 (1965), was issued the same day as *Brown.* There, the Court 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." *Boilermakers Local 88 v. NLRB*, 858 F.2d 756, 760 (D.C. Cir. 1988) (quoting *American Ship Building*, 380 U.S. at 318). Thus, *American Ship Building* cannot be legitimately invoked by Boeing to support the validity of its

actions. *Accord, Allina Health System*, 343 NLRB 498, 500-501 (2004) (Board rejected hospitals' argument that lockout was permitted under *American Ship Building*, observing, "[w]hatever the Respondents' legitimate economic interests were, they had been resolved through collective bargaining with the Union," and this "economic weapon cannot be condoned as legitimate in the absence of negotiations between the Respondents and the Union."); *Ethyl Corp.*, 231 NLRB 431, 433 (1977) (finding employer's post-organizing campaign layoffs at Tiptonville plant after transfer of work to new plant violated 8(a)(3), and noting that the dissent misunderstood *Brown* because "no strike was anticipated, let alone imminent, at the Tiptonville plant").

Thus, even if *Brown* arguably applied to this case, which it does not, the *Brown* Court itself recognized that "antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice." 380 U.S. at 288 (citing *NLRB v. Erie Resistor Corp.*, 373 U.S. at 227); *see also, Boehringer Ingelheim Vetmedica, Inc.*, 350 NLRB 678, 689 (2007) ("[p]roof of an employer's unlawful motive can convert an initially lawful lockout into an unlawfully motivated lockout that violates the Act") (citing *R. E. Dietz Co.*, 311 NLRB 1259, 1264, 1267 (1993)). Here, the Complaint alleges a discriminatory and retaliatory motive behind Boeing's decision to transfer bargaining unit work to a non-union facility. Therefore, even if Boeing's conduct was an otherwise legitimate use of economic pressure under *Brown*, the Employer's anti-union motivation would nonetheless render the relocation an unfair labor practice.[15]

[15] Boeing's continued reference to additional jobs created in the Puget Sound area (which, at this point, is merely an assertion by Boeing, and not evidence in this case) that have been created due to increased demand for its aircraft and incorrectly low estimates of the need for assembly workers on the 787 does not erase the adverse impact on the bargaining unit. Although Boeing argues in its brief that these new jobs are the result of "consumer demand," it also suggests that these new jobs rebut any inference of union animus. If "consumer demand" is what has created these jobs, then these jobs are entirely irrelevant to the case. If indeed Boeing seeks to argue that it is its own generosity created these jobs, then this is the classic iron "fist

IV. THE ALJ SHOULD DENY BOEING'S MOTION TO STRIKE THE REMEDY SOUGHT BY THE GENERAL COUNSEL; ANY CHALLENGE BY BOEING TO THE REMEDY MUST BE MADE UPON A COMPLETE RECORD.

A. Boeing's Motion to "Strike" the Status Quo Ante Remedy Fails As A Matter Of Law Because The General Counsel, By Seeking A Return Of The Unlawfully Transferred Work, Has Requested The Standard Remedy For An 8(a)(3) Violation.

The authority to craft a remedy for unfair labor practices lies with the Board, rather than the ALJ, whose authority in this area is limited to restricting the presentation of evidence in support of particular remedies. *See, e.g., Kaumagraph Corp.*, 313 NLRB 624, 624-25 (1994); *Albertson's Inc.*, 307 NLRB 787, 788 (1992) ("[p]ursuant to Section 10(c), the Board has broad discretion to devise remedies that effectuate the purposes and policies of the Act"), *rev'd on other grounds, N.L.R.B. v. Albertson's, Inc.*, 8 F.3d 20 (5th Cir. 1993), citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898 (1984). *Accord, United Steelworkers v. NLRB,* 482 F.3d 1112, 1116 (9th Cir. 2007) ("The Board's discretion in the selection of appropriate remedies is exceedingly broad."). At the same time, the Board is "required to tailor our remedy to the unfair labor practices the remedy is intended to redress." *Id.* Because Board orders are remedial – e.g., intended to address the particular unfair labor practice violation(s) found, if any, the determination as to the appropriate remedy should be made only following an evidentiary hearing. See, *Sutter*

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inside the velvet glove," such as described in *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409 (1964), and these new jobs bestowed by Boeing do not excuse its prior unlawful act. Regardless, the fact that it is framing any arguments at all based on facts far outside the record elucidates why its Motion to Dismiss should be denied. The same is true regarding Boeing's factual assertions regarding its 2009 discussions with the Union regarding the second 787 line and Boeing's claim of unlimited freedom under its current collective bargaining agreement to transfer work anywhere for any reason, including, apparently, unlawful discrimination. Highly disputed questions of fact and Boeing's own inadmissible, self-serving factual assertions cannot serve as the basis for a motion to dismiss, and thus Boeing's motion must be denied.

Lakeside Hosp., JD(SF)-20-94 (1994) (describing the basis for an ALJ's decision to deny a motion to strike the remedy sought in a Complaint).

The General Counsel's Complaint seeks an order requiring Respondent to have bargaining unit employees operate the second 787 final assembly line in the State of Washington, using supply lines maintained by bargaining unit employees in Washington and Oregon. This remedy sought is entirely consistent with cases involving discriminatory or retaliatory transfers of operations. Where, as here, the work would have been located at the employer's union facility but for the discriminatory conduct of the employer, it is standard practice for the Board to seek the return of the work that was unlawfully relocated. When "bargaining unit work has unilaterally and unlawfully been removed, whether by subcontracting or relocation, it is appropriate to order restoration of the work to the bargaining unit, unless the employer has demonstrated that restoration would be unduly burdensome." *Power, Inc.*, 311 NLRB 599, 600 (1993), *citing Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989). Such a finding regarding burden can only be made on evidentiary record, and it is premature to raise such a defense prior to litigation of the underlying unfair labor practice allegations.

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B. Boeing's Emphasis On The Current Impact On Unit Employees' Terms And Conditions Of Employment Misses Its Mark, Both Because Economic Harm Is Not Necessary To Establish An 8(a)(3) Violation And Because The Loss Of Future Job Opportunities Arising From An Employer's Expansion Of Work Violates 8(a)(3).

The Charging Party vehemently disputes what Boeing states as an uncontroverted fact: that Boeing's location of the second 787 final assembly line cost Unit employees no loss of work, no adverse impact on the terms and conditions of Unit employees, and no remediable injury. *See*, Motion to Dismiss at 25-26. No determination of harm to Unit employees, whether economic or otherwise, can be made at this pre-trial stage. The admissible evidence will establish that Boeing's unlawful transfer of the second 787 final assembly line from Washington to South Carolina has caused and will cause significant economic and non-economic harm to Unit employees in Puget Sound. However, economic harm is not a necessary element of a Section 8(a)(3) violation.

The Board has repeatedly found 8(a)(3) violations in the absence of any present monetary or job loss. *See NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978) (holding that employer unlawfully discriminated against former strikers by shifting from rotating shift system to fixed shift system, with workers being assigned worse shifts the longer they stayed out striking); *WestPac Electric, Inc.*, 321 NLRB 1322, 1374 (1996) (Board adopting ALJ decision, where, in relevant part, an employer was accused of punishing a returning striker by giving him an isolated assignment); *Cold Heading Co.*, 332 NLRB 956, 975-76 (2000) (finding 8(a)(3) violation where employer routed two new pieces of bolt manufacturing equipment away from a facility where the employees had recently affiliated with the UAW and installed them instead at a recently opened, non-union facility).

Additionally, the Board has long recognized that the discriminatory loss of *future* job opportunities arising from the expansion of work violates 8(a)(3). *See*, cases cited in II, *supra.* In *Adair Standish*, for example, the Board held that an employer violated Section 8(a)(3) of the Act when it refused to install a new printing press, which would have expanded its operations, because of union activity at the facility. *Adair Standish Corp.*, 290 NLRB 317, 318 (1988), *enf'd in relevant part and vacated in part,* 912 F.2d 854 (6th Cir. 1990). The employer had ordered the press prior to an organizing drive and scheduled it to be installed after the drive had begun. Following union certification, the employer canceled the installation and installed it instead at a non-union facility.

The Board not only adopted the ALJ's ruling that the decision to place the new press at the non-union site violated Section 8(a)(3) because it was motivated by union animus, it further emphasized that the failure to install the new press at the union site cost the employees there new work opportunities:

> In adopting the judge's decision in this regard, **we additionally find that the failure to install the Goss press at Standish [the Union facility] adversely affected the employees' terms and conditions of employment because the arrival of the new press was reasonably anticipated by the employees as having a beneficial effect on their jobs. According to the credited and uncontradicted testimony of employee Tim Cummings, [Plant Manager] Dennis Adair had spoken of the new press in the context of the Company's attempt to expand into a new field. 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.

Id. at 319 (footnote omitted) (emphasis added).

The evidence pertaining to Boeing's siting decision for the second 787 final assembly line will establish a loss of future work opportunities and attendant benefits

similar to that in *Adair Standish*. To the extent that Boeing can avoid liability for its discriminatory decision to locate the second 787 final assembly facility in South Carolina, it must present such evidence on the record. The Administrative Law Judge should deny Boeing's motion to strike the General Counsel's remedy and fully hear the evidence in the case before ruling on the appropriate remedy.

C. Any Determination Whether The Status Quo Ante Remedy Will Cause Boeing Undue Hardship Is Intensely Fact-Specific And Thus Cannot Be Decided At This Pre-Hearing Stage.

Boeing's Motion to Strike the remedy rests on numerous disputed factual allegations concerning which the ALJ has not yet heard a whit of evidence. *See*, Motion to Dismiss at 26-27. The ALJ should not entertain any argument by Respondent that the remedy is unduly burdensome at this early stage of the proceedings. Boeing will be afforded the opportunity to introduce any competent evidence the ALJ determines to be relevant to the claims, defenses and remedies at issue in this matter.

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.

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CONCLUSION

For all of the foregoing reasons, the Charging Party respectfully requests an order denying, in its entirety, the "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" filed by Boeing.

Respectfully submitted this 21st day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2011, I caused the foregoing Charging Party's Opposition To Respondent's Motion To Dismiss And Motion To Strike to be e-filed with the National Labor Relations Board Division of Judges and a copy to be e-mailed to the following:

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