

August 22, 2011

The Honorable Clifford H. Anderson
Division of Judges
National Labor Relations Board
901 Market Street, Suite 300
San Francisco CA 94103

Re: *The Boeing Co. v. Int'l Ass'n of Machinists and Aerospace Workers Dist. Lodge 751 et al.*, NLRB Case No. 19-CA-32431

Dear Judge Anderson:

We write on behalf of our client, Bloomberg L.P., regarding the August 12, 2011 protective order in the above-referenced matter.

Bloomberg L.P. operates Bloomberg News, a 24-hour global news service that supplies business, financial and legal news to more than 350,000 subscribers worldwide. Bloomberg News, along with several other media outlets, have provided extensive coverage of this hearing, which has sparked considerable public debate. *See, e.g.*, <http://www.bloomberg.com/news/2011-05-05/republicans-rally-behind-boeing-over-u-s-labor-board-complaint.html>.

On August 12, 2011, you entered a protective order allowing the parties to treat certain information as “confidential.” The order provides, in relevant part:

Immediately, upon any party’s belief that a document or material designated as confidential under the Protective Order will be or may be likely to 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

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witnesses testify or fairly are expected to testify in a manner revealing confidential information.

Bloomberg respectfully asks you to modify this 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.” We believe this comports with the First Amendment interest in promoting openness of judicial and administrative proceedings, and providing information to the public about the important labor dispute at the heart of this hearing.

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. Thus, in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), the Supreme Court reversed a lower court order closing a trial, and held that there is a “presumption of openness” that inheres to such proceedings. As the Supreme Court explained in another case:

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.

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984).

Courts have applied these same principles to administrative hearings. *See, e.g., Detroit Free Press v. Ashcroft*, 303 F.3d 681(6th Cir. 2003). For example, in *Detroit Free Press*, the Sixth Circuit Court of Appeals invalidated a directive closing “special interest” deportation hearings. *See id.* In doing so, it noted that courts have applied the First Amendment right of access to a variety of other administrative hearings, ranging from university disciplinary hearings to municipal planning meetings. *Id.* at 695 (citing cases). That tradition led the court to:

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.

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Id. (quotation marks, citation omitted).

In light of these well-established principles, Bloomberg respectfully asks that you reconsider a portion of your August 12, 2011 protective order. The order allows closure of the hearing once a party notifies you that it is “likely” that someone may refer to confidential information. Bloomberg asks that you change “refer to” to “disclose,” such that a party notifies you only when it believes that confidential material is “likely to be *disclosed* in open court.” This minor, but important, change will assure that the press, and therefore the public, continue to access the proceedings in this important matter.

Very truly yours,

Davis Wright Tremaine LLP



Bruce E. H. Johnson

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of this document on the following:

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DATED this 22nd day of August, 2011.



Lynn Michel