

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

THE BOEING COMPANY

and

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

Case 19-CA-32431

**IAM DISTRICT LODGE 751’S SUPPLEMENTAL BRIEF REGARDING  
RESPONDENT’S REQUEST FOR PROTECTIVE ORDER**

At the request of the Administrative Law Judge (“ALJ”), the Charging Party, International Association of Machinists and Aerospace Workers, District Lodge 751 (“District 751”), affiliated with International Association of Machinists and Aerospace Workers (“IAM”), submits this supplemental brief concerning the request by Respondent, The Boeing Company (“Respondent” or “Boeing”), for a Protective Order in the above-captioned unfair labor practices proceeding.

Despite the parties’ diligent efforts, the parties were not able to reach complete agreement on a stipulated protective order to submit to the ALJ for approval. The Charging Party therefore reasserts its motion that the ALJ adopt the Proposed Production and Protective Order Applicable to Documents of Respondent The Boeing Company, attached as Exhibit A to the IAM’s Brief Re: Respondent’s Request for Protective Order, with the few modifications detailed below.

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## ARGUMENT AND AUTHORITY

**I. THE ALJ SHOULD ISSUE A PROTECTIVE ORDER THAT RETAINS THE JUDGE'S AUTHORITY TO REGULATE THE COURSE OF THE HEARING, INCLUDING TO DECIDE EVIDENTIARY MATTERS, TO CONDUCT THE HEARING IN PUBLIC, AND TO MAINTAIN THE INTEGRITY OF THE PROCEEDINGS.**

District 751 respectfully requests that the ALJ enter a protective order which provides him full authority to rule on all evidentiary matters in the case, including claims of confidentiality, without the interference of a federal court. This NLRB unfair labor practice proceeding is governed by the Board's Rules and Regulations and Board decisional law, which grant the ALJ specific powers and broad discretion to conduct a full, complete and public hearing. The ALJ is a labor law expert and a trial judge. He sits in a unique position. His expertise and grasp of the facts and issues make him uniquely qualified to weigh the probative value of evidence and claims of privilege in this case. Federal judges are neither inclined by institutional disposition, nor required as a matter of law, to rule on such evidentiary issues when enforcing subpoenas. Here, the ALJ is in the best position to evaluate the competing considerations in light of the facts of the case, and thus to prevent the overly broad or abusive use of a protective order while at the same time ensuring the confidentiality of information that warrants it.<sup>1</sup>

It should be uncontroversial that the Board's rules and decisions empower the ALJ to issue and enforce protective orders. *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1111, n.7 (2005) ("Despite the [Administrative Law Judge's] stated aversion to issuing a

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<sup>1</sup> The Charging Party incorporates herein all of the concerns and objections raised in its earlier brief in opposition to Boeing's request to prohibit impacted union members, the public and the press from hearing the most critical evidence in the case, to improperly limit the Charging Party's right to full participation in this proceeding, to stall the case in ongoing battles in federal court related to confidentiality and to punitively disqualify the Union's chosen representatives in future collective bargaining negotiations.

protective order, it is clear that judges do have that authority.”), citing *AT&T Corp.*, 337 NLRB 689, 693, n.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);<sup>2</sup> *see also*, NLRB Division of Judges Bench Book, § 8-415. The Board has noted that violation of a protective order may be enforced by processing a charge of misconduct pursuant to the Board’s Rules and Regulations. *United Parcel Service*, 304 NLRB at 694. The Board’s rules and decisions give the ALJ broad discretion to admonish or reprimand any person who engages in misconduct at a hearing, to sanction attorneys or party representatives for misconduct at any stage of the proceedings, and to issue sanctions for subpoena noncompliance, based on the Board’s “inherent interest in maintaining the integrity of the hearing process.” 29 C.F.R. § 102.177; *McAllister Towing & Transportation*, 341 NLRB 394, 396-97 (2004), *enfd* 156 Fed. Appx. 386 (2d Cir. 2005) (discussing sanctions for subpoena noncompliance); NLRB Division of Judges Bench Book § 8-620, and cases cited therein. In accordance with that authority, the Charging Party does not object to the ALJ including a provision in the protective order specifically addressing sanctions for violations of the order, along the lines of the “Violations” provision proposed by Counsel for the Acting General Counsel (“CAGC”) in its July 25, 2011, Proposed Protective Order.

None of the authority cited by Boeing supports its argument that the ALJ here lacks effective authority to issue or enforce a protective order. For example, *Detroit Edison v. NLRB*, 440 U.S. 301 (1979) was an 8(a)(5) unfair labor practice case that did not involve subpoena enforcement or protective orders. The U.S. Supreme Court held that the NLRB abused its discretion by ordering an employer to disclose employment tests to the union with only minimal

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<sup>2</sup> Boeing cited *Peerless Importers* for the exact *opposite* proposition, quoting language from the ALJ’s decision in *Peerless*, with which the Board explicitly disagreed. Respondent’s Motion for Approval of a Protective Order at 16.

confidentiality restrictions, because disclosure of the contents of the test to those who would take the test in the future would compromise its integrity and the validity of the results, and there were no effective sanctions against the union in event of deliberate leaks as the union was not a party to the action to enforce the Board's remedial order. *EEOC v. Aon Consulting*, 149 F. Supp. 2d 601 (S.D. Ind. 2001) similarly involved employment tests. Neither case in any way limits the ALJ's authority to decide matters of confidentiality.<sup>3</sup>

If there are any doubts about how far the authority of the ALJ reaches concerning issuance and enforcement of a protective order, those doubts should be resolved in favor of a working protective order that allows decisions about evidence to be made as the evidence is introduced - the same right granted to any trial judge. The Union's proposed Protective Order thus establishes a process by which designations of confidentiality may be challenged before the ALJ, who is empowered to make good cause determinations as to disputed documents, to decide claims of privilege and to determine, after motion, whether to place any confidential documents under seal.<sup>4</sup> If the ALJ has exceeded his authority in crafting a Protective Order, the Board or

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<sup>3</sup> Boeing also cites two inapposite cases for the broad contention that "it is common for federal courts to enforce protective orders for the benefit of employers involved in administrative agency proceedings." In *NLRB v. William Filene's Sons Co* (D. Mass. 1982), involving a pre-Complaint NLRB investigative subpoena, the Court granted a protective order to prohibit the Board from disclosing information to the Charging Party. Quite obviously, here, the Charging Party has the right, post-Complaint, to full participation in this unfair labor practices proceeding. *See, e.g.*, 29 C.F.R. §§ 102.8, 102.38; *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 811 n.6 (D.C. Cir. 1997). The Court in *EEOC v. Aon Consulting*, 149 F. Supp. 2d 601, recognized U.S. Supreme Court and statutory authority to *permit* the EEOC to disclose information obtained in an investigation to the charging party, citing *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 598 (1981) (employer was required to comply with a subpoena despite EEOC's refusal to agree that the information produced would be kept confidential from the charging party; recognizing practical value of disclosure of information to charging party). The Court acknowledged that conditions for enforcement of subpoenas "should be rare and limited to extraordinarily sensitive information" and "because disclosure to charging party would ordinarily further the enforcement of the Act, disclosure should be the norm." *Aon Consulting*, 149 F. Supp. 2d at 608, quoting *Associated Dry Goods* at 598 and *EEOC v. Morgan Stanley & Co.*, 132 F. Supp. 2d 156 (S.D.N.Y. 2000).

<sup>4</sup> As explained below, the Union also supports, as an alternative, the provisional and permanent seal procedures set forth in the CAGC's July 25, 2011, Proposed Protective Order.

the Court will no doubt correct him.<sup>5</sup> However, if out of concerns regarding the extent of an ALJ's authority concerning protective orders, the ALJ here signs a protective order which divests him of authority to make rulings any trial judge would be expected to make,<sup>6</sup> the absence of asserted authority will undercut the ALJ's trial management and create delays in federal court. Boeing employees are being chilled by Boeing's unlawful conduct. A procedural order protecting Boeing's trade secrets should not become a weapon to prolong that chill.

In any event, the role of the district court in an administrative subpoena enforcement proceeding is quite limited. *E.E.O.C. v. City of Norfolk Police Dept.*, 45 F.3d 80, 82 (4th Cir. 1995), citing *EEOC v. South Carolina Nat'l Bank*, 562 F.2d 329, 332 (4th Cir.1977); *EEOC v. American & Efird Mills, Inc.*, 964 F.2d 300, 303 (4th Cir.1992). "The Court's consideration of a protective order is guided by the same concerns that underpin the judicial review of an agency investigative subpoena generally, which is to say, its role is sharply limited." *NLRB v. Engineering Steel Concepts*, No. 2:09-MC-72 PRC, 2010 WL 4852640 at \*2 (N.D. Ind. 2010). Agencies, not courts, should decide and implement procedures safeguarding confidentiality in the first instance. *See, FTC v. Texaco*, 555 F.2d 862, 884 (D.C. Cir. 1977) (holding a protective order imposed by a district court was improper because it placed the court in a position of control over an administrative agency in the exercise of its statutory duties); *FTC v. Stanley H. Kaplan Educ. Ctr. Ltd.*, 433 F. Supp. 989, 993 (D.C. Mass. 1977) (holding a federal court-issued protective order restricting the use of information sought by the FTC would be an improper

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<sup>5</sup> Boeing erroneously relies on the 4th Circuit *Interbake* decision to argue that the only means to establish an enforceable protective order is through the federal courts. Boeing Motion for Approval of a Protective Order at 16. Such an assertion is squarely at odds with the numerous Board cases, cited above, in which the Board and/or the ALJ adopted and applied a protective order. The quoted language from *Interbake* means at most that a federal district court in a subpoena enforcement proceeding would also have the authority to issue a protective order, if the court believed a protective order appropriate in determining whether the subpoena should be enforced. *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 499-50 (4th Cir. 2011).

<sup>6</sup> *See*, 29 C.F.R. § 102.35 (granting the ALJ full control over the trial proceedings, including to issue subpoenas, revoke subpoenas, examine witnesses, receive evidence, and rule on claims of privilege, etc.).

exercise of judicial power; agency rulings regarding confidential treatment of subpoenaed information (e.g., to require disclosure of competitive information without a protective order) must be upheld unless they are arbitrary and capricious); *FCC v. Schreiber*, 381 U.S. 279, 293 (1965) (endorsing a rule which required full disclosure of all evidence to the public, except in extraordinary circumstances where disclosure would irreparably damage private, competitive interests and where such interests outweighed the paramount interest of public disclosure). Protective orders that would enmesh the district court in the administrative proceeding are improper. *FTC v. Stanley H. Kaplan Educ. Ctr. Ltd.*, 433 F. Supp. at 993.

**II. THE ALJ SHOULD DENY BOEING'S REQUEST TO EXCLUDE THE CHARGING PARTY FROM EVIDENCE, AS THE REQUEST IS BASED ONLY ON SPECULATIVE, CONCLUSORY CLAIMS THAT DISCLOSURE OF CERTAIN INFORMATION WILL UNFAIRLY ADVANTAGE THE UNION IN BARGAINING AND WOULD IMPROPERLY EXCLUDE THE CHARGING PARTY FROM FULL PARTICIPATION IN THE PROCEEDINGS.**

**A. Adoption Of Boeing's Proposed "Highly Confidential" Category Of Documents And The Related Disqualification Provisions Would Deny The Charging Party Its Right To Full Participation In The Hearing And Its Choice Of Bargaining Representative In Future Collective Bargaining Negotiations.**

Boeing's claim that the Union's access to certain documents would give it an advantage in bargaining simply cannot trump its rights as a party in this case. In its opening brief, the Union explained at length the practical and legal reasons why Boeing's proposed protective order improperly excludes the Charging Party from the full participation in the hearing to which it is entitled and its choice of bargaining representative in contravention of applicable regulations and case law. *See*, IAM District 751 Brief Regarding Respondent's Request for Protective Order at 14-24. The Union expressly reincorporates that argument and authority here.<sup>7</sup> As a practical

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<sup>7</sup> At oral argument, Boeing referenced *NLRB v. Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO*, 476 F.2d 1031 (1st Cir. 1973), cited in the Union's brief, as establishing that the Charging Party's rights in this hearing are

matter, under Boeing's proposed order, the Charging Party would be denied access not only to subpoenaed documents, but to documents that the CAGC or Boeing offer as evidence in the case. If only a single document designated by Boeing as "Highly Confidential" contains relevant probative evidence that helps advance the unfair labor practice claims or defeat the defenses raised by Boeing, then denying the Charging Party access is inconsistent with the Board's rules and minimum due process requirements. *See*, 29 C.F.R. § 102.8; 29 C.F.R. § 102.38 ("[a]ny party shall have the right to...call, examine, and cross-examine witnesses, and to introduce into the record documentary evidence").

Nor is the dilemma offered by Boeing's proposed disqualification provision consistent with due process and the NLRA. If the ALJ adopts Boeing's proposed disqualification provision, District 751 must choose between having its counsel fully participate in this proceeding, or represent the Union in future bargaining, but not both. David Campbell is lead counsel in this case, and he is also the Union's long-time legal representative in collective bargaining with Boeing, having represented the Union in negotiations since 1995. If relevant evidence will be withheld from lead counsel, then the Charging Party is denied the ability to utilize and access what may be critical evidence. If such evidence is sealed, then the Charging

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limited. To the contrary, the First Circuit stated that a charging party in an unfair labor practice proceeding is a party that may participate fully in the hearing, by introducing and objecting to evidence, cross-examining witnesses, etc. 476 F.2d at 1036. While the court acknowledged that the charging party does not have the same status as a civil litigant, the recognized limitations to that status are not at all related to the restrictions that Boeing attempts to impose upon the Union in this proceeding through its "Highly Confidential" designation and disqualification provisions. *Id.* (noting, for example, that the charging party cannot overrule the agency's decision not to issue a complaint and holding that its right to a hearing based on objections to a settlement is not absolute). Respondent also referenced the *In re Bellsouth Corp.* case, cited in the Charging Party's protective order brief in support of the well-settled principle that a litigant has the right to choose his or her own counsel. 334 F.3d 941 (11th Cir. 2003). In its brief, the Charging Party acknowledged what Boeing appeared eager to point out - that the Eleventh Circuit in *Bellsouth* found that the presumptive right to counsel of one's choice could be overridden, where, for example, the lawyer was chosen "with the sole or primary purpose of causing the recusal of the judge." IAM 751 Brief at 23, n. 6. Here, Boeing seeks to disqualify the Union's choice of legal representative without any such egregious conduct, indeed without any "compelling reason" at all.

Party will not even be privy to evidence presented, and perhaps considered and deemed determinative, in this case when it writes its post-hearing briefs and argues any appeal.

Granting certain member(s) of the trial team access to all documents, but not lead counsel, creates an impractical, if not impossible, scenario in which lead counsel is examining certain witnesses without full knowledge of the available evidence that his co-counsel possess, and in which lead counsel must be asked to leave the courtroom while certain witnesses are questioned. Furthermore, Boeing proposes a process that grants itself full liberty to self-designate documents as “Highly Confidential,” and the Union’s counsel is disqualified from future bargaining immediately upon viewing the documents, even though he lacks access to the witnesses he would need to use or understand those same documents. Furthermore, even if the Charging Party were to choose to use the undersigned counsel for this proceeding and be disqualified, counsel would still need to ask its designated representative, IAM District 751 President Tom Wroblewski, to leave the courtroom when such evidence was discussed.

We do not yet know what evidence will be in this “Highly Confidential” box, but we do know that if the evidence rebuts Boeing’s defenses and requires the understanding of the Union officials and witnesses to explain its significance in the case, then denying the Charging Party access to such evidence falls short of minimum due process requirements. Given Boeing’s sweeping definitions of “Confidential” and “Highly Confidential,” as including business planning, strategy, studies and analyses regarding work placement--that is, the precise contemporaneous documents related to the basis, process and purpose for Boeing’s work transfer decision, the Charging Party’s exclusion from evidence central to the case is likely. Certainly, once the hearing ends, the Charging Party needs, but under Boeing’s proposal would be denied,



access to the entirety of the evidence in writing its brief and making its argument to the ALJ, and if his decision is appealed, then to the Board and any reviewing Court.

**B. Boeing Has Not Established, As It Must, That Disclosure Of Any Subpoenaed Documents To The Union Would Result In A Clearly-Defined And Serious Injury To It.**

In seeking a protective order under FRCP 26(c), a party must demonstrate that “good cause” exists to justify the order. At oral argument, Boeing debated the degree of injury that must be shown in order to establish “good cause,” but federal courts have repeatedly and consistently held that good cause is shown only when the moving party establishes with specificity that disclosure “will inflict a clearly defined and serious injury” on the disclosing party. *Spinturf, Inc. v. Southwest Rec. Industr., Inc.*, 216 F.R.D. 320 (E.D. Pa. 2003); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994), quoting *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984); *Hobley v. Burge*, 225 F.R.D. 221, 224 (N.D. Ill. 2004); *see also, Humboldt Baykeeper v. Union Pacific R. Co.*, 244 F.R.D. 560, 563 (N.D. Cal. 2007) (the presumption in favor of freedom of dissemination “cannot be outweighed by mere speculative threats of harm to other interests. Instead, a proponent of a protective order must demonstrate that...if the disclosure occurred it ‘would cause an identifiable, significant harm.’”), quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130, 1131 (9th Cir. 2003).

This is not hypothetical harm, based on conclusory allegations or generalized contentions of possible injuries, but is rather a particularized inquiry requiring the disclosing party to identify specific and detailed examples of harm that would result from public access to each document sought to be withheld. *Humboldt Baykeeper*, 244 F.R.D. at 563; *Contratto v. Ethicon, Inc.*, 227 F.R.D. 304 (N.D. Cal. 2005); *Pansy*, 23 F.3d at 786-87; *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987). In deciding whether “good

cause” exists, federal courts generally balance the requesting party’s need for information against the possible injury accompanying public dissemination. *Pansy*, 23 F.3d at 786-87

There are two significant problems with Boeing’s proposed protective order in this regard. First, unlike the Union’s proposed order, which incorporates the FRCP 26 standard, Boeing’s proposed order replaces the good cause standard with a process that allows Boeing to designate as “Confidential” any document that falls within one of five exceedingly broad categories of documents, without any good faith belief that disclosure would inflict any injury upon it. Even as to “Highly Confidential,” Boeing sets a lesser standard than that required by FRCP 26 and federal case law. Boeing is permitted to designate a document as such if “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.” Boeing Proposed Order at 4. By that standard, a “Highly Confidential” document could be withheld from the Union, regardless of any resulting injury, if disclosure to the Union would advantage the Union in bargaining. This unfettered discretion to conceal information from the public, the Union and its members simply does not comport with applicable law. A protective order adopting such a standard would be vulnerable to collateral attack by third parties who would be largely shut out from the proceedings.

Second, the affidavit provided by Boeing at most establishes good cause that some protective order is warranted. Boeing provides a specific basis for concluding that the subpoenas reach trade secret and certain other proprietary information, the disclosure of which to the public would inflict competitive harm. However, the affidavit’s conclusory statements about, for example, a broad range of “tax and financial” information, are exactly the unsupported, non-specific statements that courts have found inadequate to establish good cause. *See, Contratto*,

227 F.R.D. 304; *Harrisonville v. Telephone Co. v. Illinois Commerce Com'n*, 472 F. Supp. 2d 1071 (S.D. Ill. 2006). Indeed, ¶ 12 of the Bodensteiner affidavit, discussing supposed harm if information were disclosed to the Union, makes little sense. He writes

Such parties (it is unclear to whom he is referring) 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.

There is no correlation between the contentions in this affidavit and the types of work placement decisional documents Boeing has identified it would consider as "Highly Confidential." The Charging Party, along with its representatives and its counsel, would be required to protect any Confidential information from public disclosure, so there is no factual or logical basis by which the ALJ could conclude that sharing such information with the Union would make Boeing vulnerable with regard to mergers, joint ventures, prices on the market or would cause any other financial harm.

Finally, any protective order must include a prompt challenge procedure that allows the recipients of Boeing's subpoenaed documents to dispute the "Confidential" and "Highly Confidential" designations with rulings to be issued by the ALJ based on "good cause" determinations made about specific disputed documents. *See*, IAM 751 Brief at 11-12 (and cases cited therein).

**C. Patent and Copyright Infringement Cases Are Not A Useful Guide To The ALJ In Crafting a Protective Order Here, Because The Union Is Boeing's Business Partner, Not Its Competitor.**

In support of its two-tier designation and disclosure system, Respondent cites to numerous cases involving copyright and patent infringement and acts of corporate espionage, but

none arising in a labor context.<sup>8</sup> This authority does not support the need for either an “Attorneys’ Eyes Only” provision or for disqualification of the Union’s chosen representatives in future bargaining negotiations based on disclosure of confidential documents to counsel, experts or witnesses in wholly separate litigation. Neither does the sample protective order attached to Boeing’s motion, which contains neither a “Highly Confidential” category (or any two-tier designation system) nor a disqualification provision. Respondent’s cited cases have as their foundation what does not exist between Boeing and District 751 here: a competitive relationship between the parties where trade secrets can be used to the benefit of one party and the severe detriment of another.<sup>9</sup>

In the attempt to draw a parallel to these cases, Respondent frequently characterizes the relationship between itself and the Union as one “[t]hat is in material respects indistinguishable from those of competitors, suppliers, or customers.” (unofficial transcript, day 15 at 13:19-21). Drawing from this characterization, and the particular procedures necessitated in patent and copyright infringement cases, Respondent reasons that it is entitled to the same restrictions on access and choice of counsel as might be proper in cases where the parties are fierce competitors, arguing that “[t]here is *no* basis to assert that the sometimes disputatious relationship between Boeing and the IAM is an exception to this norm.” (Boeing’s Motion for Protective Order at 24).

However, the relationship between the parties to this proceeding *is* an exception to this norm in that it involves a necessary interdependence and ongoing interaction not found in

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<sup>8</sup> Respondent also cites to *In re Anonymous Online Speakers*, No. 09-71265, 2011 WL 61635 (9th Cir. 2011) and *Salmeron v. Enterprise Recovery Sys. Inc.*, 579 F.3d 787 (7th Cir. 2009). *In re Anonymous Online Speakers* involves neither patents nor copyright issues, and the court only mentions the existence of a protective order. Similarly, *Salmeron* is not a copyright or patent case and addresses only whether an attorney violated an “attorney’s eyes” provision. Neither case provides analysis as to when such a provision is appropriate.

<sup>9</sup> No one disputes that some of the subpoenaed information likely contains trade secrets and that trade secrets should be protected from public disclosure. What is hotly contested is Boeing’s attempt to shield from the *Union’s* view evidence central to the reason behind the siting decision at issue in this case, including “asset allocation and utilization plans” and “studies and analyses dealing with work placement.”

competitive business relationships. When Boeing prospers, the Union prospers, and each party to the relationship is dependent on the other for their continued mutual success. This is the relationship that lies at the heart of the National Labor Relations Act.

**D. The Rationale For “Attorneys’ Eyes Only” Provisions In Cases Involving Business Competitors Is Inapplicable To The Current Proceeding And Does Not Justify Denying The Union Access To, And Participation In, The Unfair Labor Practice Proceeding.**

Respondent cites to a number of cases from areas of the law where concerns over trade secrets and confidentiality are inherent in any proceeding, such as cases concerning the misappropriation of trade secrets, patent litigation and patent prosecution bars.<sup>10</sup> However, the reasoning behind the cited courts’ decisions to either grant or deny protective orders is inapplicable to the current proceeding. For example, Respondent cites *Covey Oil Co.*, an anti-trust case where the court prudently limited access to material subpoenaed from *third-parties who were not involved in the litigation* to counsel and certified public accountants assisting in the case.<sup>11</sup> *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965).

Patent litigation presents a unique situation where a disclosing party in such a case could argue that a patent attorney who both prosecutes patents and participates in the litigation for the receiving party could somehow intentionally or unintentionally misuse the disclosed confidential information in their patent prosecution duties. *See Gen-Probe Inc. v. Becton, Dickinson & Co.*, 267 F.R.D. 679 (S.D. Cal. 2010) (questioning whether a court could issue a protective order precluding party’s outside counsel from seeing confidential information if that counsel engaged in patent prosecution for any client in the industry). In order to determine if an attorney needs to

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<sup>10</sup> Respondent relies heavily on cases involving patent prosecution bars, which have been recognized as “unique to patent law.” *Gen-Probe Inc. v. Becton, Dickinson & Co.*, 267 F.R.D. 679, 683 (S.D. Cal. 2010).

<sup>11</sup> Respondent’s motion actually characterizes this as a denial of information to “in-house” counsel, but the decision does not appear to draw that distinction.

be placed under such restrictions, courts look to see if that attorney is involved in “competitive decision making” which is defined as “involv[ing] counsel’s advice and participation in any or all of the client’s decisions...*made in light of similar or corresponding information about a competitor.*” *U.S. Steel Corp. v. United States.*, 730 F.2d 1465, 1468 n.3 (D.C. Cir. 1984) (emphasis added).

The rationale behind all of these cases is clearly inapplicable here. First, the Union is not one of Boeing’s industry competitors, and the proceedings do not concern how to build a 787. Second, while patent prosecution bar cases may on the surface offer a tempting analogy, the Union’s counsel is not advising the Union on how to build an engine or design a fuselage. Thus, unlike in patent, trade secret and copyright cases, where the parties are industry competitors, disclosure to the Union of the kinds of information Boeing seeks to keep secret – such as studies and analyses *dealing with a work placement decision made back in 2009* - could not conceivably result in the kind of competitive economic harm described in the affidavit attached to Boeing’s motion. *See*, Boeing’s Motion for a Protective Order, Ex. D (Bodensteiner Declaration alleging that disclosure to the Union of confidential information would make Boeing vulnerable in prospective mergers or joint ventures, would minimize Boeing’s profits and could affect the prices that it is able to obtain on the market).

Respondent also argues that the Union should not be able to obtain through a properly issued *subpoena duces tecum* probative documents pertaining to the unfair labor practice allegations simply because the Union might not be entitled to such information outside the context of this litigation. Apparently failing to find any Board or federal law to support this argument, Boeing cites a number of labor cases involving denials of a union’s information request of little relevance here. For example, *Neilsen Lithographing Co.* and *United Steelworkers*

both stand for the oft-cited notion that a union can request financial documentation from an employer only when the employer claims an inability to pay.<sup>12</sup> In *Emeryville Research Center*, the court denied the union's request for salary data, not because it was confidential to the employer, but because the employer had developed the salary structure using confidential information from other companies that the employer agreed to keep secret, and the employer had provided the union with equivalent information already. *Emeryville Research Center v. NLRB*, 441 F.2d 880, 882 (9th Cir. 1971). Finally, Respondent cites *Graphic Communications* as identifying a concern that unions may use requests for salary information to harass the employer. Indeed the court felt that a union could use information requests to harass, but that was in a larger exploration of the potential ways a union could abuse the process, and the court eventually determined that the union was not entitled to the information simply because the employer had not claimed an inability to pay. *Graphic Communications, Local 508 v. NLRB*, 977 F.2d 1168, 1171 (7th Cir. 1992).

Finally, disqualification of counsel, even in business competitor cases, is not as commonplace as Respondent portrays and is not justified by conclusory allegations of hypothetical harm. Even in Respondent's cited patent cases, in which the unique context sometimes requires a court to consider exclusion of counsel, courts do not automatically assume a prosecution bar. Instead, courts weigh the rights and interests of the parties to determine whether the situation necessitates interfering with a party's choice of representative. For example, in *Brown Bag Software*, in which the Respondent argues the court prevented in-house counsel from "lock[ing] up trade secrets in his mind" to use in advising the employer "on a gamut of legal issues involving the defendant," the court stresses that the interests of the parties

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<sup>12</sup> *Nielsen Lithographing Co.*, 305 NLRB 697 (1991); *United Steelworkers of Am., Local 14534 v. NLRB*, 983 F.2d 240 (D.C. Cir. 1991).

should be subject to a balancing that considers not only the presence of trade secrets but the interests of the party seeking discovery as well. *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992).

Nor can *Brown Bag* be considered an outlier patent case; indeed, several of Respondent's cited cases discuss an approach that balances the interests and concerns of the parties. *See Infocint S.A. v. H. Lundbeck A.S.*, No. 06CIV2869LAKRLE, 2007 WL 1467784, at \*2 (S.D.N.Y. May 16, 2007) (“Where a party seeks a protective order restricting the scope of discovery of technical, proprietary information, the court should balance ... ‘the interests in full disclosure of relevant information and reasonable protection from economic injury’”) (quoting *Uniroyal Chem. Corp.*, 224 F.R.D. 53). *See also Gen-Probe Inc. v. Becton, Dickinson & Co.*, 267 F.R.D 679, 686 (S.D. Cal. 2010).

Respondent’s cited cases demonstrate that a party cannot achieve disqualification of counsel merely by raising the specter of harm without some evidentiary basis. For example in *Gen-Probe*, it was not enough that the opposing party prosecuted patents for industry competitors, the complaining party needed to support its objections with concrete examples of their concerns. *Id.* at 685-86. Similarly the court in *Quotron* stated that “a party asserting that ‘discovery will cause competitive injury because of the revelation of trade secrets...cannot generally rely upon conclusory statements, but must present evidence of specific damage likely to result from disclosure.’” *Quotron Systems, Inc.*, 141 F.R.D. 37, 41 (S.D.N.Y. 1992) (quoting *Culligan v. Yamaha Motor Corp.*, 110 F.R.D. 122, 125-26 (S.D.N.Y. 1986). In the present proceeding, Respondent has yet to offer concrete examples of the harm it would suffer if the Union’s counsel is allowed full access to the documents and evidence in this proceeding and to participate in future negotiations. Paragraph 12 of the Bodensteiner affidavit contains just the



kind of conclusory, unsupported, hypothetical allegations that these courts found insufficient to warrant disqualification.

Thus, the bulk of the authority relied on by Respondent to support its “Highly Confidential” and disqualification provisions wholly fails to support the extraordinary and punitive restrictions that Boeing is attempting to impose on the Charging Party’s participation in this proceeding and its choice of bargaining representative. Applicable authority in the labor context directs that the appropriate protection is to limit to this proceeding the disclosure and use of the union-sensitive information produced by the disclosing party in response to the subpoenas. *See, Bonin v. World Umpires Assoc.*, 204 F.R.D. 67 (E.D. Pa. 2001) (where disclosure to employer organization and rival labor organization of union’s relevant financial information would unfairly advantage the other parties in future labor representation efforts and at the bargaining table, the court found good cause for a protective order permitting disclosure to the parties, restricting the use of the financial information to the instant litigation and requiring experts to agree to non-disclosure).<sup>13</sup> The Charging Party’s Proposed Protective Order here already provides those protections for all Confidential information. *See*, Proposed Order ¶ 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), ¶ 13 (witnesses and prospective witnesses (including expert witnesses) and independent support services must “agree in writing to abide by and comply with the terms and provisions therein”). Any protective order issued in this case should not include a two-tier

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<sup>13</sup> Cases involving protective orders to restrict a party’s access to the other’s internal bargaining strategy and negotiating priorities do not appear relevant to the protective order here, because Boeing does not appear, by this protective order, to be seeking to limit disclosure of such documents. *See*, Boeing’s Proposed Order at 4 (seeking to withhold from the Union “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.”).

designation system or attorneys' eyes only provision that would exclude the Charging Party from any evidence in this case.

**III. IN WEIGHING THE INTERESTS AT STAKE IN DRAFTING THE PROTECTIVE ORDER, THE JUDGE SHOULD CONSIDER THE INTEREST OF THE DISCRIMINATEES IN HEARING BOEING'S EXPLANATION AS TO WHY IT CHOSE TO MOVE THE SECOND 787 FINAL ASSEMBLY LINE FROM WASHINGTON TO SOUTH CAROLINA.**

Boeing's request for a protective order requires the ALJ to resolve the tension between one party's privacy interests and another party's or the public's right to know what evidence there is to support or defend the unfair labor practices alleged in this case that is so vitally important to Boeing's employees, both union and non-union, and, indeed, to workers throughout the United States.

Discriminatees have a right to unrestricted presence during a Board hearing, with only limited exclusions "during that portion of the hearing when another of the General Counsel's or charging party's witnesses is testifying about events to which the discriminatees have testified, or will or may testify, either in the case-in-chief or on rebuttal, unless, in the judgment of the Administrative Law Judge, there are special circumstances warranting the unrestricted presence of discriminatees or total exclusion when not testifying." *Unga Painting Corp.*, 237 NLRB 1306, 1307 (1978). The Board reasoned:

We foresee an undesirable consequence if discriminatees are excluded from hearings in their entirety, to wit, a loss of public confidence in the Board's processes. A man's livelihood is, financially at least, the core of his existence. Separating him entirely from a process determining his right to reinstatement to his former job, and to reimbursement for wages lost as a result of a discriminatory discharge, may add insult to injury. There is no substitute for experiencing—at least to some degree—the remedial process, albeit confrontation as such is normally requisite only in the criminal context. In our view, the educational benefits accruing to *all participants* in Board proceedings serve to stabilize labor-management relations by cultivating an appreciation of conflicting policy considerations and of the decision making process.

*Id.* at 1308.

As the discriminatees in this case, victims of Boeing's unlawful actions, rank and file union members have a right to be present throughout the proceedings. To enter Boeing's order excluding District 751's members – the discriminatees here – from the hearing would exacerbate the adverse impact of the continuing chill of Boeing's unlawful conduct. Even a narrowly drawn protective order will require the ALJ to clear the courtroom whenever Confidential information is introduced and discussed. Each time that happens, the Union members will be denied the opportunity to hear the evidence to either substantiate and validate the unfair labor practice charges or to provide the basis for Boeing's defenses. Thus, the ALJ should use his discretion to craft a protective order that achieves the greatest possible public access to the proceedings while at the same time protecting Boeing's legitimate need to protect information that, if publicly disclosed, would cause it serious harm. District 751 believes that its proposed order establishes appropriate procedures to allow the ALJ to make such determinations as to specific documents throughout the course of the hearing in the least disruptive manner.

**IV. IF THE ALJ DETERMINES THAT A PROTECTIVE ORDER MUST PROVIDE SOME PROCESS FOR ADDRESSING BOEING'S ASSERTED RIGHT TO WITHHOLD INFORMATION IT BELIEVES WOULD INJURE BOEING IF DISCLOSED TO THE UNION, THEN THE CHARGING PARTY AGREES TO A HYBRID DESIGNATION AND CHALLENGE PROCEDURE.**

At oral argument on Boeing's motion for a protective order, District 751 acknowledged that, if the ALJ determined that there was "good cause" to protect certain union-sensitive information from District 751, it would agree to a hybrid disclosure process to address Boeing's concerns. To that end, the Charging Party proposes an additional paragraph under "Disclosure of Confidential Information" as follows:

The Disclosing Party asserts an as yet untested right to withhold from the Charging Party those documents designated as Confidential for which the Disclosing Party has a reasonable good faith belief that disclosure to the Charging Party would likely result in an unfair advantage to the Charging Party in future collective bargaining negotiations. If, at the time of the Producing Party's production of subpoenaed documents the Producing Party withholds documents from the Charging Party based on this asserted right, the Producing Party must nevertheless produce such documents to the CAGC and simultaneously provide to the Charging Party a log that will identify the date, author, recipients, title, general nature of the document of communication, and the factual or other basis for the Producing Party's belief that the documents should be withheld from the Charging Party. The description of the nature of the documents withheld should be such that, without revealing the Confidential information, it will enable the assessment of whether there is good cause for such withholding. Such documents shall be referred to as "restricted." The Charging Party or the CAGC may challenge the Producing Party's failure to produce any document to the Charging Party pursuant to this section under the Dispute procedure set forth in ¶¶ \*\*. In no event may the Charging Party be denied access to any document introduced into evidence, any testimony, or any information sufficiently probative that 1) denial of access by the Charging Party would interfere with the CAGC's prosecution of the alleged unfair labor practices or 2) access by the Charging Party is necessary to the Charging Party's full participation as a party in the case.

The first sentence of the first paragraph under Disputes would then be amended as follows:

The Charging Party or the CAGC may challenge Respondent's designation of any document as Confidential or restricted by the following procedure: If the Charging Party and/or the CAGC object to the Producing Party's designation of a document as Confidential or restricted, the Charging Party and/or the CAGC (hereinafter "the Objecting Party") shall serve a written notice of the dispute upon the Acting General Counsel and the other Party/Parties within thirty (30) days of receipt of notice from Respondent that it has completed production in compliance with the subpoenas.

District 751 also does not object to the procedures contained in the proposed Protective Order submitted on July 25, 2011, by CAGC concerning 1) confidential information placed under provisional seal at hearing, 2) confidential information placed under permanent seal at conclusion of hearing and 3) Freedom of Information Act ("FOIA") requests. District 751

believes that the procedures proposed by CAGC set forth an appropriate protocol for sealing evidence, because the protocol minimizes disruptions to the administrative proceeding, properly maintains the burden for sealing evidence on the moving party, applies the appropriate standard for sealing evidence and protects Boeing's asserted interests in preserving the confidentiality of trade secret and other confidential commercial information.

It is important to note that while the Ninth Circuit recognized that “‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and justify sealing court records exist” when court files might be used to release trade secrets, *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-80 (9th Cir. 2006), Boeing’s Proposed Protective Order seeks to prohibit the disclosure of, and automatically and permanently seal from public view, a broad swath of non-confidential information central to the claims and defenses at issue in this case – information that Boeing does not in any way claim to be trade secrets. The information that Boeing proposes to automatically seal includes, for example, business strategy or planning documents, “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,” generalized tax and financial information and studies or analyses dealing with work placement. A separate process providing for the heightened “compelling reasons” showing should be applied before any evidence is placed permanently under seal.

### **CONCLUSION**

District 751 reiterates its request that, if the ALJ finds that Boeing has adequately demonstrated the prerequisite good cause for a protective order, the ALJ adopt, with the modifications described above, the Proposed Production and Protective Order Applicable to

Documents of Respondent The Boeing Company, attached as Exhibit A to District 751's Brief Regarding Respondent's Request for Protective Order.

Respectfully submitted this 5<sup>th</sup> day of August, 2011.

A handwritten signature in black ink that reads "Dave Campbell" followed by a flourish and the initials "by Tom".

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## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2011, I caused the foregoing to be e-filed with the National Labor Relations Board Division of Judges and a copy to be e-mailed to the following:

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