

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

**BOEING'S MOTION FOR CLARIFICATION
REGARDING PROTECTIVE ORDER**

To avoid unnecessary uncertainty in connection with the production and handling of confidential materials, Boeing requests clarification of certain terms of the Administrative Law Judge's August 12, 2011 Protective Order. While the structure and intent of the Order are generally clear, Boeing submits that the parties would benefit from additional clarity in certain areas. Specifically, Boeing respectfully requests that Judge Anderson clarify the following provisions of the Order:¹

1. Boeing requests that Section IV.B of the Order be modified as shown in the following italicized text: "Only Qualified Persons may have access to agreed upon or adjudicated Confidential Information, *and to Respondent Designated Confidential Information unless and*

¹ In making this Motion, Boeing hereby reserves all rights to seek review of the Protective Order and rulings thereunder.

until such information is finally adjudicated not to be confidential.” By way of explanation: The Protective Order identifies three separate categories of Confidential Information: “Agreed,” “Adjudged,” and “Respondent Designated.” Order pp. 1–2. Boeing expects that for “Respondent Designated” confidential information—which is not currently, but ultimately may be, Agreed or Adjudged confidential—the tribunal’s intention is that this information, like Agreed and Adjudged information, not be disclosed beyond the class of Qualified Persons pending a final determination that the information is *not* confidential. However, the lack of a reference to Respondent Designated information in IV.B creates a presumably unintended lack of clarity on this score.²

2. Boeing requests that the definition of “All Party Agreed Confidential Information” be modified to encompass: “Respondent Designated Confidential Information which has not been *timely* challenged by any party under the terms of this Protective Order.” We believe that the italicized additional word makes it clearer how, in practice, Respondent Designated confidential information becomes Agreed confidential information. Specifically, Respondent Designated confidential information not challenged in the 60-day dispute period in Section III is thereupon Agreed confidential information. A late challenge would not alter that fact.

3. Boeing requests that the definition of “Qualified Persons” be modified to read as follows: ““Qualified Persons’ includes the following individuals unless such individuals have been specifically limited by name or category from having access to specific confidential

² Section III.D comes close to addressing the issue, but is not pellucid because it says that information shall be treated as confidential “where there is any dispute” as to its confidentiality. Respondent Designated confidential information is not necessarily disputed: indeed it could go as long as 60 days without its designation being challenged. Moreover, it is appropriate that Respondent Designated information be mentioned together with Agreed and Adjudged information in the paragraph specifically addressing Qualified Person access.

information under this Protective Order, ***including being limited through a restriction proposed by Boeing that has not been the subject of a successful final challenge.***” Consistent with the first request above, we believe the bolded language gives useful additional clarity that when Boeing uses the Order’s procedures to limit access to individuals by name or category, that restriction must be given full effect pending final adjudication to the contrary. An important element of the Order’s procedures would be sharply undermined if people who ultimately are adjudged *not* Qualified due to a restriction proposed by Boeing could nonetheless have access for as long as 60 days before a decision by this tribunal.

4. Boeing requests clarification of the standard that this tribunal will use to adjudicate challenges concerning Boeing’s proposed restrictions on Charging Party access. *See* Section II.A (allowing Boeing to propose “Additional Restrictions on Charging Party Access”). In supporting the entry of a protective order, Boeing proposed a standard whereby it could withhold information from the Charging Party that would “provide [the IAM] with an unfair advantage in its future collective bargaining with Boeing.” *See* Boeing’s Motion for Approval of a Protective Order, at pp. 21–26 (citing cases). For reasons previously given, Boeing believes this is the appropriate standard. This tribunal’s articulation *now* of the standard to be applied will facilitate Boeing’s decisionmaking regarding which materials to produce on a “restricted” basis, and the appropriate contents of the accompanying logs.

5. Boeing requests that the second paragraph of Section II.B be modified to read as follows: “***At such time as any party challenges the basis for Respondent’s designations,*** the Respondent shall also submit to the other parties a showing of good cause” Boeing submits that the bolded language is necessary for purposes of clarity and to ensure the Order’s efficient administration. If the existing paragraph were read to require a showing of good cause

regardless of whether any party challenges Boeing’s designations, then Boeing would have to elaborate upon even utterly un-controversial designations. The first part of the same paragraph of the Order already requires Boeing to provide disclosures that enable the other parties “to understand the nature and general content [of the] materials involved,” through a log, for example, which is the means by which restrictions on documents produced are ordinarily explained to other parties in the first instance, and which should be sufficient here. To require more would impose undue burden, delay the production of documents, and stall substantive proceedings for no good reason.

6. Boeing requests clarification regarding the instruction in Section II.B that “[u]pon request, counsel for the Respondent will identify the category in the Bodensteiner Declaration to which a particular document or documents corresponds.” Boeing has no objection to correlating claims of confidentiality with categories in the Bodensteiner Declaration, where applicable. However, the Bodensteiner Declaration is not—and was never held out to be—a comprehensive list of all potential bases for treating documents confidentially. Especially given Section XI.C of the Order, which preserves “other rules and controlling case law respecting confidential documents,” Boeing should not be required to link every claim of confidentiality to a category in the Bodensteiner Declaration. An express clarification from this tribunal would assist the parties in addressing future uncertainties or disagreements regarding Boeing’s designation of confidential documents.

7. Section II.B of the Order refers separately to a “redacted document” (category 2) and a “modified document” (category 3). The difference is not clear, and Boeing accordingly requests clarification so as to guide its preparation of documents for production.

8. Boeing requests clarification concerning the intended use of the “cover sheet” required under Section II.A. In practice, Boeing must initially present all documents as “Respondent Designated Confidential Information.” Thus, it is not clear how and when the other checkboxes (*i.e.*, “All Party Agreed Confidential Information” and “Adjudged Confidential Information”) will be used, and which parties (if any) are responsible for altering the cover sheet when a document changes categories. Boeing requests that this tribunal further explain the use of “cover sheets” and the parties’ respective responsibilities for maintaining and revising them.

* * *

To minimize future disputes, prevent undue burden, and maintain efficiency, Boeing’s Motion for Clarification should be granted along the lines requested above.

Respectfully submitted,

August 17, 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

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CERTIFICATE OF SERVICE

I certify that a copy of Boeing's Motion for Clarification Regarding Protective Order was electronically filed on August 17, 2011, and was sent via overnight mail to the following parties, as well as electronically served where emails are listed:

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@nrlrb.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 Foundation, Inc.
c/o Glen M. Taubman
8001 Braddock Road, Suite 600
Springfield, VA 22160
gmt@nrtw.org

Matthew C. Muggeridge
National Right to Work Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
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 17th Day of August, 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