UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO OFFICE

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

RULING ON MOTION OF BLOOMBERG L.P. SEEKING MODIFICATION OF AMENDED PROTECTIVE ORDER

On August 12, 2011, I issued a Protective Order in the above captioned case and amended that Order on August 22, 2011. On August 22, 2011, Bloomberg L.P. filed a motion for modification of the Protective Order. On August 26, 2011, the General Counsel, the Charging Party, and the Respondent (the Boeing Company) filed responses to the motion.

Background

Bloomberg L.P. represents that it operates Bloomberg News, an international news service providing business news to subscribers worldwide. It further represents that it "along with several other media outlets, has provided extensive coverage of this hearing, which has sparked considerable public debate."

The instant case is an unfair labor practice proceeding under the National Labor Relations Act which has been in hearing since June and is now calendared through the current year with reasonable prospects of continuing beyond that time. To date, the hearing has been exclusively involved in pre-evidentiary matters but will, in due course, commence the receipt of evidence through the testimony of witnesses and the introduction into evidence of exhibits.

I administratively notice that the case has evoked public interest and debate and that media attendance at and media coverage of the proceedings has been extensive. Unusually, *amicus curia* and related status has been granted to various groups including Attorney Generals for many states, Boeing employees interested in any remedy which may be directed herein, and a professional association. For the parties, the instant case involves important matters of significance and consequence.

Based on intimations of public interest even before the hearing commenced, a site for the hearing was selected that could accommodate substantial public attendance at the trial. During the earlier days of the hearing, when it developed that the press had difficulty in interviewing relevant trial participants outside the courtroom, the hearing room was changed to allow for better outside-the-courtroom contact between media, litigants and others.

The Boeing Company's Confidentiality Needs and the Protective Order

The Boeing Company manufactures and produces military and commercial aircraft. An issue in the instant case involves the details and circumstances of a decision to locate the assembly of a new commercial aircraft, the Boeing 787 or Dreamliner. The parties represent that a considerable amount of documentary evidence will be involved in the trial of the issues involved in that aspect of the instant case.

The Boeing Company further represents that some of the documents described above that will be disclosed to the other parties and, in some cases, may be offered into evidence, include trade secrets, proprietary information and other confidential material and information that should not be disclosed to anyone other than those necessary to see such material during the litigation. The Boeing Company further suggests that such confidential materials, to the extent they are testified about, or are directly offered into evidence in this proceeding, should be received only as sealed exhibits or as testimony transcribed in a sealed portion of the transcript. Sealed exhibits, unlike normal exhibits, are not made available for public inspection. Sealed testimony, unlike normal testimony, is not taken in public sessions nor are transcripts of sealed testimony made available for public inspection.

The other parties to the proceeding did not oppose the concept of confidential protocols applying to confidential information, but indicated that such processes must be applied to specific documents and evidence and not in a blanket fashion. Through an initial negotiation process followed by my issuance of a Protective Order and subsequent Amended Protective Order, a protocol is now in place setting forth a procedure for handling of proposed confidential materials, the method of resolving questions of disputed confidential materials, and the handling of adjudicated confidential materials. The Amended Protective Order however had not as yet been applied to any contested documents. The process provided by the Protective Order is in essence just now underway.

The Amended Protective Order provides in part at Section V. B.:

V. Confidential Information Placed Under Provisional Seal of Record at Hearing

> B. Immediately upon any party's belief that a document or material designated as confidential under the Protective Order will be or may likely be referred to in open court in contravention of the Protective Order, the party holding such belief should notify the administrative law judge and the other parties. Upon motion by any 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 or fairly are expected to testify in a manner revealing confidential information. The portions of the official transcripts of proceedings taken while the hearing room is cleared pursuant to such order shall also be placed under provisional seal.

In effect the quoted paragraph sets up a two-step process. First, a party forming a belief that confidential information "will be or may likely be referred to in open court" notifies the judge and the other parties of that fact. Second, upon a motion by any party the judge will clear the hearing room if it is anticipated that witnesses will testify or fairly are expected to testify in a manner revealing confidential information.

The Bloomberg L.P. Motion and the Position of the Parties on the Motion

Bloomberg L.P. makes a single request in its motion respecting the portion of the Protective Order quoted above:

> Bloomberg respectfully asks you to modify this [protective] order such that the parties notify you not simply when confidential information is likely to be "referred to" but rather when such information is likely to be "disclosed." (Bloomberg L.P. motion at 3.)

Thus, Bloomberg L.P. does not seek to change or alter the standard for clearing the courtroom under the Amended Protective Order but rather seeks to alter the standard applying to the parties in deciding when to notify the court as described above.

Counsel for Bloomberg L.P. points out in its motion:

> Open judicial proceedings are an essential element of our system of law and an integral facet of American society. As a matter of constitutional law and common law, courts have consistently held that courts must conduct such proceedings in public, and allow the public to inspect court files. (Bloomberg L.P. motion at 2.)

Counsel for Bloomberg L.P. in his motion at 3, further cites the Supreme Court's decision in *Press-Enterprise Co.* v. *Superior Court,* 464 U.S. 501, 508 (1984).

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Finally, counsel for Bloomberg L.P. notes at page 2 of its motion that these same principles apply to administrative hearings citing *Detroit Free Press* v. *Ashcroft,* 303 F.3d 681(6th Cir. 2002) at 695:

> Thus, we reject the Government's assertion that a line has been drawn between judicial and administrative proceedings, with the First Amendment guaranteeing access to the former but not the latter.
> The First Amendment question cannot be resolved solely on the label we give the event, i.e., "trial" or otherwise . . . . [T]here is a limited First Amendment right of access to certain aspects of the executive and legislative branches.

The parties each filed responses to the Bloomberg L.P. motion. The Boeing Company asserts at page 2 of its response:

> In its letter, Bloomberg asks the Administrative Law Judge to "change 'refer[red] to' to 'disclose[d],' such that a party notifies you only when it believes that confidential information is 'likely to be ***disclosed*** in open court.'" Letter at 3 (emphasis in original).
>
> Boeing does not oppose the change, although it appears to be unnecessary to satisfy Bloomberg's concerns. Under the Order's current terms, a party merely *notifies* the

Judge and other parties when confidential information may be referred to. A separate motion is required for non-Qualified Persons to leave the courtroom. Moreover, the notification obligation is triggered when confidential information may be "referred to *in contravention of the Protective Order*." (Emphasis added.) Thus, if the confidential information would be referred to in a generic manner that would not disclose the information itself, no notice is required. Boeing believes it is appropriate for the parties to be vigilant about notifying the tribunal and other parties when confidential information *may* arise in testimony, so the other parties and Judge can determine how to proceed. With the understanding that the parties will approach their responsibilities under the Order in this manner, Boeing has no opposition to the change suggested by Bloomberg.

The Charging Party and the General Counsel also submitted positions on the motion. The General Counsel stated at pages 2 and 3 of its response:

> The Acting General Counsel understands and agrees with Bloomberg's underlying concerns on this discrete issue. Premature and unnecessary clearance of the hearing room in this - or any - Board proceeding should be avoided whenever possible. See, *e.g.*, §101.10(a) of the National Labor Relations Board's Rules and Regulations ("Except in extraordinary situations the hearing is open to the public"). The Acting General Counsel respectfully submits, however, that Bloomberg's concerns are directly addressed in the latter portion of §V.B. that is italicized above and, therefore, the discrete modification requested by Bloomberg appears unnecessary.
>
> Bloomberg apparently reads §V.B. as permitting closure of the hearing room when a party "notifies" the Administrative Law Judge that it is "likely" that someone will or may likely "refer" to Confidential Information. However, notice of the possibility or likelihood that Confidential Information will be "referred to" merely triggers any Party's right to move the Administrative Law Judge to consider clearing; actual clearing of the hearing room occurs only at the point "when witnesses testify or are fairly expected to testify in a manner revealing confidential information." Thus, while the issue of whether the hearing room should be cleared to avoid the inappropriate disclosure of Confidential Information might ripen when the possibility or likelihood of a "reference to" Confidential Information comes to light, "reference to" Confidential Information, alone, does not instigate clearance of the hearing room. Rather, as Bloomberg would have it, the Protective Order only requires clearance of the hearing room when witnesses testify, or are likely to testify, in a manner that will disclose Confidential Information.
>
> For the above reasons, the Acting General Counsel submits that the Protective Order, as written, adequately addresses Bloomberg's important concern. [Footnote omitted.] Accordingly, Bloomberg's requested modification appears to be unnecessary.

The Charging Party in its reply addresses both the standing of Bloomberg L.P. to make the motion as well as its request that the Protective Order be modified:

> Charging Party notes that although Bloomberg's letter was filed in the Board's electronic filing system, Bloomberg is not currently a party to this proceeding. Bloomberg's letter does not purport to be a motion to intervene under Board Rules and Regulations § 102.29. As Bloomberg is neither a party nor a putative intervenor in this matter, Bloomberg does not have standing to bring a motion to modify the Administrative Law Judge's protective order. *See Wal-Mart Stores, Inc.,* 348 NLRB 833, n. 3 (2006)

("[i]nasmuch as Local 120 was denied intervenor status . . . it lacks standing to file motions and make other submissions in this proceeding").

Charging Party agrees with Bloomberg's concerns that the hearing room should not be closed to the press and public except when there is a real need to do so. This is a highly publicized law enforcement proceeding. The public has a recognized right to know "that standards of fairness are being observed . . . [and] that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 508 (1984).

However, Charging Party agrees with Counsel for the Acting General Counsel that Bloomberg's concerns appear to be adequately addressed and safeguarded by the existing protective order language issued by the Administrative Law Judge. Section V.B. of the protective order states that parties should notify the Administrative Law Judge and the other parties when they believe it is likely that confidential material will be "referred to." Bloomberg rightly notes that this is a somewhat murky standard. However, the protective order further provides that the room shall actually be *cleared,* "when witnesses testify or fairly are expected to testify in a manner *revealing* confidential information" (emphasis added). Bloomberg's suggestion that "referred to" should be replaced with "disclosed" doesn't appear to change this at all. Under the current Order, merely "referring" to confidential information does not require the hearing room to be closed – it only provides a basis to provide notice to the judge and parties. (Charging Party's response at pages 2-3.)

Discussion, Analysis and Conclusion

Bloomberg L.P.'s Standing to File a Motion

The threshold issue herein is the status of Bloomberg L.P. to make the motion here under discussion. While the other parties did not raise the question, the Charging Party argues that because Bloomberg is "neither a party nor a putative intervenor in this matter, Bloomberg does not have standing to bring a motion to modify the Administrative Law Judge's protective order." (Charging Party's Response at 1.)

I note that the Board has approved its administrative law judges ruling on motions from the news media respecting media coverage of unfair labor practice proceedings without requiring an explicit granting of intervention status to the moving party. See e.g. *Dura-Vent Corporation*, 257 NLRB 430, ALJD, n. 1 at 430 (1981). The *Wal-Mart Stores, Inc.,* 348 NLRB 833, n. 3 (2006), case cited by the Charging Party is distinguishable because in that case the moving party involved had earlier been explicitly denied intervenor status. I find that consideration of a motion related to media coverage of the proceedings, such as that now before me, is within the discretion of the trial judge in management of an NLRB unfair labor practice hearing.

I exercise that discretion in the instant case to receive and consider the Bloomberg L.P. motion and to rule on its merits. I do so, in part, because the Board has earlier implicitly instructed me in the instant case, by reversing my contrary more restrictive ruling on an intervention matter respecting other individuals, that "[i]n the unique circumstances of this

Case. . ." the right to submit statements of positions and advocacy in support of such positions by non-parties is to be taken more broadly than in more typical unfair labor practice cases.

Further, in a case such as the instant case, in which all parties have noted the substantial public interest in the case, I find that media coverage and the ability of the media and the public to have access to the greatest portion of the record possible, is vitally important. The greatest possible transparency in managing the instant litigation will allow the broadest possible understanding of the Board's processes.[1]

Finally a public proceeding will reveal, insofar as possible, the evidence and argument presented by the parties in the case and the consideration and analysis underlying the unfair labor practice allegations tried before the administrative law judge. The fullest possible disclosure of the evidence and details of the litigation generally will maximize the opportunity of the public to understand the issues, the evidence, the arguments of the parties, and the basis for the trial court's decision that is ultimately issued by the judge on that evidence and argument.

All the above suggests that close attention be paid to issues of public and media access to Board proceedings including motions on access issues filed by media enterprises. I therefore find Bloomberg L.P. has status to file the instant motion and I shall consider the motion on its merits and in the context of the instant case which, as found and described above, is one concerning which there is an important public right to all possible information and disclosure.

The Merits of Bloomberg L.P.'s Motion

In addressing the motion of Bloomberg L.P., it is appropriate to note again the context of the motion. The Board specifically directs that its hearings be open to the public generally. Thus. the Board's Rules and Regulations at Section 101.10(a) notes "Except in extraordinary situations the [trial] is open to the public. . ." An open trial encompasses not only physical access to and the ability to observe the taking of evidence, but also public access to the evidence taken, i.e. the transcript of testimony and the physical evidence received into the record. As the aphorism based on the statement of Lord Hewart aptly describes: "Not only must Justice be done; it must also be seen to be done."[2]

Despite this general rule, certain types of evidence have long been recognized as properly sheltered from public disclosure. As noted above, it is expected that trade secrets, proprietary information and other materials will be described on the record during testimony or offered into evidence as exhibits. The parties to the instant litigation accept the concept that such evidence meets the "extraordinary situation" standard of Board Rule 101.10(a) that such evidence not be disclosed to the public.

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[1] Further, the Supreme Court has noted:

> In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury" (citations omitted). *Waller v. Georgia*, 467 U.S. 39, 46, (1984).

[2] *Rex v Sussex Justices Ex parte McCarthy [1924] 1 KB 256 at 259.*

The Amended Protective Order to which the Bloomberg L.P. motion is directed is, in relevant part, a protocol allowing the parties to establish what evidence is confidential and thus what evidence should be held from public disclosure and how that process of ascertaining what evidence is confidential and what evidence should be withheld from public disclosure should proceed. Even though the Protective Order has not been applied to specific argued confidential evidence as yet, it is fairly expected to be so applied very soon. The Bloomberg L.P. motion seeks a change in that protocol as described herein in some detail. In the context of that process, I turn to the merits of Bloomberg L.P.'s motion.

Based on the motion and the parties' responses as described above, and further based on the entire record to date, I find and conclude as follows.

As is set forth in detail above, Bloomberg L.P.'s Motion seeks to change the trigger standard of the Amended Protective Order which determines when the parties should bring to the judge's attention the risk that confidential material will be revealed by a testifying witness. As written, the Amended Protective Order instructs a party to notify the judge and the other parties when that party comes to believe that confidential material may be referred to in open court. The motion seeks to change the words "may be **referred** to" to "may be **disclosed**."

The Boeing Company, the General Counsel and the Charging Party in their responses to the motion as discussed in detail above, take the similar position that the Bloomberg L.P.'s motion's proposed language change is unnecessary. The parties all argue that the proposed change of in trigger language: i.e. the possibility of **reference** to confidential information as opposed to the possibility of **disclosure** of confidential information, is of little significance given that as a trigger, the entire mechanism in dispute is but a procedural preamble to the subsequent and far more important judicial application of the standard to seal the record "when witnesses testify or fairly are expected to testify in a manner revealing confidential information." It is this post trigger application of the unchallenged judicial standard which will determine what portions of the record are withheld from the public and which is for that reason critical, and which, the parties note, is not under challenge by any party or Bloomberg L.P.'s motion.

The three parties' responses, while arguing as noted above that Bloomberg L.P.'s proposed change is unnecessary, do not strongly oppose the proposed change for the same reason asserted against it: The trigger language in contention is simply tangential to, and of far less consequence to, the workings of the protocol.

I agree with the parties position discussed above that a party, believing during the hearing that a witness may refer to confidential material, may properly bring such a situation to the attention of the other parties and the judge. That test, "referred to" to rather than "disclosed", which is broader than the language proposed by Bloomberg L.P., does not undermine the standard the judge will apply to the evidence. Therefore, ithe current trigger standard does not present any realistic risk that non-confidential evidence will be improperly withheld from the public. The broader language currently in the Amended Protective Order and under objection by Bloomberg L.P. might, however, prompt an earlier warning to the judge and perhaps stimulate an earlier cautionary instruction to a witness respecting how to answer the question presented without revealing confidential information. Thus, in my view, the broader trigger language currently in place in the Protective Order might avoid an inadvertent disclosure of confidential evidence that could otherwise occur. Thus, I find the Protective Order language under attack has little risk of overly restricting testimony and a reasonable possibility of reducing

inadvertent disclosures that could have been avoided. I therefore conclude the current language is simply superior to the language proposed by Bloomberg L.P.

As noted, the parties are not particularly concerned with, or in strong opposition to, the language offered by Bloomberg L.P. in substitution for the current language of the Amended Protective Order. Rather they simply find the language change proposed unnecessary. I agree in each case. I also find, however, the fact that a proposal which does no particular harm and is advanced in support of a good cause is not on that basis alone sufficient to justify a change the existing language of the Amended Protective Order. And, even further, on the basis of the above analysis, I do not find the merits of Bloomsberg L.P. request for substitution of one trigger standard for another to be a question of balancing similarly worthwhile alternatives. Rather, I find the current language is simply superior to the language proposed by Bloomberg L.P.

I find therefore, in agreement with the parties, that the motion of Bloomberg L.P. has failed to establish that the current language of the Amended Protective Order under discussion is inadequate to maximize public access to the record of the proceeding or that the proposed language offered in substitution would produce a material increase in such access. I shall therefore deny the Bloomberg L.P. motion.

Summary and Conclusion

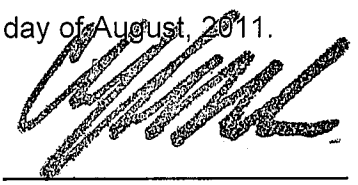
I have found that Bloomberg L.P. has status to file the instant motion. I have therefore received the motion and have considered the motion on its merits.

On the merits, I have found the current language of the Amended Protective Order properly insures all possible and proper public access to the record of the instant proceeding and that the Bloomberg L.P. motion's offered substitute language does not materially improve that access. I therefore find the motion of Bloomberg L.P. without merit and it shall be dismissed. The Amended Protective Order will stand unchanged.

The analysis herein of the desirability of maximizing, insofar as practicable, and consistent with the rights of the parties, broad public access to the record of trial proceedings in the instant case will inform the interpretation and application of the Amended Protective Order throughout the proceedings.

SO ORDERED[3]

Issued at San Francisco, California this 29th day of August, 2011.



Clifford H. Anderson
Administrative Law Judge

[3] Appeals from administrative law judge rulings on motions are governed by the Board's Rule 102.26.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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SAN FRANCISCO BRANCH OFFICE

THE BOEING COMPANY

and **Case 19-CA-32431**

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

AFFIDAVIT OF SERVICE OF: RULING ON MOTION OF BLOOMBERG L.P. SEEKING MODIFICATION OF AMENDED PROTECTIVE ORDER

DATE: August 29, 2011

I, THE UNDERSIGNED EMPLOYEE OF THE NATIONAL LABOR RELATIONS BOARD, BEING DULY SWORN, DEPOSE AND SAY THAT ON THE DATE INDICATED ABOVE, I SERVED THE ABOVE-ENTITLED DOCUMENT(S) BY ELECTRONIC MAIL AND/OR REGULAR MAIL, UPON THE FOLLOWING PERSONS, ADDRESSED TO THEM AT THE FOLLOWING ADDRESSES:

BY REGULAR MAIL AND E-MAIL

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SUBSCRIBED AND SWORN TO BEFORE ME THIS 29TH DAY OF AUGUST 2011.

DESIGNATED AGENT