NLRB Primer and the Boeing Complaint
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I. The National Labor Relations Board (NLRB) Is an Independent Federal Agency that Protects the Rights of Private-Sector Employees to Join Together, With or Without a Union, To Improve Their Wages or Working Conditions

The National Labor Relations Board [NLRB] "is an independent federal agency that protects the rights of private-sector employees to join together, with or without a union, to improve their wages or working conditions."[1] Independent agencies, such as the NLRB, are created by an act of Congress, in this case, the National Labor Relations Act (NLRA) of 1935 as amended.[2] These agencies are outside the federal executive departments, which are led by a Cabinet secretary. In other words, the NLRB is independent of, and should not be confused with, the Department of Labor (which is currently led by Secretary of Labor Hilda Solis).

II. The NLRB Has Jurisdiction over Large, Private-Sector Employers

The NLRB has jurisdiction only over private-sector employers and their workers.[3] The NLRB does not have jurisdiction over federal,[4] state, or local governments[5] except for the United States Postal Service and its employees.[6] Nor does the NLRB have jurisdiction over the railway and airline industries or most of its workers.[7] Although the NLRB's jurisdiction is co-extensive with the Commerce Clause of the United States Constitution,[8] the Board has declined to assert its jurisdiction to the fullest extent. For example, the Board will only assert jurisdiction over retail enterprises that have at least $500,000 total annual volume of business and over nonretail businesses that have at least $50,000 annual outflow (direct sales of goods to out-of-state consumers) or inflow (direct purchases of goods from out-of-state suppliers).[9] Accordingly, very

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[1] NATIONAL LABOR RELATIONS BOARD, WHO WE ARE, http://nlrb.gov/who-we-are.

[2] 29 U.S.C. § 151 et seq.

[3] 29 U.S.C. § 152(2), (3).

[4] The Federal Labor Relations Authority protects the labor rights of federal employees.

[5] State law governs the labor rights of state and local workers. These rights may be protected by the state's constitution, its statutes, or its common law.

[6] *See* 1970 Postal Reorganization Act.

[7] The National Mediation Board protects the rights of railroad and airline employees.

[8] *See generally NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[9] NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT: GENERAL PRINCIPLES OF LAW UNDER THE STATUTE AND PROCEDURES OF THE NATIONAL LABOR RELATIONS BOARD 34 (1997).

small businesses are effectively exempt from complying with the NLRA. The NLRB has jurisdiction over the Boeing Company, a large corporation which clearly engages in interstate commerce.

Even if an individual works for a non-exempt, private-sector employer that is large enough to come under the NLRB's jurisdiction, that individual does not necessarily have rights under the NLRA. To have such rights, the worker must come under the statutory definition of employee and must not come under one of the statutory exemptions.[10] The following workers are not protected by the NLRA: managers, supervisors, independent contractors, agricultural laborers, domestic servants, close relatives of managers, government workers, and employees of employers who are not covered by the NLRA.

III. The NLRB Has a Bifurcated Institutional Organization—the General Counsel and the Board

The NLRB is divided into two sides, the General Counsel or GC-side and the Board or Board-side.[11]

A. The General Counsel or GC-side Investigates and Prosecutes Employer and Union Unlawful Conduct (known as Unfair Labor Practices)

The GC-side, which is led by the General Counsel, has the following three main divisions: (1) the Division of Operations Management, which oversees the regional offices, (2) the Division of Advice, which advises the regional offices, and (3) the Division of Enforcement Litigation. The General Counsel's staff investigates and prosecutes unfair labor practice cases and conducts secret-ballot elections through its 52 offices located throughout the United States. These offices include 33 regional offices, 3 subregional offices, and 16 resident offices.[12] These offices are headed by a Regional Director.

B. The Board or Board-side Reviews Cases Prosecuted by the General Counsel

The Board is a five-member Board, led by a Chairman, which acts as a quasi-judicial administrative body. The Board decides cases based on formal records in administrative proceedings typically heard first by administrative law judges. Accordingly, the Board itself tends to act as an administrative appellate tribunal. The Board plays no role in the investigation of charges or the issuance of complaints. (*See* Section VII. below.)

IV. The General Counsel and the Board Members are Appointed by the President with Senate Consent

The General Counsel is appointed by the President to a four-year term. The Acting General Counsel currently is Lafe Solomon, a career NLRB employee. He began his career in

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[10] 29 U.S.C. § 152(3), (11).

[11] For a more in-depth breakdown of the NLRB's organizational structure, see NATIONAL LABOR RELATIONS BOARD, ORGANIZATION CHART, http://nlrb.gov/who-we-are/organizational-chart.

[12] For a list of the NLRB's offices with addresses, see NATIONAL LABOR RELATIONS BOARD, REGIONAL OFFICES, http://nlrb.gov/who-we-are/regional-offices.

1972 as a field examiner. (Field examiners investigate complaints received by the NLRB.) He has worked in several branches for the GC-side and for nine Board members under both Democratic and Republican administrations. The Office of the General Counsel is in Washington, D.C.

Each Board Member is appointed by the President, with Senate consent, to a five-year term, with the term of one member expiring either in August or December of each year.[13] The Board Members' offices are in Washington, D.C.

The current Board members are:

- Wilma B. Liebman, Chairman (term expires August 27, 2011)
- Brian Hayes, Member (term expires December 16, 2012)
- Mark G. Pearce, Member (term expires August 27, 2013)
- Craig Becker, Member (recess appointment; term expires December 31, 2011) [14]
- Vacancy

V. The NLRB Enforces the NLRA, a Federal Law that Protects the "Section 7" Rights of Employees to Band Together for Mutual Aid or Protection, Including the Right To Strike

The NLRA primarily protects the rights of employees. Those rights are described in NLRA Section 7[15] and therefore have become known as "Section 7 rights." They include the following rights:

- to self-organize;
- to form, join, or assist unions;
- to bargain collectively through representatives of their own choosing;
- to engage in other concerted activities for the purpose of collective bargaining;
- to engage in other concerted activities for the purpose of other mutual aid or protection; and
- to refrain from any such activities, except to the extent that the right to refrain may be affected by a union security agreement.

These rights include the right to strike.[16]

The Board, with Supreme Court approval, has interpreted these rights broadly to include the conduct of workers who band together with or without a union.[17] Employees who engage in

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[13] NATIONAL LABOR RELATIONS BOARD, MEMBERS OF THE NLRB SINCE 1935, CHART, http://nlrb.gov/members-nlrb-1935.

[14] Member Becker is currently sitting in a recess appointment, which is why his term is expiring in 2011 rather than 2014.

[15] 29 U.S.C. § 157.

[16] *See NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963) ("Section 7 guarantees, and Section 8(a)(1) protects from employer interference the rights of employees to engage in concerted activities, which . . . include the right to strike").

these rights may not be fired, disciplined, or coerced by their employer. For example, although an employer may fire an at-will employee merely for asking for a raise, that very same employer may not lawfully fire that very same employee who asks for a raise for herself and her co-workers. In the first example, the employee is acting only as an individual and is therefore not protected. But in the second case, because the individual is acting collectively (with or on behalf of others), protection is provided.

It is important to notice that the right of employees to refrain from Section 7-protected conduct is not a right of management to interfere with or restrain that conduct.

VI. The NLRB Is Tasked by Congress with Prosecuting (GC-side) and Remedying (Board-side) Unlawful Conduct by Employers and Unions (Unfair Labor Practices)

When Congress enacted the NLRA in 1935, it created the NLRB and charged that agency with prosecuting and remedying the unlawful conduct of employers and unions.[18] Such unlawful conduct is known as unfair labor practices (ULPs). This section focuses on employer ULPs.

There are five basic employer ULPs, all of which are described in Sections 8(a)(1) through 8(a)(5) of the NLRA. Under those subsections, it is an unfair labor practice for an employer to:

(1) "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"[19]
(2) "dominate or interfere with the formation or administration of any [union] or contribute financial or other support to it . . .;"[20]
(3) "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a [union] . . . ;"[21]
(4) "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;"[22]
(5) "refuse to bargain collectively with the representatives of his employees . . . ."[23]

Boeing has been charged with Section 8(a)(1) and Section 8(a)(3) violations in a recent, highly-publicized case involving the location of its operations and the alleged motivation behind the selection of the location.

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[17] *See generally NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

[18] 29 U.S.C. § 158. Congress enacted the NLRA in 1935. At that time, there was only one kind of ULP—an employer ULP. In 1947, Congress amended the NLRA to include, among other things, union ULPs.

[19] 29 U.S.C. § 158(a)(1).

[20] 29 U.S.C. § 158(a)(2).

[21] 29 U.S.C. § 158(a)(3).

[22] 29 U.S.C. § 158(a)(4).

[23] 29 U.S.C. § 158(a)(5).

VII. An Unfair Labor Practice Case Proceeds by an Orderly Administrative Process

There are two main types of cases processed by the Board—unfair labor practice (ULP) cases and representation cases. This primer focuses on unfair labor practice cases since the Boeing case involves an alleged ULP.[24]

Step 1. Charge. All ULP cases start with a charge that is filed with the appropriate regional office. Any person can file a charge. For example, an employee or a union could file a charge regarding employer conduct. The charge alleges that an employer or a union has acted unlawfully by engaging in one of several unfair labor practices.

Step 2. Investigation. The regional office investigates the charge and recommends to the Regional Director whether or not there is reasonable cause to believe that an employer or a union has committed a violation of the NLRA. If there is no such reasonable cause, the Regional Director will refuse to issue a complaint. That refusal may be appealed to the General Counsel. At any time during the investigation, the parties may settle the case.

Step 3. Complaint and Answer. If after the investigation there is reasonable cause to believe that an employer or union has committed a violation of the law, the Regional Director, under the General Counsel's authority, issues a complaint and a notice of hearing. The respondent-employer or union must file an answer within ten days.

Step 4. Hearing. An administrative law judge presides over an administrative hearing. At that hearing, counsel for the General Counsel presents testimonial and documentary evidence to show that the respondent has committed the ULPs as alleged. Other parties of interest—such as a charged employer or union—may present evidence including cross-examination of the General Counsel's witnesses. At any time before, during, or after the hearing, the parties may settle the case.

Step 5. The Administrative Law Judge's Decision and Recommended Order. After the close of the hearing, the judge issues a decision (ALJD) and order, recommending one of two courses of action to the Board. First, the judge may simply dismiss the complaint. Second, the judge may find that there is merit to all or some of the allegations. If so, he/she will recommend that the Board order the respondent to cease and desist from the unlawful conduct and take appropriate affirmative action. For example, if an employee is found to have been discharged for undertaking protected activity, the employer could be ordered to rehire the employee with back pay and to refrain from interfering with protected activity in the future.

Step. 6. Exceptions. Parties may file exceptions (objections) to the ALJD within a specified time period. If the parties fail to file timely exceptions, then the ALJD becomes the Board's order. If, however, the parties file exceptions then the entire record, including the judge's decision and recommended order, is transferred to the Board for review.

Step 7. Board Review. The Board and its staff review the entire record and the ALJD. In most cases, the Board acts as a panel of three members. In exceptional circumstances the

[24] For an excellent chart of the Board's processes, see NATIONAL LABOR RELATIONS BOARD, THE NLRB PROCESS, http://nlrb.gov/nlrb-process.

entire Board will review the case. Oral argument is rarely granted. After each Board member reviews the case, the panel makes a decision and issues a final decision and order (D&O).

The Board need not agree with either the administrative law judge's opinion or the General Counsel's litigation position. The Board's review is independent of the judge's and the General Counsel's legal analysis and its review may result in a variety of orders. For example, the Board may dismiss the complaint or it may find merit to some or all of the allegations. If the Board finds merit to any of the allegations, it will order the respondent to cease and desist from the unlawful conduct and to take appropriate affirmative action necessary to remedy the unfair labor practice. Occasionally, the Board may remand the case to the administrative law judge for additional findings.

Step 8. Court Review. At this stage, the losing party (known as the aggrieved party) may take one of three courses of action. First, it may try to settle the case with the Regional Office. Second, it may petition a United States court of appeals for review of the Board's D&O. Third, it can do nothing and wait for the Board to apply to a court of appeals to enforce its D&O. If the case goes to a court of appeals for review, then attorneys in the NLRB's Division of Enforcement (Section III.A. above) represent the Board in court. The court may make several types of decisions. It may decide (1) to enforce the Board's order, (2) to enforce the Board's order with some modifications; (3) to grant the petition for review and deny enforcement of the Board's order, (4) to enforce the Board's order in part and to grant the petition for review in part, or (5) to dismiss the complaint. In rare cases, the Supreme Court may review the case. Less than one NLRB case per year goes to the Supreme Court.

Step 9. Enforcement. Once the Board's order has been enforced by a federal court the parties are under court order to comply with any part of the Board's order that has been enforced. A party's failure to comply with a court-enforced Board order may result in contempt proceedings.

VIII. The Boeing Case: The Facts and Procedural History

Undisputed Facts. The Boeing Company manufactures and produces military and commercial aircraft at facilities throughout the United States, including facilities in Washington state and Portland, Oregon.[25] The Company is a private-sector employer within the NLRB's jurisdiction.[26] The Boeing Company employs several managers, whom the parties agree are statutory supervisors, managers, and/or agents of the Company.[27]

The International Association of Machinists and Aerospace Workers District Lodge No. 751 (the Union) is a labor organization within the meaning of the NLRA.[28] It has represented the Company's production and maintenance employees in Washington State (the Puget Sound Unit) and the Company's production and maintenance employees in the Portland, Oregon, area (the

[25] Cmplt. ¶ 2(a), Answer, Response to Specific Allegations, ¶ 2(a).

[26] Cmplt. ¶ 2(b), (c), (d), Answer, Response to Specific Allegations, ¶ 2(b), (c), (d).

[27] Cmplt. ¶ 4, Answer, Response to Specific Allegations, ¶ 4.

[28] Cmplt. ¶ 3, Answer, Response to Specific Allegations, ¶ 3.

Portland Unit) since at least 1975.[29] The Puget Sound Unit and the Portland Unit (collectively the Units) are appropriate bargaining units within the meaning of the NLRA.[30] That means that the Company has a legal obligation, among other things, to bargain with the Union over wages, hours, and other terms and conditions of employment of the employees in those units.[31] Since 1975, throughout the course of the Company's and the Union's bargaining relationship, the Union engaged in strikes in 1977, 1989, 1995, 2005, and 2008.[32] In late October 2009, the Company decided to place a second assembly line for the 787 Dreamliner in North Charleston, South Carolina.[33] It is the nature of that decision and comments made by company agents about that decision that is the subject of this labor dispute.

Step 1. Charge. On March 26, 2010, the Union filed a charge, alleging that the Company had engaged in several unfair labor practices related to its decision to place a second production line for the 787 Dreamliner airplane in a non-union facility. That charge was filed in Regional Office 19, in Settle, Washington.

Step 2. Investigation. The NLRB's Settle regional office investigated that charge.

Step 3. Complaint and Answer. On April 20, 2011, the Regional Director, Richard L. Ahearn, acting under the General Counsel's authority, issued the complaint and notice of hearing. That complaint alleges that the Boeing Company violated Section 8(a)(1) of the NLRA by making "coercive statements to its employees that it would remove or had removed work from the Unit because employees had struck and Respondent threatened or impliedly threatened that the unit would lose additional work in the event of future strikes."[34] Since the NLRA protects the right to strike, such threats could be construed as interference with that right. The complaint further alleges that the Boeing Company violated Section 8(a)(3) of the NLRA by deciding to transfer work from union facilities (the Units) to nonunion facilities in South Carolina.[35] The Boeing Company, as respondent, filed an answer, denying those allegations.[36]

Detailed Account of the Complaint and Answer, Including the Disputed Facts

The General Counsel alleges, and the Company denies, that company representatives made several statements that, if true, would violate Section 8(a)(1) of the law. In particular, the General Counsel alleges that Company President James McNerney stated that the Company was moving 787 Dreamliner production work from Seattle to South Carolina because of "strikes happening every three to four years in Puget Sound." The General Counsel further alleges that

[29] Cmplt. ¶ 5(a), (b), (c), Answer, Response to Specific Allegations, ¶ 5(a), (b), (c).

[30] *Id*.

[31] *Id*.

[32] Cmplt. ¶ 5(d), Answer, Response to Specific Allegations, ¶ 5(d).

[33] Cmplt. ¶ 7(a), Answer, Response to Specific Allegations, ¶ 7(a).

[34] Cmplt. ¶ ¶ 7, 8, 10.

[35] Cmplt. ¶ ¶ 6, 9.

[36] Answer, Response to Specific Allegations, ¶ ¶ 6-10.

company agents made several other statements indicating that it would be moving production from Seattle to South Carolina. Many of these statements appeared in newspapers or have been videotaped.[37] The Company admits that the newspapers printed these statements but denies either that the statements were made or, if made, that they were unlawfully coercive. Affirmatively, the Company contends that these statements are protected both by Section 8(c) of the NLRA and under the First Amendment of the United States Constitution.[38]

The General Counsel also alleges several violations of Section 8(a)(3) of the law. First, the General Counsel alleges, and the Company denies, that the Company's decision to transfer its second 787 Dreamliner production line of three planes per month from the Puget Sound and Portland Units to a non-union site in South Carolina violates Section 8(a)(3) because of the Company's motives in making that decision and because of the effect that decision has on protected Section 7 activity. In particular, the General Counsel alleges, and the Company denies, that the Company decided to transfer work from union sites to a nonunion site because the employees at the union sites had engaged in lawful strikes. The General Counsel alleges that the Company's decision had the purpose of discouraging union activity and is inherently destructive of the rights of employees in the Puget Sound and Portland Units.[39] Second, the General Counsel alleges, and the Company denies, that the Company's decision to transfer a sourcing supply program for its 787 Dreamliner production line from the Units to a non-union facility in South Carolina or to subcontractors also violated Section 8(a)(3) for the same reasons.[40] The Company's main defense to the Section 8(a)(3) violations is that its decisions were not motivated by anti-union animus but by legitimate business reasons.[41] Alternatively, the Company contends that the Union contractually waived its employees' rights to the work.

To remedy the violations it alleges Boeing committed, the General Counsel has asked for a cease and desist order and the following affirmative action: (1) that an appropriate remedial notice be read to its Unit employees and posted on the Company's intranet; and (2) that the disputed work be maintained in the Puget Sound and Portland Units. The Company contends that this second remedy is unduly punitive and that it effectively requires the Company to shut down operations in South Carolina.

Step 4. Hearing. An administrative hearing has been scheduled for June 14, 2011. At that hearing, counsel for the General Counsel will likely present testimonial and documentary evidence to show that the respondent has committed the ULPs as alleged. The Company will have an opportunity to present cross-examine the General Counsel's witness and to present its evidence. At any time before, during, or after the hearing, the parties may settle the case. Note that no decision has yet been made by an administrative law judge or by the NLRB. All that has happened as of this date is a hearing.

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[37] Cmplt. ¶ 6, Answer, Response to Specific Allegations, ¶ 6.

[38] Answer, Response to Specific Allegations, ¶ 2.

[39] Cmplt. ¶ 7, Answer, Response to Specific Allegations, ¶ 7.

[40] Cmplt. ¶ 8, Answer, Defenses, ¶ 3.

[41] Answer, Response to Specific Allegations, ¶ 6.

IX. The Legal Principles Involved in the Boeing Case

A. An Employer Violates Section 8(a)(1) by Making Statements that Have a Reasonable Tendency to Chill Employees' Section 7 Activity

Section 7 of the NLRA grants "employees the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . ."[42] Section 13 of the NLRA provides that "[n]othing in this Act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications of that right."[43] The right to strike is protected under both Section 7 and Section 13. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[44] Section 8(c) of the NLRA provides that the "expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . *if such expression contains no threat of reprisal or force or promise of benefit*."[45]

An employer's conduct violates Section 8(a)(1) if it has a reasonable tendency to coerce employees or interfere with their Section 7 rights. In examining such violations, the Board considers "the economic dependence of the employees on their employers, and the necessary tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."[46] The critical inquiry is what the employee reasonably could have inferred from the employer's statements or actions—not what the employer intended to imply.[47]

Under the facts alleged, the Board could find that statements that the Company transferred work from the Puget Sound and Portland Units to a non-union facility because of the Unit employees striking activity are coercive and have a reasonable tendency to chill employees' Section 7 activity, namely strikes. Those statements, if found to be true, send a message to the Units' employees that if they want to keep enough work to sustain their jobs they should refrain from engaging in future strikes. Moreover, coercive speech is neither protected by Section 8(c) nor protected by the First Amendment's Free Speech Clause. In other words, the NLRB may remedy employer speech that is coercive without running afoul of either Section 8(c) or the First Amendment.

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[42] 29 U.S.C. § 157.

[43] 29 U.S.C. § 163.

[44] 29 U.S.C. § 158(a)(1).

[45] 29 U.S.C. § 158(c).

[46] *NLRB v. Gissel Packing Corp.*, 395 U.S. 575, 617 (1969).

[47] *See, e.g., Felix Indus., Inc. v. NLRB*, 251 F.3d 1051, 1056 (D.C. Cir. 2001).

B. An Employer Violates Section 8(a)(3) by Taking Actions that Discourage Employee Participation in Union Activity, Such as Strikes

Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[48] The Board has found that retaliation against employees' for having engaged in striking activity constitutes a Section 8(a)(3) violation. If the complaint allegations are true, that the Company decided to transfer work from the Units to a nonunion facility, then the Board could reasonably find that the employer's conduct was unlawfully motivated by a desire to retaliate against employees for participating in past strikes.

C. The Board Has Broad Statutory Authority to Remedy an Unfair Labor Practice

Section 10(c) of the NLRA authorizes the Board, upon finding a violation of the NLRA, to order the violator not only to cease and desist from the unlawful conduct but also "to take such affirmative action . . . as will effectuate the policies of th[e] Act."[49] The purpose of the Board's remedial order is "to restore, so far as possible, the status quo that would have obtained but for the wrongful act."[50] Here, if the Board finds that the Company acted unlawfully as alleged, then the Board would be required "to restore, so far as possible, the status quo that would have obtained but for the wrongful act." In this case, the status quo ante could be to return the work to the Puget Sound and Portland Units. However, how the administrative law judge or the NLRB might rule, and what remedy might be proposed if Boeing is found to have committed an unfair labor practice, is unknown at this time.

X. Conclusion: The Boeing Complaint Is Routine

This primer demonstrates the following key points. First, despite news reports that the Boeing Complaint is unprecedented, the complaint has firm grounding in the law, including statutory and Supreme Court precedent. Second, the Boeing Case is still in the early stages of litigation. The dispute may be settled at any time. And most importantly, the Board had nothing to do with the issuance of the complaint against Boeing, nor has the Board reviewed this case yet.

The NLRB General Counsel-side has exclusive authority to issue complaints. The purpose of issuing complaints is to enforce the law. Here, the General Counsel issued a complaint after an investigation of the facts and an understanding of the law as it applied to those facts. If the General Counsel can prove these facts at the administrative hearing then the General Counsel can prove the unfair labor practices alleged. Assuming that the General Counsel acted in good faith during the investigation, the General Counsel acted properly in his prosecutorial role by choosing to prosecute this case. As yet, no remedy, if the complaint is found to have validity, has been determined.

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[48] 29 U.S.C. § 158(a)(3).

[49] 29 U.S.C. § 160(c).

[50] *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969).