Statement of Professors from Colleges and Universities Across the United States on HR 2587

HR 2587, currently being considered by the House of Representatives and endorsed by a majority of the House Committee on Education and the Workforce, would amend the National Labor Relations Act to take away from the NLRB the ability to remedy unfair labor practices involving the removal of work or the elimination of jobs by requiring employers to undo their unlawful actions. As scholars of law and labor policy, we are deeply concerned about the far-reaching impact this bill would have on employees' basic rights to organize, to bargain collectively, and to engage in other concerted activities protected by the NLRA.

The language of the proposed amendment to the Act is sweeping. It provides that the Board shall have no power to order an employer (or seek an order against an employer) to restore or reinstate any work, product, production line, or equipment, to rescind any relocation, transfer, subcontracting, outsourcing, or other change regarding the location, entity, or persons who shall be engaged in production or other business operations. This language has been justified by the bill's sponsors and critics of the Board as a response to the NLRB Acting General Counsel's actions in issuing a complaint against Boeing Corporation. As such, it would prevent the Board and the courts from directing Boeing to restore work to its employees in Washington State in the event that the company is found to have illegally moved the work in retaliation for those workers' exercise of legally protected rights.

But that unprecedented interference with a pending legal proceeding for the benefit of a particular employer is not all that the bill would do. If enacted, HR 2587 will eliminate the ability of the NLRB and the courts to effectively remedy any discriminatorily motivated decision to transfer work from employees or eliminate their jobs not for legitimate business reasons, but because the employees have engaged in union or other NLRA-protected activity. It will also eliminate any meaningful remedy for an employer's refusal to bargain with a union in circumstances where it is required to do so before transferring or contracting out work performed by workers the union represents.

The Board has long held that moving jobs from one facility to another or shutting down a particular operation to avoid unionization or to punish workers for engaging in protected activity violates a basic policy of the Act, that of insulating union activity from economic reprisal.[1] The same is true of discriminatorily motivated decisions to subcontract or outsource work.[2] The standard remedy for such a violation, regularly affirmed by the Federal Courts of Appeals, is an order to the employer to return the work that has been unlawfully eliminated or removed.[3] In the interests of economic efficiency, however, the Board will not require restoration of work if the employer can show that it would be "unduly burdensome" to do so.[4]

An order to restore work that has been eliminated or removed is also the standard remedy in cases where the employer's actions were taken in violation of its duty to bargain. In unionized workplaces, employers have a legal obligation to bargain over certain decisions

affecting where and by whom bargaining unit work is performed. If the employer acts unilaterally, without first bargaining with the union until the parties reach agreement or are at impasse, the Board routinely orders the employer to rescind the unilateral action and restore the work until the duty to bargain has been satisfied, subject again to the "unduly burdensome" standard.[5]

If HR 2587 becomes law, the Board will be precluded from ordering this common-sense relief. Employers will be able to eliminate jobs or transfer employees or work for no purpose other than to punish employees for exercising their rights and the Board will be powerless to direct the employer to return the work regardless of the circumstances.

Without the ability to order a unionized employer to bring back work that has been unilaterally transferred or outsourced in violation of the duty to bargain, the Board will also be unable to insure that employees, though their union, are able to engage in meaningful bargaining over such decisions.

We are dismayed that a single complaint, not yet tried by an administrative law judge argued to the Board, or ruled on by the courts, should be the basis for so fundamental a reversal of long-standing law. The legal theory on which the Acting General Counsel's complaint against Boeing is based is thoroughly consistent with existing law. Contrary to the claims of critics, the Acting General Counsel is not seeking to dictate where Boeing assigns work, but only to insure that such actions are not taken in retaliation for workers' exercise of rights protected by the NLRA. In fact the complaint itself specifically states that "the Acting General Counsel does not seek to prohibit Respondent from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility."

But as we have shown, the impact of HR 2587 would go well beyond overruling the Acting General Counsel's actions in the Boeing case. If enacted, it will give tacit permission to employers to punish any segment of their workforce that chooses to unionize or to exercise the right to strike by eliminating their jobs. It will allow unionized employers who find it convenient to ignore their duty to bargain with the union before transferring or eliminating bargaining unit work to act unilaterally without concern for legal consequences. Employers will be able to eliminate lines of work, hire subcontractors, switch jobs to non-union facilities or transfer them out of the country in violation of the NLRA—secure in the knowledge that the Board will be unable to order it to undo those actions.

In the Committee report regarding the bill, the majority states, "To ensure employees can continue to exercise their rights under federal labor law, the NLRB will continue to have more than a dozen strong remedies against unfair labor practices to protect workers and hold unlawful employers accountable." However, the report does not list those remedies and we are at a loss to identify them. The Board's remedial power under existing law is already severely restrained. The Board cannot impose sanctions. It may not seek to punish wrongdoers. It cannot impose fines; it cannot require anything that would amount

to a new contract between the parties. If the bill passes, the Board will have no effective response to basic unfair labor practices.

The Committee majority seeks to justify the reducing of employee rights and Board authority by claiming that it is merely strengthening the employer's right to make basic business decisions, including where and how to invest its resources. We reject the premise that restoring work to those who would perform it were it not for the employer's unlawful action violates an employer's basic entrepreneurial rights. The policy of restoring victims to the position they would have been in had it not been for unlawful conduct is common throughout our legal system, and it represents no more than a recognition of simple justice.

1. See, for example, *Frito-Lay, Inc*. 232 NLRB 753 (1977) (employer violated the Act by shutting down plant and transferring the work to another facility in response to a union organizing campaign); *Lear Siegler, Inc*., 295 NLRB 857 (1989) (same).
2. See, for example, *Century Air Freight*, 284 NLRB 730 (1987) (employer's subcontracting of trucking work violated Act because purpose was to avoid bargaining with union). See also *Aguayao v. Quadrtech Corp*., 129 F. Supp. 2d 1273 (C.D. Cal. 2000) (granting the Board's request for an injunction stopping an employer from moving its California operations to Mexico in retaliation for union organizing).
3. See, for example, *Mid-South Bottling Co. v. NLRB*, 876 F.2d 458 (5th Cir. 1989) (affirming appropriateness of Board order directing bottling company to reopen a distribution facility closed because employees voted for union representation); *Woodline Motor Freight, Inc. v. NLRB*, 843 F.2d 285 (8th Cir. 1988) (upholding Board order requiring employer to restore trucking operations transferred to another facility after employees engaged in union organizing campaign); *Statler Industries, Inc*., 644 F.2d 902 (1st Cir. 1981) (approving Board order directing employer to restore office jobs relocated to another facility in order to frustrate union organizing activity).
4. *Lear Siegler, Inc.*, supra, 295 NLRB at 861.
5. The Board's authority to order such a remedy in refusal to bargain cases was expressly affirmed by the Supreme Court in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), which upheld a Board order directing an employer that contracted out the work of its maintenance employees without first bargaining with the employees' union to resume maintenance operations and reinstate the employees. The Court said the order restoring the status quo ante "to insure meaningful bargaining" was well-designed to promote the policies of the Act and had not been shown to impose an undue burden on the employer. *Id*. at 216

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