UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE BOEING COMPANY and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	Case No. 19-CA-32431

CHARGING PARTY'S OPPOSITION TO MOTION TO INTERVENE

Charging Party International Association of Machinists and Aerospace Workers District Lodge 751, affiliated with International Association of Machinists and Aerospace Workers (hereinafter "Charging Party" "IAM", or "the Union"), files this response in opposition to the Motion to Intervene brought by Dennis Murray, Cynthia Ramaker, and Meredith Going, Sr. (hereinafter "putative intervenors").

I. OVERVIEW AND LEGAL STANDARD

Putative intervenors oppose the remedy they mistakenly believe the Acting General Counsel is seeking in this case. They also wish to present evidence concerning their personal opposition to IAM representation at the Boeing facility in North Charleston, South Carolina. Neither issue is relevant, nor does either one establish a basis for intervention under Sec. 102.29, Rules and Regulations, or under NLRB precedent. Putative intervenors' passionate views on South Carolina laws prohibiting

union security clauses are an irrelevant diversion from the issues in this case and do not constitute grounds for intervention.

This case is about Boeing's retaliation against workers in the Puget Sound region who engaged in concerted and protected activity. The complaint asserts that the statements by Boeing executives demonstrate unmistakable anti-union animus in connection with the decision to transfer the second 787 Dreamliner production line out of the bargaining unit. The views of three South Carolina based employees about Respondent's actions are not relevant, and certainly do not establish a basis for intervention.

The current three parties already face formidable challenges with respect to subpoenas, witnesses, rights of appeal, and any settlement efforts. Permitting intervention here – especially where the organization brings its own ideological agenda – threatens to transform an already large and complicated hearing into an unmanageable and unwieldy proceeding. At the very most, putative intervenors should be granted leave to file an amicus brief addressing the specific legal issues the Administrative Law Judge will be considering, however the Motion to Intervene should be denied.

Whether or not to permit a party to intervene is subject to the discretion of the judge and will not be disturbed absent abuse or prejudice. *Auto Workers v. NLRB,* 392 F.2d 801, 809 (D.C. Cir. 1967), *cert. denied*, 392 U.S. 906 (1968); *Biles-Coleman Lumber Co.*, 4 NLRB 679, 682 (1937).

According to the NLRB Case Handling Manual, § 10388.1, "Counsel for the General Counsel should not oppose intervention by parties or interested persons with direct interest in the outcome of the proceeding. Sec. 102.29, Rules and Regulations and

Camay Drilling Co., 239 NLRB 997 (1978). Otherwise, counsel for the General Counsel should oppose such intervention." *Id.* (emphasis added).

Putative intervenors have no legally significant direct interest in this proceeding. According to their motion, the putative intervenors seek intervention to oppose the Acting General Counsel's proposed remedy, and to offer evidence concerning their opposition to IAM representation at the Boeing facility in North Charleston. These reasons fail on their face to establish a direct interest in the proceeding's outcome.

First, granting the motion to intervene as a party would cause unnecessary delay and complication in this case. Second, the harm alleged by putative intervenors is speculative and is based on an erroneous reading of the remedy sought in the complaint. Third, the harm, even if manifested, would be collateral to the Board's remedy and would not be the result of the direct legal operation and effect of the judgment. The Board's established policies do not support a right of intervention for such secondary parties.

II. ARGUMENT

A. Intervention Would Render An Already Complicated And Lengthy Hearing Into An Unwieldy And Unmanageable Proceeding

As the Motion to Intervene demonstrates, the putative intervenors seek to participate in order to argue issues that have nothing to do with this case. They have already demonstrated their confusion, by raising completely irrelevant issues in their Motion to Intervene, and mischaracterizing the remedy being sought by the Acting General Counsel. This case has nothing to do with the current representational status of workers in South Carolina; nor with South Carolina's status as a so-called "right to work"

state.[1] The case is about Respondent's retaliation against IAM represented employees in the state of Washington. Nonetheless, according to their Motion to Intervene, putative intervenors seek to litigate issues not relevant to this case. Tellingly, these issues reflect and help advance a well established independent political agenda. This proceeding should not be derailed in this manner.

Counsel for the putative intervenors are staff attorneys for the National Right To Work Legal Defense Foundation ("Foundation"), an independent organization opposed to labor unions, with an unwavering enmity toward lawful union security clauses. Courts have recognized the Foundation's "ideological hostility to unions" and political agenda. *Scheffer v. Civil Serv. Empls. Ass'n, Local 828*, No. 6:05-CV-06700, slip op. at 6-7 (Docket No. 38) (W.D.N.Y., 2006) (citing *Gilpin v. AFSCME,* 875 F.2d 1310, 1313 (7th Cir. 1989)), *aff'd* 610 F.3d 782 (2nd Cir. 2010), *cert. denied*, 131 S.Ct. 1480 (2011). "The Foundation's real objective is political notwithstanding its claimed objective of being a 'charitable public interest, legal aid organization.'" *Id.* at 7 (internal citation omitted).

> In fact, as the Foundation's president stated in a confidential internal memorandum produced in discovery 'I realize that, as a charitable entity, we are constrained to activities which can be defended as charitable. However, I believe our real aim is dedicated to "reducing union political influence over society." (citation omitted). The Foundation is dedicated to "reducing union political influence over society." (citation omitted).

Id. at 7. Particularly disturbing – and germane to this motion – is the court's finding that the Foundation readily makes use of the legal process to advance its political agenda, and to obstruct the operation of lawful union security clauses.

> The Foundation's manner of pursuing this objective is by triggering legal attacks that seek to impair the ability of unions to collect agency fees from

[1] Pursuant to NLRA Section 14(b), 29 U.S.C. § 164(b), so called "right to work" laws enable bargaining unit members to enjoy the benefits of a collective bargaining agreement and representation without having to pay any portion of union dues.

> nonmembers whom they represent in collective bargaining in what the Foundation describes as forced unionism.

Id. at 7-8 (internal citation omitted). In its fundraising literature the Foundation boasts "[n]o other national legal organization focuses exclusively on dismantling forced unionism – the engine that drives the far-left political machine." *Id.* at 8, n. 1.

The tone and emphasis of the Foundation's motion unmistakably reflects its core anti-union agenda, and demonstrates precisely what should be avoided here: distractions involving irrelevant and ideological issues not germane to this proceeding. The Foundation's motion portends the confusion and delay which would inevitably result if putative intervenors' were permitted to intervene as parties.

Permitting intervention would invite needless complication, delay and disruption into all aspects of these proceedings. The addition of a fourth party would undoubtedly compound the number of subpoenas and witnesses involved and complicate the presentation of evidence. But beyond the immediate prospect of rendering the trial unmanageable, the putative intervenors, working with the Foundation, would have full rights of appeal and ability to seek enforcement, throughout the life of this case. Likewise, they would have the ability to participate in and thwart any settlement efforts between the Acting General Counsel and Respondent. This is an invitation for untold delay, makes their participation anathema to these proceedings, and prejudices the charging party.

To the extent the putative intervenors have any interest in issues that are relevant to the case, it is limited to the remedy only, which can be adequately protected by permitting the putative intervenors to participate as amici. *See Hotel Del Coronado*, 345 NLRB 306, n. 1 (2005) (attorney for National Right to Work Legal Defense Foundation,

who represented an employee of the employer opposed to unionization, sought to intervene to urge that a neutrality agreement between the union and the employer's predecessor was unlawful. The Board denied the motion to intervene but permitted filing of an amicus brief).

B. Vigorous Opposition To The Remedy Putative Intervenors Mistakenly Believe The Acting General Counsel Seeks Does Not Establish A Basis For Intervention, Especially Where The Asserted Harm Of Unemployment Is Entirely Speculative And Would Be Collateral To The Outcome Of This Case Rather Than A Direct Result

In their motion to intervene, putative intervenors allege that the complaint seeks a "draconian remedy" of "closure of their work site and their discharge from employment." Motion to Intervene at 1. Again, the complaint seeks no such thing. The complaint seeks an order "requiring respondent to have the [Pacific Northwest IAM] Unit operate its second line of 787 Dreamliner aircraft assembly production in the State of Washington, utilizing supply lines maintained by the Unit in the Seattle, Washington, and Portland, Oregon, area facilities." Complaint, ¶ 13(a). In the following paragraph, the complaint explicitly states that

> [o]ther than as set forth in paragraph 13(a) above, the relief requested by 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.

Complaint, ¶ 13(b). Thus, the putative intervenors' allegation that the complaint seeks the closure of the work site and their discharge, is undeniably incorrect. The motion to intervene should be denied as it is based on a fundamentally wrong understanding of what this case is about.

As explained in section 2 below, the putative intervenors' fear of unemployment is speculative and based on a series of assumptions that may not be true. But even if the remedy was *certain* to cause the putative intervenors' unemployment, this still would not constitute cause to intervene here. Their interest is only in the remedy, if it is granted. At the very most, putative intervenors should be granted leave to participate as amici in the remedial stage of the proceeding.

1. Under Established General Counsel Policy (GC Memo 82-21), A Non-Party Should Not Be Permitted To Intervene Based On Opposition To A Restoration Remedy.

In General Counsel Memorandum 82-21 (1982), Associate General Counsel Joseph E. DeSio explained why, in unilateral subcontracting cases where a restoration remedy is sought, the subcontractors should not be permitted to intervene. GC Mem. 82-21, 1982 WL 45397 (1982) (attached hereto as Attachment "A"). In such cases, the subcontractors have a potential interest, in that if the work that was unilaterally subcontracted was remedially restored to the bargaining unit, the subcontractor would necessarily lose that work. This situation is clearly analogous to the asserted interest in the present motion to intervene, where putative intervenors allege they will lose work if the remedy is granted here.

The General Counsel Memorandum concluded that because, in such cases the subcontractors' interests relate to the remedy only, they should only be permitted to participate as amici. "Such participation would be for the limited purpose of adducing evidence tending to show that the remedy would impose an inequitable burden on it." *Id.* at 2 (citing *Mobil Oil Corporation*, 219 NLRB 511 (1975); *Hillside Manor Health Related Facility*, 257 NLRB 981 (1981), *enforced*, 697 F.2d 294 (2nd Cir. 1982)).

As to motions to intervene by these parties, however, the General Counsel Memorandum states:

> Counsel for the General Counsel should oppose any such motion, except as noted, infra, on the following grounds: First, the subcontractor is not faced with the prospect of a remedial order against it. Second, the cases do not require that intervention be granted. Third, it does not appear that a subcontractor is an "interested party" within the meaning of the APA. Fourth, even if the subcontractor is an "interested party" under the APA, this fact does not require intervention under Section 554(c). Finally, it should be argued that the subcontractor's interest is only with respect to the remedy and that interest can be protected by participation as amicus.

Id. (citing *Camay Drilling Co.*, 239 NLRB 997 (1978)) (footnote omitted). The subcontractors' loss of the contract is a much more foreseeable and direct consequence of a restoration order than the putative intervenors' feared unemployment here. Nonetheless, the General Counsel Memorandum found that the subcontractors should not be permitted to intervene. The same factors described by the General Counsel Memorandum also hold true for the putative intervenors in this case – they are not faced with the prospect of a remedial order against them; the cases do not require that intervention be granted; the putative intervenors do not appear to be "interested parties;" and their interest is only with respect to the remedy, which could be protected by participation as amici. Thus, intervention is not warranted in this case and the motion should be denied.

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2. The Harm Putative Intervenors Attribute To The Proposed Remedy Rests Entirely On Speculation.

In their motion to intervene, putative intervenors allege that they have a "direct and tangible stake in the outcome of this case because their employment will almost certainly be terminated if the General Counsel's proposed remedy is imposed". Motion to Intervene at 3. The declarations of the putative intervenors, however, reveal how this anticipated harm is speculative.[2]

Putative Intervenor Murray admits in his declaration that he does not work in the Final Assembly and Delivery facility which is the subject of this complaint. *See* Declaration of Dennis Murray in Support of Motion to Intervene, p. 6 ("I still work in the 'old' section of the building working on the aft sections of the aircraft"). His fear that he will lose his job stems only from his speculation that "it is possible that I could transfer over to the new facility". *Id.* Murray avers absolutely nothing in support of this "possibility". He also recognizes that the complaint does not actually seek his unemployment, but only the maintaining of the work in the Unit at Everett, WA. However, Murray exacerbates his own anticipated harm by insisting that he would decline to follow the work back to the Pacific Northwest and would rather choose unemployment for himself. *See Id.* ("even if Boeing gave me the opportunity to move to Washington to perform the work that the General Counsel seeks to transfer to that state, I

[2] With respect to the legal sufficiency of the three declarations offered in support of the putative intervenors' motion, only one is signed. The other two do not comply with Board law, and therefore should not be relied on as credible evidence. 28 U.S.C. § 1746 (setting forth signature and swearing requirements for declarations); *In re Veiga*, 746 F.Supp.2d 27, 37 (D.D.C. 2010) ("[s]imply put, Salgado's unsworn (and unsigned) declaration, provided upon his 'honor and conscience,' is not substantially the same as the statutorily required language") (citing *Gotlin v. Lederman,* 616 F.Supp.2d 376, 389 n. 7 (E.D.N.Y.2009)); *see Eurasian Automotive Products,* 234 NLRB 1049, n. 2 (1978) ("we agree with the Regional Director's refusal to consider a declaration submitted in support of Objection 10, which was unsigned and which did not contain sufficient information to enable the Regional Director to contact the declarant").

would oppose and decline such a move"). Mr. Murray's declaration is the only valid testimony before the ALJ and it shows no harm nor establishes a direct interest in this case.

Even if unsigned declarations were evidence, none of the putative intervenors even allege they work in the facility that is the subject of this case.[3] Their interest in this case is based on a series of speculations and assumptions – that they will be transferred to the Final Assembly and Delivery Facility; that the Acting General Counsel's proposed remedy will be granted; that the remedy sought by the Acting General Counsel would result in the closure of that facility (which is not sought as part of the remedy); that they would not remain in or be able to transfer back to their current jobs, or obtain other jobs in South Carolina that are not in the Final Assembly and Delivery facility; and that they would refuse an offer of transfer to retain their employment. Such speculative and self-aggravated harm does not constitute a direct interest warranting intervention in this case.

C. Putative Intervenors' Evidence Concerning Their Opposition To Representation By The IAM At The North Charleston Facility Is Immaterial And Does Not Establish A Basis For Intervention

Putative intervenors state that they seek to participate as parties to the case because "they have relevant evidence concerning their opposition to representation by the IAM at the Boeing facility in North Charleston, South Carolina, including Mr. Murray's successful decertification of the same union in *The Boeing Company / IAM,* Case No. 11-RD-723." Motion to Intervene at 2.

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[3] Putative Intervenor Going also admits that he does not work in the Final Assembly and Delivery Facility. *See* Declaration of Meredith Going, Sr. In Support of Motion to Intervene, p. 2 ("I am currently working in the mid-body plant").

Putative Intervenor Ramaker also admits that she does not work in the Final Assembly and Delivery Facility. *See* Declaration of Cynthia Ramaker in Support of Motion to Intervene, p. 6 ("I work in a building usually called 'off-site warehouse' where the 787 parts are received").

The IAM fully acknowledges and agrees that the putative intervenors, along with most private-sector workers in the United States, have important rights under the NLRA to free choice of whether or not they wish to be represented by a labor organization. The putative intervenors' Section 7 rights and their attitude towards IAM representation, however, are completely irrelevant to the issues raised in the complaint and do not provide a basis for intervention here. The complaint concerns whether Boeing managers made certain coercive statements, and whether the company decided to relocate the second 787 line in South Carolina in response to protected activities of the Pacific Northwest workforce.

The putative intervenors also request leave to submit a brief:

> on behalf of themselves and all other employees at Boeing's North Charleston plant, particularly as the case relates to: a) the remedies sought by the General Counsel; b) Intervenors' exercise of their Section 7 rights to reject unionization by the IAM; and c) Intervenors' desire to work in South Carolina in a nonunion setting and to enjoy the protections of Section 14(b) of the Act, 29 U.S.C. § 164(b) and the South Carolina Right to Work law, S.C. Code Ann. §§ 41-7-10 through 90.

Id. As an initial matter, putative intervenors present no basis for their request to intervene "on behalf of themselves and all other employees at Boeing's North Charleston plant". *Id.* There is no legal basis for such "class" intervention, nor is there any factual basis to suggest that the three named putative intervenors adequately represent "all other employees".[4] But moreover, besides the "remedies sought by the General Counsel", the issues which the putative intervenors seek to argue have nothing to do with this case.

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[4] *See, e.g., Washington Gas Light Co.*, 302 NLRB 425, 427 n. 1 (1991) ("[t]he Intervenor has objected to the judge's ruling not to allow him to represent the interests of other employees in these proceedings. As the judge noted, there is no evidence that those employees requested or authorized Stringfellow to represent their interests"). Counsel for putative intervenors, the National Right to Work Legal Defense Foundation, was recently admonished by the Second Circuit when it attempted to represent a class of dissenting employees: "The district court denied the motion because it held that '**Foundation counsel are clearly in conflict with the objectives of plaintiffs** and the putative class and cannot act in their best interests.'...

The complaint alleges that the Respondent has retaliated against IAM members in the Pacific Northwest for exercising their Section 7 rights. The complaint also concerns the Respondent's transfer of work *away* from the Pacific Northwest bargaining units because of their concerted activities. The same charges would have been brought if the work had been sent to Michigan or California. Putative intervenors' desire to work in South Carolina in a nonunion setting, and South Carolina's "right to work" status, have nothing to do with the issues in this case.

It is also worth emphasizing again that nothing in the complaint or proceeding seeks to cause the elimination of current employee jobs or the shutdown of any facilities, and putative intervenors' asserted interest in their fear of losing their jobs is indirect and collateral to the issues in this case.

D. With Respect To The Remedy Sought By Acting General Counsel, The Putative Intervenors' Interests Are Aligned With Respondent's

Putative intervenors' interests in opposing the remedy in this case are aligned with Respondent's, accordingly intervention is not warranted. Both Respondent and putative intervenors vehemently oppose the Acting General Counsel's complaint and particularly the remedy. Putative intervenors embrace and rely on Respondents' answer in explaining their interest in the case. *See* Motion to Intervene at 1. The putative intervenors do not raise any new relevant issues, but rather they join Respondent in opposition to the Acting General Counsel's complaint and proposed remedy. *See, e.g., Semi-Steel Casting Co.*, 66 NLRB 713, 716 (1946) ("[t]he issues raised by the alleged intervenors thus do not differ from those raised by the respondent, which we have found to be without merit").

This conclusion is well grounded in the record." *Scheffer v. Civil Service Employees Assoc., Local 828*, 610 F.3d 782, 786 n. 3 (2nd Cir. 2010), *cert. denied*, 131 S.Ct. 1480 (2011) (citation to lower court slip opinion omitted) (emphasis added).

In *Camay Drilling Co., supra*, the Board found that the "interests of the Trustees are not necessarily identical to that of the Charging party," observing that under ERISA, "they are bound to use their independent judgment with respect to the administration of the trust fund... Accordingly, we do not feel that the interests of the Trustees were adequately protected by allowing their counsel to consult with counsel for the Charging Party during the hearing." *Id.* at 999, n. 10. Here, the putative intervenors are employees of the Respondent and, with respect to their opposition to the remedy, share the interests of Respondent.

Putative intervenors assert that their interests are not aligned with the Respondent's because the Respondent "has no Section 7 rights to refrain from unionization, no rights under Section 9 to decertify an unwanted IAM union (unlike Mr. Murray and his co-workers), and no rights under South Carolina's Right to Work law to refrain from joining or supporting a union." Motion to Intervene, p. 8. It is true that these are some of the differences between the putative intervenors and the Respondent, however these differences are irrelevant to this case. There is no allegation here that any South Carolina employees' Section 7 or Section 9 rights have been violated. There is no allegation that anyone's rights have been violated under the South Carolina "Right to Work" law either, even if the Board had jurisdiction over this state law (which it does not).

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E. The Cases Upon Which Putative Intervenors Rely Are Inapposite Because The Acting General Counsel Does Not Seek A Remedy Against Them, And The Statutory And Representational Rights Of South Carolina-Based Boeing Employees, Though Important, Are Irrelevant To This Proceeding

The cases cited by putative intervenors are distinguishable and inapplicable. Unlike the present case, these cases involve situations where the statutory duties and rights of third parties were *directly* implicated by the Board's action.

Putative intervenors claim that *Camay Drilling*, *supra*, is "directly on point." That case involved an allegation that the employer had unilaterally withheld trust contributions that were required under the CBA. The trustees of the jointly operated pension fund moved to intervene "on the basis that said trusts were entitled to receive the increase in fringe benefits contributions". *Id.*, 239 NLRB at 997. The trustees maintained that under ERISA, they "owe[d] a fiduciary duty to the beneficiaries of the trusts to 'utilize all reasonable and lawful means to effect the collection of amounts owed to the trust[s].'" *Id.* The Board found that the trustees were "interested parties" and should have been permitted to intervene, "[i]n light of the **rigorous fiduciary obligations imposed upon the Trustees by ERISA** with respect to safeguarding and administering the assets of the trust fund". *Id.* at 998 (emphasis added). Thus, *Camay Drilling* is clearly not on point here, where putative intervenors have no fiduciary or other legal duties that would be directly impacted by the outcome of this case.

Similarly, *Local 57, International Ladies' Garment Workers Union v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967), which putative intervenors assert is "[p]erhaps the most important and analogous case," is also easily distinguished from the present case and does not support intervention here. The Board found that the employer in that case had maintained a "runaway shop," but rather than order the employer to restore the runaway

work, the Board ordered the employer to recognize the union as the representative of employees at the relocated facility in Florida. The D.C. Circuit refused to enforce the Board's order, finding it was in violation of the Florida employees' Section 7 rights, and also finding that the Florida employees should have been permitted to intervene in the case. *Local 57* demonstrates a situation where the Section 7 rights of non-party employees *would* be impacted, which is clearly not the case here. Unlike *Local 57*, the proposed remedy here would not order the IAM or anyone else to be certified in South Carolina - the remedy is to preserve the discriminatorily relocated work at the Everett, WA facility. No South Carolina jobs are at stake. Thus, in contrast to *Local 57*, the employees have no direct interest in the case here and intervention should be denied.[5]

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[5] The other cases cited by putative intervenors are also readily distinguishable, as those cases centrally involved the legal rights of the parties who were permitted to intervene. In *Gary Steel Products Corp.*, 144 NLRB 1160 (1963), the essence of the case involved a union's alleged misrepresentations to employees during an organizing campaign. Thus, those employees' Section 7 rights to free choice were at the core of that case and those employees were properly permitted to intervene. *J.P. Stevens & Co.*, 179 NLRB 254 (1969) also centrally involved an organizing campaign and the free choice of a group of employees. The employees who signed authorization cards during the campaign were permitted to intervene to protect their Section 7 rights. In *Sagamore Shirt Co.*, 153 NLRB 309 (1965), employees were permitted to intervene to show that they constituted a majority of employees and did not wish to be represented by the union. At issue in that case was whether the union represented a majority of employees in the bargaining unit, and the employees were properly permitted to intervene so that they could present evidence showing that "their signatures on the union applications were induced through threats, promises of benefits, and other coercions". *Id.* at 311. In *Washington Gas Light Co.*, 302 NLRB 425 (1991), an individual employee's dues check-off was the subject of the case. The individual employee was entitled to intervene to assert his own interests. *See also, Taylor Bros., Inc.*, 230 NLRB 861 (1977), where employees of the Respondent were permitted to intervene in order to present evidence that an election should be directed as a remedy to 8(a)(1), (3) and (5) violations, instead of a bargaining order. *Id.* at 870. In contrast to each of these cases, this case does not involve or directly impact the Section 7 rights of the three putative intervenors or any other South Carolina employees whatsoever.

Putative intervenors also gesture toward cases where unions have been permitted to intervene as parties in Board cases, but these too are inapposite because in those cases, the intervening party had a direct interest in the case. For example, in *Frito Co., Western Division v. NLRB*, 330 F.2d 458 (9th Cir. 1964), non-party unions were permitted to intervene because they claimed jurisdiction over the work at issue in that case. In *Harvey Aluminum*, 142 NLRB 1041 (1963), an employer was allegedly discouraging and interfering with employees who were trying to organize with the Steelworkers union, and Steelworkers union was permitted to intervene.

CONCLUSION

For the forgoing reasons, putative intervenors' motion to intervene as parties in this case should be denied. At the most, they should be granted leave to participate as amici.

Respectfully submitted this 7th day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2011, I caused the foregoing Charging Party's Opposition to Motion to Intervene to be e-filed with the National Labor Relations Board, and a copy to be e-mailed to the following:

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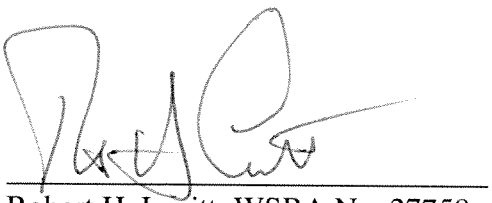

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ATTACHMENT A

1982 WL 45397 (N.L.R.B.G.C.)

TO: All Regional Directors, Officers-in-Charge and Resident Officers

*1 SUBJECT: Pleadings Manual Revision—Notice to Nonrespondent Employers in Unilateral Subcontracting Cases when Restoration Remedy is Sought

MEMORANDUM 82–21

June 8, 1982

I. Introduction

In unilateral subcontracting cases, where restoration of the status quo ante is being sought as a remedy, recent cases have raised the question of whether nonrespondent employers who would be affected by the remedial order should be named as parties-in-interest.[FN1] A second issue is whether such employers should be advised of the proceeding, and whether and to what extent they should be permitted to participate. As set forth hereinafter, we have concluded that such employers (subcontractors) [FN2] should not be named in the complaint as parties-in-interest, absent unusual circumstances. However, they should be given notice of the proceeding by service of a copy of the complaint and should be permitted to participate in the proceeding as amici curiae. Additionally, the complaint should allege that a restoration remedy is part of the relief being sought. Attached are revisions of the Pleadings Manual incorporating these provisions.

II. Subcontractors as Parties-in-Interest

The Board has long been authorized to order a restoration remedy in unilateral subcontracting cases. Thus, in Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964), the Supreme Court determined that, even though the respondent's motive in subcontracting unit work was economic, rather than antiunion, nevertheless, the Board's order requiring the respondent to resume its maintenance operations and reinstate its employees with backpay was within the Board's remedial authority. In Mobil Oil Corporation, 219 NLRB 511 (1975), enf. den. 555 F.2d 732 (9th Cir.1977), a case involving a unilateral change of subcontractors, the General Counsel also sought a restoration remedy, i.e., that the employer should abrogate the extant subcontract and restore the prior one. The Board declined to grant the remedy. In doing so, the Board pointed out that neither the contract termination nor the displacement of unit employees occasioned thereby was alleged as a violation of the Act. It also noted, inter alia, that the extant subcontractor (who would be losing the subcontract under the proposed order) was not named as a party.[FN3]

Thus, a restoration order was denied in Mobil, in part, because the subcontractor was not named as a party.[FN4] However, Hillside Manor subsequently made it clear that party status for those subcontractors is not a prerequisite for a restoration remedy. In that case, the Board ordered reinstatement notwithstanding the fact that the subcontractor which would lose the work, was not a party to the proceeding. It was sufficient that this subcontractor had the opportunity to be present at the hearing and was permitted to participate as amicus curiae.

Based upon the foregoing, we have concluded that it is not necessary to name the subcontractor as a party-in-interest in the Complaint, absent unusual circumstances.

III. Notice to Subcontractors of the Proceeding and Extent of Participation

A. Notice

*2 As set forth above, in Mobil, the Board, in denying the restoration remedy, noted that the subcontractor was not represented at the hearing. In Hillside Manor, the Board, in granting the remedy, noted that the subcontractor had an opportunity to be present at the hearing and was permitted to participate as amicus. Thus, the subcontractor should be given notice of the proceeding. Further, if the subcontractor appears at the hearing, he should be given an opportunity to be present and to participate as amicus. Consequently, subcontractors should be served with a copy of the complaint and the complaint should contain a specific prayer for relief.[FN5] The attached revisions of Sections 605.2(f) and 1000 of the Pleadings Manual incorporate these requirements.

B. Extent of Participation

The Administrative Procedure Act (hereinafter referred to as the APA) provides in pertinent part:

> (c) The Agency shall give all interested parties opportunity for—
>
> (1) submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit.[FN6]

Thus, if the subcontractor simply wishes to be present at the hearing and to participate as amicus, counsel for the General Counsel should not oppose this level of participation. Such participation would be for the limited purpose of adducing evidence tending to show that the remedy would impose an inequitable burden on it. See, Mobil Oil Company, supra, and Hillside Manor Health Related Facility, supra.

On the other hand, if the subcontractor wishes to intervene, it should so move under Section 102.29 of the Board's Rules and Regulations which provide in pertinent part:

> Any person desiring to intervene in any proceeding shall file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest.... The regional director or the administrative law judge, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper.

Counsel for the General Counsel should oppose any such motion, except as noted, infra, on the following grounds: First, the subcontractor is not faced with the prospect of a remedial order against it. Second, the cases do not require that intervention be granted. Third, it does not appear that a subcontractor is an "interested party" within the meaning of the APA.[FN7] Fourth, even if the subcontractor is an "interested party" under the APA, this fact does not require intervention under Section 554(c).[FN8] Finally, it should be argued that the subcontractor's interest is only with respect to the remedy and that interest can be protected by participation as amicus.

Any questions concerning the foregoing should be addressed to your Assistant General Counsel.

Joseph E. DeSio
Associate General Counsel

Unilateral Action

*3 Respondent engaged in the acts and conduct described above in paragraph(s) _____,[FN9] (without prior notice to the Union) (and) without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees with respect to (such acts and conduct) (and) (the effects of such acts and conduct).[FN10]

REMEDIES

As previously indicated (see Introductory Statement, supra) a complaint should, inter alia, advise a respondent as to the specific nature of its alleged unlawful conduct. Since the remedy for most unfair labor practices is a traditional one, it is generally not necessary for a complaint to include a specific prayer or request for remedial relief. However, in those limited circumstances where the remedy being sought is novel or unique, the complaint will not afford a respondent adequate notice of the relief being sought. Therefore, the complaint should contain a separate prayer or request for specific remedial relief.[FN11] While such a prayer or request need not specify all of the remedial relief which is traditional or appropriate, in order to avoid such contentions as "estoppel," "waiver," or "lack of due process," the General Counsel's right to subsequently seek, and the Board's right to ultimately provide, any other appropriate remedy should be specifically preserved.

The samples preceding this section contain language dealing with the need for a remedial bargaining order in Trading Port situations (see sec. 605.2(a), supra) and pleading a restoration remedy in unilateral subcontracting cases (see sec. 605.2(f), supra. The preceding sections also contain suggested language dealing with the status of a strike as an unfair labor practice strike (see sec. 600.1(b) supra).[FN12] Additional samples of specific prayers or requests for relief which have arisen in cases where the remedy was novel or unique are contained in the following illustrative, but not all inclusive, examples:

FN1 See e.g., Hillside Manor Health Related Facility, 257 NLRB No. 134 (1981).

FN2 As used hereinafter, the term "subcontractor" identifies the person who performs the subcontract, and the term "employer" identifies the party who lets the subcontract.

FN3 Since Mobil involved an employer who changed subcontractors, the restoration order had an impact on the subcontractor who would be reacquiring the work as well as on the subcontractor who would be losing the work. By contrast, this memorandum focuses on the more typical situation involving an employer who subcontracts work which it previously performed. However, in cases like Mobil, the Region should apply the principles discussed below to the "losing" subcontractor and the "reacquiring" subcontractor. In this regard, it was noted that the Board's refusal to grant the restoration order in Mobil was based, in part, on the fact that the "reacquiring" subcontractor was not represented at the hearing.

FN4 The factor of nonrepresentation at the hearing is discussed infra.

FN5 It should be noted, however, that the respondent is not denied due process if the remedy sought is not alleged in the complaint. See Local 964, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, (Contractors and Suppliers Association of Rockland County, New York, Inc.), 184 NLRB 625, 626 (1970).

FN6 5 U.S.C. Section 554.

FN7 Cf. **Camay Drilling Company, 239 NLRB 997 (1978)**.

FN8 As set forth above, while Section 554 (c) requires agencies to permit interested parties to participate in the proceeding, it does not mandate that intervenor status be accorded to such parties.

FN9 Precede this allegation with a recitation of the actual changes in employment conditions of, or affecting, unit employees.

FN10 When the unilateral action involves the subcontracting of unit work and the General Counsel is seeking a restoration remedy, the following paragraph should be included in the complaint:

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs(s).... and...., the General Counsel seeks an order requiring the Respondent, inter alia, to reinstitute its.... [insert description of illegally subcontracted work] operation as it existed on ..... [insert date the work was illegally subcontracted] A copy of the complaint should also be served upon the subcontractor who would be losing the work under the proposed order.

FN11 The Regions should, of course, continue the longstanding practice of advising respondents of the relief being sought during all precomplaint settlement discussions and, where appropriate, during counsel for the General Counsel's opening statement at trial.

FN12 As previously noted, allegations with regard to the status of a strike as an unfair labor practice strike are to be included in a complaint even though the respondent has not discriminated against any of the strikers by discharging or refusing to reinstate them. Furthermore, in these cases the complaint should also request an open-ended order requiring the reinstatement, upon application therefor, of all qualified strikers.

OFFICE OF GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

1982 WL 45397 (N.L.R.B.G.C.)

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