

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

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**

**RULING ON THE PARTIES' MOTIONS FOR APPROVAL OF
THEIR RESPECTIVE PROTECTIVE ORDERS, THE RESPONDENT'S MOTION TO
STRIKE, AND ISSUANCE OF PROTECTIVE ORDER**

On July 25, 2011, the Respondent filed a motion for approval of its proposed protective order to prevent the disclosure of Boeing's confidential and proprietary information. On that same day the General Counsel filed a response to the Respondent's motion, the General Counsel's own proposed protective order, and a brief in support thereof. Also on the same day the Charging Party filed a brief opposing the Respondent's request for a protective order and, with conditions, proposed its own protective order. Thereafter, on July 28 and 29, 2011, the parties orally argued the matter at hearing. On August 5, 2011, the parties filed supplemental briefs and positions on the matter. On August 8, 2011, the Charging Party filed a motion to strike portions of the Respondent's supplemental brief and, on August 9, 2011, the Respondent filed a response thereto. On August 10, 2011, the General Counsel filed a reply to the motion.

Based on the above filings, the positions and argument advanced at trial, and the entire record to date, I find and rule as follows:

I. Background

From the first day of hearing in the instant case, the parties have discussed on the record and engaged in substantial off the record negotiations concerning the need for, content of, and role of the Board and a Federal District Court in reviewing or approving a protective order herein. The goal of the parties' negotiations was to arrive at an all party protective order which could be submitted to me for my approval or an all party agreement with certain alternative provisions offered by the parties for my

selection but which, irrespective of my selection of alternative portions of such an order, would then comprise an all party agreement. In the event, the parties did not reach agreement on an all party stipulated protective order. The parties in light of the failed negotiations, submitted individual proposed orders.

In the process described above, which involved substantial on record advocacy and off record negotiation, I informed the parties that, should they not be able to reach an all party agreement, I would issue a protective order guided by their final positions.

II. Generally, The Protective Order in an Unfair Labor Practice Case

A protective order, in the most general sense, is an order by a trial judge addressing various procedures dealing with the manner in which subpoenaed and other materials shared by the parties are to be used during the course of the litigation. It is thus a protocol establishing the procedural particulars necessary to efficiently determine how certain materials are to be handled by the parties, how disputes regarding the status of such materials may be handled, and how the information found protectable should be handled including how it should be received into the trial record.

In the federal setting, the Federal Rules of Civil Procedure (FRCP), Rule 26(c), provides that a party in litigation subject to the FRCP, who is obligated to disclose information to other parties, may move for such a protective order in the court where the action is pending. The rule further provides that the court may, for good cause, issue an order to protect such a party's provided information in various ways including the following itemized particulars:

FRCP 26(c):

(1) that the disclosure or discovery not be had;

* * * *

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way...

The court under the FRCP has extensive discretion as to how to deal with claims of confidentiality, including utilization of the process of *in-camera* examination. *Klein v. Henry S. Miller Residential Services, Inc.*, 29 F.R.S.2d 398 (N.D.Tx 1978). In *Seattle*

Times Co. v. Rhinehard, 467 U.S. 20 (1984), the United States Supreme Court recognized that Federal District Courts have substantial discretion to issue protective orders. FRCP Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required respecting particular documents. The trial court handling the litigation is in the best position to weigh the competing needs and interest of parties affected by discovery. Further, the unique character of the disclosure process requires that the trial court have substantial latitude to fashion protective orders and to customize disclosure to match sometimes competing needs of disclosure and confidentiality.

State procedures also provide for protective orders in litigation. Most states have adopted discovery provisions modeled on Rules 26 through 37 of the Federal Rules of Civil Procedure. F. James & G. Hazard, *Civil Procedure* 179 (1977).

Neither the National Labor Relations Act (the Act) nor the Board's Rules and Regulations specifically provide for the issuance of protective orders in unfair labor practice hearings. The Board's Rules Sec. 102.35 does provide that the administrative law judge shall have authority, inter alia, to grant applications for subpoenas; to rule upon petitions to revoke subpoenas; to regulate the course of the hearing and, to dispose of procedural requests, motions, or similar matters; and to take any other action necessary under the foregoing and authorized by the published Rules and Regulations of the Board. And, the Board has held that an administrative law judge has broad discretionary authority under the Act, the Administrative Procedure Act, and the Board's Rules and Regulations in unfair labor practice proceedings, which are inherent in the administrative law judge's duties and powers to regulate the course of the hearing. *George Joseph Orchard Siding, Inc.*, 325 NLRB 252, 252-253 (1998).¹

The Board in this regulatory context has specifically found that an administrative law judge in an unfair labor practice case may issue a protective order. For example the Board noted in *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011, n.7 (2005):

Despite the judge's stated aversion to issuing a protective order, it is clear that judges do have that authority. *AT&T Corp.*, 337 NLRB 689, 693 fn. 1 (2002); *National Football League*, 309 NLRB 78, 88 (1992); *United Parcel Service*, 304 NLRB 693 (1991); *Carthage Heating Co.*, 273 NLRB 120, 123 (1984). NLRB Division of Judges Bench Book § 8-330.

¹ The power to issue a protective order has been found to be such an inherent power in a non-Board setting. Thus, the circuit court noted in *International Products Corp. v. Koons*, 325 F. 2d 403, 407-408 (2nd Cir. 1963), "[w]hether or not the Rule itself authorizes [a particular protective order] . . . we have no question as to the court's jurisdiction to do this under the inherent equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices" citing *Gumbel v. Pitkin*, 124 U. S. 131, 145-146 (1888).

Further, as the parties in their filings have agreed, this authority to issue a protective order in appropriate cases also empowers the administrative law judge to manage confidential evidence and disclosure issues as described in the above quoted provisions of FRCP 26(c) and further includes the power to limit the trial use of disclosed materials including the sealing of exhibits and transcripts. Seemingly then, the Act permits and the Board has authorized its administrative law judges hearing unfair labor practices broad power and discretion to issue protective orders. And, even though the Board has not authorized by rule or decision addressing the propriety of all elements of a protective order, the Board has made it clear that FRCP Rule 26(c) and the cases that interpret and apply its provisions may serve as a useful guide in this area.

Based on the above, I find I have authority to issue protective orders applicable to unfair labor practice proceedings. More particularly, I find I have the authority to rule on the Respondent's motion for approval of its proposed protective order and/or to issue such an order on my own motion.

III. A Protective Order In the Instant Case

As noted supra, the parties were unsuccessful in their attempts to negotiate a common, stipulated protective order for my consideration and approval. An all party stipulated protective order, at least to a certain extent, may provide conclusionary findings regarding necessary elements of protective orders under the FRCP and may establish procedures which apply different standards than those in the FRCP and the cases that explain those rules. This is so because, being all party, the stipulated protective order essentially constitutes a waiver of the parties rights to object to their own stipulated order.

A protective order that is not an all party stipulated agreement may not limit or circumscribe any party's rights without the predicate facts, analysis and consideration necessary to formally rule on the question. Essentially no facts are in the record respecting any specific document's confidential status in this case. This in my view limits the scope of a non-all party stipulated protective order in the circumstances of the instant case. This is so for the following reasons.

A protective order may include a protocol or protocols which prescribe necessary actions and procedures to establish predicate facts and circumstances which support the specific actions to be taken with respect to particular documents or materials. If such an order is written so as not to change, amend, or modify the substantive rules and standards existing for the handling of such documents or materials, the protective order is procedural not substantive and may be issued without the various necessary factual findings and analysis that are necessary for making specific findings respecting a particular document or material.

In the instant case, in addition to substantial representations asserted in the record colloquy respecting the instant protective order issues, the Respondent submitted an affidavit from a knowledgeable official that it argues establishes that

litigation of the issues of the instant case will require the Respondent to turn over various materials in the course of the trial which materials would include proprietary, trade secret and other confidential information within the meaning of FRCP 26(c). Based on this assertion, the Respondent seeks a protective order which would allow the procedures and protections set forth in FRCP 26 to be obtained protecting it from the harms noted in the rule. The General Counsel does not oppose the issuance of such a protective order. The Charging Party argues that the Respondent "has yet to produce any evidence of good cause necessary for a protective order to issue." (The Charging Party's Brief regarding the Respondent's Request for Protective Order at 1.)

I find that the Respondent's showing herein to date is sufficient to warrant my issuance of a protective order establishing non-substantive processes and procedures which will allow the orderly handling of protective issues. I am however well aware that the Charging Party's complaint of insufficient showing by the Respondent on the threshold issue of need is correct in that not a single document has been specially described or even identified so as to allow consideration of the myriad issues relevant to a disposition under a confidential protocol or under FRCP Rule 26 and applicable case law.

My finding above that there has been sufficient showing by the Respondent to justify the entry of a protective order even though not a single document has been identified by the Respondent as meriting protection under such a protective order is worthy of explanation. The explanation is further apt because it illuminates my intentions respecting the effect of the protective order that I issue with this order.

It has long been clear to all parties that the instant case will involve evidentiary disclosure by the Respondent of a large number and variety of documents and materials. It is also clear that the Respondent has argued generally and indicated that it will argue on a case by case basis that it has a good faith belief that a large number of documents require handling under FRCP Rule 26's protective protocols and that therefore a protective order is necessary. While the Charging Party is correct we have no concrete information respecting specific examples of such individual documents, the large number of documents likely involved in FRCP Rule 26 confidential document adjudication supports in my view putting a protocol in place to allow an orderly and standardized means of addressing these issues with respect to a large number of documents. Hence my ruling.

I am mindful of the Charging Party's admonition that I have no facts before me on which to consider particular protective order elements, and I am also aware of both the General Counsel's and the Charging Party's stated fear of and objection to the adoption of a protective order, the terms of which may result in a reduction in their respective rights under FRCP 26 and confidential document case law to contest the Respondent's actions and proposals. I have drafted the attached protective order with these objections in mind. The protective order issuing with this order in all its procedures and protocols is explicitly intended to avoid diminishing the rights of any party under FRCP 26. It will not modify or amend the rights of the parties which they

possessed to address confidential document issues had no protective order been in place.² Thus in my view, the issuing protective order herein will apply the same legal standards and the parties will have the same rights to litigate confidential document status, confidential document disclosure and its regulation. I hope and expect that the protective order will allow such litigation in a more efficient manner.

While the Respondent's motion seeks approval of its proposed protective order in its entirety, unmodified, I find the order as proposed changes in various particulars the rights of the parties respecting the litigation of confidential materials under FRCP 26. I will not accept these changes without the agreement of the other parties. And, as noted, what was once to be an all party proposed order is no longer all party. I therefore will not approve the Respondent's proposed protective order in its entirety. Further, I will not approve either the General Counsel or the Charging Party's proposed protective order in its entirety. Rather I will issue my own protective order which will, in some cases, adopt elements or aspects of the format and language contained in one or more of the parties proposed orders.

The rules and standards of FRCP 26, save where the Board has specifically held otherwise, shall be applied under the terms of this protective order. The protective order issued herein is a framework or protocol for deciding issues of the confidentiality of individual documents or classes of documents. It does not change the existing law respecting how given documents will be ultimately treated. Specific findings and application of the noted standards to individual documents or document classes must await the identification of those specific documents and the argument of the parties on such specific documents and the proposed disclosure and handling limits in issue.

Given all the above, it is appropriate to consider the specific elements of a protective order in the instant case.

IV. Specific Elements of the Instant Protective Order

The order of the sections of the protective order presented below and the final organization of the protective order involved herein track the General Counsel's and the Respondent's proposed orders in their final submissions. This order of appearance is also similar to that of the Charging Party's order filed with its earlier brief. Issues and disputes between the parties respecting various aspects of protective orders generally, and respecting those proposed herein, are discussed on a section by section bases below.

² The exception to the described neutrality of this or any possible protective order is that establishing a protocol or procedure also establishes the party or parties in given circumstances who must initiate an action or objection. The burden of going forward is thus controlled in a protective order. I did not find that fact disabling.

A. Definitions

The matters defined and the language of definition where not in substantive dispute are carried over to a degree from the parties proposed orders. The definition of a confidential document is grounded in the language of FRCP 26(c), but the definition is further broken-down to make clear and better track the status of a given document at different stages of processing within the protective order procedures.

B. Designation and Disclosure of Proposed Confidential Information

Procedures for marking and tracking documents being reviewed under the protective order are set forth. The process is procedural only and does not modify or conflict with the substantive law respecting the issues involved. The procedure also provides for party consultations respecting these documents and allows for documents to be held confidential by all party agreement.

The Respondent is allowed, consistent with the requirements of the FRCP, under this procedure to elect the type and extent of initial disclosure to the other parties of information concerning the individual documents it has designated Confidential Information allowing the issue of confidentiality to be considered and, as necessary, argued and decided.

For those documents respecting which the Respondent seeks "Additional Restrictions on Charging Party Access", a special asymmetrical disclosure of the entire document to the General Counsel and a lesser extent of disclosure to the Charging Party is optionally provided.

C. Disputes Regarding Designation of Confidential Information

The protective order provides the procedure for resolution of disputes respecting the confidential status of documents designated by the Respondent as confidential. The language again makes clear the procedure does not change the applicable standards under the FRCP to establish confidentiality. As noted below under restrictions on use, confidential documents under the protective order are grossly categorized into simple or standard confidential information respecting whether a standard order limiting possession and use is sought and a second "all other" category in which additional factors may be advanced or additional restrictions sought and opposed.

D. Restrictions on Use of Confidential Information

The protective order provides generally for a "standard" or first level restriction for confidential documents which should be restricted from disclosure to other than the parties. This is consistent with the orders proposed by the parties and the FRCP. It then provides that other proposed restrictions on use of confidential information will be

resolved on a case by case basis on the specific facts relevant to the document. Again, all substantive law is unchanged by the procedure and the Administrative Law Judge retains full discretion to craft document specific use limitations as appropriate.

In essence the restrictions on possession and use of confidential documents are bifurcated. For those documents found confidential without a special request for greater restriction, a "standard" limitation is provided which tracks the essentially common position of the parties. As to all other circumstances in which a document is found confidential, but the Respondent seeks additional or non-standard restrictions on use, the Protective Order does not provide a specific restriction.

The parties have an ongoing dispute respecting certain categories of confidential documents to which the Respondent desires additional restrictions on Charging Party access. The protocol does not resolve or even narrow the issues of that dispute. Rather it in essence defers such disputes to the resolution process at which time specific documents may be considered and the full judicial discretion respecting the issue and restrictions ordered under Board rule and law and the FRCP may be applied.

E. Confidential Information Placed Under Provisional Seal at Hearing

The Protective Order recognizes that certain confidential material, if entered directly or indirectly into evidence by offer as an exhibit, or through testamentary or party filing document description or other allusion, should be appropriately be placed under seal. Similarly when certain confidential materials are discussed in such a manner in the court, on or off the record, it may be appropriate to close the hearing to the public in such circumstances. And, anticipating that such a sealed information process may be necessary and appropriate, procedures providing for the invocation of such a process are provided for. Finally, given that sealed material may then result, further procedures for handling sealed material are provided.

The Protective Order addresses these issues. Again the procedures are provided without modification of the FRCP and Board standards for determining that a given document in a given circumstances should be handled under the sealed protocol.

F. Confidential Information Placed Under Permanent Seal at Conclusion of Hearing

Similar to the provisional sealing procedures discussed immediately above, the Protective Order establishes a protocol for addressing provisionally sealed portions of the record. The applicable rule and case law on the questions and disputes arising in this setting as well as the judge's discretion are not limited or modified.

G. Subpoena by Other Courts or Agencies and Freedom of Information Act ("FOIA") Requests

The Board in *AT&T Corp.*, 337 NLRB 689 (2002), affirmed the rulings of the administrative law judge including the judge's issuance of a protective order prohibiting the furnishing of confidential materials to "outside sources pursuant to the Freedom of Information Act (FOIA) or pursuant to other requests". (337 NLRB 693 ALJD fn. 1).

Having the authority to so limit disclosure of confidential information, I have incorporated the language proposed by the Respondent and the General Counsel in their respective proposals.

H. Termination of the Proceeding

This portion of the Protective Order addresses the implications and consequences of maintenance of the confidential process after the termination of the proceeding.

I. No Waiver, Rights Reserved, Modification, Duration

These provisions are self evident and provide assurances to the parties as to the limitations of the Protective Order, its duration and a means of obtaining modification of its terms.

J. Violations

The Protective Order in this section provides that any party may make any claim of breach of the terms of this Protective Order to the attention of the Administrative Law Judge at any time, and the Administrative Law Judge will have and exercise his full authority to halt, ameliorate and remedy any sustained claim that a breach occurred which constituted conduct prejudicial to any party.

K. Appeals to the Board

The Protective Order establishes that appeals to the Board from the Administrative Law Judge's rulings under this Protective Order shall be governed by Rule 102.26 of the Board's Rules and Regulations.

L. The Omission of Proposed Language Providing for the Approval of the Protective Order by an United States Federal Court Judge

One of the elements of the Respondent's proposed protective orders, one not opposed in principal by the General Counsel, but specifically opposed by the Charging Party, was language providing for the submission of the protective order for approval by a United States District Court Judge. I believe I could have approved an all party stipulated protective order with such language, but the question did not arise since no such all party agreement was reached.

I did not include any US District Court Judge supervisory or approval language in the Protective Order. I did not do so because I find and conclude that I do not have the authority to issue a protective order subject to approval by a United States District Court. There is no statutory provision for an administrative law judge to take such an action. There is no Board rule addressing such a circumstance. I simply find no Board authority for such a proposition. Indeed, in *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011, n.7 (2005), the Board addressed indirectly the difference between the power of an Article III court with contempt power to enforce a protective order with the authority and power available to the Board and its judges to do so. At no time in *Teamsters Local 917* was the possibility of a US District Court Judge approved protective order discussed or addressed. Rather the Board indicated Board enforced protective orders were appropriate. No party has cited Board authority, direct or indirect, suggesting an NLRB administrative law judge has the authority to issue such a protective order.

Given all the above, I omitted to include in the instant Protective Order any language concerning or establishing a relationship between the Protective Order and the US District Court.³

Clearly a US District Court Judge ruling on subpoena issues in a proceeding under Section 11(2) of the Act would consider any protective order in the case if it applied to the subpoena evidence at issue. Such a circumstance does not require the protective order issued by an administrative law judge to have language providing for US District Court review of that protective order or require that the District Court review findings made by the administrative law judge under the protective order.

If the parties wish to obtain Federal District Court approval language for the Protective Order herein, they will have to file a special appeal to the Board under Rule 102.26 challenging both the Protective Order as written and my explicit finding here that I have no authority to issue or approve a less than all party protective order calling for United States District Court approval of the protective order and or language in the

³ The United States District Court does of course have a role in Board proceedings. If a party to an unfair labor practice trial refuses to comply with a subpoena or other related ALJ order, Section 11(2) of the Act provides in part:

(2) In case of contumacy or refusal to obey a subpoena issued to any person, any United States District Court or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

order providing for any supervisory or approval role of the District Court in the determinations and orders made by the administrative law judge under the Protective Order.

V. The Charging Party's Motion to Strike

As part of the parties' filings respecting the Protective Order, the failed negotiations were noted. The Charging Party takes issue with the Respondent's characterizations of those negotiations. Counsel for the Charging Party notes at page 1 of its motion:

Although the Charging Party trusts that the ALJ will disregard those portions of Boeing's supplemental brief concerning negotiations for an agreed order, the instant motion to strike is necessary to preserve an accurate record.

The Respondent filed a reply to the Charging Party's motion generally challenging the motion to strike, its factual assertions, and the relevance and significance of the entire dispute. Thereafter the General Counsel filed a reply to the Charging Party's motion generally supporting the Charging Party's position.

I find, based on the filings and the entire record to date, it is unnecessary to rule on the controversy. The instant order is unaffected by the state of party negotiations beyond the significant, but undisputed, fact that no all-party agreement was submitted to me. I shall not grant the motion to strike, but have not found the specifics of failed negotiations relevant to this ruling and have therefore disregarded them, including the Respondent's filing here under attack. I find it unnecessary to consider the matter further.

ORDER⁴

Based on the parties' filings and argument, the record as a whole to date, and the above analysis and conclusions, I issue the following:

The Parties Motions to Approve Their Respective Proposed Orders are each denied.

The Parties Motions Opposing the Approval of the Other Parties' Proposed Protective Orders are each granted.

⁴ Appeals from administrative law judge rulings on motions and are governed by the Board's Rule 102.26.

The Charging Party's Motion to Strike is denied.

The Protective Order attached as the Appendix to this Order will take effect immediately.

Issued at San Francisco, California this 12th day of August, 2011.

A handwritten signature in black ink, appearing to read 'Clifford H. Anderson', written over a horizontal line.

Clifford H. Anderson
Administrative Law Judge

APPENDIX

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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*, National Labor Relations 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" is any type of information which contains, includes, or consists of confidential, proprietary, and/or trade secret financial, personal, business, or technical information that the Respondent maintains in confidence in the ordinary course of business and which, if disclosed, will cause specific financial and/or competitive harm to the Respondent. The information has been submitted by the Respondent to the court under the terms of this protective order and is within the protective order protocols in one of the following sub-categories:

1. "Respondent Designated Confidential Information" - Any type of information which is submitted by the Respondent to the court under the terms of this

protective order and that is designated by the Respondent as confidential by the Respondent and shall contain, include, or consist of confidential, proprietary, and/or trade secret financial, personal, business, or technical information that the Respondent maintains in confidence in the ordinary course of business and which the Respondent reasonably and in good faith believes that, if disclosed, will cause specific financial and/or competitive harm to the Respondent.

2. "All Party Agreed Confidential Information" – Respondent Designated Confidential Information which has not been challenged by any party under the terms of this Protective Order.

3. "Adjudged Confidential Information" - Respondent Designated Confidential Information which has been determined by the ALJ, the Board or a United States District Court under this Protective Protocol to be confidential information.

"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. No current intervenor or amicus has been granted full rights of participation.

"Qualified Persons" includes the following individuals unless such individuals have been specifically limited by name or category to have access to specific confidential information under this Confidential Order:

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, contractors 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.

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 provided, however, that no such witness may retain a copy of any material designated as Confidential, except as otherwise provided under the Protective Order.

g. 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;

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.

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

Receiving Parties" means (i) the 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.

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

II. Designation and Disclosure of Confidential Information

A. Documents and or other information the Respondent seeks to submit under the terms of the Protective Order as "Respondent Designated Confidential Information" shall in all cases be marked on each page with Bates numbers and the word "Confidential". Each document shall have a full page, paque paper cover sheet affixed identifying the document by its first page Bates number and indicating its total pagination. 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.

The cover sheet shall prominently display the centered large print heading: "Submitted Protective Order Protocol – Limited Access".

Under the described heading, the cover sheet should have a grouping of 3 statements preceded by boxes susceptible to being checked off, as follows:

- Respondent Designated Confidential Information
- All Party Agreed Confidential Information
- Adjudged Confidential Information

Under the grouping of 3 statements described above, and separated by a vertical space of at least 2 inches, should be a second heading in large type: "Access/Distribution Limits Proposed by Respondent".

Immediately under that heading should appear the Respondent's proposed restrictions in detail: Thus, "Standard Protective Order Confidential Information Restrictions" will be a typical entry for general protections of confidential materials. A separate more restrictive requested limitation: "Additional Restrictions on Charging Party Access" would raise different issues. If neither choice is applicable, the correct proposed restriction on use of the information should be entered in lieu of one of the described entries.

B. For each document that the Respondent designates as Respondent Designated Confidential Information and submits for protection under the Protective Order, the Respondent will, contemporaneously with its submission, provide the General Counsel and the Charging Party with one of the following disclosures, to allow the General Counsel and the Charging Party to understand the nature and general content materials involved and the limitations on disclosure and use requested by Respondent:

1. an FRCP log,
2. a redacted document,
3. a modified document,
4. conditional disclosure of the document at issue, disclosed to the other two parties only for the purpose of a confidential status determination under the Protective Order, and therefore conditionally released subject to a final ruling on the Respondent's assertion of confidential protections under the Protective Order,
5. an asymmetrical disclosure of the document to the General Counsel and another form of disclosure to the Charging Party,
6. other reasonable means of appraising the Charging Party and the General Counsel of the maximum amount of information relevant to the documents status consistent with maintaining proper confidentiality.

The Respondent shall also submit to the other parties a showing of good cause setting forth the reason as to why the document or information must be treated as Confidential Information, as defined herein. Upon request, counsel for the Respondent will identify the category in the Bodensteiner Declaration to which a particular document or documents corresponds.

III. Disputes Regarding Designation of Confidential Information

A. The Charging Party or the General Counsel may challenge the Respondent's designation of any document as Designated Confidential Information by the following procedure: If the Charging Party and/or the General Counsel object to the Respondent's designation of a document as Confidential Information, the Charging Party and/or the General Counsel (hereinafter "the Objecting Party") shall serve a written notice of the dispute upon the other Party/Parties within sixty (60) days of receipt of notice from the Respondent that it has completed production in compliance with relevant portions of subpoena. All 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 by all party agreement respecting the document or information at issue. 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.

B. If the Respondent produces additional documents designated Confidential Information after it has provided its original notice as described above, the Respondent will repeat the disclosure and identification protocols described above. The Charging Party or the General Counsel may challenge Disclosing Party's designation of any such document as Confidential Information pursuant to the same procedure.

C. This Protective Order does not modify the factual and legal standards to establish "good cause" for applicability of this Order to a Designated Confidential document based on a showing that a) the Document in fact constitutes 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 b) disclosure of the Document will cause specific financial and/or competitive harm to the Disclosing Party.

D. Where there is any dispute pending regarding the designation of records or documents as Confidential Information at any stage of the procedures set forth in this Protective Order, the disputed matter and all parties' filings associated therewith shall be treated as Confidential Information and subject to this Order until final resolution of the dispute under the Protective Order.

IV. Restrictions on Use of Confidential Information

A. The Administrative Law Judge shall determine the appropriate limitations and restrictions that will be placed on the disclosure, use and sharing of confidential information under this Protective Protocol without limit to the power, authority and discretion possessed by the administrative law judge in these particulars under the statute, Board rules and decisional law. Determinations and establishment of limits as described are fact and context intensive and may require document by document

consideration in some circumstances. The discretion of the judge in determining the appropriate restrictions respecting a particular confidential document will not be limited to those sought by the Respondent or proposed by the other parties.

B. Only Qualified Persons may have access to agreed upon or adjudicated Confidential Information. 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.

C. 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.

D. 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 Proceeding resulting from the use of Confidential Information, however nothing in this Order shall be construed to limit in any way the right of the Respondent to use its own documents and information, including Confidential Information, for any purpose separate from the Board Proceeding and any Related Federal Court Proceeding.

E. In placing special restrictions on the disclosure and use of confidential information under the Protective Order, the Administrative Law Judge will act with the full range of discretion under the FRCP as adopted and allowed by Board rule and decision and such discretion may be applied on his own motion or in response to party motion in resolving disputes under the Protective Order.

V. Confidential Information Placed Under Provisional Seal of Record at Hearing

A. Immediately preceding any Party's introduction into the record of exhibits or filing of any Document containing Confidential Information during the Board Proceeding, the introducing Party shall notify the administrative law judge and the other parties of that fact. Any party may then move the Administrative Law Judge under this Protective Order, applying the appropriate legal standards for sealing documents in NLRB unfair labor practice proceedings, for an order placing such materials under seal and state the reasons therefore. Upon such motion, the other parties shall state on the record whether they agree to or oppose the motion. The Administrative Law Judge shall then order, without making any further findings, that the material may be introduced into evidence or, in the event the document is in a court filing, may be submitted by the filing Party, in either case under provisional seal.

B. Immediately upon any party's belief that a document or material designated as confidential under the Protective Order will be or may likely be referred to in open court in contravention of the Protective Order, the party holding such belief should notify the administrative law judge and the other parties. Upon motion by any 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 or fairly are expected to testify in a manner revealing confidential information. The portions of the official transcripts of proceedings taken while the hearing room is cleared pursuant to such order shall also be placed under provisional seal.

C. Final adjudication of any and all motions to permanently seal such provisionally sealed filings, exhibits and transcripts of proceedings shall be deferred by the Administrative Law Judge until the conclusion of the evidentiary stage of the hearing. Such adjudication will be part of the case and will be conducted on the record. The protocols respecting sealing of the transcript, exhibits and filings will also apply to this stage of the proceedings.

VI. Confidential Information Placed Under Permanent Seal at Conclusion of Hearing

A. At the closure of the hearing in the Board Proceeding, pursuant to such schedule as the Administrative Law Judge shall direct, the Respondent or any other party may file with the Administrative Law Judge a motion and any supporting brief to place under permanent seal, under the appropriate standard, any filings, exhibits and transcript excerpts containing Confidential Information that were earlier provisionally sealed under this Protective Order. Opposing parties shall submit briefs in response to the moving party's motion. To the extent that any such motion, affidavit, brief or other filing contains, quotes, or summarizes Confidential Information, it shall be filed under provisional seal and may be the subject of a motion to permanently seal the material at the conclusion of the hearing.

B. If, at any time, a non-Party seeks to intervene to challenge a party's motion to place portions of the record under seal, and if the request for intervention is granted, the Administrative Law Judge shall resolve the intervener's challenge at the same time and pursuant to the same procedure applicable to the parties.

C. The Administrative Law Judge shall issue a written or on record oral order in response to any motion or motions to permanently seal elements of the record that resolves in uncontested as well as disputed motions to permanently seal exhibits, filings and transcript excerpts in the permanent seal motion. Any Documents or transcript excerpts that were provisionally sealed under this Confidential Order but are not listed in any motion for permanent seal shall be ordered unsealed.

D. If any party seeks review of a ruling by the Administrative Law Judge that unseals an earlier provisionally sealed exhibit, filing, or transcript excerpt, any such material shall remain provisionally sealed pending the resolution of the review.

VII. Subpoena by Other Courts or Agencies

If another court or administrative agency subpoenas or orders production of Confidential Information that a party has obtained in the Board Proceeding, the party

that has received the subpoena or order shall notify the Disclosing Party of the issuance of such subpoena or order as soon as possible, but in no event later than three (3) days after receiving the subpoena or order, and in any event before the date of production set forth in the subpoena or order. The Respondent may then notify the person receiving the subpoena of the Respondent's intent to intervene to resist the subpoena. Should the Respondent give notice of such intent, the person receiving the subpoena shall take steps reasonable and necessary to withhold production while the Respondent'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.

VIII. Freedom of Information Act ("FOIA") Requests

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

B. The Acting General Counsel agrees that any information marked by the 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. General Counsel will not disclose any Confidential Information in response to a FOIA request without first providing the 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, the 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 the Respondent's objections, the General Counsel makes an ultimate disclosure determination, the General Counsel acknowledges that the Respondent may 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 Respondent files suit to enjoin disclosure of Confidential Information, the Board will not disclose such Documents pending the final disposition of that lawsuit.

IX. Termination of the Proceeding

A. Within 30 days after the final conclusion of the Board Proceeding and any Related Federal Court Proceeding including, without limitation, any judicial review, all materials found confidential under this Protective Order and which have not been made part of the record before the Board, shall be returned to counsel for the Respondent. Alternatively, at the option of the party in possession, all materials found confidential under the Protective Order and which have not been made part of the record before the Board, shall be destroyed and the Respondent notified in writing of that fact.

B. 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.

X. No Waiver

A. The inadvertent disclosure of privileged matter by the Respondent or its counsel shall not constitute a waiver of any applicable privilege. If the Respondent 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 under the terms of this Protective Order.

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.

XI. 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.

C. Nothing in this Protective Order is intended to or shall act to change or modify the substantive law respecting FRCP 26(c) or other rules and controlling case law respecting confidential documents.

XII. Modification

Nothing in this Protective Order shall prevent any party, or the Administrative Law Judge on his own motion, from seeking modification of this Protective Order.

XIII. Duration

This Order shall become effective upon its issuance. It shall remain in full force and effect until modified, superseded, or terminated by consent of the Parties and the General Counsel or by Order of the Administrative Law Judge or reviewing authority.

XIV. Violations

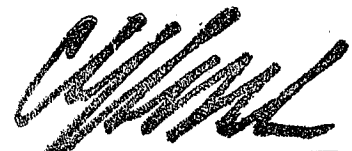
The Parties and Counsel for the Acting General Counsel may bring any claim of breach of the terms of this Protective Order before the Administrative Law Judge at any time, and the Administrative Law Judge will have and exercise his full authority to halt, ameliorate and remedy any sustained claim that a breach occurred which constituted conduct prejudicial to any Party.

XV Appeals to the Board

Appeals to the Board from the Administrative Law Judge's rulings under this Protective Order shall be governed by Rule 102.26 of the Board's Rules and Regulations.

SO ORDERED.

Issued at San Francisco, California, this 12th day of August , 2011.

A handwritten signature in dark ink, appearing to read 'Clifford H. Anderson', is written over a horizontal line.

Clifford H. Anderson
Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO, CA

THE BOEING COMPANY

and

Case 19-CA-32431

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

SERVICE OF: RULING ON THE PARTIES' MOTIONS FOR APPROVAL OF THEIR
RESPECTIVE PROTECTIVE ORDERS, THE RESPONDENT'S
MOTION TO STRIKE AND ISSUANCE OF PROTECTIVE ORDER
BY JUDGE CLIFFORD ANDERSON DATED AUG. 12, 2011

-BY REGULAR MAIL AND E-MAIL TO:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO, CA

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Served by: Susan George. at 415 356-5255, August 12, 2011