Microsoft Outlook

From: Farrell, Ellen
Sent: Tuesday, April 12, 2011 3:28 PM
To: Cleeland, Nancy
Cc: Solomon, Lafe E.; Kearney, Barry J.
Subject: RE: Boeing
Attachments: ADV.19-CA-32431.Response2.Boeing.dlw.doc; ADV.19-CA-32431.factsheet.Boeing.dlw.doc

Nancy
Attached are the memo, which issued yesterday, and the fact sheet.

Ellen

Ellen Farrell
Deputy Associate General Counsel
Division of Advice, NLRB
202-273-3810
Ellen.Farrell@nlrb.gov

From: Solomon, Lafe E.
Sent: Tuesday, April 12, 2011 2:36 PM
To: Kearney, Barry J.; Farrell, Ellen; Cleeland, Nancy
Subject: Boeing

Ellen, Would you please send electronically to Nancy the Boeing Advice memo and fact sheet?

Nancy, We anticipate that Region 19 will issue complaint next week. We can talk about it, [redacted] Exemption 5 Thanks, Lafe

NLRB-FOIA-U00001402

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 11, 2011

S.A.M.

TO: Richard L. Ahearn, Regional Director
Region 19

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Boeing Company
Case 19-CA-32431

512-5006-5062	524-8307-1600
512-5006-5067	524-8307-5300
512-5036-8387	530-6050-0825-3300
512-5036-8389	530-6067-4011-4200
524-0167-1033	530-6067-4011-4600
524-5029-5037	530-6067-4011-7700
524-0167-1033	530-8054-7000
524-506	775-8731

The Region submitted this case for advice on several issues relating to the Employer's decision to place a second assembly line at a nonunion facility rather than at the facility where unit employees work on the original assembly line. Specifically the Region requested advice as to whether: (1) the Employer violated Section 8(a)(1) by threatening to place the second assembly line at a nonunion facility unless the Union agreed to a long-term no-strike clause and by repeatedly stating that its decision to place the second line elsewhere was based on the unit's strike history; (2) the Employer violated Section 8(a)(3) by deciding to place the second assembly line at a nonunion facility because of the unit's strike history, even though no unit employees have yet to lose their jobs; and (3) the Employer violated Section 8(a)(5) by failing to bargain in good faith over its decision about where to locate the second assembly line or whether the Union waived its right to bargain under the parties' collective-bargaining agreement.

We conclude that the Region should issue a complaint alleging: independent Section 8(a)(1) violations based on the Employer's coercive and threatening statements; and a Section 8(a)(3) violation based on the Employer's decision to locate the second line at a nonunion facility and to establish a dual-sourcing supply program in retaliation for protected activity. However, the Region should dismiss the Section 8(a)(5) allegations because under the contract, the Union expressly waived its right to bargain about the Employer's decision to "offload" unit work to a facility not covered by the agreement. To remedy the chilling effect of Boeing's Section 8(a)(1) statements, the Region should request, in addition to the traditional remedies, a notice reading by a

high-level Boeing official. To remedy the Section 8(a)(3) violation, the Region should seek an order that would require Boeing to maintain the surge line in the Puget Sound area. Specifically, Boeing intended for the second line to assemble three aircraft each month in South Carolina, while assembling seven planes on the first line. Thus, the Region should seek an order requiring Boeing to assemble in the Puget Sound area the first ten 787 aircraft that it produces each month and to maintain the supply lines for those aircraft where they currently exist, in the Puget Sound and Portland facilities.

FACTS

The Boeing Company is an international corporation engaged primarily in developing and producing military and commercial aircraft. Boeing has a long-established collective-bargaining relationship with the International Association of Machinists and Aerospace Workers (IAM) and certain IAM District and Local Lodges. The parties' current collective-bargaining agreement is effective November 2, 2008 through September 8, 2012 and covers three separate bargaining units of production and maintenance employees in three geographical areas, the Puget Sound area in Washington; Portland, Oregon; and Wichita, Kansas.

Section 21.7 of that agreement, entitled "Subcontracting," sets forth various notice periods and an opportunity for the Union to review and recommend alternatives to Boeing proposals to subcontract or "offload" unit work. "[O]ffloading work" is defined as "moving work from one Company facility to another Company facility not covered by this Agreement[.]" Less stringent notice requirements apply to subcontracting and offloading decisions affecting less than ten employees. In addition, the notice and review process does not cover certain work transfers listed in subsections (a) through (d), including "[d]ecisions to subcontract or offload work due to lack of capability or capacity, or to prevent production schedule slippage[.]" Section 21.7 concludes with the following language:

> Anything in this Section 21.7 to the contrary notwithstanding, it is agreed that ... the Company has the right to subcontract and offload work, to make and carry out decisions in (a) through (d) above, to enter offsets and offset arrangements, and to designate the work to be performed by the Company and the places where it is to be performed, which rights shall not be subject to arbitration. ...

Boeing Introduces the 787 "Dreamliner"

The Puget Sound unit is comprised of approximately 18,000 employees working in Washington. Historically these employees have performed the final assembly of all Boeing planes. In late 2003, Boeing announced that it would place the assembly line for its new 787 "Dreamliner" airplane in Everett, Washington after the Washington State Legislature passed a tax and subsidy incentive package totaling more than $3.2 billion. That line opened in May 2007, with the capacity for producing seven planes each month.

With the 787, Boeing departed from its previous practice of manufacturing most of the aircraft parts with its own employees and instead outsourced parts production to other suppliers in the southeast U.S. and abroad. For example, Boeing contracted with Vought Aircraft Industries in North Charleston, South Carolina for the manufacture of the aft fuselage and with Mitsubishi Heavy Industries in Japan for the manufacture of the wings. Boeing repeatedly has had to postpone the delivery dates for the aircraft, due primarily to problems with suppliers and software issues.

Starting in mid 2008, the media began reporting that Boeing would need to add a second 787 assembly line because of its growing order backlog. At about the same time, Boeing entered negotiations with the Union for a successor collective-bargaining agreement. During those negotiations, Company officials noted the need for a second assembly line but did not discuss the matter further.

The 2008 Strike and Its Aftermath

On September 6, 2008, the employees struck in support of the Union's bargaining position. On October 6, 2008, Boeing's stock dropped to a four-year low. That same day, CEO Jim McNerney sent a long e-mail to Boeing employees about the strike. McNerney stated that he understood and shared "the frustration so many of you feel when we don't have the whole team together working to meet the commitments we've made to our customers and competing to win the new business that will sustain and grow Boeing jobs[.]" McNerney went on to state, "[t]he issue of competitiveness as it relates to this strike is a big deal[.]" He also tied labor disputes to problems with Boeing's customer relationships. After asserting that the Union had recommended that its members reject contract offers and go on strike four of the last five negotiations going back to 1995, he wrote, "we believe this track record of repeated union work stoppages is earning us a reputation as an

unreliable supplier to our customers – who ultimately provide job security by buying our airplanes."[1]

The following day, Boeing's Vice President for Government and Community Relations Fred Kiga spoke at an aerospace conference in Everett. In a *Seattle Times* article, he was quoted as stating, "We can't afford to become known as the strike zone[.]" He reportedly also told the conference that "labor unrest" could drive Boeing's decision on where to build planes in the future. In an interview after his speech, Kiga reportedly stated that his "strike zone" comments had been cleared by Boeing Commercial Airplanes CEO Scott Carson. Kiga noted that he and Carson grew up in and shared a love for the Northwest; Kiga then said that they would "hate to lose a treasure like Boeing."

The strike lasted 57 days and ended on November 1, 2008, when the parties signed the current contract. During the negotiations, the Union had proposed to amend Section 21.7 to, among other things, eliminate the "waiver" language quoted above. Boeing refused to agree to such an amendment, and the language remained in the contract.

In early 2009,[2] the media again began publishing reports that Boeing needed to establish a second 787 assembly line. On February 9, the *Seattle Times* reported that Washington Senator Patty Murray had met with Boeing's Senior Vice President of Government Operations; he had informed her that the CEO was "sick and tired" of the union's strikes and was looking to put the second 787 line elsewhere.

On April 16, Boeing and IAM officials held their annual summit in Chicago. Management officials attending included CEO McNerney, Boeing Commercial Airplanes CEO Carson, Integrated Defense Systems CEO Jim Albaugh, and for the first time, Vice President and General Manager of Supply Chain Management & Operations Ray Conner. IAM representatives included International President Tom Buffenbarger, General Vice President Rich Michalski, and the Directing Business Representatives who represented Boeing employees, including District 751 DBR Tom Wroblewski. This was the first opportunity for the parties to meet since the strike had ended. McNerney and Buffenbarger were the lead speakers. McNerney stated that Boeing's customers were losing confidence

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[1] In his e-mail, CEO McNerney exaggerated the number of times that the Union had struck. In actuality, prior strikes occurred in 1948 (140 days), 1965 (19 days), 1977 (45 days), 1989 (48 days), 1995 (69 days), and 2005 (28 days).

[2] Dates are in 2009 unless otherwise noted.

in the Company because of past strikes and the possibility of future strikes. He said that the parties had to come up with a way to stop having labor disputes. The general theme was that management and labor should continue to meet to find ways to avoid the problems of the past.

As a follow-up to this summit, Wroblewski and IAM Aerospace Coordinator Mark Blondin met on June 23 in Seattle with Conner and Boeing's Vice President of Human Resources Doug Kight. The parties focused on how to build a better relationship and improve communication. While Wroblewski had an established relationship with Kight, Conner was new to labor relations. Wroblewski thought that one of the purposes of the meeting was to get to know Conner. At a subsequent meeting on June 30 between Wroblewski and Conner, Conner expressed Boeing's concern that its customers did not have confidence it could make timely deliveries because it had experienced two strikes in the last five years and had supplier issues. For the first time, Conner raised the prospect of a long-term collective-bargaining agreement as a way to gain the customers' confidence that they would get their aircraft on time.

In early July, Boeing announced its intent to purchase the Vought plant in North Charleston, South Carolina. IAM Local Lodge 183 represented the Vought production, maintenance, and quality employees. Boeing agreed to recognize the Union but wanted to negotiate a new collective-bargaining agreement.

On July 8, the *Seattle Times* reported that Boeing's CEO had informed Washington Congressmen Norm Dicks and Jay Inslee that as a result of past strikes, the Company would place the second line outside the Puget Sound area unless it could reach a long-term contract with the Union. Boeing told the Congressmen that South Carolina was the main competitor.

Wroblewski, Blondin, Kight, and Conner met again twice in July, on July 7 and July 23. At each of these meetings, Conner and Kight emphasized that strikes had to stop for Boeing to be viable. They stated that Boeing needed a long-term agreement with no-strike language to satisfy their customers. At this point, Boeing was two years behind schedule and had approximately 850 787 planes on back order as a result of supplier and software problems.

Then, on July 30, the same date that Boeing announced that it had purchased Vought's plant, a South Carolina employee filed a decertification petition. During August, Boeing denied the Union access to the employees in the North Charleston plant and wrote a memorandum to the employees stating that it preferred to "deal with employees directly

without intermediaries."[3] Boeing also issued a FAQ document to the employees stating that the mass layoffs that took place at the Vought plant in late 2008 were due to the "unique situation created by the Everett strike." Meanwhile, the South Carolina press was reporting that a decertification decision could influence where Boeing located the second 787 assembly line. For example, *The Post and the Courier* reported that South Carolina's "low unionization rate is viewed as an advantage in the 787 chase[.]" An article in the *Charleston Business Journal* asserted that Charleston might be a better choice in the event of decertification because of "its potentially tamer work force" instead of the Washington workers with a history of "walk[ing] off the job."

On August 26, Boeing e-mailed its managers and human resource professionals that it had notified South Carolina that it intended to file permits for the construction of a second 787 line but that it had not yet made a decision as to where to locate the second line. The following day, Boeing and Union officials met in Portland to discuss the prospect of a long-term agreement. Carson informed the Union that the only way Boeing would place the second line in Washington was if the Union agreed to a twenty-year no-strike agreement. Boeing suggested a series of three-year agreements with an overarching twenty-year no-strike pledge until 2032 and binding interest arbitration if no agreement was reached at the end of each of the three-year contracts. The Union said that this was not possible, but the Union would consider a longer agreement than the current four-year contract in return for some sort of neutrality agreement. At the end of the meeting, the parties agreed to schedule negotiations for a long-term agreement.

Meanwhile, the decertification election in South Carolina was scheduled for September 10. In reporting on Boeing's permit filings in South Carolina, the Puget Sound Business Journal characterized this vote as "[a] wild card" in Boeing's decision about where to locate the second line. On September 2, Kight presented an hour-long video on Boeing's website (later quoted in a September 29 article in the *Seattle Times*). In regard to the second line, he stated:

> What do you do with the 787 second line so that we can build up to rate and meet our commitment to customers? ... There's a lot of issues to look at, a lot being studied, no decision has been made. But truthfully, it is very clear that this triennial disruption, our

[3] The Union filed a Section 8(a)(5) charge alleging that Boeing unilaterally changed its access rules but withdrew the charge following the election.

> customers can't live with it anymore. So we've become an unreliable supplier.... So we look at how do we become a reliable supplier. How do we ensure production continuity so that we can meet our commitments to our customers in a timely way and that's what we're trying to do.

The Union lost the election in South Carolina eight days later and was decertified on September 18.

As a follow-up to the parties' August 27 meeting in Portland, CEO McNerney wrote to IAM International President Buffenbarger on September 21 that Boeing planned to make a decision on the second line's location by the end of October and wanted the Union's input within the next three to four weeks. He stated, "I look forward to our respective teams engaging in fruitful dialog." Two days later, Boeing filed an application for a storm water permit with the City of North Charleston and an overall site plan with the State of South Carolina. On October 1, Boeing applied to North Charleston for a site clearing permit.

The Parties Meet over a Long-Term Agreement

The parties opened negotiations for a long-term agreement on October 1. At the start of negotiations, Boeing explained that placement of the second line in Washington depended on a long-term agreement to insure no further disruptions in deliveries to customers. The Union responded that in exchange for giving up the right to strike, the parties would need to resolve economic issues for the long term rather than through interest arbitration every three years.

The parties met again on October 7, 8, and 15. The Union maintains that Boeing never submitted a written proposal or counter-proposal, that it was in the dark as to what Boeing wanted, and that in effect it was negotiating against itself. For example, with respect to the length of the agreement, at various points Boeing requested a contract ending in 2020 or 2022 but at other times, demanded a twenty-year agreement. In terms of wages, Boeing wanted to reduce general wage increases and move toward a profit-sharing incentive program. The Union was not adverse to this concept but requested information to insure that Boeing's measures of productivity were tied to employee performance and not events beyond the employees' control. At one point, Boeing stated that the general wage increase and COLA could not exceed 3.5%. When a Union negotiator asked what would happen if the cost of living increased more than 3.5%, Boeing responded that employees would get more. On October 15, for the first time, Boeing said that it wanted a lower wage structure for new hires and a

defined contribution plan for them rather than the defined benefit pension plan that the existing employees enjoyed.

The Union repeatedly raised the issues of job security and Employer opposition to the Union elsewhere. The Union argued that in return for giving up the right to strike during the long-term, employees needed enhanced job security. Also, if the parties' relationship were to improve, the Union did not want to face the type of anti-union conduct Boeing had engaged in during the decertification campaign in South Carolina.

At the October 15 session, Conner informed the Union that the Board of Directors would be meeting on October 26 and he wanted to give the Board a progress report on the negotiations. The Union asserts that Boeing never described the Board of Directors meeting as a deadline for resolving the outstanding bargaining issues. Moreover, Boeing never provided a concrete proposal that could be put to the unit employees for a vote.

The parties met again on October 20 and 21. Conner stated that Boeing was getting close to making its decision on the location of the second line and it would be discussed at the Board meeting on October 26. By the end of the parties' October 21 session, the Union orally had proposed the following: an extension of the existing contract to 2020, 3% annual wage increases plus a 1% COLA, ratification bonuses for unit employees, an incentive pay program, health cost sharing towards the end of the contract, annual increases in pension benefits starting in 2013, and neutrality in connection with Union organizing campaigns. In addition, the Union presented Boeing with a two-page document entitled "Rough Draft on Concepts" for a long-term agreement and a joint partnership committee. This "Draft" called for retention of current unit work; location of the second line in the Puget Sound area; and six-month advance notice and good-faith bargaining over any decision to establish an assembly operation for any next generation product. Boeing asserts that this "rough draft" was the Union's "last and final" offer, but the Union disagrees and also maintains that its negotiators had no idea that this would be the parties' final session. Indeed, the Union negotiator involved in working out the details of the incentive pay program sent an e-mail to Kight on October 27 requesting further information. Kight responded that he would get back to him.

Meanwhile, on October 21, Boeing posted its quarterly earnings conference call on its intranet site for employees. With respect to locating the second line in South Carolina, CEO McNerney stated:

> [T]here would be some duplication. We would obviously work to minimize that. But I think having said all of that, diversifying our labor pool and our labor relationship has some benefits. ... And so some of the modest inefficiencies, for example, associated with the move to Charleston, are certainly more than overcome by strikes happening every three or four years in Puget Sound. And the very negative financial impact of [sic] the company, our balance sheet would be a lot stronger today had we not had a strike last year. Our customers would be a lot happier today had we not had a strike last year, and the 787 program would be in better shape.... And I don't blame this totally on the union. We just haven't figured out a way -- the mix doesn't -- isn't working well yet. So, we've either got to satisfy ourselves that the mix is different or we have to diversify our labor base.

McNerney stated that a decision would be made in the "next couple of weeks."

Two days later, IAM General Vice President Michalski called Conner to ask about the status of the negotiations. Conner stated that the Union's economic terms and demand for neutrality were unacceptable to Boeing. Michalski explained that the Union was not asking for a traditional neutrality agreement but rather, as explained during negotiations, a code of conduct. Michalski stated that the Union was willing to meet at any time for additional negotiations, but Conner did not respond. On October 24, Michalski called Senior Vice President of Operations Tim Keating to reiterate that the Union was not seeking a true neutrality agreement. He wanted to clear up any misunderstanding if that issue was blocking the parties' ability to reach an agreement. Keating did not respond, and no further negotiations were ever scheduled.

Meanwhile, the governmental bodies in South Carolina were moving quickly to facilitate the second line's placement in their State. On October 23, North Charleston approved Boeing's request for a storm water permit, and the State of South Carolina approved Boeing's overall site plan. On October 27, the South Carolina legislature, in a special session, approved $170 million in taxpayer-backed bonds for Boeing's startup costs and tax breaks totaling $450 million in exchange for Boeing's agreement to create at least 3,800 jobs and invest more than $750 million in the State within the next seven years. That same day, North Charleston approved Boeing's site clearing permit.

Boeing contends that it entered these negotiations with a good-faith intention to reach a long-term agreement that would have resulted in placing the second line in Washington, but

the Union's economic demands were too costly and its insistence upon neutrality and job security were unacceptable. The Union asserts, however, that Boeing's failure to submit any proposals, its rejection of the Union's serious efforts to address Boeing's purported concerns, and then its precipitous halting of negotiations as soon as the South Carolina legislature awarded it a generous tax and subsidy package demonstrate that the negotiations were in fact a sham.

Boeing Announces its Decisions to Locate the Second Line in South Carolina and to Establish a Dual-Sourcing Program

On October 28, Boeing announced its decision to locate the second 787 assembly line in South Carolina. In a press release and internal e-mails, Boeing stated that the Board of Directors had just approved the selection of North Charleston. Boeing also announced that it intended to build a "surge line" in Everett -- a temporary second assembly line that would be phased out once the South Carolina line was up and running.

Boeing issued a memo to its managers on October 28 that provided answers to anticipated questions from employees and talking points regarding its decision. The managers were advised to inform employees, among other things, that the decision to locate the second line in Charleston would "provide economic advantages by improving our competitiveness and reducing vulnerability to delivery disruptions due to a host of factors, from natural disasters to homeland security issues and work stoppages." The memo further stated, "In the final analysis, this came down to ensuring our long-term global competitiveness and diversifying the company to protect against the risk of production disruption ... from natural disasters, to homeland security threats, to work stoppages."

On December 3, Boeing notified its fabrication managers that it intended to create a "dual-sourcing" program and contract separate suppliers for the South Carolina assembly line. As a result, employees in the Puget Sound and Portland units who produce parts for the 787 assembly line are likely to suffer a loss of work. Articles that appeared in the *Seattle Times* on December 7 and the *Puget Sound Business Journal* on December 8 discussed this announcement. The *Seattle Times* quoted Boeing spokesman Jim Proulx as stating, "Repeated labor disruptions have affected our performance in our customers' eyes. We have to show our customers we can be a reliable supplier to them. [The second production] line has to be able to go on regardless of what's happening over here." The *Puget Sound Business Journal* quoted Conner as follows: "Dual-sourcing and co-production will allow us to maintain production stability and be a reliable supplier to our customers."

On March 2, 2010, a *Seattle Times* journalist conducted a videotaped interview of Boeing's new Commercial Airplanes CEO, Jim Albaugh. (Albaugh had moved over from his position as Integrated Defense Systems CEO to replace Carson.) The interviewer asked Albaugh some "hard questions" on behalf of the Washington community about Boeing's decision to locate the second 787 line in Charleston. In explaining Boeing's decision, Albaugh repeatedly referenced the Union's strike history. For example, he stated:

- The issue last fall was really about, you know, how we could ensure production stability and how we could ensure that we were competitive over the long haul. And we had some very productive discussions with the union. And unfortunately, we just didn't come to an agreement where we felt we could ensure production stability. And read [sic] that is [sic] getting away from the frequent strikes that we were having and also could we stop the rate of escalation of wages. And we just could not get to a place where we both felt it was a win for both ourselves and the union so we made the decision to go to Charleston.

- [W]e've had strikes three out of the last four times we've had a labor negotiation with the IAM. ... And we've got to get to a position where we can ensure our customers that every three years they're not going to have a protracted shutdown.

- It was about ensuring to our customers that when we commit to deliver airplanes on certain dates that we actually do deliver. And we have lost - our customers have lost confidence in our ability to do that, because of the strikes.

When asked whether going to Charleston, in light of the expense and risk, made business sense, he responded:

> There's no question that whenever you go to a green field site, there's risk involved. At the same time, with the protracted labor stoppage that we had ... the fall of 2008, I mean that cost the company billions of dollars. And I think if you compare, you know, what it cost because of the stoppages versus the cost and the risk of starting a new line in Charleston, I think the investment certainly is the right one for us to make.[4]

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[4] Once again, a Boeing CEO grossly exaggerated the burden of the Union's strike activity. Boeing had alleged elsewhere that the 2008 strike reduced its earnings by $1.8 million, far

At one point, Albaugh summed up the basis of Boeing's decision as follows:

> [t]he overriding factor was not the business climate. And it was not the wages we're paying today. It was that we cannot afford to have a work stoppage, you know, every three years. We cannot afford to continue the rate of escalation of wages....

Albaugh also implicitly threatened the loss of additional work because of Union strikes, stating, "[w]e'll do work here if we can make sure that we have the stability of the production lines and that we can be competitive over the long haul."

Production is now approximately three years behind schedule. Approximately 2,900 Puget Sound unit employees currently work on the 787 assembly line. Approximately 1,740 of them are working on "out-of-sequence" assembly work, away from the main assembly line. Once supply issues are resolved and assembly can be accomplished in sequence on the line, it is anticipated that the number of employees will drop by approximately 60%. Boeing asserts that the South Carolina plant will be ready to begin assembly work in mid 2011. Approximately 1,000 mechanic and flight line jobs will be added in South Carolina at that time.

ACTION

This case involves Boeing's transfer of work from an experienced unionized workforce to a new, nonunion facility. Boeing's decision was motivated by antiunion considerations.

From the time of the Union's strike in the fall of 2008, Boeing made clear to its unionized workforce that it would not countenance further strikes. Time and again, in e-mails to employees, on its intranet site, in the media, and in talks with the Union, Boeing tied its ability to compete to the avoidance of future strike activity. Then, when Boeing purchased the Vought facility in South Carolina, its officials denied the Union access to employees at the facility. It also let the employees know that it preferred to deal with them directly rather than through their Union and their receipt of the second line hinged on their vote in a decertification election. Simultaneously, Boeing officials told the Puget Sound unit employees that they could retain all of the 787 assembly work only by waiving their right to strike for twenty years. Although the Union entered negotiations with Boeing

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less than the "billions of dollars" that Albaugh claimed in this interview.

and made major concessions in an effort to address its stated concerns, once the Union was decertified in South Carolina, Boeing courted the South Carolina legislature and applied for the necessary permits from the South Carolina regulatory bodies - even as it continued the motions of negotiating with the Union. As soon as South Carolina approved the financial incentives for Boeing, Boeing called off negotiations and announced its decision. Boeing's CEO admitted that the "overriding factor" for moving work to South Carolina was the employees' strike activity. Moreover, to reinforce the message to unit employees, he intimated that the continuation of *any* work in Washington was contingent on "the stability of the production lines," a veiled threat designed to coerce employees to abstain from future strikes. Nor could Boeing credibly blame the 787 production delays on employees' 2008 strike activity, which halted production for approximately two months. Rather, the delay resulted primarily from its own business decision to outsource the manufacture of the aircraft components to various suppliers and from unexpected software problems.

Further, the fact that it made little practical sense to locate this second line in South Carolina, despite a two-and-a-half-year delay in the production of its new 787 aircraft, rather than its existing facilities in Washington, supports a finding of unlawful motivation. While South Carolina would not be ready for production for two years because of the need for substantial capital improvements and the hiring and training of a new workforce, Washington was already up and running, with the space, the necessary equipment, and a significant complement of trained employees.

On these facts, we conclude that the Region should issue a complaint alleging: independent violations of Section 8(a)(1) based upon Boeing's coercive and threatening statements to employees on the intranet and through the media; and a violation of Section 8(a)(3) based upon Boeing's decision to place the second line in South Carolina and to establish a dual-sourcing supply program in order to retaliate against the unit employees for engaging in protected Union activity. We would also argue, in the alternative, that Boeing's actions were inherently destructive of employee rights. But the Region should dismiss the Section 8(a)(5) allegations because the Union waived its right to bargain about Boeing's decision to offload unit work to a facility not covered by the parties' agreement. Finally, to remedy the Section 8(a)(1) and (3) violations, the Region should seek: a notice reading by a high-level Boeing official in addition to the traditional remedies; and an order requiring Boeing to assemble in the Puget Sound area the first ten 787 aircraft that it produces each month and to maintain the supply lines for those aircraft in the Puget Sound and Portland facilities.

I. The Employer Violated Section 8(a)(1)

The Supreme Court long ago delineated the line between employer speech protected under Section 8(c) of the Act and threats of reprisals violative of Section 8(a)(1).[5] The Court ruled in Gissel that an employer may make "a prediction" as to the effects of unionization but that prediction "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control[.]"[6] On the other hand, "'threats of economic reprisal to be taken solely on [the employer's] own volition'" violate Section 8(a)(1).[7]

In General Electric Company, the Board applied the Gissel test to set aside an election because the employer threatened a long-term loss of work based on the possibility of a strike at some future time.[8] Faced with a union organizing drive, the employer gave multiple speeches touting its "two-source supplier strategy."[9] The employer stated that it had established its nonunion plant so that customers could get the motors they needed during the seven strikes at its union plant. The employer also made clear that the plant's nonunion status was the reason it had experienced a rise in employment.[10] And the employer conveyed the message that the plant remaining nonunion was "an important, if not a decisive, factor in any company decision to choose that plant as a second manufacturing facility" for the new motor the employer planned to introduce.[11] The Board concluded that although the employer might want to insure itself against production interruptions caused by 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."[12] The Board expressly distinguished an employer's right to take defensive action when threatened with an

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[5] See NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

[6] Ibid.

[7] Id. at 619 (citation omitted).

[8] See 215 NLRB 520, 522-23, fn. 6 (1974).

[9] See id. at 520.

[10] See id. at 520-21.

[11] See id. at 521.

[12] See id. at 522.

imminent strike from threats to transfer work "merely because of the possibility of a strike at some speculative future date."[13]

The Board repeatedly has held that an employer violates Section 8(a)(1) by threatening to withhold work opportunities because of the exercise of Section 7 rights.[14] Thus, telling employees that they will lose their jobs if they join a strike violates Section 8(a)(1).[15] Similarly, in Kroger Co., the employer unlawfully threatened to put its plan to build a new freezer facility for its distribution center on hold because of intraunion unrest and labor disputes.[16]

Further, where an employer unconditionally "predicts" a loss of customers due to unionization or strike disruptions without any factual basis, its "predictions" amount to unlawful threats.[17] Rather, an employer's predictions of customer disaffection must be based on objective facts.[18] Thus, in Curwood, Inc., an employer lawfully related its

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[13] See id. at 522, fn. 6.

[14] See, e.g., Kroger Co., 311 NLRB 1187, 1200 (1993), affd. mem. 50 F.3d 1037 (11th Cir. 1995); General Electric Co., 321 NLRB 662, fn. 5 (1996), enf. denied 117 F.3d 627 (D.C. Cir. 1997).

[15] Aelco Corp., 326 NLRB 1262, 1265 (1998). See also Dorsey Trailers, Inc., 327 NLRB 835, 851 (1999), enfd. in pertinent part 233 F.3d 831 (4th Cir. 2000) (threat to close the plant if the employees went out on strike).

[16] 311 NLRB at 1200. See also General Electric Co., 321 NLRB at 662, fn. 5 (employer conveyed to employees that unionization could result in the withholding of further investment in the plant or its closure).

[17] See, e.g., Tawas Industries, 336 NLRB 318, 321 (2001) (no objective basis for prediction that customers, fearing strikes, would not give their business to the employer if the employees' independent union affiliated with the UAW); Tradewaste Incineration, 336 NLRB 902, 907-08 (2001) (prediction that 90% of the customers would not deal with a union facility because of fear of a work stoppage was not based on objective facts); Debbie Reynolds Hotel, 332 NLRB 466, 466 (2000) (no factual basis for statements about having to move productions and equipment elsewhere because customers would not be able to afford employer's facilities if employees unionized).

[18] Curwood, Inc., 339 NLRB 1137, 1137-38 (2003).

customers' concerns about strikes, where the employer produced written inquiries from customers seeking information about its contingency plans in the event of a strike.[19] An employer may also reference the *possibility* that unionization, including strikes, might harm relationships with consumers, as opposed to predicting "unavoidable consequences."[20]

Here, the Union has alleged that several statements by Boeing officials violated Section 8(a)(1). Some statements were posted by Boeing on its website or intranet. Others were reprinted in newspaper articles as direct quotes; although such a quotation is hearsay, it would be admissible as an admission (an exception to the hearsay rule), if the reporter testifies.[21] By contrast, reporter summaries cannot form the basis for a Section 8(a)(1) violation. And statements recounted by political figures within newspaper articles are in effect double hearsay and inherently unreliable.

Based on these principles, we find that the following constitute unlawful threats under the Gissel standard:

(1) Boeing posted its quarterly earnings conference call on its intranet for employees on October 21. During the call, CEO McNerney made an extended statement about "diversifying our labor pool" and moving work to South Carolina because of "strikes happening every three or four years in Puget Sound."[22] His comments were indistinguishable from the comments regarding a "two-source supplier strategy" found violative in General Electric.[23]

(2) Boeing's October 28 memo to managers advised them to inform employees that it decided to locate the second line in South Carolina in order to reduce vulnerability to delivery disruptions caused by, among other things, strikes. The thrust of Boeing's message to employees was that Boeing had

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[19] See id. 339 NLRB at 1137.

[20] E.g., Miller Industries Towing Equipment, Inc., 342 NLRB 1074, 1075-76 (2004) (employer "did not predict unavoidable consequences").

[21] Cf. Sheet Metal Workers Local 15 (Brandon Regional Medical Center), 346 NLRB 199, 201-02 (2006), enf. denied on other grounds 491 F.3d 429 (D.C. Cir. 2007) (newspaper report of party admission is inadmissible hearsay because the reporter was not available for cross-examination).

[22] These same comments were quoted in the *Seattle Times*.

[23] See 215 NLRB 520, 522-23 (1974).

removed jobs from Puget Sound because employees had struck and that they would lose work if they struck again.[24]

(3) In articles that appeared in the *Seattle Times* and the *Puget Sound Business Journal* on December 7 and 8 respectively, Boeing officials attributed the plan to use a "dual-sourcing" system and contract separate suppliers for the South Carolina line to past strikes and implicitly threatened the loss of future work opportunities in the event of future strikes.[25]

(4) In a video-taped interview on March 2, Boeing Commercial Airplanes CEO Albaugh expressly attributed the Employer's decision to locate the second line in South Carolina to employee strikes and threatened the loss of future work opportunities in retaliation for such protected activity.[26]

The above statements, disseminated through various channels to unionized and nonunionized employees nationwide, drove home the message: union activity could cost them their jobs, while a decision to reject union representation could bring those jobs to their communities.

II. <u>The Employer Violated Section 8(a)(3)</u>

The Employer's decision to locate the second 787 line at a nonunion facility and to establish a dual-sourcing program to support that line violated Section 8(a)(3) because the Employer acted in retaliation for the employees' Union activity and not for a legitimate business reason.

Initially, despite Boeing's assertions that its decision to locate a second 787 assembly line in South Carolina will not adversely impact any current unit employees, there is no question that the decision will direct work away from Puget Sound employees with consequent adverse effects. Instead of

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[24] The Region should insure that this message was communicated to employees.

[25] The authors of these articles will need to testify. If they resist testifying, and it becomes necessary to seek subpoena enforcement, the Region should contact Advice.

[26] Vice President Kight's video-taped comments that Boeing's customers could not live with "this triennial disruption" and that Boeing was looking to insure "production continuity" cannot be alleged as an independent violation because they were first posted on Boeing's website on September 2, outside the Section 10(b) period.

assembling all of the 787 planes in Washington as originally planned, once the second line opens in South Carolina, a significant portion of the remaining 787 orders will be filled by planes produced in North Charlestown. Future work opportunities will be lost for employees on the "surge line," as well as unit employees waiting to transfer into the more desirable 787 jobs. There are likely to be transfers to older, less desirable aircraft assembly lines, demotions, and layoffs. Moreover, Boeing's adoption of its new "dual-sourcing" program means that the Puget Sound and Portland unit employees will produce parts only for planes assembled in Washington and not for those planes assembled in South Carolina, also causing the loss of employment opportunities for unit employees and the likelihood of demotions and layoffs. If no unit employees have been harmed yet, it is merely because Boeing's retaliatory decision has not yet been implemented.

Recently, in Pittsburg & Midway Coal Mining Co., the Board expressly reaffirmed that an actual financial loss is not necessary to establish a Section 8(a)(3) violation.[27] In that case, the employer revised its bonus policy in retaliation for the employees' use of contractual "memorial days" to engage in work stoppages. Even though no employees thereafter suffered a diminution of their bonuses, the Board found a Section 8(a)(3) violation based upon the employer's retaliatory motive.[28]

Moreover, the Board specifically has held that an employer may not, for unlawfully motivated reasons, divert unit work to a nonunion plant even where there is no immediate impact on unit employees.[29] In Adair Standish Corp., the employer refused to take delivery of a new press ordered for its newly-organized Standish plant and installed it instead at its nonunion plant. The Board noted that "diversion of the press from Standish could reasonably result in diversion of new work from Standish" and therefore violated Section 8(a)(3) even though there was no immediate impact on the unit employees.[30] Similarly, in Cold Heading Co., the employer unlawfully relocated equipment to a newly-purchased nonunion facility and changed its plans to install new equipment in its

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[27] See 355 NLRB No. 197, slip op. at 5, fn. 8 (2010).

[28] Ibid.

[29] See Adair Standish Corp., 290 NLRB 317, 318-19 (1988), enfd in pertinent part 912 F.2d 854 (6th Cir. 1990).

[30] See id. at 319.

union facility after its employees' independent union representative sought to affiliate with the UAW.[31]

Here, as in Adair Standish and Cold Heading, there is a diversion of unit work that the unit employees otherwise would have performed. And as in Pittsburg & Midway Coal Mining Co., the fact that unit employees may not yet have experienced the financial impact of Boeing's decision is no defense to a Section 8(a)(3) violation.

Further, Boeing made this decision for unlawful reasons. Boeing admits that the "overriding factor" in its decision to place the second line in a nonunion facility was the employees' strike history. An employer's discouragement of its employees' participation in a legitimate strike constitutes discouragement of union membership within the meaning of Section 8(a)(3).[32] This applies to employer conduct designed to retaliate against employees for having engaged in a strike in the past,[33] as well as employer conduct designed to forestall employees from exercising their right to strike in the future.[34] Indeed, the Board recently reaffirmed that an employer violates the Act when it acts to prevent future protected activity.[35] Comparing such conduct to the

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[31] See 332 NLRB 956, fn. 5, 975-76 (2000). See also Associated Constructors, 325 NLRB 998, 998-1000 (1998), enfd. sub nom. O'Dovero v. NLRB, 193 F.3d 532 (D.C. Cir. 1999) (double-breasted employer unlawfully diverted work from its union entity to its nonunion entity in retaliation for the union's efforts to organize the nonunion entity and to escape the collective-bargaining agreement).

[32] Capehorn Industry, 336 NLRB 364, 365 (2001).

[33] See id. at 365-67 (employer violated Section 8(a)(3) by failing to immediately reinstate strikers upon unconditional offer to return to work where there was no legitimate business justification for entering into a permanent subcontract).

[34] See Century Air Freight, 284 NLRB 730, 732 (1987) (employer violated Section 8(a)(3) by permanently subcontracting unit work and discharging unit employees in order to forestall the exercise of their right to strike); Westpac Electric, 321 NLRB 1322, 1374 (1996) (employer violated Section 8(a)(3) by isolating employee in retaliation for his previous striking activities and also in anticipation that he would participate in a strike in the future).

[35] See Parexel International, LLC, 356 NLRB No. 82, slip op. at 4 and cases cited therein (2011) (employer violated Section

erection of "a dam at the source of supply of potential, protected activity," the Board reasoned that, "the suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity."[36]

Boeing concedes that it is removing work from the unit employees based upon their past exercise of their right to strike. However, Boeing relies upon the Supreme Court's decision in NLRB v. Brown Food Store[37] to argue that it is privileged to move work outside the unit to avoid the disruptive consequences of future strikes and that this is a sufficient business justification to permit its actions.

In Brown Food Store, the Court held that an employer was privileged to lock out its employees and use temporary replacements to carry on its business in the face of a whipsaw strike.[38] Specifically, the Court found that the use of a lockout and the hiring of temporary replacements "to bring pressure to bear" in support of its bargaining position after an impasse in negotiations was not an unfair labor practice.[39] Rather than finding the use of this economic weapon discriminatory, the Court concluded that it was a legitimate defensive measure to preserve the multiemployer group in the face of a whipsaw strike.[40]

Boeing's attempt to extend the holding of Brown to legitimatize any action that an employer takes to protect itself against future, wholly speculative, strikes would vitiate the Section 13 right to strike. And the Board has made it clear that an employer cannot rely upon Brown to justify discriminatory conduct based upon the exercise of the right to strike. Thus, in National Fabricators, the Board expressly rejected the employer's attempt to use Brown and other lockout cases to justify its decision to lay off those employees who were likely to honor a union picket line in the

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8(a)(1) by discharging an employee to prevent her from discussing wages with other employees).

[36] Ibid. (citation omitted).

[37] 380 U.S. 278 (1965).

[38] See id. at 283-85.

[39] See id. at 284.

[40] See ibid.

future.[41] Instead, the Board found that "disfavoring employees who were likely to engage in protected union activities" was proscribed by Section 8(a)(3) and the employer's business justification -- to avoid investing money in employees who were going to cease work later -- was "neither legitimate nor substantial."[42]

Boeing's concession that choosing South Carolina will result in "duplication" and economic "inefficiencies" further demonstrates that Boeing's actions were retaliatory and not a legitimate business decision. In addition, Commercial Airplanes CEO Albaugh conceded that going to South Carolina, "a green field site," involves significant risks. Boeing has the capacity, equipment, and trained workforce to handle the second assembly line in the Puget Sound area. The substantial investment required to build and equip the South Carolina facility therefore will be duplicative. In addition, Boeing will have to recruit and train a new workforce in South Carolina, while ultimately laying off experienced employees in Washington. Exaggerating the disruptive effects of prior strikes, Boeing maintains that the inefficiencies associated with moving work to South Carolina will be counterbalanced by the avoidance of strike disruptions in the future. However, there are other nonretaliatory and less costly means of dealing with the potential of relatively short disruptions caused by employee strikes, such as concluding negotiations with the Union for a long-term no-strike agreement. In addition, Boeing's claim that it took this action to avoid strike disruptions is belied by Boeing's rejection of the Union's efforts to negotiate a long-term no strike agreement.

Accordingly, the Region should proceed on the theory that Boeing violated Section 8(a)(3) by retaliating against the unit employees for engaging in the protected activity of striking.

We also conclude that Boeing's conduct was "inherently destructive of employee interests."[43] Conduct is "inherently destructive" when it "carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of

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[41] See 295 NLRB 1095, 1095 (1989), enfd. 903 F.2d 396 (5th Cir. 1990), cert. denied 498 U.S. 1024 (1991).

[42] See 295 NLRB at 1095-96.

[43] See NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967) (citation omitted).

intent.'"[44] In International Paper Co., the Board set forth four "fundamental guiding principles" for determining whether employer conduct is inherently destructive of employee rights.[45] First, the Board looks to the severity of the harm to employees' Section 7 rights. Second, the Board considers the temporal impact of the employer's conduct, i.e. whether the conduct merely influences the outcome of a particular dispute or whether it has "far reaching effects which would hinder future bargaining." Third, the Board distinguishes between conduct intended to support an employer's bargaining position as opposed to conduct demonstrating "hostility to the process of collective bargaining." And finally, the Board assesses whether the employee's conduct discourages collective bargaining by "making it seem a futile exercise in the eyes of the employees."[46] Even if the employee's conduct is inherently destructive, the Board weighs the employer's asserted business justification against the invasion of employee rights.[47]

Boeing's actions were inherently destructive of employee rights under the four principles articulated in International Paper. First, the harm to employees' Section 7 rights was severe; employees got the distinct message that if they engage in another strike, unit work will be moved to a nonunion facility and unit jobs will be lost. Second, Boeing's decision was designed to have far-reaching effects and not just to influence the outcome of a particular dispute, namely, to take away employee support for the Union's most effective economic weapon, and for the Union itself, and thereby hinder any future collective bargaining. Third, Boeing's conduct demonstrated hostility to the very process of collective bargaining and not just to support a specific bargaining position. Finally, bargaining was made to seem a futile

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[44] Ibid., quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 228, 231 (1963). See also Dorsey Trailers, Inc., 327 NLRB 835, 863-64 (1999), enf. denied in pertinent part 233 F.3d 831 (4th Cir. 2000).

[45] See 319 LRB 1253, 1269 (1995), enf. denied 115 F.3d 1045 (D.C. Cir. 1997).

[46] Id. at 1269-70 (citations omitted).

[47] Id. at 1273 (finding no justification for employer's "inherently destructive" conduct of permanently subcontracting bargaining unit work during a lawful lockout). See also Dorsey Trailers, 327 NLRB at 863-64 (employer's closing of facility during strike and relocation of unit work to newly purchased facility outside the union's jurisdiction was "inherently destructive" of employee rights).

exercise without the possibility of a strike to support the Union's position at the bargaining table.

The unavoidable consequence of Boeing's decision to place the second line in its newly-purchased, nonunion facility, accompanied by official comments on the intranet and in the media, was to severely chill its employees' exercise of Section 7 rights in the future -- whether it be the Puget Sound employees, the South Carolina employees, or Boeing employees elsewhere. Employees will correctly fear that engaging in such protected activity could cause them to lose their jobs to nonunionized workers. Others may be encouraged to file or support decertification petitions. And the many unrepresented Boeing employees will be discouraged from organizing or voting in support of union representation if they believe that exercising their right to concerted activity justifies moving commercial production elsewhere.

Moreover, even if the effect on employee rights was only "comparatively slight," Boeing had no legitimate business justification. Its only justification was its desire to insure against its employees' exercise of their Section 7 rights, and that is not a legitimate justification.

The Board recently held in Arc Bridges, Inc. that an employer's conduct was inherently destructive where its stated reason for withholding a regularly-scheduled wage increase from represented employees was that it was in negotiations with the union.[48] The Board found that the employer's stated reason -- that it wanted to enhance its bargaining position with the union -- was an admission that it withheld the increase because employees chose union representation.[49] Likewise, Boeing's stated reason for its decision -- that it wanted to avoid strike disruptions -- was an admission that it decided to locate the second line in South Carolina because the Puget Sound employees chose union representation and the South Carolina employees did not. Accordingly, Boeing's decision coupled with its public pronouncements emphasizing the motivation for its decision was inherently destructive of its employees' rights to engage in union activity and violated Section 8(a)(3).

III. The Union Waived its Right to Bargain

The Union's allegation that Boeing failed to bargain in good faith over its decision as to where to locate the second 787 line raises two preliminary issues: (1) whether Boeing's decision was a mandatory subject of bargaining; and (2) if so,

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[48] See 355 NLRB No. 199, slip op. at 3-4 (2010).

[49] See id., slip op. at 3.

whether the Union waived its right to bargain over that subject. Although we conclude that the decision was a mandatory subject of bargaining and there is substantial evidence that Boeing did not bargain in good faith to a valid impasse, the Region should dismiss the Section 8(a)(5) allegations on the ground that the Union waived it right to bargain, applying Provena.[50]

A. Mandatory Subject of Bargaining

Under Dubuque Packing Co., a decision to relocate unit work that is not accompanied by a basic change in the employer's operation is a mandatory subject of bargaining unless the employer can establish that: the work performed at the new location varies significantly from the work performed at the prior location; the work performed at the former location is discontinued entirely and not moved to the new location; or the employer's decision involved a change in the enterprise's scope and direction.[51] Alternatively, the employer can defend by showing that: labor costs were not a factor in the decision; or if labor costs were a factor, the union could not have offered sufficient concessions to change the employer's decision.[52] Applying the Dubuque test, the Board repeatedly has found relocation decisions to constitute a mandatory subject of bargaining.[53]

In addition, the Board has held that a decision may be a mandatory subject even though there is no immediate loss of unit jobs.[54] For example, in Quickway Transportation, Inc.,

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[50] Provena St. Joseph Medical Center, 350 NLRB 808 (2007).

[51] 303 NLRB 386, 391 (1991), enfd. sub nom. Food & Commercial Workers Local 150-A v. NLRB, 1 F.3d 24 (D.C. Cir. 1993).

[52] Ibid.

[53] See, e.g., Titan Tire Corp., 333 NLRB 1156, 1164-65 (2001) (decision to permanently relocate equipment and jobs in reaction to strike); Owens-Brockway Plastic Products, 311 NLRB 519, 521-23 (1993) (decision to close plant and transfer work to other facilities).

[54] See, e.g., Overnite Transportation Co., 330 NLRB 1275, 1276 (2000), revd. mem. 248 F.3d 1131 (3d Cir. 2000) ("We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunion employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees").

the Board found that the employer's decision to contract with independent owner-operators rather than expand the unit, as it had originally planned, was mandatory because that decision "obviously constrained the work opportunities available to the bargaining unit."[55] Likewise, in Spurlino Materials, LLC, the Administrative Law Judge, in a decision adopted by the Board, found that even though no unit employees suffered a loss of work as a result of the employer's subcontracting, existing employees might have otherwise been given overtime or the employer might have hired additional unit employees, resulting in benefits for the Union and current unit employees in having an expanded unit.[56] And in Dorsey Trailers, Inc., the Board found that subcontracting work to reduce a backlog in orders was a mandatory subject because "the potential loss of overtime or reasonably anticipated work opportunities poses a detriment to unit employees" even if no employees lost their jobs.[57]

Here, the decision to locate the second 787 assembly line in South Carolina amounted to a relocation of unit work. Even though no unit employees have yet to lose work, as in Dorsey Trailers the assignment of unit work to nonunit employees in order to reduce an order backlog presents a potential loss of overtime or reasonably anticipated work opportunities and therefore poses a detriment to unit employees.[58] The work that will be performed in South Carolina is identical to that performed on the first line and the surge line in Everett by unit employees. The decision did not involve a basic change in Boeing's operation or any change in the enterprise's scope or direction; Boeing does not intend to change its production methods or its products.[59] Boeing did not demonstrate that labor costs were not a factor in the decision. In fact, according to Boeing's CEO, the decision was motivated primarily by a desire to avoid strikes and secondarily because the Employer cannot afford the rate at which unit wages are escalating. Boeing also did not demonstrate that the Union could not have offered sufficient concessions to change its

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[55] See 355 NLRB No. 140 (2010), incorporating by reference the rationale of 354 NLRB No. 80, slip op. at 2 (2009).

[56] See 355 NLRB No. 77 (2010), incorporating by reference the rational of 353 NLRB 1198, 1219 (2009).

[57] See 321 NLRB 616, 617 (1996), enf. denied in relevant part 134 F.3d 125 (3d Cir. 1998). Accord Acme Die Casting, 315 NLRB 202, fn. 1, 209 (1994).

[58] See 321 NLRB at 617.

[59] See Owens-Brockway Plastic Products, 311 NLRB at 522.

decision; the Union was willing to make concessions on both the strike and wage issues during negotiations in the fall of 2009. Accordingly, we conclude that Boeing's decision as to where to locate the second 787 line was a mandatory subject of bargaining.

B. Waiver of the Right to Bargain

The Board applies a "clear and unmistakable" waiver standard to determine whether a union has waived its right to bargain about a mandatory subject of bargaining during the term of a collective-bargaining agreement.[60] The Board will find a waiver if the contract either "expressly or by necessary implication" confers on management a right to unilaterally take the action in question.[61] In interpreting the parties' agreement, the relevant factors include: (1) the wording of pertinent contractual provisions; (2) the parties' bargaining history; and (3) the parties' past practice.[62]

The Board has found a waiver based on contract language where there is an express reference to the specific type of decision that the employer has implemented unilaterally.[63] Thus, in Ingham Regional Medical Center, the Board adopted an Administrative Law Judge's decision that the union waived its right to bargain about a subcontracting decision where the contractual management-rights clause expressly reserved to management the right to "use outside assistance or engage independent contractors to perform any of the Employer's operations or phases thereof (subcontracting)[.]"[64] This right was "vested exclusively in the Employer" and was not

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[60] See Provena St. Joseph Medical Center, 350 NLRB at 810-11.

[61] See id. at 812, fn. 19.

[62] See Johnson-Bateman Co., 295 NLRB 180, 184-89 (1989) (no waiver of right to bargain about drug/alcohol testing requirement where the management rights clause was generally worded, issue was not "fully discussed and consciously explored" during negotiations, and past practice of union acquiescence to other unilateral work rule changes did not waive the right to bargain about such changes for all time).

[63] See, e.g., Ingham Regional Medical Center, 342 NLRB 1259, 1261-62 (2004) (under the management-rights clause, the employer expressly reserved the right to subcontract); Allison Corp., 330 NLRB 1363, 1364-65 (2000) (management-rights clause "specifically, precisely, and plainly" granted the employer "the exclusive right ... to subcontract").

[64] See 342 NLRB at 1260, 1261-62.

subject to arbitration.[65] Although another contractual provision required the employer to provide 60 days notice and "discuss" with the union any subcontracting decision that would cause unit employees to be laid off, the words "discuss" and "bargain" were found not "synonymous" in the parties' contract.[66]

In this case, Section 21.7 of the parties' agreement "specifically, precisely, and plainly"[67] granted Boeing the right to offload work to a facility not covered by the agreement. As in Ingham Regional Medical Center, the other provisions of Section 21.7 that required Boeing to provide the Union notice and an opportunity to review and recommend alternatives did not require the Employer to bargain over an offloading decision.

The Union does not dispute that Section 21.7 contains a waiver but asserts instead that the Employer may not take advantage of the waiver. Specifically, the Union maintains that a contractual waiver cannot be applied to a decision that is unlawfully motivated. But there is no authority for the proposition that an unlawful motive negates a contractual waiver; rather, the cases on which the Region and Union rely hold that a contractual waiver is no defense to a Section 8(a)(3) violation.[68]

The Union's other arguments against application of the waiver are also unavailing. Thus, the Union asserts that the contractual waiver does not apply because the parties entered negotiations for a new contract. However, during those mid-term negotiations, their existing contract -- including Section 21.7 -- continued in effect. The Union also contends

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[65] Id. at 1260.

[66] Id. at 1262.

[67] See Allison Corp., 330 NLRB at 1365.

[68] See Reno Hilton, 326 NLRB 1421, 1430 (1998), enfd. 196 F.3d 1275 (D.C. Cir. 1999) ("merely because the Respondent has negotiated the unfettered right in a collective-bargaining agreement to contract out work at any time, such right ... does not unfetter and insulate the Respondent from the sanctions of the Act prohibiting it from discriminating"); RGC (USA) Mineral Sands, Inc. v. NLRB, 281 F.3d 442, 450 (4th Cir. 2002) (enforcing Board decision finding Section 8(a)(3) violation on grounds that, even if contract authorized employer to unilaterally alter shift assignments, "an employer cannot exercise contractual rights to punish employees for protected activity").

that the waiver cannot extend to work transferred after the contract's expiration in September 2012, but Boeing made its final decision in 2009 and expects to open the second line in South Carolina in mid 2011.[69] The Union's estoppel argument also lacks merit. While Boeing took the position that the notice and review provisions in Article 21.7 did not apply because no employees will be laid off, Boeing is not thereby estopped from asserting the waiver provision.

Moreover, Boeing's request to negotiate mid-term changes to the parties' agreement did not subject it to the traditional Section 8(a)(5) bargaining obligations.[70] Absent a contractual reopener provision, parties are under no obligation to bargain over proposals for mid-term modifications.[71] For this reason, we do not reach the question of whether Boeing engaged in surface bargaining in the fall of 2009, bargained to a valid impasse, or unlawfully failed to provide information relevant to those negotiations.

IV. The Appropriate Remedy

We conclude that special remedies must be fashioned in the unusual circumstances of this case.

First, with respect to the Section 8(a)(1) violations, which had a particularly chilling impact upon employees, the Region should seek a notice reading by a high-level Boeing official, to insure that employees learn about their statutory

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[69] Thus, if there is a duty to bargain over a relocation decision, it arises when the decision is announced and not when it is ultimately implemented. See, e.g., Bell Atlantic Corp., 336 NLRB 1076, 1086-89 (2001) (union waived right to bargain over employer's decision to close facility and transfer work to nonunion facility where it received notice of decision in August and did not request bargaining until December, even though no unit work would be relocated before the following April).

[70] See St. Barnabas Medical Center, 341 NLRB 1325, 1325 (2004) (union did not incur traditional bargaining obligations by requesting that employer meet to discuss feasibility of wage reopener, and employer violated Section 8(a)(5) by unilaterally implementing wage increases after an impasse in those negotiations).

[71] See Boeing Co., 337 NLRB 758, 763 (2002) (employer did not incur bargaining obligation by agreeing to union's request to consider midterm modification); Connecticut Power Co., 271 NLRB 766, 766-67 (Section 8(d) does not require an employer who suggests a midterm contract change to negotiate about it).

rights and gain assurance that Boeing will respect those rights.[72] The notice reading is particularly effective if read by an official who personally committed some of the violations, or read by a Board agent in his presence, in order "to dispel the atmosphere of intimidation he created."[73]

Finally, to remedy the Section 8(a)(3) violation, the Region should seek an order requiring Boeing to maintain the second line in Washington. At the time of the discriminatory conduct, Boeing intended to use the second line to assemble three 787 aircraft each month, while assembling seven 787 aircraft each month on the first line in Everett. At present, even the first line is not producing up to capacity because of problems with suppliers and FAA certification. Thus, the Region should seek an order requiring that, as Boeing production increases, the first ten aircraft assembled each

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[72] See, e.g., Homer D. Bronson Co., 349 NLRB 512, 515 (2007), enfd. 273 F. App'x 32 (2d Cir. 2008) (notice reading is an "effective but moderate way to let in a warming wind of information, and more important, reassurance"); Federated Logistics & Operations, 340 NLRB 255, 258 (2003), affd. 400 F.3d 920 (D.C. Cir. 2005) (employees will perceive that "the Respondent and its managers are bound by the requirements of the Act").

[73] Three Sisters Sportswear Co., 312 NLRB 853, 853 (1993), enfd. mem. 55 F3d 684 (D.C. Cir. 1995), cert. denied 516 U.S. 1093 (1996). See also, e.g., Homer D. Bronson Co., 349 NLRB at 515 (reading by president of manufacturing, who personally delivered speeches threatening plant closure or relocation); Texas Super Foods, 303 NLRB 209, 209 (1991) notice reading by owner and president who signed unlawful letters to unit employees, drafted unlawful speech threatening job losses, and personally gave the speech to at least two groups of employees).

month be assembled by the Puget Sound unit employees and that the supply lines for these aircraft be maintained in the Puget Sound and Portland facilities.[74]

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[74] At this time, we do not reach a decision on the Union's request for preliminary injunctive relief. The Region should reassess whether Section 10(j) relief is warranted after the case is tried before the Administrative Law Judge. In the meantime, the Region should put evidence in the record regarding the chilling impact of Boeing's violative statements and conduct to support the notice-reading remedy. This will facilitate use of the administrative record to demonstrate in a subsequent Section 10(j) proceeding that preliminary injunctive relief is just and proper.

The Boeing Company, an international corporation engaged primarily in developing and producing military and commercial aircraft, has a long-established collective-bargaining relationship with the International Association of Machinists and Aerospace Workers (IAM) and certain IAM District and Local Lodges, covering production and maintenance employees in Washington, Oregon, and Kansas. This case involves Boeing's transfer of work from its unionized workforce in Washington to a new, nonunion facility in South Carolina because union employees in Washington had exercised their right to strike, a right protected by the National Labor Relations Act.

Historically, the Washington employees have performed the final assembly of all Boeing planes. In late 2003, Boeing announced that it would place the assembly line for its new 787 "Dreamliner" airplane in Everett, Washington after the Washington State Legislature passed a tax and subsidy incentive package totaling more than $3.2 billion. That line opened in May 2007, with the capacity for producing seven planes each month.

With the 787, Boeing departed from its previous practice of manufacturing most of the aircraft parts with its own employees and instead outsourced parts production to other suppliers in the southeast U.S. and abroad. Boeing repeatedly has had to postpone the delivery dates for the aircraft, due primarily to problems with suppliers and software issues. As a result, sometime in late 2008 or early 2009, Boeing determined that it would have to establish a second assembly line.

Meanwhile, in the fall of 2008, after negotiations for a successor collective-bargaining agreement broke down, the Union struck for approximately two months until the parties were able to agree on a new contract. Thereafter, Boeing made clear to its unionized workforce that it would not countenance further strikes. Time and again, in e-mails to employees, on its intranet site, in the media, and in talks with the Union, Boeing tied its ability to compete to the avoidance of future strike activity.

In late July, 2009, Boeing purchased the Vought facility in South Carolina and immediately raised the possibility that the second line would be located in South

Carolina. Although that facility had been unionized, on the date of the purchase an employee filed a decertification petition. In mid-September, the Union lost the decertification election and was decertified.

At the same time, Boeing officials told the Washington unit employees that they could retain all of the 787 assembly work only by waiving their right to strike for twenty years. If agreement could not be reached, the second line would be put in South Carolina. The Union entered negotiations with Boeing in late September, and the parties continued bargaining through much of October. The Union made concessions in an effort to address Boeing's stated concerns. During the negotiations, Boeing applied for the necessary permits from the South Carolina regulatory bodies, and as soon as the South Carolina legislature approved financial incentives for Boeing on October 27, Boeing called off negotiations and announced its decision.

Thus, on October 28, Boeing announced that it would locate the second 787 assembly line in South Carolina. Boeing also stated that it intended to build a "surge line" in Everett -- a temporary second assembly line that would be phased out once the South Carolina line was up and running. In addition, on December 3, Boeing announced that it would create a "dual-sourcing" program and contract separate suppliers for the South Carolina assembly line. As a result, unionized employees in Washington and Oregon who produce parts for the 787 assembly line are likely to suffer a loss of work. Boeing's CEO admitted that the "overriding factor" for moving work to South Carolina was the employees' strike activity

On these facts, the Acting General Counsel issued a complaint alleging independent violations of Section 8(a)(1) based upon Boeing's statements to employees on the intranet and through the media that drove home the message that union activity could cost them their jobs. The Acting General Counsel's complaint further alleges a violation of Section 8(a)(3) based upon Boeing's decision to place the second line in South Carolina and to establish a dual-sourcing supply program in order to retaliate against bargaining unit employees for engaging in protected Union activity. To remedy the Section 8(a)(3) violation, the Acting General Counsel will seek an order that would require Boeing to maintain the surge line in Washington.

Since Boeing intended for the second line to assemble three aircraft each month in South Carolina, while assembling seven planes on the first line, the Acting General Counsel will seek an order requiring Boeing to assemble in Washington the first ten 787 aircraft that it produces each month and to maintain the supply lines for those aircraft where they currently exist, in the Washington and Oregon facilities.