



1 The National Labor Relations Board (the "NLRB"), by the undersigned Counsel for the  
2 Acting General Counsel of the NLRB ("AGC"), has made an Application, pursuant to § 11(2) of the  
3 National Labor Relations Act ("NLRA" or "the Act") [29 U.S.C. § 161(2)], for an Order compelling  
4 Respondent The Boeing Company ("Respondent") to comply with a Board trial subpoena *duces*  
5 *tecum* (Number B-648185) (the "Subpoena"), subject to the protective order issued by the  
6 administrative law judge in the underlying NLRB proceeding.

7 **I. INTRODUCTION**

8 The complaint underlying this action alleges that Respondent, in violation of §§ (8(a)(1) and  
9 (3) of the NLRA [29 U.S.C. §§ 158(a)(1) and (3)], made a discriminatory decision to transfer its  
10 second 787 Dreamliner airplane assembly line (and accompanying sourcing supply program) from  
11 employees represented by Charging Party International Association of Machinists and Aerospace  
12 Workers District Lodge 751 ("Charging Party") to non-union sites in North Charleston, South  
13 Carolina. Respondent denies these allegations. For nearly the past five months, this matter has  
14 been before Administrative Law Judge Clifford H. Anderson ("ALJ Anderson") for hearing. The  
15 majority of that time was spent addressing Respondent's objections regarding the Subpoena. ALJ  
16 Anderson heard oral argument and ruled on Respondent's objections to the Subpoena, including  
17 those as to relevance, breadth, and burdensomeness.<sup>1</sup> Thereafter, he issued and then amended a  
18 Protective Order setting forth the protocol to be followed where handling of confidential information  
19 contain in the subpoena documents.

20 The parties have operated consistent with terms of the Protective Order. For example, the

---

<sup>1</sup> For example, after Respondent identified certain undisclosed documents as containing attorney-client and/or attorney work-product information, the AGC withdrew the Subpoena's demand for such items. (App. at ¶ 9). Accordingly, there is no dispute regarding the application of these privileges.

1 parties have agreed to treat as “confidential” each piece of information Respondent has so  
2 designated (*see* App. at ¶ 16), and have referred to ALJ Anderson all challenges to Respondent’s  
3 additional proposed restrictions (*id.* at ¶¶ 17-19). Respondent has also voluntarily allowed ALJ  
4 Anderson to review *in camera* unredacted versions of the disputed redactions, and ALJ Anderson  
5 has ruled on more than fifty (50) disputed redactions. No party has appealed the Protective Order  
6 or any of ALJ Anderson’s rulings.

7           Despite the issuance of the Protective Order, and ALJ Anderson’s rulings regarding  
8 confidentiality designations under that now-established protocol, Respondent has refused to  
9 disclose information responsive to the Subpoena in unredacted form. Rather, Respondent has  
10 stated that it will produce unredacted documents only upon order of a Federal District Court. In  
11 these circumstances, the NLRB urges this Court to affirm the Protective Order, to order all parties to  
12 comply with its terms, and to order Respondent to comply with the Subpoena by producing  
13 unredacted versions of (i) all documents which have been produced with “confidential” information  
14 redacted, and (ii) all individual documents ordered produced by ALJ Anderson. The NLRB  
15 respectfully submits that ALJ Anderson has properly ruled on all subpoena issues, and that his  
16 individual rulings rejecting Respondent’s demands for heightened restrictions on Charging Party’s  
17 access to specific records should be affirmed by this Court.

## 18 **II. SUMMARY OF ISSUES BEFORE THE COURT**

19           The issues presented to this Court have been narrowed by ALJ Anderson over the course of  
20 several months’ hearing. The Subpoena requires enforcement in the following manner:

### 21 A. Respondent Conditions Compliance on this Court’s Issuance of a Protective Order

22           Respondent has represented that it has produced substantially all subpoenaed documents  
23

1 (Bates numbered 000001-010359), and, based upon such representation, the NLRB does not seek  
2 to enforce the Subpoena beyond the production of such documents. However, because  
3 Respondent has produced a large portion of documents in redacted form only, and refuses to  
4 disclose unredacted copies to the AGC or the Charging Party absent a protective order from a  
5 Federal District Court, the NLRB seeks an Order affirming the Protective Order, requiring all parties  
6 to comply with its terms, and directing Respondent to comply with the Subpoena.

7 B. Respondent Seeks to Withhold Information from Charging Party

8 Although the AGC and the Charging Party agreed to treat as "confidential" under the  
9 Protective Order all information so designated by Respondent, Respondent has sought additional  
10 restrictions for access to and use of a subset of the "confidential" information, referred to as  
11 "Charging Party Restricted" or "CPR" material. Thus, Respondent has sought the following  
12 restriction on the Charging Party's access to the specified redacted portions of the above  
13 documents:

14 Redacted information shall not be viewed, shared, or otherwise  
15 communicated to Charging Party, or any employee, officer or  
16 representative of the IAM or its counsel. However, counsel for  
17 charging party who will not be participating in the 2012 collective  
18 bargaining negotiations between Charging Party and Respondent will  
19 be permitted to view the restricted information.

20 (App. at ¶ 17). The AGC and the Charging Party challenged those requests for restrictions of  
21 Charging Party access. After ALJ Anderson conducted an *in camera* inspection of unredacted  
22 copies of the CPR information and heard oral argument by the parties, he ruled that the Charging  
23 Party's access to, or use of, the information should not be restricted beyond the protocol for handling  
24 confidential information dictated by the Protective Order and ordered Respondent to produce  
25 unredacted versions of the documents consistent with the protocol of the Protective Order. As

1 | noted above, Respondent has so far refused to do so.

2 | C. Respondent Seeks to Withhold Information It Claims  
3 | Is Shielded by the "Labor Relations Strategy" Privilege

4 |  
5 | Respondent has redacted other additional information that it contends is privileged from  
6 | disclosure under the NLRB's qualified labor-relations strategy privilege. *See, e.g., Berbiglia, Inc.*,  
7 | 233 NLRB 1476, 1496 (1977) ("[i]f collective bargaining is to work, the parties must be able to  
8 | formulate their positions and devise their strategies without fear of exposure"). After a separate *in*  
9 | *camera* inspection of the claimed privileged information, ALJ Anderson ruled that certain of those  
10 | documents were protected by the privilege and did not need to be produced, and others were not.  
11 | As to those documents determined not privileged, ALJ Anderson ordered Respondent to produce  
12 | those documents in unredacted form consistent with the Protective Order protocol. Respondent has  
13 | so far refused to produce that information, and has indicated it may seek this Court's review of these  
14 | rulings.

15 | **III. LEGAL AUTHORITIES**

16 | A. Subpoenas and Protective Orders in Unfair Labor Practice Hearings

17 |  
18 | Section 11(1) of the NLRA empowers the NLRB to subpoena "any evidence of any person  
19 | being investigated or proceeded against that relates to any matter under investigation or in  
20 | question." 29 U.S.C. § 161(1). Subpoenaed information must be produced if it relates to any matter  
21 | in question, or if it can provide background information or lead to potentially relevant evidence.  
22 | *Perdue Farms*, 323 NLRB 345, 348 (1997), *affd. in rel. part*, 144 F.3d 830 (D.C. Cir. 1998); *NLRB v.*  
23 | *Interstate Material Corp.*, 930 F.2d 4, 6 (7th Cir. 1991); *NLRB v. Steinerfilm, Inc.*, 702 F.2d 14, 15  
24 | (1st Cir. 1983); *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 114 (5th Cir. 1982).

1           The NLRB has delegated to its administrative law judges the authority to rule on petitions to  
2           revoke subpoenas during unfair labor practice hearings, subject to review by the NLRB upon appeal  
3           by an aggrieved party. 29 C.F.R. §§ 102.31(b) and 102.35(3). Encompassed within the  
4           administrative law judges' authority to conduct unfair labor practice hearings<sup>2</sup> is the inherent  
5           authority to issue protective orders governing the treatment of confidential information in  
6           "appropriate circumstances." *Teamsters, Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 n.7  
7           (2005); *AT&T Corp.*, 337 NLRB 689, 693 n.1 (2002); *National Football League*, 309 NLRB 78, 88  
8           (1992); *United Parcel Service*, 304 NLRB 693 (1991); *Carthage Heating Co.*, 273 NLRB 120, 123  
9           (1984).

10           NLRB subpoenas are "subject to extremely limited judicial review." *NLRB v. G.H.R. Energy*  
11           *Corp.*, 707 F.2d at 113, *citing Shotkin v. Nelson*, 146 F.2d 402, 404 (10th Cir. 1944). Review of  
12           NLRB protective orders is likewise "sharply limited." *See NLRB v. Engineering Steel Concepts, Inc.*,  
13           2010 WL 4852640, slip op. at \*2 (N.D. Ind. 2010). *See also FCC v. Schreiber*, 381 U.S. 279, 290-  
14           91, 295-96 (1965); *FTC v. Texaco, Inc.*, 555 F.2d 862, 885 (D.C. Cir. 1977); *FTC v. Stanley H.*  
15           *Kaplan Educ. Ctr. Ltd.*, 433 F. Supp. 989, 993 (D.C. Mass. 1977).<sup>3</sup> Subpoena enforcement actions  
16           are therefore summary in nature,<sup>4</sup> and the district court should treat the NLRB's application as a  
17           dispositive matter, not as a pre-trial discovery issue. *See NLRB v. Frazier*, 966 F.2d 812, 817-18  
18           (3d Cir. 1992). *See also In re McVane*, 44 F.3d 1127, 1135 (2d Cir. 1995); *In re Office of Inspector*  
19           *General*, 933 F.2d 276, 277 (5th Cir. 1991); *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 475 (4th

---

<sup>2</sup> *See* § 102.35 of the NLRB's Rules and Regulations, Series 8, as amended, 29 C.F.R. § 102.35.

<sup>3</sup> This limited review is analogous to federal appellate courts' limited review for abuse of discretion of trial courts' issuance of protective orders under their inherent authority. *See Wharton v. Calderon*, 127 F.3d 1201, 1205 (9th Cir. 1997).

<sup>4</sup> The Federal Rules of Civil Procedure specifically authorize the courts to allow a less formal application of those rules in keeping with the summary nature of the application for enforcement. *See* F.R.C.P. 81(a)(3). *See also United States v. Markwood*, 48 F.3d 969, 982 (6th Cir. 1995).

1 Cir. 1986); *Interstate Dress Carriers*, 610 F.2d 99, 112 (3d Cir. 1980); *FTC v. Anderson*, 631 F.2d  
2 741, 744-45 (D.C. Cir. 1979).

3 B. Protective Orders Generally and the Heightened Standard  
4 For Denying a Party Full Access to Subpoenaed Documents  
5

6 As ALJ Anderson noted in his August 12, 2011 ruling on the Protective Order, Rule 26 of the  
7 Federal Rules of Civil Procedure (“FRCP”) sets the standard for his determinations regarding the  
8 necessity for, and proper scope, of a protective order governing the NLRB proceeding. Under this  
9 standard, an administrative law judge, upon a showing of good cause, may enter a protective order  
10 restricting the disclosure of a trade secret or other confidential research, development, or  
11 commercial information.<sup>5</sup> Fed. R. Civ. P. 26(c); *Rivera v. NIBCO, Inc.*, 384 F.3d 822, 827 (9th Cir.  
12 2004), quoting *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1211-12 (9th  
13 Cir. 2002).

14 The party seeking the protection bears the burden of demonstrating that “specific prejudice  
15 or harm will result if no protective order is granted.” *Phillips*, 307 F.3d at 1210-11. Moreover, even  
16 where good cause has been shown for the confidential treatment of documents produced pursuant  
17 to subpoena, once those documents offered into evidence and will become part of an official  
18 adjudicatory record, a party later seeking to have the documents sealed from access to the public  
19 must show that “compelling reasons supported by specific factual findings” outweigh the presumed  
20 right to public access to the judicial record. *Pintos v. Pacific Creditors Ass’n*, 605 F.3d 665, 677-78  
21 (9th Cir. 2010); *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-80 (9th Cir. 2006)  
22 (citing *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 n.7 (1978)).

---

<sup>5</sup> The NLRB and its Administrative Law Judges use the Federal Rules of Civil Procedure and in particular, Rule 26, for guidance in adjudicating disputes related to subpoenas. *CNN Am., Inc.*, 353 NLRB 891, 892 (2009); *Brink’s, Inc.*, 281 NLRB 468, 468-69 (1986).

1           Where, as here, the producing party seeks to bar access by another party and its chosen  
2 counsel to records that are material to the civil dispute based on the producing party's claim that  
3 disclosure would result in financial or competitive harm, additional considerations must be taken into  
4 account. The Charging Party is a full party to an unfair labor practice proceeding, with the right "to  
5 appear at such hearing in person, by counsel, or by other representative, to call, examine, and  
6 cross-examine witnesses, and to introduce into the record documentary or other evidence" (29  
7 C.F.R. § 101.38), to present its case (including submitting rebuttal evidence) for a "full and true  
8 disclosure of the facts" (20 C.F.R. § 101.10), and to obtain testimony and documents pursuant to  
9 subpoena (29 U.S.C. § 161(1); 29 C.F.R. § 102.31(d)). *See also Rickert Carbide Die, Inc.*, 126  
10 NLRB 757 n.3 (1960); *John L. Clemmey Company, Inc.*, 118 NLRB 599, 600 n.1 (1957); *Hydro*  
11 *Conduit Corp.*, 274 NLRB 1293 (1985); 29 C.F.R. § 102.8. In unfair labor practice proceedings, the  
12 charging party is also "entitled to be heard by the [ALJ] and the Board, and is entitled to appeal  
13 adverse Board decisions to the Court of Appeals. 29 U.S.C. A. § 160(f)." *Kellwood Co., Ottenheimer*  
14 *Bros v. NLRB*, 411 F.2d 493, 500 (8th Cir.1969).

15           C.       The NLRB's Labor-Relations Strategy Privilege

16           As noted above, the NLRB has established a qualified labor-relations strategy privilege to  
17 address parties' concerns regarding the potential impact to the collective-bargaining process if they  
18 are compelled to disclose information that would reveal their collective-bargaining objectives or  
19 strategy. *See Taylor Lumber & Treating*, 326 NLRB 1298, 1300 (1998); *Champ Corp.*, 291 NLRB  
20 803, 817 (1988), *enfd.*, 933 F.2d 688 (9th Cir. 1990), *cert. denied*, 502 U.S. 957 (1991); *Patrick*  
21 *Cudahy, Inc.*, 288 NLRB 968, 971 (1988); *Berbiglia*, 233 NLRB at 1495. The NLRB limits disclosure  
22 of such information to allow parties engaged in collective-bargaining to formulate their positions and



1 devise their strategies without fear of exposing “crucial material regarding pending union  
2 negotiations.” *Berbiglia*, 233 NLRB at 1495, quoting *Harvey’s Wagon Wheel, Inc. v. NLRB*, 550 F.2d  
3 1139, 1142 (9th Cir. 1976). However, the privilege is qualified: there is no categorical privilege  
4 protecting all information about a party’s bargaining strategy from disclosure, particularly where the  
5 information sought is directly relevant to the proceedings. *Taylor Lumber*, 326 NLRB at 1300.

6 **IV. LEGAL ARGUMENT**

7 A. The Protective Order Adequately Addresses  
8 Respondent’s Confidentiality Concerns  
9

10 The NLRB has the inherent authority to issue protective orders restricting the disclosure of  
11 subpoenaed information (*see* Sec. III(A), *supra*), and ALJ Anderson has appropriately exercised his  
12 authority in that regard. ALJ Anderson considered the parties’ various proposals, as well as their  
13 extensive arguments before issuing the Protective Order. That order comports with the standards  
14 articulated in FRCP 26(c) by applying the appropriate “good cause” standard for determining  
15 whether subpoenaed information should be treated as confidential, and the appropriate “compelling  
16 reasons” standard to determine whether documents entered into the trial record may be sealed.  
17 *See Pintos*, 605 F.3d at 677-78.

18 As set forth in the Application, Respondent – like the AGC and the Charging Party – has  
19 accepted and proceeded consistent with the Protective Order protocol when: designating certain  
20 information as “confidential” upon production of the information pursuant to the Subpoena;  
21 voluntarily engaging in the protocol procedure when the AGC or the Charging Party challenged its  
22 claim for heightened access restrictions; submitting unredacted versions of information for *in*  
23 *camera* inspection; and arguing to the ALJ its reasons for continued redaction. Any lingering  
24 confidentiality concerns are adequately addressed by the seal procedures of the Protective Order

1 whereby, upon motion by a party, "confidential" information offers into evidence will be provisionally  
2 sealed, and disputes regarding the propriety of permanently sealing the information will effectively  
3 be deferred to the end of the evidentiary hearing. Any ALJ ruling denying a request for permanent  
4 seal will result in maintaining the provisional seal until the ALJ ruling is reviewed by a court of  
5 competent jurisdiction. Finally, all of ALJ Anderson's rulings will be subject to appropriate review.

6 B. The Court Should Affirm ALJ Anderson's Rulings on the Appropriate  
7 Disclosure of and Protection Afforded Specific Redacted Information  
8

9 Respondent should be required to produce to the AGC and counsel for the Charging Party  
10 unredacted versions of all information that Respondent has designated as "Charging Party  
11 Restricted." Considering the AGC and the Charging Party's express willingness to follow the terms  
12 of the Protective Order when handling "confidential" information, and after *in camera* inspection, ALJ  
13 Anderson reasonably balanced the harm Respondent argued it would result if Charging Party gained  
14 access to this information, against the prejudice to the AGC and the Charging Party were they  
15 denied access. ALJ Anderson reasonably concluded that the parties' agreement to treat the  
16 information at issue as confidential – prohibiting the Charging Party from using the information for  
17 collective-bargaining or any other purpose unrelated to the unfair labor practice proceeding –  
18 mitigated any harm that would likely result from disclosure to the Charging Party. ALJ Anderson  
19 also reasonably found that the extra restrictions requested by Respondent would result in significant  
20 prejudice for the Charging Party, whose chosen lead counsel most familiar with the instant litigation,  
21 would be excluded from portions of the NLRB proceeding any time "Charging Party Restricted"  
22 information would be disclosed or discussed, because they may also represent the Charging Party  
23 in collective-bargaining.

1 ALJ Anderson also noted that the heightened-access restrictions requested by Respondent  
2 would compromise the AGC's presentation of its case by preventing it from consulting with  
3 knowledgeable Charging Party agents about certain information undisputedly material to the  
4 litigation of the unfair labor practice charge, if those agents might be involved in future contract  
5 negotiations. Union charging party agents often have unique knowledge of respondents' operations,  
6 the significance of the subpoenaed information, and the context surrounding the alleged unfair labor  
7 practices, thus their contribution to the administrative trial litigation is often critical not only to  
8 Counsel for the AGC, but also complete the administrative record to the Board and reviewing courts.  
9 The NLRB therefore respectfully requests that this Court affirm ALJ Anderson's rulings rejecting  
10 Respondent's request for designation of certain confidential information as "Charging Party  
11 Restricted."

12 After an *in camera* inspection and hearing arguments from the parties, ALJ Anderson  
13 additionally ruled that certain information Respondent had redacted was not privileged pursuant to  
14 the NLRB's labor-relations strategy privilege and, therefore, must be disclosed to the AGC and  
15 Charging Party consistent with the terms of the Protective Order. In making his ruling, ALJ  
16 Anderson drew upon his decades of experience and knowledge of this area of the law to  
17 differentiate between true bargaining strategy information which would be covered under the NLRB's  
18 qualified privilege, and other types of information. ALJ Anderson also balanced the impact of  
19 disclosure of the labor-relations strategy information on the parties's future collective bargaining and  
20 the AGC's need to access and use the information in the NLRB proceeding. Given that thorough  
21 document-by-document review by an ALJ steeped with experience in the field of labor relations, the  
22 NLRB respectfully requests that this Court enforce the Subpoena insofar as it requires the

1 production of information that he determined is not covered by the privilege.

2 **V. CONCLUSION**

3 Because Respondent refuses to provide the AGC with unredacted versions of documents  
4 responsive to the Subpoena, it has engaged in what amounts to contumacious conduct within the  
5 meaning of § 11(2) of the Act, 29 U.S.C. § 161(2). Respondent's conduct has impeded the NLRB's  
6 administrative unfair labor practice hearing, and has therefore impeded the NLRB from carrying out  
7 its duties and functions under the Act. Based on the foregoing, it is respectfully requested that this  
8 Court order Respondent to comply with the Subpoena, subject to the terms of the enforced  
9 Protective Order.

10 DATED AT Seattle, Washington, this 22<sup>nd</sup> day of November, 2011.

11  
12

Respectfully Submitted,

13  
14  
15  
16

By: /s/ Anne P. Pomerantz  
/s/ Mara-Louise Anzalone  
/s/ Peter G. Finch  
/s/ Rachel Harvey

17  
18  
19  
20

ANNE P. POMERANTZ CA Bar 204059; NY Bar 2398428  
MARA-LOUISE ANZALONE NY Bar 2770592  
PETER G. FINCH WA Bar 27705  
RACHEL HARVEY FL Bar 763411

21  
22  
23

National Labor Relations Board  
Region 19

24  
25  
26

2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174

27  
28  
29  
30

Telephone: (206) 220-6301  
Facsimile: (206) 220-6305  
Email: Anne.Pomerantz@nrlrb.gov  
Mara-Louise.Anzalone@nrlrb.gov  
Peter.Finch@nrlrb.gov  
Rachel.Harvey@nrlrb.gov

31  
32  
33  
34

Counsel for Applicant