UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

In the matter of

The Boeing Company,

Employer,

And

Case No. 10-RC-215878

International Association of Machinists
And Aerospace Workers, AFL-CIO,

Petitioner.

AMICUS BRIEF ON BEHALF OF THE GOVERNORS OF SOUTH CAROLINA, MAINE, KENTUCKY, AND MISSISSIPPI

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INTRODUCTION

The Amici Curiae moving for leave to file a brief and supporting the Boeing Company's ("Boeing" or "Employer") Request for Review do not intend to submit a detailed analysis of the significant defects in the Regional Director's ("RD") Decision and Direction of Election ("DDE") that misapplies the facts to the appropriate legal standard. Boeing's Request for Review filed June 26, 2018, thoroughly and accurately addresses all the factual errors and legal misapplications in the DDE.

Instead, this brief emphasizes the critical public policy considerations that formed the underpinnings of the Board's recent decision in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017). *PCC Structurals* made great strides in reversing the NLRB's prior trend of issuing decisions and establishing harmful policy aimed at creating imbalances and one-sided advantages in the federal labor laws. The DDE, here, effectively disregards the holdings in *PCC Structurals.*

The citizens of South Carolina, Maine, Kentucky, and Mississippi, as well as the citizens of all states, rightfully expect federal labor laws to be written, interpreted, and applied in a fair, consistent, balanced, and neutral manner, not tilted to favor one side or the other. Likewise, businesses that make substantial investments in particular states based on what they understand to be competitive advantages and improved opportunities should not have to face repeated attacks made possible by biased, resulted oriented decisions applying federal labor law.

For well over six years, the individuals who make up the Boeing SC team have faced repeated organizing efforts by the Petitioner, who had the full advantage of very

pro-union NLRB polices and decisions. When the question of third-party representation was properly presented to the appropriate unit of the Boeing SC team, the vast majority soundly rejected the Petitioner despite these advantages. The decisions made by Boeing SC team members should be respected. Neither the team members nor Boeing, as well as citizens and businesses from any other state, should have to suffer through repeated attacks made possible by the misapplication of federal labor law.

Boeing's Request for Review should be granted. Further, the DDE at issue in this matter should be reversed and the correct application of *PCC Structurals* should be made. Finally, the Board should take this opportunity to clarify and confirm the proper application of the appropriate unit analysis to avoid future misapplication and foster a more stable labor environment.

ARGUMENT

A. Employees Freely Choosing to Remain Union Free Must Not then Be Fragmented and Forced to Face Off

Struggling through the wake of the Great Recession, South Carolina's workforce has largely completed its long road to economic recovery. Today, South Carolinians are proudly back to work with South Carolina continuing to enjoy the proud reputation of a thriving and prosperous right-to-work state culture. So too has Maine seen a dramatic fall of its unemployment rate from 8.3% in June 2009 to 2.7% in March 2018. Kentucky has also experienced a significant drop in unemployment from 10.7% in June 2009 to 4.0% in March 2018. Similar recovery has occurred in Mississippi with its unemployment rate dropping from 10.8% in March 2010 to 4.5%

in March 2018. To ensure our state economies continue to recover, our states must continually encourage and support the manufacturing jobs our citizens depend on. Boeing continues to be a major part of the backbone of the United States manufacturing infrastructure, employing over 50,000 factory workers and over 45,000 engineers and supporting 1.3 million supplier-related U.S. jobs.

For Maine, Kentucky, Mississippi, and South Carolina employees choosing to remain union free – like Boeing's production and maintenance employees, who voted three-to-one to reject union representation – union attempts to penetrate, divide, and carve out employees into micro-units must be deterred. Specifically, Petitioner's goal of pitting union and non-union co-workers against each other is a practice that must be prevented, not promoted.

The National Labor Relations Act ("NLRA") gives similarly situated employees the right to bargain collectively; it also gives them the right to refrain from such activity. Thus, the National Labor Relations Board ("the Board") has long held that part of its mission of ensuring employees have the full benefit of their right to self-organization, and to collective bargaining, is to create efficient and stable collective bargaining relationships. *See Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962). Section 9(b) maintains that unit determinations must "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." 29 USC §159(b). Section 7 of the Act also dictates that, besides protecting the right of employees to engage in protected activities, the Act protects "the right to refrain from any or all of such activities." 29 U.S.C. §157. These important amendments to the Act "emphasized that

one of the principal purposes of the [Act] is to give employees full freedom to choose or *not* to choose representatives for collective bargaining." H.R. Rep. No. 80-510, at 47 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 551 (1948) (emphasis added.)

As elected officials, these Governors support their respective states' employees' right to join or reject a union as provided for under the NLRA. The similarly situated employees at Boeing's North Charleston facility overwhelmingly rejected the union's efforts to represent them on February 15, 2017, voting 2,907 to 731 against union representation and collective bargaining. When a workforce, like this one, rejects unionization, a union's changed tactic of cherry picking employees off in small factions should be discouraged. It is not healthy for a company or a union; it does not unify but divides similarly situated employees.

Drowning in an overwhelming lack of employee support for union representation, the union has attempted to whittle away a micro-unit of 178 employees from the fully integrated and interdependent workforce that manufactures Boeing's 787 Dreamliner. IAM's attempt to fracture Boeing's unified workforce by chipping away a piecemeal collection of employees will not result in efficient or stable collective bargaining relations but instead will infuse strife, instability, and inefficiency in the workplace. It will allow multiple unions to subdivide divisions of the workplace, forcing a company like Boeing, with over 7,000 employees, to bargain with multiple unions for a similarly situated workforce.

Manufacturing employees across our states should find their right to work rights respected, especially when they vote and decline union representation. Boeing employees' decision to rebuke the union's efforts should not be undermined by the Regional Director's misinterpretation of the principles in *PCC Structurals*.

B. The Regional Director Failed to Properly Apply *PCC Structurals* and Smuggled *Specialty Healthcare's* Fatally Flawed Analysis Back into the Equation

On December 15, 2017, the National Labor Relations Board correctly struck down the pro-union use of micro-units and overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), reinstating the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. *PCC Structurals Inc.*, 365 NLRB (2017). Restoring stability, the Board retired *Specialty Healthcare's* divisive unit-determination standard that fractured the very nature of the bargaining relationship by breaking apart functionally integrated structures. This rightfully rejected practice stripped away the rights of similar employees to determine whether to elect a collective bargaining representative. Before appropriately abandoning it, *Specialty Healthcare* contravened the NLRA's mandate and ignored the business realities and impact fractured units have on continued labor peace, stability, and employee rights – all of which impact the principles of strong economic development, which eschews changing policies that allow the use of disruptive political gamesmanship.

The Board's right-minded return to the long established "communities of interest" analysis in *PCC Structurals* follows this notion that labor stability is a

prerequisite to economic development and employee unity. This is because the ability to have a small sub-unit unionized is reserved for a group truly dissimilar to others within the company. It is not intended to disruptively chip-off employees who are part of an integrated manufacturing process. Unfortunately, the Regional Director's interpretation of *PCC Structurals* in the Boeing decision appears to be a bureaucratic effort to skirt the principles in *PCC Structurals* and smuggle *Specialty Healthcare's* "fundamentally flawed" analysis back into the equation. See *PCC Structurals* NLRB No. 160.

Wholly ignored and unaddressed by the Regional Director is the Board's statement in *PCC Structurals* acknowledging, "there are sound policy reasons for returning to the traditional community-of-interest standard that the Board has applied throughout most of its history, which permits the Board to evaluate the interests of all employees – both those within and those outside the petitioned-for unit – without regard to whether these groups share an 'overwhelming' community of interests." *PCC Structurals* NLRB No. 160. *PCC Structurals'* restoration of the Board's traditional rule encouraged the development of policies and benefits for the entire workplace, rather than pitting employees against each other in a divide-and-conquer battle for better terms.

Specialty Healthcare stood for a new and radical proposition that classification or departmental units were *de facto* appropriate bargaining units. The Regional Director makes the same critical error present in *Specialty Healthcare*, exaggerating minimal differences between employees while ignoring the similarities among and

between overlapping and fully integrated groups. For this reason the *PCC Structurals* decision teaches that a comparison of employees must look at "whether excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *PCC Structurals* NLRB No. 160.

The Regional Director misapplied *PCC Structurals* by focusing only on how alike the 178 employees were, and ignoring similarities with other employees. It created a "department" where none exists. (Boeing RFR at 25). It noted, but did not review, that employees outside of the 178 employees have the same licenses, skills, and training. It did not discuss that pay rates and pay plans and policies are the same for not just the 178 employees, but for all hourly employees. It acknowledged supervisors oversee 10 employees on the cabin system team, but did not explain how or why it excluded these employees from the unit. Finally, while indispensable to the analysis, the decision ignored the fully integrated process that the 178 employees are part of: manufacturing the Boeing 787 Dreamliner.

CONCLUSION

To allow the Regional Director's decision to stand will resurrect the "fundamentally flawed" destabilizing principles in *Specialty Healthcare* and will contradict the clear and definitive decision of Boeing's South Carolina employees, creating competition within the manufacturing facility. It will stunt growth and sow discord in an otherwise unified and stable workforce, thriving in right-to-work state.

[Signature Page to Follow]

Respectfully submitted this 23rd day of July, 2018

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CERTIFICATE OF SERVICE

I certify that the foregoing **Amicus Brief on Behalf of the Governors of South Carolina, Maine, Kentucky, and Mississippi** was electronically filed with the Board through the Board's website and was served electronically on:

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Dated this 23rd day of July, 2018

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