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Corporate Campaigns and the NLRB: The Impact of Union Pressure on Job Creation

Chairman Roe, Ranking Member Andrews, and Members of the Subcommittee, thank you for your invitation to participate in this hearing. I am honored to appear before you today.

By way of introduction, I am a partner in the law firm of Morgan, Lewis & Bockius LLP, where I represent employers in many industries under the National Labor Relations Act, including manufacturing, construction, maritime, retail food, and higher education. I am also an Adjunct Professor at Georgetown University Law Center, where I co-teach a course on labor law with a retired chief counsel of the National Labor Relations Board. Beginning in September 2011, I will serve as the management co-chair of the American Bar Association's Committee on Practice and Procedure under the National Labor Relations Act.[1]

In my testimony today, I will describe the phenomenon of union corporate campaigns and how they relate to the structure and policies of the National Labor Relations Act (NLRA or Act).[2] I will also discuss recent National Labor Relations Board (NLRB or Board) cases that relate to union corporate campaign tactics and what effect those cases have on employers that are the target of a corporate campaign. Finally, I will address the Boeing case and its relevance to the subject matter of this hearing.

What Is a Corporate Campaign?

One of the most frequently cited definitions of a corporate campaign is attributed to the current President of the AFL-CIO, Richard L. Trumka:

> Corporate campaigns swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow.[3]

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[1] I am not speaking on behalf of Morgan, Lewis & Bockius, the Georgetown University Law Center, or the American Bar Association, and my testimony should not be attributed to any of these organizations. My testimony reflects my own personal views, although I wish to thank Ross H. Friedman and David R. Broderdorf for their efforts in helping me preparing this testimony.

[2] 29 U.S.C. §§ 151 *et seq*.

[3] Jarol B. Manheim, THE DEATH OF A THOUSAND CUTS: CORPORATE CAMPAIGNS AND THE ATTACK ON THE CORPORATION (2001).

Unions engage in corporate campaigns as an alternative to calling a strike as a means of applying pressure on employers. This is because unions increasingly believe that the strike is an ineffective weapon of industrial warfare.[4] A strike necessarily entails a loss of pay for the striking employees, which tends to have a mitigating effect on the duration of the labor dispute. Because both parties (the employer and the union-represented employees) suffer economic consequences during a strike, there is an incentive on both sides of the table to resolve the labor dispute as quickly as possible.

During a corporate campaign, however, employees generally continue to work and receive pay. Therefore, employees suffer little or no economic harm as a result of the union's campaign against their employer. This means that a union can wage a prolonged corporate campaign without any real pressure from the employees to resolve the underlying dispute. Consequently, the dispute may persist for as long as the employer is willing to resist the union's demands and absorb the economic damage caused by the campaign.

Corporate campaigns are used in various types of labor disputes. They are used during an organizing campaign in order to pressure an employer to remain neutral during the campaign and to recognize the union without an election. They also can be used as a means of creating leverage for the union in the context of negotiating a collective bargaining agreement on behalf of a group of employees that the union already represents.

The target of the corporate campaign may not be the employer with which the union has a labor dispute. For instance, the union may engage in corporate campaign tactics against the employer's customers, suppliers, lenders, creditors, or investors as a means of creating secondary pressure against the employer.[5]

The types of tactics employed in a corporate campaign vary widely, and are limited only by the union's imagination. They typically involve efforts to generate negative publicity for the employer though print, radio, or television advertisements or the display of billboards, banners, or inflatable rats. The union may coordinate these public relations activities with civic or religious leaders, politicians, or public interest groups. Corporate campaigns can involve calls for boycotts of the employer's products, including through picketing, handbilling, or demonstrations at stores or other retail outlets. The union also may seek to apply personal pressure against the corporation's officers and directors, through picketing or demonstrations at their residences or at social events.

Corporate campaigns may involve other forms of pressure that have no apparent connection to the labor dispute. For instance, the union may lobby legislators or regulators to withhold government contracts, to block zoning approvals, or to deny public financing to the employer that is the target of the corporate campaign. The union also may file charges or initiate legal action under a variety of state or federal laws, such as environmental laws, securities laws, or employment laws. These claims or charges may then be withdrawn as soon as the labor dispute is resolved.

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[4] *See* Cynthia L. Estlund*, The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1605 (2002).

[5] *See id.*

Does Federal Labor Law Regulate Corporate Campaign Tactics?

Corporate campaigns must be understood in the context of the structure and policy of the NLRA. The basic policy objective of the Act is to promote industrial peace through the process of collective bargaining.[6] Somewhat paradoxically, the right to strike (and the employer's corresponding right to lockout) promotes industrial peace by creating an incentive for the parties to negotiate and resolve their differences at the bargaining table.[7] In most cases, the parties do not engage in a strike or a lockout, but instead decide to enter into an agreement that reflects each side's actual or perceived economic leverage.

Once the parties have entered into a collective bargaining agreement, the Act assumes that there will be labor peace during the term of the agreement. Section 8(d) of the Act prohibits the parties from engaging in a strike or lockout until at least 60 days after they have provided written notice of their desire to negotiate a new agreement.[8] In addition, the party seeking to modify the agreement is obligated to notify the Federal Mediation and Conciliation Service and any equivalent state agency, so that these agencies may help the parties resolve their negotiations peacefully.[9]

To further ensure industrial peace during the term of a collective bargaining agreement, Congress enacted Section 301 of the Labor Management Relations Act, which creates a federal cause of action to enforce the terms of the collective bargaining agreement, including the duty to resolve disputes through arbitration.[10] The legislative history of Section 301 clearly reflects Congress's expectation that employers should be able to run their businesses without the threat of economic warfare during the term of a collective bargaining agreement:

> The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.[11]

Corporate campaigns are designed to "sidestep the labor laws" by creating new forms of economic warfare as an alternative to the carefully regulated right to strike, either during or after

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[6] *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964) ("One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor−management controversies to the mediatory influence of negotiation."); *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959) ("The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining . . . and thereby to minimize industrial strife.").

[7] *See NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960) ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.").

[8] 29 U.S.C. § 158(d)(1) & (4).

[9] 29 U.S.C. § 158(d)(3).

[10] 29 U.S.C. § 185; *see also Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 455 (1957) (finding that Section 301 "expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way").

[11] *Lincoln Mills*, 353 U.S. at 454 (quoting S.Rep. No. 105, 80th Cong., 1st Sess., p.16).

the term of a collective bargaining agreement.[12] There is no provision of the NLRA that regulates "corporate campaigns." To the contrary, unions typically employ corporate campaign tactics that cannot be regulated because they fall within the arguable scope of First Amendment speech or petitioning activity.[13] Thus, while a corporate campaign may have a destructive impact on an employer's business, the employer is largely without a remedy to counteract the union's campaign.

Recent NLRB Cases That Relate to Union Corporate Campaign Tactics

Some recent NLRB decisions provide additional weapons for unions to use in a corporate campaign. For instance, the Board recently decided that a union's display of large (3 to 4 feet high and 15 to 20 feet wide) stationary banners, calling for a boycott of a neutral employer's business, did not violate the Act's secondary boycott provisions.[14] The Board held that the display of these banners outside the secondary employer's facility did not "coerce" the secondary employer and therefore did not constitute an unlawful secondary boycott under the Act.

As a result of this decision, unions are more likely to utilize large banners in a corporate campaign. Banners such as these typically are not directed against the employer with which the union has a labor dispute. Instead, they are used to pressure companies that do business with the target employer. Displaying a large, and often provocative, banner may be as effective, if not more effective, than traditional picketing, which is regulated by the Act's secondary boycott provisions. By holding that banners, unlike picketing, constitute non-coercive speech, the Board has effectively exempted these types of banners from regulation under the Act.

In another recent case,[15] the Board held that AT&T could not prohibit employees from wearing, while on the job and visiting customers in their homes, t-shirts that said "INMATE #" on the front and "PRISONER OF AT$T" on the back. The Board dismissed the employer's concern that customers would be disturbed by an employee arriving at their home wearing this t-shirt. The Board found that the "totality of the circumstances would make it clear that the technician was one of [AT&T's] employees and not a convict."[16] Member Hayes dissented, arguing that the Board majority "failed to give sufficient weight to the potential for employees wearing these shirts to frighten customers in their own homes and thereby to cause substantial damage to [AT&T's] reputation."[17]

The AT&T case demonstrates that the current Board will allow unions and employees to engage in corporate campaign tactics while they are on the job. This means that employees can work and collect pay from their employer while they are engaged in a form of economic warfare against their employer. Such tactics stand in contrast to the traditional strike, which involves a

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[12] *See* Estlund*, supra* note 4, at 1603.

[13] *See Edward DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 588 (1988) (holding that union handbills calling for boycott of shopping mall did not constitute a secondary boycott in violation of the NLRA because of potential First Amendment concerns); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 65 (1966) (holding that employer may pursue defamation action against union only if the defamatory statements were made "with knowledge of their falsity or with reckless disregard of whether they were true or false").

[14] *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (Aug. 27, 2010).

[15] *AT&T Connecticut*, 356 NLRB No. 118 (March 24, 2011).

[16] *Id.*, slip op. at 1.

[17] *Id.*, slip op. at 3.

deliberate withholding of labor (and therefore a foregoing of pay) by employees who wish to protest their wages, hours, or working conditions. For this reason, a corporate campaign is viewed by unions and employees as a superior alternative to a traditional strike because a corporate campaign is effectively a "strike with pay."

In addition to permitting employees to engage in corporate campaign tactics while on the job, the current Board is inclined to permit employees to engage in such tactics while on the employer's property. For instance, in a case arising in the hotel industry, the Board held that off-duty employees of a restaurant company are entitled to distribute handbills while on the hotel's property.[18] Even though the employees were employed by the restaurant company and not the hotel, the Board concluded that the hotel violated the Act when it prohibited the off-duty restaurant employees from distributing handbills to hotel customers while on hotel property.[19]

The Board is currently considering the extent to which non-employee union agents should be permitted to distribute anti-employer literature on the employer's property, even if the union has no labor dispute with that employer.[20] On November 12, 2010, the NLRB solicited briefs on the question of whether the Board should continue to apply its existing precedent, which holds that an employer may not prohibit non-employee union agents from soliciting or distributing literature on its property if the employer allows charitable or civic organizations to solicit on its property.[21] Several federal courts of appeals have criticized the Board's current standard in cases involving non-employee union agents who seek access to an employer's property in order to persuade customers to boycott the employer.[22] It remains to be seen whether the Board will adhere to its precedent despite the contrary views of these federal courts of appeals.

How Does the Boeing Case Fit in to All of This?

The Acting General Counsel's much-publicized decision to prosecute an unfair labor practice complaint against Boeing can be viewed as a corporate campaign tactic in the sense that it involves an effort by the International Association of Machinists and Aerospace Workers (IAM) to obtain an outcome that the union was not able to achieve at the bargaining table.

The complaint alleges that Boeing violated the Act when it decided to locate a second production line for its 787 Dreamliner aircraft at a facility in South Carolina, rather than at its IAM-represented facilities in Washington State and Oregon.[23] The theory of the complaint is that Boeing made this decision in order to retaliate against the IAM-represented employees based on their past strike activity at the Washington State and Oregon facilities.

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[18] *New York New York Hotel & Casino*, 356 NLRB No. 119 (March 25, 2011).

[19] Member Hayes dissented in this case as well. *Id*., slip op. at 15-19.

[20] *Roundy's Inc*, 30-CA-17185.

[21] *Sandusky Mall Co.*, 329 NLRB 618, 622 (1999). If the employer has permitted only a few "isolated" acts of charitable solicitation on its property, the Board might permit the employer to exclude non-employee union agents from its property. *Id.* at 621.

[22] *See, e.g., Salmon Run Shopping Ctr. LLC v. NLRB*, 534 F.3d 108, 114 (2d Cir. 2008); *Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 685-86 (6th Cir. 2001); *Be-Lo Stores v. NLRB*, 126 F.3d 268, 284 (4th Cir. 1997).

[23] *The Boeing Company*, Case 19-CA-32431 (April 20, 2011), available at http://www.nlrb.gov/sites/default/files/documents/443/cpt_19-ca-032431_boeing__4-20-2011_complaint_and_not_hrg.pdf.

This complaint will be litigated before an NLRB Administrative Law Judge at a hearing beginning on June 14, 2011. I am not in a position to comment on the issues and allegations that will be litigated at the hearing. I am not privy to any of the evidence that will be presented in the hearing, beyond what has been reported publicly. I will, however, comment on a significant issue that is *not* going to be litigated in that hearing.

According to the "fact sheet" published on the NLRB's website,[24] the Acting General Counsel decided not to prosecute any allegation that Boeing violated its duty to bargain with the IAM over the decision to locate the second 787 production line in South Carolina. This is because the Board concluded that the IAM "waived its right to bargain on the issue in its collective bargaining agreement with Boeing."[25]

The Board's conclusion that Boeing had the unilateral right, under its collective bargaining agreement, to locate this work in South Carolina is a significant one. The Board's standard for proving that a union has waived its right to bargain over an issue is an exceedingly high one, requiring proof that the union's waiver was "clear and unmistakable."[26] In other words, the employer and the union must "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply."[27] This standard "reflects the Board's policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes."[28]

In this case, the Board found that Boeing and the IAM negotiated about Boeing's right to perform work in other locations and "unequivocally and specifically" agreed that Boeing was entitled to make these decisions unilaterally. Boeing exercised that right when it decided to locate the second 787 Dreamliner production line in South Carolina. The Board concluded that Boeing had no further obligation to bargain with the IAM over this decision.

Nonetheless, the Acting General Counsel decided to challenge Boeing's decision as a violation of the NLRA based on a theory of discrimination and retaliation under Section 8(a)(3) and (1) of the Act. If the Acting General Counsel succeeds on this theory, he will ask the Board to order Boeing to move the second 787 production line from South Carolina to the IAM-represented facilities in Oregon and/or Washington State. This remedy, if granted, will override Boeing's collectively bargained right to decide where it wishes to perform this work.

In my view, this prosecution does not advance the core purpose of the Act – promoting industrial peace through the process of collective bargaining. Certainly, the Acting General Counsel has an obligation to protect the rights of employees to engage in strikes and other concerted activity protected by the Act. But this is not a case where the employees are in the vulnerable early stages of an organizing campaign. The Boeing employees have been represented for decades by a powerful and sophisticated union, the IAM. They have a mature collective bargaining relationship, with an agreement that no doubt reflects a series of carefully negotiated compromises over time. By stepping into this dispute, the Acting General Counsel is

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[24] *Boeing Complaint Fact Sheet*, available at http://www.nlrb.gov/boeing-complaint-fact-sheet.

[25] *Id.*

[26] *See Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007).

[27] *Id.*

[28] *Id.*

altering the delicate balance of power and likely undermining the deal that the parties negotiated when the IAM agreed to recognize Boeing's right to determine the location where the additional 787 assembly work will be performed.

For these reasons, the Acting General Counsel's decision to prosecute this case does not serve "the Board's policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes."[29] Board litigation can be a distraction from the bargaining process. And because Board litigation often takes years to resolve, it can disrupt labor relations and the expectation of industrial peace during the term of a multi-year collective bargaining agreement.

The Board's job is not an easy one, to be sure. There are important rights and interests on both sides of the table. And in a labor dispute of this magnitude, a breakdown in the collective bargaining relationship can have a profound effect on the national economy. In these circumstances, the aggressive prosecution of unfair labor practice charges may ultimately disrupt, rather than promote, industrial peace. A dispute that might otherwise have been resolved at the bargaining table (and arguably was resolved by virtue of the IAM's waiver in this case) has exploded into an intense public relations campaign as a result of the Acting General Counsel's decision to prosecute. That is an unfortunate and costly result, whatever the outcome of the litigation may be.

This concludes my prepared testimony. Thank you again for the invitation to appear today. I would be happy to answer any questions that Members of the Subcommittee may have.

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[29] *Provena St. Joseph Medical Center*, 350 NLRB at 811.