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 BRIEF REGARDING RESPONDENT'S REQUEST FOR PROTECTIVE ORDER

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 brief concerning the asserted need of Respondent, The Boeing Company ("Respondent" or "Boeing"), for a Protective Order in the above-captioned unfair labor practice proceeding. The Administrative Law Judge ("ALJ") requested the positions of the parties regarding Boeing's request for a protective order.

As a threshold matter, Boeing has yet to produce any evidence of good cause necessary for a protective order to issue. However, should Boeing adequately demonstrate the prerequisite good cause and otherwise satisfy the applicable legal requirements, District 751 hereby moves for the ALJ to adopt the Proposed Production and Protective Order Applicable to Documents of Respondent The Boeing Company, attached hereto as **Exhibit A**.

INTRODUCTION

Respondent has refused, absent a sweeping Protective Order, to turn over documents that have been subpoenaed by Counsel for Acting General Counsel ("CAGC") and District 751 and that the ALJ has ruled are relevant. Boeing has proposed a Protective Order, attached hereto as **Exhibit B.** Boeing inappropriately proposes a federal court order, which should be rejected out of hand on that basis alone. This order is also objectionable because it would:

1. Prohibit impacted union members, the public and the press from hearing the most critical evidence in the case;
2. Eviscerate the Charging Party's right to participate fully in this proceeding;
3. Enmesh the federal court in an ongoing protective order fight over routine rulings; and
4. Disqualify the Union's chosen representatives in future collective bargaining negotiations.

District 751 agrees that if legitimately confidential information is necessary for the prosecution of this case, a reasonable protective order may be appropriate. However, as both Board procedures and the Federal Rules of Civil Procedure direct, Boeing's proposed sweeping Protective Order cannot be issued. Rather, as the rules direct, if Boeing can establish that public disclosure will result in a clearly defined and serious injury to its business if a particular document is made public, a protective order may be appropriate. Even then, all parties must have equal access and use of the confidential material.

STATEMENT OF THE CASE

Stark differences exist between the Proposed Protective Orders of District 751 and Boeing. First, Boeing inappropriately proposes a federal court order to be signed by a federal judge as its Proposed Protective Order. Boeing proposes that a federal district court have jurisdiction over disputes regarding the confidentiality of documents, their use in evidence, and

enforcement of any protective order. Boeing cannot, through motion, arrogate this ALJ's authority to a federal court when reasonable, lawful alternatives exist to protect any legitimate confidentiality interest Boeing may demonstrate. The Union's Proposed Protective Order adequately protects any reasonable concerns, and contains a dispute procedure before the ALJ in accordance with Board law. (Compare, Boeing Proposed Protective Order, pp. 8, 12; Union Proposed Protective Order, pp.6-7).

Second, in contrast to the Union's proposal to have a single "Confidential" designation, Boeing has proposed two categories of documents that it may designate as subject to a protective order: "Confidential" and "Highly Confidential." Under Boeing's proposed order, information from documents deemed "Confidential" may not be disclosed to the public or non-witnesses. They may be disclosed to the ALJ, the Parties, the Acting General Counsel and his staff, court reporters, witnesses and experts. Boeing proposes five sweeping definitions of confidential documents which would cover the factors that motivated its decision to move the 787 line, the very facts at issue in this case. Under Boeing's proposed order, should such information be presented, the ALJ would be compelled to clear the courtroom, excluding not only impacted workers, but the public as well. (See Boeing Proposed Order at 3-5.)

Boeing also proposes a second tier of documents deemed "Highly Confidential" which may not be disclosed to the Charging Party, but rather only to the General Counsel and its staff, counsel for the Union, court reporters, the ALJ and outside experts (absent special permission). (Boeing Proposed Protective Order, pp.3-4.) Although the proposed order provides the possibility for exceptions totally denying even IAM counsel access to documents and assigning the burden of proof to the Union to allow a union representative to see (but not use or testify about) certain documents, the ability of the other parties to review trial exhibits with their lay and

expert witnesses would effectively be denied to the Charging Party. (Boeing Proposed Protective Order, p. 10.)

The two categories appear to encompass non-confidential business strategy and planning documents that lie at the heart of the case: the motive behind Boeing's transfer of work to South Carolina. Boeing seeks to prohibit the Union from accessing "asset allocation and utilization plans, assembly rate information, studies or analyses dealing with work placement," in addition to any item it lists under the "Confidential" tier of protection based on Boeing's own determination that disclosure may cause it harm, which includes prohibiting access to:

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

(Boeing's Proposed Protective Order at p.4.) This case is about just this critical information.

In contrast, District 751's proposed order defines "Confidential" in accordance with the Federal Rules of Civil Procedure. Although District 751's proposed order allows Boeing to self-designate documents as Confidential, it ensures that Boeing at all times retains the burden of establishing both that the documents designated Confidential constitute trade secret or other confidential commercial information and that disclosure of such documents would inflict a clearly defined and serious injury upon the company, as required by the federal rules. *See*, FRCP 26(c)(G); Union Proposed Protective Order, pp. 3-4. Furthermore, it sets forth a swift but practical challenge procedure that requires Boeing to prove up its case for applicability of the Protective Order to any particular document regarding which the General Counsel or the Union believes "good cause" is lacking. (Union Proposed Order, pp. 6-7.)

To add insult to injury, Boeing demands that the IAM would be forever barred from choosing to be represented in collective bargaining by counsel or experts who are shown "Highly Confidential" information.

District 751's Proposed Protective Order allows the case to progress by setting forth a date certain for the production of subpoenaed documents. (Union Proposed Protective Order, p.3.) It also requires that, throughout a challenge to Boeing's designation of documents, Boeing is to retain the burden to establish "good cause" for applicability of the Protective Order to any document whose designation is under dispute. (Union Proposed Order, pp. 6-7.) In addition, it ensures maximum public access to the hearing, mandating a procedure for the parties to "take all reasonable steps to minimize disruptions to the Board Proceeding and to ensure public access to the Board Proceeding to the greatest possible extent." (Union Proposed Order, p.4).

ARGUMENT AND AUTHORITY

I. AMERICAN LEGAL PROCEEDINGS ARE ONLY CLOSED IN THE RAREST OF CIRCUMSTANCES AND TO DO SO HERE WOULD DENY IMPACTED WORKERS THE ABILITY TO MONITOR THE ENFORCEMENT OF THEIR LEGAL RIGHTS TO ENGAGE IN PROTECTED CONCERTED ACTIVITY, THEREBY UNDERMINING THE PURPOSES OF THE NATIONAL LABOR RELATIONS ACT.

The National Labor Relations Act guarantees the right of American workers to join together in a union, bargain with a single voice, and, if necessary, strike their employer to achieve a better life for themselves and their families. If, as Boeing contends here, employers are free to divert work away from union members because they may strike, the right to strike will cease to be protected under the Act. An issue of this importance to American workers requires an open hearing, a full and clear public record, and fair participation by all parties. This ALJ's rulings, the NLRB's review, and any further court appeals decisions must be supported by an unsealed open public record.

In addition to the press and the public, thousands of Boeing employees, union and non-union, are closely watching this case to determine the authority of Boeing to strip job opportunities from them should they engage in protected concerted activities under the NLRA. More than a thousand current IAM-represented employees in Everett are watching this case to learn if the 787 assembly work they are performing today will be shipped to South Carolina when Boeing, consistent with its announced plan, shuts down the second 787 surge line in Everett.

As is more fully outlined below, the combination of Boeing's Proposed Protective Order provisions would effectively conceal central testimony regarding Boeing's motives and require repeated clearing of the hearing room. Boeing's proposed order would require clearing the court and sealing testimony regarding "the cost, competition, production scheduling, and contingency planning in connection with the development of the second final assembly line in Charleston and surge line in Everett." (Boeing Proposed Order at 4.) This ALJ's decision, and those of reviewing entities, will of necessity turn on this precise evidence. It is difficult to see how any ruling which failed to address the central evidence in the case could withstand public scrutiny. In the interest of public confidence, to allow impacted workers to see a fair hearing on their case, and for purposes of establishing a transparent public record on what may be a critical case to labor law in America, this case should be tried in the light of day.

II. TO ISSUE RULINGS ON SUBPOENAS, PRIVILEGE LOGS, AND PROTECTIVE ORDERS, AND THUS THERE IS NO BASIS IN LAW FOR BOEING'S DESIRED SPECIAL TREATMENT.

A. The ALJ Has The Authority To Issue Any Necessary Protective Order.

The Board, through the ALJ, has the authority to issue subpoenas, to revoke subpoenas, to examine witnesses and to receive evidence in this unfair labor practices proceeding. 29 C.F.R. § 102.35; *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 498 (4th Cir. 2011); *NLRB v. Duval Jewelry Co.*, 357 U.S. 1, 8 (1958) ("Certainly preliminary rulings on subpoena questions are as much in the purview of a hearing officer as are rulings on evidence and the myriad of questions daily presented to him."). The ALJ also has the authority to order a privilege log, to sustain or overrule a claim of privilege based on a privilege log, and to order the production of documents for *in camera* review. *Interbake Foods*, 637 F.3d at 499.[1] The ALJ also has the authority to issue a protective order in the appropriate circumstance, providing the parties (including the Charging Party) with access to confidential records, but sealing the records as to the public. *See, e.g., Teamsters Local 917 (Peerless Importers),* 345 NLRB 1010, 1011, n.7 (2005); *GTE Southwest Inc.*, 1995 WL 1918148 (1995) ("the Union has now been granted access to the test materials...In order to protect the above noted exhibits from being generally disclosed they shall remain sealed").

B. Any Disputes Arising Under A Protective Order Are Properly Decided By The ALJ, Without The Premature Involvement Of A Federal District Court.

Inherent in the ALJ's authority to issue a protective order is his authority to decide disputes arising under it. Any number of questions to be decided concerning the production,

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[1] Nothing in the Fourth Circuit's *Interbake* decision, in which it ruled that "an ALJ has no power *to require the production* of documents for *in camera* review or for admission into evidence when a person or party refuses to produce them," *id.* (emphasis in the original), detracts from the ALJ's authority to rule on claims of privilege or other issues of evidence.

designation, handling and treatment of records may develop over the course of the proceedings. Preliminarily, once a protective order has issued, Boeing will presumably produce subpoenaed documents, designate some portion of them as confidential, and the General Counsel and the Charging Party will have some opportunity to review the documents and mount any challenges to those designations. Disputes may arise as to whether disclosures to particular witnesses are appropriate or whether Boeing has met the heavy burden for establishing whether certain documentary evidence or testimony should be placed under seal. Federal court is not, as Boeing will contend, the appropriate venue to decide such issues.

The jurisdiction of the U.S. District Court to decide matters related to subpoenas is clearly set forth in the NLRA and applicable regulations, which define that authority in terms of subpoena enforcement. 29 U.S.C. § 161(2) (granting district court jurisdiction over subpoena enforcement upon application of the Board, in the event that a subpoenaed party fails to comply); 29 C.F.R. § 102.31(d); *Interbake*, 637 F.3d at 499-500 ("Once the Board files an application for judicial enforcement, the district court is given the authority to evaluate the parties' positions and to take any action it believes appropriate for determining whether the subpoena should be enforced."). The federal court's jurisdiction does not extend, however, to disputes about how documents that must be disclosed should be treated or handled post-production. Such questions are within the ALJ's enumerated powers concerning evidentiary issues and case management. *See generally,* 29 CFR § 102.35; *see also*, *FTC v. Texaco,* Inc., 555 F.2d 862, 884, n. 62 (D.C. Cir. 1977) (en banc), *cert. denied*, 431 U.S. 974 (1977) (The Board, "not the courts...should, in the first instance, establish the procedures for safeguarding confidentiality"). In *FTC v. Texaco*, the D.C. Circuit explained that protective orders that place district courts in a position of control

over an administrative agency in the exercise of its statutory duties are improper. *FTC*, 555 F.2d at 885.

For the foregoing reasons, the ALJ should resolve all disputes arising under the Protective Order, and Respondent's request that these decisions be reviewed by the U.S. District Court should be rejected as there is no authority for such an unusual procedure and such a procedure would needlessly delay this case.

III. ANY PROTECTIVE ORDER ENTERED IN THIS CASE MUST 1) ENSURE THAT BOEING AT ALL TIMES RETAINS ITS BURDEN TO ESTABLISH GOOD CAUSE FOR THE PROTECTIVE ORDER AS TO EACH DOCUMENT AT ISSUE AND 2) INCLUDE A SENSIBLE CHALLENGE PROCEDURE WHERE THE UNION OR CAGC BELIEVES GOOD CAUSE IS LACKING.

A. Boeing Must Establish "Good Cause" For A Protective Order As To Each Record It Seeks To Keep Confidential.

A party seeking a protective order to protect trade secret or other confidential commercial documents bears the burden to establish, based on specific facts, rather than conclusory assertions, both that the information in fact constitutes a trade secret or other confidential commercial information and that "good cause" exists for such a protective order. *See*, NLRB Division of Judges Bench Book § 8-415, citing Federal Rule of Civil Procedure ("FRCP") 26(c); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003); *State Farm Fire and Cas. Co. v. Nokes*, 263 F.R.D. 518 (N.D. Ind. 2009); *In re Parmalat Securities Litigation*, 258 F.R.D. 236 (S.D.N.Y. 2009); *Miles v. Boeing Co.*, 154 F.R.D. 112, 114 (E.D. Pa. 1994); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3rd Cir. 1994). FRCP 26(c) permits a court, "for good cause," to enter an order "to protect a party or person from annoyance, embarrassment,

oppression, or undue burden or expense."[2] "Good cause" within the meaning of FRCP 26(c) requires a showing that disclosure of the document will inflict a clearly defined and serious injury on the moving party. NLRB Division of Judges Bench Book § 8-415; *Spinturf, Inc. v. Southwest Rec. Indust., Inc.*, 216 F.R.D. 320 (E.D. Pa. 2003); *Pansy*, 23 F.3d at 786. The "good cause" requirement is generally held applicable even to stipulated protective orders. *See, Makar-Wellbon v. Sony Electronics, Inc.*, 187 F.R.D. 576, 577-78 (E.D. Wis. 1999).

Whether "good cause" exists to support the issuance of a protective order is a particularized inquiry that must be applied to each and every document, not assumed based on a party's [b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning." *Pansy,* 23 F.3d at 786-87, quoting *Cippollone v. Liggett Group Inc.*, 785 F.2d 1108, 1121 (3rd Cir. 1986), *cert. denied*, 484 U.S. 976, 108 S. Ct. 487, 98 L.Ed.2d 485 (1987); *Foltz*, 331 F.3d at 1130; *see also, Contratto v. Ethicon, Inc.,* 227 F.R.D. 304 (N.D. Cal. 2005) (holding declaration of counsel was insufficient to warrant protection of purportedly confidential documents, where declaration failed to explain why the exhibits attached should be protected, failed to identify any specific prejudice or harm that would result from public access to the documents and failed to demonstrate that the documents contained trade secrets or other confidential research, development or commercial information); *Harrisonville Telephone Co. v. Illinois Commerce Com'n*, 472 F. Supp. 2d 1071 (S.D. Ill. 2006) (attorney's conclusory affidavit insufficient to establish good cause). This requirement furthers the goal that the judge will issue as narrow a protective order as is necessary under the facts.

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[2] Federal Rule of Civil Procedure 26(c) guides the Board in this area. *See*, NLRB Division of Judges Bench Book § 8-415; *Brink's Inc.*, 281 NLRB 468, 468-69 (1986); *Security Walls, LLC*, JD-26-10 (April 21, 2010).

Courts have held that corporate defendants do not establish good cause for a protective order where they retain limitless discretion to decide what documents are subject to the restrictions imposed by the protective order. *See, Reed v. Bennett*, 193 F.R.D. 689 (D. Kan. 2000) (defendant failed to meet the good cause standard when it did not identify specific documents or types of documents to be protected, but rather sought a protective order applicable to any documents it "reasonably contends contain proprietary and confidential information"); *see also, Pierson v. Indianapolis Power & Light Co.*, 205 F.R.D. 646, 647 (S.D.Ind. 2002) (proponent must provide specific facts demonstrating good cause for relief; merely describing material as "confidential," "private" or "proprietary" does not meet Rule 26(c)'s "good cause" standard).

Thus, courts will reject proposed or stipulated protective orders that grant a party blanket permission to designate documents as "confidential" or that otherwise circumvent the proponent's burden at all times to justify the confidentiality of the documents sought to be protected. *See, e.g., E.E.O.C. v. Synergy Health, Inc.*, 265 F.R.D. 403, 405 (E.D. Wis. 2009) (rejecting stipulated protective order that allowed self-designation by parties without any showing of good cause); *Miles,* 154 F.R.D. at 115 (E.D. Pa. 1994) (rejecting protective order allowing Boeing to designate any document as confidential without the ability of the other party to challenge the designation except at the point of proposed disclosure; instead, the court required designation pending agreement or decision on motion made within ten days of designation);[3] *Spinturf, Inc. v. Southwest Rec. Indus., Inc.*, 216 F.R.D. 320, 323 (E.D. Pa. 2003) (rejecting stipulated protective order that allowed self-designation, because 1) the order failed to

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[3] The court in *Miles v. Boeing* explained why a process requiring a designation of "confidential" pending agreement or court order achieves the requirements of FRCP 26(c): "This system does not allow misuse of the confidential designation and places the burden of proving such confidentiality squarely upon defendant as is required by Rule 26(c) and the First Amendment." *Miles*, 154 F.R.D. at 115.

require the demonstration of good cause prior to a designation of "confidential;" 2) the order failed to require the parties to show what documents would fall within the order or what "precise and well-defined harm will accompany the disclosure of such documents"; and 3) the breadth of the order would waste scarce judicial resources to be expended resolving disputes arising under the order); *Pierson, supra*, at 647-48 (rejecting agreed protective order that granted "impermissible *carte blanche* discretion by the parties" to determine what records would be subject to the protective order).

When tasked with determining the appropriateness or contents of a protective order, the judge must balance the potential harm to a party caused by the disclosure of sensitive information with countervailing factors that may warrant denying or limiting the protective order, including the public's right to obtain information involving public proceedings. NLRB Division of Judges Bench Book § 8-415; *Pansy,* 23 F.3d at 786-77, n. 14, citing *City of Hartford v. Chase*, 942 F.2d 130 (2d Cir. 1991) ("confidentiality orders, when not subject to proper supervision, have a great potential for abuse. For this reason, judges should review such agreements carefully and skeptically before signing them.").

The ALJ here may enter a protective order to protect Boeing's interest in keeping confidential certain trade secret, financial or commercial information, while maintaining the due process rights of the parties. Boeing has not yet shown good cause for any protective order, let alone for the sweeping proposed Protective Order that it submitted to the parties for review. There is no reason to believe that every document that Boeing has to date withheld would, if disclosed in this proceeding, result in a clearly defined and serious injury to the company.

B. The ALJ Should Ensure That Any Protective Order Provides A Process For Placing Documents Under Seal, And That Such Process Requires Boeing To Establish That Compelling Reasons Exist For Placing Such Documents Under Seal.

Where, as here, a protective order will forbid disclosure of evidence to the general public or other nonparties or participants in the proceeding, the judge must place the evidence under seal if he wishes to protect the documents from subsequent attempts to gain access to the documents despite the order. *See, United Parcel Service,* 304 NLRB 693, 694 (1991). Importantly, a more stringent standard applies to a party's request to place records – even those covered by a protective order – under seal.

In order to seal records or testimony admitted in evidence in the Board Proceeding, Boeing must establish "compelling reasons" for placing the documents under seal that are supported by specific factual findings that outweigh the presumed right of public access to judicial proceedings. *Pintos v. Pacific Creditors Ass'n,* 605 F.3d 665, 677-78 (9th Cir. 2010); *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-80 (9th Cir. 2006); *Foltz, supra*, 331 F.3d 1122, 1135 (9th Cir. 2003). Courts have recognized a strong presumption in favor of access to public records and documents, including judicial records. *Kamakana*, 447 F.3d at 1178. "This right is justified by the interest of citizens in 'keep[ing] a watchful eye on the workings of public agencies.'" *Id.*, quoting *Nixon v. Warner Commc'ns, Inc.,* 435 U.S. 589 (1978).[4]

> In general "compelling reasons" sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such "court files might have become a vehicle for improper purposes," such as the use of records to

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[4] The court must thus balance the competing interests of the public and the party who seeks to keep judicial records secret, must base any decision to seal on compelling reasons, and must "articulate the factual basis for its ruling, without relying on hypotheses or conjecture." *Id.*, quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995).

> gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets.

Kamakana, 447 F.3d at 1179.[5] The "compelling reasons" standard is more stringent than the FRCP 26(c) "good cause" standard. *Kamakana*, 447 F.3d at 1180, 1180 n.4 ("[T]he difference between the two standards is not merely semantic. A 'good cause' showing will not, without more, satisfy a 'compelling reasons' test."). In the U.S. District Court for the Western District of Washington, "[t]he court will not sign stipulated protective orders to allow the sealing of unidentified documents that the parties have marked or expect to mark as confidential during discovery.") Local Rule for the U.S. District Court for the Western District of Washington 26(c)(2).

District 751's Proposed Order appropriately requires Boeing to move to place documents under seal based on a showing of compelling reasons supported by specific facts. It also requires a ruling from the ALJ before any evidence or testimony will be placed under seal.

IV. ANY PROTECTIVE ORDER ISSUED IN THIS CASE MUST NOT INTERFERE WITH THE RIGHTS OF THE CHARGING PARTY TO PARTIPATE FULLY IN THE UNFAIR LABOR PRACTICE PROCEEDING.

Respondent's Protective Order, if adopted by the ALJ, would unduly interfere with and undermine the Charging Party's well-established rights in an unfair labor practice proceeding, including the rights to introduce and object to evidence, to cross examine witnesses, to file exceptions and to make arguments based on the record and applicable law. Boeing would

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[5] Federal courts recognize an exception to the presumption of access for the sealing of documents attached to a non-dispositive motion. Such documents require only a showing of good cause. The rationale for this exception is that the public has less of a need for access to court records attached to non-dispositive motions, because those documents are often "unrelated, or are only tangentially related to the underlying cause of action." *Foltz*, 331 F.3d at 1135, quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). However, where a party seeks to seal documents that become part of a judicial record, the heightened "compelling reasons" standard applies. *See*, *Kamakana,* 447 F.3d at 1180.

effectively exclude the Union from large portions of the case – including the documents and testimony that lie at the very heart of the unfair labor practice allegations being adjudicated here - through a two-tier designation procedure. Boeing has proposed that it be permitted to designate certain information as "Confidential" if it believes that disclosure of such information to *competitors* or the *public* would be injurious. It has also proposed that it be permitted to designate other information as "Highly Confidential" if Boeing believes disclosure to the *Union* would be injurious, including by giving the Union some abstract advantage at the bargaining table. In addition to CAGC and its staff, the ALJ and court reporters, such "Highly Confidential" information can only be disclosed to counsel for the Union, outside experts unaffiliated with the Union and, in limited circumstances, certain Union officials to whom the ALJ orders disclosure. Any counsel or expert who views "Highly Confidential" materials is forever disqualified from representing District 751, including in all future negotiations.

A. The Charging Party Has the Well-Established Right To Fully Participate In the Unfair Labor Practice Proceeding.

Section 102.8 of the Board's Rules and Regulations defines "party" as specifically including the charging party:

> The term "party" as used herein shall mean the Regional Director in whose Region the proceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, *including, without limitation, any person filing a charge or petition under the Act....*

29 C.F.R. § 102.8 (emphasis added). Section 102.38 provides, "[a]ny party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary evidence." 29 C.F.R. § 102.38.

Accordingly, the Charging Party in an unfair labor practice case is entitled to be present and fully participate in the proceedings. In *NLRB v. Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO*, 476 F.2d 1031, 1036 (1st Cir. 1973), the First Circuit explained how the purposes of the NLRA are served by having the Charging Party present and participating at the hearing:

> [T]he charging party in an unfair labor practice proceeding possesses a unique legal status. Although like a complaining witness in a criminal prosecution in that it cannot compel issuance of a complaint, it has far greater powers once the complaint issues. By Board rule, 29 C.F.R. § 102.8, pursuant to statutory authorization, 29 U.S.C. § 160(b), it is considered a "party", and may, subject to limitations imposed to parallel the extent of its interest, **participate fully** in the subsequent hearing and proceedings before the Board, by **introducing and objecting to evidence, cross-examining witnesses**, filing exceptions, arguing orally before the Board, and petitioning for reconsideration.... On the other hand, the charging party is not the alter ego of the Board or the equivalent of a civil litigant.... It is rather **the gadfly insuring that the Board considers all relevant facts and acts in the public interest** and the enforcer of whatever private rights the Act recognizes.

Id. at 1036 (emphasis added). *See also, International Union, United Auto Workers v. Scofield*, 382 U.S. 205, 219, 86 S.Ct. 373, 382, 15 L.Ed.2d 272 (1965) ("the charging party is accorded formal recognition: he participates in the hearings as a 'party;' he may call witnesses and cross-examine others") (footnote omitted); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 156 n.22, 95 S.Ct. 1504 (1975) ("[u]nlike the victim of a crime, the charging party will, if a complaint is filed by the General Counsel, become a party to the unfair labor practice proceeding before the Board"); *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 811 n. 6 (D.C. Cir. 1997) (Wald, J., dissenting in part) ("[o]nce formal proceedings have begun, a charging party is treated just like any other party.... Charging parties have the right to appear at the hearing and to examine and cross examine witnesses"); *Ashley v. NLRB*, 454 F. Supp. 2d 441, 446 (M.D.N.C. 2006), *aff'd*,

255 Fed. Appx. 707 (4th Cir. 2007) (unpublished) ("the [charging] party has the right to, among other things, subpoena evidence and witnesses, appear at the hearing, [and] cross-examine witnesses"); *Rickert Carbide Die, Inc.*, 126 NLRB 757, n.3 (1960) (charging party is entitled to "participate fully" in the unfair labor practice proceeding).

B. Any Provision Of A Protective Order That Limits the Charging Party's Participation In The Board Proceeding, As Boeing's "Highly Confidential" Category Does, Unlawfully And Severely Prejudices The Charging Party, And Must Be Rejected.

Respondent attempts to impose a Protective Order upon the parties to this proceeding, the ALJ, and all reviewing bodies, that excludes the Union from full access to evidence, while giving Boeing the unfettered discretion to determine which of its subpoena responses and affirmative evidence the exclusions apply to. Boeing accomplishes this through its "Highly Confidential" category, which "includes, but is not limited to, asset allocation and utilization plans, assembly rate information, studies or analyses dealing with work placement, non-public financial data (except for wages and benefits), and actual contracts with subcontractors." Already encompassed within the confidential designation are "business strategy or planning" documents, including, "without limitation, considerations regarding cost, competition, production scheduling, and contingency planning in connection with the development of the second final assembly line in Charleston and the surge line in Everett." Yet Boeing may designate as "Highly Confidential" studies, analyses and plans related to work placement if it believes disclosure to Union officials would advantage District 751 in bargaining.

The sweeping definition that Boeing has attached to the "Highly Confidential" category illustrates that, without doubt, adoption of the two-tier designation structure would permit Boeing to conceal from the Union, its officers and the injured workers, as well as the public, the documents that answer the key question at the heart of this case: Why did Boeing move the

second 787 final assembly line from Everett to North Charleston? For example, if Boeing possessed a memo, written some time around August 2009, in which Boeing set forth a plan to leverage the chilling impact of its move of the second line to South Carolina as a way to inhibit strikes and force concessions at the bargaining table, under Boeing's Proposed Order, that document could be marked "Highly Confidential." The Union would not be permitted to consult or examine friendly or hostile witnesses about that document. When time for testimony about that document came about, the ALJ would be required to order out of the courtroom not only the press and the public, but the Charging Party's designated representative (District 751 President Tom Wroblewski). Similar restrictions would apply to financial information and work placement studies that Boeing may use to support its *Wright Line* affirmative defense, effectively preventing the Union from rebutting Boeing's case.

In a last minute concession, Boeing added a provision that would allow the ALJ to decide, on a limited, case-by-case analysis, that a particular Union witness may have access to particular "Highly Confidential" documents. This additional provision reads:

> The Administrative Law Judge may permit HIGHLY CONFIDENTIAL MATTER to be shown to an identified representative or representatives of the IAM, including additional counsel, upon showing by the IAM that disclosure of the HIGHLY CONFIDENTIAL MATTER in question to the representative(s) is necessary to the IAM's meaningful participation in the Proceeding.

The problems inherent in the "Highly Confidential" category are not mitigated by this provision, because it (1) still treats the Charging Party's access to documents as an exception; (2) it improperly shifts the burden to establish "good cause" from Boeing to the Union; (3) it ignores the obvious need to be able to review the document with the union representative in order to adequately be able to demonstrate good cause; (4) it does not allow testimony, or use of other "Highly Confidential" documents in rebuttal; and (5) it would be time-consuming, disruptive,

wasteful of judicial resources, including by delaying the Charging Party's ability to evaluate the meaning and probative value of documents and to prepare and cross examine witnesses.

In light of the Charging Party's well-established interest and right in participating in this hearing, including to put on its case-in-chief and cross-examine witnesses, Respondent's two-tier designation process, including a "Highly Confidential" category, must be rejected.

V. NO PROTECTIVE ORDER MAY ISSUE THAT CONDITIONS ACCESS TO CONFIDENTIAL MATERIALS ON DISQUALIFICATION FROM FUTURE COLLECTIVE BARGAINING.

Under Boeing's Proposed Protective Order, any counsel or expert who has access to "Highly Confidential" information may not represent District 751 or otherwise be involved in any manner in any future collective bargaining negotiations between Boeing and the Union. Boeing thus conditions the participation of the Union in the hearing, through its counsel and experts, on disqualification of those individuals from future negotiations in perpetuity. Disqualification of the kind proposed is not only punitive, impractical and highly prejudicial to the Charging Party, but also unlawful.

A. Disqualification Of The Kind Proposed By Boeing Would Deny The Union Its Right To Fully Participate In The Board Proceeding.

For reasons explained in § IV above, a Protective Order may not deny the Charging Party its right to fully participate in the Board Proceeding. Boeing's proposal to disqualify from future negotiations any counsel, expert or negotiator who has access to "Highly Confidential" documents does just that. If the ALJ were to adopt Boeing's proposed order, the Charging Party would be faced with the following choice as to each attorney, expert and, as Boeing has at times proposed, IAM or District 751 witness granted access to "Highly Confidential" information: do not allow them to participate in this proceeding or do not use them in any future bargaining.

There is no legal basis for forcing such a choice. The Union alleged in its unfair labor practice charges that Boeing violated federal labor law when it decided to transfer its second 787 final assembly facility from Washington to South Carolina in retaliation for strikes and to prevent future strikes. In order to retain its use of counsel, experts and negotiators in future collective bargaining, the Charging Party must not be limited from its full participation in the trial on the merits of its ULP charges. Boeing's "Highly Confidential" designation, and its disqualification provision, should be rejected on this basis alone.

B. Denying A Union Its Choice Of Bargaining Representative Is An Unfair Labor Practice In Violation Of 8(a)(5) Of The National Labor Relations Act.

Employees and employers generally have an unrestricted statutory right to select who they wish to represent them in labor negotiations. *General Elec. Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969). "This right carries with it a corresponding obligation to meet with the representatives chosen by the other side." John E. Higgins, Jr., *The Developing Labor Law*, 897 (5th Ed. 2006), citing *General Elec. Co.*, 412 F.2d 512; *NLRB v. Indiana & Mich. Elec. Co.*, 599 F.2d 185, 191 (7th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980). Thus, as a general rule, neither party may lawfully refuse to bargain with the other because of a personal objection to an individual selected to serve as a member of that party's negotiation team. *See, e.g., R.E.C. Corp.*, 307 NLRB 330, 333 (1992).

While there have been narrow exceptions to the obligation of an employer to meet with the particular representatives of the union's choosing, "they have been rare and confined to situations so infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical." *General Elec. Co.*, 412 F.2d at 517. An employer must establish the heavy burden that meeting with that particular designated representative would be a "clear and present danger to the bargaining process." *Id.* ("Thus, the freedom to select representatives is not

absolute, but that does not detract from its significance. Rather the narrowness and infrequency of approved exceptions to the general rule emphasizes its importance."); *CBS Inc.,* 226 NLRB 537, 539 (1976), *enf'd sub nom. Electrical Workers (IBEW) v. NLRB*, 557 F.2d 995 (2d Cir. 1977) (presence on unions' bargaining panel of official of another labor organization, which represented no employees of two archrivals, constituted clear and present danger to bargaining process, in which employer had intended to reveal to unions confidential trade secrets relating to its proposals).

However, the burden to establish the exception is heavy, and the Board has enforced the duty to bargain, even in circumstances involving an employer's concerns around confidentiality. *Milwhite Co.*, 290 NLRB 1150, 1151 (1988) (employer obligated to bargain with union even though member of union negotiating team, the union president, was long-time employee of competitor); *KDEN Broadcasting General Elec. Co.*, 225 NLRB 25, 35 (1976) (holding it was a ULP for employer to refuse to meet with a bargaining committee member that included a managerial employee who had access to confidential records of the employer).

Under enduring Board precedent, Boeing's Proposed Protective Order denying the Union its choice of representatives in future collective bargaining would, if adopted, constitute a violation of §§ 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA"). *Quality Food Management, Inc.*, 327 NLRB 885, 889 (1999); *R.E.C. Corp.*, 307 NLRB at 336; *Indiana & Mich. Elec. Co.*, 599 F.2d at 190 (absent extraordinary circumstances, "the employer violates the Act by interfering with its employees' choice of negotiators, or by refusing to deal with the negotiators once selected"); *KDEN,* 225 NLRB at 35; *General Elec. Co.*, 412 F.2d at 523. For the foregoing reasons, any Protective Order must not include disqualification of counsel, its employees or experts based on access to Boeing's confidential documents.

C. Denying A Union Its Choice Of Counsel Violates Well-Established Principles Of Autonomy In Selecting One's Legal Representative And Is Highly Prejudicial To The Charging Party.

Courts have long recognized that litigants have a broad right to choice of counsel. *Flores v. Emerich & Fike*, 416 F. Supp. 2d 885, 908 (E.D. Cal. 2006) ("[a]s a general matter, each party to litigation is entitled to have legal representation of its choice"); *In re Valley Historic Ltd. Partnership*, 307 B.R. 508, 517 (Bankr. E.D. Va. 2003) ("[t]he selection of counsel is generally within the sound discretion of the client"); *Harrison v. Keystone Coca-Cola Bottling Co.*, 428 F. Supp. 149, 152 (M.D. Penn. 1977) ("Implicit in the right to represent oneself is the right to be represented by counsel of one's own choosing.").

The right to select one's legal representative should not be interfered with lightly. As the Fifth Circuit has explained, this principle exists in both the civil and criminal contexts:

> [T]he right to counsel in criminal cases is expressly guaranteed by the sixth amendment; the right to counsel in civil cases is no less fundamental and springs from both statutory authority and from the constitutional right to due process of law. Therefore, disqualification of counsel "is an extreme remedy that will not be imposed lightly."

McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1262-63 (5th Cir. 1983) (citation and footnote omitted).

The Eleventh Circuit has discussed the presumptive right to choice of counsel in the context of a motion to disqualify counsel – a motion akin to what Boeing is attempting to accomplish through its "Highly Confidential" designation and attendant disqualification provisions:

> Because a party is presumptively entitled to the counsel of his choice, that right may be overridden only if "compelling reasons" exist. *Texas Catastrophe Property Ins. Ass'n v. Morales,* 975 F.2d 1178, 1181 (5th Cir.1992) (*quoting McCuin,* 714 F.2d at 1262); *see also United States v. Locascio,* 6 F.3d 924, 931 (2nd Cir.1993) (recognizing, in criminal case, presumption that party is entitled to counsel of choice, which may be overcome "by a showing of an actual conflict or

> potentially serious conflict"). The party moving to disqualify counsel bears the burden of proving the grounds for disqualification. *Duncan v. Merrill Lynch,* 646 F.2d 1020, 1028 (5th Cir. Unit B 1981); *accord A.J. by L.B. v. Kierst,* 56 F.3d 849, 859 (8th Cir.1995); *see also American Airlines,* 972 F.2d at 611 (holding that motions to disqualify are subject to exacting review because of potential for strategic abuse); *Evans v. Artek Sys. Corp.,* 715 F.2d 788, 794 (2nd Cir.1983) (characterizing movant's task in seeking removal of opposing counsel as "heavy burden").

In re Bellsouth Corp., 334 F.3d 941, 961 (11th Cir. 2003) (citations omitted).[6] *Accord, A.H. Robins Co. Inc.*, 197 B.R. 607, 608 (Bankr. E.D. Va. 1992) ("[e]lection of counsel is a serious interest that should not be hampered without sound justification") (citation omitted); *Roberts v. Anderson*, 66 F.2d 874, 876-77 (10th Cir. 1933) (finding party was "denied her constitutional right to be heard through counsel of her choice").[7]

Boeing's proposed "Highly Confidential" category, and its disqualification provision, is such a "strategic abuse," as it attempts to disadvantage the Union by denying its use of undersigned counsel, either in the prosecution of the instant unfair labor practice charges or in the bargaining of future contracts, where the counsel has decades-long experience and institutional knowledge of the Union, its contracts, its negotiations history and labor law. Boeing cannot establish any legitimate basis for its request, much less compelling reasons for it. It is unclear, for example, why Boeing believes that counsel's access to documents, including "studies or analyses dealing with work placement," concerning the basis for Boeing's decision in

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[6] In *Bellsouth*, the court found that the right to counsel of choice could be overridden under this test, where the particular individual was chosen as counsel "with the sole or primary purpose of causing the recusal of the judge." *Id.* at 956.

[7] All but one of the cases cited herein regarding the right to counsel of one's own choosing are civil cases in a variety of contexts, including environmental issues, defamation, civil rights, securities fraud, shareholder actions and property disputes. The only criminal case is *United States v. Locascio*, 6 F.3d 924.

2009 to relocate the second 787 final assembly line from Washington to South Carolina would have any bearing on the negotiations in 2012 and beyond.

District 751 acknowledges that courts, in certain circumstances involving counsel's representation of *business competitors*, have issued a protective order that both limits disclosure of confidential information to counsel (to the exclusion of the client) and disqualifies counsel from representation of a competitor on some issues for some period of time; however, such cases, often arising in the patent prosecution or antitrust context, are distinguishable for several important reasons.

First, District 751 is not a business competitor of Boeing, and Union counsel does not represent any of Boeing's competitors, or their employees or unions. Second, disqualification of the Union's counsel and negotiators, who all have a long history of representing District 751 in its negotiations with Boeing, is an extreme penalty with lasting implications well beyond the instant litigation. Finally, the information that Boeing seeks to exclude from counsel, e.g., the considerations, studies and analyses relating to Boeing's siting decision in 2009, lies at the very heart of this case. Exclusion from such information effectively precludes the Union from participating in the hearing or calling witnesses to establish parts of its case or to rebut Boeing's asserted defenses to the alleged unfair labor practices directly at issue.

For the foregoing reasons, any Respondent's request to include a disqualification of counsel provision in the Protective Order should be denied.

CONCLUSION

District 751 respectfully requests the ALJ consider all of the foregoing authority and analysis in determining whether and to what extent a Protective Order is warranted in this case.

Should the ALJ determine a Protective Order is necessary, District 751 respectfully requests the ALJ adopt the Proposed Production and Protective Order attached hereto as Exhibit A.

Respectfully submitted this 25th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 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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Exhibit A

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

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

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

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

Definitions

1. As used herein, "Confidential Information" means all written, recorded or graphic matter, including, but not limited to, electronic and hard copy records, which are produced by Respondent by agreement or in response to *subpoenas duces tecum* issued on behalf of CAGC, the Charging Party or the Administrative Law Judge and which are designated by Respondent as Confidential, a) where such designation has not been disputed pursuant to § 14 of the Order, or b) where such designation was disputed pursuant to § 14 of the Order and the Administrative Law Judge has determined such records to be subject to this Protective Order; any portions of the transcripts of testimony concerning any such Confidential records or documents, where Respondent has moved and the ALJ has ordered such portions of the transcript be designated Confidential; and any portion of any filings by the parties or orders by the Administrative Law Judge, the Board or any other judicial officer in the Board Proceeding or in any Related Action that quotes from any such Confidential records or documents.

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

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

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

Production of Subpoenaed Documents

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

Designation of Confidential Information

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

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

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

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

Disclosure of Confidential Information

9. Respondent by motion may request that members of the public and other individuals not specifically allowed access to Confidential Information under this Order be excluded from the hearing at times when Confidential Information is disclosed. The Parties shall take all reasonable steps to minimize disruptions to the Board Proceeding and to ensure public access to the Board Proceeding to the greatest possible extent, including by structuring the order and examination of witnesses to maximize public access to the Board proceeding and by examining witnesses without reference to non-Confidential documents where reference to such non-Confidential documents would be equally as effective as reference to Confidential documents.

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

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

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

13. Confidential Information may be disclosed solely to the following persons:

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

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

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

d. The Parties;

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

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

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

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

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

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

Disputes

14. The Charging Party or CAGC may challenge Respondent's designation of any document as Confidential by the following procedure: If the Charging Party and/or CAGC object to the Producing Party's designation of a document as "Confidential," the Charging Party and/or CAGC (hereinafter "the objecting Party") shall serve a written notice of the dispute upon CAGC and the other Party/Parties within thirty (30) days of receipt of Respondent's certification of compliance referenced in §5. CAGC and the Parties shall, within five (5) business days of receipt of the written notice of the dispute, confer or attempt to confer with each other in a good faith effort to resolve the dispute. In the event that the dispute is not resolved through such conference, the objecting Party may thereupon move for a ruling from the Administrative Law Judge on all disputed designations.

15. If the Producing Party produces additional documents designated "Confidential" after it has produced the certification of compliance referenced in §5, the Charging Party or CAGC may challenge Respondent's designation of any such document as Confidential pursuant to the same procedure set forth in § 14.

16. At all times, the Producing Party bears the burden to establish "good cause" for applicability of this Order to a contested document based on a specific factual showing that a) the document in fact constitutes trade secret or other confidential commercial information and b) disclosure of the document will result in a clearly defined and serious injury to Respondent.

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

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

Rights Reserved/Hearings/Trial

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

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

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

Termination of Proceedings

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

Freedom of Information Act ("FOIA") Requests

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

24. In addition to the designation procedure set forth in Section 6 above, Respondent may mark with a designation of "confidential commercial or financial information" those Confidential documents Respondent believes should be treated by the Board as protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). Such marking shall be done in a manner so as not to interfere with the legibility of any of the contents of the documents.

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

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

Miscellaneous

27. Should any Confidential Information be disclosed, through inadvertence or otherwise, to any person not authorized to receive it under this Order, then the disclosing person(s) shall promptly: (a) identify the recipient(s) and the circumstances of the unauthorized disclosure to the Producing Party; and (b) use best efforts to bind the

recipients to the terms of this Order. No information shall lose its confidential status because of its disclosure to a person not authorized to receive it under this Order.

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

Dated this _____ of _____, 2011.

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

Exhibit B

DRAFT

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

NATIONAL LABOR RELATIONS BOARD, Applicant, v. THE BOEING COMPANY, Respondent.	Case No. _____

PROTECTIVE ORDER AND CONFIDENTIALITY AGREEMENT

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

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

The Acting General Counsel and Charging Party have issued subpoenas to Boeing, which has refused to provide certain commercially sensitive and proprietary non-public documents absent a protective order that can be effectively enforced. Pursuant to Section 11(2) of the

National Labor Relations Act, the Acting General Counsel has brought an enforcement proceeding to compel disclosure of documents that Boeing has determined contain confidential information, and the Acting General Counsel, Charging Party, and Boeing have agreed to the following Protective Order, which the Court finds to be reasonable and appropriate.

IT IS HEREBY AGREED:

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

2. Definitions:

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

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

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

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

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

3. Production of Subpoenaed Documents:

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

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

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

4. Designation of CONFIDENTIAL MATTER and HIGHLY CONFIDENTIAL MATTER:

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

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

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

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

C. Before delivery to other parties of copies of Subpoenaed Material, each page of Subpoenaed Material designated as CONFIDENTIAL MATTER shall be marked by the producing person as "CONFIDENTIAL." Before delivery to other parties of copies of Subpoenaed Material, each page of Subpoenaed Material designated as HIGHLY CONFIDENTIAL MATTER shall be marked by the producing person as "HIGHLY CONFIDENTIAL." If the producing party designates only a portion of a document as CONFIDENTIAL or HIGHLY CONFIDENTIAL, the

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

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

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

F. All CONFIDENTIAL and HIGHLY CONFIDENTIAL MATTER shall be controlled and maintained in a manner that precludes access by any person not entitled to access under this Order. At all times in this proceeding, the Acting General Counsel shall maintain responsibility for ensuring the security of those portions of the official record that constitute CONFIDENTIAL or HIGHLY CONFIDENTIAL information, and any copies thereof that have been provided to the Administrative Law Judge, the Board, or the District Court.

5. Restrictions on CONFIDENTIAL MATTER:

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

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

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

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

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

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

iv. witnesses at the hearing in the Board Proceeding, as allowed by the rules and regulations of the National Labor Relations Board, and witnesses at

the hearing in any Related Federal Court Proceeding as allowed by the Federal Rules;

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

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

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

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

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

(b) experts; and

(c) persons served with a Subpoena *ad testificandum* in the Board Proceeding or any Related Federal Court Proceeding, when the person is expected to testify and when the Subpoena *ad testificandum* has not been revoked, to the extent reasonably necessary in preparing to testify in such proceeding; provided, however, that no such witness may retain a copy of any material

designated as CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER, except as otherwise provided by this Order.

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

6. Restrictions on HIGHLY CONFIDENTIAL MATTER:

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

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

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

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

ii. undersigned counsel for the IAM and secretarial, technical, and clerical persons employed by the law firm of the undersigned counsel for the IAM, who have been assigned to assist in the conduct of the Board Proceeding

or any Related Federal Court Proceeding. No such employee may be otherwise associated with the IAM; moreover, no one employed by the undersigned counsel's law firm who has access to HIGHLY CONFIDENTIAL MATTER may represent the IAM or be involved in any manner in any collective bargaining negotiation between the IAM and Boeing;

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

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

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

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

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

D. With respect to HIGHLY CONFIDENTIAL MATTER, the Administrative Law Judge may, upon a showing of good cause by the producing party, restrict HIGHLY CONFIDENTIAL MATTER to the Acting General Counsel. The

Administrative Law Judge may permit HIGHLY CONFIDENTIAL MATTER to be shown to an identified representative or representatives of the IAM, including additional counsel, upon showing by the IAM that disclosure of the HIGHLY CONFIDENTIAL MATTER in question to the representative(s) is necessary to the IAM's meaningful participation in the Proceeding.

7. Public Access:

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

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

C. The Parties shall take all reasonable steps to minimize disruptions to the Board Proceeding and any Related Federal Court Proceeding, and to minimize limitations on public access to the Proceedings, by structuring the order and examination of witnesses without reference to CONFIDENTIAL or HIGHLY CONFIDENTIAL documents where reference to non-CONFIDENTIAL

documents would be equally as effective as reference to CONFIDENTIAL or HIGHLY CONFIDENTIAL documents.

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

8. Use:

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

9. Use by Producing Person:

Nothing in this Order shall be construed to limit in any way the right of the producing person to use its own Subpoenaed Material, including CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER, for any purpose other than in the Board Proceeding and any related Federal Court Proceedings.

10. Certification of Compliance:

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

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

11. Subpoena by Other Courts or Agencies. If another court or an administrative agency subpoenas or orders production of CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER that a party has obtained in the Board Proceeding, the party that has received the subpoena or order shall notify the person that designated the Subpoenaed Material as CONFIDENTIAL MATTER or HIGHLY CONFIDENTIAL MATTER of the issuance of such subpoena or order as soon as possible, but in no event later than three (3) business days after receiving the subpoena or order, and in any event before the date of production set forth in the subpoena or order. The producing person may then notify the person receiving the subpoena of the producing person's intent to intervene to resist the subpoena. Should the producing person give notice of such intent,

the person receiving the subpoena shall take steps reasonable and necessary to withhold production while the intervening person's motion is pending. Provided, however, that nothing in this Order shall be construed to require a party to violate or refuse to comply with valid court orders of any court, or with the rules of procedure of any court.

12. Filing:

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

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

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

B. The Acting General Counsel agrees that any information marked by Respondent as "CONFIDENTIAL" OR "HIGHLY CONFIDENTIAL" pursuant to paragraph

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

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

14. Material Not Placed in Evidence:

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

15. Termination of the Proceeding:

Within thirty days after the final conclusion of all aspects of the Board Proceeding, including any judicial review, CONFIDENTIAL MATTER and HIGHLY CONFIDENTIAL MATTER and all copies in the files of all attorneys and all other persons who have possession of such matter shall without exception either be returned to the producing person or, at the option of the party in possession, be destroyed in accordance with the same procedures described in

Paragraph 11 above, except that the time limit for counsel of record to deliver certificates of compliance with this paragraph shall be ninety days after final conclusion of all aspects of the Board Proceeding. Following termination of the Board Proceeding, the provisions of this Order relating to the confidentiality of protected documents and information shall continue to be binding, except with respect to documents or information that are no longer confidential.

16. No Waiver:

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

17. Disputes:

A. The Charging Party and/or Acting General Counsel may challenge Respondent's designation of any document as CONFIDENTIAL or HIGHLY CONFIDENTIAL by the following procedure: If the Charging Party and/or the Acting General

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

B. The Producing Party shall bear the burden to establish "good cause" for designation of documents as CONFIDENTIAL or HIGHLY CONFIDENTIAL under this Order based on a showing that: a) the document constitutes a trade secret or other confidential commercial or financial information, and b) disclosure of the document will result in an identifiable injury to Respondent.

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

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

E.

18. Rights Reserved

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

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

19. Modification:

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

20. Duration:

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

21. Violations:

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

IT IS SO ORDERED.

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

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

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

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

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

EXHIBIT A

CERTIFICATION AND STIPULATION

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

By_____

Dated_____