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National Labor Relations Board Overreach Against Boeing Imperils Jobs and Investment

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Abstract: *In asserting that the Boeing Company is engaging in unfair labor practices by establishing a new aircraft assembly facility in South Carolina, a right-to-work state, instead of Washington State, which is heavily unionized, the National Labor Relations Board is twisting the law to benefit unions at the expense of the rule of law and the nation's economy. The NLRB's decision to issue a complaint represents an unbridled, unauthorized, and unlawful expansion of the regulatory power of an executive agency. If allowed to stand, its actions threaten business investment and job creation as well as the employment of both unionized and nonunion workers. Congress should amend the National Labor Relations Act to reaffirm the long-standing construction of the Act that any new investment decisions—such as (but not limited to) expanding existing facilities, building new plants, or relocating—are not unfair labor practices and are outside the legal jurisdiction of an overzealous NLRB.*

The federal government does not have the legal authority to prohibit a company from expanding its business or building a new factory in another state. Regrettably, the National Labor Relations Board (NLRB) is attempting to do just that. In asserting that the Boeing Company is engaging in unfair labor practices by establishing a new aircraft assembly facility in South Carolina, the NLRB is twisting the law to benefit a special interest—unions—at the expense of the rule of law and the nation's economy.

To prevent any more litigation costs and anti-competitive pressures, Congress should amend the National Labor Relations Act (NLRA) to reaffirm the long-stand-

Talking Points

- The NLRB has filed dubious charges against Boeing for opening its second 787 Dreamliner aircraft assembly line in South Carolina, a right-to-work state, instead of in heavily unionized Washington State.
- Neither the National Labor Relations Act nor legal precedent gives the NLRB the authority to dictate where Boeing builds new plants.
- Boeing's economic decision about where to make a large capital investment is fully justified by Washington's history of union strikes and by a $900 million incentive package from South Carolina.
- The NLRB is attempting to force companies to invest in heavily unionized states with less attractive business climates. This is contrary to the intent of federal law, which permits states to pass right-to-work measures.
- If the NLRB succeeds, it will damage the U.S. economy by decreasing capital investment and job creation. Companies will invest less if they cannot take advantage of the best business opportunities.

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NLRB v. Boeing

In March 2010, months after talks broke down between Boeing and its unions over the placement of a second assembly line for the 787 Dreamliner aircraft at its Washington plant, the International Association of Machinists and Aerospace Workers District Lodge No. 751 filed a charge with the NLRB.[1] The union claimed that Boeing's decision to place the second production line in a non-union facility constituted an unfair labor practice.[2]

On April 20, 2011, a complaint was filed against Boeing by NLRB Acting General Counsel Lafe Solomon. The complaint, which will be heard before an administrative law judge on June 14, claims that the Boeing Company violated Section 8(a) of the NLRA[3] by allegedly (1) discriminating in the hire, tenure, terms, and conditions of employment; (2) making coercive statements and threats against employees for engaging in statutorily protected activities; and (3) retaliating against union strikes by "transferring" work to be done on a second assembly line for its 787 Dreamliner to a new plant that was to be constructed in South Carolina,[4] a right-to-work state.[5] Solomon claims that Boeing is trying to chill union activities and is seeking an order mandating that Boeing produce the 787 Dreamliner aircraft in Washington.

The fact that Boeing has been forced to respond to the economic realities resulting from the actions of its employees is not "retaliation."

At the same time, however, the NLRB acknowledged that there was no merit to the union's claim that Boeing failed to bargain in good faith over the decision regarding the second production line. Additionally, the NLRB's own regional director, Richard Ahearn, has admitted that no existing work was actually "transferred" by Boeing—instead, the company decided to place new work in South Carolina.[6]

Section 8(a) of the NLRA states that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed"[7] by the law or to encourage or discourage membership in a union "by discrimination in regard to hire or tenure of employment or any term or condition of employment."[8] A typical

1. It should be noted that no such discussions with the union were even required by Section 21.7 of the collective bargaining agreement, which specifies that decisions by Boeing over "the work to be performed by the Company and the places where it is to be performed" are not "subject to arbitration." *See* http://www.iam751.org/contract08pages/08Lang_Only.pdf.
2. According to the NLRB, Boeing announced its plans regarding South Carolina on October 21, 2009. Ironically, Bill Daley, now President Obama's Chief of Staff, was a member of the Boeing Board of Directors at the time this unanimous decision, which the NLRB is characterizing as an unfair labor practice, was made. Eric Lipton, *Business Background Defines Chief of Staff*, NEW YORK TIMES, Jan. 6, 2011.
3. National Labor Relations Act, 29 U.S.C. §158(a) (2011).
4. Complaint and Notice of Hearing, The Boeing Company and International Association of Machinists, Case No. 19-32431 (NLRB Region 19, April 20, 2011). In a letter dated May 2, 2011, from Boeing General Counsel Michael Luttig to Solomon, Boeing points out that there was no "transfer" of the second production line, but simply a decision by Boeing to do the work in South Carolina, and that Boeing had never made any commitment to "build all of its 787s" in Washington.
5. There are 22 right-to-work states (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming) and one territory (Guam). NATIONAL LEGAL RIGHT TO WORK FEDERATION, *Right to Work States*, http://www.nrtw.org/rtws.htm (last visited May 6, 2011). A right-to-work state has a law providing that no person can be compelled as a condition of his or her employment to join or not to join or to pay dues to a labor union. Section 14(b) of the 1947 Taft–Hartley Act permits states to enact right-to-work laws. *See* 29 U.S.C. § 164 (2011). The other 28 states are closed union shop jurisdictions where employees must be members of a union if the union has a contract with their employer.
6. Dominic Gates, *Machinists File Unfair Labor Charge Against Boeing Over Charleston*, SEATTLE TIMES, June 4, 2010.
7. 29 U.S.C. § 158(a)(1) (2011).

interference or coercion claim would be a threat by an employer to fire employees if they join a union or to discriminate in their terms of employment, such as wages or hours. But an economic decision to expand production or open a new plant in another location does not fall within either of these prohibitions, even if one of the main reasons for doing so is the business costs incurred during prior strikes.

The NLRB has no evidence of any threats of retaliatory action.

The few statements of Boeing representatives cited in the complaint as the basis for the NLRB's action fail even to come close to meeting the legal standard for a "threat of reprisal or force" or unlawful "discrimination." One statement that allegedly supports the claim is Boeing President, Chairman, and CEO Jim McNerney's assertion that "strikes [are] happening every three to four years in Puget Sound."[9] The NLRB admits in its complaint that the union held strikes in 1977, 1989, 1995, 2005, and 2008.[10] Unmentioned in the complaint is the reported $900 million incentive package given to Boeing by the state of South Carolina.[11]

How is Boeing's reference to union strikes either retaliatory or a threat of force? Just because a Boeing executive said that one of "the overriding factor[s]" in moving the work to a factory in South Carolina is "that [Boeing] cannot afford to have a work stoppage…every three years" is not indicative of anti-union animus; it is a statement of "demonstrably probable" economic effects. The fact that Boeing has been forced to respond to the economic realities resulting from the actions of its employees is not "retaliation." A contrary holding would mean that a company like Boeing could not factor the economic costs of its employees and their behavior into decisions about where to conduct business—a practice that is in the best interests not only of the company's shareholders, but of the company's customers as well.

In response to the NLRB complaint, Peter Schaumber, who served for eight years on the NLRB, declared, "There is no precedent to support this."[12] In fact, the precedent cited by the NLRB[13] cuts the other way. In the 1969 Supreme Court case, *National Labor Relations Board v. Gissel Packing Co.*, an employer asserted that he had the freedom of speech to make statements to employees that unionization would lead to a strike resulting in a plant shutdown.[14] The Supreme Court said that an employer is permitted to "make a prediction as to the precise effects he believes unionization will have on his company" as long as these predictions are "demonstrably probable."[15] Federal law is violated, as was the case in *Gissel*, only when an employer (during a union recognition election) makes a statement that is no "longer a reasonable prediction based on available facts" but rather a threat of retaliatory action if the employees vote to join a union.[16]

In the instant complaint, the NLRB has no such evidence of any threats of retaliatory action, only evidence of Boeing talking about the stark economic consequences the company faces because of the

8. *Id.* § 158(a)(3) (2011).
9. Complaint at 4, The Boeing Company and International Association of Machinists, No. 19-32431. President Obama appointed McNerney to the President's Export Council in March 2010 at almost the same time the union filed its grievance. John Adams, *Boeing Boss Jim McNerney Named to Obama's Export Council*, Govconwire.com, March 12, 2010.
10. *Id.*
11. David Slade and Katy Stech, *Boeing's Whopping Incentives*, THE POST AND COURIER (Jan. 17, 2010), http://www.postandcourier.com/news/2010/jan/17/boeings-whopping-incentives.
12. Philip Klein, *Former NLRB Chairman Says Board's Complaint Against Boeing Is Unprecedented*, WASH. EXAM'R (Apr. 21, 2011), http://washingtonexaminer.com/blogs/beltway-confidential/2011/04/former-nlrb-member-says-boards-complaint-against-boeing-unprecede.
13. *See* NATIONAL LABOR RELATIONS BOARD, *Boeing Complaint Fact Sheet* (Apr. 20, 2011), http://www.nlrb.gov/print/443.
14. Nat'l Labor Relations Bd. v. Gissel Packing Co., 395 U.S. 575 (1969).
15. *Id.* at 618.
16. *Id.*

constant strikes in Washington—comments that are well within the protected First Amendment free speech rights of employers.

The NLRB does not cite another relevant case, *First National Maintenance Corp. v. NLRB*,[17] in which the Supreme Court dismissed a similar unfair labor charge against a company for failing to bargain with the union over the closure of a nursing home for economic reasons. In that case, the Court found that Congress "limited the mandate or duty to bargain to matters of 'wages, hours, and other terms and conditions of employment.'"[18] The Court stated that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise."[19] Management must be able to make decisions "essential for the running of a profitable business" and "to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice."[20]

Here, Boeing is not even closing its existing Washington plant; it is simply creating new production capabilities in a second facility in South Carolina. The statements from Boeing cited by the NLRB demonstrate that Boeing believes this expansion is related to "the running of a profitable business."

The Board's Overreach

The NLRB complaint goes far beyond the legal authority that the agency is authorized to exercise under the law.[21] Not only is the NLRB's general counsel using scant evidence to claim that a company is violating federal labor law, but the evidence he cites does not show behavior that violates the applicable statute and precedent.

The NLRB is also ignoring the right (confirmed by the Supreme Court) of companies to make economic-based decisions. After five strikes over the past 34 years, Boeing was confronted with repeated lapses in productivity that it believed, if repeated in the future, would injure its reputation and hamper its ability to deliver promised products on time. Preventing delivery disruptions and damage to company finances by reducing work stoppages on one of its newest products is part of a company's business discretion that is outside the authority of the NLRB to regulate.

Going so far as to shut down a plant for economic reasons after reaching a bargaining impasse does not violate sections 8(a)(1) or 8(a)(3) of the NLRA even if the employer's purpose was "to bring about a settlement of a labor dispute on favorable terms."[22] In this case, Boeing is not even trying to obtain an advantage in its bargaining position with the union, an objective the Supreme Court has said is lawful. Instead, Boeing is trying to avoid or decrease the economic damage to the company that will be inflicted by anticipated strikes that could shut down production of one of the newest members of its fleet.[23]

Furthermore, Boeing's actions can hardly be considered a "reprisal" against a union when none of the jobs held by the union's members have been eliminated since the company decided to build a South Carolina factory.[24] Under the NLRB's view

17. 452 U.S. 666 (1981).
18. First Nat'l Maint. Corp. v. Nat'l Labor Relations Bd., 452 U.S. at 674.
19. *Id.*
20. *Id.* at 678 (citations omitted). The Supreme Court also pointed out that various courts of appeal have declined to require collective bargaining over management decisions involving a major commitment of capital investment or a basic operational change in the scope or direction of an enterprise. *Id.*
21. *See, e.g.*, THE WALL ST. J., *The Death of Right to Work* (Apr. 21, 2011), http://online.wsj.com/article/SB10001424052748704570704576275351993875640.html.
22. American Ship Building Co. v. Nat'l Labor Relations Bd., 380 U.S. 300, 313 (1965).
23. *See also* Nat'l Labor Relations Bd. v. Brown, 380 U.S. 278 (1965), where the Supreme Court allowed an employer to lock out its employees and continue its operations with temporary employees, stating that there "are many economic weapons which an employer may use that either interfere in some measure with concerted employee activities, or which are in some degree discriminatory and discourage union membership, and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either §8(a)(1) or §8(a)(3)." *Brown*, 380 U.S. at 283.
24. Steven Greenhouse, *Labor Board Tells Boeing New Factory Breaks Law*, N. Y. TIMES (Apr. 20, 2011), http://www.nytimes.com/2011/04/21/business/21boeing.html.

of the law, all manufacturers who have facilities in closed union shop states like Washington would be permanently prohibited from expanding their operations or building new facilities in right-to-work states like South Carolina—a legally untenable and economically disastrous result.

Boeing's actions can hardly be considered a "reprisal" against a union when none of the jobs held by the union's members have been eliminated since the company decided to build a South Carolina factory.

Such a result would also be contrary to the fundamental structure of the NLRA. Congress enacted the law to protect the rights of both union members and employers, and it does so by carefully balancing various interests. The Act allows states that choose to promote unionization to enact closed-shop laws, but it allows other states to implement right-to-work laws. The NLRB's current litigation position would significantly alter that statutory scheme. It would effectively mean that existing companies with any unionized workforce could not expand in right-to-work states, at least not without serious litigation. Besides its impact on the affected companies, this change would have a large negative effect on right-to-work states and their citizens and would fundamentally change the policy in the NLRA (as amended by the Taft–Hartley Act) that is supposed to be neutral between states with closed-shop and right-to-work laws.

Another perverse incentive in reading the NLRA in this way is that new start-up companies building their first manufacturing or other facilities could freely take the union laws of various states into account, but existing firms could not do so without incurring substantial risks. This defies common sense and would have disastrous economic effects and encourage even more companies to operate offshore.

Moreover, this would ultimately injure union workers as well. In the future, if the NLRB prevails, companies would not offer their existing unions a chance to compete for investment in expanded business for fear that such competition would create an inference that the company chose to expand in another state as "retaliation" against the union. Thus, a "pro-union" position in the instant case not only harms the nation's economy, but also, in the long run, will cost union jobs.

The NLRB

If the administrative law judge who will hear the complaint in June recommends that Boeing be ordered to abandon its placement of work in South Carolina and expand its existing plant or build a new one in Washington State, the case may go before all of the members of the NLRB.

The four-member NLRB contains one Republican appointee, Brian Hayes;[25] two members appointed by President Barack Obama, Craig Becker[26] and Mark G. Pearce;[27] and one member appointed by President Bill Clinton, Wilma B. Liebman,[28] who was later appointed as Chairman by President Obama. One of the most controversial members, Becker, is a recess appointee who is seeking confirmation to a full-term appointment.

Both Becker and Liebman have made disturbing comments about employers and the right to work that evidence their pro-union views and raise the question of whether they will be able to make an unbiased decision. Becker has said that "employers should have no right to be heard in either a representation case or an unfair labor practices case, even though [NLRB] rulings might indirectly affect their duty to bargain."[29] He believes that the government

25. Hayes was confirmed by the Senate on June 22, 2010; http://www.nlrb.gov/who-we-are/board/brian-hayes.
26. Becker was sworn in on April 5, 2010, after a recess appointment by President Obama. NAT'L LABOR RELATIONS BD., *Who We Are: Craig Becker*, http://www.nlrb.gov/who-we-are/board/craig-becker (last visited May 6, 2011).
27. Pearce was confirmed by the Senate on June 22, 2010. NAT'L LABOR RELATIONS BD., *Who We Are: Mark G. Pearce*, http://www.nlrb.gov/who-we-are/board/mark-g-pearce (last visited May 6, 2011).
28. Liebman was appointed by President Obama as Chairman on January 20, 2009, NAT'L LABOR RELATIONS BD., *Who We Are: Wilma B Liebman*, http://www.nlrb.gov/who-we-are/board/wilma-b-liebman-chairman (last visited May 6, 2011).
29. Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV., 459, 451–53 (1993).

should strengthen unions by interpreting the law to limit the freedom of businesses to invest:

> What threatens to eviscerate labor's collective legal rights, therefore, is less the common law principle of individual liberty than the mobility of capital…. The right to engage in concerted activity that is enshrined in the Wagner Act—even when construed in strictly contractual terms—implicitly entails legal restraint of the freedom of capital.[30]

Sadly, Becker's radical views do not appear to be inconsistent with the Board's prevailing philosophy. Indeed, Chairman Liebman has written:

> [A]n exclusive orientation toward an individual-rights regime could have troubling political and social consequences. Workers may view the employment relationship in purely individual terms and may fail to grasp common economic interests and the potential of collective action at work, as well as in the public sphere.[31]

Attack on Domestic Competition

The NLRB's charges against Boeing lack legal merit and would prevent domestic competition from right-to-work states. South Carolina Attorney General Alan Wilson says that the complaint is "without legal and factual foundation."[32] According to Senator Jim DeMint (R–SC), the NLRB is "really trying to bully and intimidate—not just Boeing—they are attacking every right-to-work state."[33]

Businesses prefer to operate in states with better business climates, and the NLRA allows states to compete for new investment by implementing labor laws that allow workers not to join unions. This reality may direct investment toward right-to-work states and away from heavily unionized states—a development that unions want to prevent from happening.

Forcing companies to either expand their unionized operations or not expand at all will reduce investment and job creation in the United States.

Consider the U.S. auto industry. Between 1973 and 2006 (before the recent recession), its employment grew modestly. At the same time, its unionization rate fell from 71 percent to 26 percent. This decrease in unionization was the result of "foreign" brands building new plants in Tennessee, Alabama, and South Carolina.[34] These brands created cars that consumers wanted and jobs for thousands of workers—and out-competed unionized Detroit. As a result, auto-manufacturing jobs grew in the South and fell in the Midwest. Unions want to outlaw such domestic competition.

Threatening Investment

If the NLRB and activist courts uphold the NLRB Acting General Counsel's complaint, they will damage the U.S. economy. Forcing companies to either expand their unionized operations or not expand at all will reduce investment and job creation in the United States.

Unions essentially "tax" investments that corporations make, redistributing part of the return from these investments to their members. This process makes new investment less worthwhile. As a result, unionized firms invest less in physical capital and in research and development than non-union firms do.[35] One study found that unions directly reduce capital investment by 13 percent and reduce R&D

30. Craig Becker, *Book Review: Individual Rights and Collective Action: The Legal History of Trade Unions in America*, 100 HARV. L. REV. 672, 689 (1987).
31. Wilma Beth Liebman, *Labor Law Inside Out*, 11 J. LABOR & SOC'Y 1 (2008).
32. Letter from Alan Wilson, South Carolina Attorney General, to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (Apr. 28, 2011), http://www.scag.gov/wp-content/uploads/2011/05/4.28.11_NLRB_Letter_Formatted_with_Signatures.pdf.
33. Hiram Reisner, *DeMint: Labor Relations Board Acting Like "Thugs"*, NEWSMAX (Apr. 21, 2011), http://www.newsmax.com/InsideCover/demint-labor-relations-board/2011/04/21/id/393722.
34. Barry T. Hirsch, *Sluggish Institutions in a Dynamic World: Can Unions and Industrial Competition Coexist?*, 22 J. ECON. PERSP. 153, 176 (2008).

activity by 15 percent to 20 percent.[36] Other studies find larger effects,[37] such as the fact that newly unionized plants reduce capital investment by 30 percent—the same effect as a 33 percentage point increase in the corporate tax rate.[38]

Restricting competition restricts growth.

Forcing companies to invest only in unionized operations will reduce the total amount these companies decide to invest. Restricting competition restricts growth. The NLRB proposes to do this at a time when the U.S. economy remains sluggish and business investment remains weak. Private nonresidential fixed investment growth fell from an 8.6 percent rate in the last quarter of 2010 to just a 2.8 percent rate in the first quarter of 2011.[39]

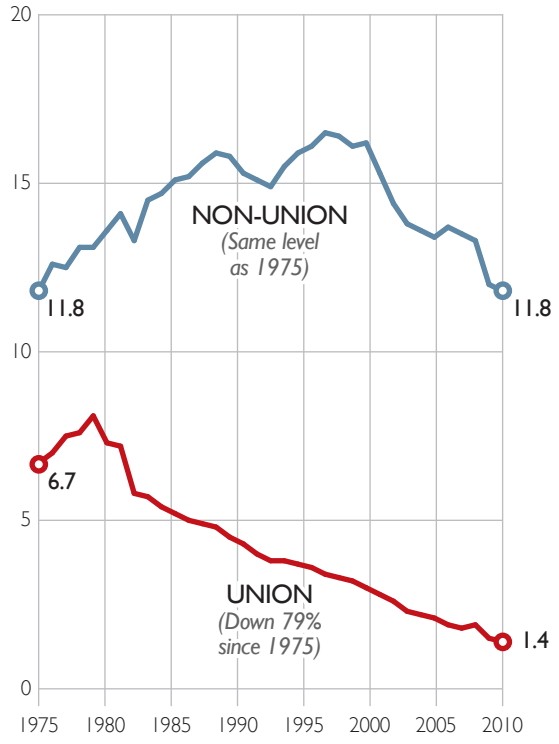
Fewer Jobs

Because they invest less, unionized companies often become less competitive. As a result, these companies create fewer jobs. Research shows that unionized firms shed jobs more frequently and expand less frequently than non-union firms do.[40]

This is not a coincidence: Unions directly *cause* these job losses. Employment falls between 5 percent and 10 percent when unions organize a company.[41] Going forward, jobs in unionized firms shrink (or grow more slowly) by three to four percentage points

Union Manufacturing Jobs in Decline

Manufacturing Jobs in Millions



Source: Heritage Foundation calculations based on data from Barry T. Hirsch and David A. Macpherson, "Union Membership and Coverage Database from the Current Population Survey," at *http://unionstats.gsu.edu/* (May 5, 2011).

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35. Robert Connolly, Barry T. Hirsch & Mark Hirschey, *Union Rent Seeking, Intangible Capital, and Market Value of the Firm*, 68 REV. ECON. & STAT. 567 (1986); Stephen G. Bronars, Donald R. Deere & Joseph S. Tracy, *The Effects of Unions on Firm Behavior: An Empirical Analysis Using Firm-Level Data*, 33 INDUS. REL. 426 (1994); Stephen G. Bronars & Donald R. Deere, *Unionization, Incomplete Contracting, and Capital Investment*, 66 J. BUS. 117 (1993); Barry T. Hirsch, *Firm Investment Behavior and Collective Bargaining Strategy*, 31 INDUS. REL 95 (1992).
36. Barry T. Hirsch, *Labor Unions and the Economic Performance of U.S. Firms*, UPJOHN INST. FOR EMP'T RESEARCH (Kalamazoo, Mich.) (1991).
37. Julian Betts, Cameron W. Odgers & Michael K. Wilson, *The Effects of Unions on Research and Development: An Empirical Analysis Using Multi-Year Data*, 34 CAN. J. ECON. 785 (2001).
38. Bruce C. Fallick & Kevin A. Hassett, *Investment and Union Certification*, 17 J. LAB. ECON. 570 (1999).
39. THE BUREAU OF ECONOMIC ANALYSIS, *Gross Domestic Product, 1st quarter 2011 (Advance estimate)* (Apr. 28, 2011).
40. Timothy Dunne & David MacPherson, *Unionism and Gross Employment Flows*, 60 S. ECON. J., 727 (1994).
41. Robert J. Lalonde, Gerard Marschke & Kenneth Troske, *Using Longitudinal Data on Establishments to Analyze the Effects of Union Organizing Campaigns in the United States*, 41–42 ANNALES D'ECONOMIE ET DE STATISTIQUE 155 (1996); Richard B. Freeman & Morris M. Kleiner, *The Impact of New Unionization on Wages and Working Conditions*, 18 J. LAB. ECON. S8 (1990).

a year than they do in non-union firms.[42] In the long term, unionized jobs disappear.

Such economic decline is the exact effect that unionization has had on the manufacturing sector.[43] Non-union manufacturing businesses employed as many workers in 2010 as they did in 1975. However, unionized manufacturing employment fell by 79 percent during the same period. In the aggregate, only unionized manufacturing jobs have disappeared from the economy.[44]

Economic injury seems to be of little concern to this nation's union advocates.

Competition encourages domestic investment and job creation instead of economic sclerosis. Forcing companies to invest only in heavily unionized areas means that they will create fewer new jobs. If the law had prevented the auto industry from expanding into the South, companies would have gone overseas. Applying these principles suggests that Boeing's expansion into South Carolina will mean more new jobs than if Boeing stayed only in Washington.

What Congress Should Do

Domestic competition means more jobs overall but fewer new union jobs. While restricting competition might benefit unions in the short term, it will damage the U.S. economy for years to come, yet such economic injury seems to be of little concern to this nation's union advocates. The Boeing complaint is yet another example of how the union-dominated NLRB contorts the law to benefit a special interest at the expense of America's economy.

Congress should not allow the NLRB to inflict more damage on this nation's already struggling economy. Instead, Congress should amend the National Labor Relations Act to reaffirm the long-standing construction of the Act that any new investment decisions—such as (but not limited to) expanding existing facilities, building new plants, or relocating—do not constitute unfair labor practices. This amendment would prevent abusive litigation by the NLRB and protect companies' ability to freely make investments that benefit their shareholders, their customers, their employees, and the overall economy.

An Unlawful Expansion of Regulatory Power

Boeing made an economic decision involving a large capital investment that was justified by the history of union strikes in Washington and by South Carolina's estimated $900 million incentive package.[45] The NLRB's decision to issue a complaint in the matter represents an unbridled, unauthorized, and unlawful expansion of the regulatory power of an executive agency. If allowed to stand, the Board's actions threaten business investment and job creation as well as the employment of both unionized and non-union workers.

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42. David G. Blanchflower, Neil Millward & Andrew J. Oswald, *Unionization and Employment Behavior*, 101 ECON. J. 815 (1991); Jonathan S. Leonard, *Unions and Employment Growth*, 31 INDUS. REL. 80 (1992); Richard J. Long, *The Effect of Unionization on Employment Growth of Canadian Companies*, 46 INDUS. & LAB. REL. REV. 691 (1993).
43. Heritage Foundation calculations based on data from Barry T. Hirsch and David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey*, UNION STATS, http://www.unionstats.com (last visited May 6, 2011).
44. In recent years, both union and non-union employment have fallen, but non-union manufacturing remains at 1970s levels. Between 2006 and 2010, non-union manufacturing employment fell by 14 percent while unionized employment fell by 22 percent. Source: Heritage Foundation calculations based on data from Barry T. Hirsch and David A. Macpherson, "Union Membership and Coverage Database from the Current Population Survey," online at http://www.unionstats.gsu.edu.
45. Slade & Stech, *supra* note 11.