UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

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| THE BOEING COMPANY<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS | Case 19-CA-32431 |

**MOTION FOR APPROVAL OF A PROTECTIVE ORDER TO PREVENT THE DISCLOSURE OF BOEING'S CONFIDENTIAL AND PROPRIETARY INFORMATION**

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**Rules**

Respondent The Boeing Company ("Boeing") respectfully requests approval of its proposed Protective Order for ultimate entry by a federal district court. As this tribunal and all parties generally acknowledge, a protective order is necessary to safeguard the confidentiality of Boeing's sensitive business, commercial and proprietary information that has been sought by the Acting General Counsel and the International Association of Machinists and Aerospace Workers District Lodge 751 (the "Union" or "IAM") in subpoenas B-648185 and B-648186. Boeing's Proposed Order is Exhibit A hereto.

Boeing provided the other parties a draft of its proposed Order on June 14, the day hearing in this matter began. The draft was based on an agreed-upon order entered in a case pending in federal district court in Wichita, Kansas, in which the IAM is a plaintiff and Boeing is a defendant. *See SPEEA et al. v. Boeing*, No. 05-cv-1251 (D. Kan.) and *Harkness et al. v. Boeing*, No. 07-cv-1043 (D. Kan.).[1] Consistent with the Administrative Law Judge's instructions, in the ensuing weeks Boeing conferred with the Acting General Counsel and the IAM with respect to the Order's terms. The proposed Order attached hereto reflects the fruits of those negotiations; in highlighting, it shows numerous provisions that address and incorporate comments and suggestions of the IAM and the Acting General Counsel, often adding their proposed language verbatim.

As the parties reported to this tribunal periodically—and as the highlighting on the attached document reflects—considerable progress on the terms of an order appeared to have been made, with evident agreement on an order's basic elements. For example, it would be entered by federal district court, this tribunal would make preliminary determinations regarding documents' confidentiality, and a limited "appeal" would lie to the federal court.

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[1] A copy of the *Harkness* protective order is attached as Exhibit B.

On July 13, however,—more than 4 weeks after Boeing provided its proposed Order—the IAM provided an alternative proposed protective order. That proposal is Exhibit C hereto, with "red-lining" that reflects the surprisingly few changes by the IAM between July 13 and the parties' July 21 deadline for exchanging final proposed orders. The IAM's proposed order constitutes a full retreat from the progress the parties appeared to have made in the prior weeks' discussions, reneging on what Boeing considered to be agreements on various provisions of any order for this case. For example, the discussions with the IAM and the Acting General Counsel were premised on a protective order being entered by a federal district court, given that—as this tribunal has acknowledged—neither it nor the Board can effectively enforce such an order. Extensive discussions were had regarding the role of that district court, including such details as whether appeal would lie to the court of appeals. (Boeing's proposed order includes an IAM suggestion that no such appeal lie.) And yet, the IAM's proposed order does not even provide for entry by a federal court. It therefore casts aside the discussions and progress the parties made over a period of weeks toward a protective order's terms.

The proposed protective order from the Acting General Counsel, which Boeing only received mid-afternoon on Monday, July 25th, the date this brief is due, follows the IAM's proposal in most material respects. (That proposed order is attached as Exhibit E.) It, too, largely fails to reflect the progress the parties seemingly made during their negotiations.[2]

For reasons set forth below, Boeing requests that the tribunal approve Respondent's proposed Order, Exhibit A hereto, for entry by a federal district court. Boeing's proposal is the

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[2] Because the Acting General Counsel presented its proposed protective order four days after the July 21 deadline and Boeing has only had a few hours to review it, Boeing reserves the right to supplement this motion with any additional responses to the Acting General Counsel's proposed protective order as it has time to more thoroughly review the proposed order.

fruits of the negotiation that the tribunal directed to occur. The IAM's proposal is a repudiation of those negotiations. The proposed order by the Acting General Counsel is only marginally better. Substantively, the IAM and the Acting General Counsel proposals are non-starters as they both fail to even recognize a role for federal district court. Neither can serve as an operating template for an order in this case.

Boeing observes, finally, that its submission of a proposed order that embodies so much of the parties' discussion and seeming consensus should not serve, now, as a vehicle for the IAM or (to a lesser extent) the Acting General Counsel to "negotiate" the order a second time. The first time was in sessions where Boeing prepared and revised a document that reflected the parties' seeming progress, and the second time would be in argument before this tribunal, where Boeing's many accommodations would be treated as a new starting point from which to further whittle away at Respondent's position. Any such conduct should not be rewarded. And it is hardly likely to yield an order that is adequate to protect Boeing's obvious and substantial interests in protecting its trade secrets and other confidential, sensitive information.

## BACKGROUND

### A. Boeing's Proposed Order: Material Terms

The Protective Order proposed by Boeing (which is attached as Exhibit A) is modeled on protective orders routinely used by federal district courts. In fact, as noted, the proposed Order is based upon an agreed-upon order entered in a case pending in federal district court in Wichita, Kansas, in which the IAM is a plaintiff and Boeing is a defendant. Adjustments have been made to that order to reflect the special circumstances of this case, and to incorporate proposals and suggestions made by the IAM and the Acting General Counsel.

Boeing's proposed Order, which would be entered by a federal district court to ensure its effective enforcement, provides that Boeing would make initial "good faith" designations at two levels of confidentiality: "CONFIDENTIAL" and "HIGHLY CONFIDENTIAL." The first category, CONFIDENTIAL material, would include trade secrets, confidential research, private or commercially-sensitive information, information pertaining to Boeing's business strategy or development plans, and non-public information pertaining to Boeing's taxes and finances. Ex. A, at ¶ 4(A). In response to concerns raised by the IAM and the Acting General Counsel that the subcategories of CONFIDENTIAL matters were too vague, Boeing added a parenthetical after each providing an example. Thus, the parenthetical after trade secrets states "(including without limitation the process and methods for the construction and assembly of the 787 Dreamliner and other commercial aircraft)." *Id*. Material designated as CONFIDENTIAL could not be publicly disclosed and could only be distributed to parties and to other individuals directly involved in the proceeding. *Id.* at ¶ 5.

The second category, HIGHLY CONFIDENTIAL material, would be a subset of CONFIDENTIAL material that, in Boeing's good faith determination, is likely to result in harm to Boeing in its dealings with the IAM by providing the IAM with an unfair advantage in collective bargaining. *Id.* at ¶ 4(B). The HIGHLY CONFIDENTIAL information in this category would constitute information that, under settled Board law, the IAM would not be entitled to receive in its collective bargaining negotiations and dealings with Boeing. Again, in response to comments by the IAM and the Acting General Counsel, Boeing added examples of the sort of information that would fall into the HIGHLY CONFIDENTIAL category: asset allocation and utilization plans, studies or analyses dealing with work placement, aircraft assembly rate information, non-public financial data, and actual contracts with subcontractors.

*Id.* at ¶ 4(B). HIGHLY CONFIDENTIAL material could only be disclosed to counsel for the Acting General Counsel, and to certain specified representatives and agents of the IAM who will not subsequently become involved in collective bargaining with Boeing, including outside counsel not used in negotiation, outside experts, and outside support staff for the IAM. *Id.* at ¶¶ 6(B)(ii), (v). For good cause shown by Boeing, the Administrative Law Judge could further restrict HIGHLY CONFIDENTIAL information to counsel for the Acting General Counsel only. *Id.* at ¶ 6(D). Also for good cause shown by the IAM, the Administrative Law Judge could permit certain items of HIGHLY CONFIDENTIAL information to be shown to identified representatives of the IAM not otherwise entitled to receive HIGHLY CONFIDENTIAL material under the Protective order, whose access to those materials is demonstrated to be necessary to the IAM's meaningful participation in the proceeding. *Id.* This latter provision is another that was added to accommodate concerns expressed by the IAM.

After making its initial designations of CONFIDENTIAL and HIGHLY CONFIDENTIAL materials, Boeing would produce these materials to counsel for the Acting General Counsel and the IAM. The Acting General Counsel and the IAM would then have the ability to dispute Boeing's designations based upon their review of the actual documents in question. Ex. A at ¶ 17(A). Under the specific dispute mechanism outlined in the proposed Order, the parties would first engage each other in a good faith attempt to resolve their differences. *Id.* at ¶ 17. If that process is unsuccessful, either the IAM or the Acting General Counsel could raise the dispute before the Administrative Law Judge. *Id.* At this point, Boeing would have the burden to establish that the material in dispute was properly designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL. *Id.* at ¶ 17(B). Any party aggrieved by the Administrative Law Judge's ruling on the confidentiality of specific material could seek review

in district court, which would rule with "due deference" to the Administrative Law Judge's determination. *Id.* at ¶ 17(A). Boeing's Proposed Order adopts the IAM's suggestion that the parties waive any appeal to the Ninth Circuit so as not to further delay this proceeding. *Id*. at ¶ 17(D).

Under Boeing's proposed Order, CONFIDENTIAL and HIGHLY CONFIDENTIAL materials would be placed under seal if offered as exhibits at the trial of this matter. Ex. A at ¶ 7(A). However, the Acting General Counsel (but not the IAM) could move to unseal particular items of CONFIDENTIAL or HIGHLY CONFIDENTIAL material, or to permit the hearing to be open to the public at times when items of CONFIDENTIAL or HIGHLY CONFIDENTIAL material may be disclosed through exhibits or testimony. *Id.* at ¶ 7(D). To unseal particular items, the Acting General Counsel would have the burden to show that Boeing's need for protection of its trade secrets and confidential proprietary business, commercial, or financial information is outweighed by the interest in public access to the items-at-issue. *Id.* In its proposed Order, Boeing has adopted the provision in the IAM's proposal that would minimize instances of sealing exhibits and closing the courtroom by obliging the parties to "structur[e] the order and examination of witnesses without reference to CONFIDENTIAL or HIGHLY CONFIDENTIAL documents where reference to non-CONFIDENTIAL documents would be equally as effective." *Id.* at ¶ 7(C).

Under Boeing's Proposed Order, in the event the NLRB receives a Freedom of Information Act ("FOIA") request seeking the disclosure of CONFIDENTIAL or HIGHLY CONFIDENTIAL materials, it would treat those materials as presumptively-protected under Exemption 4 of FOIA. *Id.* at ¶ 13(B). If the Board later decides to disclose Boeing's CONFIDENTIAL or HIGHLY CONFIDENTIAL materials, it would first provide Boeing an

opportunity to object. *Id.* at ¶ 13(C). If, over Boeing's objections, the Board determined to accede to the FOIA request and Boeing filed a lawsuit to enjoin the disclosure, the Board would refrain from disclosing the materials until disposition of that lawsuit. *Id.* The FOIA provision in Boeing's Order is, like many other provisions, a modified version of a proposal by the other parties, in this case by the Acting General Counsel.

**B. Major Areas of Disagreement**

The major areas of disagreement between Boeing and the IAM are (1) whether the protective order should be entered by a district court and the role of the court in resolving challenges to Boeing's designations, or whether instead the protective order should be entered and administered only by this tribunal; (2) the definition of CONFIDENTIAL information; (3) the IAM's opposition to a "HIGHLY CONFIDENTIAL" category of protected information and its "attorneys' eyes only" limitation on the IAM's access to that material, and the related limitation on access for those individuals would assist the IAM in collective bargaining with Boeing; (4) how CONFIDENTIAL and HIGHLY CONFIDENTIAL information should be treated if offered as exhibits or through testimony at the hearing; and (5) narrow differences on how the Board should handle any FOIA requests for documents that Boeing has designated as containing CONFIDENTIAL or HIGHLY CONFIDENTIAL information. Compare Boeing's proposed Protective Order, Ex. A at ¶¶ 4-6, 13, 17, with the IAM proposed protective order at ¶¶ 6, 8, 13, 15, 17, 19.

The major areas of disagreement between Boeing and the Acting General Counsel are mostly the same. Like the IAM's proposal, the Acting General Counsel's proposed order excludes any role for a federal district court in entering or administering the order; has a definition of CONFIDENTIAL matter that is inferior to Boeing's more detailed definition; and has no HIGHLY CONFIDENTIAL category of protected information with an "attorney's eyes

only" limitation for the IAM, and no related limitation on access for those individuals who would assist the IAM in collective bargaining with Boeing; and differs substantively from Boeing's proposal as to how CONFIDENTIAL and HIGHLY CONFIDENTIAL information should be treated if offered as evidence at the hearing. With respect to the FOIA, the Acting General Counsel's proposal, while still improperly allowing the Board to decide *de novo* whether material determined to be confidential in this proceeding is exempt from disclosure under Exemption 4 of the FOIA, at least accepts Boeing's insistence that no disclosure be made pending the disposition of any lawsuit to enjoin a decision by the Board to disclose.

As detailed below, Boeing has by far the better position on each of these issues. First, it is abundantly clear that a protective order must be entered by the district court, because neither this tribunal nor the Board is endowed with the powers to effectively enforce a protective order.

Second, Boeing's definition of "CONFIDENTIAL" information is far superior to the non-specific definitions advanced by the IAM and the Acting General Counsel. As demonstrated by the Declaration of Steven Bodensteiner attached as Exhibit D, Boeing would plainly be harmed by disclosure of information in the various sub-categories it has identified. That is sufficient under the case law to warrant protection. The proposal of the Acting General Counsel (but not the IAM) that Boeing "log" and explain its confidentiality designations is unnecessary and would impose undue cost and delay.

Third, the propriety of an "attorneys' eyes only" provision to limit the disclosure of information to an adverse party who also has an ongoing competitive or adversarial relationship with the producing party is well-established in civil litigation. The prosecuting party in this case—the Acting General Counsel—would have full access to all responsive information, as would various representatives and agents of the IAM in all or nearly all circumstances. Notably,

as of last Friday there are now three outside lawyers for the IAM who have entered appearances in this case, making it easy for the Union to provide HIGHLY CONFIDENTIAL information to one or more outside lawyers who do not participate in collective bargaining with Boeing.

Fourth, Boeing's proposed procedures for protecting CONFIDENTIAL and HIGHLY CONFIDENTIAL materials from public disclosure at the time such materials are introduced as exhibits or through testimony captures the proper balance between its interests in confidentiality and the public's interest in access to the proceeding. The IAM would improperly place the burden on Boeing to show a "compelling need" why information that *already is determined to be confidential* must be protected from public disclosure. The Acting General Counsel likewise would improperly put the burden on Boeing.

Finally, Boeing's proposal properly provides a non-binding presumption that documents will not be disclosed under FOIA if they have been designated CONFIDENTIAL under the special designate-and-challenges procedures of this case, and that—if Boeing sues to prevent disclosure—disclosure will not occur before that court rules. While the Acting General Counsel accepts that limitation on any disclosure, the IAM's proposal does not.

Before turning to the particular issues in dispute, Boeing begins by demonstrating its entitlement to the Protective Order it has proposed.

## ARGUMENT

## THE ADMINISTRATIVE LAW JUDGE SHOULD APPROVE BOEING'S PROPOSED PROTECTIVE ORDER

### A. Good Cause Exists For Entry Of A Protective Order: The IAM And Acting General Counsel Subpoenas Call For The Production of Trade Secrets And Other Confidential Materials, The Disclosure Of Which Would Cause Harm to Boeing.

A protective order is unquestionably necessary to prevent harm to Boeing from the disclosure of subpoenaed materials containing trade secrets, as well as non-public proprietary

business, commercial and financial information about Boeing in general and Boeing's 787 Dreamliner in particular. Under Federal Rule 26(c), which the Board applies, *see Richmond Times Dispatch*, 346 N.L.R.B. 74 (2005), a protective order is appropriate if a party demonstrates "good cause" that "a trade secret or other confidential research, development, or commercial information [should] not be revealed." Fed. R. Civ. P. 26(c)(1)(G). A party establishes "good cause" where "specific prejudice or harm will result if no protective order is granted." *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002). Tribunals applying Rule 26 have "broad latitude to grant protective orders." *Id.* at 1211.

Through their subpoenas, the Acting General Counsel and IAM seek confidential and proprietary information regarding the design and manufacture of the 787 Dreamliner, the actual and projected cost and revenue structures and production schedules of the 787, Boeing's finances, and information regarding Boeing's current and former employees. *See* Declaration of Steven Bodensteiner, attached as Ex. D, at ¶ 10. This information, accumulated by Boeing through billions of dollars of marketing and research-and-development expenses, provides Boeing with a competitive advantage in the "highly competitive" market for commercial airplanes. *Id.* at ¶¶ 4–7. The 787 is a first of its kind: a composite, wide-bodied aircraft that is 20% more fuel-efficient and 10% less expensive to operate than traditional aircraft of similar size. *Id.* at ¶ 5. The success of the 787 program is dependent upon this groundbreaking design, as well as upon its cost and revenue structures and its production schedule. *Id.* at ¶¶ 5–6. Boeing's cost and revenue structures—including its profit margins, its relationships with suppliers, and the plan by which it has re-tooled its Everett, Washington facility and developed a second facility at a "greenfield" site in Charleston, South Carolina—are the *sine qua non* of efficient and economical production. *Id.* at ¶ 6. And Boeing's production schedules position it

both to absorb fluctuations in demand and initiate strategic fluctuations in supply. *Id.* All that information plainly would be of great value to Boeing's competitors, including Airbus and nascent operations in China, India, Brazil and Canada. Public disclosure of that information would undeniably cause Boeing competitive injury.

Boeing takes great care to prevent the disclosure of these confidential and proprietary materials, which it regards as "trade secrets." *Id.* at ¶¶ 5, 8. Pursuant to Boeing procedure PRO-2227, every employee involved in the 787 program is trained, at least annually, on identifying and preventing the disclosure of this information. *Id.* at ¶ 8. The information is stored on limited-access servers and distributed on a need-to-know basis. *Id.* It is not disclosed to competitors or unions, and it is only disclosed to suppliers and customers who have signed proprietary rights agreements. *Id.* Paper copies are promptly destroyed after use. *Id.*

Courts have traditionally entered protective orders to prevent the broad distribution of documents like those sought by the Acting General Counsel's and the IAM's subpoenas. First, courts have uniformly held that confidential information regarding the design and manufacturing process of a commercial product—such as, in this case, the design of the 787—is deserving of protection from disclosure. *See, e.g.*, *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1469 (9th Cir. 1992) (entering protective order to prevent disclosure of a computer program's "source code," as well as the "developmental plans" for that program"); *DDS, Inc. v. Lucas Aerospace Power Transmission Corp.*, 182 F.R.D. 1 (N.D.N.Y. 1998) (finding that the manufacturing process for production of a pivoting device for mechanical assemblies was a trade secret because it provided a business advantage and could not easily be duplicated or acquired by others); *Fireman's Fund Ins. Co. v. ECM Motor Co.*, 132 F.R.D. 39 (W.D. Pa. 1990) (entering protective order to preserve the confidentiality of laboratory files regarding a motor

manufactured by the defendant *even though the defendant had not shown that a specific injury would result from their disclosure*).

Courts have similarly recognized the need to prevent disclosure of information pertaining to the cost, pricing, and marketing of commercial products. In *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965), for example, the plaintiff in a price-fixing suit subpoenaed a number of non-party oil marketers to provide details concerning the "price, cost, and volume of sales of gasoline." *Id.* at 999. The court determined that the information constituted a "trade secret" because the subpoenaed parties maintained the secrecy of the information and because disclosure would allow the plaintiff, who competed with these parties in the wholesale oil market, to "destroy [their] businesses" by strategically undercutting and disrupting these prices, costs, and outputs. *Id.* Other cases have reached similar results. *See, e.g.*, *Star Scientific, Inc. v. Carter*, 204 F.R.D. 410 (S.D. Ind. 2001) (information relating to tobacco company's customer lists, consumer purchasing habits, pricing information, and sales techniques constituted trade secret). Indeed, the Ninth Circuit has recognized that "[c]ourts could not function effectively" in cases involving trade secrets and other commercially-sensitive information if they "lacked the power to limit the use parties could make of sensitive information obtained from the opposing party . . . ." *Bittaker v. Woodford*, 331 F.3d 715, 726 (9th Cir. 2003).

Disclosure of Boeing's confidential and proprietary information would plainly cause Boeing financial harm. First, such documents would enable Boeing's competitors, like Airbus, to shorten their time to market, eroding Boeing's competitive advantage and challenging its current primacy. *See* Ex. D at ¶ 11. Most obviously, new competitors entering the market for wide-body aircraft would be able to mimic the first-ever design and cost and supply structures for a wide-body composite airplane, including Boeing's process for establishing a final assembly

at a "greenfield" site in Charleston, South Carolina. *Id.* And with direct access to Boeing's finances as well as its cost and revenue information, competitors could seek to disrupt Boeing's arrangements with customers, suppliers, and workers, and anticipate its production schedule, mitigating any advantages that Boeing has from strategic increases in output.

Additionally, since Boeing only provides confidential and proprietary information to customers and suppliers who have signed proprietary rights agreements, disclosure would place customers and suppliers who have *not* signed such an agreement in an improved bargaining position vis-à-vis Boeing with regard to prices, wages, and profit margins, thereby affecting the prices that Boeing is able to obtain. *See* Ex. D at ¶ 12. They could second-guess Boeing's high-level investment decisions to their own advantage, as could Boeing's partners in any prospective mergers or joint ventures. *Id.*

The HIGHLY CONFIDENTIAL information category in Boeing's proposed Order is intended to deal with issues peculiar to the IAM. The concern is that the IAM would obtain an unfair advantage over Boeing in the collective bargaining negotiations that are scheduled to begin in 2012 if it obtains unrestricted access to Boeing's trade secrets and non-public proprietary business, commercial and financial information. It is well established that in bargaining a union cannot compel production of information related to an employer's financial condition, relative profitability, and competitive information unless the employer claims an inability to pay. *See Nielsen Lithographing Co.*, 305 N.L.R.B. 697 (1991), *enf'd*, *Graphic Communications, Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1922); *United Steelworkers of Am., Local 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993) ("There is no presumption of relevance when a union seeks access to financial information to test an employer's need for concessions on labor costs"). Boeing has never provided the IAM (or any other union) with

materials meeting the Protective Order's definition of "HIGHLY CONFIDENTIAL," and the IAM never asserted that it was entitled to that information for bargaining purposes. Requiring Boeing to provide such information through the Board's subpoena process would ignore these relevant circumstances and alter the parties' relative bargaining power by providing a new and improper means for the IAM to obtain sensitive and confidential financial information that it is not entitled to review as part of the collective bargaining process. *Cf. Electrical Energy Services*, 288 N.L.R.B. 925, 931 (1988).

Boeing, of course, recognizes that the IAM has an interest in accessing HIGHLY CONFIDENTIAL materials solely *for purposes of prosecuting this case* (although that need is mitigated somewhat by the complete access afforded the Acting General Counsel). As discussed in more detail *infra* at Part E, Boeing's proposed Order would accommodate the IAM's interests by allowing full access to HIGHLY CONFIDENTIAL material by its outside counsel, support personnel, litigation consultants, and retained experts. Further access to other IAM representatives would be available on a special showing that specific materials are necessary to the IAM's "meaningful participation" in this case.

**B. The Terms Of Boeing's Proposed Protective Order Are Substantively Fair.**

The terms of Boeing's proposed Protective Order would permit the efficient production of subpoenaed documents by allowing Boeing to make initial confidentiality designations, which would be controlling for the course of this proceeding or for any related federal court proceeding unless successfully challenged by the Acting General Counsel or the IAM. And, if any document that Boeing designates as CONFIDENTIAL or HIGHLY CONFIDENTIAL is challenged, Boeing would have the burden to establish "good cause" for its designation. Ex. A at ¶ 17(B). This procedure is appropriately tailored to protect Boeing's interests, while providing confidential and proprietary information to the Acting General Counsel and the IAM (on an

"attorneys' eyes only" basis for HIGHLY CONFIDENTIAL materials) for immediate use *in this case*.[3]

A protective order like the one Boeing has proposed, which "limit[s] the persons who are to have access to the information disclosed and the use to which these persons may put the information," is the "most common" kind. *See* 8A, Charles A. Wright et al., *Federal Practice & Procedure* § 2043 (3d ed.); *see also Quotron Sys., Inc. v. Automatic Data Processing, Inc.*, 141 F.R.D. 37, 40 (S.D.N.Y. 1992) ("protective orders that limit access to certain documents to counsel and experts only are commonly entered in litigation involving trade secrets and other confidential research, development, or commercial information"). Further, Boeing's proposed terms—including allowing Boeing to make good faith designations, restricting access to counsel and other persons directly involved in the case, and establishing a dispute-resolution mechanism—are familiar terms routinely accepted by federal district courts in entering protective orders. *See, e.g.*, *Upjohn Co. v. Hygieia Biological Labs*, 151 F.R.D. 355, 361 (E.D. Cal. 1993) (permitting defendant to designate confidential trade secrets, subject to plaintiff's objections, and prohibiting access to designated materials by plaintiff's in-house counsel); *Covey Oil*, 340 F.2d at 999 (prohibiting access to subpoenaed parties' trade secrets by plaintiff's in-house counsel); *Brown Bag*, 960 F.2d at 1471 (prohibiting access to defendant's trade secrets by plaintiff's in-house counsel).

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[3] Indeed, even without a protective order, the Acting General Counsel would be prohibited from disclosing much of Boeing's confidential and proprietary information. *See* 18 U.S.C. § 1905; West's RCWA 19.108.020; *see also NLRB v. Cemex, Inc.*, No. 2:09-CV-2546, 2009 WL 5184695, at *3 (D. Ariz. Dec. 22, 2009) (placing limits on the NLRB's ability to disclose confidential information in response to a FOIA request).

### C. To Ensure Effective Enforcement, The Protective Order Must Be Entered By A Federal District Court.

Since Boeing has established good cause for limiting the disclosure of confidential information, this tribunal should approve Boeing's proposed Protective Order for entry by a federal district court. The IAM's and the Acting General Counsel's proposals to have this tribunal enter and administer the protective order with no role for the federal district court is simply a non-starter.[4]

To begin with, this tribunal lacks effective authority to enforce a protective order. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) (holding that, because the Board had no contempt power over the charging party, the Board's order requiring respondent to produce confidential information under an unenforceable protective order was an abuse of discretion); *see also Local 917, Int'l Bhd. of Teamsters*, 345 N.L.R.B. 1010, 1015 (2005) (refusing to enter a protective order "inasmuch as [the Board] do[es] not have the power to hold the other counsels in contempt in the event that there is noncompliance"). The only means to establish an enforceable mechanism for the protection of Boeing's confidential materials is through proceedings in federal court: "Once the Board files an application for judicial enforcement, the district court is given the authority . . . to take any action it believes appropriate for determining whether the subpoena should be enforced." *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 499–50 (4th Cir. 2011). And it is common for federal courts to enforce protective orders for the benefit of employers involved in administrative agency proceedings. *See NLRB v. William Filene's Sons Co. Inc.*, Civ. No. 82-0472-C, 1982 WL 2173 (D. Mass. May 13, 1982) (prohibiting the NLRB

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[4] Indeed, the IAM's resistance to having the protective order entered by a district court is inexplicable, as only a court order can effectively protect Boeing's confidential information from falling into the hands of competitors like Airbus. The interests of Boeing and the IAM, which represents Boeing's employees, should be aligned on this point at least.

from disclosing to the charging party employment records obtained through subpoena); *EEOC v. Aon Consulting, Inc.*, 149 F. Supp. 2d 601 (S.D. Ind. 2001) (prohibiting the EEOC from disclosing to the charging-party employment-screening tests obtained through subpoena).

Similarly, excluding the district court from ultimate review of any challenge to Boeing's confidentiality designations would vest this tribunal with authority it does not have—*i.e.*, to compel Boeing to produce documents—and would deprive the district court of authority it does have, *i.e.*, to enforce its orders. To be sure, Boeing's Proposed Order contemplates a substantial role for this tribunal in adjudicating challenges to confidentiality designations. Any challenge must first be presented to this tribunal for resolution and if any party seeks further review in the federal district court, that court will give appropriate deference to the ruling of this tribunal. (With regard to public access to evidence and testimony, this tribunal's rulings would be final.)

However, the district court's role, as provided for in Boeing's Proposed Order, is necessary. The enforcement of Board-issued subpoenas is the exclusive province of Article III courts. *See* 29 U.S.C. § 161(2); *Interbake*, 637 F.3d at 497. As the *Interbake* court explained, "when, on the Board's application, an Article III judge is called on to determine whether to enforce a Board subpoena, the court must exercise its full judicial function and decide for itself the validity of the subpoena and the validity of the reason given for not complying with it." *Id.* at 501. Thus, if Boeing disagrees with the initial determination by the Administrative Law Judge that a given document was not properly designated as CONFIDENTIAL, or that information designated as HIGHLY CONFIDENTIAL should be demoted to the CONFIDENTIAL category, only a federal district court has the power to force Boeing to produce the document. The insistence by the IAM and the Acting General Counsel that the Administrative Law Judge should

make the final decision on all confidentiality disputes cannot be reconciled with Article III, Section 11, and *Interbake*.

Moreover, no federal district court can be expected to enter an order that relinquishes its ability to control application and enforcement of its own order. "Courts possess the inherent authority to enforce their own injunctive decrees." *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985). As the Supreme Court said more than a century ago in *In re Debs*, 158 U.S. 564, 594 (1895), "[t]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court." This authority of the district court to enforce its order extends to retaining jurisdiction over a protective order, the terms of which are implicated in another, related proceeding. *See, e.g.*, *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279, 1282 (5th Cir. 1989) (finding that only the court that entered a protective order "could exercise jurisdiction over a contempt proceeding to enforce i[t]."); *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 934 (9th Cir. 1993) ("If Westinghouse were really seeking to enforce the district court's protective order during the pendency of [a related action], that court would certainly have original jurisdiction").

District court review would not unduly delay proceedings in this matter. At the request of the Acting General Counsel and IAM, Boeing has agreed informally that, under its proposed Protective Order, all confidentiality objections not settled to the parties' satisfaction before the Administrative Law Judge would be compiled and brought before the district court in a single, expeditious proceeding. For the same reason, Boeing agreed to the IAM's suggestion that there be no appeal to the Ninth Circuit from any decision made by the district court under the dispute resolution proceedings. Ex. A at ¶ 17(D).

**D. The IAM's Definition Of "CONFIDENTIAL" Information Is Too Vague, While Boeing's Definition Provides Appropriate Detail And Guidance By Listing Categories Of CONFIDENTIAL Information And Providing Examples For Each Category.**

Boeing's proposed definition of CONFIDENTIAL INFORMATION identifies five separate categories and provides an example for each category:

- trade secrets (including without limitation the process and methods for the construction and assembly of the 787 Dreamliner and other commercial aircraft);
- confidential research, development, private or commercially sensitive information (including without limitation design information about the 787 and other commercial aircraft);
- business strategy or planning (including without limitation considerations regarding cost, competition, production scheduling, and contingency planning in connection with the development of the second final assembly line in Charleston and the surge line in Everett);
- tax and other financial information (including without limitation non-public financial information such as cost projections and profit margins); or
- confidential information regarding current and former Boeing employees (including without limitation personnel information).

Ex. A at ¶ 4(A). *See also id*. at ¶ 17(B), providing that Boeing has the burden establish that disclosure of CONFIDENTIAL information would result in an "identifiable injury" to Boeing.

The IAM's definition, in contrast, simply speaks about "trade secrets and other confidential information," the disclosure of which "will result in a clearly identified and serious injury to [Boeing]." IAM proposal, Ex. C at ¶ 6. There is, however, no reason to prefer a "clearly identified" injury to an "identifiable injury." If the injury from the disclosure of the information is identifiable, the need for protection from public dissemination is sufficiently established. The addition of the term "clearly" adds nothing.

Similarly, there can be no requirement that only "serious injury" to Boeing justifies non-disclosure of confidential material. Boeing should suffer *no* injury through disclosure of trade

secrets and confidential commercial and financial information it provides in this case; there is no basis for maintaining that litigants may injure one another by disclosing indisputably confidential materials, up to the point where the injury becomes unacceptably "serious." Moreover, to concede that information is "confidential" and that Boeing will be "injured" by its disclosure, but the injury will still be tolerated so long as it is not "serious," would subject Boeing's rights to a standard-less debate over what injuries are "serious enough" and whether that level of "seriousness" is separately met with respect to each document marked CONFIDENTIAL. This proceeding is not a vehicle to force Boeing to give public access to information it keeps private. It is sufficient that Boeing would suffer harm from public disclosure.

The Acting General Counsel's definition of CONFIDENTIAL information is more in line with Boeing's but lacks the specific examples of the categories of such information that Boeing agreed to add in response to the Acting General Counsel's complaint that Boeing's earlier definition was too vague. Boeing does not perceive any real difference between the "specific harm" that would follow from disclosure in the Acting General Counsel's proposed order (Ex. E at ¶ I), and the "identifiable harm" that Boeing would need to show under its proposal (Ex. A at ¶ 17(B)). But to the extent there is a difference, "identifiable" is preferable. If the harm is "identifiable," Boeing should be protected from disclosure of its confidential information.

Finally, the Acting General Counsel, but not the IAM, would have Boeing prepare a log setting forth the factual bases as to why the information designated as confidential "must be treated as Confidential Information as that term is defined herein." (Ex. E at ¶ II(B)(1)). Such a log is wholly unnecessary. In the great majority of instances, the material will on its face show why it deserves confidential treatment. For those instances where the material does not, the consultation requirement under the dispute resolution regime would be a far more efficient

method of advising the IAM or the Acting General Counsel why the questioned information should be treated as confidential. (Ex. A at ¶ 17(A)). By its very nature, the log the Acting General Counsel seeks can only describe in the most general terms why the designated materials are confidential, and is thus unlikely to satisfy the Acting General Counsel, leading the parties to engage in the very consultative process outlined in Boeing's proposed order.

### E. The Protective Order Should Place Limitations On The IAM's Access To HIGHLY CONFIDENTIAL Material To Prevent The IAM From Obtaining An Unfair Advantage In Future Negotiations with Boeing.

Both the IAM's and Acting General Counsel's proposals have no "HIGHLY CONFIDENTIAL" category that limit access to counsel for the Acting General Counsel and to the IAM's outside counsel, outside experts, and outside support staff. Instead, even though such "attorneys' eyes only" provisions are standard in federal court protective orders, the IAM and the Acting General Counsel apparently believe that *no* materials should be withheld from broad disclosure to the IAM, *even though the Union is not otherwise legally entitled to these materials, and giving the IAM unrestricted access would provide it with an unfair advantage in its future collective bargaining with Boeing*. The Acting General Counsel and the IAM further disagree with the provision in Boeing's proposed Protective Order that the individuals affiliated with the IAM who have access to HIGHLY CONFIDENTIAL material would be individuals who do not participate on behalf of the IAM in collective bargaining with Boeing.

1. The propriety of "attorneys' eyes only" protective order designations is well-established. In the leading case of *Brown Bag Software*, 960 F.2d at 1469, the district court entered a protective order whereby it recognized that the source code of the defendant's computer program was a "trade secret," as were the "developmental plans for [that program]" and the identities of "consumer representatives upon whom [the defendant] had market-tested different versions of [the program]." *Id.* In light of the economic harm that could befall

defendant from the "inadvertent disclosure" of this information, the court in that case agreed that the protective order should include an "attorneys' eyes only" provision that prevented plaintiff's in-house counsel from viewing designated information. This provision was necessary, the district court determined, because plaintiff's in-house counsel was involved in "competitive decisionmaking" vis-à-vis the defendant, which included advising the plaintiff on "a gamut of legal issues [like] contracts, marketing, and employment." *Id.* at 1471. Thus, his access to confidential information could reasonably have resulted in future economic harm to the defendant. *See id.* On appeal, the Ninth Circuit rejected the plaintiff's challenge to this provision in the protective order. In-house counsel "could lock up trade secrets in his mind" and subsequently use them to plaintiff's improper economic advantage, the court explained, especially since the in-house counsel would be advising his employer "on a gamut of legal issues involving defendant." *Id.*; *see also, e.g.*, *Upjohn Co. v. Hygieia Biological Labs.*, 151 F.R.D. 355 (E.D. Cal. 1993) (entering an "attorneys' eyes only" provision preventing access by inside counsel); *In re Anonymous Online Speakers*, __ F.3d ___, 2011 WL 61635, at *7 (9th Cir. 2011) (same); *Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 793 (7th Cir. 2009) (same). Here, as in the above cases, an "attorneys' eyes only" provision is necessary to protect Boeing from a specific harm that would result from the unrestricted disclosure of HIGHLY CONFIDENTIAL information to IAM personnel who engage in "competitive decisionmaking" vis-à-vis Boeing. Consistent with established Board law, Boeing does not disclose (and it is not *required* to disclose) non-public financial information, asset-utilization information, and other HIGHLY CONFIDENTIAL information to the IAM. *See Nielsen Lithographing Co.*, 305 N.L.R.B. 697; *United Steelworkers of Am., Local 14534 v. NLRB*, 983 F.2d 240. Such information is not essential to the administration of the parties' collective bargaining agreement, and its disclosure

would give the IAM the very discrete unfair advantage in its bargaining with Boeing that the relevant case law seeks to prevent. *See Emeryville Research Center v. NLRB*, 441 F.2d 880, 882 (9th Cir. 1971) (declining to require employer to disclose certain salary information after the ALJ "credit[ed] the Company's fear that disclosure of the guide curves would jeopardize its entire salary system"); *Graphic Communications Int'l Union, Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992) (identifying concern that union might "harass" employer, by *inter alia*, using information to "find out exactly what [supervisors'] . . . pay and perquisites are, [so] it can formulate alternative proposals to [the employer's] for cutting costs, and those proposals will take time to discuss").

For example, information on profit margins, which is not disclosed to the IAM in the ordinary course of labor negotiations, would provide the IAM with an improper advantage in determining Boeing's ability to pay more in wages and benefits. Similarly, information about projections for the assembly rate of 787s, also not regularly disclosed to the IAM, would give the IAM an improper advantage in gauging Boeing's future labor needs and thus what the Company might be willing to agree to in compensation and other terms and conditions of employment.

Some information designated as HIGHLY CONFIDENTIAL will certainly be relevant to this proceeding. It is, however, not necessary for the IAM to have unrestricted access to that information for it to prosecute its claims in this matter. First, the IAM's outside counsel, support personnel, litigation consultants and retained experts will have full access to any information designated as HIGHLY CONFIDENTIAL. Second, any possible prejudice is fully mitigated by the provision in Boeing's proposed Protective Order that would allow a representative of the IAM to gain access to HIGHLY CONFIDENTIAL information on a showing that access to that

information by that individual is necessary for the IAM's "meaningful participation" in this proceeding.[5]

Simply, "attorneys' eyes only" provisions are routine features of protective orders in litigation between parties with ongoing financial or commercial relationships or rivalries. There is *no* basis to assert that the sometimes disputatious relationship between Boeing and the IAM is an exception to this norm, such that the protective order between them should lack the prophylaxis that is standard elsewhere.

2. The IAM and the Acting General Counsel also take issue with the provision in Boeing's proposed Protective Order that would generally exclude access to HIGHLY CONFIDENTIAL information for anyone involved (or who would be involved) on behalf of the IAM in collective bargaining with Boeing. That provision, however, is merely a corollary to the first principle of any protective order: That parties receiving documents subject to the order "shall use the matter only for preparation and the hearing in the Board Proceeding . . . and shall not use the matter for any other purpose." Ex. A at ¶ 8. Some of the information to be produced by Boeing may be so important (and thus memorable) that even restrictions on further disclosure would be ineffective to prevent harm. For example, the materials may include information like the profit margins for the 787. An "attorneys' eyes only" recipient reviewing such information—and especially an individual who anticipates appearing at a collective bargaining

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[5] The Acting General Counsel and the IAM also disagree with the provision in Boeing's proposed Protective Order recognizing that there may be some HIGHLY CONFIDENTIAL material that is so sensitive that it should not be shared with any representatives of the IAM. *See* Ex. A at ¶ 6. But this too poses no genuine risk of prejudice. Boeing would be entitled to this level of protection only if the Administrative Law Judge found that the information is so sensitive that even restricted disclosure on an "attorneys' eyes only" basis is inadequate to protect Boeing's interest. Although Boeing is not yet aware of any documents that fall into this category, it is more efficient to establish a procedure now than to invent a procedure on a case-by-case basis should such materials be identified.

table on behalf of the IAM for the 2012 negotiations with Boeing—would be able to use that information to Boeing's disadvantage during the negotiations. As the Court observed in *Mikohn Gaming Corp. v. Acres Gaming Corp.*, No. CV-97-1383, 1998 WL 1059557, at *1 (D. Nev. Apr. 15, 1998), "[e]ven if the competitor's counsel acted in the best of faith and in accordance with the highest ethical standards, the question remains whether access to the moving party's confidential information would create an unacceptable opportunity for inadvertent disclosure." (quotation marks and citation omitted).

For those and related reasons, courts have recognized that some information is so sensitive, and some outside counsel so important to a party's future decision-making, that counsel receiving such information in a particular case should be precluded from certain future representations of that party in another proceeding where that sensitive information would not be available to that party. *See, e.g., Gen-Probe Inc. v. Becton, Dickinson & Co.*, 267 F.R.D. 679, 689 (S.D. Cal. 2010) (protective order required counsel to specify whether they represented disclosing party's competitors before obtaining access to disclosing party's "Highly Confidential" patent information); *Infosint S.A. v. H. Lundbeck A.S.*, No. 06CIV2869LAKRLE, 2007 WL 1467784, at *4–5 (S.D.N.Y. May 16, 2007) (precluding access to confidential patent material by counsel who offered to "refrain from any involvement" in prosecuting the patent-in-question in the future but "ha[d] not made the same offer with respect to his firm as a whole"); *Mikohn Gaming*, 1998 WL 1059557, at *1 (denying counsel's access to confidential materials where access would put counsel in the "'untenable position' of having to either refuse his client

legal advice on competitive design matters [in the future] or violate the protective order's prohibition against revealing [the disclosing party's] technical information").[6]

In sum, to exclude the provision Boeing seeks would be to deny the Company a standard protection in protective orders. To include it, however, leaves ample opportunity for appropriate use of HIGHLY CONFIDENTIAL material: It would be fully available to the Acting General Counsel, the principal prosecutor of the case; to various IAM representatives and attorneys who do not participate in bargaining; and even to additional IAM representatives in demonstrated cases of special need. And its very designation can always be challenged on a case-by-case basis.

### F. The Acting General Counsel, Not The IAM, Should Be Able To Seek An Order That CONFIDENTIAL And/Or HIGHLY CONFIDENTIAL Matters Be Publicly Disclosed During The Hearing, And The Acting General Counsel Should Have The Burden Of Establishing That The Public Interest Outweighs Boeing's Confidentiality Interest.

Under the IAM's proposal, exhibits containing CONFIDENTIAL and HIGHLY CONFIDENTIAL information and related testimony would be made public during the course of the hearing unless Boeing moved to have the proposed exhibit sealed and the testimony not to be taken in open court. (IAM proposal, Ex. C at ¶¶ 9, 12). This approach would greatly impair the efficiency of the proceeding, and would unnecessarily create a second round of challenges to Boeing's determination that the disclosure of CONFIDENTIAL and HIGHLY CONFIDENTIAL information would cause harm.

At the time CONFIDENTIAL and HIGHLY CONFIDENTIAL materials would be introduced at the hearing through exhibits or witnesses' testimony, Boeing would already have

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[6] In the event they made the special showing of need for access to HIGHLY CONFIDENTIAL information provided for in Boeing proposed order, IAM representatives, such as high ranking officials of the Union, would *not* be disqualified from representing the IAM in future collective bargaining with Boeing.

designated them as such and withstood any challenges by the Acting General Counsel and/or the IAM by demonstrating "good cause." At this point the Acting General Counsel and the IAM would have acknowledged the harm to Boeing from disclosure by their failure to challenge the designations, or the Administrative Law Judge and/or the district court would have expressly determined that public disclosure of the information would cause Boeing harm. "When a court grants a protective order for information produced during discovery, it already has determined that 'good cause' exists to protect this information from being disclosed to the public by balancing the need for discovery against the need for confidentiality. Applying a strong presumption of access to documents a court has already decided should be shielded from the public would surely undermine, and possibly eviscerate, the broad power of the district court to fashion protective orders." *Phillips*, 207 F.3d at 1213; *see also United States v. Corbitt,* 879 F.2d 224, 228 (7th Cir.1989) ("Where judicial records are confidential, the party seeking disclosure may not rely on presumptions, but must instead make a specific showing of need for access to the document.").[7] The Board's practices and case law expressly provide that "[i]f the protective order forbids disclosure of evidence to the general public or other nonparties or participants in the proceeding, it is *essential* that the judge place the evidence under seal." NLRB Bench Book § 8-415 (August 2010), *citing United Parcel Service*, 304 N.L.R.B. 693, 694 (1991) (emphasis added); *see also National Football League*, 309 N.L.R.B. 78, 88 (1992).

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[7] *See Times Mirror Co. v. The Copley Press, Inc.,* 873 F.2d 1210, 1219 (9th Cir.1989) ("there is no [common law] right of access to documents which have traditionally been kept secret for important policy reasons"); *Grundberg v. Upjohn Co.,* 140 F.R.D. 459, 465 (D. Utah 1991) (relying on *Corbitt* to find that the common law right of access "should not apply to materials properly submitted to the court under seal"); *Webster Groves School Dist. v. Pulitzer Publ. Co.,* 898 F.2d 1371, 1377 (8th Cir.1990) ("The Supreme Court never has found a First Amendment right of access to civil proceedings or to the court file in a civil proceeding.").

Under the circumstances here, the burden should be placed on the party seeking to make public the very information whose disclosure has already been determined would cause Boeing identifiable harm. And the right to do so, as provided in Boeing's proposed Order, should be limited to the Acting General Counsel. As a government agency with public accountability, the Acting General Counsel generally possesses the standing to articulate the public's interest in viewing Boeing's CONFIDENTIAL and HIGHLY CONFIDENTIAL materials. By contrast, the IAM is a private party whose interests are often directly adverse to Boeing's, and which may be particularly tempted to seek public disclosure of Boeing's confidential information for other, more parochial reasons unrelated to the public's interest. As a prophylactic matter, excluding the IAM from any disputes about the sealing of CONFIDENTIAL or HIGHLY CONFIDENTIAL materials would better effectuate the imperative that court files must not "'become a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *See Starlite Dev. (China) Ltd. v. Textron Fin. Corp.*, No. CV-F-07-1767, 2008 WL 2705395, at *33 (E.D. Cal. July 8, 2008) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)).[8]

Finally, by agreeing to the IAM proposal obliging the parties to "structur[e] the order and examination of witnesses without reference to CONFIDENTIAL or HIGHLY CONFIDENTIAL documents where reference to non-CONFIDENTIAL documents would be equally as effective." *Id.* at ¶ 7(C), Boeing has taken steps to greatly limit the necessity for sealed exhibits, or non-public testimony.

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[8] A beneficial by-product of giving the Acting General Counsel and not the IAM the right to challenge the sealing of exhibits or testimony would be a reduction in the number of such challenges and, consequently, fewer disruptions of the proceedings.

The Acting General Counsel also proposed a procedure for dealing with confidential information offered into evidence at the hearing. See Ex. E at ¶ IV. The information would be placed under provisional seal and the courtroom cleared when the evidence is introduced. After the close of the evidentiary portion of the hearing, the parties would then brief whether the evidence should remain sealed or unsealed and placed in the public record. While the Acting General Counsel's proposed procedure is reasonable, it, like the IAM's proposal, improperly imposes on Boeing the burden of establishing that information designated CONFIDENTIAL or HIGHLY CONFIDENTIAL should remain sealed. As detailed above, that burden should be on the party seeking to introduce confidential documents or testimony into evidence.

Also, the Acting General Counsel's proposed order has no standard by which the Administrative Law Judge will determine whether the information should remain sealed. As established above, however, the NLRB Bench Book and the relevant cases speak find that it is "essential" that the ALJ place confidential information under seal.

### G. The IAM's Proposal For The Handling of FOIA Requests Does Not Adequately Protect Boeing's Interests And Is Inefficient.

The IAM's proposed order rejects Boeing's procedure whereby the Board would treat CONFIDENTIAL and HIGHLY CONFIDENTIAL materials as presumably privileged under Exemption 4 of the FOIA and refrain from disclosing such materials if Boeing sued to enjoin disclosure pending the resolution of that action. Instead, the IAM would allow the Board to make a wholly *de novo* determinations of whether CONFIDENTIAL and HIGHLY CONFIDENTIAL materials sought through a FOIA request fall within Exemption 4 of the FOIA (IAM proposal, Ex. C at ¶ 26). The IAM's position, reflecting the Acting General Counsel's, is, however, contrary to Board precedent, which would not allow the Board to disclose Boeing's trade secrets or other confidential information subject to a protective order. *See AT&T Corp.*,

337 N.L.R.B. 689, 693 at n.1 (2002) ("The exhibits in this proceeding are covered by a protective order . . . and no exhibits are to be furnished to outside sources pursuant to the Freedom of Information Act or pursuant to other requests"). Under the IAM's proposal, however, Boeing's competitors, or other third parties who might seek to profit from Boeing's sensitive information or to cause it harm, could simply submit a FOIA request for documents covered by the protective order—and the Board, second-guessing the determinations of the ALJ and/or the district court, could disclose the documents of its own accord. To prevent that, the Acting General Counsel, at a minimum, should be barred from disclosing CONFIDENTIAL or HIGHLY CONFIDENTIAL materials over Boeing's objection until Boeing has had a full opportunity to litigate its objections in court. The Acting General Counsel has accepted that limitation (Ex. E at ¶ VI(C)), but the IAM has not.[9]

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[9] There are certain other differences between the competing proposed protective orders that while of less importance, still require discussion:

First, the IAM would allow CONFIDENTIAL information to be disclosed to the "Parties" (IAM proposal, Ex. C at ¶ 13(d)), while Boeing's proposal would limit the disclosure to those "employees of the parties who have a substantial need for the information for prosecution or defense of the Board Proceeding or any Related federal court proceeding," (Ex. A at ¶ 5(B)(iii)). Allowing for unrestricted disclosure to employees of the parties without need for the information would merely increase the risk of disclosure with no corresponding benefit.

Second, one of the few changes made by the IAM in its regressive July 13 proposed order is to change that order's dispute resolution provision to give the IAM and Acting General Counsel thirty (30) days from receipt of Boeing's certification that it has substantially complied with its production obligation to initiate the dispute process. (IAM proposal, Ex. C at ¶ 15). Boeing's proposed Protective Order would allow only fifteen (15) days for the IAM or Acting General Counsel to provide written notice of a disputed designation. Given the stated desire of all the parties to move this proceeding along, the IAM's thirty (30) day period is excessive; fifteen (15) days should suffice.

Finally, Boeing's proposed order would require the IAM and Acting General Counsel to return or destroy CONFIDENTIAL or HIGHLY CONFIDENTIAL material not introduced into the record within thirty days of the close of evidence (Ex. A at ¶ 14), and to require that

*  *  *  *

For the above reasons, Boeing has shown good cause for entry of a protective order preventing the disclosure of its confidential and proprietary information. Since the terms of Boeing's proposed Order are substantively fair—both under the specific circumstances of this case and by reference to the applicable caselaw—and since the competing proposed order from the IAM (joined in by the Acting General Counsel) is defective in material respects, this tribunal should give approval for entry of Boeing's proposed Order in federal court.

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those parties return or destroy such material introduced into evidence within thirty days after the conclusion of the Board proceedings and any subsequent judicial review. (*Id.* at ¶ 15). The proposals by the IAM and the Acting General Counsel only require that confidential information be returned to Boeing after the termination of all proceedings. (Ex. C at ¶ 23; Ex. E at ¶ VII).

There is, however, no reason for the IAM or the Acting General Counsel to retain CONFIDENTIAL and/or HIGHLY CONFIDENTIAL materials that have not been placed into evidence. Boeing should not be subjected to the risk that its trade secrets or other confidential information not made part of the record in this case might be inadvertently disclosed. That risk increases the longer those materials are held outside of Boeing and not subject to Boeing's security protocols. *See* Ex. D at ¶ 8.

Respectfully submitted,

July 25, 2011

/s/ William J. Kilberg
William J. Kilberg P.C.
Eugene Scalia
Matthew McGill
Paul Blankenstein
Daniel J. Davis
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue N.W.
Washington, District of Columbia 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

J. Michael Luttig
Bryan H. Baumeister
Brett C. Gerry
Eric B. Wolff
THE BOEING COMPANY
100 N. Riverside Plaza
Chicago, Illinois 60606

Richard B. Hankins
Alston D. Correll
Drew E. Lunt
MCKENNA LONG & ALDRIDGE
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
Telephone: 404.527-4000
Facsimile: 404.527-4198

Attorneys for The Boeing Company

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

| | |
|---|---|
| THE BOEING COMPANY<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS | Case 19-CA-32431 |

**CERTIFICATE OF SERVICE**

I certify that a copy of Respondent's Motion for Approval of a Protective Order to Prevent the Disclosure of Boeing's Confidential and Proprietary Information was electronically filed on July 25, 2011 and emailed to the following parties with an electronic address, and was sent via overnight mail to the following parties without an electronic address:

The Honorable Clifford H. Anderson
Associate Chief Administrative Law Judge
National Labor Relations Board Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103-1779

Richard L. Ahearn
Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174-1078
Richard.Ahearn@nlrb.gov

Mara-Louise Anzalone
Peter G. Finch
Rachel Harvey
Counsel for the Acting General Counsel
National Labor Relations Board
915 2nd Avenue, Suite 2948
Seattle, Washington 98174-1078
Mara-Louise.Anzalone@nlrb.gov
Peter.Finch@nlrb.gov
Rachel.Harvey@nlrb.gov

David Campbell
Carson Glickman-Flora
Robert H. Lavitt
Sean Leonard
Jennifer Robbins
Jude Bryan
SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT LLP
18 West Mercer Street, Suite 400
Seattle, Washington 98119
Campbell@workerlaw.com
Flora@workerlaw.com
lavitt@workerlaw.com
leonard@workerlaw.com
robbins@workerlaw.com
bryan@workerlaw.com

Christopher Corson, General Counsel
IAM
9000 Machinists Pl.
Upper Marlboro, MD 20772-2687
ccorson@iamaw.org

Dennis Murray, Cynthia Ramaker & Meredith Going, Sr.
National Right to Work Legal Defense Foundation, Inc.
c/o Glen M. Taubman
8001 Braddock Road, Suite 600
Springfield, VA 22151-2110
gmt@nrtw.org

Matthew C. Muggeridge
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22151-2110
mcm@nrtw.org

Jesse Cote, Business Agent
Machinists District Lodge 751
9135 15th Pl. S
Seattle, WA 98108-5100

James D. Blacklock
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
Jimmy.blacklock@oag.state.tx.us

Andrew M. Kramer
Jessica Kastin
Jones Day
51 Louisiana Ave., N.W.
Washington, D.C. 20001-2113

Daniel V. Yager
General Counsel
HR Policy Association
1100 Thirteenth Street, NW
Suite 850
Washington, D.C. 20005

DATED this 25th Day of July, 2011

_/s/ Daniel J. Davis___
Daniel J. Davis
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue N.W.
Washington, D.C. 20036-5303
DDavis@Gibsondunn.com

**Exhibit List**

| Exhibit | Tab |
|---|---|
| The Boeing Company Proposed Protective Order | A |
| Protective Order entered in *SPEEA et al. v. Boeing*, No. 05-cv-1251 (D.Kan.), and *Harkness et al. v. Boeing*, No. 07-cv-1043 (D. Kan.) | B |
| IAM Proposed Protective Order (July 13, 2011) | C |
| Declaration of Steven Bodensteiner | D |
| Acting General Counsel Proposed Protective Order (July 25, 2011) | E |

# EXHIBIT A

**DRAFT**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

| | |
|---|---|
| NATIONAL LABOR RELATIONS BOARD,<br>Applicant,<br><br>v.<br><br>THE BOEING COMPANY,<br>Respondent. | Case No. _____ |

**PROTECTIVE ORDER**

To expedite the flow of subpoenaed material, facilitate the prompt resolution of disputes over confidentiality, ensure that confidential material is protected, and provide that such confidential material as may be disclosed is used solely in the prosecution of *In re The Boeing Company*, NLRB Case 19-CA-32431 (hereafter, "the Board Proceeding") and any related proceeding in federal court ("Related Federal Court Proceeding"), the following Protective Order is hereby entered to govern the handling of Subpoenaed Material (as defined below) produced in the Board Proceeding.

The Board Proceeding involves a complaint filed on behalf of the Acting General Counsel of the National Labor Relations Board, based on a charge filed by the International Association of Machinists and Aerospace Workers, District Lodge 751 ("IAM" or "Charging Party"), alleging that Respondent The Boeing Company ("Boeing") committed certain unfair labor practices.

The Acting General Counsel and Charging Party have issued subpoenas to Boeing, which has refused to provide certain commercially sensitive and proprietary non-public documents

absent a protective order that can be effectively enforced. Pursuant to Section 11(2) of the National Labor Relations Act, the Acting General Counsel has brought an enforcement proceeding to compel disclosure of documents that Boeing has determined contain confidential information. After considering the arguments of the respective parties, the Court enters this Protective Order, which will apply to the current subpoena requests by the Acting General Counsel and the IAM, and for any future subpoenas that the Acting General Counsel or the IAM issue to Boeing.

1. This Protective Order is being entered for good cause shown. Specifically, certain documents that may be produced in the Board Proceeding contain trade secrets or other confidential and proprietary business or financial information, the public disclosure of which would cause competitive harm to Boeing or would reveal confidential employment and personnel information regarding current or former employees of Boeing. Other documents contain information that Boeing believes would cause it harm if provided to the IAM on an unrestricted basis.

2. Definitions:

   A. The term "Subpoenaed Material" shall mean all documents (having the broadest meaning accorded the term under Fed. R. Civ. P. 26 and 34), computer tapes or disks, information, matters, tangible items, things, objects, materials, and substances produced in discovery in the Board Proceeding, whether originals or copies, whether produced pursuant to Subpoena Duces Tecum or by agreement, and hearing papers to the extent that such papers quote, summarize, or contain materials covered by this Protective Order.

B. The term "CONFIDENTIAL MATTER" shall mean any Subpoenaed Material and its contents designated "CONFIDENTIAL" as described below.

C. The term "HIGHLY CONFIDENTIAL MATTER" shall mean any Subpoenaed Material and its contents designated "HIGHLY CONFIDENTIAL" as described below.

D. The term "producing person" shall mean The Boeing Company.

E. The terms "party" or "parties" mean any person or entity that is a party to the Board Proceeding.

3. Production of Subpoenaed Documents:

A. The Parties agree that they shall substantially comply on or before August 15, 2011 with production of documents pursuant to all rulings to date of the Administrative Law Judge concerning subpoenas *duces tecum* issued on behalf of the Parties and any related Petitions to Revoke.

B. Substantial compliance shall include logs of all responsive documents or portions thereof not produced. Such logs shall include: a) a description of the document, including its subject matter and the purpose for which it was created; b) the date the document was created; c) the name and job title of the author of the document; and d) if applicable, the name and job title of the recipient(s) of the document.

C. Each Party shall serve written certification of substantial compliance on the other Parties within twenty-four (24) hours of such substantial compliance.

4. Designation of CONFIDENTIAL MATTER and HIGHLY CONFIDENTIAL MATTER:

A. Subpoenaed Material may be designated CONFIDENTIAL by Boeing if Boeing determines in good faith that the Subpoenaed Material contains

- trade secrets (including without limitation the process and methods for the construction and assembly of the 787 Dreamliner and other commercial aircraft);

- confidential research, development, private or commercially sensitive information (including without limitation design information about the 787 and other commercial aircraft);

- business strategy or planning (including without limitation considerations regarding cost, competition, production scheduling, and contingency planning in connection with the development of the second final assembly line in Charleston and the surge line in Everett);

- tax and other financial information (including without limitation non-public financial information such as cost projections and profit margins); or

- confidential information regarding current and former Boeing employees (including without limitation personnel information).

B. Subpoenaed Material may be designated HIGHLY CONFIDENTIAL by Boeing if Boeing determines in good faith that the Subpoenaed Material meets all of the requirements of CONFIDENTIAL MATTER and further that its disclosure to the Charging Party is likely to result in business harm to Boeing or unfair use or advantage in the Charging Party's collective bargaining relationship with Boeing. HIGHLY CONFIDENTIAL MATTER includes, but is not limited to, asset allocation and utilization plans, assembly rate information, studies or analyses dealing with work placement, non-public financial data (except for wage and benefits), and actual contracts with subcontractors.

C. Before delivery to other parties of copies of Subpoenaed Material, each page of Subpoenaed Material designated as CONFIDENTIAL MATTER shall be marked by the producing person as "CONFIDENTIAL." Before delivery to other parties of copies of Subpoenaed Material, each page of Subpoenaed Material designated as HIGHLY CONFIDENTIAL MATTER shall be marked by the producing

person as "HIGHLY CONFIDENTIAL." If the producing party designates only a portion of a document as CONFIDENTIAL or HIGHLY CONFIDENTIAL, the producing party shall, in addition to the other requirements of this paragraph, indicate which portion of the document is CONFIDENTIAL or HIGHLY CONFIDENTIAL. Stamping or marking of a document will be done in a manner so as not to interfere with the legibility of any of the contents of the documents.

D. If the producing person inadvertently fails to designate Subpoenaed Material as CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER, it may subsequently make the designation so long as it does so promptly after learning of the oversight, or promptly after the producing person should reasonably have been aware of the oversight.

E. Counsel for the receiving parties shall take reasonably necessary steps to assure the confidentiality of the CONFIDENTIAL MATTER and HIGHLY CONFIDENTIAL MATTER, including reasonable efforts to secure return of the CONFIDENTIAL MATTER and HIGHLY CONFIDENTIAL MATTER from individuals to whom disclosure was made but would not have been permitted by this Protective Order had the Subpoenaed Material been originally designated as CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER.

F. All CONFIDENTIAL and HIGHLY CONFIDENTIAL MATTER shall be controlled and maintained in a manner that precludes access by any person not entitled to access under this Order. At all times in this proceeding, the Acting General Counsel shall maintain responsibility for ensuring the security of those portions of the official record that constitute CONFIDENTIAL or HIGHLY

CONFIDENTIAL information, and any copies thereof that have been provided to the Administrative Law Judge, the Board, or the District Court.

5. Restrictions on CONFIDENTIAL MATTER:

CONFIDENTIAL MATTER produced or revealed in the Board Proceeding shall be subject to the following restrictions:

A. CONFIDENTIAL MATTER shall be produced only to counsel to parties to the Board Proceeding. It shall be used only for the purpose of prosecuting the Board Proceeding or any Related Federal Court Proceeding and not for any other purpose whatsoever.

B. Except as otherwise provided, CONFIDENTIAL MATTER shall not be shown, discussed, or communicated in any way to anyone other than:

i. counsel for the parties who are actively engaged in the conduct of the Board Proceeding or any Related Federal Court Proceeding (both outside and in-house counsel employed by a party) and secretarial, paralegal, technical, and clerical persons assisting them in the conduct of the Board Proceeding or any Related Federal Court Proceeding, as well as counsel's experts or consultants;

ii. court reporters involved in the Board Proceeding or any Related Federal Court Proceeding;

iii. the parties and employees of the parties who have a substantial need for the information for prosecution or defense of the Board Proceeding or any Related Federal Court Proceeding;

iv. witnesses at the hearing in the Board Proceeding, as allowed by the rules and regulations of the National Labor Relations Board, and witnesses at the hearing in any Related Federal Court Proceeding as allowed by the Federal Rules;

v. the Administrative Law Judge in the Board Proceeding and his support personnel for any purpose the Administrative Law Judge finds necessary, and the Judge in any Related Federal Court Proceeding and the Judge's support personnel for any purpose the Judge finds necessary;

vi. any other person or entity that the producing party agrees in writing may have access to CONFIDENTIAL MATTER;

vii. independent litigation support services, including, but not limited to, document reproduction services, computer imaging services, and demonstrative exhibit services, who are involved in the Board Proceeding or any Related Federal Court Proceeding;

viii. subject to compliance with the certification requirement contained in paragraph 3, and to the extent not covered by the above provisions,

(a) the authors, addressees, copy recipients, originators of the CONFIDENTIAL MATTER;

(b) experts; and

(c) persons served with a Subpoena *ad testificandum* in the Board Proceeding or any Related Federal Court Proceeding, when the person is expected to testify and when the Subpoena *ad testificandum* has not been revoked, to the extent reasonably

necessary in preparing to testify in such proceeding; provided, however, that no such witness may retain a copy of any material designated as CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER, except as otherwise provided by this Order.

C. Recipients of CONFIDENTIAL MATTER may not disclose it to any person or entity other than as provided in this Order without the prior written consent of the producing person.

6. Restrictions on HIGHLY CONFIDENTIAL MATTER:

HIGHLY CONFIDENTIAL MATTER produced in the Board Proceeding shall be subject to the following restrictions:

A. HIGHLY CONFIDENTIAL MATTER shall be produced only to counsel to the Acting General Counsel of the National Labor Relations Board, and to undersigned counsel for the IAM. It shall be used only for the purpose of prosecuting the Board Proceeding or any Related Federal Court Proceeding and not for any other purpose whatsoever.

B. Except as otherwise provided, HIGHLY CONFIDENTIAL MATTER, including the existence and nature of any HIGHLY CONFIDENTIAL MATTER, shall not be shown, discussed, or communicated in any way to anyone other than:

i. counsel for the Acting General Counsel and secretarial, paralegal, technical, and clerical persons assisting them in the conduct of the Board Proceeding or any Related Federal Court Proceeding;

ii. undersigned counsel for the IAM and secretarial, technical, and clerical persons employed by the law firm of the undersigned counsel for the IAM, who have been assigned to assist in the conduct of the Board Proceeding or any Related Federal Court Proceeding. No such employee may be otherwise associated with the IAM; moreover, no one employed by the undersigned counsel's law firm who has access to HIGHLY CONFIDENTIAL MATTER may represent the IAM or be involved in any manner in any collective bargaining negotiation between the IAM and Boeing;

iii. court reporters involved in the Board Proceeding or any Related Federal Court Proceeding

iv. the Administrative Law Judge in the Board Proceeding and his support personnel for any purpose the Administrative Law Judge finds necessary, and the Judge in any Related Federal Court Proceeding and his support personnel for any purpose the Judge finds necessary; and

v. experts retained by undersigned counsel for the IAM, provided that any such would be precluded from being involved in any manner in any collective bargaining between Boeing and the IAM.

vi. any other person or entity that the producing party agrees in writing may have access to the Highly Confidential Matter.

C. Recipients of HIGHLY CONFIDENTIAL MATTER may not disclose it to any person or entity other than as provided in this Order without the prior written consent of the producing person.

D. With respect to HIGHLY CONFIDENTIAL MATTER, the Administrative Law Judge may, upon a showing of good cause by the producing party, restrict HIGHLY CONFIDENTIAL MATTER to the Acting General Counsel. The Administrative Law Judge may permit HIGHLY CONFIDENTIAL MATTER to be shown to an identified representative or representatives of the IAM, including additional counsel, upon showing by the IAM that disclosure of the HIGHLY CONFIDENTIAL MATTER in question to the representative(s) is necessary to the IAM's meaningful participation in the Proceeding.

7. Public Access:

A. CONFIDENTIAL or HIGHLY CONFIDENTIAL MATTER that is offered into evidence in the Board Proceeding or any Related Federal Court Proceeding shall be placed under seal, and appropriate precautions shall be taken to ensure that the CONFIDENTIAL or HIGHLY CONFIDENTIAL MATTER is not disclosed, by testimony or otherwise, to persons not authorized to receive such matter under this Order.

B. The Administrative Law Judge or the Judge in any Related Federal Court Proceeding shall direct the court reporter/stenographer to place those portions of the transcript discussing CONFIDENTIAL or HIGHLY CONFIDENTIAL MATTER under seal and to mark the face of each relevant page of the transcript of the testimony with the word: "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" as appropriate.

C. The Parties shall take all reasonable steps to minimize disruptions to the Board Proceeding and any Related Federal Court Proceeding, and to minimize

limitations on public access to the Proceedings, by structuring the order and examination of witnesses without reference to CONFIDENTIAL or HIGHLY CONFIDENTIAL documents where reference to non-CONFIDENTIAL documents would be equally as effective as reference to CONFIDENTIAL or HIGHLY CONFIDENTIAL documents.

D. The Acting General Counsel may, by motion, request that a particular item or items of CONFIDENTIAL or HIGHLY CONFIDENTIAL MATTER not be placed under seal, or that the hearing be open to the public at times when a particular item or items of CONFIDENTIAL or HIGHLY CONFIDENTIAL MATTER may be disclosed through exhibits to be offered as evidence in the record or through testimony by witnesses. The Acting General Counsel will have the burden to show that Boeing's need to protect the trade secrets and/or other confidential information in issue is outweighed by the public's interest in access to those exhibits and/or testimony.

8. Use:

Persons obtaining access to CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER designated under this Order shall use the matter only for preparation and the hearing in the Board Proceeding or any Related Federal Court Proceeding and shall not use the matter for any other purpose.

9. Use by Producing Person:

Nothing in this Order shall be construed to limit in any way the right of the producing person to use its own Subpoenaed Material, including CONFIDENTIAL MATTER or HIGHLY

CONFIDENTIAL MATTER, for any purpose other than in the Board Proceeding and any related Federal Court Proceedings.

10. Certification of Compliance:

A. Before disclosure of CONFIDENTIAL MATTER under the terms of Paragraphs 5(B)(iii), (vi), and (vii) and 6(B)(V) and (vi) above, the disclosing party shall obtain from each individual from whom certification is required a signed certification in the form attached hereto as Exhibit A, certifying that the person to whom such materials are disclosed has read and understands this Order, agrees to be bound by it, and submits to the jurisdiction of the Court for purposes of enforcing this Order.

B. The executed certifications shall be retained by counsel for the party making the disclosure and shall be provided to the other parties upon a showing of good cause. In the event there is a dispute between the parties about a possible breach of the confidentiality provisions of this Order, however, the form executed by the individual who is the subject of the dispute shall be made available to the Court for *in camera* review.

11. Subpoena by Other Courts or Agencies. If another court or an administrative agency subpoenas or orders production of CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER that a party has obtained in the Board Proceeding, the party that has received the subpoena or order shall notify the person that designated the Subpoenaed Material as CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER of the issuance of such subpoena or order as soon as possible, but in no event later than three (3) business days after receiving the subpoena or order, and in any event

before the date of production set forth in the subpoena or order. The producing person may then notify the person receiving the subpoena of the producing person's intent to intervene to resist the subpoena. Should the producing person give notice of such intent, the person receiving the subpoena shall take steps reasonable and necessary to withhold production while the intervening person's motion is pending. Provided, however, that nothing in this Order shall be construed to require a party to violate or refuse to comply with valid court orders of any court, or with the rules of procedure of any court.

12. Filing:

In the event that any CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER is included with, or the contents thereof are in any way disclosed in any pleading, motion, or other paper filed in the Board Proceeding or any Related Federal Court Proceeding, such confidential materials shall be filed under seal in an envelope marked as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL." Although entire transcripts containing confidential testimony shall be marked as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," only such testimony as has been designated as confidential shall be subject to the protections of this Order.

13. Freedom of Information Act ("FOIA") Requests:

A. The Acting General Counsel agrees to promptly notify Respondent of any FOIA request it receives seeking the disclosure of Confidential or Highly Confidential Information in order to permit Respondent the opportunity to explain why such records should not be disclosed. The Acting General Counsel acknowledges that FOIA Exemptions 6 and 7(C) protect personal privacy information of individuals,

including information such as social security numbers, and individuals' names, addresses, and medical information. *See* 5 U.S.C. 552(b)(6) and 552(b)(7)(C).

B. The Acting General Counsel agrees that any information marked by Respondent as "CONFIDENTIAL" OR "HIGHLY CONFIDENTIAL" pursuant to paragraph 3 above shall be treated by the Board as presumptively protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). Any such information that is determined by the Board to be covered by Exemption 4 shall not be disclosed in response to a FOIA request, absent a court order. In making such determinations, the Board shall give due weight to the information's designation as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" pursuant to this Order.

C. Counsel for the Acting General Counsel agrees that the Board will not disclose any information marked by Respondent as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in response to a FOIA request without first providing Respondent written notice at least ten (10) working days in advance of the proposed disclosure of such information. Pursuant to the FOIA, in the event of such notice, Respondent shall have the right to file a written statement explaining why the information comes within Exemption 4, and to object to any disclosure. If, after consideration of Respondent's objections, the Board makes an ultimate disclosure determination, the Board acknowledges that Respondent may have the right to file a lawsuit seeking to prevent the disclosure of the asserted CONFIDENTIAL or HIGHLY CONFIDENTIAL information. In this regard, the Board will follow the process described in the Board's Rules and Regulations, Section 102.117. If Respondent files suit to enjoin disclosure of

CONFIDENTIAL and/or HIGHLY CONFIDENTIAL MATTERS, the Board will not disclose such documents pending the final disposition of that lawsuit.

14. Material Not Placed in Evidence:

Within thirty days after the close of evidence before the Administrative Law Judge in the Board Proceeding, CONFIDENTIAL MATTER and HIGHLY CONFIDENTIAL MATTER that has not been placed in evidence in the Board Proceeding and all copies in the files of all attorneys and all other persons who have possession of such matter shall without exception either be returned to the producing person or, at the option of the party in possession, be destroyed. All such notes, memoranda, summaries, or other materials setting forth, summarizing, or paraphrasing CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER not placed in evidence shall also be destroyed, except that counsel of record for each party may maintain in its files customary copies of each pleading, motion, order, or brief, and its customary attorney work product, correspondence and other case files, exclusive of any CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER and copies or excerpts thereof. All counsel of record shall certify their own compliance with this paragraph, and shall obtain certification from their clients and expert consultants retained by them, and not more than ten days after the end of the time to present evidence to the Administrative Law Judge in the Board Proceeding shall deliver to counsel for the producing person the certifications. Nothing in this provision shall require the Administrative Law Judge to return or destroy confidential documents that are filed in this case.

15. Termination of the Proceeding:

Within thirty days after the final conclusion of all aspects of the Board Proceeding, including any judicial review, CONFIDENTIAL MATTER and HIGHLY CONFIDENTIAL

MATTER and all copies in the files of all attorneys and all other persons who have possession of such matter shall without exception either be returned to the producing person or, at the option of the party in possession, be destroyed in accordance with the same procedures described in Paragraph 11 above, except that the time limit for counsel of record to deliver certificates of compliance with this paragraph shall be ninety days after final conclusion of all aspects of the Board Proceeding. Following termination of the Board Proceeding, the provisions of this Order relating to the confidentiality of protected documents and information shall continue to be binding, except with respect to documents or information that are no longer confidential.

16. No Waiver:

The inadvertent disclosure of privileged matter by the producing person or its counsel shall not constitute a waiver of any applicable privilege. If the producing person inadvertently discloses matter it claims to be covered by a privilege, it shall give notice promptly after discovery of the inadvertent disclosure that the matter is privileged. Upon receipt of such notice, if the person to whom such information was disclosed seeks to challenge the claim of privilege or lack of waiver, the notice and motion procedures set forth below shall apply. If the claim of privilege is upheld, the material shall be returned to the producing person or counsel. In addition, the disclosure of CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER pursuant to the procedures set forth in this Order does not constitute a waiver of any trade secret or any intellectual property, proprietary, or other rights to, or in, such information. It is expressly acknowledged that no such rights or interests shall be affected in any way by production of Subpoenaed Material designated CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER in the Board Proceeding.

17. Disputes:

A. The Charging Party and/or Acting General Counsel may challenge Respondent's designation of any document as CONFIDENTIAL or HIGHLY CONFIDENTIAL by the following procedure: If the Charging Party and/or the Acting General Counsel object to the Producing Party's designation of subpoenaed material as CONFIDENTIAL or HIGHLY CONFIDENTIAL the Charging Party and/or Acting General Counsel (hereinafter "the objecting Party") shall serve a written notice of the dispute upon the other Parties within fifteen (15) days of receipt of Respondent's certification of substantial compliance referenced in paragraph 3. A failure by the Acting General Counsel and/or the IAM to provide notice of a dispute as to the designation of information as CONFIDENTIAL or HIGHLY CONFIDENTIAL within the time period prescribed shall constitute a waiver of any objection, and will preclude any challenge to any such designation. The Parties shall, within five (5) business days of receipt of the written notice of the dispute, confer in a good faith effort to resolve the dispute. In the event that the dispute is not resolved through such conference, the objecting Party may move for a ruling from the Administrative Law Judge on all disputed designations within eight (8) business days of receipt of Respondent's certification of substantial compliance. Any party aggrieved by the decision of the Administrative Law Judge shall have five (5) business days from the date of such decision to file for review in the District Court. This Court shall rule with due deference to the decision of the Administrative Law Judge.

B. The Producing Party shall bear the burden to establish "good cause" for designation of documents as CONFIDENTIAL or HIGHLY CONFIDENTIAL

under this Order based on a showing that: a) the document constitutes a trade secret or other confidential commercial or financial information, and b) disclosure of the document will result in an identifiable injury to Respondent.

C. Where there is any dispute pending regarding the designation of records or documents as CONFIDENTIAL or HIGHLY CONFIDENTIAL, the disputed matter shall be treated as CONFIDENTIAL or HIGHLY CONFIDENTIAL and subject to this Order until final resolution of the dispute.

D. The parties agree that they will not appeal to the Ninth Circuit any decision of the District Court made under this paragraph.

18. Rights Reserved

A. Nothing in this Order shall be construed as a waiver of the right of any Party to object to the production of documents on the grounds of privilege or on other grounds not related to the confidentiality of the documents.

B. Nothing in this Order shall be construed as a waiver by any Party of any objections that might be raised as to the admissibility at trial of any proposed evidentiary materials.

19. Modification:

Nothing in this Order shall prevent any party from seeking modification of this Order by the District Court.

20. Duration:

This Order shall remain in full force and effect until modified, superseded, or terminated by consent of the Parties or by Order of the District Court.

21. Violations:

The parties may pursue any and all administrative and civil remedies available to them for breach of the terms of this Order and may seek to claim that a breach constituted prejudicial contempt of Court and/or of the proceedings in the Board Proceeding.

IT IS SO ORDERED.

_____ _____
[[JUDGE'S NAME]] Date
United States District Judge

_____ _____
Mara-Louise Anzalone Date
Counsel for the Acting General Counsel,
National Labor Relations Board

_____ _____
William J. Kilberg, P.C. Date
Counsel for The Boeing Company

_____ _____
Dave Campbell Date
Counsel for the Charging Party,
International Association of Machinists
and Aerospace Workers District Lodge 751

**DRAFT**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

## EXHIBIT A

## CERTIFICATION AND STIPULATION

I, _____, hereby certify that I have read and understand the Protective Order in this case, that I agree to be bound by its terms, and I agree to submit to the jurisdiction of the above-referenced court for purposes of any proceedings concerning my compliance with the Protective Order.

By_____

Dated_____

# EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

| | | |
|---|---|---|
| SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES IN AEROSPACE, IFPTE LOCAL 2001, AFL-CIO, et al.<br><br>Plaintiffs,<br><br>v.<br><br>THE BOEING COMPANY,<br><br>Defendant. | ) | CIVIL ACTION<br>CASE NO. 05-1251-MLB |
| DAVID A. HARKNESS, on behalf of himself and all others similarly situated, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>THE BOEING COMPANY, et al.<br><br>Defendants. | ) | CIVIL ACTION<br>CASE NO. 07-1043-MLB |

**PROTECTIVE ORDER**

To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, protect adequately for material to be kept confidential, ensure that confidential material is protected, and confirm that such confidential material as may be disclosed may be used solely in the prosecution of this case, the Court enters the following Protective Order to govern the handling of Discovery Material (as defined below) produced in the above-captioned civil litigation ("this litigation").

IT IS HEREBY AGREED:

1. This Protective Order is being entered for good cause shown. Specifically, some of the documents which may be produced in this case may contain confidential or proprietary business or financial records, or confidential employment and personnel information regarding former employees of defendant. This Protective Order shall only apply to the documents, information, items, or material specifically set forth in this Order.

**2. Definitions**

A. The term "Discovery Material" shall mean all documents (having the broadest meaning accorded the term under Fed. R. Civ. P. 26 and 34), computer tapes or disks, information, matters, tangible items, things, objects, materials, and substances produced in discovery in this litigation, whether originals or copies, whether produced pursuant to Fed. R. Civ. P. 26, Fed. R. Civ. P. 34, court order, subpoena, or by agreement, including interrogatory answers, responses to requests to produce or for admissions, deposition transcripts and exhibits, and court papers to the extent that such court papers quote, summarize, or contain materials covered by this Protective Order.

B. The term "CONFIDENTIAL MATTER" shall mean any Discovery Material and its contents designated "CONFIDENTIAL" pursuant to paragraph 3 below.

C. The term "producing person" shall mean with respect to particular Discovery Material the person or entity disclosing the Discovery Material through discovery.

D. The terms "party" or "parties" mean any person or entity that is a party to this litigation.

3. **Designation of CONFIDENTIAL MATTER**

A. Discovery Material may be designated CONFIDENTIAL by the producing person if that person determines in good faith that the Discovery Material contains trade secrets or confidential research, development, private or commercially sensitive information,

tax and other financial information, or confidential information regarding current and former employees of Defendants. In no event shall a producing person be entitled to designate as CONFIDENTIAL any Discovery Material that is available to the general public or to the participants of the relevant employee-benefit plans..

B. Before delivery to the other side of copies of Discovery Material, each page of Discovery Material designated as CONFIDENTIAL MATTER shall be marked by the producing person as "CONFIDENTIAL."

C. If a producing person inadvertently fails to designate Discovery Material as CONFIDENTIAL MATTER, it may make the designation belatedly so long as it does so promptly after learning of the oversight, or promptly after the producing person should reasonably have been aware of the oversight. Counsel for the receiving parties shall take reasonably necessary steps to assure the confidentiality of the CONFIDENTIAL MATTER, including reasonable efforts to secure return of the CONFIDENTIAL MATTER from individuals to whom disclosure was made but would not have been permitted by this Order had the Discovery Material been originally designated as CONFIDENTIAL MATTER. The producing person shall be responsible for actual attorneys' fees, paralegal fees, clerical and other costs incurred in complying with a belated request, and shall pay such expenses and costs within thirty (30) days of the date of invoice.

4. **Restrictions on CONFIDENTIAL MATTER**

CONFIDENTIAL MATTER produced or revealed in this litigation shall be subject to the following restrictions:

A. CONFIDENTIAL MATTER shall be used by the party to whom it is produced only for the purpose of prosecuting or defending this litigation and not for any business or other purpose whatsoever.

B. Except as otherwise provided, CONFIDENTIAL MATTER shall not be shown, discussed, or communicated in any way to anyone other than:

(i) counsel for the parties[1] who are actively engaged in the conduct of this litigation (both outside and in-house counsel employed by a party) and secretarial, paralegal, technical, and clerical persons assisting them in the conduct of this litigation, as well as counsel's experts or consultants;

(ii) court reporters and officials involved in this litigation;

(iii) the parties and employees of the parties who have a reasonable need for the information for prosecution or defense of this litigation;

(iv) witnesses at trial and in deposition, to obtain evidence or discovery as allowed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence;

(v) the Court and Court personnel for any purpose the Court finds necessary;

(vi) jurors and the Court personnel at trial of this action, as may be necessary for trial purposes; and

(vii) subject to compliance with the certification requirement contained in paragraph 7, and to the extent not covered by the above provisions,

[1] Prior to the consolidation of these two actions, the Court issued a Protective Order in the *SPEEA v. The Boeing Company* case, Civil Action No. 05-1251, and the parties to that action designated documents CONFIDENTIAL pursuant to that Order (the "Original Protective Order"). [Civil Action No. 05-1251, Doc. 25] With the consolidation of Civil Action No. 05-1251 and No. 07-1043, there was a need for a new Protective Order governing all parties. Nothing herein precludes a party from showing, discussing, or communicating CONFIDENTIAL MATTER disclosed or produced pursuant to the Original Protective Order with counsel for the parties who are actively engaged in the conduct of this litigation (and secretarial, paralegal, technical, and clerical persons assisting them in the conduct of this litigation, as well as counsel's experts or consultants), even if such party was not covered by the Original Protective Order.

(a) the authors, addressees, copy recipients, originators of the CONFIDENTIAL MATTER or other persons as to whom it is clear have previously seen it except as to documents pertaining to specific individuals, which may be shown only to those who are shown on the face of the document as having received or seen it;

(b) experts; and

(c) persons noticed for deposition or designated as trial witnesses to the extent reasonably necessary in preparing to testify in this litigation, provided, however, that no such deponent or witness may retain a copy of any material designated as CONFIDENTIAL MATTER, except as otherwise provided by this Order.

The provisions of this Order apply to any person(s) attending a deposition to the same extent as if such person were being shown written CONFIDENTIAL MATTER, but will not constitute a basis for excluding a party from attending any deposition. However, nothing in this Order shall prevent any party from arguing for exclusion of any person from attending any deposition on any other basis.

C. An attorney for a party in this matter may not disclose CONFIDENTIAL MATTER to any person or entity other than as provided in this Order without the prior written consent of the producing person, which consent will not be unreasonably refused or delayed. If the producing party does not agree, the attorney seeking to show the CONFIDENTIAL MATTER may apply to the court for relief from this Order.

D. Nothing in this Order shall be construed to limit in any way the right of any producing person to use its own Discovery Material, including CONFIDENTIAL MATTER, for any purpose; provided, however, that the Court may consider the producing party's own

disposition, distribution and publication of Discovery Material as evidence of good faith compliance with this Order, and as bearing on the propriety of the producing party's designations of CONFIDENTIAL MATTER. Furthermore, nothing in this Order shall prevent counsel from discussing generally with potential witnesses events, without reading from or showing the person CONFIDENTIAL MATTER.

E. Any and all electronic databases produced by Defendants to Plaintiff, and all information contained therein, shall be designated and treated as CONFIDENTIAL MATTER and shall be subject to the protections of this Order. Relevant analyses and compilations prepared by Plaintiff from the electronic databases for use in the preparation and conduct of this action shall not be confidential, so long as those analyses or other compilations do not contain Social Security Numbers or other confidential personal identifying information of individual employees or former employees of Defendants, which information shall be redacted before being filed with the Court

**5. Use**

Persons obtaining access to CONFIDENTIAL MATTER designated under this Order shall use the matter only for preparation and trial of this litigation (including appeals and retrials) and shall not use the matter for any other purpose. By entering into this Order, no party concedes that any information designated hereunder should be treated confidentially at time of trial nor that any portion of the trial should be closed to the public.

**6. Confidentiality of Depositions**

Any producing person may designate deposition testimony as CONFIDENTIAL MATTER, either on the record at a deposition by identifying specific portions of the deposition (and exhibits discussed during that portion of the deposition), or within 30 days after receiving a deposition transcript by identifying pages of the deposition transcript (and exhibits to it) as CONFIDENTIAL

MATTER. If the latter method is used, CONFIDENTIAL MATTER within the deposition transcript may be designated by underlining the portions of the pages being designated and marking those pages (and accompanying exhibits if not already so marked) with the legend(s) set forth in paragraph 3.B, above. Challenges to such designations shall be as set forth in paragraph 12 below.

**7. Certification of Compliance**

A. Before disclosure of CONFIDENTIAL MATTER, the disclosing party shall obtain from each individual from whom certification is required under paragraph 4.B(vii) a signed certification in the form attached hereto as Exhibit "A," certifying that the person to whom such materials are disclosed has read and understands this Order, agrees to be bound by it, and submits to the jurisdiction of the Court for purposes of enforcing this Order.

B. The executed certifications shall be retained by counsel for the party making the disclosure and are discoverable by other parties upon a showing of good cause. In the event there is a dispute between the parties about a possible breach of the confidentiality provisions of this Order, however, the form executed by the individual who is the subject of the dispute shall be made available to the Court for in camera review.

**8. Subpoena by Other Courts or Agencies**

If another court or an administrative agency subpoenas or orders production of CONFIDENTIAL MATTER that a party has obtained in discovery in this litigation, the party that has received the subpoena or order shall notify the person that designated the Discovery Material as CONFIDENTIAL MATTER of the pendency of such subpoena or order as soon as reasonably possible, but in no event later than five (5) business days after receiving the subpoena or order, and in any event before the date of production set forth in the subpoena or order. The designating person may then notify the person receiving the subpoena of the designating person's intent to intervene to resist the subpoena. Should the producing person give notice of such intent, the person receiving

the subpoena shall take steps reasonable and necessary to withhold production while the intervening person's motion is pending. Provided, however, that nothing in this Order shall be construed to require a party to violate or refuse to comply with valid court orders of any court, or with the rules of procedure of any court. Provided further that tender of notice of intent to intervene to resist the subpoena, as provided herein, shall constitute an agreement by the designating person to pay attorneys' fees, paralegal fees, clerical and other expenses and cost actually incurred in connection with complying with this paragraph, such payment to be made within thirty (30) days of the date of invoice.

**9. Filing**

In the event that any CONFIDENTIAL MATTER is included with, or the contents thereof are in any way disclosed in any pleading, motion, deposition transcript, or other paper filed with the Clerk of the Court, such confidential materials shall be filed under seal in an envelope marked as "CONFIDENTIAL." Although entire transcripts containing confidential testimony shall be marked as "CONFIDENTIAL," only such testimony as has been designated as confidential shall be subject to the protections of this Order. The party seeking to file CONFIDENTIAL MATTER must first file a motion with the court and be granted leave to file the particular document under seal.

**10. Termination of Litigation**

Within ninety (90) days after final conclusion of all aspects of this litigation, CONFIDENTIAL MATTER and all copies in the files of all attorneys and all other persons who have possession of such matter shall without exception either be returned to the producing party or, at the option of the party in possession, be destroyed. All notes, memoranda, summaries, or other materials setting forth, summarizing, or paraphrasing CONFIDENTIAL MATTER shall also be destroyed, except that counsel of record for each party may maintain in its files customary copies of each pleading, motion, order, or brief filed with the Court, and its customary attorney work

product, correspondence and other case files, exclusive of any CONFIDENTIAL MATTER and copies or excerpts thereof. All counsel of record shall certify their own compliance with this paragraph, and shall obtain certification from their clients and expert consultants retained by them, and not more than ninety (90) days after final termination of this litigation shall deliver to counsel for the producing party the certifications. Nothing in this provision shall require the Court or Court Clerk to return or destroy confidential documents that are filed in this case.

Following termination of this litigation, the provisions of this Order relating to the confidentiality of protected documents and information shall continue to be binding, except with respect to documents or information that are no longer confidential. This Court, however, shall not retain jurisdiction over persons provided access to confidential materials or information for enforcement of the provisions of this Order following the final disposition of this case. Nothing in this Order shall prevent a party from seeking leave of the Court to reopen the case to enforce the provisions of this Order.

**11. No Waiver**

The inadvertent disclosure of privileged matter by a producing person or its counsel shall not constitute a waiver of any applicable privilege. A producing person that inadvertently discloses matter it claims to be covered by a privilege shall give notice promptly after discovery of the inadvertent disclosure that the matter is privileged. Upon receipt of such notice, if the person to whom such information was disclosed seeks to challenge the claim of privilege or lack of waiver, the notice and motion procedures set forth in paragraph 12, below, shall apply. If the claim of privilege is upheld, the matter shall be returned on request of the producing person or counsel. In addition, the disclosure of CONFIDENTIAL MATTER pursuant to the procedures set forth in this Order does not constitute a waiver of any trade secret or any intellectual property, proprietary, or other rights to, or in, such information. It is expressly acknowledged that no such right or interests

shall be affected in any way by production of Discovery Material designated CONFIDENTIAL MATTER in this litigation.

**12. Disputes**

If a dispute arises regarding the applicability of the provisions of this Order, the affected parties shall make good faith efforts to resolve the dispute without intervention of the Court. A party that objects to another person's designation of Discovery Material as CONFIDENTIAL MATTER hereunder shall give the designating person of such CONFIDENTIAL MATTER and all parties to this litigation written notice of such objection, including a specific designation of the Discovery Materials to which objection is raised, and an explanation of the basis for objection. Counsel shall confer within seven court days of such objection to attempt to resolve the dispute. In the event that the dispute is not resolved through such conference, the producing person shall have ten (10) court days following notice of objection to move for an order designating the Discovery Material "CONFIDENTIAL." In ruling on such a motion, the burden shall be on the party seeking to preserve confidentiality to establish the confidential, private or proprietary nature of the Discovery Material. While such a motion is pending, no disclosure of the CONFIDENTIAL MATTER may be made except in accordance with this Order, and the matter will be treated as CONFIDENTIAL MATTER. Failure to file such a motion within ten (10) Court days shall constitute a waiver of the right to designate the Discovery Material CONFIDENTIAL under this Order, and the Discovery Material to which an objection was made shall no longer be treated as CONFIDENTIAL MATTER.

**13. Modification**

Nothing in this Order shall prevent any party from seeking modification of this Order or from objecting to discovery in accordance with the Federal Rules of Civil Procedure. Nothing in this Order shall prevent the Court from ordering any appropriate relief with respect to the matters addressed in this Order.

**14. Violations**

The parties may pursue any and all civil remedies available to them for breach of the terms of this Order and may seek to claim that a breach constituted a contempt of court.

IT IS BY THE COURT SO ORDERED.

s/ Karen M. Humphreys
The Honorable Karen M. Humphreys
United States Magistrate Judge

Dated: May 12, 2008

APPROVED:

DAVIS, COWELL & BOWE LLP
1701 K Street NW, Suite 210
Washington, DC 20006

s/ Arlus J. Stephens
Arlus J. Stephens, DC #478938
*Attorneys for Plaintiffs*

HAMMOND, ZONGKER & FARRIS, L.L.C.
727 N. Waco, Suite 200
P.O. Box 47370
Wichita, KS 67201

s/ Thomas E. Hammond
Thomas E. Hammond, #10242
*Attorneys for Plaintiffs*

FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206-4466

s/ James M. Armstrong
James M. Armstrong, #09271
*Attorneys for Boeing Defendants*

SPENCER FANE BRITT & BROWNE LLP
40 Corporate Woods, Suite 700
9401 Indian Creek Parkway
Overland Park, KS 66210

s/ Michael F. Delaney
Michael F. Delaney, #22510
*Attorneys for Spirit Defendants*

**CERTIFICATION AND STIPULATION**

I, _____, hereby certify that I have read and understand the Protective Order in this case, that I agree to be bound by its terms, and I agree to submit to the jurisdiction of the above-referenced Court for purposes of any proceedings concerning my compliance with the Protective Order.

By_____

Dated_____

EXHIBIT "A"

# EXHIBIT C

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

| | |
|---|---|
| THE BOEING COMPANY<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS | Case 19-CA-32431 |

**[PROPOSED] PRODUCTION AND PROTECTIVE ORDER APPLICABLE TO DOCUMENTS OF RESPONDENT THE BOEING COMPANY**

The undersigned Administrative Law Judge finds that a production order and protective order should issue to protect and control the production and use of confidential information of Respondent, The Boeing Company ("Respondent"), throughout and after the completion of the above-captioned proceeding before the National Labor Relations Board (the "Board") (the "Board Proceeding"). This Protective Order ("Order") shall govern the designation, production, handling and treatment of certain trade secret or other confidential information of Respondent, which will be produced by Respondent in response to the current or subsequent *subpoenas duces tecums* issued on behalf of Counsel for the Acting General Counsel ("CAGC"), International Association of Machinists and Aerospace Workers, District Lodge 751 ("Charging Party"), or the Administrative Law Judge for use in the Board Proceeding and any related action for subpoena enforcement, injunctive relief, contempt, or appeal in the United States District Courts (hereafter "Related Actions"). Accordingly, CAGC and its staff; the Parties and

their representatives, attorneys and agents; and those individuals specifically allowed access to Confidential Information under this Order shall comply with the following:

**Definitions**

1. As used herein, "Confidential Information" means all written, recorded or graphic matter, including, but not limited to, electronic and hard copy records, which are produced by Respondent in response to *subpoenas duces tecum* issued on behalf of CAGC, the Charging Party or the Administrative Law Judge and which are designated by Respondent as Confidential, a) where such designation has not been disputed pursuant to § ** of the Order, or b) where such designation was disputed pursuant to §** of the Order and the Administrative Law Judge has determined such records to be subject to this Protective Order; any portions of the transcripts of testimony concerning any such Confidential records or documents; and any portion of any filings by the parties or orders by the Administrative Law Judge, the Board or any other judicial officer in the Board Proceeding or in any Related Action that quotes from any such Confidential records or documents.

2. As used herein, "Parties" shall refer to Charging Party and Respondent.

3. As used herein, "Producing Party" shall refer to Respondent, its subsidiaries, managers, supervisors, agents, and/or representatives.

4. As used herein, "counsel" or "attorney" means counsel for the Parties of this action and all of their employees, contractors and subcontractors.

**Production of Subpoenaed Documents**

5. The Parties shall substantially comply on or before August 15, 2011 with production of documents pursuant to all rulings to date of the Administrative Law Judge concerning *subpoenas duces tecum* issued on behalf of CAGC or the Parties and any related Petitions to Revoke. Substantial compliance shall include logs of all documents not produced. Logs shall include a) a description of the document, including its subject matter and the purpose for which it was created; b) the date the document was created; c) the name and job title of the author of the document; and d) if applicable, the name and job title of the recipient(s) of the document. Each Party shall serve written certification of substantial compliance on CAGC and the other Party within twenty-four (24) hours of such substantial compliance.

**Designation of Confidential Information**

6. The Producing Party shall only designate a record as "Confidential" if the Producing Party and its counsel of record have a reasonable, good faith belief based on specific facts that a) the document in fact constitutes trade secret or other confidential commercial information and b) disclosure of the document will result in a clearly defined and serious injury to Respondent.

7. The Producing Party shall designate all or a portion of a document as Confidential by stamping or otherwise marking every page of the document with the word "Confidential." If the Producing Party designates only a portion of a document as Confidential, the Producing Party shall, in addition to the other requirements of this paragraph, indicate which portion of the document is Confidential. Respondent's

stamping or marking of the document will be done in a manner so as not to interfere with the legibility of any of the contents of the documents.

8. Respondent may move to designate as "Confidential" portions of testimony concerning Confidential Information by requesting that the Administrative Law Judge direct the court reporter/stenographer to separately transcribe those portions of the testimony so identified and to mark the face of each relevant page of the transcript of the testimony with the word: "Confidential."

**Disclosure of Confidential Information**

9. Respondent by motion may request that members of the public and those not specifically allowed access to Confidential Information under this Order be excluded from the hearing at times when Confidential Information is disclosed. The Parties shall take all reasonable steps to minimize disruptions to the Board Proceeding and to ensure public access to the Board Proceeding to the greatest possible extent.

10. Confidential Information shall be used solely for the prosecution and/or defense of the Board Proceeding and any Related Actions, unless the Producing Party authorizes its use for any other particular purpose.

11. All Confidential Information shall be controlled and maintained in a manner that precludes access by any person not entitled to access under this Order.

12. The Producing Party may move to place any Confidential Information (either documents or testimony) under seal at the time the Confidential Information is offered into evidence in the Board Proceeding. At all times, the Producing Party bears the burden to establish that compelling reasons supported by specific factual findings for

sealing such documents or testimony outweigh the presumed right of public access to judicial records.

13. Material designated "Confidential" may be disclosed solely to the following persons:

a. The Administrative Law Judge, the Board members, any judicial officer before whom the Board Proceeding or any Related Action is pending, and any of their respective support personnel;

b. CAGC and any Board employees who are engaged in assisting or advising CAGC in the Board Proceeding or any Related Action;

c. Courtroom personnel, including court reporters/stenographic reporters engaged in the Board Proceeding or any Related Action;

d. The Parties;

e. Counsel for either Party, including counsel's partners, associates, legal assistants, secretaries and employees who are engaged in assisting such counsel in the Board Proceeding or any Related Action;

f. Witnesses or prospective witnesses, including expert witnesses and their staff, who reasonably need access to such materials in connection with the Board Proceeding or any Related Action;

g. Independent litigation support services, including, but not limited to, document reproduction services, computer imaging services, and demonstrative exhibit services; and

h. Any person who authored or received the particular Confidential Information sought to be disclosed.

i. Any other person to whom the Parties and CAGC collectively agree to in writing and/or to which the Administrative Law Judge orders disclosure.

Confidential Information shall not be disclosed to persons described in 11(f) or (g) unless or until such persons have been provided with a copy of this Order and have agreed in writing to abide by and comply with the terms and provisions therein.

14. At all times in this proceeding, CAGC shall maintain responsibility for ensuring the security of those portions of the official record that constitute Confidential Information, and any copies thereof that have been provided to the Administrative Law Judge or the Board.

**Disputes**

15. The Charging Party or CAGC may challenge Respondent's designation of any document as Confidential by the following procedure: If the Charging Party and/or CAGC object to the Producing Party's designation of subpoenaed material as "Confidential," the Charging Party and/or CAGC (hereinafter "the objecting Party") shall serve a written notice of the dispute upon CAGC and the other Party/Parties within fifteen (15) days of receipt of Respondent's certification of substantial compliance referenced in §**. CAGC and the Parties shall, within five (5) business days of receipt of the written notice of the dispute, confer or attempt to confer with each other in a good faith effort to resolve the dispute. In the event that the dispute is not resolved through such conference, the objecting Party may thereupon move for a ruling from the Administrative Law Judge on all disputed designations.

16. At all times, the Producing Party bears the burden to establish "good cause" for applicability of this Order to a contested document based on a specific factual

showing that a) the document in fact constitutes trade secret or other confidential commercial information and b) disclosure of the document will result in a clearly defined and serious injury to Respondent.

17. In evaluating an objecting Party's motion, the Administrative Law Judge will balance the potential harm to Respondent caused by the disclosure of sensitive information with countervailing factors that may warrant denying or limiting the protective order, including the public's right to obtain information involving public proceedings and the Charging Party's right to fully participate in the Board Proceeding and Related Actions.

18. Where there is any dispute pending regarding the designation of records or documents as Confidential, the disputed matter shall be treated as Confidential and subject to this Order until final resolution of the dispute.

19. All disputes arising under this Order shall be resolved by the Administrative Law Judge.

**Rights Reserved/Hearings/Trial**

20. Except as limited by paragraph 5, nothing in this Order shall be construed as a waiver of the right of CAGC or either Party to object to the production of documents on the grounds of privilege or on other grounds not related to the confidentiality of the documents.

21. Nothing in this Order shall be construed as a waiver by CAGC or either Party of any objections that might be raised as to the admissibility at trial of any proposed evidentiary materials.

22. This Order shall not prevent CAGC or either Party from applying to the Administrative Law Judge for relief under this Order or for modification of this Order.

**Termination of Proceedings**

23. Within thirty (30) days after the conclusion of the Board Proceeding and all Related Actions, all Confidential Information, excluding any copies that were not made part of the formal record in the Board Proceeding and any Related Actions, shall be returned to the counsel who provided it. Alternatively, a party or counsel in possession of documents containing Confidential Information shall destroy the documents within a reasonable period of time subsequent to the conclusion of the Board Proceeding and any Related Actions.

**Freedom of Information Act ("FOIA") Request*s***

24. CAGC agrees to notify Respondent of any FOIA request it receives seeking the disclosure of Confidential Information in order to permit Respondent the opportunity to explain why such records should not be disclosed. CAGC acknowledges that FOIA Exemptions 6 and 7(C) protect personal privacy information of individuals, including information such as social security numbers, and individuals' names, addresses, and medical information. See 5 U.S.C. 552(b)(6) and 552(b)(7)(C).

25. CAGC agrees that any Confidential Information marked by Respondent as "confidential commercial or financial information" shall be treated by the Board as arguably protected from disclosure under Exemption 4 of the FOIA (5 U.S.C. 552(b)(4). Any Confidential Information marked by Respondent as "confidential commercial or financial information" that is determined by the Board to actually be covered by Exemption 4 shall not be disclosed in response to a FOIA request, absent a court order.

26. CAGC agrees that the Board will not disclose any Confidential Information marked by Respondent as "confidential commercial or financial information" in response to a FOIA request without first providing Respondent written notice at least ten (10) working days in advance of the proposed disclosure of such information. Pursuant to the FOIA, in the event of such notice, Respondent shall have the right to file a written statement explaining why the Confidential Information marked "confidential commercial or financial information" comes within Exemption 4, and to object to any disclosure. If, after consideration of Respondent's objections, the Board makes an ultimate disclosure determination, the Board acknowledges that Respondent may have the right to file a lawsuit seeking to prevent the disclosure of the asserted confidential commercial or financial information. In this regard, the Board will follow the process described in the Board's Rules and Regulations, Section 102.117.

**Miscellaneous**

27. Should any Confidential Information be disclosed, through inadvertence or otherwise, to any person not authorized to receive it under this Order, then the disclosing person(s) shall promptly: (a) identify the recipient(s) and the circumstances of the unauthorized disclosure to the Producing Party; and (b) use best efforts to bind the recipients to the terms of this Order. No information shall lose its confidential status because of its disclosure to a person not authorized to receive it under this Order.

28. This Order shall remain in full force and effect until modified, superseded, or terminated by consent of the Parties and the CAGC or by Order of the Administrative Law Judge.

Dated this _____ of _____, 2011.

_____
Clifford H. Anderson
Administrative Law Judge
NLRB San Francisco Division of Judges

# EXHIBIT D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

| | |
|---|---|
| THE BOEING COMPANY<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS | Case 19-CA-32431 |

**DECLARATION OF STEPHEN BODENSTEINER**

I, Stephen Bodensteiner, declare as follows:

1. I make this declaration based upon my personal knowledge and my familiarity with the matters recited herein. If called upon, I would testify under oath to the matters stated herein.

2. I am an employee of the Boeing Company ("Boeing"), the Respondent in this action. I am the Director of Business Operations for Production Integration for the 787 Program. In this role, I oversee the integration of Boeing's newest commercial airplane, the 787 Dreamliner, into Boeing's existing operations. Among other things, I am responsible for developing and maintaining a master schedule for the production of 787s.

3. Boeing is the world's leading aerospace company and the largest combined manufacturer of commercial and military aircraft. Boeing services customers in over 90 countries and has more than 159,000 employees in 70 countries.

4. The markets in which Boeing competes are highly competitive and involve the development and implementation of cutting-edge technology. Boeing has invested billions of dollars in developing its proprietary portfolio of aerospace and communications technology.

5. The 787 is the first commercial airplane to be made of at least 50% composite material and to have a mostly electrically powered architecture. It is 20% more efficient than existing jet aircraft and costs 10% less to operate, as measured on a per-seat basis. These and other proprietary design attributes have made the 787 a commercial success and have contributed to Boeing's market advantage over its competitors. It is my understanding that the 787's proprietary design attributes include the processes by which it is assembled, the design of the buildings and tooling stations used in assembly, and the confidential research and development information underlying its creation and ongoing production. It is my further understanding that these design attributes constitute trade secrets under applicable law.

6. The success of the 787 program is also dependent upon proprietary information regarding actual- and projected- cost and revenue structures and actual- and planned- production schedules. Boeing's cost and revenue structures, including its profit margins and the plan by which it has developed a second production line at a "greenfield" site in Charleston, South Carolina, permits economical and efficient airplane production. And Boeing's production schedules position it to absorb fluctuations in demand and initiate strategic fluctuations in supply. Boeing's cost and revenue structures and production schedule contribute to its market

advantage, especially since no other company has an established system for the production and assembly of composite wide-body airplanes.

7. In addition to the above materials, Boeing collects and maintains other confidential information in connection with the 787 program. This material includes tax and other financial information.

8. Boeing takes great care to protect the confidential and proprietary information described in ¶¶ 5–7, above. Pursuant to Boeing procedure PRO-2227, every employee involved in the 787 program is trained, at least annually, on identifying and preventing the disclosure of the above categories of information. This information is stored on limited-access servers and is internally distributed on a need-to-know basis. It is not disclosed to competitors or unions, and it is only distributed to suppliers and customers who have signed a proprietary rights agreement. Paper copies of this information are promptly destroyed after use.

9. In my role as Director of Business Operations for Production Integration for the 787 Program, I regularly review the confidential and proprietary information that is described in ¶¶ 5–7, above. To develop a master production schedule for the 787, I synthesize this information and recommend the most efficient and strategically-advantageous course of action.

10. I was asked to review subpoenas B-648185 and B-648186, which were served on Boeing by counsel for the Acting General Counsel of the National Labor Relations Board and counsel for the International Association of Machinists and Aerospace Workers District Lodge 751 ("IAM"), respectively. On their face, these subpoenas would require Boeing to disclose documents containing the confidential and proprietary information described in ¶¶ 5–7, above. By way of example, Boeing would have to provide documents revealing its per-plane profit margins, supply costs, and future workforce projections, including any planned or potential changes in these figures.

11. If the above documents are disclosed to unauthorized third parties, Boeing will suffer significant losses. Such documents would enable Boeing's competitors to: (a) mimic the 787's successful design; (b) duplicate the first-ever supply-and cost-structures for a wide-body composite airplane (including Boeing's process for enabling final assembly at a "greenfield" site in Charleston, South Carolina); disrupt Boeing's existing arrangements with customers, suppliers, and workers, and (c) anticipate Boeing's production schedule and mitigate any advantages from strategic increases in output. Disclosure would dramatically shorten competitors' time to market and erode Boeing's competitive advantage. Especially given the high start-up costs that Boeing incurred to develop this first-of-its-kind airplane—including the development from scratch of a final assembly site in Charleston, South Carolina—details about Boeing's designs, costs, and production schedules, among other things, would provide competitors with a roadmap for success.

12. In addition, since Boeing only provides confidential and proprietary information to customers and suppliers who have signed proprietary rights agreements, and since it is my understanding that unions are not entitled to the above documents under applicable law, disclosure would place these parties in an improved bargaining position vis-à-vis Boeing with regard to prices and profit margins, and other non-public financial information. Such parties could second-guess Boeing's high-level investment decisions to their own advantage and minimize Boeing's profits, as could Boeing's partners in any prospective mergers or joint ventures. The IAM, in particular, would have an unfair advantage over Boeing in the collective bargaining negotiations that are scheduled to begin in 2012. More generally, the publication of Boeing's future production capacity could affect the prices that it is able to obtain on the market.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED in Everett, Washington this 15th day of July, 2011.

STEPHEN BODENSTEINER

# EXHIBIT E

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 19**

**THE BOEING COMPANY**

**and** **Case 19-CA-32431**

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS**

# [PROPOSED] PROTECTIVE ORDER

## I. Definitions

"Acting General Counsel" means the Acting General Counsel of the National Labor Relations Board or his successors.

"Board Proceeding" means the hearing, adjudication, or administrative appeals of any matter arising in connection with *The Boeing Company*, Board Case 19-CA-32431, including, without limitation, any compliance proceeding.

"Charging Party" means the International Association of Machinists and Aerospace Workers, District Lodge 751.

"Confidential Information" means any type of information that is designated as confidential by the Disclosing Party and shall contain, include, or consist of confidential, proprietary, and/or trade secret financial, personal, business, or technical information that the Disclosing Party maintains in confidence in the ordinary course of business and which the Disclosing Party reasonably and in good faith believes that, if disclosed, could cause specific financial and/or competitive harm to the Disclosing Party.

"Disclosing Party" means The Boeing Company, its subsidiaries, managers, supervisors, agents, and/or representatives, including, but not limited to, Boeing Commercial Airplanes.

"Document" or "Documents" mean all materials within the scope of Federal Rules of Civil Procedure 26 and 34, computer tapes or disks, information, matters, tangible items, things, objects, materials, and substances disclosed in the Board Proceeding or any Related Federal Court Proceeding, whether originals or copies, whether disclosed pursuant to subpoena *duces tecum* or by agreement, as well as hearing papers to the extent that such papers quote, summarize, or contain Confidential Information covered by this Protective Order.

"Party" or "Parties" mean any person or entity that is a party either to the Board Proceeding or any Related Federal Court Proceeding and who has full rights of participation.

"Qualified Persons" includes:

a. The Administrative Law Judge, the Board members, any judicial officer before whom the Board Proceeding or any Related Federal Court Proceeding is pending, and any of their respective support personnel;

b. Counsel for the Acting General Counsel and any Board employees who are engaged in assisting or advising Counsel for the Acting General Counsel in the Board Proceeding or any Related Federal Court Proceeding;

c. Counsel for the Charging Party, including counsel's partners, associates, legal assistants, secretaries and employees who are engaged in assisting such counsel in the Board Proceeding or any Related Federal Court Proceeding;

d. Courtroom personnel, including court reporters/stenographic reporters engaged in the Board Proceeding or any Related Federal Court Proceeding;

e. Individuals assisting Counsel for the Acting General Counsel or the Charging Party, who are designated by Counsel for the Acting General Counsel or Counsel for the Charging Party after review of Confidential Information produced by the Disclosing Party;

f. Witnesses or prospective witnesses, including expert witnesses and their staff, who reasonably need access to such materials in connection with the Board Proceeding or any Related Federal Court Proceeding;

g. Independent litigation support services, including, but not limited to, document reproduction services, computer imaging services, and demonstrative exhibit services;

h. Any person who authored or received the particular Confidential Information sought to be disclosed;

i. Any other person whom the Parties and Counsel for the Acting General Counsel collectively agree in writing to include and/or to whom the Administrative Law Judge orders disclosure.

Confidential Information shall not be disclosed to persons described in (e), (f) or (i) unless or until such persons have been provided with a copy of this Order and have agreed in writing to abide by and comply with the terms and provisions therein.

"Receiving Parties" means (i) counsel for the Acting General Counsel, and/or (ii) the Charging Party.

"Related Federal Court Proceeding" means any case seeking judicial enforcement or review, or judicial resolution, of any matter arising in connection with *The Boeing Company*, Board Case 19-CA-32431.

## II. Designation and Disclosure of Confidential Information

A. Regardless of the date or manner of disclosure, before delivering any Documents containing Confidential Information to the Receiving Parties, the Disclosing Party shall designate such Confidential Information by stamping or otherwise marking the word "CONFIDENTIAL" on each page of any such Document. If the Disclosing Party designates only a portion of a Document as confidential, the Disclosing Party shall, in addition to the other requirements of this section, indicate which portion of the Document contains Confidential Information. Stamping or marking of a Document will be done in a manner so as not to interfere with the legibility of any of the contents of the Document.

B. 1. For all information that the Disclosing Party designates as confidential, the Disclosing Party will, contemporaneous with its production, provide the Receiving Parties with a log setting forth the specific factual bases as

to why the information must be treated as Confidential Information, as that term is defined herein.

2(a) The Receiving Parties will have the right to challenge any designation of confidentiality by the Disclosing Party.

(b) In the event that either of the Receiving Parties challenges the designation of any Document as Confidential Information, the Disclosing Party may then move the Administrative Law Judge under the appropriate standard for designating Confidential Information and state the reasons therefor. Upon such motion, the Receiving Parties shall state on the record whether they agree to or oppose the Disclosing Party's designation. The Administrative Law Judge shall then determine whether or not the Document(s) should be designated as Confidential Information.

C. By marking a Document as confidential in the manner described in Section II-A and by raising its confidentiality claims at all times as set forth in Sections IV and V, the Disclosing Party conditionally discloses such a Document subject to a final ruling on its claim of confidentiality.

## III. Restrictions on Use of Confidential Information

A. Only Qualified Persons may have access to Confidential Information. All Confidential Information shall be controlled and maintained by the Parties in a manner that precludes access by any person not entitled to access under this Protective Order.

B. Confidential Information shall be used only for the purpose of litigating the Board Proceeding or any Related Federal Court Proceeding and not for any other purpose whatsoever.

## IV. Confidential Information Placed Under Provisional Seal at Hearing

A. Immediately preceding any Party's introduction into evidence or filing of any Document containing Confidential Information during the Board Proceeding, the introducing Party shall so notify the other Parties. The other Parties may then move the Administrative Law Judge under the appropriate standard for sealing documents for an order placing such Document under seal and state the reasons therefor. Upon such motion, the introducing Party shall state on the record whether they agree to or oppose the other Party's motion. The Administrative Law Judge shall then order that the Document be introduced into evidence or filed by the introducing Party under provisional seal.

B. Upon motion by the Disclosing Party, the hearing room in the Board Proceeding shall be cleared of all individuals other than Qualified Persons and essential personnel such as court reporters and security officers when witnesses testify regarding the contents of any provisionally sealed Document. Transcripts of proceedings that occur while the hearing room is cleared shall also be placed under provisional seal.

C. Final adjudication of any and all motions to seal Documents and transcripts of proceedings shall be deferred by the Administrative Law Judge until

the closure of the hearing before the Administrative Law Judge as set forth in Section V.

## V. Confidential Information Placed Under Permanent Seal at Conclusion of Hearing

A. Within ___ days of the closure of the hearing in the Board Proceeding, the Disclosing Party shall file with the Administrative Law Judge a motion and any supporting brief to place under permanent seal, under the appropriate standard, any Documents and transcript excerpts containing Confidential Information that were provisionally sealed pursuant to Section IV. The Receiving Parties shall have ___ days to submit briefs in response to the Disclosing Party's motion, and the Disclosing Party shall have ____ days to file a reply. To the extent that any such motion, affidavit, brief or other filing contains, quotes, or summarizes Confidential Information, it too shall be filed under provisional seal.

B. The Administrative Law Judge shall rule on the Disclosing Party's motion in a written order that specifically addresses each Document or transcript excerpt in dispute as well as any papers filed pursuant to Section V-A. Any Documents or transcript excerpts that were provisionally sealed pursuant to Section IV but are not listed in the Disclosing Party's motion for permanent seal shall be ordered unsealed.

## VI. Freedom of Information Act ("FOIA") Requests

A. The Acting General Counsel agrees to promptly notify the Disclosing Party of any FOIA request it receives seeking the disclosure of Confidential Information in order to permit the Disclosing Party the opportunity to explain why such records should not be disclosed.

B. The Acting General Counsel agrees that any information marked by Respondent as Confidential Information pursuant to Section II-A above shall be treated by the Agency as triggering the procedures of Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4).

C. The Acting General Counsel agrees that he will not disclose any Confidential Information in response to a FOIA request without first providing Respondent written notice at least 10 business days in advance of the proposed disclosure of such information. Pursuant to the FOIA, in the event of such notice, Respondent shall have the right to file a written statement explaining why the information comes within Exemption 4, and to object to any disclosure. If, after consideration of Respondent's objections, the Acting General Counsel makes an ultimate disclosure determination, the Acting General Counsel acknowledges that Respondent may have the right to file a lawsuit seeking to prevent the disclosure of the asserted Confidential Information. In this regard, the Acting General Counsel will follow the process described in Section 102.117 of the Board's Rules and Regulations. If the Disclosing Party files suit to enjoin disclosure of Confidential Information, the Board will not disclose such Documents pending the final disposition of that lawsuit.

## VII. Termination of the Proceeding

Within 30 days after the final conclusion of the Board Proceeding and any Related Federal Court Proceeding including, without limitation, any judicial review, all Documents designated as confidential and which have not been made part of the record before the Board, shall be returned to counsel for the Disclosing Party. Alternatively, at the option of the Receiving Party or Qualified Person in possession, all Documents designated as confidential and which have not been made part of the record before the Board, shall be destroyed. Following termination of the Board Proceeding and all related federal court proceedings, the provisions of this Protective Order relating to the confidentiality of protected documents and information, including any final decision on the sealing of documents and testimony, shall continue to be binding, except with respect to documents or information that are no longer confidential.

## VIII. No Waiver

A. The inadvertent disclosure of privileged matter by the Disclosing Party or its counsel shall not constitute a waiver of any applicable privilege. If the Disclosing Party inadvertently discloses any matter it claims to be covered by a privilege, it shall give notice promptly after discovery of the inadvertent disclosure that the matter is privileged. Upon receipt of such notice, if the person to whom such information was disclosed seeks to challenge the claim of privilege or lack of waiver, the matter shall be submitted to the Administrative Law Judge.

B. Disclosure of Confidential Information pursuant to the procedures set forth in this Protective Order does not constitute a waiver of any trade secret or any intellectual property, proprietary, or other rights to, or in, such information. It is expressly acknowledged that no such rights or interests shall be affected in any way by production of subpoenaed material designated as containing Confidential Information in the Board Proceeding.

## IX. Rights Reserved

A. Nothing in this Protective Order shall be construed as a waiver of the right of any Party to object to the production of documents on the grounds of privilege or on other grounds not related to the confidentiality of the Documents.

B. Nothing in this Protective Order shall be construed as a waiver by any Party of any objections that might be raised as to the admissibility at hearing or trial of any proposed evidentiary materials.

## X. Modification

Nothing in this Protective Order shall prevent any party from seeking modification of this Protective Order by the Administrative Law Judge.

## XI. Duration

This Order shall remain in full force and effect until modified, superseded, or terminated by consent of the Parties and Counsel for the Acting General Counsel or by Order of the Administrative Law Judge.

## XII. Violations

The Parties and Counsel for the Acting General Counsel may bring any claim of breach of the terms of this Protective Order before the Administrative Law Judge at any time, and the Administrative Law Judge will have the authority to remedy any sustained claim that a breach constituted conduct prejudicial to any Party and/or the Board Proceeding. Appeals from the Administrative Law Judge's rulings shall be governed by § 102.26 of the Board's Rules and Regulations.

**IT IS SO ORDERED.**

Issued at _____ this ____ day of _____, 2011.

_____
Clifford H. Anderson
Administrative Law Judge