Bloomberg BNA

Daily Labor Report®

NUMBER 41 MARCH 1, 2012

Unfair Labor Practices

ABA Panelists Divide on Boeing Case Issues, But Call Political Attacks on NLRB Excessive

KEY WEST, Fla.—A management attorney and a union lawyer speaking Feb. 28 at an ABA meeting divided on some of the legal issues raised by a National Labor Relations Board complaint last year against Boeing Co., but they agreed the highly publicized case led to unwarranted criticism of NLRB and its acting general counsel.

Christopher Corson, general counsel of the International Association of Machinists, said at the midwinter meeting of the ABA Section of Labor and Employment Law's Committee on the Development of the Law Under the NLRA that ''ferocious attacks'' should not have been directed at agency officials who were successful in ''holding the framework of the act in place,'' and allowed Boeing and the union to resolve the case and negotiate an ''historic agreement'' at the end of 2011.

Summarizing their views of the outcome of the Boeing case, both lawyers expressed disappointment in the political firestorm that followed the April 2011 announcement of the complaint against Boeing.

Henry E. Farber, a management lawyer at Davis Wright Tremaine in Bellevue, Wash., questioned Acting General Counsel Lafe E. Solomon's authorization of a complaint that alleged Boeing engaged in conduct that was ''inherently destructive'' of employee rights under the National Labor Relations Act. But he agreed that much of the public debate over the case was marked by ''political nonsense'' that was ''unfair and inappropriate.''

Dreamliner Production at Stake. Corson reviewed the history of the NLRB complaint and its origin in Boeing's development and production of its 787 Dreamliner aircraft.

In 2003, the lawyer said, Boeing signed an agreement with Washington state to locate final assembly of the Dreamliner at its Everett, Wash., site, where IAM District Lodge 751 represents employees.

In October 2009, Corson said, the company announced that it would assemble seven Dreamliners each month in Everett, but planned to assemble three more planes per month at a North Charleston, S.C., facility that Boeing had acquired from another company and expanded.

Boeing announced that it would operate a ''surge line'' in Everett that would assemble three additional planes per month until the South Carolina plant was fully operating.

Charge, Complaint Followed Failed Negotiations. Corson said the union discussed the siting of the Dreamliner work at length with Boeing representatives, but failed to reach agreement.

Statements by Boeing executives linked the decision to locate work in South Carolina with the union's engaging in strikes against Boeing during prior contract disputes. In addition, Corson said District Lodge 751 filed an unfair labor practice charge against the company in March 2010 based on a belief that if Section 7 of the NLRA ''means what it says,'' an employer may not lawfully discriminate against employees because they have previously exercised a statutory right to strike.

The union's charge, alleging that the company had violated Sections 8(a)(1) and 8(a)(3) of the NLRA—by its comments concerning strikes and its decision to locate the second line in South Carolina—and violated Section 8(a)(5) of the act—by failing to bargain in good faith—was submitted to the board's Division of Advice. The division concluded in an April 11, 2011 memorandum that a complaint should be issued against the company on the union's charges of unlawful interference and discrimination. Citing the language of the Boeing-IAM collective bargaining agreement, the advice memorandum concluded that the complaint should not allege an unlawful refusal to bargain.

Acting on Solomon's authorization, an NLRB regional director issued a complaint against the company on April 20, 2011 (77 DLR AA-1, 4/21/11).

Boeing, IAM Reached Settlement. The case was scheduled for trial before an NLRB administrative law judge, but the NLRB complaint was dismissed in December

 ISSN 0418-2693

2011 after District Lodge 751 requested that the charge be withdrawn (237 DLR AA-1, 12/9/11).

The union and company announced that they had agreed on a four-year contract extension for union-represented employees and the company had committed to locating production of its new 737 MAX jetliners in the Seattle area.

Corson, who called Boeing ''a great company,'' told the ABA audience that throughout the litigation, Boeing and IAM never publicly confronted one another. Stating that the company and union have invested an ''extraordinary amount'' of effort in ''relationship-building,'' Corson said both sides recognized the importance of their long-term relationship and they eventually reached an agreement to protect that relationship.

IAM Lawyer Cites Company's Focus on Strike History. Both lawyers cited remarks of Boeing executives about prior IAM strikes against the company as key to the acting general counsel's case against Boeing.

''You just can't consider it,'' Corson argued, saying to the extent Boeing representatives were attempting to place all of the blame from earlier strikes on the union, ''that's just not the case.''

In one of the strikes cited by Boeing executives, Corson said, an NLRB complaint had been issued against the company before a strike even began. In another strike, the IAM lawyer said, an NLRB regional director was ''on the brink'' of issuing a complaint when the parties settled the labor dispute.

Corson said the union's view was that the company had caused or prolonged some strike actions, and allowing an employer to take such strikes into account when making business decisions would allow an employer to provoke a strike and then cite the risk of future work stoppages as a supposed ''economic justification'' for its actions. ''You just can't do that,'' he argued.

Management Attorney: 'Forward-Looking' Statements. Farber, a management lawyer whose law firm was not involved in the Boeing case, said the manufacturer's public discussion of its strike history before announcing the second assembly line in South Carolina suggested ''there wasn't a lot of consultation with the labor lawyers,'' but he argued that it isn't clear under the NLRA that an employer may never consider the disruptive effect of strikes when planning future activities.

Where there have been four strikes over collective bargaining agreements, Farber argued, it is not unreasonable to factor concern about a fifth strike into business planning.

As a practical matter, the management lawyer said, employers will consider any risks or hazards that may jeopardize the continuity of their production—including hurricanes and labor disputes.

Legally, Farber said, he saw no evidence in the statements of Boeing executives that the company had set out to punish employees for participating in activity protected by the NLRA. Instead, he said, the executives seemed to be making ''forward-looking'' statements about a perceived need for ''diversifying the company'' and spreading risk by locating Dreamliner assembly work at more than one location.

Disagreement Over Impact on IAM Workers. The lawyers also disagreed on the question of whether Boeing's conduct should be considered unlawful under the NLRA if, as the company contended, its addition of a second aircraft assembly line in South Carolina had no adverse consequences for IAM-represented employees in the Puget Sound area.

Farber acknowledged that there were factual disputes about whether adding the second line impacted the union-represented workers, but he said he believes that if the only risk to those employees was that siting work in South Carolina created a ''potential future job loss'' in Washington state, that would not be enough to support finding that the decision to locate work in South Carolina was unlawful.

But Corson said it was clear that there would be a job loss in Washington once the North Charleston plant began assembling three Dreamliners per month and the Everett, Wash., surge line was terminated.

The lawyer said NLRB's acting general counsel properly relied on several board decisions and concluded that it was appropriate to look at the future loss of the ''upside'' provided by the temporary operation of the surge line in Everett.

''If in response to protected activity a company takes that future away, that violates the act,'' Corson said.

Political Furor Called Regrettable. Summarizing their views of the outcome of the Boeing case, both lawyers expressed disappointment in the political firestorm that followed the April 2011 announcement of the complaint against Boeing.

Corson said the political pressure on Solomon was ''absolutely, unforgivably over the top.'' Noting that the House passed the Protecting Jobs From Government Interference Act (H.R. 2587), a bill that would prevent NLRB from issuing any order to restore work that was illegally relocated or transferred by an employer, he said ''I don't get why there wasn't outrage over this.''

Farber said ''you do have to question whether government had its finger on the scale'' in favor of a union in a labor-management dispute between Boeing and the IAM, but he agreed that the dispute was excessively politicized and criticism of NLRB's career employees were often unfair and unwarranted.

BY LAWRENCE E. DUBÉ

Text of the advice memorandum is available at http://op.bna.com/dlrcases.nsf/r?Open=ldue-8rytes.

  DLR ISSN 0418-2693