Statement of

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Capital Investment, Relocations and Major Business Changes Under the NLRA

Chairman Issa, Representative Maloney, and Committee Members, thank you for your invitation to participate in this hearing. I am honored to appear before you today.[1]

I am a Senior Fellow at the University of Pennsylvania's Wharton School and for more than 30 years I have been associated with the Wharton Center for Human Resources (previously known as the Wharton Industrial Research Unit). The majority of my academic work has dealt with the National Labor Relations Act ("NLRA" or "Act")[2] and the Act's treatment of major business changes including relocations and significant capital investment decisions.[3] I am also a partner in the law firm of Morgan Lewis & Bockius LLP, and I have been a labor lawyer in private practice representing management since 1982.

Summary – The Perfect Storm

Capital investment and major business changes have always warranted special attention under the National Labor Relations Act.[4] These issues have been addressed in many decisions

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[1] My testimony reflects my own views and should not be attributed to The Wharton School, the University of Pennsylvania, or Morgan Lewis & Bockius. I am grateful to David R. Broderdorf, Ross Friedman, Stephanie Christiansen-LaRocco and Lavanga V. Wijekoon for assistance.

[2] 49 Stat. 449 (1935), 29 U.S.C. §§ 151 *et seq*.

[3] *See*, *e.g*., Philip A. Miscimarra, THE NLRB AND MANAGERIAL DISCRETION: PLANT CLOSINGS, RELOCATIONS, SUBCONTRACTING, AND AUTOMATION (1st ed. 1983), cited by the NLRB as containing a "comprehensive review of prior decisions in this area, including cogent criticism of inconsistency and ambiguities." *Milwaukee Spring Div. of Illinois Coil Spring Co. ("Milwaukee Spring II")*, 268 N.L.R.B. 601, 603 n.12 (1984), *affd sub nom. Int'l Union, UAW v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985). *See also* Philip A. Miscimarra, Ronald Turner, Ross H. Friedman, Shannon M. Callahan, Brandon R. Conrad, Michael E. Lignowski & Andrew Scroggins, THE NLRB AND MANAGERIAL DISCRETION: SUBCONTRACTING, RELOCATIONS, CLOSINGS, SALES, LAYOFFS, AND TECHNOLOGICAL CHANGE (2d ed. 2010) (hereinafter "MANAGERIAL DISCRETION, 2d ed."); Herbert R. Northrup & Philip A. Miscimarra, GOVERNMENT PROTECTION OF EMPLOYEES INVOLVED IN MERGERS AND ACQUISITIONS (1st ed. 1989 and 1997 supp.); Philip A. Miscimarra & Kenneth D. Schwartz, *Frozen in Time – The NLRB, Outsourcing and Management Rights*, 18 J. LAB. RES. 561 (1997).

[4] The NLRA was created during the Great Depression, and was adopted to foster collective bargaining for the overriding purpose of eliminating burdens and obstructions on commerce. *See* NLRA § 1, 29 U.S.C. § 151; *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981) (citation omitted). Even in 1937, when the Act was two years old, the Supreme Court stated that work stoppages had an "immediate" and "potentially catastrophic" impact on the "far-flung activities" of a company. *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 41 (1937).

of the National Labor Relations Board ("NLRB" or "Board") and the courts, including nearly a dozen U.S. Supreme Court decisions.[5]

Based on these cases, three factors – taken together – help explain why the litigation against Boeing presents such significant problems.[6] The first factor involves NLRA *process*. Second is the *substance* of NLRA case law regarding capital investment decisions and major business changes. Third, the Boeing litigation involves very significant concerns about the *outcome* or *remedy* being sought in the case.

I have a pair of preliminary disclaimers.

- My view of existing case law differs from what has been advanced by the Board's General Counsel concerning the claims asserted against Boeing, which challenge Boeing's decision to create a second 787 Dreamliner assembly facility in South Carolina.
- It does not break new ground for there to be differences regarding how the law applies to fundamental business changes. "Even with the luxury of backward-looking analysis after the relevant events have already occurred, in many cases NLRB members have been unable to agree among themselves concerning applicable standards. In other cases, a similar tug-of-war has been evident between the NLRB, its ALJs and/or the courts of appeals."[7]

The differences in existing case law can present challenges when the General Counsel decides what cases to pursue.

But the challenges facing employers are magnitudes greater. Companies like Boeing must, in real time, attempt to interpret and comply with existing law while making million and billion dollar investment decisions, with spillover consequences affecting employees, family members, local and state governments, customers, vendors, suppliers and the rest of the economy.

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[5] Supreme Court cases addressing fundamental business changes under the NLRA or the Labor Management Relations Act ("LMRA") include *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U. S. 27 (1987); *First Nat'l Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981); *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *NLRB v. Deena Artware, Inc.*, 361 U.S. 398 (1960); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945); *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942).

[6] In my testimony, I do not differentiate between "General Counsel" and "Acting General Counsel," even though the General Counsel role at the Board is currently being performed by Acting General Counsel Lafe Solomon, who I respect personally and professionally. My comments focus on the General Counsel's institutional and functional role and not Mr. Solomon individually.

[7] MANAGERIAL DISCRETION, 2d ed., at 568.

Background

There is not yet an evidentiary record in the Boeing case, and I have not discussed the case with the Acting General Counsel, representatives of Boeing or other litigants.[8] However, basic facts and the claims asserted against Boeing have been outlined in the Board's complaint and in public statements released by the parties.

Boeing produces military and commercial aircraft at facilities throughout the United States, including one facility in Everett, Washington, where employees are represented by the International Association of Machinists and Aerospace Workers ("IAM" or "Union").[9] Boeing employs a total of approximately 25,000 IAM-represented employees in the Puget Sound area.[10]

In 2007, Boeing commenced assembly of the 787 Dreamliner at the Everett facility,[11] with planned production of seven 787 Dreamliners per month.[12]

The IAM engaged in five strikes at Boeing's Puget Sound facililties since 1975,[13] including a 58-day strike in 2008 which shut down all 787 production when the Dreamliner program reportedly was already 15 months behind schedule.[14]

Based on a backlog of orders extending through approximately 2020 (among other things), Boeing decided to create a second 787 Dreamliner assembly line, which was projected to produce three additional 787 Dreamliners per month.[15] This second assembly line reportedly has involved capital investment of more than $750 million.[16]

Boeing's IAM collective bargaining agreement gave Boeing the unilateral right to decide where work would be located (which the Board's General Counsel concluded was a waiver of

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[8] Under the Board's normal process, the Administrative Law Judge ("ALJ") hearing is held for the purpose of developing a detailed factual record. The scheduled ALJ hearing in the Boeing litigation commenced June 14, 2011 and is likely to continue for some time. The facts referenced in my testimony are based on the Board's Complaint and Notice of Hearing (dated April 20, 2011) ("Complaint"), Boeing's Answer (dated May 4, 2011) ("Answer"), public statements released by the Board and Boeing, and other facts reported in the media. These sources obviously are not equivalent to testimony and exhibits admitted in a formal hearing, nor do they provide the opportunity for cross examination or credibility determinations.

[9] Complaint ¶¶ 2, 3, 5.

[10] Statement of J. Michael Luttig, Senate Committee on Health, Education, Labor and Pensions, p. 4 (dated May 12, 2011) ("Luttig Statement").

[11] Luttig Statement, p. 3.

[12] Letter from J. Michael Luttig to Lafe E. Solomon, May 3, 2011, p. 6 ("Luttig Letter"). Boeing has described the 787 Dreamliner as a revolutionary airpline with advanced electric systems and significantly greater energy efficiency than comparably sized airplanes. Luttig Statement, p. 1.

[13] The IAM engaged in strikes during 1977, 1989, 1995, 2005 and 2008. Complaint ¶ 5(d); Answer, Response to Specific Allegations of the Complaint, ¶ 5(d).

[14] Luttig Statement, p. 4.

[15] Luttig Statement, pp. 3-4; Luttig Letter, p. 6.

[16] "Boeing Cuts Ribbon on $750 Million North Charleston Plant," Greenville News, June 11, 2011. Boeing has reported that the North Charleston facility has involved an estimated financial commitment exceeding $1 billion. Luttig Statement, p. 7.

any Union bargaining rights).[17] Nonetheless, Boeing engaged in discussions with the IAM regarding the possibility of locating the additional 787 Dreamliner assembly line in Puget Sound, but Boeing and the IAM were unable to agree on mutually acceptable terms.[18]

Regarding Boeing's possible creation of the second assembly line in South Carolina, state government officials in South Carolina offered Boeing financial incentives amounting to hundreds of millions of dollars.[19] Boeing also reportedly considered South Carolina attractive because it would provide geographic diversity in final assembly, lower labor costs, and a favorable general business climate, among other things.[20] Boeing management also reportedly took into account "[t]he Company's inability to reach agreement with the IAM" which, it had been hoped, could have "ensure[d] long-term production stability in Everett."[21]

In late October 2009, Boeing announced that it decided to locate the second 787 Dreamliner assembly line in North Charleston, South Carolina.[22] According to Boeing, this decision has not caused any layoffs or loss of jobs within the Puget Sound bargaining unit, and no work or equipment has been removed or transferred away from Boeing's Puget Sound operations.[23]

Boeing has asserted that it could lawfully decide to locate the new production line in South Carolina "to protect the stability of the 787's global production system" and "to mitigate the harmful effects of an anticipated future strike."[24] The Complaint against Boeing alleges that Company representatives unlawfully discriminated against IAM-represented employees in Puget Sound because of their past or future strikes. Boeing representatives allegedly stated (i) the new South Carolina facility was intended "to reduce [Boeing's] vulnerability to delivery disruptions caused by work stoppages," (ii) the decision reflected a desire "to use a 'dual-

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[17] The collective bargaining agreement between Boeing and the IAM reportedly provides that the Company has the unilateral right to "designate the work to be performed by the Company and the places where it is to be performed." Luttig Statement, p. 5.

[18] Boeing and IAM representatives reportedly met seven times between August 27 and October 21, 2009. Luttig Statement, p. 5. In exchange for locating the second line in Washington State, Boeing reportedly sought a long-term contract with protection from production interruptions, and the IAM reportedly sought guaranteed future wage/benefit increases, a requirement that Boeing would locate future commercial aircraft work in the Puget Sound area (or face potential termination by the IAM of the collective bargaining agreement), and Boeing neutrality regarding future IAM organizing efforts elsewhere in the country. Luttig Letter, pp. 5-7.

[19] Luttig Statement, p. 7.

[20] *Id*.

[21] *Id*.

[22] Complaint ¶ 6(b); Answer, Response to Specific Allegations of the Complaint, ¶ 6(b); Luttig Statement, p. 7; "Boeing to Place Second 787 Assembly Line in North Charleston, SC," Boeing Media Release, Oct. 28, 2009; "Boeing Picks South Carolina for 2nd 787 Line," Seattle Times, Oct. 28, 2009; "Boeing Picks South Carolina for New 787 Line," Seattle Post-Intelligencer, Oct. 27, 2009.

[23] Luttig Statement, pp. 8-9; Luttig Letter, pp. 1-2. When Boeing made its announcement regarding the decision to create the second 787 Dreamliner assembly plant in South Carolina, it also announced plans to build a temporary 787 "surge" assembly line at Boeing's existing facility in Everett, Washington – where even more IAM-represented employees will work on a temporary basis – until the South Carolina plant reaches its projected production level. "Everett Will Get A Second 787 Line, Briefly," Seattle Times, Nov. 1, 2009. See also note 22, *supra*.

[24] Answer, Defenses, ¶ 3, Response to Specific Allegations of the Complaint, ¶¶ 6(a) to (e).

sourcing' system," and (iii) costs associated the new line in South Carolina were offset by "strikes happening . . . every three or four years in Puget Sound."[25]

The 787 Dreamliner production facility in South Carolina officially opened on Friday, June 10, 2011, and more than 1,000 employees have already been hired, with planned additional future hiring.[26]

1. NLRA Process: Delays, Costs, and Uncertainty

I will now turn to the factors which, in combination, have produced such intractable problems concerning the litigation against Boeing.

The first factor relates to process – the process for resolving NLRA disputes is poorly suited to deal with significant investment decisions. In these cases, current Board process conjures up the image of a tortoise that has little chance of winning any race, because the global economy requires movement at speeds not imaginable when the Act was adopted.

Some process-related elements in the Board case against Boeing should be clear to everyone:

- *The General Counsel does not decide these cases*. The General Counsel is responsible for investigating alleged NLRA violations *and* acting in the role of a prosecutor – *i.e.*, the General Counsel identifies the cases that warrant being litigated for resolution by the NLRB.
- *There has not been any "finding" of unlawful conduct by Boeing*. Cases involving alleged NLRA violations are resolved by the NLRB, not the General Counsel. If the Boeing litigation moves forward like most other NLRB cases, it will be years before the dispute even reaches the point where the Chairman and Members of the NLRB can give the case consideration and render a decision.

However, issuance of the complaint has placed Boeing's South Carolina investment on a very long NLRB litigation treadmill: there is typically an Administrative Law Judge ("ALJ") hearing, followed by post-hearing briefing, then "exceptions" can be filed which challenge designated parts of the ALJ ruling, the Chairman and Members of the NLRB evaluate the "exceptions," the NLRB itself renders a decision, and court appeals can be pursued (the courts, in turn, can return the case to the NLRB, along with other possible outcomes).

Merely describing these steps demonstrates the significant "process" problem that exists when an NLRB complaint issues against significant capital investment or major business changes. Contrary to the technical "process" rules applied by the Board, the complaint's issuance does *not* merely represent the start of litigation in these cases. As a practical matter,

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[25] Complaint ¶¶ 6(a) to (e).

[26] "A Grand Boeing Opening," The Post and Courier (Charleston, SC), June 11, 2011; "Boeing Opens New South Carolina 787 Final Assembly Building," Boeing Media Release, June 10, 2011; "Boeing Cuts Ribbon on $750 Million North Charleston Plant," Greenville News, June 11, 2011; Luttig Statement, p. 7.

the complaint's issuance means there will be significant adverse consequences for the employer – and others dependent on the employer – regardless of who eventually prevails:

- Issuance of a complaint means the challenged Company investment becomes the equivalent of a frozen asset, which is then basically tied up for years.
- It is often difficult, expensive or impossible to make further investment decisions while the NLRB litigation remains unresolved.
- Competitive demands or financial problems which gave rise to the challenged investment or business change are often made worse by the litigation.
- Litigation often makes it necessary to establish contingent reserves and to prepare for potential liabilities or remedies that may be ordered.
- Litigation requires significant management resources often including extensive involvement and time of the company's most senior executives.
- Litigation-related costs and uncertainty often add to costs and burdens associated with Company efforts to comply with the Act that have *already* taken place .
- These problems and costs do not only affect the company: they cause adverse consequences for employees, family members, customers and local businesses, state and local governments, surrounding communities, and – in many cases – even the union(s) and union members responsible for initiating the litigation.

The Board's General Counsel can be regarded as the agency's traffic cop. He does not write the laws, he does not resolve alleged violations, and the laws are important. However, alleged traffic violations do not routinely involve impounding the car. This is the practical effect when an NLRB complaint challenges capital investment and major business changes. The litigation creates significant costs and uncertainty which can severely damage the vehicles people need for stable employment and economic growth.

2. Substance: Capital Investment versus "Runaway Shop"

Concerning the substance of the law, several aspects of existing law appear to contradict claims that Boeing violated sections 8(a)(3) and (1) of the Act by locating a new, additional 787 Dreamliner production line in South Carolina.

(a) Existing Law Defers to Management Decisions Regarding Substantial Capital Investment and Entrepreneurial Changes

A recurring theme in cases involving major business changes has been a recognition that the NLRA has as its focus *employment* terms and conditions, and *not* business judgments involving "the core of entreprenurial control."[27] The NLRB also lacks authority to dictate the

[27] *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964). In *Fibreboard*, the Supreme Court held that maintenance subcontracting was a mandatory subject of bargaining under the NLRA, and the Court emphasized that "[n]o capital investment was contemplated" and mandatory bargaining "would not significantly abridge [the company's] freedom to manage the business." *Id*. at 213. In his well-known concurring opinion, Justice Stewart

substance of agreements unless they have been mutually agreed upon by the parties themselves.[28]

The Supreme Court has stated that, when adopting the NLRA, "Congress *had no expectation that the elected union representative would become an equal partner* in the running of the business enterprise in which the union's members are employed."[29] When a unionized facility is purchased and where the buyer hires all of the seller's employees (and, thus, is obligated to recognize and bargain with the union), the Supreme Court has held the buyer is not bound by the seller's labor contract because this could "*discourage and inhibit the transfer of capital*."[30] Other decisions likewise show that NLRA legality often turns to a significant degree on the presence or absence of significant capital investment and other major business changes.[31]

Section 8(a)(3) of the Act prohibits antiunion discrimination "in regard to hire or tenure of employment or any term or condition of employment."[32] However, section 8(a)(3) cases also take into account whether there are substantial capital investment decisions or major business changes. The Supreme Court in *Textile Workers Union v. Darlington Manufacturing Co*.[33] held that employers can even *shut down* unionized operations based on hostility towards the union and

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stated more broadly that the Act did not require bargaining over managerial decisions "which lie at the core of entrepreneurial control. . . . Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." *Id*. at 223 (Stewart, J., concurring). He concluded that the Act's bargaining obligations excluded "those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security." *Id*.

[28] *See* NLRA § 8(d), 29 U.S.C. § 158(d), which states the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." *See also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937); NLRB *v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952), *citing* H.R. Rep. No. 245, 80th Cong., 1st Sess. 19 (1947).

[29] *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 668, 676 (1981) (emphasis added). The Supreme Court in *First National Maintenance* held that employers could unilaterally decide to shut down a union-represented facility, without bargaining, even if the employer had other facilities that remained in operation. *Id*.

[30] *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287-88 (1972) (emphasis added).

[31] *See, e.g.*, *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 491 (11th Cir. 1982) (employer did not violate § 8(a)(3) based on shutdown of unionized facility followed by increased production at nonunion facility, where company made a "business decision" to consolidate operations when "faced with a deteriorating economic climate"); *Arrow Automotive Industries, Inc. v. NLRB*, 853 F.2d 223, 231-32 (4th Cir. 1988) (employer did not violate § 8(a)(5) when, following a lengthy strike at a unionized plant in Massachusetts, the employer closed the plant and relocated the work to South Carolina; the court concluded: "The magnitude of the decision to shut down an entire facility and to reallocate large amounts of capital underscores the need for certainty in the conduct of business affairs. . . . Companies must be able to make closing and consolidation decisions of the magnitude presented here"); *General Motors Corp. (GMC Truck & Coach Div.)*, 191 N.L.R.B. 951, 952 (1971) (transfer of operations declared lawful under § 8(a)(5) based on conclusion that "decisions such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature").

[32] NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3).

[33] 380 U.S. 263 (1965).

union members at the location being shut down, notwithstanding the fact that nonunion plants remain in operation.[34]

In *Dorsey Trailers, Inc. v. NLRB*,[35] the employer committed several unfair labor practices in connection with a strike involving a company plant in Pennsylvania (Northumberland). Yet, the court *rejected* claims that the employer violated section 8(a)(3) by shutting down the Pennsylvania plant and then "transferring work" and "deciding to relocate" to a new facility in Georgia (Cartersville).[36] Although Boeing has not implemented any "relocation" or "transfer" of preexisting work, the situation in *Dorsey Trailers* otherwise resembles Boeing's creation of a second 787 assembly line in South Carolina:

- A strike at Dorsey's Pennsylvania plant prompted the company to consider the different facility in Georgia because the Company "needed to fill backlogged orders," including some of the "biggest orders in its history."[37]
- Upon investigation, the Company found that the Georgia location was "tremendous" and for many reasons "better suited its needs. . . ."[38]
- The Georgia location offered "substantial efficiency gains" and cost advantages including incentives offered by the State of Georgia, including tax credits, training assistance and utility cost reductions, among other things.[39]

The court concluded that the employer lawfully decided to place its manufacturing operations in Georgia, notwithstanding the strike involving the Pennsylvania facility:

> Dorsey Trailers made a reasoned business decision that for the long term, the Cartersville plant was a superior facility to the Northumberland plant. Although the strike might have precipitated the search for a new plant, economic reasons drove the company to purchase and retain the Cartersville facility.
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[34] In *Darlington*, *supra* note 33, the Supreme Court held that an employer had "the absolute right to terminate his entire business for any reason he pleases" even if the employer was "motivated by vindictiveness toward the union." *Id*. at 268, 273-74. The Supreme Court also held that a discriminatory *partial* shutdown, where other facilities remained in operation, would violate section 8(a)(3) only if the evidence proved the employer "was motivated by a purpose to chill unionism *in . . . remaining plants*. . . ." *Id*. at 274-75 (emphasis added). Concerning an alleged motive to "chill unionism" elsewhere, the Supreme Court indicated this must be proven, and it would *not* suffice to argue the discriminatory closing "necessarily had an adverse impact upon unionization in such other plants." *Id.* at 276.

The Supreme Court in *Darlington* indicated the case did not involve a "runaway shop" whereby the company "would *transfer its work* to another plant or open a new plant in another locality *to replace [the] closed plant*." *Id*. at 272-73 (emphasis added). In the Boeing case, it appears there likewise has been no "transfer" of "work" nor did the South Carolina assembly line "replace" preexisting 787 Dreamliner assembly work in Everett, Washington. *See* subpart (b) below.

[35] 233 F.3d 831 (4th Cir. 2000), *denying enforcement in relevant part*, 327 N.L.R.B. 835 (1999).

[36] 233 F.3d at 839, 840.

[37] *Id*. at 840.

[38] *Id*.

[39] *Id*.

> *The decision of where to locate a business is fundamentally a managerial decision. Companies must account for the costs of operating a facility as well as the benefits of working in a particular place*. . . . In this case, the company made its decision to relocate its plant for a variety of economic reasons. Although Dorsey Trailers violated the Act in the ways we have recounted, it did not do so by relocating its plant to a more favorable business environment.[40]

Using the label "capital investment" does not give employers a blanket exemption from the NLRA. However, the cases indicate that capital investment is important and requires very careful treatment. And in the Boeing litigation, it is clear that "capital investment" is more than a label: Boeing's placement of a second 787 Dreamliner production line in South Carolina has involved a financial commitment of more than $750 million with more than 1,000 existing employees and more to be hired in the future. This obviously involves a substantial commitment of capital and decision-making that is fundamental to Boeing's business.

(b) Section 8(a)(3) Does Not Prohibit New Investment Decisions, Without a "Relocation," "Transfer" or "Removal" of Work

If an employer engages in a discriminatory "transfer," "relocation" or "removal" of work from a facility, based on antiunion hostility, this can violate NLRA section 8(a)(3), which makes it unlawful for an employer "to . . . discourage membership in any labor organization" by engaging in "discrimination *in regard to hire or tenure of employment* or *any term or condition of employment*. . . ."[41]

The Board Complaint against Boeing focuses primarily on a discriminatory alleged "transfer" of the Company's "second 787 Dreamliner production line" (and a related "sourcing supply program") to Boeing's new facility in South Carolina.[42] However, placement of the new production line in South Carolina has not involved any "relocation," "transfer" or "removal" of preexisting work or equipment from Boeing's IAM facilities in Puget Sound, nor have IAM-represented employees experienced any other adverse impact.[43]

The cases indicate that – without some type of *other* tangible employment action – decisions regarding whether and where to make major capital investment decisions are *not* considered a "term or condition of employment" for purposes of section 8(a)(3) and section 8(a)(5).[44] In the Supreme Court *Darlington* decision, the Court held that even a discriminatory *shutdown* of a unionized facility was lawful under section 8(a)(3) – when other employer facilities remained open – in part because such a decision involved what were deemed

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[40] *Id*. at 841, 845 (emphasis added).

[41] 29 U.S.C. § 158(a)(3) (emphasis added).

[42] Complaint ¶¶ 7, 8.

[43] After the initial NLRB charge was filed against Boeing, Regional Director Richard Ahearn reportedly stated to the Seattle Times that "it would have been an easier case for the union to argue if Boeing had moved existing work from Everett, rather than placing new work in Charleston." *See* "Machinists File Unfair Labor Charge Against Boeing Over Charleston," Seattle Times, June 4, 2010.

[44] *See* subpart (a) above.

"peculiarly matters of management prerogative."[45] The *Darlington* Court also indicated that the case did not involve a "runaway shop," which the Court defined as a situation where the employer "would *transfer its work* to another plant or open a new plant in another locality *to replace [the] closed plant*."[46]

The cases indicate that investment in a new facility can be unlawful only if there is some tangible "runaway shop" defined as (i) a physical "relocation" of equipment, or (ii) an identifiable "transfer" of production that is removed from point "A" and placed in point "B."[47] Boeing's investment in South Carolina has not involved this type of physical relocation or transfer-and-removal of work away from the Puget Sound bargaining unit.

(c) Employers Can Lawfully Consider Higher Costs and Improved Bargaining Leverage, and Communicate Their Lawful Reasons for Investment Decisions

The NLRB Complaint against Boeing alleges that various Company representatives made statements suggesting the Company was penalizing Puget Sound employees – based on past or future strikes – by creating the new 787 Dreamliner assembly plant in South Carolina.[48]

Existing law establishes several principles concerning the types of statements that have been attributed to Boeing representatives.

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[45] *Darlington*, *supra* note 33, 380 U.S. at 268-69. The Court held that the discriminatory partial closing involved "peculiarly matters of management prerogative" to a degree that rendered inapplicable § 8(a)(1) unless the evidence established unlawful motivation sufficient to establish a violation of § 8(a)(3). *Id*.

[46] *Id*. at 272-73 (emphasis added).

[47] *See, e.g.*, *Darlington*, *supra* note 33, 380 U.S. at 268-69 (NLRA § 8(a)(3) prohibits a "runaway shop" if the employer who shuts down a union plant "would transfer its work to another plant or open a new plant in another locality to replace [the] closed plant"); *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 491 (11th Cir. 1982) (§ 8(a)(3) applies when employer "transfers work from the closed facility to another plant or opens a new plant to replace the closed plant"; "[i]f no transfer of work has taken place . . . then there has been no unfair labor practice") (citations omitted); *Frito-Lay, Inc. v. NLRB*, 585 F.2d 62, 67-68 (3d Cir. 1978) (no violation of § 8(a)(3) where "the record indicates that instead of a transfer of work . . . the closing . . . represented an elimination of production"); *Garwin Corp.*, 153 N.L.R.B. 664 (1965), *enforced in part sub nom. Local 57, ILGWU v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967) ("It is unlawful for an employer to close down a plant in one locality and move it to another in order to deprive his employees of their statutory rights"); *Kaumagraph Corp.*, 316 N.L.R.B. 793, 801-802 (1995) (ALJ opinion) (no violation of § 8(a)(3) based on nondiscriminatory reason for union facility's "closure and relocation" notwithstanding union recognition shortly before these changes); *Seminole Intermodal Transp., Inc.*, 312 N.L.R.B. 236, 238-39 (1993) (violation of § 8(a)(3) where employer "permanently closed its Columbus terminal . . . and relocated all its Columbus trucking work to Springfield"); *Vico Prods. Co.*, 336 N.L.R.B. 583, 587-89 (2001) (violation of § 8(a)(3) based on decision to "relocate" operation and "to layoff the 33 unit employees"); *Langston Cos., Inc.*, 304 N.L.R.B. 1022 n.2 (1991) (employer did not violate § 8(a)(3) "by transferring the half-bag manufacturing operation from its Arlington plant to its Memphis plant"). *See also* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 Tex. L. Rev. 921, 943 n.80 (1993), *citing FMC Corp.*, 290 N.L.R.B. 483, 487 (1988) ("I have been unable to locate any decisions holding that a withholding of capital investment from a union plant, or a decision not to place new or expanded operations at the plant, was discriminatory under § 8(a)(3). It appears to be necessary under Board law to show that existing unit work was eliminated, subcontracted, or relocated.").

[48] Complaint ¶¶ 6(a) to (e). *See, e.g.*, alleged statements quoted in the text accompanying note 25, *supra*.

First, employers have a protected right under the NLRA to make changes calculated to give the employer greater leverage in future rounds of bargaining with the union.[49] The NLRB itself argued in *American Ship Building Co. v. NLRB*[50] that an employer's "weapons to counterbalance the employees' power of strike" included "economic self-help" measures and the right to "maintain his commercial operations while the strikers bear the economic brunt of the work stoppage."[51]

Second, the NLRA permits employers to make business changes – including "relocation" or "work transfer" decisions – based on economic costs the employer has experienced because of union representation.[52] And under the NLRB "mixed motive" test, a "relocation" will be lawful, even if the employer has hostility towards a union, if economic considerations would have prompted the employer to make the same decision without regard to antiunion sentiments.[53]

Third, it is permissible for employers to *communicate* to employees and Union representatives the economic reasons that are responsible for important business changes.[54]

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[49] Inherent in any strike are union efforts to inflict economic damage on the employer, and these efforts are generally protected under the NLRA. *See NLRB v. Insur. Agents' Int'l Union*, 361 U.S. 477, 489 (1960) (the presence and exercise of "economic weapons" are "part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized"). Consequently, employers likewise have a protected right to take action calculated to increase employer leverage in bargaining, to increase the employer's ability to operate during strikes, and to impose pressure on the union. *See American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965) (employer lawfully implemented lockout to impose pressure on union and to avoid risk of strike during busy season); *NLRB v. Brown*, 380 U.S. 278 (1965) (employer lawfully implemented lockout and continued operations using temporary replacements); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (employer faced with economic strike may permanently replace striking employees).

[50] 380 U.S. 300 (1965).

[51] *Id*. at 316 (emphasis added).

[52] The leading § 8(a)(5) relocation case *presumes* that many lawful relocations occur *because of* labor costs or other things for which the union is responsible. *See Dubuque Packing Co.*, 303 N.L.R.B. 386, 391 (1991), *enforced in relevant part sub nom. UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 511 U.S. 1016 (1994), *cert. dismissed*, 511 U.S. 1138 (1994) (bargaining required over relocation decisions where, in part, "labor costs were a factor in the decision" and the union could have "offered labor cost concessions that could have changed the employer's decision to relocate"). *See also Langston Cos., Inc.*, *supra* note 47 (employer did not violate § 8(a)(3) even though transfer from union to nonunion facility occurred after successful union organizing drive).

[53] *See, e.g., Litton Mellonics Sys. Div.*, 258 N.L.R.B. 623 (1981), *enforced*, 738 F.2d 447 (9th Cir. 1984); *Dorsey Trailers, Inc. v. NLRB, supra* note 35; *Langston Cos., Inc.*, *supra* note 52. *See generally Wright Line, Inc.*, 251 N.L.R.B. 1083, 1086 (1980), *enforced,* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[54] Section 8(c) of the Act broadly protects employer speech regarding union-related issues if there is no threat of reprisal or force or promise of benefit. 29 U.S.C. § 158(c). *See also Oxford Pickles*, 190 N.L.R.B. 109, 111 (1971) (Member Brown, dissenting) (employer lawfully stated that plant's survival could be "seriously hurt by a union" and that employer "would have every legal right to move the business" if a union "put us in a position of not being able to compete"); NLRB *v. Gibraltar Industries, Inc.*, 653 F.2d 1091, 1095 (6th Cir. 1981) (employer comments regarding effect of negotiation stalemate and possible strike reflected lawful "attitude" of "a rational businessman concerned about minimizing costs, a particularly relevant concern for a business . . . involved in government contracts"); *National Terminal Baking Corp.*, 190 N.L.R.B. 465, 466 (1971) (employer statements about losing money and possible closing reflected "overwhelming economic need for shutting down then and there"). *See generally NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Finally, the alleged statements described in the NLRB complaint against Boeing (some of which Boeing has denied)[55] generally reflect a sentiment that would hardly be surprising to anyone: when a company makes a major decision about new investment, the company is interested in maximizing its return and minimizing instability and downtime.[56]

The Act protects employees from unlawful strike-related retaliation, but it does not give employees immunity from a strike's economic consequences. Especially in the circumstances of Boeing's 58-day strike in 2008 – when the 787 Dreamliner production already was 15 months behind schedule and when the strike itself cost Boeing 105 fewer aircraft deliveries and $1.8 billion in lost revenues[57] – it could not have been a revelation to IAM employees that strike-related costs and disruption might be considered when the Company was deciding what *new* investment was appropriate and where it should be made.[58]

The Supreme Court in *Darlington* indicated it was *permissible* for an employer to announce "a decision to close already reached by the board of directors or other management authority empowered to make such a decision," which the Court distinguished from the type of "threatening to close his plant" that could violate section 8(a)(1) of the Act.[59] Consequently, in the litigation against Boeing:

- The South Carolina investment decision announced by Boeing falls literally within what Darlington permits – i.e., "a decision . . . reached by the board of directors or other management authority empowered to make such a decision."[60]
- Even if the alleged statements by Boeing representatives are considered independent violations of section 8(a)(1), this would not support the remedy being sought, which

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[55] *See* note 24, *supra*.

[56] It is most ironic that the Board's General Counsel in the Boeing litigation is attempting to protect employees under NLRA § 8(a)(1) from alleged "interference," "coercion" and "restraint" associated with fairly self-evident statements about strike-related costs and risks (*e.g.*, the impact of business instability and costs on future investment decisions), when the Board has recently held it does not constitute "coercion" of neutral employers under NLRA § 8(b)(4)(B) for employees to display large banners (3 or 4 feet high and from 15 to 20 feet long) or a similarly oversized inflatable "rat" in front of the neutral businesses. *See, e.g., Sheet Metal Workers Int'l Ass'n, Local 15 (Brandon Regional Medical Center)*, 356 N.L.R.B. No. 162 (May 26, 2011); *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 N.L.R.B. No. 159 (Aug. 27, 2010). In both of these cases there were dissenting opinions by Members Schaumber and/or Hayes.

[57] Luttig Statement, p. 4.

[58] Contemporaneous news articles described the economic costs resulting from the 2008 work stoppage in terms that would make it irresponsible for any management representative not to take such costs into account when making new or additional investment decisions. *See, e.g.*, "Boeing Strike, 787 Delays Hurting Titanium Producers," Reuters, Sept. 29, 2008 ("'The Boeing strike raises risk of further 787 schedule slips and related titanium demand and price softness through 2010,' Cowen and Co analyst Gautam Khanna wrote in a research note on Monday"); "Boeing Says Strike Might Delay 787 Test Flight," Industry Week, Oct. 1, 2008 ("Boeing has staked its future on the Dreamliner. . . . Any further delays in the schedule would damage Boeing's reputation and risk antagonizing clients"); "Boeing Posts Big Loss in 4th Quarter," Seattle Post Intelligencer, Jan. 28, 2009 (stating Boeing's financial results "show the deep impact of the two-month long Machinists strike" and "a 787 customer . . . canceled its entire order for 15 planes").

[59] *Darlington*, *supra* note 33 380 U.S. at 274 n.20.

[60] *Id*.

is a requirement that Boeing "operate its second line of 787 Dreamliner aircraft assembly production in the State of Washington."[61]

(d) South Carolina Employee Interests Warrant Consideration and Protection

Another relevant legal principle concerning Section 7 of the Act involves its protection of *all* employees without regard to whether or not they are represented by a union, and whether they participate or refrain from engaging in collective bargaining and other concerted activities.[62] Therefore, in cases involving multiple work locations and two or more groups of employees, the interests of *both* employee groups warrant consideration and protection.[63]

In one of the Board's leading section 8(a)(3) "relocation" cases – *Garwin Corp*.[64] – the employers violated the Act "by closing their New York facility, discharging their employees, and removing their operations to Miami, Florida, . . . to avoid dealing with the Union,"[65] which the Board described as "the traditional runaway-shop situation."[66]

Even though the employer in *Garwin* engaged in a "relocation" that was based on hostility towards the union, the court of appeals rejected the Board's order which sought to impose union representation on Florida employees. The court stated: "We find it difficult to see genuine meaning in a 'remedy' which is essentially negative in character and smacks of punitive action."[67] The court concluded:

> The right to choose a union and have that union operate in a climate free of coercion, which is the goal of Board compulsory bargaining orders, is a cornerstone of the National Labor Relations Act; *equally protected by the Act with the right of the workers to choose that representative is the right to have none*.
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> * * *

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[61] Complaint ¶ 13(a). *See* the "outcome" discussion in subpart 3 below.

[62] Section 7 of the Act provides: "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." 29 U.S.C. § 157.

[63] For example, in "accretion" disputes – where a union attempts to become the representative of employees at a different location without an election – the Board typically will not "compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election."*Melbet Jewelry Co.*, 180 N.L.R.B. 107, 110 (1969). *See also Gitano Group, Inc.*, 308 N.L.R.B. 1172, 1174 (1992). Likewise, if a collective bargaining agreement's "after-acquired" clause purports to make the agreement applicable to employeees at a newly purchased facility, the Board has held the clause will not be enforced absent a showing that the union has majority support among the new facility's employees. *See, e.g., Kroger Co.*, 219 N.L.R.B. 388 (1975).

[64] 153 N.L.R.B. 664 (1965), *enforced in part sub nom. Local 57, ILGWU v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967).

[65] 153 N.L.R.B. at 664-65.

[66] *Id*. at 665 n.2.

[67] 374 F.2d at 300.

> In our view *the Board should not seek to "discipline" the Employer at the expense of the new Florida employees. Such a remedy is, on its face, arbitrary; the Board ought not rob Peter to punish Paul*.[68]

3. Outcome: The "Take it Back, Put it Back" Remedy

In NLRB cases challenging major business changes, the General Counsel can seek an exceptionally onerous penalty: an order requiring employers responsible for an unlawful "relocation" to undo major decisions many years after-the-fact, to move work to a different location, and to hire or reinstate dozens or hundreds of employees with years of backpay and benefits. This "take-it-back, put-it-back" remedy is being sought in the current NLRB proceedings against Boeing.

The absence of a bona fide "relocation," "transfer" or "removal" of work from Boeing's Puget Sound facilities raises fundamental problems with the "take it back, put it back" remedy being sought by the General Counsel,[69] as would the extraordinary hardship and costs associated with imposing the "take it back, put it back" remedy following years of litigation.[70]

It bears emphasis that the remedy being sought against Boeing (a requirement that the second 787 assembly line be operated in the State of Washington) involves what is uniformly described as the Board's authority to order restoration of the "*status quo ante*,"[71] which means "the situation that existed before."[72] Of course, an order requiring Boeing to place a second 787

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[68] *Id*. at 301-304 (emphasis added; footnotes and citations omitted).

[69] Subject to a variety of qualifications (see note 70, *infra*), the Board's "take it back, put it back" remedy (requiring restoration of the *status quo ante*) can be imposed in "relocation" cases where the employer is found to have viiolated § 8(a)(3). *See, e.g., American Needle & Novelty Co*., 206 N.L.R.B. 534 (1973); *Seminole Intermodal Transport*, 312 N.L.R.B. 236 (1993), *enforced without opinion*, 50 F.3d 10 (6th Cir. 1995). However, if one excludes the § 8(a)(3) relocation/transfer allegation asserted against Boeing, statements like those attributed to Boeing representatives would normally be evaluated under § 8(a)(1), and the typical Board remedy would be an order requiring the employer to "cease and desist" from violations of § 8(a)(1), the posting of a notice, and possibly a "rerun" election or bargaining order (if the statements were deemed to have interfered with a representation election in which the union lost). *See, e.g., Upper Great Lakes Pilots, Inc.*, 311 N.L.R.B. 131 (1993); *Almet Inc*., 305 N.L.R.B. 626 (1991); *Imperial Machine Corp.*, 121 N.L.R.B. 621 (1958).

[70] In § 8(a)(3) and § 8(a)(5) cases, the Board and the courts will not order restoration of the *status quo ante* where this would be financially burdensome and/or where other considerations render such a remedy inappropriate. *See, e.g*., *Garwin Corp*., *supra* note 64, 153 N.L.R.B. at 681, where the Board held the employer was not required to restore operations at the former location, and stated: "the Board considers such questions as the extent to which the employer divested himself of his assets and machinery, whether he permanently discontinued or merely subcontracted his operations, whether he operates a related plant and, if so, the geographical distance of that plant from the old one, and the feasibility of and hardship entailed in requiring resumption of operations." *See also Dorsey Trailers, Inc. v. NLRB*, *supra* note 35; *Lear Siegler, Inc*., 295 N.L.R.B. 857 (1989) ("financially burdensome" standard); *Special Mine Serv*., 308 N.L.R.B. 711 (1992), *enforcement denied in part*, 11 F.3d 88 (7th Cir. 1993) (court finds NLRB restoration order inappropriate); *Townhouse TV & Appliances*, 213 N.L.R.B. 716 (1974), *enforcement denied in part*, 531 F.2d 826 (7th Cir. 1976) (restoration order deemed too "financially burdensome"); *National Terminal Baking Corp*., 190 N.L.R.B. 465 (1971) (compelling economic circumstances).

[71] *See* cases described in notes 69 and 70, *supra*.

[72] *United States v. Matthews*, 395 F.3d 477, 480 (4th Cir. 2005), *quoting* BLACK'S LAW DICTIONARY 1448 (8th ed. 2004).

assembly line in Washington State would bear no resemblance to what "existed before," since that second assembly line constitutes new work that had not previously been done anywhere.[73]

Conclusion

The NLRB is charged with the "difficult and delicate responsibility" of administering the NLRA.[74] I have dealt with the Board for nearly 30 years. I greatly respect the Members of the Board, the Acting General Counsel, and others employed in the agency. Their work is not easy and it is fraught with controversy.[75]

It would benefit everyone if some meaningful adjustment in the factors I have mentioned – process, substance, and the remedy being sought – accomplished a resolution of the Boeing dispute. There is also room for progress on other fronts. It would help to have clearer and more uniform legal standards,[76] and there should be a harder look at the process built into the Act for resolving these disputes. Major business changes and investment opportunities are non-partisan events, and their consequences do not differentiate on the basis of political party.

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[73] If Boeing's actions are lawful, the Board has no authority to impose any remedial measures. *See Preston Feed Corp.*,309 F.2d 346, 352 (4th Cir. 1962) ("the Board is without power to interfere with management where the discontinuance of a part of the business is prompted by legitimate business motives and not in order to frustrate the purposes of the Act or interfere with employees in the exercise of the rights conferred upon them by the statute").

[74] *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 499 (1960), *quoting NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957). In *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963), the Court stated "we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life" (citation omitted). *See also NLRB v. Action Automotive, Inc*., 469 U.S. 490, 496-97 (1985); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1978); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

[75] I have written that the NLRB and the courts have an unenviable responsibility under the Act, which becomes even more daunting when variations in the law result from periodic changes in the Board's composition. MANAGERIAL DISCRETION, 2d ed. at 569.

Unfortunately, not much has changed since Professor Summers made the following observation about the NLRB more than 50 years ago: "The labor lawyer's world is not a secure one, for [the lawyer] walks on a thin crust of precedents. The body of Board decisions in many areas often gives an appearance of firmness only to have tremors beneath the surface open unexpected fissures or raise new ranges of decisions. In our primitiveness we may see these faults and upheavals in the crust of precedents as acts of God or Satan, crediting angels or devils incarnate in the bodies of Board members. With the appointment of new members the warning rumblings become more noticeable, and we spur our efforts to seek out the spirits and identify them as good or evil." C. Summers, *Politics, Policy Making, and the NLRB*, 6 Syracuse L. Rev. 93 (1955). No side has a monopoly on pleas for more stability and fewer changes at the Board. *See, e.g.*, L. Bierman, *Reflections on the Problem of Labor Board Instability*, 62 Denv. U. L. Rev. 551 (1985); Cooke & Gautschi, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 Indus. & Lab. Rel. Rev. 539 (1982); Dunau, *The Role of Criticism in the Work of the National Labor Relations Board*, 16 N.Y.U. Conf. Lab. 205 (1963). *Cf.* Hickey, *Stare Decisis and the NLRB*, 17 Lab. L.J. 451 (1966).

[76] A longstanding challenge in NLRB cases involving major business changes has been the existence of multiple different legal standards, the application of which depends on the label used to describe the employer's actions. In this respect, "most Board and court cases presume a world where complex restructuring decisions can be reduced to a one- or two-word label, which in turn dictates how a roulette wheel of different legal standards translates into the rights and obligations deemed applicable in a given situation." MANAGERIAL DISCRETION, 2d ed. at 565.

I will close today by mentioning NLRB litigation challenging a "relocation" that was announced on June 10. Except this "relocation" was announced 30 years ago on June 10, 1981.[77] Like the Boeing case, this other "relocation" was the subject of a Board complaint. There was an ALJ hearing, an NLRB decision, and court appeals. And it took *13 years* before the litigation finally ended in this case, which was called *Dubuque Packing Co*.[78]

When this other "relocation" dispute was being considered by the Court of Appeals for the D.C. Circuit, the court stated:

> *This case presents hard questions – indeed, some of the most polarizing questions in contemporary labor law*. While we are sympathetic to the task that lies ahead for the National Labor Relations Board, *our sympathy does not lead us to shirk our duty to hold the Board accountable for the rationality of its decisions*.[79]

This concludes my prepared testimony. I have provided an extended version of my remarks for the record. I look forward to any questions Members of the Committee may have. Thank you for the invitation to appear today.

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[77] *Dubuque Packing Co.*, 287 N.L.R.B. 499, 510-11 (1987) (ALJ opinion), *remanded sub nom. UFCW Local 150-A v. NLRB*, 880 F.2d 1422 (D.C. Cir. 1989), *on remand*, 303 N.L.R.B. 386, 390 n.8 (1991), *enforced in relevant part sub nom. UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 511 U.S. 1016 (1994), *cert. dismissed*, 511 U.S. 1138 (1994).

[78] *Id*.

[79] *UFCW Local 150-A v. NLRB*, 880 F.2d 1422 (D.C. Cir. 1989).

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: Philip A. Miscimarra

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2008. Include the source and amount of each grant or contract.

None

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

None

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2008, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None

I certify that the above information is true and correct.

Signature: Philip A. Miscimarra

Date: June 16, 2011

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Mr. Miscimarra has represented many groups in prominent cases, such as the United States Chamber of Commerce and The National Association of Manufacturers with respect to Electromation, Inc. and E.I. du Pont de Nemours & Co. (involving the legality of employee committees, work teams, and employee involvement initiatives). He also represented the Business Roundtable during the U.S. Department of Labor's development of regulations to interpret the Worker Adjustment and Retraining Notification Act.

From 2004 through 2010, Mr. Miscimarra has been named one of the leading U.S. lawyers for employment law by *Chambers USA*, based on the views of clients, peers and other industry professionals. *Chambers* notes that according to competitors, "Most lawyers pale next to Philip Miscimarra." Additionally, *Chambers* mentions that clients admire Mr. Miscimarra's "multilayered abilities and business savvy" and his "high level of integrity" while also recognizing his "extensive network of contacts" that clients find invaluable.

Mr. Miscimarra's books on labor and employment issues include *The NLRB and Managerial Discretion: Subcontracting, Relocations, Closings, Sales, Layoffs, and Technological Change* (2d ed. 2010) (by Miscimarra et al.), the first edition of which was cited by the National Labor Relations Board for its "comprehensive review of prior decisions in this area, including cogent criticism of inconsistency and ambiguities" (*Milwaukee Spring Division of Illinois Coil Spring Co.*, 268 N.L.R.B. 601, 603 n. 12); *The NLRB and Secondary Boycotts* (3d ed. 2002) (by Miscimarra, Berkowitz, Wiener and Ditelberg); *Government Protection of Employees Involved in Mergers and Acquisitions* (1989 and 1997 supp.) (by Northrup and Miscimarra); and *Multinational Union Organizations in the White-Collar, Service, and Communications Industries* (1983) (by Rowan, Pitterle and Miscimarra); among other publications.

In 1982, Mr. Miscimarra earned his J.D. from the University of Pennsylvania and his M.B.A. from the University of Pennsylvania's Wharton School. He earned his B.A., summa cum laude, from Duquesne University in 1978.

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