



NEWS RELEASE

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For Immediate Release
June 9, 2011

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South Carolina and Texas Lead 16 State Action in Latest Challenge to NLRB Complaint

Columbia, S.C. / Austin, T.X. –South Carolina Attorney General Alan Wilson and Texas Attorney General Greg Abbott today authored an amicus brief on behalf of a bipartisan, 16-state coalition that opposes the National Labor Relations Board’s (NLRB) proposal to punish employers for creating new jobs in right-to-work states. The brief, which was joined by attorneys general from both right-to-work and unionized states, explains that the NLRB’s unprecedented enforcement action would stifle job creation and economic opportunity in all states.

The brief, authored by and South Carolina and Texas, was joined by the following states: Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Kansas, Michigan, Nebraska, Oklahoma, South Dakota, Utah, Virginia and Wyoming.

[Read the Amicus Brief](#)

"The NLRB has misconstrued federal law in its complaint. In fact, the federal government's actions contradict federal law, which allows states to enact right-to-work laws without fear of retaliation from the NLRB," Attorney General Wilson said. "Unless deterred, the NLRB's unprecedented proceedings against a company's private business decisions will cause irreparable harm to the business climate in every state and will undoubtedly create an exodus of jobs from our country."

"At a time when 13.9 million Americans are unemployed, the NLRB is threatening to micromanage private sector investment decisions, punish states that protect their citizens from forced union membership, and discourage the creation of jobs that are desperately needed by families across the country," Attorney General Abbott said.

"Concerned about the detrimental impact of yet another job-threatening federal overreach, we forged a bipartisan, 16-state coalition to protect states' ability to encourage economic development and promote job creation. Just last week, the Obama Administration revealed that the nation's economic recovery is still struggling and that the unemployment rate is unacceptably high. So, at this critical juncture, we took legal action to prevent the federal government from once again stifling economic opportunity in Texas and across the United States."

The States' legal action was filed in response to a proposed enforcement action that would threaten jobs creation at a time when the nation's unemployment rate is 9.1 percent and the country is still struggling to recover. On April 20, the NLRB's acting general counsel proposed an enforcement action against The Boeing Company for building a new final production line and creating one thousand new jobs in South Carolina, which is a right-to-work state. The NLRB incorrectly claims that Boeing "retaliated" against its unionized employees in Washington State—which is not a right-to-work state—because the aircraft manufacturer exercised its business judgment to create new manufacturing capacity in South Carolina. Further, the NLRB is considering an enforcement action despite the fact

that Boeing has created 2,000 new jobs in Washington, does not plan to eliminate any union jobs, and only proposes to create new jobs in South Carolina.

In right-to-work states like South Carolina and Texas, workers cannot be forced to join a union or pay union dues as a condition of employment. Workers in states that have not enacted right-to-work laws, however, do not have a choice to join or not join a union. All employees at unionized facilities must join the local union and pay union dues—even if the employee prefers to not join a union—or risk losing their jobs.

The states' brief explains that the NLRB's proposal violates federal labor law, ignores states' discretion to enact right-to-work laws, and harms all states by discouraging employers from opening new manufacturing facilities anywhere in the United States, where the NLRB has enforcement jurisdiction. According to the brief, States that have not enacted right-to-work laws will be harmed by the NLRB's proposal because newly established employers will be discouraged from basing their operations in unionized states—because they could face a federal enforcement action if they decide to create a new facilities or jobs in right-to-work states. Similarly, the NLRB poses a threat to right-to-work states because its enforcement action could discourage existing employers from exercising their discretion to build new facilities in states that protect workers from compulsory union membership.

A federal administrative law judge is scheduled to hold a hearing on the NLRB's proposed enforcement action against Boeing on June 14. Legal documents filed in that case indicate that surging global demand for the 787 Dreamliner led Boeing to conduct a geographical and economic cost-benefit analysis before deciding whether to expand operations in Washington—or construct a second final assembly facility in Charleston, South Carolina.

More than a year after Boeing invested hundreds of millions of dollars constructing its South Carolina facility—and only weeks before the new assembly line was scheduled to begin operations—the NLRB's General counsel filed the proposed enforcement action against Boeing. If the legally baseless proposal survives the federal administrative process, NLRB could be empowered to micromanage private sector business decisions and improperly force Boeing to close its South Carolina facility.

The States' challenge to the NLRB's proposal explains that the General counsel has not only misapplied the National Labor Relations Act, but has threatened economic development and job growth across the United States. Newly established businesses will be discouraged from building their manufacturing facilities in unionized states and pre-existing employers will be prohibited from expanding operations to right-to-work states. Worse, because employers can avoid NLRB enforcement actions and micromanagement by simply creating new manufacturing facilities in foreign countries, the NLRB's proposal creates a perverse incentive for employers to move their operations overseas.

Further, the brief explains that the NLRB is pursuing its job-killing enforcement action just days after the federal Bureau of Labor Statistics announced that 13.9 million Americans are still unemployed. Despite the nation's 9.1 percent unemployment rate, the brief argues, the NLRB continues to pursue an enforcement action that will further undermine job growth and threaten the United States' economic recovery.

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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/empstat.nr0.htm>.

Dated: June 9, 2011

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CERTIFICATE OF SERVICE

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