UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

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

BOEING'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION FOR APPROVAL OF A PROTECTIVE ORDER TO PREVENT THE DISCLOSURE OF BOEING'S CONFIDENTIAL AND PROPRIETARY INFORMATION

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Introduction

After weeks of discussion, including briefing and oral argument, it would appear that Boeing and the Acting General Counsel reached agreement on almost all terms of a Protective Order. We write "it would appear" because so it did, until less than two hours before today's filing deadline, when counsel for the Acting General Counsel told Boeing's counsel that a draft negotiated late into the night before the filing deadline was not necessarily the order the Acting General Counsel would be proposing to the Administrative Law Judge. Indeed, counsel for the Acting General Counsel said she *did not know* what proposed order the Acting General Counsel would be filing, and had not recently seen it. Accordingly, this brief will address (and attach) the proposed order that the Acting General Counsel most recently provided—and extensively negotiated with Boeing—and will refer to that as reflecting what Boeing had understood and long been led to believe was the Acting General Counsel's position.

With that qualification, then, the parties now agree that certain of Boeing's documents sought by the Acting General Counsel and the International Association of Machinists and Aerospace Workers, District Lodge 751 (hereafter "IAM" or "Union") are presumptively confidential and would cause harm to Boeing if publicly disclosed. The parties further acknowledge Boeing's concern that some confidential documents may contain information that would not be provided to the IAM in the course of collective bargaining and, if disclosed to the Union in this proceeding, would give the IAM an unfair advantage in its collective bargaining relationship with Boeing. And, the parties appear to recognize the appropriateness of a federal court order to provide full protection and enforcement for Boeing's confidentiality interests.[1]

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[1] Since the last hearing on July 29, Boeing's negotiations were directly with the counsel for the Acting General Counsel, who in turn has been speaking with the IAM and reportedly attempted to address and incorporate their concerns in its draft proposals. Boeing therefore

Boeing's revised proposed Order (attached as Exhibit A) addresses all of these matters in a manner that properly protects Boeing's indisputably legitimate confidentiality interests, while also respecting the interests of the Acting General Counsel, the Charging Party, and the general public. Boeing's proposed Order is in a form to be entered by this tribunal; Boeing would then seek an order that is identical in all material respects from federal district court.

Exhibit B to this brief is a "redline" copy of the last proposed order that Boeing received from the Acting General Counsel, showing—in redline—where Boeing would alter the Acting General Counsel's order to conform to its own. The changes—while relatively few—are important, and Boeing could not agree to an order that included the provisions of the Acting General Counsel's order that diverge from Boeing's. That is, Boeing requests a ruling, and is not in a position to agree to an order that draws from both competing proposals.

This brief begins by addressing certain questions raised in the July 28 hearing regarding the role of this tribunal vis-a-vis the district court, and the effect of a protective order on the conduct of the hearing. It then addresses the specific remaining differences among the parties. We first address the most important concerns—those dealing with access by representatives of the Charging Party to certain "restricted" Boeing information, and the role of the district court as the final interpreter and enforcer of the protective order—and then the significant differences.

I. The Function and Effect of Boeing's Proposed Protective Order.

The parties now evidently acknowledge the appropriateness of a federal court protective order; the preliminary observations of the Administrative Law Judge at the July 28 hearing suggest that this tribunal sees a place for a federal court order as well. At the same time, this tribunal has expressed its intent to enter an order of its own regarding confidential documents.

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operated in the belief that the Acting General Counsel's most recent draft reflected the IAM's operating position, but does not know what final position the IAM will stake.

Accordingly, Boeing's proposed Order, like the Acting General Counsel's, is in a form that could be entered by this tribunal and could then be entered by a federal district court with minor modifications—and, of course, with the federal court's concurrence.

At the July 28 hearing, the Administrative Law Judge invited discussion of the appropriate relationship between this tribunal and such a federal district court. *See* Rough Transcript, (attached as Exhibit C), at 80. "Let's assume that the parties took this order [entered by the ALJ] . . . and went into the Federal District Court. I'm imagining, why would they listen? . . . Will the judge not say in the District Court, what you want me to do is give some of my power to the [administrative law] judge so I'm limited on review . . . ?"). Boeing respectfully submits that the district court's perspective is likely to be as follows: A federal court will recognize the unique capacity an Article III court has to enforce its orders, and therefore to protect Boeing's significant confidentiality interests. A federal court's powers and responsibilities with respect to its own order are ultimately non-delegable; Boeing believes a federal court would reject an order that gave another authority—even the Board—final say on whether disclosure of a particular Boeing document violated the federal court's order. *See* Boeing's Motion for Approval of a Protective Order to Prevent the Disclosure of Boeing's Confidential and Proprietary Information (hereafter "Boeing's Motion"), at 16–18. At the same time, however, Boeing expects a federal court to respect this tribunal's familiarity with the factual and legal issues in the case and its need to "manage its own courtroom." Nor would a federal court want proceedings before this tribunal—or in the federal court—to be continually interrupted by demands for federal court review.

Boeing's proposed Order aims to balance these interests by presenting to the district court—in the form of an order by this tribunal—a process that the Administrative Law Judge

believes would result in a properly administered and manageable hearing, and that reserves a final decisionmaking role for the district court while providing that this tribunal's confidentiality rulings will be reviewed with "due deference." (Boeing also believes that this harmonization of the two tribunals' roles more than amply addresses any lingering concerns associated with the old pre-*Detroit Edison* cases involving regulatory commissions cited by the Acting General Counsel and the Charging Party). *See* pp. 7–9, below. Likewise, it is Boeing's expectation that the parties' objections to this tribunal's confidentiality rulings on Boeing's initial, principal production would be presented to the district court in an initial "single trip," rather than piecemeal through a series of individualized filings in federal court.

Counsel for the Charging Party raised concerns of another nature at the hearing which merit a brief response. First, with a rhetorical flourish, counsel suggested that Boeing will seek to designate the great majority of documents and testimony in this proceeding confidential, effectively shielding the case from public view. In fact, consistent with applicable law, under Boeing's proposed order a confidentiality designation would be supportable only if the information in the document was (a) not generally disclosed, and (b) likely to cause Boeing some specific harm. Ex. A, at I (defining "Confidential Information") & IV (establishing a procedure for the Acting General Counsel and/or the IAM to challenge Boeing's designations). Boeing already has disclosed numerous aspects of its decision to assemble 787's in South Carolina—it will not claim that matters it already disclosed are confidential. Moreover, not all things that *are* secret are potentially injurious if disclosed. Among other things, the passage of time can render information that was once sensitive and potentially injurious no longer so. For this and other reasons, Boeing already has given the parties numerous documents reflecting the business considerations that are essential to the merits of the IAM's and the Acting General Counsel's

allegations—*i.e.*, the considerations leading to the placement of the second final assembly line in Charleston, South Carolina. To be sure, there remain documents and information associated with that decision which are confidential. But Boeing's judiciousness in this regard is fully apparent to the parties: of the hundreds of documents that Boeing has produced to date to the Acting General Counsel and the IAM, only approximately 3% are designated "Confidential" in whole or in part.[2]

Second, counsel for the IAM suggested that Boeing's concern is that IAM members—Boeing employees—will leak confidential information to competitors such as Airbus. That is specious. As the Charging Party's counsel well knows, Boeing's proposed Order would give the IAM access to most confidential documents in the case—including many documents that would be useful to its competitors. The proposed Order would only restrict the IAM's access to a limited category of documents that the case law recognizes would provide the IAM with an unfair advantage in its collective bargaining relationship with Boeing. *See* Ex. A, at I(j) & III.C; *see also* Boeing's Motion, at 21–24 (discussing cases recognizing that limitations on access are warranted to prevent an unfair bargaining advantage). Boeing's proposed order would do so

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[2] In the parties' negotiations over the protective order this week, the Acting General Counsel proposed—presumably at the IAM's request—that Boeing agree to an order to require complete production in compliance with the subpoenas by August 16. This tribunal explicitly declined to entertain a similar request at the last hearing, on July 29. Such a deadline is not a customary element of a protective order, as reflected in the fact that the Acting General Counsel and IAM proposed it as a separate, companion stipulated order. Moreover, since the parties and the Administrative Law Judge first discussed such a deadline for "substantial compliance" with the subpoenas, the definition, scope, and means of identifying "confidential information" has been the subject of extended, evolving discussions and therefore uncertainty among the parties; this inevitably has slowed Boeing's preparation of documents for production. Accordingly, while Boeing is prepared to make a substantial document production August 16 and to substantially comply with the subpoenas (as limited by the Judge's rulings on the petitions to revoke) shortly after entry of a federal court order, its production is now slightly delayed. Compliance by August 16 should not be compelled, and is not germane to the question of the appropriate terms of a protective order.

through a familiar "attorneys' eyes only" provision that, if anything, is remarkable for the opportunities for access it continues to allow the Charging Party.

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Against this background, this brief will now proceed to address what Boeing understood to be the remaining differences between the parties' proposed protective orders.

II. This Tribunal Should Enter Boeing's Proposed Protective Order.

A. The Protective Order Must Provide A Consistent Means For The Resolution Of Disputes Through A Federal Court Enforcement Proceeding.

For there to be enforceable protection of Boeing's interests, a protective order must ultimately be entered in a federal district court, with final authority for dispute resolution vested in the district court rather than the Administrative Law Judge. As the Supreme Court explained in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), protective orders are "only as effective as the sanctions available to enforce them," and the Board's sanctions are not sufficiently effective to ensure the protection of confidential documents. *Id.* at 315–16. In its preliminary observations, this tribunal appeared to acknowledge the significance of *Detroit Edison*. *See* Ex. C., at 79. ("[T]here are consequences to an Article III judicial order. I cannot give that.").[3] The Acting General Counsel agrees that district court involvement is necessary by including provisions in his proposal that anticipate entry of a protective order in federal district court. *See* Ex B, at II.A. Nevertheless, the Acting General Counsel includes several obstacles to district

[3] Unlike the Board, federal district courts have broad discretion to enforce compliance with the terms of a protective order. *See, e.g., Clear One Communications v. Bowers*, ___F.3d___, 2011 WL 2547498, at *11 (10th Cir. 2011) (issuing a civil contempt order that required the defendant in a trade secret case to (a) immediately stop selling misappropriated confidential materials, (b) arrange for the delivery to the plaintiff of all misappropriated material, (c) provide written evidence that he had delivered all misappropriated material to the plaintiff no later than a certain date, (d) appear in court for incarceration after this date "unless and until he had proven to the court that he ha[d] complied with the court's directives," and (e) pay the plaintiff's attorneys fees for pursuing the contempt order against him).

court enforcement, which render his proposal impractical to administer and insufficiently protective of Boeing's confidential information.

First, the Acting General Counsel has proposed a bifurcated dispute-resolution procedure whereby *Boeing's* objections to the Administrative Law Judge's rulings agreeing with challenges to Boeing's designation of confidential documents are reviewed by the federal district court, but the *Acting General Counsel's and the IAM's* objections to rulings by the Administrative Law Judge rejecting such challenges can only be reviewed by the *Board*. *See* Ex. B, at IV.F. Aside from ignoring the legal reality that only a federal district court may issue enforceable mandates, this cumbersome, confusing procedure creates a real possibility of conflicting rulings by the district court and the Board. It is likely, for example, that the Administrative Law Judge will issue some rulings that are objectionable, in part or in whole, to all parties. In such instances, under the Acting General Counsel's procedure, Boeing would seek review of the ruling in district court, and the other parties would seek review of the same ruling before the Board. The two forums may issue inconsistent orders, making the parties' obligations unclear. If the Acting General Counsel or the IAM later sought enforcement of the Board's rulings in the district court under this complex regime the district court would unnecessarily be called upon to address an issue it had already decided. Similarly, if another party obtained a favorable ruling from the Board, Boeing still would be entitled to a district court's interpretation of its own order before being compelled to produce assertedly confidential information. Boeing's proposed Order eliminates this needless confusion by simply providing that any party aggrieved by the Administrative Law Judge's rulings on the designation or sealing of confidential information has the right to seek review of the ruling in the district court, which would rule with "due deference" to the decision of the Administrative Law Judge. Ex. A, at IV.F. Boeing's proposal anticipates

that with regard to Boeing's initial, principal production, the parties would bring all of their objections to the district court in a single proceeding after Boeing's production, the parties' review, and any challenges before this tribunal.

Second, the provision in the Acting General Counsel's proposal that allows those parties to petition to give the IAM full access to "restricted" material anticipates that the Administrative Law Judge will have final authority over such petitions. Ex. B, at III.C.3. But there is no reason why the order should give the Administrative Law Judge final authority over this limited category of documents while otherwise necessarily recognizing that authority to interpret and enforce the Protective Order resides with the district judge. Boeing's proposed Order appropriately provides that petitions raised under this provision would be subject to the Protective Order's general dispute-resolution procedures before the District Court. Ex. A, at III.C.3. As the authority that entered the Protective Order having that restriction, the district court should have the final say on any exceptions.

In placing the limitations on the district court's authority discussed above, the Acting General Counsel and the IAM purport to rely upon *FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977) and *FCC v. Schreiber*, 381 U.S. 279 (1965), which they claim stand for the proposition that the ability of district courts to enforce protective orders in administrative proceedings is "sharply limited." *See* Acting General Counsel's Response, at 8. Yet, *Texaco* and *Schreiber* have little relevance to this case, since they both pre-date *Detroit Edison* and neither case involved the NLRB. The cases stand for the unremarkable proposition that federal courts must give some deference to the actions of administrative agencies in enforcing their own statutory mandates. In *Texaco*, the district court developed its own system for reviewing and ruling upon purportedly-confidential material without giving the agency "an opportunity to rule on specific

requests for confidential treatment." 555 F.2d at 885. And in *Schreiber*, the district court upended an agency's regulation concerning the burden of proof for establishing the confidentiality of particular documents. *Schreiber*, 381 U.S. at 287. Boeing's proposed Order envisions nothing along these lines. The district court would have the benefit of the Administrative Law Judge's determinations regarding an appropriate framework for the protective order. Any disputes arising under the protective order would first be addressed by the Administrative Law Judge and then, if necessary, by a district court giving "due deference" to the Administrative Law Judge's decision.

It is, in fact, affirmatively necessary for a district court to retain final say over any protective order that it enters. As the Fourth Circuit has explained, "when, on the Board's application, an Article III judge is called on to determine whether to enforce a Board subpoena, the court must exercise its full judicial function and decide for itself the validity of the subpoena and the validity of the reason given for not complying with it." *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 497 (4th Cir. 2011); *see also Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985) ("Courts possess the inherent authority to enforce their own injunctive decrees"); *In re Debs*, 158 U.S. 564, 594 (1895) ("The power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court."). In the wake of *Detroit Edison*, district courts are familiar with entering protective orders to govern the handling of confidential information obtained in administrative proceedings. *See NLRB v. William Filene's Sons Co. Inc.*, Civ. No. 82-0472-C, 1982 WL 2173 (D. Mass. May 13, 1982) (prohibiting the NLRB from disclosing to the charging party employment records obtained through subpoena); *and see* the thoughtful discussion in *EEOC v. Aon Consulting, Inc.*, 149 F.

Supp. 2d 601 (S.D. Ind. 2001) (prohibiting the EEOC from disclosing to the charging-party employment-screening tests obtained through subpoena). And as a purely practical matter, although a district court would likely welcome an Administrative Law Judge's proposals on how to proceed and protect information in a Board proceeding, no district court will enter an order relinquishing its enforcement authority.

B. Boeing Must Be Allowed To Effectively Withhold Information From The IAM That Would Provide The Union With An Unfair Advantage In Collective Bargaining.

The parties generally acknowledge that some of Boeing's confidential information may contain information that, if disclosed to the IAM, would provide it with an unfair advantage in its collective bargaining relationship with Boeing. *See* Ex. C, at 47 (IAM counsel admitting "Boeing could conceivably have some argument that should be—that there should be some restriction on General Counsel only"); *and see id.* at 85 (Administrative Law Judge offering tentative view that "there may be a reason never to give [certain documents] to the union"). The case law supports a provision allowing Boeing to withhold these documents from representatives of the IAM except for outside counsel, outside experts, and outside support staff—a familiar "attorney's eyes only" provision. *See Brown Bag Software*, 960 F.2d 1465, 1471 (9th Cir. 1992); *see also, e.g.*, *Upjohn Co. v. Hygieia Biological Labs.*, 151 F.R.D. 355 (E.D. Cal. 1993) (entering an "attorneys' eyes only" provision preventing access by inside counsel); *In re Anonymous Online Speakers*, __ F.3d ___, 2011 WL 61635, at *7 (9th Cir. 2011) (same). Recognizing this, the last-seen proposal of the Acting General Counsel permits Boeing to withhold certain information from those representatives who "may represent the IAM in, or be involved in any manner in" the IAM's 2012 collective bargaining negotiations with Boeing. *See* Ex. B), at I(j). But the Acting General Counsel also undermines this basic principle in several important respects:

First, under his proposed order, the limitation on access by IAM representatives who will be involved in the 2012 negotiations would not apply to *counsel* for the IAM. *Id.* at I(b). Instead, the Acting General Counsel apparently believes that outside counsel for the IAM and others in the attorney's eyes only category should be able to view the contents of "restricted" documents *regardless* of whether they could use that information to Boeing's detriment in bargaining. This defeats the purpose of having a "restricted" category of documents since the lead counsel for the IAM has made it clear that he intends to be involved in the 2012 collective bargaining negotiations. Instead of allowing this unjustified carve-out, Boeing's proposed Order tracks the case law by recognizing that IAM access to "restricted" information must be limited to those people, counsel or otherwise, who will not assist the IAM in its 2012 negotiations with Boeing. *See* Ex. A, at I(b) & I(j).

Second, the Acting General Counsel's proposed order would allow counsel for the Acting General Counsel to "consult" with representatives of the Charging Party as "necessary to challenge [a] restricted designation or prepare its case," *See* Ex. B, at III.C.2. That proposed provision would again provide a loophole for representatives of the IAM to view "restricted" material. The Acting General Counsel attempts to mitigate the impact of this by providing that any representatives of the IAM who consulted with the Acting General Counsel would do so "subject to the restrictions of Section I(j)" (which limits the definition of Qualified Persons to exclude representatives of the Charging Party who will assist in the 2012 collective bargaining negotiations). *See id.* But this provision lacks any policing mechanism. The very purpose of having a protective order is so that Boeing need not rely upon the good faith of undisclosed persons to maintain the secrecy and prevent the unfair use of its confidential documents. Boeing's proposed Order closes this significant loophole by eliminating the Acting General

Counsel's unfettered ability to "consult" about restricted information with persons who are prohibited from accessing that information.

Third, the Acting General Counsel and the IAM provide that counsel for the Acting General Counsel or the Charging Party may avoid the limitations on IAM access to "restricted" documents by demonstrating that IAM access is necessary to the Charging Party's "full participation as a party in the case" or that the denial of access "interfere[s] with the Acting General Counsel's prosecution of the alleged unfair labor practices." Ex. B, at III.C.3. However, these standards are unduly vague and broad. By one view, "full participation" would mean "full" access to documents. The language plainly cannot mean that, however, since it would nullify the restriction. The meaning of the "full participation" language is therefore entirely unclear and impossible to apply. Similarly, the Acting General Counsel's inability to call any specified representative of the IAM will necessarily "interfere" with her discretion in some small way. But the case law unambiguously shows that some "interference" is warranted to protect Boeing's valid interests in protecting confidential information. Boeing's proposal addresses these problems by reasonably providing that the Acting General Counsel or the IAM may avoid limitations on access to "restricted" documents where the inability of a specific representative to access these documents would "meaningfully interfere" with the IAM's full participation in the Proceeding or with the Acting General Counsel's ability to try his case. Ex. A, at III.C.3. In the spirit of fairness, Boeing's proposal also includes a reciprocal provision that would allow Boeing to limit access to "restricted" documents to the Acting General Counsel if it demonstrated that such restrictions were necessary to adequately protect its confidential information. *Id.* at III.C.4.

Finally, counsel for the IAM suggested during oral argument that the case law on limiting attorneys' access to confidential information can only support the "disqualification of a counsel in a single patent case." Ex. B, at 52. But consistent with the terms of Boeing's proposed Order, the cases demonstrate that counsel involved in "competitive decisionmaking" vis-à-vis another party may use confidential information gained in one lawsuit to unfairly advise their clients on "a gamut of legal issues involving [that party]" going forward. *See Brown Bag Software*, 960 F.2d at 1471. Accordingly, in those circumstances, such counsel must either be denied access to such confidential material in the first instance or else not participate in subsequent related proceedings. *See, e.g., Gen-Probe Inc. v. Becton, Dickinson & Co.*, 267 F.R.D. 679, 689 (S.D. Cal. 2010) (protective order required counsel to specify whether they represented disclosing party's competitors before obtaining access to disclosing party's "Highly Confidential" patent information); *Infosint S.A. v. H. Lundbeck A.S.*, No. 06CIV2869LAKRLE, 2007 WL 1467784, at *4–5 (S.D.N.Y. May 16, 2007) (precluding access to confidential patent material by counsel who offered to "refrain from any involvement" in prosecuting the patent-in-question in the future but "ha[d] not made the same offer with respect to his firm as a whole"). As this tribunal has tentatively suggested, just because the "factual settings" that "commonly arise in patents" are not common in Board cases, "that doesn't mean the law doesn't apply here." *See* Ex. C, at 85.

C. All Persons Who Assist The Parties To This Proceeding Must Be Bound By The Terms Of The Protective Order.

Although providing that individuals "assisting Counsel for the Acting General Counsel or the Charging Party" in this litigation must abide by the provisions of the Protective Order, the Acting General Counsel and the IAM inexplicably exempt "independent litigation support services" from this requirement. S*ee* Ex. B, at I(j), It would not impose any undue burden on the Acting General Counsel and the IAM to obtain a written agreement from such parties to

abide by the Protective Order. Therefore, Boeing includes "independent litigation support services" within the scope of its proposed Order. *See* Ex A., at I(g) & I(j).

D. During The Hearing, Boeing Must Be Able To Prevent Disclosure of Confidential Information Even If A Specific Confidential Document Is Not Being Placed In Evidence.

The Acting General Counsel provides that, during the hearing, Boeing may only object to prevent public disclosure "when witnesses testify regarding the contents of any provisionally sealed Document." Ex. B, at VI.B. Boeing would add that it may also object when "the testimony is otherwise reasonably expected to reveal Confidential Information." Ex. A, at VI.B. In other words, even if a specific document's contents will not be the subject of testimony, Boeing still needs the ability to object to prevent the disclosure of that same confidential information through direct testimony. Boeing's additional language is eminently sensible and should be included in this tribunal's order.

E. The Protective Order Must Include Definite Time Limits For The Acting General Counsel And The IAM To Lodge Their Objections To Boeing's Confidentiality Designations.

The proposal of the Acting General Counsel provides that, for any confidential documents that Boeing produces after the original production deadline, the Receiving Parties will have an unlimited time to state objections to Boeing's designations. *See* Ex. B, at IV.B. There should be some limit on the ability of the parties to raise objections, just as there is for Boeing's initial, principal production. Boeing's proposed Order provides that for documents produced after the initial production deadline, the Acting General Counsel and the IAM will have the later of two weeks or 60 days from Boeing's initial, principal production to raise their objections. Ex. A, at IV.B. The Receiving Parties should not require an extended amount of time to develop objections to these later-produced documents.

F. The Protective Order Must Include A Provision To Prevent The Burdensome Recall of Witnesses.

To prevent inefficiencies and undue burden upon Boeing, it is necessary that the Protective Order include a provision to prevent the delayed resolution of confidentiality disputes from resulting in the need to recall witnesses. Boeing's proposed Order addresses this practical necessity by providing that "except for good cause shown, no witness shall be recalled 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." Ex. A, at IV.A. The Acting General Counsel's proposal includes no similar provision and, as such, would potentially allow duplicative and wasteful proceedings.

G. The Protective Order Must Require The Return Or Destruction Of All Confidential Information At The Close Of The Proceedings, Even Record Evidence.

To prevent the unintentional disclosure of Boeing's Confidential Information, the Protective Order should require the return or destruction of such information at the close of the case. The Acting General Counsel's proposal would permit the parties to retain Confidential Information that is part of the record. Ex. B, at X. But when the case is closed, there is no reason for that—*all* Confidential Information should be returned or destroyed. Boeing's proposed order so provides. However, because the Acting General Counsel maintains that federal law requires the office to retain record evidence even after close of the case, Boeing's Order allows that the parties may refrain from returning or destroying evidence where they are indeed prevented from doing so by law. Ex. A, at X.

* * *

For the above reasons, and for the reasons set forth in Boeing's July 25, 2011, Motion for Approval of a Protective Order to Prevent the Disclosure of Boeing's Confidential and Proprietary Information, Boeing respectfully requests that this tribunal enter its proposed Order.

Respectfully submitted,

August 5, 2011

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CERTIFICATE OF SERVICE

I certify that a copy of Respondent's Supplemental Brief in Support of its Motion for Approval of a Protective Order to Prevent the Disclosure of Boeing's Confidential and Proprietary Information was electronically filed on August 5, 2011, and was sent via overnight mail to the following parties, as well as electronically served where emails are listed:

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Exhibit List

Exhibit	Tab
The Boeing Company Proposed Protective Order (Aug. 5, 2011)	A
"Redline" Comparison of The Boeing Company Proposed Protective Order (Aug. 5, 2011) and Acting General Counsel Proposed Protective Order (Aug. 5, 2011)	B
Rough Transcript, Hearing, Day 15, *The Boeing Company*, Board Case 19-CA-32431	C

EXHIBIT A

UNITED STATES OF AMERICA
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THE BOEING COMPANY

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

[PROPOSED] PROTECTIVE ORDER

I. Definitions

"Acting General Counsel" means the Acting General Counsel of the National Labor Relations Board or his successors.

"Board Proceeding" means the hearing, adjudication, or administrative appeals of any matter arising in connection with *The Boeing Company*, Board Case 19-CA-32431, including, without limitation, any compliance proceeding.

"Charging Party" means the International Association of Machinists and Aerospace Workers, District Lodge 751.

"Confidential" means those documents that the Disclosing Party and its counsel have a reasonable, good-faith belief consist of confidential, proprietary, and/or trade secret financial, personal, business, or technical information that the Disclosing Party maintains in confidence in the ordinary course of business and which the Disclosing Party reasonably and in good faith believes that, if disclosed, will cause specific financial and/or competitive harm to the Disclosing Party.

"Confidential Information" means any type of information that is produced by the Disclosing Party by agreement or in response to subpoenas *duces tecum* issued on behalf of the Acting General Counsel, the Charging Party or the Administrative Law Judge and that is designated by the Disclosing Party as Confidential, a) where such designation has not been disputed pursuant to Section IV of the Order, or b) where such designation was disputed pursuant to Section IV of the Order and the Administrative Law Judge and, if applicable, the District Court has determined such records to be subject to this Protective Order; 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 Federal Court Proceeding that quotes from any such Confidential records or Documents.

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

"District Court" means any district court that adopts or applies this order in connection with an action to enforce any subpoena in the Board Proceeding.

"Document" or "Documents" mean all materials within the scope of Federal Rules of Civil Procedure 26 and 34, computer tapes or disks, information, matters, tangible items, things, objects, materials, and substances disclosed in the Board Proceeding or any Related Federal Court Proceeding, whether originals or copies, whether disclosed pursuant to subpoena *duces tecum* or by agreement, as well as hearing papers to the extent that such papers

quote, summarize, or contain Confidential Information covered by this Protective Order.

"Non-Logged Documents" means any Document that the Disclosing Party designates as Confidential Information and which constitutes: (a) "proprietary aerospace and communications technology," as referenced in the fourth paragraph of the July 15, 2011 Declaration of Stephen Bodensteiner ("Bodensteiner Declaration") attached to Respondent's Motion for a Protective Order; (b) "proprietary design attributes" of the 787, as referenced in the fifth paragraph of the Bodensteiner Declaration, including the processes by which it is assembled, the design of the buildings and tooling stations used in assembly, and the confidential research and development information underlying its creation and ongoing production; (c) "cost and revenue structures," "profit margins," and "production schedules" for the 787, as well as the design and specifications for the Charleston, South Carolina facility, and proprietary operational information about that facility, as referenced in the sixth paragraph of the Bodensteiner Declaration, and (d) tax and other non-public financial information, as referenced in the seventh paragraph of the Bodensteiner Declaration. The Receiving Parties may object to the Disclosing Party's designation of specific documents in the above categories as Confidential pursuant to the procedure outlined in Section IV.

"Party" or "Parties" mean any person or entity that is a party either to the Board Proceeding or any Related Federal Court Proceeding and who has full rights of participation.

"Qualified Persons" includes:

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

b. Counsel for the Acting General Counsel and any Board employees who are actively engaged in assisting or advising Counsel for the Acting General Counsel in the Board Proceeding or any Related Federal Court Proceeding;

c. Counsel for the Charging Party, including counsel's partners, associates, legal assistants, secretaries, contractors and employees who are actively engaged in assisting such counsel in the Board Proceeding or any Related Federal Court Proceeding, subject to the limitation in subparagraph (j), below;

d. Courtroom personnel, including court reporters/stenographic reporters engaged in the Board Proceeding or any Related Federal Court Proceeding;

e. Individuals actively assisting Counsel for the Acting General Counsel or the Charging Party, subject to the limitation in subparagraph (j) below;

f. Subject to the limitation in subparagraph (j) below, witnesses and prospective witnesses in the Board Proceeding or any Related Federal Court Proceeding, 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, except as otherwise provided by this Order; and expert witnesses and their staff, who reasonably need access to such materials in connection with the Board Proceeding or any Related Federal Court Proceeding;

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

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

i. Any other person whom the Parties and Counsel for the Acting General Counsel collectively agree in writing to include and/or to whom the Administrative Law Judge orders disclosure.

j. Provided, however, that with respect to restricted Confidential Information withheld from the Charging Party pursuant to the provisions in Section III.C below, Qualified Persons shall not include representatives or members of the IAM, except as provided in Section III.C and except for outside experts and 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, provided further that Qualified Persons shall not (with respect to restricted Confidential Information under Section III.C. only) include anyone who may represent the IAM in, or be involved in any manner in, any collective bargaining negotiation between the IAM and Boeing from the present through the conclusion of the 2012 collective bargaining negotiations.

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

"Receiving Parties" means (i) Counsel for the Acting General Counsel, and/or (ii) the Charging Party.

"Related Federal Court Proceeding" means any case seeking judicial enforcement or review, or judicial resolution, of any matter arising in connection with *The Boeing Company*, Board Case 19-CA-32431.

II. Production of Subpoenaed Documents

A. The Disclosing Party shall not be obligated to produce Confidential Information or any of the logs described in Section III below, until the District Court enters an order that is consistent with all material terms of this Order.

B. Compliance with production of Documents shall include identification of all Documents by Bates number and shall provide a written certification of the date on which Documents so identified were produced.

III. Designation and Disclosure of Confidential Information

A. Regardless of the date or manner of disclosure, before delivering any Confidential Documents to the Receiving Parties, the Disclosing Party shall designate such Documents by stamping or otherwise marking the word "CONFIDENTIAL" on each page of any such Document. If the Disclosing Party designates only a portion of a Document as Confidential, the Disclosing Party shall, in addition to the other requirements of this section, indicate which portion of the Document is 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 Document.

B. 1. For all information that the Disclosing Party designates as Confidential other than Non-Logged Documents, the Disclosing Party will, contemporaneous with its production, provide the Receiving Parties with a log or other showing of good cause setting forth the reason as to why the information must be treated as Confidential Information, as that term is defined herein. Upon reasonable request, counsel for the Disclosing Party will identify the category in the Bodensteiner Declaration to which a particular document or documents corresponds.

2. The Receiving Parties will have the right to challenge any designation of a document as Confidential by the Disclosing Party pursuant to the procedures set forth in Section IV.

C. 1. The Disclosing Party may withhold from the Charging Party those documents designated as Confidential for which the Disclosing Party has a

reasonable good faith belief that disclosure to the Charging Party would likely result in unfair advantage to the Charging Party in future collective bargaining negotiations. If at the time of the Disclosing Party's production of subpoenaed documents the Disclosing Party withholds documents from the Charging Party on this basis, the Disclosing Party must nevertheless produce such documents to the Counsel for the Acting General Counsel and simultaneously provide to the Charging Party a log that will identify the date, author, recipients, and general nature of the document or communication, and the factual or other basis for Disclosing Party's belief that the Documents should be treated as confidential. Documents withheld pursuant to this Section shall be referred to as "restricted."

2. The Charging Party or the Counsel for the Acting General Counsel may challenge the Disclosing Party's failure to produce any document to the Charging Party pursuant to this section. Such disputes shall be handled pursuant to the dispute procedure set forth in Section IV below.

3. The Charging Party and the Acting General Counsel reserve the right to petition the ALJ to permit Charging Party's counsel, officers, members and staff to review restricted Confidential Information and testify without disqualification from bargaining if a challenge to the restricted designation fails and (i) in the case of the Charging Party, the restricted Confidential Information is introduced into evidence and is sufficiently probative that access by a specified representative of the Charging Party is necessary for the Charging Party's meaningful participation in the Proceeding and (ii), in the case of the Acting General Counsel, lack of access by a specified representative of the Charging

Party would materially interfere with the ability to prosecute the case. Any such petition shall be handled pursuant to the dispute procedure set forth in Section IV below.

4. The Disclosing Party also reserves the right, at the time of production of restricted Confidential Information, to designate the Information as "for Acting General Counsel only," and to petition the ALJ within 7 days to restrict access to such Information to the Acting General Counsel only. Any such petition shall be handled pursuant to the dispute procedure set forth in Section IV below.

D. By marking a Document as Confidential in the manner described in Section III-A and by raising its confidentiality claims at all times as set forth in Sections IV and V, the Disclosing Party conditionally discloses such a Document subject to a final ruling on its claim of confidentiality.

E. If the producing person inadvertently fails to designate a Document as Confidential, it may subsequently make the designation so long as it does not delay the hearing or presentation of evidence.

F. Upon written notice from the Disclosing Party of an inadvertent failure to designate a Document as Confidential, Counsel for the Receiving Parties shall take reasonably necessary steps to assure the confidentiality of the Document , including reasonable efforts to secure return of the Confidential Information from individuals to whom disclosure was made but would not have been permitted by this Protective Order had the Document been originally designated as Confidential Information.

G. All recipients of Confidential Information, no matter how such Confidential Information may have been received pursuant to the Order, are prohibited from disclosing it to any person or entity other than as provided in this Order without the prior written consent of the Disclosing Party.

IV. Disputes Regarding Designation of Confidential Information

A. The Charging Party or the Counsel for the Acting General Counsel may challenge the Disclosing Party's designation of any document as Confidential and/or restricted by the following procedure: If the Charging Party and/or Counsel for the Acting General Counsel object to the Disclosing Party's designation of a document as Confidential and/or restricted, the Charging Party and/or Counsel for the Acting General Counsel (hereinafter "the Objecting Party") shall serve a written notice of the dispute upon the other Party/Parties within sixty (60) days of receipt of notice from Disclosing Party that it has substantially completed production in compliance with a subpoena pursuant to Section II.B. All Parties shall, within five (5) business days of receipt of the written notice of the dispute, confer or attempt to confer with each other in a good faith effort to resolve the dispute. 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. Except for good cause shown, no witness shall be recalled 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.

B. If the Disclosing Party produces additional documents designated Confidential and/or restricted after it has provided its original notice pursuant to Section II.B above, the Disclosing Party will identify such documents by Bates number and provide an additional written certification of the date on which Documents so identified were produced. The Charging Party or the Acting General Counsel may challenge the Disclosing Party's designation of any such document as Confidential and/or restricted pursuant to the same procedure set forth in Section IV, except that such challenge must be brought within the later of two weeks of receipt of the document or 60 days of receipt of the paragraph A notice.

C. At all times, the Disclosing Party bears the burden to establish "good cause" for applicability of this Order to a contested Document based on a showing that a) the Document in fact constitutes confidential, proprietary, and/or trade secret financial, personal, business, or technical information that the Disclosing Party maintains in confidence in the ordinary course of business, and b) disclosure of the Document would likely cause specific financial and/or competitive harm to the Disclosing Party.

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

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

F. 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, provided, however, that with regard to the confidentiality designations made by the Disclosing Party up until the date of its notice of substantial completion (paragraph A above), all objections to rulings of the Administrative Law Judge on such designations shall be presented to the District Court for decision at a single time. The District Court shall rule with due deference to the decision of the Administrative Law Judge. The Parties waive any right to appeal the ruling of the District Court under this Section to any Circuit Court of Appeals.

V. Restrictions on Use of Confidential Information

A. Only Qualified Persons may have access to Confidential Information. All Confidential Information shall be controlled and maintained by the Parties in a manner that precludes access by any person not entitled to access under this Protective Order.

B. The Parties shall take all reasonable steps to minimize disruptions to the Board Proceeding and limitations on public access to the Proceeding resulting from the use of Confidential Information.

C. Confidential Information shall be used only for the purpose of litigating the Board Proceeding or any Related Federal Court Proceeding and not for any other purpose whatsoever.

D. Nothing in this Order shall be construed to limit in any way the right of the Disclosing Party to use its own Subpoenaed Material, including Confidential

Information, for any purpose other than in the Board Proceeding and any Related Federal Court Proceeding.

VI. Confidential Information Placed Under Provisional Seal at Hearing

A. Before any Party's introduction into evidence or filing of any Document containing Confidential Information during the Board Proceeding, the introducing Party shall so notify the other Parties. The Disclosing Party may then move the Administrative Law Judge for an order placing such Document under provisional seal. The Administrative Law Judge shall then order that the Document be introduced into evidence or filed by the introducing Party under provisional seal, subject to the procedures set forth in Section VII.

B. Upon objection by the Disclosing Party, the hearing room in the Board Proceeding shall be cleared of all individuals other than Qualified Persons and essential personnel such as court reporters and security officers when witnesses testify regarding the contents of any provisionally sealed Document, or when the testimony is otherwise reasonably expected to reveal Confidential Information. Transcripts of proceedings that occur while the hearing room is cleared shall also be placed under provisional seal, subject to the procedures set forth in Section VII.

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

A. At the closure of the hearing in the Board Proceeding, pursuant to such schedule as the Administrative Law Judge shall direct, the Disclosing Party shall file with the Administrative Law Judge a motion and any supporting brief to place

under permanent seal, under the appropriate standard, any Documents and transcript excerpts containing Confidential Information that were provisionally sealed pursuant to Section VI. The Receiving Parties shall submit briefs in response to the Disclosing Party's motion, and the Disclosing Party shall have the option to file a reply. To the extent that any such motion, affidavit, brief or other filing contains, quotes, or summarizes Confidential Information, it shall be filed under provisional seal.

B. If, at any time, a non-Party seeks to intervene to challenge the Disclosing Party's motion to place Documents and transcript excerpts under seal, and if the request for intervention is granted, the Administrative Law Judge shall resolve the intervenor's challenge at the same time and pursuant to the same procedure referenced in Section VII-A, except that the intervenor shall also file a brief at the same time as the Receiving Parties, and the Receiving Parties shall have the option to file a statement of position regarding any intervenor brief at the same time that the Disclosing Party's reply brief is due.

C. The Administrative Law Judge shall issue a written order that resolves every disputed Document and transcript excerpt in the Disclosing Party's motion. Moreover, such order shall specifically address each Document or transcript excerpt in dispute as well as any papers filed pursuant to Section VII-A. The Administrative Law Judge shall stay his ruling pending the expiration of the five-day period provided by Section VII-D. Any Documents or transcript excerpts that were provisionally sealed pursuant to Section VI but are not listed in the Disclosing Party's motion for permanent seal shall be ordered unsealed, except

that Documents and/or transcript excerpts in the Disclosing Party's motion not challenged or disputed by the Receiving Parties shall remain sealed.

D. 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. The District Court shall rule with due deference to the decision of the Administrative Law Judge. The Parties waive any right to appeal the ruling of the District Court under this Section to any Circuit Court of Appeals.

E. If the Disclosing Party seeks review in the District Court from a ruling by the Administrative Law Judge that unseals a provisionally sealed Document or transcript excerpt, any such Document or transcript excerpt shall remain sealed pending the decision of the District Court, but only as to those Documents or transcript excerpts specifically identified by the Disclosing Party in its notice.

VIII. Subpoena by Other Courts or Agencies

If another court or an administrative agency subpoenas or orders production of Confidential Information that a party has obtained in the Board Proceeding, the party that has received the subpoena or order shall notify the Disclosing Party of the issuance of such subpoena or order as soon as possible, but in no event later than three (3) days after receiving the subpoena or order, and in any event before the date of production set forth in the subpoena or order. The Disclosing Party may then notify the person receiving the subpoena of the Disclosing Party's intent to intervene to resist the subpoena. Should the Disclosing Party give notice of such intent, the person receiving the subpoena shall take steps reasonable and necessary to withhold production while the Disclosing Party'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.

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

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

B. The Acting General Counsel agrees that any information marked by the Disclosing Party as Confidential pursuant to Section III above shall be treated by the Agency as triggering the procedures of Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4).

C. The Acting General Counsel agrees that he will not disclose any Confidential Information in response to a FOIA request without first providing the Disclosing Party written notice at least ten (10) business days in advance of the proposed disclosure of such information. Pursuant to the FOIA, in the event of such notice, the Disclosing Party shall have the right to file a written statement explaining why the information comes within Exemption 4, and to object to any disclosure. In considering those objections, the Acting General Counsel shall presume that information designated as Confidential pursuant to this Order shall not be disclosed, and give due weight to said designation. If the Acting General Counsel makes an ultimate disclosure determination, the Acting General Counsel acknowledges that the Disclosing Party may file a lawsuit seeking to prevent the

disclosure of the asserted Confidential Information. In this regard, the Acting General Counsel will follow the process described in Section 102.117 of the Board's Rules and Regulations. If the Disclosing Party files suit to enjoin disclosure of Confidential Information, the Board will not disclose such Documents pending the final disposition of that lawsuit.

X. Termination of the Proceeding

Within 30 days after the final conclusion of the Board Proceeding and any Related Federal Court Proceeding including, without limitation, any judicial review, all Documents designated as confidential shall be returned to counsel for the Disclosing Party. Alternatively, at the option of the Receiving Party or Qualified Person in possession, all Documents designated as confidential shall be destroyed. Provided, however, that the Acting General Counsel is not required to return or destroy confidential material that is part of the record to the extent doing so is prohibited by law. Following termination of the Board Proceeding and all Related Federal Court Proceedings, the provisions of this Protective Order relating to the confidentiality of protected documents and information, including any final decision on the sealing of documents and testimony, shall continue to be binding, except with respect to documents or information that are no longer Confidential.

XI. No Waiver

A. The inadvertent disclosure of privileged matter by the Disclosing Party or its counsel shall not constitute a waiver of any applicable privilege. If the Disclosing Party inadvertently discloses any matter it claims to be covered by a

privilege, it shall give notice promptly after discovery of the inadvertent disclosure that the matter is privileged. Upon receipt of such notice, if the Receiving Party and/or any other 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 in Section IV shall apply.

B. Disclosure of Confidential Information pursuant to the procedures set forth in this Protective Order does not constitute a waiver of any trade secret or any intellectual property, proprietary, or other rights to, or in, such information. It is expressly acknowledged that no such rights or interests shall be affected in any way by production of subpoenaed material designated as containing Confidential Information in the Board Proceeding.

XII. Rights Reserved

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

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

XIII. Modification

Nothing in this Protective Order shall prevent any party from seeking modification of this Protective Order, except that no change shall be made to this Order without a corresponding change to the order of the District Court.

XIV. Duration

Subject to Section XIII above, this Order shall remain in full force and effect until modified, superseded, or terminated by consent of the Parties and Counsel for the Acting General Counsel or by Order of the Administrative Law Judge.

XV. Violations

The Parties and Counsel for the Acting General Counsel may bring any claim of breach of the terms of this Protective Order before the Administrative Law Judge at any time, and the Administrative Law Judge will have the authority to remedy any sustained claim that a breach constituted conduct prejudicial to any Party and/or the Board Proceeding. Such authority and remedies shall be in addition to, and not in derogation of, the remedies available from the District Court. Appeals from the Administrative Law Judge's rulings shall be governed by § 102.26 of the Board's Rules and Regulations.

IT IS SO ORDERED.

Issued at _____ this ____ day of _____, 2011.

_____
Clifford H. Anderson
Administrative Law Judge

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

THE BOEING COMPANY

and **Case 19-CA-32431**

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

[PROPOSED] PROTECTIVE ORDER

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disclosed, will cause specific financial and/or competitive harm to the Disclosing Party.

"Confidential Information" means any type of information that is produced by the Disclosing Party by agreement or in response to subpoenas *duces tecum* issued on behalf of the Acting General Counsel, the Charging Party or the Administrative Law Judge and that is designated by the Disclosing Party as Confidential, a) where such designation has not been disputed pursuant to Section IV of the Order, or b) where such designation was disputed pursuant to Section IV of the Order and the Administrative Law Judge and, if applicable, the District Court has determined such records to be subject to this Protective Order; 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 Federal Court Proceeding that quotes from any such Confidential records or Documents.

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whether originals or copies, whether disclosed pursuant to subpoena *duces tecum* or by agreement, as well as hearing papers to the extent that such papers quote, summarize, or contain Confidential Information covered by this Protective Order.

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c. Counsel for the Charging Party, including counsel's partners, associates, legal assistants, secretaries, contractors and employees who are actively engaged in assisting such counsel in the Board Proceeding or any Related Federal Court Proceeding, subject to the limitation in subparagraph (j), below;

d. Courtroom personnel, including court reporters/stenographic reporters engaged in the Board Proceeding or any Related Federal Court Proceeding;

e. Individuals actively assisting Counsel for the Acting General Counsel or the Charging Party, subject to the limitation in subparagraph (j) below;

f. Subject to the limitation in subparagraph (j) below, witnesses and prospective witnesses in the Board Proceeding or any Related Federal Court Proceeding, 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, except as otherwise provided by this Order; and ~~(ii)~~ expert witnesses and their staff, who reasonably need access to such materials in connection with the Board Proceeding or any Related Federal Court Proceeding;

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

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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, provided further that Qualified Persons shall not (with respect to restricted Confidential Information under Section III.C. only) include anyone who may represent the IAM in, or be involved in any manner in, any collective bargaining negotiation between the IAM and Boeing from the present through the conclusion of the 2012 collective bargaining negotiations.

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

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B. 1. For all information that the Disclosing Party designates as Confidential other than Non-Logged Documents, the Disclosing Party will, contemporaneous with its production, provide the Receiving Parties with a log or other showing of good cause setting forth the reason as to why the information must be treated as Confidential Information, as that term is defined herein. Upon reasonable request, counsel for the Disclosing Party will identify the category in the Bodensteiner Declaration to which a particular document or documents corresponds .

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C. 1. The Disclosing Party may withhold from the Charging Party those documents designated as Confidential for which the Disclosing Party has a reasonable good faith belief that disclosure to the Charging Party would likely result in unfair advantage to the Charging Party in future collective bargaining negotiations. If at the time of the Disclosing Party's production of subpoenaed documents the Disclosing Party withholds documents from the Charging Party on this basis, the Disclosing Party must nevertheless produce such documents to the Counsel for the Acting General Counsel and simultaneously provide to the Charging Party a log that will identify the date, author, recipients, ~~title,~~and general nature of the document ~~of~~or communication, and the factual or other basis for Disclosing Party's belief that the Documents should be treated as confidential~~. The description of the nature of the Documents withheld should be such that, without revealing the Confidential Information, it will enable the assessment of the applicability of the protection~~. Documents withheld pursuant to this Section shall be referred to as "restricted."

2. The Charging Party or the Counsel for the Acting General Counsel may challenge the Disclosing Party's failure to produce any document to the Charging Party pursuant to this section. Such disputes shall be handled pursuant to the dispute procedure set forth in Section IV below. ~~Counsel for the Acting General Counsel may consult the Charging Party's counsel, officers,~~

~~members and staff to the extent it deems it necessary to challenge the restricted designation or prepare its case, subject to the restrictions of Section I(j) above.~~

3. The Charging Party and the Acting General Counsel reserve the right to petition the ALJ to permit Charging Party's counsel, officers, members and staff to review restricted Confidential Information and testify without disqualification from bargaining if a challenge to the restricted designation fails and (i) in the case of the Charging Party, the restricted Confidential Information is introduced into evidence and is sufficiently probative ~~or is sufficiently probative such that denial~~that access by a specified representative of the Charging Party is necessary for the Charging Party's meaningful participation in the Proceeding and (ii), in the case of the Acting General Counsel, lack of access by a specified representative of the Charging Party would ~~1) interfere with the Acting General Counsel's prosecution of the alleged unfair labor practices or 2) is necessary to Charging Party's full participation as a party in the case.~~ materially interfere with the ability to prosecute the case. Any such petition shall be handled pursuant to the dispute procedure set forth in Section IV below.

4. The Disclosing Party also reserves the right, at the time of production of restricted Confidential Information, to designate the Information as "for Acting General Counsel only," and to petition the ALJ within 7 days to restrict access to such Information to the Acting General Counsel only. Any such petition shall be handled pursuant to the dispute procedure set forth in Section IV below.

D. By marking a Document as Confidential in the manner described in Section III-A and by raising its confidentiality claims at all times as set forth in Sections IV and V, the Disclosing Party conditionally discloses such a Document subject to a final ruling on its claim of confidentiality.

E. If the producing person inadvertently fails to designate a Document as Confidential, it may subsequently make the designation so long as it does not delay the hearing or presentation of evidence.

F. Upon written notice from the Disclosing Party of an inadvertent failure to designate a Document as Confidential, Counsel for the Receiving Parties shall take reasonably necessary steps to assure the confidentiality of the Document , including reasonable efforts to secure return of the Confidential Information from individuals to whom disclosure was made but would not have been permitted by this Protective Order had the Document been originally designated as Confidential Information.

G. ~~Recipients~~All recipients of Confidential Information ~~may not disclose~~, no matter how such Confidential Information may have been received pursuant to the Order, are prohibited from disclosing it to any person or entity other than as provided in this Order without the prior written consent of the Disclosing Party.

IV. Disputes Regarding Designation of Confidential Information

A. The Charging Party or the Counsel for the Acting General Counsel may challenge the Disclosing Party's designation of any document as Confidential and/or restricted by the following procedure: If the Charging Party and/or Counsel for the Acting General Counsel object to the Disclosing Party's

designation of a document as Confidential and/or restricted, the Charging Party and/or Counsel for the Acting General Counsel (hereinafter "the Objecting Party") shall serve a written notice of the dispute upon the other Party/Parties within sixty (60) days of receipt of notice from Disclosing Party that it has substantially completed production in compliance with a subpoena pursuant to Section II.B. All Parties shall, within five (5) business days of receipt of the written notice of the dispute, confer or attempt to confer with each other in a good faith effort to resolve the dispute. 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. Except for good cause shown, no witness shall be recalled 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.

B. If the Disclosing Party produces additional documents designated Confidential and/or restricted after it has provided its original notice pursuant to Section II.B above, the Disclosing Party will identify such documents by Bates number and provide an additional written certification of the date on which Documents so identified were produced. The Charging Party or the Acting General Counsel may challenge the Disclosing Party's designation of any such document as Confidential and/or restricted pursuant to the same procedure set forth in Section IV~~.A.~~, except that such challenge must be brought within the later of two weeks of receipt of the document or 60 days of receipt of the paragraph A notice.

C. At all times, the Disclosing Party bears the burden to establish "good cause" for applicability of this Order to a contested Document based on a showing that a) the Document in fact constitutes confidential, proprietary, and/or trade secret financial, personal, business, or technical information that the Disclosing Party maintains in confidence in the ordinary course of business, and b) disclosure of the Document would likely cause specific financial and/or competitive harm to the Disclosing Party.

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

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

F. ~~Within five (5) days~~ Any Party aggrieved by the decision of the Administrative Law Judge~~'s or the Board's ruling or the resolution of any special appeals to the Board therefrom, if aggrieved, Disclosing Party will notify Counsel for the Acting General Counsel in writing of its objection to the Administrative Law Judge's or Board's determination and, upon such notice, Counsel for the Acting General Counsel will bring an action to enforce or to enforce ex rel. in District Court.~~ shall have five (5) business days from the date of such decision to file for review in the District Court, provided, however, that with regard to the confidentiality designations made by the Disclosing Party up until the date of its notice of substantial completion (paragraph A above), all objections to rulings of

the Administrative Law Judge on such designations shall be presented to the District Court for decision at a single time. The District Court shall rule with due deference to the decision of the Administrative Law Judge ~~or the Board. Any objection by a Receiving Party to any Administrative Law Judge determination shall be governed by the Board's Rules and Regulations.~~ . The Parties waive any right to appeal the ruling of the District Court under this Section to any Circuit Court of Appeals.

V. Restrictions on Use of Confidential Information

A. Only Qualified Persons may have access to Confidential Information. All Confidential Information shall be controlled and maintained by the Parties in a manner that precludes access by any person not entitled to access under this Protective Order.

B. 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.~~Proceeding resulting from the use of Confidential Information.

C. Confidential Information shall be used only for the purpose of litigating the Board Proceeding or any Related Federal Court Proceeding and not for any other purpose whatsoever.

D. Nothing in this Order shall be construed to limit in any way the right of the Disclosing Party to use its own Subpoenaed Material, including Confidential Information, for any purpose other than in the Board Proceeding and any Related Federal Court Proceeding.

VI. Confidential Information Placed Under Provisional Seal at Hearing

A. Before any Party's introduction into evidence or filing of any Document containing Confidential Information during the Board Proceeding, the introducing Party shall so notify the other Parties. The Disclosing Party may then move the Administrative Law Judge for an order placing such Document under provisional seal. The Administrative Law Judge shall then order that the Document be introduced into evidence or filed by the introducing Party under provisional seal, subject to the procedures set forth in Section VII.

B. Upon objection by the Disclosing Party, the hearing room in the Board Proceeding shall be cleared of all individuals other than Qualified Persons and essential personnel such as court reporters and security officers when witnesses testify regarding the contents of any provisionally sealed Document, or when the testimony is otherwise reasonably expected to reveal Confidential Information. Transcripts of proceedings that occur while the hearing room is cleared shall also be placed under provisional seal, subject to the procedures set forth in Section VII.

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

A. At the closure of the hearing in the Board Proceeding, pursuant to such schedule as the Administrative Law Judge shall direct, the Disclosing Party shall file with the Administrative Law Judge a motion and any supporting brief to place under permanent seal, under the appropriate standard, any Documents and transcript excerpts containing Confidential Information that were provisionally

sealed pursuant to Section VI. The Receiving Parties shall submit briefs in response to the Disclosing Party's motion, and the Disclosing Party shall have the option to file a reply. To the extent that any such motion, affidavit, brief or other filing contains, quotes, or summarizes Confidential Information, it shall be filed under provisional seal.

B. If, at any time, a non-Party seeks to intervene to challenge the Disclosing Party's motion to place Documents and transcript excerpts under seal, and if the request for intervention is granted, the Administrative Law Judge shall resolve the intervenor's challenge at the same time and pursuant to the same procedure referenced in Section VII-A, except that the intervenor shall also file a brief at the same time as the Receiving Parties, and the Receiving Parties shall have the option to file a statement of position regarding any intervenor brief at the same time that the Disclosing Party's reply brief is due.

C. The Administrative Law Judge shall issue a written order that resolves every disputed Document and transcript excerpt in the Disclosing Party's motion. Moreover, such order shall specifically address each Document or transcript excerpt in dispute as well as any papers filed pursuant to Section VII-A. The Administrative Law Judge shall stay his ruling pending the expiration of the five-day period provided by Section VII-D. Any Documents or transcript excerpts that were provisionally sealed pursuant to Section VI but are not listed in the Disclosing Party's motion for permanent seal shall be ordered unsealed, except that Documents and/or transcript excerpts in the Disclosing Party's motion not challenged or disputed by the Receiving Parties shall remain sealed.

D. ~~Within five (5) days~~Any party aggrieved by the decision of the Administrative Law Judge~~'s ruling, if aggrieved, Disclosing Party will notify Counsel for the Acting General Counsel in writing of its document-by-document objection to the Administrative Law Judge's determination and, upon such notice, Counsel for the Acting General Counsel will bring an action to enforce or to enforce ex rel. in~~ shall have five (5) business days from the date of such decision to file for review in the District Court. The District Court shall rule with due deference to the decision of the Administrative Law Judge. ~~Any objection by a Receiving Party to any Administrative Law Judge determination shall be governed by the Board's Rules and Regulations.~~ The Parties waive any right to appeal the ruling of the District Court under this Section to any Circuit Court of Appeals.

E. If the Disclosing Party seeks review in the District Court from a ruling by the Administrative Law Judge that unseals a provisionally sealed Document or transcript excerpt, any such Document or transcript excerpt shall remain sealed pending the decision of the District Court, but only as to those Documents or transcript excerpts specifically identified by the Disclosing Party in its notice.

VIII. Subpoena by Other Courts or Agencies

If another court or an administrative agency subpoenas or orders production of Confidential Information that a party has obtained in the Board Proceeding, the party that has received the subpoena or order shall notify the Disclosing Party of the issuance of such subpoena or order as soon as possible, but in no event later than three (3) days after receiving the subpoena or order, and in any event

before the date of production set forth in the subpoena or order. The Disclosing Party may then notify the person receiving the subpoena of the Disclosing Party's intent to intervene to resist the subpoena. Should the Disclosing Party give notice of such intent, the person receiving the subpoena shall take steps reasonable and necessary to withhold production while the Disclosing Party'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.

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

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

B. The Acting General Counsel agrees that any information marked by the Disclosing Party as Confidential pursuant to Section III above shall be treated by the Agency as triggering the procedures of Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4).

C. The Acting General Counsel agrees that he will not disclose any Confidential Information in response to a FOIA request without first providing the Disclosing Party written notice at least ten (10) business days in advance of the proposed disclosure of such information. Pursuant to the FOIA, in the event of such notice, the Disclosing Party shall have the right to file a written statement explaining why the information comes within Exemption 4, and to object to any

disclosure. In considering those objections, the Acting General Counsel shall presume that information designated as Confidential pursuant to this Order shall not be disclosed, and give due weight to said designation. If the Acting General Counsel makes an ultimate disclosure determination, the Acting General Counsel acknowledges that the Disclosing Party may ~~have the right to~~ file a lawsuit seeking to prevent the disclosure of the asserted Confidential Information. In this regard, the Acting General Counsel will follow the process described in Section 102.117 of the Board's Rules and Regulations. If the Disclosing Party files suit to enjoin disclosure of Confidential Information, the Board will not disclose such Documents pending the final disposition of that lawsuit.

X. Termination of the Proceeding

Within 30 days after the final conclusion of the Board Proceeding and any Related Federal Court Proceeding including, without limitation, any judicial review, all Documents designated as ~~Confidential and which have not been made part of the record before the Board,~~confidential shall be returned to counsel for the Disclosing Party. Alternatively, at the option of the Receiving Party or Qualified Person in possession, all Documents designated as ~~Confidential and which have not been made part of the record before the Board, shall be destroyed~~confidential shall be destroyed. Provided, however, that the Acting General Counsel is not required to return or destroy confidential material that is part of the record to the extent doing so is prohibited by law. Following termination of the Board Proceeding and all Related Federal Court Proceedings, the provisions of this Protective Order relating to the confidentiality of protected

documents and information, including any final decision on the sealing of documents and testimony, shall continue to be binding, except with respect to documents or information that are no longer Confidential.

XI. No Waiver

A. The inadvertent disclosure of privileged matter by the Disclosing Party or its counsel shall not constitute a waiver of any applicable privilege. If the Disclosing Party inadvertently discloses any matter it claims to be covered by a privilege, it shall give notice promptly after discovery of the inadvertent disclosure that the matter is privileged. Upon receipt of such notice, if the Receiving Party and/or any other 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 in Section IV shall apply.

B. Disclosure of Confidential Information pursuant to the procedures set forth in this Protective Order does not constitute a waiver of any trade secret or any intellectual property, proprietary, or other rights to, or in, such information. It is expressly acknowledged that no such rights or interests shall be affected in any way by production of subpoenaed material designated as containing Confidential Information in the Board Proceeding.

XII. Rights Reserved

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

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

XIII. Modification

Nothing in this Protective Order shall prevent any party from seeking modification of this Protective Order, except that no change shall be made to this Order without a corresponding change to the order of the District Court.

XIV. Duration

Subject to Section XIII above ~~[*i.e., the immediately preceding*]~~, this Order shall remain in full force and effect until modified, superseded, or terminated by consent of the Parties and Counsel for the Acting General Counsel or by Order of the Administrative Law Judge.

XV. Violations

The Parties and Counsel for the Acting General Counsel may bring any claim of breach of the terms of this Protective Order before the Administrative Law Judge at any time, and the Administrative Law Judge will have the authority to remedy any sustained claim that a breach constituted conduct prejudicial to any Party and/or the Board Proceeding. Such authority and remedies shall be in addition to, and not in derogation of, the remedies available from the District Court. Appeals from the Administrative Law Judge's rulings shall be governed by § 102.26 of the Board's Rules and Regulations.

IT IS SO ORDERED.

Issued at _____ this ____ day of _____, 2011.

_____
Clifford H. Anderson
Administrative Law Judge

EXHIBIT C

THIS IS A COMPUTER UNCERTIFIED ROUGH DRAFT TRANSCRIPT ONLY. THIS REALTIME IS BEING PROVIDED AS A SERVICE TO THE ATTORNEYS. IT IS NOT A TRANSCRIPT. IT IS THE COURT REPORTER'S UNEDITED OR ROUGH EDITED NOTES.

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JUDGE ANDERSON: We'll be on the record. Charging Party, have you an additional appearance to enter?

MR. CAMPBELL: Yes. My esteemed senior colleague, Larry Schwerin has agreed to join our trial team.

MR. SCHWERIN: I'd like to make notice of appears on behalf of Charging Party, Your Honor.

JUDGE ANDERSON: Welcome. I think it's been over 40 years, so I recognize you, counsel. I suppose in another 40 I won't, but currently I do. Welcome.

We have in the interregnum, if you will, had discussions through the course of our proceedings, and through recently submitted motions your 200 pages or so of filings, it appears we are not currently able to reach an agreement between the parties on a protective order that, by a protective order, we're referring to the Federal rule of Civil Procedure 26 (c) document which is sometimes agreed upon, and sometimes is directed from the bench.

The parties also asked, in communications by e-mail, an opportunity to argue the question. That opportunity will be provided now. In setting the preamble to this discussion, I want to tell you the fact that you haven't reached agreement, well, it's

lamentable in a general sense. It's simply a prologue to our current argument. It's of no consequence. There is no fault, no adverse inference, no hard feelings. So too, however, in light of the motions and the certain cautionary and adversarial view, I'm not going to strike anything, I'm not going to disregard it, but I find the difficulty in the negotiation process are sort of implicit in the fact that no agreement was reached. When no agreement is reached, implicitly, parties couldn't agree, that's not implicit, is it, it's ex-plies it, and I think it was proper for Respondent to characterize its current position as submitted as involving -- I'm characterizing, my characterization, commissions that were offered in hopes of achieving an agreement, and aren't necessarily going to be binding on it in its current argument. I accept that. That's all fine.

I know I'm of good cheer, and I know you're always anxious that that it be so. But the question to us today is not that we have an agreement. We tried to get an agreement, agreement wasn't reached. I haven't seen the parties rushing to tell me, oh, we've changed our mind, Your Honor. Let's assume unless the parties tell me otherwise, that we are not going to have an agreement on a protective order.

Now, this has been an evolving process in the Federal world, but that evolving process is far advanced everybody wherefore at least perhaps the Board. And the Board too, in CNN and other occasions, is showing you that protective orders are available. You'll recall the judge who said I don't do protective orders. The Board said that's not right. And I pay attention to that. So I do do protective orders under the Board's instructions, but I'm not here to accept yours.

Now, there was an intermediate position, and the secondary source is described as a stipulation with alternatives; that is the parties may come up with a document which covers X through J and has two or three other paragraphs which are in contest. I thought that might be a fall back position.

By that I mean take everything accept J one or J two and the judge and a focus of intellectual exercise checks the boxes that he favors. I don't think that's available to us today either. I think what we're -- if it is, then the parties will let me know in your argument. What I'm assuming is that the arguments and the current positions of the parties are addressed to asking -- well, asking or opposing, different views as you suit -- my creation of a protective order. Not an adoption, save based on your advocacy, and that's the

way I'm going to take your arguments. There's some exception to that. If there is some agreement that lays there in the shards of your failed effort, let me know, but otherwise, we start in essence de novo.

Now, that doesn't mean I wouldn't necessarily use your current filings in addition to the law and your suggestions. The Board has always received findings of the fact and conclusions of law as recommendations to the judge and the finding of an unfair label practice resolution. So I'm not against -- and I'm going to use your samples. That's one reason why I wanted to note that Boeing has qualified the samples submitted as not necessarily its own, and I'll not necessarily receive them in that way. But as to the rest -- I find your stuff, let's call it stuff, informative.

That being so, let's turn to the threshold question. What order do we take up the presentation of argument. I think the moving party in all of this is Boeing, and also there's some argument that -- or suggestion that that's not a rational way to approach it, we'd start with Boeing, turn to the General Counsel, and then go to the machinists, in the order of argument, seems to me, since we don't have a protective order, Boeing is asking for one, to deal with the documents that have been subpoenaed from Boeing, and that Boeing

wants shelter, and that's what we're talking about. A protective order that's not addressed to the documents of the General Counsel or the Charging Party, but rather Boeing's documents. We ought to start with Boeing.

So unless there's an objection, we'll put Boeing to bat, to discuss what it is you'd like from me, counsel. That being so, please proceed. There's no time limitation. Counselor?

MR. CAMPBELL: Your Honor, we have no objection to Boeing proceeding first, but because of the way the issues have been framed and the case developed, we would prefer to go second, and General Counsel third, and they've indicated to us that's okay with them, unless you have an objection.

THE COURT: I have no objection between the two -- you're in agreement, so I'll accept that. That's fine.

But, General Counsel, as part of that, you don't object to Boeing proceeding?

MS. ANZALONE: No.

JUDGE ANDERSON: Very well.

Counsel?

I might tell you, and you can --

MR. SCALIA: I'll come up, if it's all right.

JUDGE ANDERSON: I've read all the filings. I

have the bulk of the cases -- no, that's not true. I've read a host of cases, about you you'll recall when this arrived, and so these 200 pages of motions, what, a day and a half old, and I'm older than that, I'm not sure I've committed it all to memory. But, counsel?

MR. SCALIA: Thank you, Your Honor.

We're, as you say, here to discuss a protective order in the case, but we feel strongly there should be a protective order. I think there's general agreement among the parties that that's appropriate. Each party has submitted a different proposed order, but all have committed orders. I'm not aware of that a case that's involved so much confidential, proprietary, everyone trade secret information such as this, where a protective order has not been entered. I don't think one as been cited to Your Honor.

In terms of the nature of that information, it's set out in the briefs, but in brief, it includes such things as profit margins, costs that Boeing might incur, production schedules, labor costs, as a portion of total costs, all things, case that is we've cited recognize to be the kind of thing appropriate for protective orders, for virtually any American company. Boeing is seeking similar protections here.

We've also identified certain kinds of

information that, in the possession of bargaining representatives of the labor union, might themselves pose certain challenges for Boeing, and we seek certain restrictions in that regard.

In terms of what we're looking for from you, Your Honor, to be clear, we're hoping that you will approve a protective order along the lines that we've outlined, in that that's one that the parties may then take to Federal Court and have entered by a Federal District Court.

I thought what I would do is begin by outlining the basic mechanics of our proposed order, and then address some of the specific legal issues of that come up in that sense.

The basic form of the order is one that, as some of the authorities we've cited have indicated, is really the standard procedure used under Rule 26 now in the Federal courts. The producing party would initially designate things that it considered to be confidential or highly confidential. There would be an opportunity for the other party, which would actually receive the documents, to consider whether to challenge those designations, a meet and confer would follow. Then if the parties couldn't reach agreement and disagreement remained, there would be motions before you. We've set

forth a time schedule for that.

And then if you made rulings that one or another party disagreed with, finally there would be an opportunity to take that disagreement to the Federal District Court, which would review your rulings regarding the confidentiality or nonconfidentiality of documents, with what our proposed order describes as due deference to the role you played conducting this proceeding. That's the basic process.

As I've said, it's two levels. A confidential level and a highly confidential level. Let me address the highly confidential category briefly, I'll come back to it later.

The purpose of a protective order is to enable a party to provide documents in litigation without risk that those documents will fall into the hands of third parties that might derive some improper advantage from it. Who are some parties who might derive that kind of advantage? Well, competitors. Sometimes --

JUDGE ANDERSON: French.

MR. SCALIA: Chinese, Brazil, Airbus, to be more specific. All of whom are either in the industry or considering entering the industry.

But plainly there may be circumstances as well where the IAM itself can derive particular advantages

that are inappropriate for a counter party in a collective bargaining relationship to enjoy.

And so although we're prepared to provide confidential and in fact highly confidential, documents to the IAM's counsel, we seek the kind of protections that are quite commonly entered, both in courts in the Ninth Circuit and throughout the country, in terms of both what representatives of the IAM can see those documents, and also the extent to which somebody with the IAM whose counsel may them participate in bargaining after having seen those kinds of documents.

What I would characterize the process then is one, we're stashing a framework now to deal with contingencies that we expect to arise. This is not a proposal that some enormous volume of documents be withheld entirely know the IAM. On the contrary, their lawyers would see them. We're dealing with a contingency where the IAM falls among a number of some people, includes Airbus, competitors of Boeing, who can derive some particular and improper advantage if they see documents.

I've spoken of contingencies to deal with. Another is the sealing of documents, and what our order provides is that if a document has been identified as confidential or highly confidential, is thereafter put

into evidence, it would be under seal, which as I understand, the Board rules, they appear to automatically provide that to be the case, the acting General Counsel's brief, as I understand it, suggests that things be provisionally sealed with rulings at the end of the case, whether it be unsealed.

What we've suggested is an opportunity for the acting General Counsel to move at the time that they're put in evidence to unseal them, but we actually don't have a quarrel with the procedure they've provided.

And then finally, with respect to testimony, I think our proposal is similar, that there might be certain testimony that just as documents would contain confidential information that we would not want publicly product cast, namely broadcast to Boeing's competitors, so there might also be testimony of the same nature that we would not want publicly broadcast, but as our order proposes, we'd like to structure testimony in a way to minimize instances, so these proceedings are generally open.

That's the overview. I don't know if you have any questions or any particular aspect of it. There's one I want to make clear. I think the acting General Counsel and the IAM may have understood that we were saying that the District Court would review both

confidentiality decisions if requested by the parties, and also questions of sealing. And that's not what our order is providing. After discussing this through with the opposing parties, we decided that as a matter of administrative convenience, and in deference to this tribunal's control its proceedings, that this tribunal would actually have the last word as to whether or not things would be sealed. I suppose appeal might lie to the Board, but the Federal District Court would not have a role in that.

Areas of disagreement. I think there's a small disagreement on what the standard for confidentiality is, small but important. The Charging Party has suggested that there must be a clear risk of serious injury. We don't believe that's the standard that the courts, the Ninth Circuit our other courts apply. We think it's too high a standard. We don't thinking Boeing should suffer competitive injury from having defended this case, whether it be serious or not serious. Injury ought to be enough. Nor must be it clear. If it's identifiable, if it can be ascertained, if it's beyond merely speculative, that ought be to enough that things are treated as confidential or highly confidential.

The Acting General Counsel's standard is not

much different than ours. We prefer ours. There's not a great difference there.

To come back to the highly confidential category. A few points. I want to emphasize first again, this isn't a case where we're saying the Charging Party can't see anything. To the contrary. The Acting General Counsel would receive all highly confidential documents, the IAM's attorneys, that is attorneys who don't participate in the collective bargaining, would also receive the highly confidential documents, with restrictions on who else can see it.

So those people would in turn have an opportunity to challenge the highly confidential designation. That's why I emphasized what we're doing is establishing a framework for contingencies. We don't need to debate every conceivable highly confidential designation now, we just need to recognize, as I think is object, that the charging Charging Party is in a competitive relationship, vis-a-vis Boeing. That is in material respects indistinguishable from those of competitors, suppliers, or customers, and they should not gain an investment inch from having a litigant in this case, any more than a party in civil litigation should be able to gain an advantage from that.

The Charging Party, by my count, now has six

lawyers who entered an appearance in the case. So there is ample opportunity for a lawyer who's not participating in the collective bargaining relationship for the Charging Party to review confidentiality designations, to use that material, and to present challenges if needed.

The Charging Party has objected that it's a full party to the case, that this is inappropriate. It has suggested that it has the right to choose its representative of counsel. I'll address them in turn. First, it is a full party, and that's not being disputed. But, of course, in all the Ninth Circuit cases we've cited, where attorneys is a only provisions are entered, resisting both the parties' ability and also certain counsel's ability to see documents, there too that party is a full party to the case. Indeed, that party has a greater interest in the case in two ways. First, that party has a greater interest in the case, because it's the only one in that side of the case. Here, the Acting General Counsel is prosecuting the case, the Charging Party is certainly a participant, but the Charging Party's own oil chemical workers case, which they cite, specifically says that the status of a Charging Party at a board proceeding is not equivalent to that of a civil litigant. I believe I'm directly

quoting that case and their brief. And it's true in that oil chemical workers case, what happened was that the Charging Party, who unfortunately happened to be an employer, the Charging Party in that case was denied the opportunity to object to a settlement that had been entered. The Board said you don't get a hearing on this particular dispute you have with the settlement agreement.

So they are a party. But their own authority, their own brief acknowledges that there are limitations. Their brief says, the First Circuit says, they need the ability to function as a gadfly. They'll have that amply, I think they'll discharge the function well. Again, they will receive, their lawyers who don't participate in bargaining, highly confidential documents.

Other points of distinction. The right to counsel of their own choosing and the right to a bargaining representative of their own choosing. Those are preferences, but they cite, for example, the Bell Southern case for the proposition that one has the right to counsel of their choosing. It is result in that case was the party was not able to use the lawyers of lawyer I its own choosing. There's exceptions to those things, likewise the ability to choose their own representative

bargaining. The case laws recognize there are expectations.

Our aim is not to dictate who represents the Charging Party in bargaining. Our aim is simply to assure that the confidentiality of Boeing proprietary information that might be used against it by the Charging Party is not information that's in the hands of those who are involved in the bargaining function.

The Brown Bag case, by the way, from the Ninth Circuit case, which we cite, specifically rejects what it calls arbitrarily distinctions, quote, between in-house counsel and outside counsel. It says that is not determinative. It's arbitrary. The question is whether the lawyer is involved in competitive decision making. A lawyer who advised on collective bargaining is inevitably involved in competitive decision making and so that risk exists.

With regard to sealing, and I think I can address this fairly briefly. There are procedures we've proposed, that the Acting General Counsel has proposed. I think it's fairly self-evident, that is something is confidential such that it shouldn't be publicly disclosed, well, then it shouldn't publicly disclosed when it ends up being put into evidence either.

The UPS/National Labor Relations Board

situation, the Board there said that it was a failure to discharge the administrative law judge's function, not to seal evidence that had been put in. It was error. I believe the bench manual suggests that as well.

There's been a lot of citing back and forth of cases concerning the Federal Court standard on sealing, and I just want to make two points about that. First, the Foltz Ninth Circuit case says that there's a presumption against sealing, quote, if the documents are not among those which have traditionally been kept secret for important policy reasons. Well, trade secrets are documents that are traditionally kept secret, so we think the burden properly lies with those who would want to unseal, rather than forcing Boeing to carry the burden for sealing.

Then finally, all of the cases that have been cited by the Charging Party and the Acting General Counsel, I believe, concern the standard in Federal courts. We're not in a Federal Court. And as we're all aware, the standards for access to documents of the executive branch of the government, are not the same as the standards for access to courts. The Freedom of Information Act demonstrates that. There's simply no general right to access to documents that exist within the executive branch, and I believe that the case law,

or rather that the Board rulings in the UPS decision reflect that view.

The importance of entry by Federal District Court, with all respect, Your Honor. This is a critical issue, perhaps the foundational disagreement between the parties. The Supreme Court recognized in Detroit Edison that it was reversible and an abusive discretion for the Board to make the profession of confidential material into the lands of a labor union contingent on protections provided by an order that couldn't be enforced where there was no effective enforcement authority comparable to that of the Federal courts.

What the court said was that restrictions in orders are, quote, only as effective as the sanctions available to enforce them, end quote. It then discussed the available sanctions, and said they weren't adequate.

Those sanctions remain the sanctions available today. Just by way of contrast, here's a case from the Tenth Circuit recently, trade secret case. Here was the order against the defendant in this case, for violating a Federal District Court order that the plaintiff, this is 2011, Westlaw, 2547498. This is fairly standard and representative of what a Federal Court is able to do. The penalty for trade secret violations there was that the party had to immediately stop selling the

misappropriated equipment, arrange for the delivery of all misappropriated confidential material, provide written evidence that he had done so, appear in court for incarceration, unless until he had done these things and also to pay the other parties' attorneys' fees for having to pursue the contempt order.

These simply are powers that are not available to you, Your Honor, or to the Board, and they are the sorts of powers that are widely recognized to are necessary in order to render something enforceable as again the Supreme Court in Detroit Edison recognized.

We have the Interbake decision, which is significant in a number of different ways. First, it says that an administrative law judge can order, can nudge, can direct that certain things be done, but ultimately can't force. Secondly, it says that when the matter is brought to enforcement about a Federal district judge, the Federal district judge has to exercise his own judgment, make his or her own decisions on the matter. And third -- and this is language that the Charging Party has cited as well, it's, I think, dispositive here, quote: Once the Board files an application for judicial enforcement, the District Court is given the authority to take any action it believes appropriate for determining whether the subpoena should

be enforced, end quote. And that plainly includes entry of a protective order.

We've cited two cases, one a Board case involving Filene's, and another, it's an EEOC case, but it's very well reasoned and interesting, relies extensively on Detroit Edison, and it explains, Detroit Edison told us that entry of an ineffectual order is not sufficient protection for trade secret parties matters, and therefore the Federal district judge, are going to enter a protective order in aid of that administrative process.

Your Honor, you mentioned the, I believe it was the Peerless Imports case, a teamsters Local 751, or 971. 971, I think. That's a different local. It's true there that the District Court judge said I'm not going to enter a protective order. I think he said I don't do them because I can't enforce them. The Board reprimanded him by saying you can enter protective orders, but it did not say you can enforce them in a manner that the Federal courts are able to do to protect trade secrets.

So that was not the point of their correction, that you can enter an enforceable order. Your Honor, I believe that you have acknowledged, I obviously don't want to speak for you, but I believe you've acknowledged

that you lacked the ability that the Federal court has obviously to enforce a protective order.

The parties have cited some cases involving the Federal Communications Commission, the Federal Trade Commission back in the mid '70s. They're not apposite. The Supreme Court case, the Schreiber case, involved the District Court's decision to essentially override and object to rules that the FCC had adopted about how it would conduct hearings. The court said that the District Court in that context did not have the authority to fully trump the regulatory scheme that had been developed without the involvement of the agency itself.

The Federal Trade Commission case that's cited involving Texaco, in that case, what happened was that the District Court put extremely sharp limits on how the Federal Trade Commission could use certain evidence that it obtained from an investigative subpoena to either use the evidence in a judicial action, the agency would have had to come back to the court. And the DC circuit said, well, that's just too restrictive. But it did enter an order. So it's not authority for the proposition that no order can be entered at all, it was simply too restrictive an order.

But I think there are two ways in which those

cases are even more importantly distinguishable, different, not apposite. First, those were cases prior to Detroit Edison, where the Supreme Court made clear another extremely important proposition, rights such as Boeing indisputably has, should not be left subject to protections by an order that can't meaningfully be enforced.

Secondly, what we are undertaking to do today is engage you, Your Honor, and the Board, in the process, ultimately with a Federal District Court, that was absent in the Schreiber case, and the Texaco case, because remember what concerned the courts there pre-Detroit Edison was that Federal courts had taken upon themselves to rewrite procedures with no input or involvement from the agencies beforehand.

We are seeking that input and involvement, and therefore the posture is very different. Again, these are cases from the mid '70s involving different agencies as opposed, for example, to Detroit Edison, involving the Board or Filene's involving the Board.

Final issues, and I'll wrap it up. The Acting General Counsel has asked that we contemporaneously log our confidential designations and give facts supporting them at the same time we produce the documents designated confidential or highly confidential. We

think that's unnecessary or burdensome. There's no need for a log and production of the document. We think that most of the time it will be immediately evident why we deem something as confidential or highly confidential.

Incidentally, a case that both parties cited actually, each of them twice, was a Boeing case about what might be confidential information. Both parties started this, cited this case twice. And what the court said was, quote: The time spent on each task multiplied by the salaries of Boeing's employees indicates the labor cost to Boeing, such information reflects upon Boeing's price competitiveness in its market. If the information was made available to the general public, it would directly reflect Boeing's labor costs, allowing competitors to examine Boeing's projection accidents, end quote.

That's exactly the kind of evidence, the kind of evidence we're talking about here is included. I welcome the case. I think it's further evidence that what we have here is confidential information.

As to the log, it's just as added burden, slow things down, no need. If there's unclarity as to why something is confidential, we can talk it out, provide information at that point.

Freedom of Information Act. I think that the

Acting General Counsel and Boeing are nearly on the same page, namely if we designate something confidential, we shouldn't then have to redesignate FOIA exemption four. If it's confidential for the purposes of this protective order. By definition, it's confidential business information as well, and then the acting General Counsel in its proposed order has agreed with an approach under which if it tells us it's going to disclose, then we -- we'll be given notice, and they will not disclose until we've had an opportunity to go to court.

JUDGE ANDERSON: But, counsel, you just said the General Counsel has agreed. Doubtless the General Counsel would have agreed and an agreed upon protective order, what you're suggesting I can impose, I have the authority to impose on the General Counsel, and I suppose the Board, a modification in their FOIA request procedures, in this proceeding.

MR. SCALIA: I stand corrected, I stand corrected. My understanding it that reflects something that they are comfortable, prepared to do. I'll be corrected by the counsel for the General Counsel.

JUDGE ANDERSON: Even if that were true to the General Counsel, I should do this for the Board? The Division of Judges I don't think has a -- I think the Division of Judges is its FOIA situation is handled by

the Board, so I don't have to tell my chief how to handle FOIA requests, but you're suggesting --

MR. SCALIA: Fair enough.

JUDGE ANDERSON: But you're suggesting I should tell the boards.

MR. SCALIA: I think what this contemplates is this governs the conduct of the Acting General Counsel. An important difference is that we believe that if something has been designated confidential and it hasn't been challenged some strong presumption not to attach that that, there shouldn't be some sort of chance to reconsider on the part of the arcing General Counsel.

The seemingly small, but very important, difference between the Charging Party's proposed order, among all the other differences, but this is one that might going -- but it's significant, they're proposed order, would have access to confidential and highly confidential documents on the part of, quote, the parties, quote. We don't agree with that. We think there should be designated people within the Charging Party who get it, but not all IAM members, for example.

With respect to the highly confidential category, one thing I want to make Your Honor aware of, we've provided a sort of toggle to accommodate special interests they may have as well as special interests

that Boeing may have. That is a procedure whereby if something is designated highly confidential, the Charging Party agrees its highly confidential, or fails to successfully challenge its designation as such, but still feels it ought to get access to more people than our proposed order provides, there's an opportunity for them to come here and seek that.

That's a toggle for them, a toggle for us. If there's something that's highly confidential, but it's super highly confidential, we would come and say this is something that we don't think anybody associated with the IAM should see, the Acting General Counsel will see said to see get to see it. That's our proposed order.

Final small points. We think when documents have been exchanged and not put into evidence, that the close of evidence in the case, our confidential and highly confidential information just ought to be destroyed at that point. There's no need for the parties to keep it. Rather than wait until the termination of the entire proceeding for things that weren't even put into evidence.

And then finally, we had proposed 15 days for the receiving parties to review confidentiality designations. The Acting General Counsel -- I made a mistake, it make be Charging Party, maybe both, has

proposed 30 days. We believe 15 days is preferable. Let me just conclude. This is about Boeing's protection of confidential business information in the manner that the Federal courts do in a daily basis throughout the country. Boeing wants no less, and believes it should have no less protection for the fact that one of the people who might use that information against it happens also to be a party in the case.

But we also are interested in moving it quickly. We provided a proposed order early on, and so this is not about slowing things down. On the contrary, we've been interested in quickly addressing this issue and hopefully we can achieve a resolution to it today.

JUDGE ANDERSON: Thank you. I will have questions. I'm going to have questions of all of you, but I'd like to give you each your individual chance to make your arguments, and that may well reduce the number of questions that I have. Thank you.

MR. SCALIA: Thank you.

JUDGE ANDERSON: Charging Party?

MR. CAMPBELL: Yes, Your Honor. Back at the lectern. I feel a little close, but I'll try not to shout.

I'd like to begin by making a couple of introductions. With me today is Mr. Wroblewski, at

counsel table. Tom is going to be the designated representative of the Union because he is the president of District Lodge 751, which is proudly represents more than 25,000 loyal Boeing employees who are every bit as loyal though this company as are its executives.

Also, with us today are a number of members from the IAM. Dan Swank, Joel Hetland, Brian Butler, and possibly others. And they are here, and they will be coming in ever greater numbers once the hoped upon day upon which we get testimony actually begins in this case, because their job security, and their right to strike, are at issue in this case. And seeing the process of justice done is part of the healing mechanism for chilling conduct.

Now, standing behind them, even though not in our courtroom today, they are currently 3,000 IAM represented Union members assembling the 787 in Everett. Half of them, at least, will have their jobs eliminated and shipped to South Carolina per Boeing's announced plan. Their presentation is also here in a sense. They are certainly watching this case from afar, because their jobs depend upon it.

And lastly, I would say, that to be blunt, standing behind them is every Boeing employee in the United States, at all of their various locations, who in

reality are going to be asked to make some difficult choices in the next few years, and this case is going to instruct those choices, because they are waiting to find out if they should pull the lever to sign the Union card -- to sign the Union card. Should they vote yes in a Union election. If Boeing insists that they give up their middle class lifestyle with huge pay cuts and pension cuts and medical cuts, should they go on strike. If they do, do they face retaliation because if Boeing is going to take the position that they've taken in this case, and it's sustained, that it's free to divert its next airplane program, and there is always a next airplane program, to non-Union sites, because they don't strike, then the right to strike is so far as Boeing employees are concerned, eliminated.

They have a right to know that this process that we're going through right now is going to reach a full and fair determination of that what could be a decisive issue for them.

Now, the immediate issues sounds procedural, but it isn't. It's not procedural at all. It goes to the heart of how this case is going to be tried and whether it is going to be tried in the light or the dark. I'm here to address the concerns of the Charging Party. I think the general public clearly has an interest in law

enforcement proceedings, which this is, and I'll need General Counsel to speak to that. I expect they will.

But looking at this point from the point of view of the Charging Party, let me begin by emphasizing some sense of irony about the focus of Boeing management's comments, because the suggestion is that what's at issue in this case are highly confidential trade secrets about how to build a 787, but I would submit to you that the three individuals we brought with us who attended today are members know more about thou build a 787 than probably most of Boeing management knows, and they don't go tell China, or anybody else how they do it, because they're loyal Boeing employees. We are not Boeing's competitor. We are not Boeing's competitor because we want Boeing to success.

This Union, led by Tom Wroblewski, just led a huge fight with all of its members support, to secure the new tanker for Boeing. These folks work together constantly to try to achieve goals, and the act doesn't make them competitors. The act says that they are supposed to work to find mutual gain, bargaining in good faith, to achieve attainable goals.

So the notion that the IAM is like Airbus, I simply want to put up front is just totally inaccurate. It's an inaccurate perception. And I'm going to get

later to comments about this bargaining advantage issue and the high classification, but let me just begin by dispelling the notion that anybody at the IAM would ever have any incentive to leak a trade secret to a competitor of Boeing. Quite to the contrary.

Under our proposed order, which is governed by Rule 26, we propose so keep all that information confidential and not to give it to anybody. The question is -- that really isn't the question. The question is whether folks will be able to be in this courtroom to watch this hearing proceed, or will be larger excluded. Whether the Charging Party will have the right to really participate in this case, and frankly whether the General Counsel will have access to witnesses to help them understand the documents at issue in the case, and whether or not Your Honor is going to enter an order or as apparently requested by Boeing -- actually, I'm not sure what Boeing exactly is asking you to sign. The only thing I'm sure of is you can't sign the order they offered you, because it says District Court judge on the bottom, and I'm pretty sure you'll get in a lot of trouble if you signed that order.

But let me begin by commenting on the question of what sort of order is appropriate, and the problems we see with Boeing's. I know you have read the cases

and the law, and a I'm going to spend a little bit of time at the end addressing a few of the cases mentioned. But I'm largely going to restrict my comments of how the practical process of how this thing would operate in a real trial. So, first, I had always understood that you were going to enter a protective order of some sort, a protocol, as you've sometimes calls it, which would guide how confidential documents would be handled in the case. We think that is clearly appropriate.

One of the cases counsel cited to the contrary, Peerless, actually says specifically, in a Board footnoted, you may have noted, that you have that authority to enter a protective order. Might at some point some reviewing authority look at your protective order? Of course. The Board, the Federal Court, who, I don't know for sure. I'm not an expert. Somebody may evaluate it. But what we need is you as the trial judge so set a protocol that makes sense for this case. You are the one who knows the evidence, you are the one who had the sense of presentation of witnesses and is going to be setting the order of trial. You are the one who can weigh the actual public interest in the context of the actual claim of confidentiality based on your knowledge of the case.

Now, as I read Boeing's order, it still leaves

the ultimate determination of confidentiality to the Federal courts. I'm not sure if I understood Mr. Scalia's comments on that, but that's how I read the order. But what we think is critical is that this protocol be a living document that is going to guide you through the case and allows you to make determinations when actual evidentiary decisions arise, and doesn't create a straight jacket signed by a judge where we have to go back to the judge over and over and over again to essentially ask the judge to redefine what confidential means or to resolve disputes on particular documents.

As a practical trial lawyer, that's simply a death knell to any trial going forward. It would be like Chinese water torture.

Secondly, I, you know, I'm not attributing motives, but frankly, under the reviewing standards, if you write an order, you get a highly deferential standard on view, whoever reviews it. Arguably arbitrary and capricious. If you don't sign an order and simply sign some protocol to send onto Federal Court, I think you're inviting us to go to Federal Court and have another mini trial on evidence that, frankly, the court isn't going to understand, because they're not going to even understand what the case is about, and it's going to cause a humongous delay.

So our preference is clearly that you write a protocol that you think satisfies whatever the parameters are, and all these other issues we're dealing with. The parties have the right to appeal to the Board if they don't like your protocol, but you would have a protocol that you can make this trial go forward with, because adjust delayed is adjust denied. We are facing a chill that impacts all of our members. We are facing contract negotiations next year, and it is vital to us to see this case move forward.

Second issue. Boeing proposes an order that includes categories of confidential and highly confidential documents, as they describe. I wanted to hand up just a couple of excerpt from Boeing's proposed order and from their answer, just for convenience sake. These are documents in the record, because I'd like to make reference to them as we go through as part of the arguments.

JUDGE ANDERSON: Thank you. Have all sides got copies of this? Okay.

MR. CAMPBELL: Again, this is simply a convenience.

So my point is this. Boeing has offered up what it describes as categories of confidential documents, and before I get to the super confidential category, or

highly confidential, let me just deal with the confidential, because, of course, under this proposed confidential category, every time either the Doc or information from a document deemed confidential is discussed, it will be necessary for Your Honor, under their proposed order, to automatically clear the courtroom. He don't have a separate seal process, they don't have a separate -- I mean, their view is this document is confidential, everybody out.

Now, maybe I get to keep my representative, Mr. Wroblewski, in this scenario, but no members get to see the testimony, the press doesn't get to see the testimony, and the public doesn't get to see the testimony, and the information is all sealed.

Now, what kind of information are they asking to into that category? And this is where I would draw your attention to the sheet in which they list highly confidential matters. Have I would particularly focus your attention on the third bullet point under A. They would designate as confidential under their order business strategy or planning, including without limitation consideration regarding cost, competition, production scheduling and contingency planning in connection with the development of the second final assembly line this Charleston, and the surge line in

Everett.

Now, if I'm not mistaken, Judge, that encompasses virtually the entire subject matter of the case, because almost every document you've already produced, and the central allegations in the complaint, all involve precisely those issues.

Now, one day soon, we hope, at least under one scenario one day soon, Boeing's principal officers, their CEOs and others, are going to take the witness stand in this case. And they are going to be asked what in this case is a question that we all know is pivotal on at least one of the theories of the case, which is why did you move to South Carolina. And I don't think there's any question that the answer to that question, and your credibility determinations regarding those answers, and your analysis that flows from that, ought to be part of a published decision in this case. But under their proposed order, it would not be. It would be sealed. Any comments you had to make on the subject would be seemed, any comments the reviewing courts had to make would be presumptively sealed. In other words, how could the public have confidence in the case of this level of importance and attention if the public, the press, and the members are excluded, and never hear what could be the pivotal testimony upon which you will base

your decision.

Second -- no, actually, let me step back. I suppose it is understandable to some extent where Boeing would like this case to be heard principally behind closed doors, and I don't say this disrespectfully. But you have to understand how the evidence is going to come in, and I just want to make it clear why this is so critical.

Boeing in the year 2009 told everyone in the state of Washington that if the IAM had agreed to a long term no strike agreement, they would keep the second 787 line in Everett. We will submit a lot of evidence, and I know that this is an offer that is not yet into evidence, but that they -- that that was the theme, that they even rejected offers from Washington state to provide incentives, yet in their answer in this case, which is the other docs document I handed up to you a few minutes ago, Boeing asserts that, quote, Boeing would have made the same decision with respect to placement of the second assembly line in North Charleston, even if it had not taken into consideration the damaging impact of future strikes on the production of 787s.

Now, General Counsel's case is pretty simply. They simply put in cases that were made by Boeing

management back in 2009 in the day. This defense suggests that there are these other compelling economic factors that would have made South Carolina so irresistible that Boeing actually was going to go there anywhere.

We, as the Charging Party, to challenge that right line defense, need not only full access to the documents, which I'll get to in a moment, but we need the public to see that testimony. Now, I concede -- I want to be clear, our protective order does not try to say there's nothing confidential in Boeing's materials. I'm sure there are a lot of things that are. But I tried a lot of cases for a lot of year, and what usually happens is you start I've thousands of documents, you get down to a handful that actually are going to be offered in evidence, you get down to a smaller handful that make a difference, you know, and you reach agreement. And our order allows them to self-designate as confidential, if we don't think something is relevant for evidence, we're you just going to ignore it. We're going to get down to that level. Those trade secrets or whatever else they might be, I agree we have to clear the courtroom for. But where our order would make that the exception in the decision made by you at the time the decision arise, their order would create a

presumptive category of the very documents that were in front of Mr. Albaugh and Mr. McNerney when they made this decision as confidential, and therefore requiring that our members not be able to see the process of adjust unfolded.

Now, I know a lot of our members are going to be coming down here once this rile begins in earnest, for a lot of the testimony, and I know there will be occasions when they will have to be asked to step outside for short periods, but the order as proposed by Boeing would throw a blanket over these proceedings, because virtually every -- their description that I just showed you of what they view as confidential, and what they're going to argue as confidential, is so broad that if you signed their order and accepted that definition, which is what they're asking you to do, this case would be almost a secret trial.

I mean, how much testimony is going to be involved in this case that doesn't involve placing the second 787 line in Charleston? That's the whole issue in the case, and they've just said any document relating to that subject is confidential.

So I am concerned that their approach will not permit a decision in a case with enormous magnitude in labor law potential, which can be published fully and in

discussing the evidence at issue, make full credibility findings on the record, and most critically, allow those who have been threatened in our view, unlawfully, by Boeing, not regularly be thrown out of the courtroom whenever -- at Boeing's insistence, which will simply reinforce the chilling impact. And our order gives you that discretion. I think the General Counsel's order gives you that discretion. Boeing's order says, Judge, we want you to say this is a confidential category now.

Now, there's a challenge procedure, but it switches the burden. The challenge 11 should be exception, not the rule, and this blanket category is a serious, serious problem for us.

Secondly, next problem, highly confidential category. Now, Boeing would define as highly confidential not only the bullet point I showed you before on this sheet, but in addition, if you look under B on this document, you will see that it would apply to any documents which would benefit unfairly in collective bargaining and automatically include several items. I would invite you to read the last four lines.

Information regarding asset allocation and utilization plans, assembly rate information -- and this is the kicker -- studies or analyses dealing with work placement and not nonpublic financial data, and actual

subcontracts would be included in a category of documents that Boeing defines as highly confidential. Now, we don't know what this is yet.

I don't know what these categories mean exactly, because I, of course, have not seen any documents, but I can tell you this, as lead counsel for the Charging Party in the case, if -- and given, you know, you have already, I would remind you, you've already trimmed the tree a lot about what documents are at issue here. You will recall your Conner and above rule, your narrowing of things just to the 787. We're talking about a time period in '09. You know, we're not talking about something they wrote last week. This would treat us as unable to access the studies or analyses dealings with the work placement decisions that are at the core of this case.

So what, under the order, they are proposing could we as Charging Partys not do? Well, I'm going to go through and describe these in a little more detail, but this is where the practical level becomes so difficult for us.

First, we couldn't show them to anybody except myself. And by the way, the notion that I could have another counsel look at the central documents about placing work in South Carolina in this case and

responsibly act in my role is, I think, a little farfetched. I've been representing the machinists in collective bargaining negotiations with Boeing since 1995. I have tremendous institutional history with them, I have been one of their representatives in bargaining, and I have to say that this notion that, you know, one of the other counsel in my firm could review this stuff and try the case on studies analyzing -- that are dealing with moving to South Carolina when I'm lead counsel, is just fanciful. I would be irresponsible. My client would be forced to choose another representative in bargaining.

I don't think that's justified. I don't think it's justified under the rules about disqualification, and I think it might be a violation of 8(a)(5) in and of itself, because it is essential using this proceeding to leverage who they're going to bargain with, which they couldn't do outside the proceeding. If I showed up at bargaining next year, I would be under an order not to participate.

But let's set aside the disqualification piece, because the truth is that isn't the principal problem. The principal problem is that what they are imposing is entirely impractical and would hobble us so much that we couldn't be effective and we couldn't really do much of

anything with these documents.

Imagine for a moment what's going to happen. So first Boeing delivers a truckload of documents to us. Some of the boxes are marked highly confidential. Under Boeing's order, the moment I open the box that says highly confidential, I'm permanently disqualified from representing the IAM in collective bargaining and in other ways. So I have a box of documents. Under the order, the only person I could consult would be an outside expert about what's in the box.

Now, I've been in enough Boeing cases to know what happens then. Those documents are full of acronyms and language and numbers and symbols I don't understand, and neither will my expert, because Boeing has its own culture, its own way of doing things, its own description for its business units, its own descriptions for all of these various pieces. How would I know what it means? I would have to show it to people who work at Boeing and understand those documents. And specifically I would need to show it to an individual name Neil Gladstein who will be a witness in this case, who is an expert, and as well as a participate in the discussions that lead to this move to South Carolina and the proposals made. But he also is a financial analyst.

I would in the ordinary course, get him, get

some people from the operations group, depending on what was in the box, and figure out what I have. Then I might be able to launch a challenge to something that's called highly confidential. I might be able to argue it shouldn't be treated that way. But under the order as written, I won't be able to mount that challenge because I won't know what it is.

I don't want to overstate this, but companies keep documents in the form they keep them in that they have proprietary way of handling, and there is an entire language at Boeing I had to learn before I could even begin to grasp half of the consents when I first started working with these folks, and even now I'm only semiliterate.

So, No. 1, the notion that we could really come back to you and say this shouldn't be highly confidential is inaccurate.

Next let's say somehow I was able to figure out which documents we could challenge, but even then have a high stack of documents in front of me that are, quote, highly confidential. And let's say those documents concern exactly what Boeing says they're going to concern. Let's say they concern, quote, studies or analyses dealing with work placement. Now, studies or analyses that deal with work placement are going to be

the heart of the right line defense, because they are going to describe the various reasons and financial consequences of choosing sites.

Under Boeing's order, I can't show that document to a Union witness, except in some extraordinary procedure where I try to get special permission for you to give me permission to show the document to somebody else, but even then it's not clear I can have them testify about it. I certainly can't have them in the courtroom when Boeing is testifying about those documents, because they're prohibited from being there, so I don't have the aid of an expert to listen to their expert testify about the documents or how they use them.

I mean, their proposal is that we not only clear the courtroom, but I ask Mr. Wroblewski to leave, and I'm sitting there alone when they get to testify about their right line defense. Now, that is not simply due process.

Frankly, if they drop those defenses, I'd be more than glad to try this case myself -- I can't speak for General Counsel -- on what they said in 2009, but if we're going with a whole new story, if we're going with a story that says it was the climate in South Carolina, it was the political people in South Carolina, it was, you know, lower labor costs in South Carolina, so we

would have gone there anyway, even though that's not what we were telling people in the state of Washington. Fine. But that's going to be the critical crux of the case on the issue of motive, and I need to have my witnesses in the room, available to me, to help me prepare my witnesses and cross-examine their witnesses on these, quote, highly confidential documents.

If I can't have them there, I can't prepare my case and I can't adequately defend the claims. And I'm the one who has access to the people who can do that. General Counsel doesn't. It's the Union folks who understand this stuff. It's the Union folks who can say what that guy just said about how Boeing does business or how it measures these things is wrong. But I'll have the hearing room cleared.

Now, I realize, I realize that there is an element of uncertainty about what these pieces of paper are that would give us this big bargaining advantage. To be quite blunt, you know, when someone tells me that the documents they wrote in 2009 on moving the second line relate to their 2012 bargaining strategy, the first thing that comes to mind to me is, yeah, we wrote memos back in 2009 about how we were going to use this move to really crush them in 2012, and make sure they didn't strike and get concessions, you know, which would be

like incriminating in the extreme, and we would think would be highly relevant. But I might not get to see that document.

In any event, I concede that it is possible that there are nuggets of information about such things as profit margins or something else that really don't pertain that greatly that Boeing could conceivably have some argument that should be -- that there should be some restriction on General Counsel only, and so I'm offering up a proposal on that right now that's a slight modification of our position, if the other pieces would work.

Frankly, that is I would agree that if we have an order with only one designation, which is confidential, period, that if the disqualification piece is dropped -- because, by the way, the disqualification piece just didn't comply to attorneys, it would apply to anybody else, like Mr. Wroblewski, who looked at any of this stuff on their order, which would be a problem, since they see the president of the district and will be negotiating next year.

So if we had one category, and no disqualification, we would be comfortable with initial production of whatever it is that Boeing is going to call highly confidential, full documents to General

Counsel, full log to us, to argue the point.

Now, that is a significant difficulty in concession on our point, and it does not incorporate buying Boeing's categories as I've described. It would be assumption would be that you would be just using the general Rule 26 standard in making judgments as you move forward rather than predefining these categories, but in terms of what we could live with, we could live with that.

And we would probably be arguing that many of those documents should come to us as confidential, but we would reserve that argument until we saw the log, and hopefully the log would be genuinely short, and the number of documents in we did would be genuinely small.

One aspect of this kind of argument is all try lawyers know, is, you know, we have no idea whether we're talking about a truck or a banker's box, you know. It's very hard to make judgments about -- I mean, there's a difference between 30 days and 15 days on review. We don't know what we're reviewing.

So if that would solve the problem, we would agree to that, but what we cannot accept, and which I think really this judge should reject, is the notion that as a Charging Party we should be denied access to the evidence on which the case may turn under any

confidentiality standard. Boeing essentially is arguing that 8(a)(5) for future bargaining in 2012 represents the limit of the information we're entitled to litigating a ULP charge about something that occurred in 2009. Well, if we're a party and we even have the most minimum due process rights, then we're not limited to those 8(a)(5) documents. We're not limited to what they would have to provide us in bargaining. Our rights as a Charging Party to participate in this proceeding trump that, and we're promising to keep this information secret.

If the information is incriminating because they have a bargaining strategy as we believe they do, that is dependent upon using work transfers in retaliation for Union activity, then we want to see those, but we would be comfortable with this log procedure, at least as a possible way, as long as there's full production to General Counsel, and a right to argue, and so long as we didn't stray past the one category.

First let me just talk about our proposed order for a minute, because both our order and General Counsel's order include the specific standards set forth in the Federal Rules for good cause, and the specific standard set by the Ninth Circuit for sealing documents, and because they don't attempt to predetermine the

categories the judge will find, because they only would ask a court at most to affirm Your Honor's existing authority to deal with those issues, they would allow this case to be a normal trial. They would allow you to have the case proceed without interruption, they would allow for maximum public access, and they would allow this hearing to proceed as virtually every NLRB hearing I've ever participated in proceeds, in the sense that you remain in control on a day-to-day basis of making the decisions the parties can't agree on.

If you cede that authority to Federal Court, I think it's wrong as a matter of law, and I think the cases relied upon them by them establish that, and I think the cases cited by General Counsel establish that. The notion of judicial intervention is a super oversight court, it's not only going to be unwelcome to a any Federal judge I know, it's not any way you could possibly do business.

So when we look at these other cases that Boeing has relied on, I want to stress that none of them suggest that you ought to do what they're asking you to do here, which is to refrain from signing your own protective order, which Peerless, among other cases, even one of their cases that they indicated, clearly say you're entitled to do.

So one line of cases they rely upon a lot are patent cases, and in these patent cases, there is both very stringent confidentiality requirements and there are disqualification provisions in some cases for the attorneys. Now, my first contention would be that the protective orders in those cases are not the norm in the civil courts, and we've cited cases to show that. They're highly unusual.

Why would then highly unusual? Because if somebody else sees how you make the mousetrap, you can't take that out of your head, and even though the same is true if we hear evidence in this case, this case is about work force placement, which is something Boeing has been proclaiming and talking about endlessly. I don't see -- no one here is litigating how to make a 787, no one here is lit gating Boeing's processes for doing so. We're litigating where they're going to do it, and whether they're going to do it with Union or non-Union workers, and what their real motive was. So the subject matter is completely different.

In addition, the notion of disqualification is completely different. First off, this case is not going to be tried principally on paper, which is our patent cases, or with outside in patent cases. Our intention would be to try this case with Union speaker. They're

the ones who know this stuff.

Secondly, this is not a one off case for the relationship between the parties. These parties meet all the time and they're going to be meet and go bargaining next year, and when they meet in bargaining, they have to right to choose their representatives. Disqualification of a counsel in a single patent case is not the same as saying you get to decide who your bargaining representative is next year.

Third, in this case it would be a denial of due process to prohibit the limited world of people who know Boeing to testify about the most critical evidence in the case, which is what the effect of their category would be. In a patent case, this is not an issue. And that's reason it's limited to patent cases, by the way.

In a case like this, the inability to have my people in the room to help me prepare to cross-examine their witnesses and to listen to their explanations of apparent contradictions in their stories, is disabling, and I don't think even in these patent cases there would have been a disqualification of counsel if that had been the consequence.

The -- in the broadest terms, let me just conclude by saying the allegations in the complaint are that Boeing threatened its workers that if they engaged

in concerted activity they would lose their jobs. Those workers want to see this hearing. The judge should adopt no order that prevents them from seeing the vast majority of that hearing and should maintain the flexibility to assure that any tiny pieces that are so confidential they genuinely justify excluding everybody from the courtroom are just that so that our members can't feel like they're being thrown out by Boeing when this testimony comes in.

Those are my comments.

JUDGE ANDERSON: Thank you.

General counsel, with your permission, we'll take a ten-minute break before we come to your --

MS. ANZALONE: You may have my request.

JUDGE ANDERSON: Let's take a ten-minute recess, and we'll resume with the General Counsel's position.

Off the record, please.

(A break was taken from 10:21 a.m. to 10:40 a.m.)

JUDGE ANDERSON: On the record, please. General Counsel?

MS. ANZALONE: Thank you. Thank you.

Your Honor, I don't intend to repeat everything that I've heard. I would say that the General Counsel larger agrees with the points that counsel for the Charging Party has made, but I wanted to say a few words

about what we think is the novel nature of what Respondent is requesting.

You have just heard its counsel represent that the order it would prefer is a standard procedure used in Federal Court. We're not in Federal Court. Well, correction, this is not a Federal Court proceeding. This is a Board proceeding. It needs to remain a Board proceeding. And administrative law judges of the Board have conducted ULP hearings for decades. It is not uncommon for Respondent for ask for protections for certain documents. Unfortunately, it's not common for them to demand a District Court order before they turn over the documents. We've all been here before. However, the District Court's role ends with the enforcement of the subpoena, frankly, and then the administrative law judge needs to do his job and conduct the hearing alone.

If one of the parties is unhappy with the ruling of the administrative law judge, they do have a route for appeal, and that is to the Board. There's no jurisdictional basis for doing anything else, frankly. The Respondent's demand to have a right to appeal evidentiary decisions from the ALJ for the judicial branch of government makes no sense. It's a nonstarter.

I'll get back to that procedural aspect of their

order later, but I just want to make it clear that we will strongly oppose any protective order that amounts to an justified incursion on the Board's administrative hearing process.

We are prepared at this point, Your Honor, to make what I certainly believe to be a concession, based on the showing that Respondent has made in its brief in support. The brief in support attached an affidavit of Respondent's representative with respect to the certain categories of confidential material.

Mr. Bodensteiner. Based on Mr. Bodensteiner's affidavit, what we would like to do is to forego certain of the logging that we were going to ask for with respect to the documents produced. We're willing to do that simply because we do not want to slow things down, and we don't want to have extra work for anyone, including Respondent, that would get in the way of us getting this hearing underway. So we are prepared to allow the Respondent to unilaterally designate documents that be governed by the protocols that Your Honor sets up, that that's fine.

Based on Respondent's affidavit from Mr. Bodensteiner, who I think is the director of business operations for product production integration as stated in the affidavit, we're prepared to forego the

requirement that Respondent prepare a log regarding certain documents, with some limited exceptions that I'll address; that is we're satisfied that they've made a showing of good cause in the first instance with the affidavit. And that would apply to certain categories of documents that the affidavit sets forth, in its paragraphs, four, five and seven, and I'll read them off so that it's clear what we're talking about.

Paragraph four contains a subcategory, proprietary aerospace technology.

Paragraph five contains language that is proprietary design attributes of a 747. And that includes composite material, mostly electric power, architecture, assembly processes, building designs, tooling station design, and confidential research and development information relating to the 787. This is all set forth in the affidavit. That's paragraph five.

Paragraph seven relates to other tax and other financial information, and in addition I should say paragraph six refers to profit margins and production schedules. To the extent that we're willing to concede to unilateral designation of the documents that Respondent in good faith claims meet the definition of those categories, we will agree to that, but I think it's important to note that this is premised on our

understanding that any protocol will correctly place the burden of proof on Respondent throughout, that there will be no point at which Respondent shifts the burden of proof on the General Counsel and the Charging Party or to prove or disprove confidentiality.

JUDGE ANDERSON: Let me stop you and make sure I understand what it is that you're suggesting. There's one or more documents, Boeing's thinking, it falls within what you regard as a concession, but they don't want to not give it to you, but they want what they want to do is give it to you with limitations.

MS. ANZALONE: Correct.

JUDGE ANDERSON: You're willing to accept the document without a log or you still want a log? I'm trying to understand what you're conceding.

MS. ANZALONE: With respect to these documents, that would be responsive to those categories, we would be willing to accept the documents without the log.

JUDGE ANDERSON: This is the threshold.

MS. ANZALONE: Correct, exactly, because that would be there would be obviously as we've built into, I think a challenge procedure, and my point is simply that in that challenge procedure the burden never flips back onto the receiving parties.

JUDGE ANDERSON: I interrupted. I'm sorry.

MS. ANZALONE: No, that's fine.

We would also ask that the burden of proof, in addition to the burden of proof, that the definition of confidentiality, which I think as we all recognize must be tied to Rule 26, being explicitly so tied. Much like in our order, that is what we do. We pull that in for the definition.

The General Counsel takes seriously, as we've stated in our brief, that upon good cause showing Respondent's right to protect certain confidential information, but the burden must remain on the Respondent, and we must have a standard we can all understand. A standard that is tied to the case law, such that if there is a category of documents listed in their protective order with no reference to Rule 26, technically there's no requirement that they show any harm, any identifiable harm with respect to that category of documents.

So our willingness to forego the law would be in a sense based on our down the road being able to take issue with a particular document and if the characterization of it is confidential, tied to Rule 26.

The Rule 26 I don't think is actually really controversial willing, but it's just something I don't see in the agreement that they propose, or rather the

order they propose. The reason for that, while the affidavit is a nice start, just doesn't get specific about the categories of harm that would result in disclosure of particular documents. It just talks about, and I put this in quotes, significant losses that Respondent would incur if its competitors saw the documents generally.

The affidavit does not mention some of the categories that its owner seeks to protect. That's another thing we would have a problem with. To the extent that Respondent claims in its order that it needs to protect information about its current and former employees, there's nothing about current prosecute former employees that I can find in the affidavit so for that reason we would again require that the confidential information definition in the order be tied to rule 56, so that we don't lose anything in that process.

Foreseeably, if what Respondent wants to do is redact Social Security numbers and employees' addresses, you know, I don't think anyone is going to have a problem with that, but as it stands, we don't know if that's the case.

Now, Respondent has raised an issue about the language "identifiable harm" versus specified "harm." I believe those are the two choices. We don't dispute

that those terms are essentially interchangeable, Your Honor.

Now, I'd like to talk about what -- I'm trying to understand whether -- we have had some sort of misunderstanding with respect to the protective order proposed by counsel for the Acting General Counsel. As I stated in the outset, the unfortunate reality is that a District Court will have to enter the order if Respondent refuses to produce documents. We didn't imagine anything else. The fact that the order that we have proposed is self-contained, so to speak, for Your Honor's signature, that's because it would be your order, and we don't see any role for the language to deal with the District Court need be to in that order. It doesn't seem to me in Your Honor's order I would sign an order telling the District Court what it may or may not do down the road.

So we acknowledge that we will likely go to District Court to get the documents because they will refuse to produce the documents without us going to District Court, and that is where they will ask that the District Court review your order. I definitely join with the Charging Party in a request that, indeed, as I expect, we do get an order. It's not my experience that the ALJ should merely recommend or make certain findings

before we go to District Court, but that the primary role drafting the order is with the administrative law judge.

This is a fairly routine procedure, as I've said, and we suggest that we follow it here. I join the Union in that. Where with break off from the Respondent is what happens after the documents are produced. After the documents are produced, Respondent's order contemplates that something different will happen, and I find no legal support for what they want to do. What they want is the ability to interrupt the hearing, that will happen here, in the administrative hearing, to interrupt it, whenever it's not pleased with a ruling on under the protective order as issued. There can be no other reason for the language of the order they've proposed. They have reserved the right to to go back to the District Court and have the District Court modify its own order in the middle of this hearing, to change the rules, without asking Your Honor, essentially. That's what sort of rights are being reserved.

This goes back to my first point. I've never seen anything like it. I don't think it preserves the appropriate role to the administrative law judge. I don't think Detroit Edison overruled the Shriver, FEC and the Texaco Oil cases. I think we all see that. I

think the administrative law judge maintains primary authority certainly for running this hearing, and in crafting an appropriate protective order.

I don't like the fact that Respondent would like to end run the Board's special appeal procedure and instead go to District Court. There's just, as I said, there there's no jurisdiction for that, and there's no basis for it in the law. It's an entirely different branch of government, and beyond the simple subpoena enforcement action, and 10 J and 10 E, there is no role for the District Court in reviewing individual decisions that are made by the administrative law judge in this hearing.

Your Honor, Respondent -- apparently the provisional seal procedure, and I'm not trying to mischaracterize what I heard, it was a little hard to hear. I understood, at least, that there was some recognition, I think I understood from their brief as well, there was some recognition that that is a reasonable, hands-on way to avoid delay and interruption and it would be interruption right in the middle of testimony. I think we all know that there are just a lot -- just bad options when it comes to the seal problem that we have when it comes to the administrative law judge getting his rulings, sort of on seal reviewed.

I think we've come up with a pretty finessed solution to that that we can all agree avoids a lot of trouble and avoids a lot of interruption. I'm hearing, I think, that we do not need to argue over whether it would be appropriate right now for Your Honor to decide prophylactically to seal documents before they are ever even offered. To me, I think on its face, we know why that doesn't make sense. District courts have even recognized that to do so is premature, and I don't know that a District Court would be any more willing to do so than Your Honor should be before a witness has testified, before a document has been offered, because essentially what it would do is require the parties and the administrative law judge and then later a District Court judge to consider every single document that may be offered, when only, fact, perhaps a handful may actually be offered.

So I think the solution that we've come up with there works. To the extent I've misunderstood, that would be my position, that the provisional sealing process fully protects Respondent's concerns. There is no more protection they need than that provisional seal procedure, which would be followed by a final appeal in District Court, and therefore with no interruption, that I can see, to this hearing would be warranted or

necessary to -- for any reason during the hearing. That would I think jibe with what the Respondent's counsel has said about Your Honor's role in ruling on -- sealing individual testimony or declaring individual testimony to be deemed some level of confidential.

The problem again that I have when I read the order is it doesn't look like the same thing that I'm hearing that they want. Their order would allow them to go to District Court and argue that you did not properly designate things confidential or seal testimony as appropriate. "As appropriate" is a ticket right back to District Court for Respondent if they disagree with how you seal something, whether it be testimony or otherwise. So I think the provisional seal procedure is the way to go.

In terms of shape of this whole thing, the AGC's proposal is more traditional for a Board proceeding, as I think counsel for Charging Party has noted. It contains this mow nuanced approach with dealing with the seal issue, and just basically contemplates after Respondent gets its District Court protective order, that it believers it need to be enforceable, that it would provide us the documents, and would provide us with a log of documents that we felt -- for the documents we did feel that we still needed a log for.

And I can get into what categories those will be.

At any rate, after it did so, we would have the opportunity to challenge the designations and again not take on the burden of showing that they are, in fact, inappropriate designations, because we need to recognize at this point but for this four-page affidavit, that's all they are, is designations. So a challenge procedure is appropriate.

We don't plan on overusing it. I don't think anybody wants to slow things down by doing so, but I think that challenge procedure needs to be there, and it can't be 15 days after what Respondent characterizes as substantial compliance.

The problem with that, and I'm reading through Respondent's proposed order, I'm not even sure I understand how the dates add up. It almost reads to me such that I would be required to challenge something sooner than it was actually -- than before the ruling rather, before their argument, their showing was made. I don't think the numbers work out.

But assuming that the dates run, and what we're really talking about is a period of time, 15 days, 30 days, so forth, for us to review however many documents they may have produced subject to confidentiality, it could be ten, it could be 10,000,

and we're picking a date out of air that, as far as I could tell, that date would apply to every production, presumably, or every substantially compliant production, whatever that is, and every subpoena. And then would have us get more rulings from you again on documents that we don't know whether we're going to use or not, let that run its course, and then go back to District Court again. That's why we part ways there.

We would retain the right to challenge throughout the proceeding. If we believe that designation was inappropriate, we would come and say, Your Honor, we think designation is inappropriate, at that time they would need to make their showing.

If they make their showing, for one or a category of documents, we move on. That's tradition leave the way I've seen it down, and I think we do it that way because it works.

The seal procedure I've already described. Following the close of the hearing, the Respondent could move for you to place the sealed documents under permanent seal, we could oppose that motion. This is one of the times when the log comes up. Because we have given up the right to get a log on documents in the first instance, right upfront, because we think that would involve so much work for Respondent, at least

that's what they represented, because we're willing to forfeit that, we would request that we can make a good decision on whether to oppose a motion to permanent seal made to Your Honor at the end of the case that, Respondent provide a log of documents that it moves to permanent seal with its motion to permanently seal. That to me is reasonable. It gives the Respondent an adequate responsibility to decide truly which documents it wants permanently sealed, and again doesn't have us all sorting through documents that we may not need to sort through. Then we would have the opportunity again upon reviewing the log to be able to make an intelligent response to whether we thought they had made the requisite compelling showing for sealing the document permanently. After that, the Respondent can move to the District Court to seal the documents permanently.

This approach, I think achieves the goals of moving the hearing along, with minimal interruption, it protects Respondent's interest in and the information it claims is justified, and keeping out of public realm, and certainly, and most importantly, to the General Counsel, preserves Your Honor's role as the primary decision maker in these matters. I would join with the Charging Party in expressing deep concern over anything that seemed to involve turnkeying out any of the

responsibility in making decisions on subpoena items via protective order issues to a District Court, and so as they have, I think, characterized it, that is probably the -- that is the most important issue for me.

I wanted to talk about the highly confidential category versus confidential. Respondent demands prohibitive order with respect to two categories, and the access as we know would be differ for the two categories. The first one is the confidential category, which we larger agree would be available to a certain group of people. There are some differences. The Acting General Counsel proposes that we would be able to show confidential information to individuals assisting the counsel for the Acting General Counsel, or individuals assisting the Charging Party, who are designated by us after review of the confidential information.

We would also allow Your Honor to designate additional people, so we have the definition called qualified persons in our order, and qualified persons would have, I guess, we would call it an escape hatch, but really it's a way for the document to be more fluid and a working document, and that would be a provision whereby something -- we take a turn in this case nobody saw, and it gives Your Honor the opportunity to color

us, to make a determination that under the circumstances, that nobody thought of, way back when we were drafting this order, in my opinion, this person should have access to confidential information.

They do not want you to have that ability. That is something that their order does not contain. It would give them, as I noted, the right to go back to District Court to seek such a modification. I don't think that's appropriate.

The other differences that I see between the confidential information category, we have requested that confidential information be able to be shown to witnesses and prospective witnesses, and their language would require that I serve a subpoena on someone to -- in order to show them confidential information.

It's a minor difference, but -- actually, I haven't even really characterized. A person served with a subpoena when a person is expected to testify, whether or not the subpoena has been revoked, to the extent reasonably necessary in preparing for testifying. I don't think any of that language is necessary. I think counsel knows counsel has a right to identify perspective witnesses, and those are witnesses that would be shown the confidential information. And, Your Honor, this is with a provision that that witness be

signing some acknowledgment that stating that they had read the order and abide by it. I don't think all is that extra, of those extra caveats, characterization is necessary.

We also have just other minor differences. We would allow, be allowed to show confidential information to the person who authored or received the particular confidential information. I think that's self-explanatory. It's a minor thing, but it certainly makes sense to me, that if the person has already seen it, that it would be very difficult to justify why they should not be allowed to see it in connection with the proceeding.

That pretty much takes care of the differences between the two versions of confidential information.

Now we get into highly confidential information. That's obviously something that the Charging Party's counsel spoke extensively on, and I absolutely appreciate why, but I didn't want to believe it -- leave Your Honor with the impression that that is exclusively the issue of the Charging Party's counsel. It's absolutely not. Respondent would limit highly confidential information based on a concern that the Union by virtue of the participation in the proceeding would gain access to information that would give them an

unfair advantage in the parties' upcoming bargaining sessions. Respondent says it doesn't want to dictate who does the bargaining for the Union in 2012, but I think, frankly, that's what you're being asked to do. I'm concerned about this issue as its currently presented, and how it's been framed and how its been supported or not supported by the evidence.

We can look to the affidavit of Mr. Bodensteiner, which is the only thing we can look at, when it comes to good cause, that Respondent has provided with respect to to this category of information, this highly confidential category, the affidavit is really not clear. Instead of using specific, more easily understood industry terms, like the ones I used earlier -- proprietary, design attributes, confidential research and development, assembly processes -- it simply posits potential scenarios, hypotheticals. You could even say speculation.

The first one is that it states that the Union could use confidential information from this hearing to damage Respondent's business by providing it to Respondent's competitors. There's no proof of this. And not only is there no proof of this, and is it not only is it just pure speculation, I think that logic

dictates that it would not be in the Union's interest to do anything of the sort, and that they would be agreeing to do nothing of the sort by being a signatory to this agreement.

It puts them in a second class status in that regard; because I'm signing -- I'm -- they're only doing what I'm doing. I'm signing the agreement, going to abide by it, but their word is not as good as mine, apparently.

Second, Respondent has suggested that, in Mr. Bodensteiner's view, the information, the highly confidential information, could give the Union an unfair advantage as we've discussed in collective bargaining. And I can't tell from the affidavit what specific information that is, but there is a reference to Respondent's profit margin on the 787. That's as close as I could get to the what -- how that might disadvantage Respondent in the negotiations.

The procedure up and to this point has just not given, in my opinion, me, and I believe anyone, enough information to make a determination on something as significant as the level of access that a parties with fuel due process rights should be afforded with respect to particular documents, a broad stroke here, I think, is a bad idea.

A procedure in which Respondent gets to unilaterally designate documents, which is what we're talking about, stamps them stamps them highly confidential, based on a four-page affidavit, these documents would not only be kept from the general public, but they would be kept from the interest to, many, many individuals at of the Charging Party, subject to being disqualified. That would hinder my prosecution of the case, because these are the people that I need to talk to in order to present my evidence.

In fact, I think as counsel for Charging Party very carefully and succinctly laid out, those documents could have to do with the affirmative defense that I'm expected to rebut, and those individuals that I would need to consult on with those documents, I'm assuming, since we don't really know what they are, I have to assume that certain of those documents would be the documents that I would wish to show to some of those experts, those individuals within the Union, who are expert in the subject matter contained in the document that simply my reviewing a document is not going to be enough.

Quite frankly, it would I think threaten not it only the prosecution of the case, but, in fact, the, the Charging Party's ability to play an effective role. So

what I think at this point would be a solution that allows us to get this thing going, would be to fall back to the log position with respect to the documents we don't have a grip on yet, the ones that are outlined in the affidavit, but we don't have an understanding completely what they are.

Now, I'm going to get them, but the Charging Party should be provided with a log from which it can at least assist me in determining whether we believe that Respondent has made its case that there is specific harm that would befall should the Union have a certain level of access to it at that point, perhaps, you know, on a document-by-document basis, if this is really the concern that Respondent has, it should be made to show what about a particular document justifies cutting the Union out of the process. That's why I believe that the log is not something we would want to forego with respect to this highly confidential category.

JUDGE ANDERSON: Charging Party made what you labeled was a concession. Is that what you're talking about?

MS. ANZALONE: Yes, I would think it is a concession, yes.

JUDGE ANDERSON: Is your position and the Charging Party's on this the same?

MS. ANZALONE: Yes.

JUDGE ANDERSON: Okay. I interrupted you. Go ahead.

MS. ANZALONE: No. That's okay.

At any rate, Your Honor, I think that the point here is that we are not trying to throw up roadblocks in order to get this procedure going. We're just trying to tread carefully and not go from zero to 60 with no good cause or not enough good cause or not enough a particularized showing of arm. We've all agreed, identified harm, and it should be shown, have it should be shown hopefully, you know, with respect to these documents before a blanket determination is made with respect to the Charging Party's access. Their due process rights are too important.

I don't think I have anything else, Your Honor, except I was going to make a comment that your comment on FOIA is absolutely accurate. And we would agree, we're certainly not in a position to dictate or ask that you dictate that anybody do anything that is not in accordance with the FOIA procedures.

JUDGE ANDERSON: So how do we handle it?

MS. ANZALONE: Your Honor, I think that the procedure that we have actually does resolve the issue, and I think that's sort of our position, is that our --

FOIA -- our position folds FOIA in, and that's the only way to resolve the issue.

JUDGE ANDERSON: Thank you.

MS. ANZALONE: Thank you.

JUDGE ANDERSON: I have some questions, and I'm going to give you each a chance to speak in response, or in further education of the judge, and I haven't read all of the cases, so I'm not telling you now how I'm going to rule, but I think in order to better inform and direct your coming to marks, I thought I'd give you at a threshold level my impressions, no stare decisis implied how this comes.

Let's start off with the concept of the protective order. What is a protective order. We recognize it's increasingly a of procedural value, it's recognized in Federal Rules of civil procedure. The Board has come to recognize it. I know we're not first in this race, but it's here with us, because of the inevitable practical requirements of this process, an order is useful.

Now, there are two kinds of orders. As far as I'm concerned, there's a critical difference here. One is in agreement of parties, or an agreement of the parties that I select and that at the end we have the agreement of the parties. The parties can do lots of

things that a judge can't. I know normally you can turn that around. I can't take away your rights, but you can adjust them in an agreement. There is no way I could, as some of the language suggested, limit the parties' rights to take an appeal to the Ninth Circuit from the U.S. District court, particularly in this building where they might hear me, I would never even consider such a thing. But the parties might do that.

So why am I saying that? To better distinguish between the discussion of your agreement, which we don't have, and what I have. What I can do is not so much different as it is less than what you can do.

Now, if I had no protective order, what we were just handling in this trial one document, you wouldn't need a protective order. There's no practical problem with doing, you don't need a wheel. You can reinvent the wheel, but if you have lots of documents, it's better to have a wheel in place.

Now, if I can't circumscribe your rights in a standardized order of things, in a predetermination, because that's an agreement of the parties I don't have, then my protective order is of the blander variety, which says in effect here is how we practically will do this, but I am not amending or increasing or diminishing your rights to get something, to give something, to

limit its gift, or to limit its being placed in the record.

In other words, a protective order from me, which is not part of an adoption of your agreement, in my view, does not change your rights. It simply orders the presentation. And to that extent, I think when the General Counsel and when the Charging Party says don't change things, I don't think the kind of order that I contemplate will change substantive rights.

Now, I do lots of this stuff all the time and there is a thing that informs my judgment that hasn't been much discussed here, and that is the intermediate handling of documents. It's one thing to have a status determined. Is this document confidential, is it a trade secret. It's another to talk about the consequences of that. These documents will be, in my view, perhaps not specific as to each. There may be a category.

If they're weekly reports, it's likely that the weekly reports don't vary much from week one to week gift, and you might have a categorical determination, but often documents are not categorical, they are specific. They can be redacted, they can be scrubbed, numbers can be converted to percentages, all kinds of stuff that can be done to protect disclosure, limiting

that disclosure to utility for the matters in the case, and diminishing the disclosure for matters superfluous or confidential.

If it's a formula you don't have to disclose it at all in some cases, but you might cross out the quantities, so that people know what Coca-Cola is made of, but they can't make it themselves. I don't plan to issue protocol that changes rights. A protocol doesn't change rights. It's a way of approaching the stuff that we have to do.

Now, I can be convinced otherwise, but I don't think an order affects the way we should handle things. Now, the problem here is there are consequences to an Article III judicial order. I cannot give that. But I can understand why, looking at the rules, looking at five oh three or Federal Rules of evidence, Respondent, Boeing Company wants that. The question is how do we get that.

I also agree with the General Counsel, and the Charging Party, that -- I suspect every District Court, if this is not the general rule will not be everything goes to the Federal District Court. But on the other hand, we know as a matter of practical reality, if Boeing says, and they would say it with respect, you can't have this, Judge, I know you want me to turn it

over, but I'm not going to turn it oh of the way you've said it unless you limit it, they have might take to it Board, they might not.

There are lots of cases, as the General Counsel suggested, if the General Counsel wants a thing, and they Respondent, or Charging Party in our cases won't give it over, Federal District Court is where this statutory process takes us.

Now, if I said I'm going to give you an order, and I am, and I'm not going to cut out the Board's review, I can't do that, and if I think the cases are going to be document-specific, what will a protective order be? It will probably be a recitation of how to do it. We've talked about timelines, who comes first, who does what, is an initial label proper. Let's assume that the parties took this order, which doesn't directly affect any document as yet. It's just a protocol, a protective order, and went into the Federal District Court, I'm imagining, why would they listen? What do they order? If they adopt the order, does that give me greater worth, does that limit them in their review when the first document is in dispute? Will the judge not say in the District Court, what you want me to do is give some of my power to the judge so I'm limited on review in the first document? He may or she may or may

not.

But I don't think it's necessarily -- you're the experts in Federal District Court, not me for almost 40 years -- I'm not sure that's something that can be approved. However, a practical side may be once we finish all the documents -- finishing is a interesting word. Stuff arises later -- but finish all the documents in the first iteration, let's put it that way, and then Boeing says, with a stack of documents presumably, I'm assuming all our efforts heretofore are going to cover more than nine documents, we'll have stuff, then if you all went in and Boeing said to the District Court we're not going to go and turn this stuff in without a protective order, and also by the way they might say, and by the way the judge got documents, Bates numbers A, B, C and wrong, we'd like you not to have us give us over irrespective of the order, the judge might give you a ruling on everything.

Now, Interbake is just a decision of the circuit giving instruction to the District Court in my judgment. The General Counsel says the Board doesn't necessarily accept that. If you think of the Interbake doctrine, it's not addressed to us. What it says is you guys can do anything you want -- I know they don't put it that way -- but when you come to us, that is the District

Court judge, we're going to do it. So the District Court judge, don't just tell the parties to give the judge the documents for in camera inspection, don't stop there, make an independent determination. I don't remember if the language of the circuit said de novo or not. Now, I know that's a new decision. There may be schools in the circuit *ch. But the point is the circuit it going to do it themselves. I don't think the circuit is going to be bound by an administrative law judge's decision, which is not an agreement of the parties.

If the parties have an agreement, the circuit judge says you guys agreed to it, don't tell me your agreement is no good. So I'm worried about the Federal District Court insofar as I can shape it. I am not sure that I can. I'm saying all of this to invite your recitation in these common remarks.

This is not a Federal District Court Article III process. This is an administrative adjudication under the terms of the NLRA.

Now, there are Texaco and other cases that talk about the relationship. They're the ones that give the stuff over, but you know, whether you give the stuff over or not, it's not a matter of great consequence to me. My little world, if you will, this frog in this

little pond, is to do it right by the rules that govern me, and to let higher authority, and in these matters, District Court is the higher authority, do what they want, but try and do it in a way that is consistent with the rules as I can understand them.

So I'm not sure, and I'm going to listen to Respondent, as to how what I do interfaces with the Federal District Court. I'm telling you now, course he or she doesn't call me in and ask me about it, I'm not apposed to the Federal Court gaining approval, I'm not opposed to Boeing getting the benefit of a Federal District Court order, but I am not there to tell the Federal District Court what to do and I'm not persuaded by reading the cases of what the Federal courts do that a judge's decision, an ALJ's decision in this proceeding, which is not the result of an agreement of all the parties, is going to be treated the way you all think it may be.

I don't think, let me repeat it, I don't think a Federal District Court taking my protocol, which applies only in the abstract, is going to say that sounds good, or that sounds bad. I think what's going to happen is you're going to need a document, that you want, General Counsel, and that you get a document that you want by not getting it from the party you want it from, that's

why you're in Federal District Court, and if you do it, query, whether or not the judge will say, okay, this applies to the one document, or he'll say the rule, the judge's protocol within the statute and within my scope of review seems good enough. I'm not sure where the district courts will go. I have no power, and I'm not confident in prediction. That's why if we get there, it might be better to do it all at once at the end, then you'll have a composite ruling.

The problem with that, of course, is lots of what we do as multiple steps. And at what point you take it there will be interesting and I'm going to leave that to you.

Now, I want to take the stuff that I said can be adjusted, redacted, third-page removed, the attachments removed. That also can apply to evaluations of remedy. If I talk about determining status, which is what we're talking about, the second thing is consequence. What is consequence? Whether or not the Charging Party can't bargain in the future, whether or not this is a matter of such confidentiality that at end of the trial all lawyers must be shot, I'm not sure that's within my power, nor would I take it.

MR. CAMPBELL: We concur on that.

THE COURT: But the point is compromises can

exist, but those consequences are also document-specific. There may well be a document that justifies foreclosure of access to an individual. You say these are unique to patents. Charging Party suggested. What they are is unique to the situations that commonly arise in patents. Those situations may never arise in a Board case. There may be no history of it. But that doesn't mean the law doesn't apply here, it just means that that factual setting which is necessary to trigger reduced access has not arisen, and is not like three to apprise.

I foreclosure and plan in my order, and the parties can address this, to foreclosure no order, because I don't have the specific document before me. Were there a page, I'm making this up, and you know my pension for levity, these are attempts to explain to you my view -- there may be a very expense civilly researched Boeing document that says when the Union negotiators, A, B and C hold a document in their left hand they're serious, but if they hold it in hear right hand we can get more out of them, there may be a reason never to give that to the Union. Or not to allow a lawyer to engage in negotiations. Once that's out, Boeing loses a trade secret, which is, in fact, uniquely applicable, almost like a patent case. But other stuff,

as you've said, may not need that.

So I'm not going to give an order that allows for blanket determinations on consequence. They're going to turn -- it can be by category perhaps, if everything is the same, one ruling can apply to 90 documents. If 90 documents in essence meet that same bag of tricks. But it will depend. I have to tell the Charging Party and General Counsel that I look with interest at this intermediate position.

Let me explain to you what I mean. If we go to a -- and we're going to go -- to a privilege examination for attorney-client and work product week, not fighting about that, we know how do that, we've done that all the time. It's logged, you don't get anything until a determination is made. There is some cases in confidence, and it will come up in this case, where documents are going to be given to everyone, at least counsel, and the argument will be -- and we've discussed that, counsel has suggested don't need a log on that, it will at least be facially self-evident in most cases. So we have all log cases, and we have no log cases, then the parties suggested a semi-log case.

In that case, where Boeing suggests Charging Party counsel shouldn't see it, except with consequences to counsel, counsel doesn't want to look at it lightly

so he says, and I'm putting words in your mouth, I believe you earlier expressed, we're willing, says the Charging Party, to look at the log so long as the General Counsel gets the entirety of it. That's the semilog case. Then we get to the analysis, you'll get a status, and the consequence ruling from me. By that I mean yes, it is something that the Union should have limited rights to, you get a specification of what those limited rights are, and then you can decide what to do. Well, then I don't want to see it or I'll designate someone.

That is an unusual procedure, and I've told you all I'm not going to take your proposals as a waiver, but I'm taking that as an offer and in drafting my order, if I think that's necessary, I'm going to mention, you didn't seem opposed to it, if that -- if now as you see how I've carved your statement into a stick to beat you with, if you don't like that, remember, you're all going to get a chance to speak, you can withdraw it.

I don't want to use this process as some Shakespearian play. It's a practical means of advancing the mechanisms of the pretrial preparation. That's all that this is. I don't intend to use it to readjust the rights of the party. And I'm aware that procedural

orders and procedural steps can have substantive consequences in the press of time.

So I am going to, and this is a cost, because you have a cautious judge, I am going to, when the doubt comes, give more time, do things over again and again, and do some wheel inventing, because I'm aware this is an important case to many parties.

Actually, you know, whether you have a single person killed in the accident or a thousand people killed in the accident, when talking to the widow of a dead person, they don't particularly adjudge the fact that only their spouse was killed as a matter of consequence. And the laws do due process, substantive rights, shouldn't vary in terms of how many folks are involved necessarily.

I'm aware that this is an important case to many parties, and it's a matter of not just news interest, like babies being shot in a park, but to labor policy generally. Congress, as you're aware, is interested. So I'm going to do it, if it comes to that, the longer, harder way, to make sure we get an adjust adjudication, that is not suffering from the attrition of efficiency.

How am I going to do what that? I really don't know. I'm going to look carefully at your stuff. I'm going to try and incorporate -- and this is sort of a

cowardly act by a judge -- trying to incorporate the principles and dodge the specific application until we get more facts. You saw that my approach, I the facts. A craft can be better applied to the specifics. So if in my order I take say, or incorporate the rights set forth in Federal Rule 26 C3 or some other, that you say, that's nice, Judge, boy that helps us a lot, thanks. Well, that may be a consequence of my approach, and you're entitled to think less of me, you just should say it politely.

That's the way it goes. We will see, however, when I get an order, the parties have mentioned, we don't know whether we got a box or a container, or a hundred containers. And I, like all of you, remember those cases where each side had a moving company, and each side trucks in the documents. "Been there, and I have done that. And we need to do it, we will. But you will get my talents as I can marshal them applied not just in the rule, but in the application. So it's going to be a little bit -- not, I hope it's not vacuous, but it's likely to be a little bit -- devil not solve all your problems. Let's put it that way. There will be adjudication, and if the quantity of the documents renders the system -- renders my order needful of adjustment, it will adjustment. If the bicycle can't

carry the load, we'll put another wheel on it. But that's my approach now.

Now, again I've got all your documents, I've read them, I've listened to your arguments. Actually, interest I think you agree much more than you realize, but you have your advocates hat on, there isn't going to be much difference, I think, in the general approach, and I'm hopeful that you will all be able to eliminate much of this stuff yourself.

You know the Federal Rules of civil procedure talk about gives the parties or requiring an insertion that you try to do it yourself. You've been very successful with that in some cases, and sometimes you haven't sucked. That's what happens. But document by document, may well be a little easier to handle. Prudent counsel don't it would not give away universal declaratives that are going to bite them as to given documents, but given documents can be evaluated, and you might well come to conclusions that document, based on X, Y, Z, shouldn't be turned over in this form, but if you redact it so, or if Boeing proposes a reduction, it might be successful, you might not even disagree. If we have to do it document by document, we will, through logs in some cases. Apparently at the threshold level, not in others. When the parties suggest you don't need

logs -- again that's a stick that you may come to beat you, that may be adopted, put into the rules. But, again, if everything turns south, then we'll adjust it.

Now, what happens to my ruling, my order? It issues. My memory is, and General Counsel, if you have an opinion upon this, in enter it in your coming remarks, it seems to me the parties aren't foreclosed from arguing in District Court if they haven't taken something to the Board.

In other words, in the order is not appealed to the Board for a reason or another, I don't know whether or not it loses or increases or changes its value as a means to getting a court order, because you can see I'm not against you getting a court order. The Board can't give you court order. The Board will give you Board order if you take up my protocol. My rulings on these motions in opposition. I don't know, and I actually, I suppose to some extent it's in your hands, not mine, once I issue this thing, if I have misspelled words that you whisper to me to correct, whether you take it to the Board first or whether it's second to the District Court, I leave to you all. In some senses that's for you to decide, not to me.

I would like the parties to have some district court order so we can get on with it. I don't know how

often the Federal District Court will entertain our rulings. In other words, if you have 17 trips there, the court may lose confidence. Let's put it that way. Have what really troubles me, because I've been there, done that, is a case where a Respondent, not in this cease, but in another multi-state, multi-year case, says I won't give it over, and the General Counsel says we'll see about that, and they all go to the District Court, and the District Court is tired of us, gives a schedule, and I go home because it's necessary to delay, and after six courts General Counsel which is back, says there's not enough time to do this, we abandon that. You do that three or four times, a year has gone by.

I have had cases delayed for a year awaiting a District Court, not in this state, a U.S. District court order to get a witness to attend a trial. I've waited a year. I am scarred by life's experiences. I don't want to do that in this case. So anything I can do with and for you to make it go forward more smoothly, I will do it. Obviously consistent with my desire to do the right thing and to follow the instructions of the Board in the courts in informing the act.

Okay. My monologue is over. Would you like a moment to gather your thoughts, or would you like to address anything that's come up, counsel?

MR. SCALIA: I think I'm prepared to offer some thoughts.

JUDGE ANDERSON: Very well. Before you start, it's 20 minutes to 12. I doubt that I'm going to get the three of you in before lunch now. That's not a problem for me. If it's not a problem for you, proceed. If you're worried that they'll have had the advantage of a sandwich and you won't, you can go to lunch now. Trying to give you a symmetrical approach.

MR. SCALIA: I'm always ready to eat, Your Honor.

JUDGE ANDERSON: But you're a man in both youth and fitness. I'm so round, I can go for years.

MR. SCALIA: If you don't mind an early lunch, maybe that makes sense.

JUDGE ANDERSON: We'll have another iteration at 1 o'clock. You'll all come back to bat. If you have all want to make a memorandum to submit to me, it's thought going to be long, it will have to be submitted by Tuesday, so don't ask, and I'll only entertain it if you all ask, I'm not going to take a request from one of you. If you're all want to go submit to that, that's fine. But I still want to hear your remarks today, and I think that this is an important -- I told you before, this is an important one to get, it's clear we're not

going to get it behind us in short order, but we got to get it started rolling, if you will.

Now, after that, still today, we're going to take up the -- I like the General Counsel's term, housekeeping matters, let's call them that. I do want to address the ad testificandum motions that are starting to stack up in the E room. It's all a physical metaphor in a electronic world. We do need to get a handle on that, and started talking about that. At least generally. I want to make sure we're concentrating on the question, and implicit in that is two words, because if you have a split of opinions, I want to hear your arguments on that. Perhaps not today, but I want to press forward on all these procedural matters, and you notice I keep asking you, do you have anything else, do you have anything else. Pretty soon we're going to come to witnesses. I promise you.

We'll stand in luncheon recess.

MR. SCALIA: Thank you, Your Honor.

(A luncheon recess was taken from 11:38 p.m. to 1:03 p.m.)

JUDGE ANDERSON: On the record, please. Counsel.

MS. ANZALONE: Your Honor, I'm not trying to interrupt Respondent, but I did take what you said

before we broke had a heart-to-heart talk with my client, and I'm going to request that we take a brief break, so that I can speak with Mr. Scalia about where we stand right now and the two parties and whether we have any hope of salvaging an agreement.

JUDGE ANDERSON: All right. Let me ask, any objection to that?

MR. SCALIA: No objection.

JUDGE ANDERSON: All right. We'll be off the record.

(A break was taken from 1:03 p.m. to 4:33 p.m.)

JUDGE ANDERSON: Counsel, you have a motion to offer into our convenience motion file?

MR. HANKINS: Yes. Your Honor, the document has been filed electronically, and served, but we've been making a practice of having copies on hand, hard copies on hand, and so what I would offer is motion No. 9, Respondent's response to petitions to revoke subpoenas ad testificandum.

JUDGE ANDERSON: As the parties know, this is not evidence, it's simply a Washington state copy of something already served, and any such high spirits I won't remind you that I'm not the associate General Counsel, as the service papers seem to perpetually indicate. I refuse the promotion once again.

We have had off-the-record discussions respecting the protective order, which are ongoing. Tomorrow at 8:15 we will reconvene and we will take the status of those matters in hand, and take appropriate action.

Tomorrow, even if our plate is full, absent extraordinary circumstances, we will still take our Friday, let the people go home, late morning adjournment. So we'll stand in recess, and I remind you, don't dally. The court has asked us to vacate the building in a timely way. We'll be off the record.

(Discussion off the record.)