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

CHARGING PARTY'S MOTION TO STRIKE IN PART BOEING'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION FOR APPROVAL OF A PROTECTIVE ORDER

The Charging Party, International Association of Machinists and Aerospace Workers, District Lodge 751 ("District 751"), moves to strike those portions of Respondent's August 5, 2011 brief that refer to the failed compromise negotiations between the parties for an agreed protective order, as well as those portions of Respondent's brief that purportedly describe the parties' positions or proposals in those discussions. Respondent's representations of the parties' positions during negotiations for a stipulated protective order are not only grossly inaccurate, irrelevant and in direct contravention of the Administrative Law Judge's ("ALJ's") instructions, but they also fall squarely within the prohibition of Federal Rule of Evidence 408 and are clearly inadmissible. Although the Charging Party trusts that the ALJ will disregard those portions of Boeing's supplemental brief concerning negotiations for an agreed order, the instant motion to strike is necessary to preserve an accurate record.

I. INTRODUCTION

Respondent, The Boeing Company ("Boeing") has moved the ALJ for approval of a protective order to prevent the disclosure of Boeing's confidential and proprietary information. On July 25, 2011, Boeing submitted its motion, and District 751 and Counsel for the Acting General Counsel ("CAGC") submitted briefs. All three parties submitted proposed protective orders for the ALJ's consideration. These submissions came after lengthy negotiations between the parties for an agreed protective order failed. The ALJ heard oral argument on July 28, 2011. Subsequently, the parties again attempted to reach agreement on a stipulated protective order. Again, these discussions were unsuccessful. On August 5, 2011, all three parties submitted supplemental briefs, along with their additional/revised proposals for the order itself.

In its supplemental brief, Boeing acts in a manner expressly at odds with the ALJ's instructions concerning submissions of positions to the ALJ on the protective order issues. Boeing attempts to introduce an alleged incomplete rejected settlement proposal by the CAGC which omits material portions. It misrepresents purported settlement discussions to persuade the ALJ to adopt its revised proposed protective order. Boeing also grossly misrepresents the Charging Party's positions in negotiations.

The ALJ has previously instructed the parties as follows:

JUDGE ANDERSON:

> ....**And as I told you before, you either have an agreement or you don't**. If you don't have an agreement, I may well take your positions, **but as the Respondent has said before, your positions on almost getting an agreement are not necessarily your positions on getting an agreement. So an almost agreement doesn't really help me as a concession, because the parties are going to say, wait a minute, this was a compromised document**.

Tr. Vol. 16, 919:14-22.

JUDGE ANDERSON:

> .....Unless you're submitting an agreement to be bound conditionally through my selection, or unconditionally by its terms, then **I just want your position, because I don't think it's right to take an almost-there document and use that against the parties. I refer again to Boeing's earlier position when we tried to negotiate a deal, we made concessions which wouldn't be our position necessarily if we didn't have a deal.** If you don't have a deal and your motions keep changing, by that I mean the motions currently before me, not ruled on, then let me know....

Tr. Vol. 16, 922:1-12.

The Charging Party has set forth its unwavering position, and the authority for that position, in its two briefs and its proposed protective order. It has at all times, before the ALJ and otherwise, rejected the notion that there is any legal basis for 1) Boeing's asserted right to withhold any subpoenaed information from the Charging Party on the basis that disclosure of such information would harm Boeing by giving the Union "unfair advantage" in future collective bargaining or 2) disqualification of the Charging Party or its counsel in future Boeing – IAM contract negotiations based on access to such documents. In the event the ALJ were to adopt some "Highly Confidential" or "Restricted" category of information, District 751 anticipated and proposed a procedure for a document-by-document challenge of that designation, the withholding of the document, and Boeing's contention that disclosure to the Union will cause it any specific or serious injury. In so doing, the Union maintained that, in no event, may the Charging Party be denied access to any document introduced into evidence, any testimony, or any information sufficiently probative that 1) denial of access by the Charging Party would interfere with the CAGC's prosecution of the alleged unfair labor practices or 2) access

by the Charging Party is necessary to the Charging Party's full participation as a party in the case.

Among the inaccurate and misleading statements Boeing makes concerning the parties' positions in negotiating an agreed protective order are the following:

- That the Charging Party agreed that any of Boeing's documents are "presumptively confidential;"
- That some confidential documents may contain information that would give the IAM an unfair advantage in its collective bargaining relationship with Boeing; or
- That a federal court order is necessary to provide full protection and enforcement for Boeing's confidentiality interests.

II. ARGUMENT AND AUTHORITY

Boeing's representations concerning the Charging Party's positions in negotiating a compromised protective order are not only inaccurate and misleading, but they are irrelevant, since, as the ALJ has already recognized, the offer or compromise position of any party does not reflect an admission that the party believes that position to be legally mandated, or even preferred.

Such compromise positions are likewise inadmissible under Federal Rule of Evidence 408 (prohibiting as evidence statements made in pursuit of a compromise of a claim to prove the validity or invalidity a claim); 29 C.F.R. § 102.39 (federal rules of evidence applicable "so far as practicable"). Rule 408 is premised primarily on the notion that without this protection parties would be deterred from entering into settlement discussions with their opponents. *See, S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 50 F.3d 476, 480 (7th Cir. 1995). The Board's Rules and Regulations also prohibit the admissibility of "evidence regarding statements, conduct, offers of settlement, and concessions of the parties" made in proceedings before a settlement judge. 29 C.F.R. §102.35(b)(4). Documents disclosed in the settlement process may not be used in

litigation. 29 C.F.R. §102.35(b)(5). These same principles of encouraging settlement discussions, and rules of exclusion as evidence the parties' compromise positions before a settlement judge, apply with equal force to the discussions, proposals and counterproposals exchanged among Boeing, CAGC and District 751 in efforts to achieve an agreed protective order. The Charging Party proceeded with continued negotiations concerning an agreed protective order, acting in good faith that Boeing would adhere to the ALJ's directions that the parties not submit settlement positions to him. Given Boeing's willingness to disregard the ALJ's rulings, and its apparent willingness to inaccurately claim that unsuccessful settlement proposals justify inferring a compromise of rights, further negotiations will be fruitless absent a clear ruling on this motion to strike.

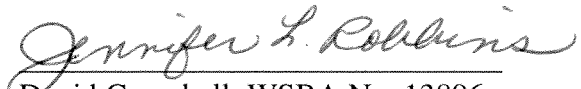
Boeing now proposes that the ALJ adopt a protective order that incorporates some proposals put forth after oral argument on July 28, 2011, including a provision that would prohibit a party from recalling a witness to testify at the hearing "on the ground that a confidentiality designation had not been challenged, or that such challenge had not been resolved, prior to the witness's attendance." Boeing Supplemental Brief, Ex. A, at IV.A. The issue whether the ALJ will permit a party to recall a witness for any reason is not a proper issue for a protective order, but is rather a proposal that the ALJ restrict his own broad discretion as to trial management outside the context of a confidentiality protocol. This issue arose, via a proposal by Boeing, only after oral argument on the protective orders. As the ALJ directed the parties not to present proposals, unless they were part of a fully-agreed order, the Charging Party and CAGC have not been afforded the opportunity to present argument or authority on the point. The Charging Party therefore

respectfully requests that, if the ALJ is seriously considering including a no-recall provision in his protective order, that he permit supplemental briefing on point.

III. CONCLUSION

For the foregoing reasons, the Charging Party respectfully requests that the ALJ strike those portions of Respondent's August 5, 2011 brief that refer to the failed compromise negotiations between the parties for an agreed protective order, as well as those portions of Respondent's brief that purportedly describe the parties' positions or proposals in those discussions.

RESPECTFULLY SUBMITTED this 8th day of August, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2011, I caused the foregoing Charging Party's Motion to Strike In Part Boeing's Supplemental Brief In Support Of Its Motion For Approval Of A Protective Order 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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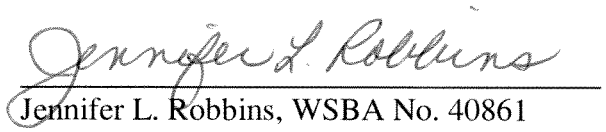

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