UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

THE BOEING COMPANY	§	
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	§	
	§	
and	§	Case 19-CA-32431
	§	
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	§	
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AMICUS CURIAE BRIEF OF SIXTEEN STATE ATTORNEYS GENERAL IN SUPPORT OF RESPONDENT THE BOEING COMPANY

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The above-signed State Attorneys General represent both right-to-work States and non-right-to-work States. We respectfully submit this *amicus curiae* brief not only out of concern that the NLRB's unprecedented proceedings against The Boeing Company will harm our States' ability to attract new employers and jobs for our citizens, but also because the NLRB's proposed action will harm the interests of the very unionized workers whom the general counsel's Complaint seeks to protect.

STATEMENT OF FACTS

Due to growing demand for its products around the globe, The Boeing Company decided to invest billions of dollars to expand its operations and construct a new final assembly facility in South Carolina. The National Labor Relations Board (the NLRB) recently filed this action to prevent Boeing from opening the South Carolina assembly line based on the NLRB's general counsel's claim that the new facility would negatively impact Boeing's unionized workforce in Washington State.

Boeing currently has a final assembly line for its new 787 Dreamliner aircraft in Washington State, but due to the growing demand for the Dreamliner, Boeing decided to construct a second final assembly-line facility. Before it exercised its discretion to open the South Carolina manufacturing facility, Boeing considered constructing a second final assembly line in Washington State and entered into negotiations with the local affiliate of the International Association of Machinists and Aerospace Workers union (IAM), which represents Boeing's union workforce.

When negotiations broke down, Boeing determined that the best business decision was to build a second assembly line in South Carolina. Boeing's Board of Directors unanimously approved the South Carolina facility. According to its General Counsel, Boeing's decision was based upon "a host of business considerations, including the desirability of geographic diversity for our commercial operations, the national security benefits of a multiple-site airplane production capability, the comparative labor costs of the competing states, the significant financial incentives that Boeing was offered by the state of South Carolina, and, as well, production stability for the 787's global production system." Hearing of the Senate Health, Labor and Pensions Committee, *The Endangered Middle Class: Is the American Dream Slipping Out of Reach for American Families?*, testimony of J. Michael Luttig, General Counsel for the Boeing Company (May 12, 2011). Boeing's decision to add *new* production capacity in South Carolina left its *existing* capacity—and existing jobs—in Washington State in place. *Id.* Indeed, since the decision to open the South Carolina factory, Boeing has added over 2,000 union jobs in Washington. *Id.* To date, Boeing has invested hundreds of millions of dollars in the South Carolina facility.

On April 20, 2011, the acting general counsel of the NLRB filed a complaint against The Boeing Company, challenging its decision to build a new final assembly line for the 787 Dreamliner aircraft in South Carolina. *Complaint and Notice of Hearing*, Case 19-CA-32431 (April 20, 2011) (the Complaint). Although Boeing has recently added thousands of union jobs in its Washington facilities, the Complaint

alleges that Boeing's decision to build the final assembly facility in South Carolina constitutes an effort to retaliate against the Washington-based unionized workforce for repeatedly striking. Complaint at 6. In an unprecedented action, the NLRB seeks to force Boeing to construct its new manufacturing facility in Washington State, rather than South Carolina. Complaint at 7-8. Notably, the Complaint was filed just weeks before Boeing's South Carolina facility was set to begin operations—and a year and a half after Boeing began constructing the new facility.

ARGUMENT

The General Counsel's unprecedented application of the National Labor Relations Act will harm the ability of *every* State—both right-to-work States and non-right-to-work States—to attract businesses and promote new job growth.

To begin with, the NLRB's eagerness to impute anti-union animus to Boeing's business decision will discourage existing employers from constructing future facilities—and creating new jobs—in right-to-work States. Under the general counsel's theory, any employer that has *ever* endured a strike at its unionized facilities could be improperly charged with retaliation simply because the company exercised its discretion to open a new factory in a State with a more favorable business climate.

Contrary to the general counsel's apparent position, federal labor law neither favors nor disfavors states based on whether they have right-to-work laws. The Taft-Hartley Act of 1947 guaranteed that the National Labor Relations Act would never be construed to undermine or interfere with each State's authority to enact

and enforce right-to-work laws. *See* 29 U.S.C. § 164(b) (providing that State laws prohibiting forced union-membership as a condition of employment prevail over any provision or application of the NLRA). State policymakers should be free to choose to enact right-to-work laws—or to choose not to enact them—without worrying about retaliation from the NLRB. Federal policy that favors or disfavors states on the basis of the existence or absence of right-to-work laws—such as the policy advocated in the Complaint—runs counter to 29 U.S.C. § 164(b) and should be rejected.

Worse still, the general counsel's aggressive approach to Boeing will actually harm non-right-to-work States' ability to attract new businesses, jobs, and economic development opportunities. New or fledgling companies are now aware that locating new facilities and creating new jobs in a non-right-to-work State could handcuff their ability to open future factories in right-to-work States. As a result, it is logical that some employers will simply avoid creating new jobs or facilities in non-right-to-work States in the first place. For these businesses, the safer course of action could limit their operations to right-to work states like South Carolina.

While the threat of NLRB enforcement may lead some new businesses to conclude that the *safer* path is to restrain their operations to right-to-work states, the gravest threat to all states is that employers will decide the *safest* path favors moving their operations out of the United States, where the NLRB lacks enforcement jurisdiction. Inexplicably, the acting general counsel would introduce this new threat to American jobs at a time when the nation's economy and

workforce are still suffering. Just last week, the Bureau of Labor Statistics ("BLS") issued a monthly jobs report indicating that 13.9 million Americans are still unemployed.[1] Despite the nation's 9.1% unemployment rate, the general counsel is advocating an enforcement action that has the potential to further threaten job growth by discouraging employers from opening new facilities in the United States. If the NLRB makes the decision to proceed with the enforcement action recommended by its general counsel, the Board will harm the very workers that it is charged with protecting—by encouraging their employers to open new facilities in other countries.

The NLRB's unprecedented and unwarranted proceedings against Boeing create perverse incentives and harm the business climate in every State. If approved by the Board, the general counsel's proposed enforcement action will also harm unionized workers in the long run by deterring companies from locating future work in non-right-to-work States. On behalf of the citizens and businesses of our States, we urge this Board to repudiate the general counsel's misinterpretation of the National Labor Relations Act as soon as possible.

[1] Economic News Release: *Employment Situation Summary*, U.S. Bureau of Labor Statistics, June 3, 2011, *available at* http://data.bls.gov/cgi-bin/print.pl/news.release/empsit.nr0.htm.

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CERTIFICATE OF SERVICE

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