THE HONORABLE JUDGE _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATIONAL LABOR RELATIONS BOARD, Applicant, v. THE BOEING COMPANY, Respondent.	Civil No. _____ NATIONAL LABOR RELATIONS BOARD'S APPLICATION FOR AN ORDER TO SHOW CAUSE AND ORDER REQUIRING COMPLIANCE WITH BOARD SUBPOENA *DUCES TECUM* B-648185 ORAL ARGUMENT REQUESTED NOTE ON MOTION CALENDAR: December 16, 2011

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The National Labor Relations Board (the "Board" or the "NLRB"), an administrative agency of the Federal Government created pursuant to the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. § 151 *et seq.,* applies to this Court pursuant to § 11(2) of the Act [29 U.S.C. § 161(2)], for an order requiring Respondent The Boeing Company ("Respondent") to comply with subpoena *duces tecum* issued by the Board and duly served upon Respondent by the Acting General Counsel for the Board (the "Acting General Counsel") in the manner provided by law.

This Application is being filed concurrently with a second Application for an order requiring Respondent to comply with a similar subpoena *duces tecum* issued on behalf of Charging Party in the administrative proceeding, the International Association of Machinists and Aerospace Workers, District Lodge 751, AFL-CIO, affiliated with International Association of Machinists and Aerospace Workers ("Charging Party"). As the issues presented and interested parties involved in these two actions are identical, the Board will move to join these two actions.[1]

The basic goal of both subpoena enforcement proceedings is to obtain from the Court an order that will permit the administrative case to proceed with sufficient access to those Respondent documents believed necessary to make a complete administrative record, but without causing undue harm to the Respondent by unnecessary release of its confidential information. That is, the Board seeks an order: (i) enforcing the Subpoenas, as modified by the Administrative Law Judge, and (ii) requiring the Board and Charging Party to obey the Protective Order -- issued by the Board's

[1] While § 11(2) of the NLRA, 29 U.S.C. § 161(2), expressly grants district courts jurisdiction to enforce Board subpoenas, it limits that jurisdiction to cases brought "upon application by the Board." Thus, the NLRB is also filing the application on the relation of Charging Party to enforce its subpoena so as to ensure the Court's jurisdiction to enforce the two subpoenas, *Wilmot v. Doyle*, 403 F.2d 811, 814 (9th Cir. 1968), and, in order to bring Charging Party and its subpoena into these proceedings. *See, e.g., NLRB, on the relation of IUOE v. Consolidated Vacuum Corp.*, 395 F.2d 416, 418 (2d Cir. 1968).

Administrative Law Judge at Respondent's request -- limiting the parties and Agency's use and disclosure of those records that are deemed confidential.

In support of this Application, the Board respectfully declares and shows as follows:

Jurisdiction and Underlying Unfair Labor Practice Proceeding

1. This Court has jurisdiction of the subject matter of the proceeding and of Respondent by virtue of § 11(2) of the Act [29 U.S.C. § 161(2)] in that the inquiry underlying the issuance of the subpoena *duces tecum* is being carried out within this judicial district and Respondent transacts business within this judicial district, where it operates aircraft production facilities in different locations throughout the greater Seattle, Washington area. NLRB subpoenas issued pursuant to § 11(1) of the NLRA are enforceable in federal district courts under § 11(2), 29 U.S.C. § 161(2), which provides that "[i]n case of contumacy or refusal to obey a subpoena issued to any person" and "upon application by the NLRB," federal district courts "have jurisdiction to issue to such person an order requiring such person to appear before the NLRB, its member, agent, or agency, there to produce evidence if so ordered . . . ." *Id*.

2. The NLRB is an administrative agency of the Federal Government charged with enforcement of the Act, 29 U.S.C. § 151 et seq. The NLRB is divided between a quasi-judicial Board and a General Counsel responsible for investigation and prosecution of cases before the Board. Regional Offices, headed by Regional Directors, are supervised by the General Counsel. Regional Directors are authorized to issue complaints on behalf of the General Counsel and to issue subpoenas at the request of parties to administrative unfair labor practice hearings on behalf of the Board. Administrative Law Judges conduct unfair labor practice hearings and issue decisions and recommended orders, which are transferred to the Board for decision. The General Counsel

represents the NLRB in federal court proceedings to require obedience to subpoenas issued by the Board. Pursuant to § 6 of the Act, 29 U.S.C. § 156, the Board has issued Rules and Regulations, Series 8, as amended 29 C.F.R. § 102 *et seq.* (the "Board's Rules"), governing the conduct of its operations.

3. Pursuant to the provisions of § 10(b) of the Act [29 U.S.C. 160(b)], there is currently pending before the Board an unfair labor practice hearing before Administrative Law Judge Clifford H. Anderson arising from the issuance of an administrative complaint in Board Case 19-CA-32431 (the "Administrative Complaint"). A copy of the transcript of the pending administrative unfair labor practice hearing before Administrative Law Judge Anderson is attached to this Application as Exhibit 1. Copies of the exhibits submitted by the Acting General Counsel, Charging Party, and Respondent at the pending administrative hearing are attached to this Application as Exhibits 2 through 7. (Exhibit 2 at 000234 through 000246). The Administrative Complaint issued following the investigation of the underlying charge filed with the Region 19 office of the Board by Charging Party. (Exhibit 2 at 000249). Each of these documents was prepared, filed, and served consistent with the requirements of § 10(b) of the Act [29 U.S.C. § 160(b)], and of §§ 102.9 through 102.14 and 102.69 of the Board's Rules [29 C.F.R. §§ 102.9-102.14 and 102.69]. (Exhibit 2 at 000232-000233, 000247-000248). Respondent filed an answer to the Administrative Complaint denying that it violated the Act. (Exhibit 2 at 000221-000231).

4. The Administrative Complaint alleges that Respondent violated §§ 8(a)(1) and (3) of the Act, 29 U.S.C. §§ 158(a)(1) and (3), by: (1) making coercive statements to its employees that it would remove or had removed work from their bargaining units represented by Charging Party because employees had previously struck Respondent, and threatening or impliedly threatening that

their bargaining units would lose additional work in the event of future strikes; and (2) deciding to transfer a second 787 Dreamliner aircraft production line and a sourcing supply program for 787 Dreamliner production from their bargaining units represented by Charging Party to its non-union site in North Charleston, South Carolina, or to subcontractors because Charging Party-represented bargaining units had previously engaged in strikes against Respondent.[2]

5. On June 14, 2011, Respondent moved to dismiss the Administrative Complaint for failure to state a claim, as well as to strike the remedy sought by the Complaint. A copy of Respondent's Motion to Dismiss or to Strike is attached to this Application as Exhibit 8. On June 30, 2011, the Administrative Law Judge denied Respondent's Motion to Dismiss in its entirety. A copy of the Administrative Law Judge's ruling is attached to this Application as Exhibit 9.[3]

Board Subpoena B-648185 and the ALJ's Rulings on its Enforcability

6. In order to procure additional relevant records and documents for possible use in the administrative hearing before Administrative Law Judge Anderson, Counsel for the Acting General Counsel made a written request for and received subpoena *duces tecum* B-648185 (the "Subpoena") from the Board. (Exhibit 4 at 000001 through 000013). On May 24, 2011, a representative of the Acting General Counsel served the Subpoena on Respondent. The Subpoena

[2] As part of the remedy for the alleged unfair labor practices, the Acting General Counsel is seeking a requirement that Respondent have the bargaining units represented by Charging Party operate its second line of 787 Dreamliner aircraft assembly production in the State of Washington, utilizing supply lines maintained by the bargaining units in Respondent's Seattle, Washington, and Portland, Oregon, area facilities. The Acting General Counsel does not seek to prohibit Respondent from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility (Exhibit 2 at 00234 through 00246).

[3] This Court should be advised that the Committee on Oversight and Government Reform of the United States House of Representatives has sought from the Acting General Counsel of the Board various documents related to the underlying unfair labor practice proceeding. In response, the AGC has made a commitment to supply the Committee with relevant records in the Agency's possession contemporaneously with theiravailability to all parties in the proceeding. At this time, it is not known whether the Committee will be interested in securing Respondent's confidential information if, and when, it is provided unredacted to all the parties pursuant to a Protective Order.

required and directed Respondent's custodian of records to appear at 9:00 a.m. on June 14, 2011, or any adjourned or rescheduled date, to testify in Board Case 19-CA-32431, and to bring with him or her and produce specified books, records, correspondence, and documents. The Subpoena was issued under the authority of § 11(1) of the Act, 29 U.S.C. § 161(1), and in the manner and form provided for in the Act and § 102.31 of the Board's Rules, 29 C.F.R. § 102.31.

7. The Subpoena seeks records directly related to the allegations of the Administrative Complaint, including information concerning Respondent's alleged coercive statements and threats and the factual basis for such statements, as well as information related to Respondent's decision to place a second 787 Dreamliner aircraft production line in South Carolina and to transfer a sourcing supply program for 787 Dreamliner production to South Carolina or to subcontractors. The Subpoena also seeks information related to Respondent's affirmative defenses, including its contentions that its decision to place the second 787 Dreamliner aircraft production line in South Carolina was motivated by "a number of varied factors," that it would have taken the same action even absent its consideration of the impact of future strikes, and that the remedy sought would present an undue hardship. (Exhibit 4 at 000001 through 000013).

8. The Subpoena was properly served upon Respondent by United States mail to Respondent's corporate headquarters, and by certified mail and email to Respondent's Counsel, William Kilberg, Esq., of the law firm Gibson, Dunn & Crutcher LLP, located at 1050 Connecticut Avenue, NW, Washington, DC 20036-5306 on May 24, 2011. Respondent's Counsel had agreed in writing on May 18, 2011, to accept service of subpoenas *duces tecum* on behalf of Respondent. (Exhibit 4 at 000014-000030). Service and receipt of the Subpoena complied with § 11(4) of the Act, 29 U.S.C. § 161(4), and § 102.113 of the Board's Rules, [29 C.F.R. § 102.113].

9. Pursuant to § 11(1) of the Act, 29 U.S.C. § 161(1), and § 102.31(b) of the Board's Rules [29 C.F.R. § 102.31(b)], Respondent, through its Counsel, filed a timely petition to revoke the Subpoena, dated May 27, 2011. (Exhibit 4 at 000031-000081). The Acting General Counsel filed an opposition to Respondent's petition to revoke the Subpoena on June 7, 2011. (Exhibit 4 at 000082-0000110). On various dates between June 23 and July 14, 2011, the parties made oral arguments to the Administrative Law Judge concerning Respondent's claims that the Subpoena is overbroad, seeks information not relevant to the material factual issues in dispute, and is unduly burdensome. The Administrative Law Judge ruled that Respondent is required to produce documents responsive to the Subpoena, as he had earlier orally limited and narrowed the Subpoena on the record. (Exhibit 1 at 000168-000485, 000764-000806). On October 20, 2011, Counsel for the Acting General Counsel withdrew the Acting General Counsel's request for subpoenaed documents identified by Respondent on a privilege log as being privileged from disclosure under the attorney-client privilege or work product privilege. (Exhibit 1 at 002032-002033; Exhibit 5).

The ALJ's Protective Order

10. On July 25, 2011, Respondent filed in the administrative proceeding a motion for a protective order so as to place a limit on persons who could have access to assertedly sensitive and confidential records and portions of records that would otherwise be responsive to the Subpoena and produced by Respondent. (Exhibit 4 at 000193-000297). The parties thereafter negotiated for terms of such a protective order, but did not reach agreement. Following the Administrative Law Judge's solicitation of the parties' positions, the parties submitted briefs and made oral argument. (Exhibit 1 at 000813-000886; Exhibit 4 at 000298-000611). On August 12, 2011, the Administrative Law Judge issued a protective order (Exhibit 4 at 000837-000861). On August 22, 2011, upon a

further motion of Respondent to clarify that order, Administrative Law Judge Anderson issued an amended protective order (the "Protective Order"). (Exhibit 4 at 000612-000639, 000862-000880).

11. On August 22, 2011, Bloomberg, L.P., the operator of global news service Bloomberg News, filed a letter requesting modification of the Protective Order. After considering the request and written responses submitted by all parties, the Administrative Law Judge issued a written ruling declining to modify the Protective Order. (Exhibit 4 at 000640-000659, 000881-000893).

12. The Protective Order sets forth a protocol for resolution of Respondent's confidentiality claims. The Protective Order recognizes "Confidential Information" as that which:

> contains, includes, or consists of confidential, proprietary, and/or trade secret financial, personal, business, or technical information that the Respondent maintains in confidence in the ordinary course of business and which, if disclosed, will cause specific financial and/or competitive harm to the Respondent.

(Exhibit 4 at 000868).

13. The Protective Order provides that, upon Respondent's designation and disclosure of such information, "Confidential Information" shall only be made available to counsel for the General Counsel and for Charging Party, witnesses, individuals assisting counsel, courtroom personnel and adjudicative bodies, such as the Board. (Exhibit 4 at 000869-000870, 000873). The Protective Order further provides that Respondent may designate additional heightened restrictions on Charging Party IAM's access. (Exhibit 4 at 000870-000871). The Protective Order also provides for a dispute resolution procedure whereby Counsel for the Acting General Counsel and counsel for Charging Party IAM may challenge any of Respondent's designations and allows an opportunity for Respondent to make a good cause showing for the same. (Exhibit 4 at 000872).

14. The Protective Order provides that if and when portions of documents designated

by Respondent as "Confidential Information" are proffered as exhibits to be placed into the administrative record, those "Confidential Information" documents will be placed into the administrative record under provisional seal upon motion of any party, without any further findings by the Administrative Law Judge at that time. Such provisional seal may be made permanent upon motion by Respondent at the conclusion of the hearing. If, at the end of the hearing, the Administrative Law Judge rejects such a motion and decides to unseal an earlier provisionally sealed exhibit, filing, or transcript excerpt, any such material shall remain provisionally sealed pending resolution of further review of that decision. (Exhibit 4 at 000873-000874).

The Protective Order in Practice and the Administrative Law Judge's Rulings

15. On various dates between June 14 and October 7, 2011, Respondent provided Counsel for the Acting General Counsel and for Charging Party (a) copies of the subpoenaed documents it contends include confidential information, with all asserted "Confidential Information" redacted, and (b) redaction logs providing information about the bases for its redactions. Respondent then submitted affidavits in support of its asserted bases for its redactions. (See Affidavits at Exhibit 4 at 000281-000285, 000803-000813, 000894-000992).

16. On October 20, 2011, Counsel for the Acting General Counsel and Counsel for Charging Party agreed to treat *all information* Respondent had designated as "Confidential Information" as properly subject to that designation and to the limitations upon their use as provided in the Protective Order. Administrative Law Judge Anderson then ordered that those documents be produced in unredacted form, subject to the confidentiality protections set forth in the Protective Order. (Exhibit 1 at 002024-002025). Such production in unredacted form has not yet been made by Respondent.

17. On various dates during the proceeding, Respondent sought the following *additional* restriction on Charging Party's access to certain specified redacted portions of some of the redacted documents:

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

(Exhibit 4 at 000733-000737). These documents are Bates numbered:

NLRB_004284	NLRB_007841	NLRB_009864
NLRB_004285	NLRB_007846	NLRB_009875
NLRB_004318	NLRB_007855	NLRB_009877
NLRB_004322	NLRB_007865	NLRB_009878
NLRB_004325	NLRB_007867	NLRB_009887
NLRB_004326	NLRB_007871	NLRB_009891
NLRB_004327	NLRB_007875	NLRB_009894
NLRB_007732	NLRB_007879	NLRB_009895
NLRB_007734	NLRB_007888	NLRB_009896
NLRB_007738	NLRB_007908	NLRB_009915
NLRB_007741	NLRB_007911	NLRB_009923
NLRB_007742	NLRB_007918	NLRB_009939
NLRB_007743	NLRB_007920	NLRB_009940
NLRB_007799	NLRB_007931	NLRB_010239
NLRB_007800	NLRB_007952	NLRB_010241
NLRB_007822	NLRB_009794	NLRB_010246
NLRB_007824	NLRB_009825	NLRB_010247
NLRB_007827	NLRB_009826	NLRB_010289
NLRB_007832	NLRB_009835	NLRB_010291
NLRB_007836	NLRB_009861	NLRB_010293
NLRB_007837	NLRB_009863	

18. On September 7 and 12, 2011, the parties submitted written arguments addressing the general factors to be considered by Administrative Law Judge Anderson in considering Respondent's requested heightened restriction on Charging Party's access to documents (described immediately above) and, on various dates between September 14 and October 19, 2011, the parties

submitted to Administrative Law Judge Anderson disputes concerning Respondent's claims that Charging Party's access to particular subpoenaed documents should be restricted. (Exhibit 1 at 001277-001321, 001394-001407, 001455-001724, 001978-001994).

19. After conducting an *in camera* inspection of unredacted versions of the documents at issue for the requested heightened Charging Party IAM use restriction, Administrative Law Judge Anderson ruled that Charging Party's access to the portions of the documents for which Respondent sought heightened Charging Party IAM use restrictions should not be so restricted and ordered that the documents be produced in unredacted form, without the requested heightened restrictions on access by Charging Party. (Exhibit 1 at 001277-001321, 001394-001407, 001455-001724, 001978-001994).

Respondent's Assertion of the "*Berbiglia*" Privilege[4]

20. On October 14 and 18, 2011, Respondent moved Administrative Law Judge Anderson to find that portions of certain documents responsive to the Subpoena may be withheld from any disclosure based on a qualified labor-relations strategy privilege recognized by the Board. (Exhibit 1 at 001728-001844). On October 14 and 18, 2011, the parties engaged in oral argument over Respondent's privilege claims in this regard. After conducting an *in camera* inspection of the allegedly privileged portions of the subpoenaed documents, Administrative Law Judge Anderson ruled orally on the record that the documents marked with the following Bates numbers are not privileged under the Board's labor-relations strategy privilege and ordered that the documents be produced in unredacted form (to the extent such documents were designated "Confidential Information" by Respondent, they would retain the protections of the Protective Order):

[4] *Berbiglia, Inc.*, 233 NLRB 1476 (1977).

NLRB_009768
NLRB_009773 (except for a portion of the fourth line of the redacted paragraph)
NLRB_009941
NLRB_009942
NLRB_009943
NLRB_009945
NLRB_009773
NLRB_009946

(Exhibit 1 at 001728-001843). Such production in unredacted form has not yet been made by Respondent.

21. The Respondent's records that Administrative Law Judge Anderson ruled *can be withheld* based on Respondent's claim of labor-relations strategy privilege are not being sought in this proceeding and are accordingly not in issue.

Respondent's Partial Compliance with the Subpoena

22. Respondent has represented to the Administrative Law Judge that it is producing substantially all subpoenaed documents, but that it has redacted from those documents all information that it contends requires either confidential treatment or heightened restrictions on access by Charging Party IAM and all information that it contends is privileged from disclosure under the Board's labor-relations strategy privilege. (Exhibit 1 at 000966-001045).

23. Respondent has further represented that it will continue to refuse to comply with Administrative Law Judge Anderson's order to produce unredacted the "Confidential Information" until a federal district court issues a protective order in proceedings to enforce the Subpoena under § 11(2) of the Act, 29 U.S.C. § 161(2). (Exhibit 1 at 002016-002017). Respondent has also stated that it may seek review of Administrative Law Judge Anderson's rulings (a) rejecting Respondent's requested heightened restrictions on Charging Party's access to portions of certain documents and (b) rejecting Respondent's claims that portions of certain documents are completely privileged from

disclosure under the Board's labor-relations strategy privilege. (Exhibit 1 at 001754, 002016-002017).

24. Respondent's refusal to produce documents material to the litigated issues in the administrative proceedings before Administrative Law Judge Anderson constitutes contumacious conduct within the meaning of § 11(2) of the Act, 29 U.S.C. § 161(2), which conduct is impeding the administrative unfair labor practice proceeding described above in paragraph 3, and preventing the Board from carrying out its duties and functions under the Act.

WHEREFORE, the National Labor Relations Board respectfully prays:

1. That an order to show cause issue directing Respondent to appear before this Court on a date specified and show cause why an order should not issue (a) directing its custodian of records to appear before Administrative Law Judge Clifford H. Anderson in Board Case 19-CA-32431 at such time and place as Administrative Law Judge Anderson may designate and to produce unredacted the subpoenaed documents that Administrative Law Judge Anderson has ordered it to produce in unredacted form, to give testimony, and to answer all questions relevant to the maintenance and production of these records at the Board's unfair labor practice hearing, and (b) affirming and ordering compliance with the Protective Order issued by Administrative Law Judge Anderson;

2. That upon the return of said order to show cause, this Court issue an order (a) requiring Respondent's custodian of records to appear before Administrative Law Judge Anderson, at a time and place to be fixed by Administrative Law Judge Anderson, and to produce unredacted the subpoenaed documents, to give testimony, and to answer all questions relevant to the maintenance and production of records at the Board's unfair labor practice hearing, affirming and,

(b) ordering all parties to comply with the Protective Order issued by Administrative Law Judge Anderson; and

3. That the Applicant, National Labor Relations Board, be granted such other and further relief as may be necessary and appropriate.

DATED AT Seattle, Washington this 22nd day of November, 2011.

Respectfully Submitted,

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/s/ Peter G. Finch
/s/ Rachel Harvey
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