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112TH CONGRESS
1st Session " HOUSE OF REPRESENTATIVES ! REPORT
112–179

PROTECTING JOBS FROM GOVERNMENT INTERFERENCE ACT

JULY 25, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KLINE, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2587]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 2587) to prohibit the National Labor Relations Board from ordering any employer to close, relocate, or transfer employment under any circumstance, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protecting Jobs From Government Interference Act".

SEC. 2. AUTHORITY OF THE NLRB.

Section 10(c) of the National Labor Relations Act (29 U.S.C. 160) is amended by inserting before the period at the end the following: ": *Provided further*, 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 employer who shall be engaged in production or other business operations, or to require any employer to make an initial or additional investment at a particular plant, facility, or location".

99–006

SEC. 3. RETROACTIVITY.

The amendment made by section 2 shall apply to any complaint for which a final adjudication by the National Labor Relations Board has not been made by the date of enactment of this Act.

PURPOSE

H.R. 2587, the "Protecting Jobs From Government Interference Act," seeks to strengthen the United States workforce and reduce uncertainty by ensuring foreign and domestic employers are free to invest in our economy and create jobs, without fear of a government board dictating where they can and cannot locate work. The bill amends the National Labor Relations Act (NLRA) to prohibit the National Labor Relations Board (NLRB), in future and pending cases, from ordering any employer to close, relocate, or transfer employment under any circumstances.

COMMITTEE ACTION

On July 19, 2011, Representative Tim Scott (R–SC) introduced H.R. 2587, the "Protecting Jobs From Government Interference Act." Original cosponsors include Chairman John Kline (R–MN), and Representatives Phil Roe (R–TN), Joe Wilson (R–SC), and Trey Gowdy (R–SC). The bill was referred to the Committee on Education and the Workforce. Given the legislative record developed through hearings in the 112th Congress, no additional hearings were necessary prior to full committee markup.

The Committee on Education and the Workforce held three hearings examining the actions of the NLRB. While the NLRB is intended to be a neutral arbiter of labor law, witnesses provided evidence that the NLRB is pursuing an activist agenda and no longer serving as an adjudicative body mediating disputes. At the two most recent hearings, witnesses discussed the complaint against the Boeing Company, the restoration remedy sought by the NLRB's Acting General Counsel, and the chilling effect this complaint is having on the economy and job creation.

The Subcommittee on Health, Employment, Labor, and Pensions held a hearing on February 11, 2011, to examine specific NLRB holdings, rulemakings, and policies. Witnesses identified and discussed a number of recent controversial and unprecedented decisions upending years of legal precedent. Witnesses provided evidence that indicates the current board is seeking to rewrite federal labor law.

On May 26, 2011, the Subcommittee on Health, Education, Labor, and Pensions held a second hearing, which explored the relatively new phenomenon known as corporate campaigns, their effects on job creation, and the extent to which federal agencies, such as the NLRB, are often complicit in their use. Two employers outlined how these campaigns had intimidated their employees and undermined the success of their businesses. The committee also heard testimony regarding the complaint against the Boeing Company and the request by the NLRB's Acting General Counsel that Boeing be ordered to relocate work in South Carolina to Washington.

Finally, on July 7, 2011, the Committee on Education and the Workforce held a hearing examining the Board's proposal to shorten the time between the filing of a union election petition and a

representational election; a proposal the committee learned will restrict employers' ability to communicate with workers and undermine employees' right to make a fully informed decision in a union election. Again, the complaint against the Boeing Company and the remedy sought by the Acting General Counsel was discussed. Witnesses raised a number of concerns regarding the the chilling effect the Boeing complaint is having on job creators.

SUMMARY

H.R. 2587, the "Protecting Jobs From Government Interference Act," amends the NLRA to prohibit the NLRB, in future and pending cases, from ordering an employer to close, relocate, or transfer employment under any circumstances. This will ensure employers have greater freedom to make one of the most basic management decisions, where to locate a business. In doing so, it will help create an economic environment that will foster investment and job creation. 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.

COMMITTEE VIEWS

In 1935, Congress passed the NLRA, guaranteeing the right of most private employees[1] to organize and select their own representative. Twelve years later, in 1947, Congress passed the most significant amendment of the NLRA, the Taft-Hartley Act,[2] to provide for a more balanced approach to labor law. Among other things, it made clear that employees had the right to refrain from participating in union activity, created new union unfair labor practices, and allowed states to enact right-to-work laws, limiting the compelling of workers to join a union.

The National Labor Relations Board, an independent federal agency, was established by the NLRA to fulfill two principal functions: (1) to determine by free democratic choice whether employees wish to be represented by a union in dealing with their employers and if so, by which union; and (2) to prevent and remedy unlawful acts (called unfair labor practices or ULPs) by either employers or unions.

Section 10(c) of the NLRA authorizes the NLRB to require persons found engaged or engaging in an unfair labor practice "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the NLRA]." Pursuant to section 10(c) of the NLRA, the Board may order a restoration of operations, forcing employers to close, relocate, or transfer work from one location to another. While there are limitations on the use of the restoration remedy, the Board has ordered this remedy multiple times since its inception. As recently as 2003, the United States Court of Appeals for the District of Columbia upheld the Board's use of the restoration remedy. Recently, the Acting

[1] The NLRA does not cover all employees and employers in the United States. For example, public sector employers (state, local, and federal employees), employers covered by the Railway Labor Act (airlines and railroads), agricultural labor, and supervisors are not covered by the act. 29 U.S.C. § 152(2).

[2] 29 U.S.C. § 141 et seq.

General Counsel has sought this extreme remedy in the complaint against the Boeing Company.

On March 26, 2010, the International Association of Machinists and Aerospace Workers District Lodge No. 751 (Local 751) filed a charge with the NLRB alleging that Boeing had violated sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act (NLRA). At the heart of the charge was Boeing's decision to locate the second 787 Dreamliner assembly line in South Carolina rather than Washington and alleged statements made by Boeing executives between October 2009 and March 2010 which stated that work stoppages were one reason for choosing the South Carolina location.

Almost a year later, on April 20, 2011, after Boeing had invested approximately $1 billion in building the South Carolina plant, the NLRB Regional Director was directed by the NLRB Acting General Counsel to issue a complaint against Boeing. Throughout the complaint, the Regional Director alleges that Boeing "transferred" work from Washington.[3] According to the Regional Director, the transfer of the 787 Dreamliner assembly line in conjunction with alleged comments made by Boeing between October 2009 and March 2010 violated sections 8(a)(3) and 8(a)(1) of the NLRA.[4] Despite the fact that no union employee at the Washington facility has lost his or her job as a result of Boeing's decision to locate the second 787 Dreamliner assembly line in South Carolina, the Regional Director has sought an extraordinary remedy, requiring Boeing to operate its second line of 787 Dreamliner aircraft assembly production in the State of Washington.[5] If successful, the NLRB may destroy thousands of South Carolina jobs and have a chilling effect on job creation across the country.

Where to locate a business is one of the most basic management decisions an employer can make. The intervention of the NLRB into this important decision has created uncertainty for job creators and will deter investment in the United States, ultimately eliminating American jobs. Former Board Chairman Peter Schaumber testified to this fact before this committee, and multiple business groups have expressed similar concerns.

At the July 7, 2011 hearing before the full committee, former Board Chairman Peter Schaumber testified that:

> [W]eeks ago I was in Canada, speaking to a group of 60 business people from some of Canada's largest companies. A few with whom I had an opportunity to speak afterwards expressed real concern about doing business in the United States as a result of the agency's complaint against the Boeing Company.[6]

This concern was reiterated by the Chamber of Commerce of the United States of America, the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. It stated in a letter to the committee in support of H.R. 2587 that "businesses

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[3] Complaint and Notice of Hearing: The Boeing Company and International Association of Machinists and Aerospace Workers District Lodge 751, Case 19–CA–32431, Page 5.

[4] Id. at 6.

[5] Id. at 7–8.

[6] See Testimony of Peter Schaumber, "Rushing Union Elections: Protecting The Interests Of Big Labor At The Expense Of Workers' Free Choice" House of Representatives, Committee on Education and the Workforce. Thursday, July 7, 2011.

considering investing in new facilities in the United States will likely think twice and consider the risk that their decisions may be second guessed by the NLRB."[7]

The National Association of Manufacturers, the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states, stated that the Boeing complaint "is having an impact on the capital expenditure and hiring decisions of many [employers]."[8] A recent survey of its members as to the effects the Boeing complaint and other NLRB actions will have on jobs found that "[o]f more than 1,000 responses, 69 percent said the NLRB's actions will negatively affect their ability to create and grow jobs."[9]

The Printing Industries of America, expressed similar concerns, stating:

> The complaint filed by the NLRB against The Boeing Company demanding that the company transfer its work from one facility to another is an example of regulatory actions that are chilling job growth. Printing company owners must have the freedom to determine in which facilities they may plan, transfer or relocate employment without threat that the government will override those business decisions. As recent NLRB actions have demonstrated, such a threat is very present and obviously worrisome as employers attempt to salvage and once again grow business operations.[10]

To prevent the long term damage this remedy could have on the United States' economy and jobs, the committee passed and reported H.R. 2587. It will amend the NLRA to prohibit the NLRB, in pending and future cases, from ordering an employer to relocate, shut down, or transfer employment under any circumstances.

To ensure employees are able to exercise their rights under the NLRA and employers who violate the law are held accountable, the NLRB retains more than a dozen strong, alternative remedies against employers that commit unfair labor practices, including back pay and bargaining orders. Back pay orders cover not only wages and interest but also, where appropriate, other employment benefits, including: vacation benefits, bonuses, health and medical coverage, overtime hours, meal allowances, and tips. Such orders can be significant. Back pay in conjunction with other remedies is an effective deterrent against unfair labor practices and an appropriate remedy when employers violate the NLRA.

Opponents of this legislation suggest that it will damage workers' rights and move jobs overseas. To the contrary, this legislation will only strip the NLRB of one remedy out of more than a dozen significant remedies and will create an environment in which employers will want to establish work in the United States. As noted by former Chairman Schaumber and the aforementioned business

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[7] Letter from R. Bruce Josten, Executive Vice President, Government Affairs, Printing Chamber of Commerce of the United States of America, to John Kline, U.S. Congressman (July 20, 2011) (on file with author).

[8] Letter from Joe Trauger, Vice President, National Association of Manufacturers to John Kline, U.S. Congressman (July 21, 2011) (on file with author).

[9] Id.

[10] Letter from Lisbeth Lyons, Vice President, Government Affairs, Printing Industries of America, to U.S. Congressmen (July 20, 2011) (on file with author).

groups, the remedy sought in the Boeing complaint has already given employers pause as they look to expand in the United States, fearing what appears to be an environment hostile to business. This legislation will help create an economy that attracts—not just keeps—jobs in the United States.

CONCLUSION

The committee believes the NLRB should not have authority to dictate where an employer can or cannot locate his or her business. Exercising this extreme authority creates uncertainty and undermines the ability of an employer to create jobs. Employers who want to grow their business may hesitate to do so in light of draconian measures envisioned by unelected entities such as the NLRB. Congress has a responsibility to ensure federal policies protect workers and promote economic growth and job creation. The Protecting Jobs From Government Interference Act will help create the confidence employers need to expand their business and create new jobs, and eliminate fear the NLRB will attempt to reverse important decisions made on behalf of our country and its workers. This legislation ensures workers retain strong protections under the law, and employers regain the certainty they need to create new jobs.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This act may be cited as the "Protecting Jobs From Government Interference Act."

Section 2. Authority of the NLRB

This section would amend section 10(c) of the National Labor Relations Act to prohibit the National Labor Relations Board, in pending and future cases, from ordering any employer to close, relocate, or transfer employment under any circumstances.

Section 3. Retroactivity

The section applies section 2 of the act to all cases in which a final adjudication by the Board has not been made by the date of enactment.

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 2587 prohibits the National Labor Relations Board from ordering any employer to close, relocate, or transfer employment under any circumstance. H.R. 2587 would have no direct impact on the Legislative Branch.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

EARMARK STATEMENT

H.R. 2587 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House Rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: July 21, 2011

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 1 Bill: H.R. 2587

Disposition: Ordered favorably reported, as amended, to the House by a vote of 23-16

Sponsor/Amendment: Mr. Wilson / motion to report the bill to the House with an amendment, and with the recommendation that the amendment be agreed to, and that the bill as amended do pass

Name and State	Aye	No	Not Voting	Name and State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)	x			Mr. MILLER (CA) (Ranking)		x	
Mr. PETRI (WI)	x			Mr. KILDEE (MI)		x	
Mr. McKEON (CA)	x			Mr. PAYNE (NJ)		x	
Mrs. BIGGERT (IL)	x			Mr. ANDREWS (NJ)		x	
Mr. PLATTS (PA)	x			Mr. SCOTT (VA)		x	
Mr. WILSON (SC)	x			Ms. WOOLSEY (CA)		x	
Mrs. FOXX (NC)	x			Mr. HINOJOSA (TX)		x	
Mr. GOODLATTE (VA)	x			Mrs. McCARTHY (NY)		x	
Mr. HUNTER (CA)	x			Mr. TIERNEY (MA)		x	
Mr. ROE (TN)	x			Mr. KUCINICH (OH)		x	
Mr. THOMPSON (PA)	x			Mr. WU (OR)		x	
Mr. WALBERG (MI)	x			Mr. HOLT (NJ)		x	
Mr. DesJARLAIS (TN)	x			Mrs. DAVIS (CA)		x	
Mr. HANNA (NY)	x			Mr. GRIJALVA (AZ)		x	
Mr. ROKITA (IN)	x			Mr. BISHOP (NY)			x
Mr. BUCSHON (IN)	x			Mr. LOEBSACK (IA)		x	
Mr. GOWDY (SC)	x			Ms. HIRONO (HI)		x	
Mr. BARLETTA (PA)	x						
Mrs. NOEM (SD)	x						
Mrs. ROBY (AL)	x						
Mr. HECK (NV)	x						
Mr. ROSS (FL)	x						
Mr. KELLY (PA)	x						

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House Rule XIII, the goal of H.R. 2587 is to prohibit the National Labor Relations Board from ordering any employer to close, relocate, or transfer employment under any circumstance. The Committee expects the Department of Labor and the National Labor Relations Board to comply with these provisions and implement the changes to the law in accordance with these stated goals.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 2587 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 25, 2011.

Hon. JOHN KLINE,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2587, the Protecting Jobs From Government Interference Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Anthony.

Sincerely,

DOUGLAS W. ELMENDORF,
Director.

Enclosure.

H.R. 2587—Protecting Jobs From Government Interference Act

H.R. 2587 would prohibit the National Labor Relations Board from ordering an employer to restore or reinstate any work or employee, or from requiring investment in a particular plant or facility.

Enacting H.R. 2587 would not affect federal spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 2587 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Christina Hawley Anthony. The estimate was approved by Holly Harvey, Deputy Assistant Director for Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 2587. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

NATIONAL LABOR RELATIONS ACT

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PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) * * *

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(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decisions shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing

the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed*: Provided further, 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 employer who shall be engaged in production or other business operations, or to require any employer to make an initial or additional investment at a particular plant, facility, or location*.

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MINORITY VIEWS

Committee Democrats strongly oppose and voted unanimously to reject H.R. 2587. This legislation represents an enormous step backwards for worker rights in this country and will force workers to choose between their rights or their job. The Republican legislation effectively renders critical rights and protections afforded under the National Labor Relations Act (NLRA) meaningless.

H.R. 2587 will be devastating to workers across this country. It will make it easier to ship jobs overseas, provide employers with a loophole for firing workers who try to organize a union, make runaway shops legal for all intents and purposes, and create a new race to the bottom for American workers' rights, wages, benefits and working conditions. At a time when 25 million Americans are unemployed or underemployed, this Committee and this Congress should be focused on creating and protecting jobs. This legislation does not create a single job and diminishes the few protections workers have.

Committee Republicans introduced H.R. 2587 and voted it out of Committee in a dramatic rush—less than 48 hours. There was not a single hearing on this bill, there has been no hearing on the concepts in this bill and their implications, no retrospective study on whether remedies to restore status quo ante that have been in place for 75 years lack merit, no objective assessments by the Government Accountability Office or the Congressional Research Service, and no evaluation of the impact on wages and job security of millions of workers who will be touched by this legislation.

The urgency with which this bill, only the second labor bill marked-up by this Committee in this Congress, was considered is unprecedented in this Congress. The Majority's sense of urgency should be directed at legislation where urgency is needed—creating and protecting American jobs. Instead, the top priority of Committee Republicans is to rush a special interest bill to the floor to protect a multi-billion dollar corporation to the detriment of U.S. workers.

H.R. 2587 DESTROYS LONG-STANDING WORKERS RIGHTS & PROTECTIONS

For more than 75 years, the National Labor Relations Act (NLRA or Act) has provided Americans the right to band together in unions and bargain for a better life. From the beginning, the National Labor Relations Board (NLRB or Board) has administered and enforced this law on behalf of workers and employers. Under this law, it is illegal to retaliate against workers for exercising their rights. These decades-old rights include the right to strike or the right to form or join a union or even to simply sign a petition asking for a raise or better safety equipment.

The freedom to organize and collectively bargain depends upon the effectiveness of the NLRA. The rights of workers are enshrined in the NLRA. Section 1 of the Act declares "it is the policy of the United States" to "encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organizing and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment, or other mutual aid or protection."

Section 7 of the Act establishes the fundamental rights of workers to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."[1] Section 8 lays out a variety of prohibitions for both employer and union behavior. For example, employers may not interfere with, coerce, intimidate, or discriminate against employees in the exercise of their Section 7 rights.

To ensure that these rights are meaningful, workers must have the ability to enforce their rights. The remedies available to workers whose rights have been violated have long been criticized as inadequate and ineffective. Human Rights Watch, legal scholars, and Board members agree that the law's remedies are "so weak [that] they fail to enforce the law and to protect employees."[2] H.R. 2587 will weaken these remedies even further.

While the NLRA does not require specific remedies, Section 10(c) of the Act provides that the Board may order "such affirmative action . . . as will effectuate the policies of [the] Act."[3] The Supreme Court has held that that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress."[4] Unlike modern employment statutes, such as the Civil Rights Act, there is no individual right of action under the NLRA for retaliation due an employee seeking to exercise their statutory rights. This means that workers cannot bring a claim in the courts. Aggrieved workers' only source of recourse is to file a complaint with the NLRB and their remedies are generally limited, unlike in the court system. For example, the law only requires employers reinstate employees unlawfully discharged, post a notice promising to never do it again, and pay the employee back wages minus what the worker earned or should have earned in the interim. In 2003, the average back-pay amount was a mere $3,800.[5]

H.R. 2587 will eliminate the only meaningful remedy workers have when an employer uses layoffs, transfers, or plant closings to discriminate or retaliate against them for engaging in protected activity. While this legislation creates a giant loophole that will allow employers to evade any liability for violating workers rights, it is

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[1] 29 U.S.C. 157.

[2] Ellen Dannin, No Rights without Remedies: The Long Struggle for Effective National Labor Relations Act Remedies," American Constitution Society, Issue Brief (Jun. 2011).

[3] 29 U.S.C. 160(c).

[4] MacKay Radio & Telegraph Co., 304 U.S. 333, 348 (1938).

[5] Strengthening America's Middle Class through the Employee Free Choice Act, Hearing Before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Nancy Schiffer, at 6).

aimed directly at eliminating the remedy requested by the NLRB's Acting General Counsel, Lafe Solomon, in his complaint on behalf of the International Association of Machinists and Aerospace Workers (IAM) District 751 against the Boeing Corporation (Boeing). Workers believe that Boeing retaliated against them for past and possible future strikes when it admittedly[6] relocated its second production line of the 787 Dreamliner to a non-union facility in South Carolina. Consistent with the law and Board precedent,[7] Mr. Solomon sought an order requiring Boeing to return the unlawfully transferred work from South Carolina back to Washington state. The specific remedy, if a remedy is determined to be appropriate, is at the discretion of the Administrative Law Judge hearing the case. Rather than waiting for the case to be decided, Committee Republicans want to change the rules so that no effective remedy is available to these workers or any others who make an unfair labor practice claim in the future.

H.R. 2587 CREATES MASSIVE LOOPHOLE IN THE LAW

While H.R. 2587 seeks to slant the rules for Boeing in its ongoing case, the bill reaches far beyond Boeing. It would expand the ability of employers to outsource jobs, expand their ability to lawfully discriminate and retaliate against workers, and create a race to the bottom where American workers are pitted against each other as employers give work to the lowest bidder.

THE BILL MAKES IT EASIER TO SHIP JOBS OVERSEAS

Last year, it was reported that American companies created 1.4 million jobs overseas compared with less than 1 million in the U.S.[8] American workers are nearly powerless against employers who outsource jobs overseas, and H.R. 2587 takes away one of the only protections workers have against outsourcing. While employers can outsource jobs for any reason, they cannot do so when that reason is unlawful, such as retaliating against workers for exercising their rights under the NLRA. H.R. 2587 changes that and would now allow companies to outsource jobs overseas, without any meaningful consequence, in retaliation for U.S. citizens exercising their rights under the NLRA.

Committee Republicans mistakenly argue that under current law employers can outsource jobs overseas for retaliatory or discriminatory purposes. This is simply not true. For example, in 2000 the

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[6] Complaint at 4–5, The Boeing Corporation and the International Association of Machinists and Aerospace Workers District Lodge 751, Case No. 19–CA–32431, National Labor Relations Board Region 19 (2011). In support of the complaint, Solomon cites numerous examples of Boeing executives clearly stating that the decision to relocate the production line was unlawfully motivated by its desire to avoid future strikes. Examples include an October 21, 2009 statement by Boeing's CEO at a quarterly earnings conference that was posted on the company's intranet that the decision to relocate to South Carolina was due to strikes, an October 28, 2009 memorandum to employees that stated, among other things, the decision to relocate the second production was made to reduce vulnerability to work stoppages, and a March 2, 2010 videotaped interview with the Seattle Times where Boeing's Executive Vice President stated that the decision to locate the second line was because of past strikes and the possibility of future strike.

[7] Acting General Counsel's Opposition to Respondent's Motion to Dismiss and Motion to Strike, The Boeing Corporation and the International Association of Machinists and Aerospace Workers District Lodge 751, Case No. 19–CA–32431, National Labor Relations Board Region 19 (2011). *See* also: Lear Siegler, Inc., 295 NLRB 857, 861 (1989).

[8] Pallavi Gogoi, Job Market Booming Overseas For Many American Companies, HUFF. POST (Dec. 28, 2010).

NLRB sought and obtained an injunction that stopped a jewelry manufacturer from moving its California operations to Mexico.[9] The Board sought the injunction because the company was making the move in retaliation for workers exercising their rights under the NLRA, namely, organizing a union. The employer was ordered to:

- Restore to the California facility work which had been subcontracted or relocated to Mexico;
- Return to the California facility any equipment, fixtures, inventory, supplies and work in progress that had been relocated or subcontracted from that facility;
- Reinstate any employees who had been laid off pursuant to any removal of work; and
- Rescind any outstanding agreements to subcontract work to Tijuana, Mexico.

Under H.R. 2587, these workers would have no effective remedy to fight their employer's unlawful attempt to relocate to Mexico. An employer would be permitted to relocate work to China or India because workers engaged in a protected activity such as trying to organize or striking. Earlier this year, Boeing fired 1,000 employees in California after entering into a multi-billion dollar deal with China to outsource the production of 200 airplanes.[10] In addition to China, Boeing has outsourced much of the work related to the 787 Dreamliner to South Korea, Sweden, Japan and Italy.[11] While no one alleges these moves were unlawful, under the Republican legislation, if the South Carolina workers tried to exercise their rights Boeing could outsource that work as well in retaliation. The NLRB would be helpless to restore that work, thanks to this bill.

THE BILL ALLOWS EMPLOYERS TO CREATE RUNAWAY SHOPS & THREATEN WORKERS IF WORKERS TRY TO EXERCISE THEIR RIGHTS

Under H.R. 2587 a company could bust a union by setting up a separate alter ego down the street, subcontract its work there, and eventually close down the unionized worksite. The only effective remedy for that kind of conduct is to order the employer to return the subcontracted work.[12] This bill would no longer allow that remedy. The Republican legislation eliminates long-standing remedies utilized by Republican and Democratic Boards, such as ordering an employer to "restore" or "reinstate" work because their action violated workers rights. For example, in 2004, the Bush Board required that an employer restore work for a group of workers after finding that the employer had violated the NLRA by laying them off for union activity. And H.R. 2587 will permit employers to lawfully threaten workers without any effective remedy. Employers will be able to openly threaten workers that if they try to exercise their rights to form a union the plant will close or jobs will be moved. While unlawful today, H.R. 2587 removes the remedy for

[9] Aguayao Ex Rel NLRB v. Quadrtech Corp (2001).

[10] Gregory White, Boeing Fires 1,000 Employees in California, Moves More Jobs to China, BUS. INSIDER (Jan. 20, 2011). *Available at: http://www.businessinsider.com/boeing-layoffs-orange county–2011—1*.

[11] Michael Hiltzik, 787 Dreamliner Teaches Boeing Costly Lesson on Outsourcing, L.A. TIMES (Feb. 15, 2011).

[12] Compu-Net Communications, Inc., 315 NLRB No. 32 (1994).

these workers and with it the single most effective deterrence against such threats.

H.R. 2587 DENIES WORKERS OF ANY EFFECTIVE REMEDY WHEN THEIR RIGHTS ARE VIOLATED

H.R. 2587 denies workers any effective remedy when their jobs are unlawfully relocated whether it be to South Carolina or South Korea. Committee Republicans assert that back pay or giving workers who lost their jobs at the old facility first priority for jobs at the new facility are sufficient remedies for workers retaliated against for exercising their rights. This belief ignores common sense and reality. The fact is that H.R. 2587 denies workers any effective remedy that will make these workers whole. An award of back pay that comes 3 years later minus any wages earned in the interim does not help a worker who has since lost their home and livelihood due to the employer's unlawful actions. Similarly, a remedy giving a worker first priority for a job at a facility possibly halfway across the country does not come close to making that worker whole. While the employer has violated the worker's rights, it is the worker who must now choose between their job and their community, their home and possibly their family. This is not a real remedy. This does not make someone whose rights have been violated whole.

Committee Republicans and Boeing assert that the remedy requested by the Acting General Counsel, that the production line for the 787 remain in Washington state, is not appropriate. According to the company, it states if it is found to have violated the rights of workers, the appropriate remedy "would be for Boeing to re-hire and restore the terms and conditions of employment to those employees adversely affected by the "transfer."[13]

However, this would not make discriminatees whole as it does nothing to remedy their loss of future opportunity. Moving the production line to South Carolina in retaliation deprives the workers of future opportunities with the company in the area of the company that has been described as: "the next evolutionary step" in aviation[14] and the "future of commercial aviation."[15] Permitting the production line to continue in South Carolina and simply reinstating the Washington state jobs to other jobs would not make these workers whole. Furthermore, an April 2011 company newsletter admits that "when the second line in South Carolina is up and operating, the surge capability in Everett will be phased out."[16] In other words, these workers will lose their jobs. Under this bill, there would be no ability to order that work be reinstated for them.

If Boeing does not agree with the remedy requested, which it has made clear it does not, it retains the right to object to it, which it has already attempted to do. The Board has said "when bargaining

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[13] Motion to Dismiss for Failure to State a Claim, or In the Alternative, To Strike the Injunctive Relief at 25, The Boeing Corporation and the International Association of Machinists and Aerospace Workers District Lodge 751, Case No. 19–CA–32431, National Labor Relations Board Region 19 (2011).

[14] Karen West, How Boeing Transformed the Aviation Industry, MSNBC (Jul. 2, 2007).

[15] Dan Reed, The Future of Commercial Aviation Arrived Tuesday, USA TODAY (Dec. 9, 2009).

[16] Boeing Corporation, 787 Surge Line Construction Activity under Way in Everett, WA, Employee Electronic Newsletter (Apr. 28, 2011).

work has been unilaterally and unlawfully removed, whether by subcontracting or relocation, it is appropriate to order restoration of the work to the bargaining unit, unless the employer has demonstrated that restoration would be unduly burdensome."[17] As a result, employers are not defenseless against restoration of work or rescission of the transfer remedies under current law. An employer can claim that it would be unduly burdensome to subject them to the remedy, which Boeing asserted during the pre-trial phase of the case. This trial is still on-going and facts have yet to be heard, let alone decided on; however, Boeing will have another chance to make this claim that the remedy is unduly burdensome if and when the ALJ decides the company violated the workers' rights.

H.R. 2587 OVERTURNS DECADES OF WELL-ESTABLISHED LAW

Committee Republicans contend that the NLRB's unfair labor practice charge against Boeing "has sent a shockwave across the country at a time when many employers are still struggling with the lingering effects of the recent recession."[18] The NLRB's proposed remedy for unlawful discriminatory relocation has been in place for the better part of a half century, and has been imposed on many occasions. The only thing shocking about the proposed remedy in the complaint is the surprise expressed by those who allege, without a scintilla of support, that a relocation remedy is unprecedented or extreme. Rather, what is at issue is an employer who has apparently pitted one group of workers in South Carolina against another group in Washington state—American workers versus American workers. With this bill, the Majority rewards that divisive dynamic and encourages it across the country, which does not create jobs but certainly drives down wages, benefits, and working conditions for American workers.

What is shocking is the rushed consideration of this legislation by the Majority without any effort to consider the sweeping implications for workers throughout the United States. If enacted, workers will have a right to engage in concerted protected activity, but have no meaningful remedy if an employer relocates or subcontracts out their work in retaliation. This will incentivize employers to move their plants to escape workers who attempt to bargain with them, whether from state to state, down the street or out of the country, or to advise workers that they should know that if they do engage in protected activity, the employer can eliminate, transfer, outsource, or subcontract their work—and their jobs—with impunity.

Pursuant to Section 10(c) of the Act which sets forth remedies for unfair labor practices, the NLRB is authorized to restore the status quo ante, including when an employer subcontracts work, relocates production or withholds job opportunities in retaliation for employees exercising rights protected under the NLRA. The Supreme Court has affirmed that the NLRB has the authority to:

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[17] Charging Parties' Opposition to Respondent's Motion to Dismiss for Failure to State a Claim, or In the Alternative, to Strike the Injunctive Relief at 23, The Boeing Corporation and the International Association of Machinists and Aerospace Workers District Lodge 751, Case No. 19–CA–32431, National Labor Relations Board Region 19 (2011).

[18] Opening Statement of U.S. Representative John Kline Regarding H.R. 2587, the Protecting Jobs from Government Interference Act (Jul. 21, 2011).

> redress the wrong incurred by an unfair labor practice . . . [to] restore economic status quo that would have obtained but for the wrongful [act]. . . . The task of the NLRB in applying Section 10(c) is to take measures designed to recreate relationships that would have been there had there been no unfair labor practice.[19]

Where the relocation or subcontracting of work from a facility is discriminatorily motivated, and thus violative of Section 8(a)(3) of the Act, the Board may also order restoration of operations.[20] As noted above, this authority is tempered, however, if the employer can show that relocation of a facility is unduly burdensome.[21]

A 1974 NLRB case involving General Electric (GE) found unpersuasive the same economic arguments now being made by Boeing to justify why it is moving production to South Carolina. Like Boeing, GE was promoting a so-called "two source supply"—one source unionized (in Illinois) and the other source non-union (in Tennessee)—to hedge against strikes and avoid potential interruption of supply. If the Tennessee workers voted against a union, GE suggested that the workers could win opportunities to operate a new product line. The Board stated:[22]

> While GE might wish to be able to insure both itself and its customers against production interruptions which can sometimes result from employee concerted activity, no such insurance is legally possible, for the simple reason that employees have a federally protected right to engage in such activity.
>
> That right may no more be interfered with by deliberately withholding job opportunities at represented plants than it can by "runaway shop" conduct, which precedent has long established as being illegal. Threats to engage in such conduct cannot be hidden behind innocent sounding labels such as "two source supply."

In sum "[t]he law does not permit an employer to flee the bargaining agent because of hostility to it . . . ."[23]

There is an abundant history of ordering the termination of subcontracts or relocation of production as a remedy for discrimination against unionized workers. Yet none of these cases has sent "shock waves."

- In 1981, Century Air Freight in New Jersey subcontracted out its trucking work and simultaneously fired its unionized employees in order to escape its obligation to bargain with its workforce. In this case, management was fearful the union might strike if they

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[19] Frank Bowman Transportation Company, 424 US 747, 769 (1975), quoting in part from NLRB v Rutter-Rex Mfg. Company, 396 US 258, 263 (1969).

[20] Frito Lay, 232 NLRB 753, (1977) enforced in part, 585 F2d 62 (1978).

[21] While the Boeing case remains pending before an ALJ, Boeing has already tried to argue that the remedy requested in the complaint—to require Boeing to keep the work in Washington state—is unduly burdensome. The ALJ denied Boeing's request stating it was premature to request dismissal before the case was even heard, and that determining if a relocation remedy is unduly burdensome is fact intensive.

[22] General Electric Company, 215 NLRB 520 (1974). Here, the NLRB set aside an election because the employer, citing concerns about possible future strikes, stated that the plant's non-union status was a primary factor in choosing to locate a production line for a new motor there. In its decision, the Board distinguished an employer's right to take defensive action when threatened with an imminent strike from threats to transfer work "merely because of the possibility of a strike at some speculative future date."

[23] Local 57, Garment Workers (Garwin Corp.) v NLRB, 153 NLRB 664 (1965), *modified* 374 F2d 295, (CA DC), *cert denied*, 387 US 942 (1967).

did not win wage increases. In 1987, the Republican-controlled NLRB ruled that the company had to terminate its subcontracting of trucking work previously performed by the unionized workforce because it was "inherently destructive" of the employees' right to belong to a union and exercise the right to strike. Had H.R. 2587 been in place, these employees never would have been reinstated, and the *status quo* ante would not have been restored.[24]

- In 1987, employees of Capehorn Industries in Clifton, New Jersey went on strike. A few weeks later the employees notified the employer by letter of an unconditional offer to return to work. However, the employer did not rehire them and permanently subcontracted their work. Since permanent subcontracting negated the workers' right to strike and the ability to return to their jobs if they were available, the Board required the employer to end the subcontract and rehire these workers. Under H.R. 2587, these workers would be left without an effective remedy.[25]
- In 1988, Lear Siegler closed its foam cutting production plant in Hermansville, Michigan and moved the production to the company's West Chicago, Illinois plant several days after its Hermansville employees voted for the United Auto Workers as their union representative. The NLRB subsequently found that the company would not have closed this plant and laid off the employees had it not been for their participation in a union organizing campaign. The Board ordered Lear Siegler to "re-establish and resume production operations at its Hermansville, Michigan facility in a manner consistent with the level and manner of operation that existed before the operation was closed" and "to offer reinstatement"[26] to laid off bargaining unit employees. The NLRB evaluated whether this requirement was "unduly burdensome" in response to employer objections. By the time the case was heard, the production equipment still remained at Hermansville; trucks regularly delivered foam to Hermansville; the loading and unloading of trucks in Hermansville was being done by non-union subcontracted employees; and the only thing needed to start up production again was bulk foam and the laid off employees. Had H.R. 2587 been in effect, the employees who were victims of a runaway shop and discriminatory layoffs would never have gotten their jobs back because the NLRB would have been handcuffed.

H.R. 2587 encourages and enables the outsourcing of work and leaves workers whose rights have been discarded powerless. It rewards lawbreaking. By blocking the NLRB's ability to order employers to restore workers to the same position they would have been in but for the employer's unlawful discrimination, this bill gives employers the freedom to evade accountability for breaking the law and leaves workers without a meaningful remedy. A right without a remedy is no right at all.

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[24] Century Air Freight, 284 NLRB 730 (1987).
[25] Capehorn Industry, 336 NLRB 364 (2001).
[26] 295 NLRB 857.

PART OF AN ONGOING EFFORT TO UNDERMINE THE NATIONAL LABOR RELATIONS BOARD

Republicans have engaged in a relentless assault of the NLRB. They began their attacks in the first days of the 112th Congress by attempting to cripple the Board by cutting $50 million from its Fiscal Year 2011 budget in the House passed H.R. 1—a cut which would have required the Board to furlough all staff for three months.[27] In fact, Republicans attempted but failed to defund the Board entirely. Committee Republicans have since demanded the deliberative documents of the Board members in a case which they are currently deliberating—including their legal memos, emails and working draft opinions. This demand raises serious concerns as it could harm the due process rights of the parties and interfere with the Board's decisionmaking processes.

On the Boeing case in particular, Congressional Republicans have undertaken efforts that would unfairly advantage Boeing at trial. For example, in May Chairman Kline and Chairman Issa of the Committee on Oversight and Government Reform demanded documents and communications related to the investigation of Boeing and the unfair labor practice claim despite the fact that the case is currently before an Administrative Law Judge. These requests would include those documents protected by attorney-client privilege and the prosecution's strategy memos which could clearly provide Boeing with an unfair advantage in court and harm the due process rights of the workers involved in the case. In addition, Senator DeMint has sent a FOIA request to the NLRB for nearly the same documents. Requests for similar documents were made by Boeing—but that request was denied by the ALJ on June 23, 2011. What Boeing could not obtain from the ALJ, because the production would be improper and unfair, Chairman Issa now demands under threat of congressional subpoena. Even a Republican witness at a recent HELP Subcommittee hearing[28] agreed that the Board has historically and should continue to zealously defend such privileged documents from improper disclosure. Additionally, the lead prosecutor overseeing the Boeing case, the NLRB's Acting General Counsel Lafe Solomon, has been subjected to a variety of congressional pressure, including being made to testify about the case under threat of subpoena before another Committee as the trial before the ALJ got underway, despite his concerns that testifying would compromise the trial.

H.R. 2587 is the latest effort to help Boeing in its efforts to avoid potential meaningful liability in this case as the bill removes any effective remedy available to workers in the case. It does so at the expense of the rights of all American workers.

H.R. 2587 IS AN ASSAULT ON THE AMERICAN MIDDLE CLASS

Now, more than ever, we must work to protect the middle class. Committee Republicans are instead choosing to sacrifice the funda-

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[27] Potential Impact of H.R. 1 on the National Labor Relations Board (NLRB), Congressional Research Service, (Mar. 15, 2011). *Available at:* http://democrats.edworkforce.house.gov/documents/112/pdf/CRSNLRBanalysis.pdf.

[28] Corporate Campaigns and the NLRB: The Impact of Union Pressure on Job Creation, Hearing Before the Subcommittee on Health, Employment, Labor & Pensions, 112th Cong., 1st Sess. (2011).

mental rights that helped build the middle class in order to protect a Fortune 500 company from a single NLRB complaint. With over 25 million Americans unemployed or underemployed, Committee Republicans have yet to schedule a legislative hearing or mark-up on any jobs bills.[29] H.R. 2587 does not create jobs and in fact may cost more Americans their jobs as it will now be easier than ever for unscrupulous employers retaliate against workers, depress wages, and send jobs overseas.

By allowing employers to discriminate against workers who exercise their right to join together and bargain for better wages without an effective remedy, H.R. 2587 insidiously plays American workers against each other. This means workers will exercise their rights to push for better wages, benefits, and working conditions less frequently and only at great peril. In turn, wages, benefits, and working conditions can only deteriorate.

Weakening the rights and protections of U.S. workers will have a devastating impact on the already struggling economy. On July 19, 2011, the Wall Street Journal stated that the problem with the economy and job creation is insufficient demand, "the main reason U.S. companies are reluctant to step up hiring is scant demand . . ."[30] Demand is scarce because wages are stagnant even while profits are up.

The Chief Investment Officer at JP Morgan Chase states "US labor compensation is now at a 50-year low relative to both company sales and US GDP."[31] While wages are down, profit margins of the Standard & Poor's 500 companies "are at their highest levels since the mid-1960s."[32] Middle class Americans are struggling to make ends meet as corporations pad their pockets. A May 2011 study from Northeastern University found that, between 2009 when the economic recovery began and the end of 2010, national income rose by $528 billion with $464 billion of that growth going to corporate profits and only $7 billion to wages and salaries. By depressing wages in a race to the bottom, this bill can only exacerbate the economic problems faced by our country.

CONCLUSION

H.R. 2587 is being rushed to the floor on behalf of a special interest at a reckless speed. The attention of this Committee should be on creating and protection jobs, not on attacking workers rights to collectively bargain, their right to earn a livable wage and their right to affordable health care and a secure retirement. Taking away workers rights does not create jobs or strengthen the economy. It depresses economic activity and demoralizes the workforce. Committee Democrats are united in our opposition to H.R. 2587 and will continue to fight for America's middle class and against these efforts to roll back workers rights.

GEORGE MILLER, Senior
Democratic Member.
DALE E. KILDEE.

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[29] Heidi Schierholz, Labor Market in Full Retreat, EPI (July 8, 2011). Available at: http://www.epi.org/publications/entry/7272/.
[30] Phil Izzo, Dearth of Demand Seen Behind Week Hiring, WALL ST. JOURNAL (Jul. 19, 2011).
[31] Harold Meyerson, Corporate America's Chokehold on Wages, WASH. POST (Jul. 20, 2011).
[32] Id.

ROBERT E. ANDREWS.
LYNN C. WOOLSEY.
CAROLYN MCCARTHY.
DENNIS J. KUCINICH.
DONALD M. PAYNE.
DAVÍD WU.
RUBEN HINOJOSA.
JOHN F. TIERNEY.
RUŚH D. HOLT
RAUL M. GRIJALVA.
DAVID LOEBSACK.
ROBERT C. SCOTT.
SUSAN A. DAVIS.
TIMOTHY H. BISHOP.
MAZIE HIRONO.

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