Testimony of Professor Julius Getman
Earl E. Sheffield Regents Chair of Labor Law
at the University of Texas School of Law
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I am Julius Getman, Earl E. Sheffield Regents Chair of Law at the University of Texas at Austin. I have taught labor law since 1963. Prior to coming to Texas I was a tenured professor at Indiana University School of Law, Stanford University School of Law, and Yale Law School. I have written extensively on issues of labor law. I am the co-author of a widely used treatise on basic labor law and was co-principal investigator of a major study of union organizing campaigns. Most recently, I have published *Restoring the Power of Unions: It Takes a Movement*, which tells the history of the hotel and restaurant workers union and discusses the current law. I appreciate the opportunity which the committee's invitation provides me to express my opinion on important issues of labor law and policy.

The General Counsel's complaint alleges that Boeing has transferred work, which would otherwise have been done at its Washington state facility, to South Carolina in reprisal for past strikes, and with the avowed purpose of heading off future strikes. If the General Counsel can establish the truth of this allegation, and public statements by Boeing officials seem to acknowledge its accuracy,[1] he will have shown that Boeing violated Section 8 (a) (3) of the NLRA. There is nothing new or controversial about this conclusion. Section 8(a) (3) of the National Labor Relations Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term of condition of employment

[1] A list of statements attributing the move of "dreamliner" work to South Carolina to union activity is contained the General Counsel's complaint.

to encourage or discourage membership in any labor organization."[2] The purpose of this section is "to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood."[3] In accord with this policy, the Court has held that to "encourage of discourage membership" means also to encourage or discourage participation in union activities.[4]

Moving jobs from once facility to another to avoid unionization or to punish workers for engaging in protected activity violates this basic policy of the Act. These practices have long been declared illegal by the Board, with the agreement of the Courts.

In 1965, the Supreme Court decided in the case of *Textile Workers Union v. Darlington Manufacturing Co.*[5], that a company may legally go out of business to thwart union activity, but it also held that "[a] partial closing is an unfair labor practice ... if motivated by a purpose to chill unionism."

Two years later, then Judge, later Chief Justice Burger stated in *Local 57, International Ladies' Garment Workers' Union v. National Labor Relations Board, 1967*,[6] "While it is now clear that an employer may terminate his business for any reason, it is equally well settled that he may not transfer its situs to deprive his employees of rights protected by Section 7."[7] Not only have the Courts regularly affirmed unfair labor practice findings based on retaliation, but they

[2] 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(2)(3) (1958).

[3] Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954).

[4] *Id.* At 39-42.

[5] 380 U.S. 263.

[6] 374 F2d 295.

[7] It has been understood since the NLRA was passed in 1937 that the right to strike is protected by Section 7.

have upheld strong remedies including the restoration of improperly closed facilities.[8] Accordingly I am in agreement with the host of distinguished labor law scholars who have publically supported the General Counsel's conclusion that issuance of a complaint was justified in the Boeing case.[9]

Despite a spate of angry statements to the contrary, there is no basis for the accusation that the issuance of a complaint is in any way connected to the fact that South Carolina is a right to work state. Right to work is a frequently misunderstood concept. Despite the name it has nothing to do with the employer's ability to hire or fire. Nor does it refer to the right to unionize. It refers only to the ability of states to prohibit unions from negotiating mandatory dues payments from workers that they represent. Had Boeing transferred operations on the same basis to a non-union facility in a non-right to work state, its actions would still have violated the Act. This same well-established precedent supports the general counsel in the instant case.

Given the routine nature of the violation and the limited nature of the proposed remedy (discussed below), it is difficult for me to understand the sense of outrage that has preceded and given rise to this hearing. The Board has routinely found violations of section 8 (a) (3) based on employer reprisal for union activity since the Act was first passed in 1935. I know of no case in which a political reaction comparable to the current denunciations of the General Counsel's action has resulted. One wonders why the issuance of a complaint, a preliminary step far less final than a Board decision, should be responded to so intensely. Behind the fervent denunciations there seems to be a deep misunderstanding of the likely consequences of the General Counsel's actions. Some seem to find, in the General Counsel's actions, the first step of

[8] See e.g. Teamsters Local 17 v. NLRB, 803 F 2d 946 (D.C. Cir 1988).

[9] The list includes Professors James Brudney of Ohio State, Catherine Fisk of Cal Irvine, and Ellen Dannin of Penn State. These are all outstanding, nationally recognized scholars.

a process to take from employers the right to make basic business decisions. In fact the complaint itself specifically states that aside from returning the work improperly removed from the unionized workers, "the Acting General Counsel does not seek to prohibit Respondent from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility."

Nor has this, or any other Labor Board, ever argued for or signaled support for, a policy depriving employers of the right to make basic entrepreneurial non-discriminatory decisions. And if the Board were to overreact in this regard, the Courts are available to correct their excesses.

The National Labor Relations Board, the agency to which Congress has delegated the process of interpreting the NLRA, has not yet ruled on the case. Even if the General Counsel's theory of violation were somehow erroneous, there would be no basis for Congressional involvement in the decision process at this point. The NLRB is an agency with two separate arms: the General Counsel who prosecutes possible unfair labor practices and the five-member Board which rules on them. There has been no ruling by the Board itself on the Boeing case.

The two branches of the Board act independently of each other. The five-member Board according to statute and precedent played no part in the decision by the General Counsel to bring a complaint. And the General Counsel does not play a role other than that of advocate in the Board's decisional process. Before the Board itself issues any order, the case must be heard and decided by an Administrative Law Judge and then by the Board itself. The Board should be permitted to decide this case according to the law without political interference. As Justice

Frankfurter stated over 50 years ago with respect to the reach of sections 7 and 8, "It is essential that these determinations be left in the first instance to the National Labor Relations Board."[10]

The complaint is simply an allegation; it does not require Boeing to take any action. Indeed the same would be true if the Board ultimately decides against Boeing. Boeing may bring the matter to a Court of Appeals without taking any of the steps contained in the Board's order, or it may simply wait for the Board to do so in an enforcement action, before complying. Not until the Board's order is enforced by a Court of Appeals would Boeing be legally compelled to take action in accordance with the Board's ruling. And if all of the adjudicatory agencies, yet to rule on the case, agree with the Acting General Counsel, the impact on Boeing will not be catastrophic since the General Counsel is not seeking to have Boeing give up its South Carolina facility and agrees that it may transfer work to it, so long as its decision to do so is made on a non-discriminatory basis. In short, there is no reason for the sense of urgency that has provoked these hearings.

What is unprecedented is a committee of the Congress choosing to intervene while the processes of law are still in so preliminary a state. I know of no similar instance. It is inevitable that this intervention will be interpreted by many as an unwarranted attack on the NLRB and an inappropriate effort to influence the ongoing adjudicatory process.

[10] San Diego Building Trades Council v. Garmon, 359 U.S. 23 (1959).