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

ACTING GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S REQUEST FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT OF PROTECTIVE ORDER PROPOSED BY ACTING GENERAL COUNSEL

As requested by the Administrative Law Judge, the Acting General Counsel submits this brief regarding the need asserted by Respondent The Boeing Company ("Respondent") for an order restricting the use and disclosure of subpoenaed evidence in the present litigation. Initially, the Acting General Counsel takes seriously a party's asserted interest, upon good cause shown, in protecting confidential information. Respondent here has failed to make the requisite showing to the Administrative Law Judge; as such, any ordered protocol for protecting information must contemplate an adequate showing of cause with respect to designated information before subjecting it to protection. More specifically, to the extent the parties disagree about the propriety of Respondent's unilateral designation of specific confidential information, Respondent should be required to satisfy the Administrative Law Judge, through presentation of a log or otherwise, that its individual claims of confidentiality are founded.

Moreover, any appropriate protective order must, to the maximum extent possible, ensure protection of the parties' due process rights and the public's right of access to the proceedings, while also avoiding interference with the parties' orderly presentation of evidence. The Acting General Counsel's proposed order (the "AGC Proposal"), which is attached hereto as Exhibit A, does just that, by providing for appropriate access and a provisional seal procedure. In addition, the AGC Proposal:

(a) preserves the appropriate roles for the Administrative Law Judge and any district court judge in a later subpoena enforcement action;

(b) protects the due process rights of Charging Party International Associations of Machinists and Aerospace Workers, District Lodge 751, affiliated with International Association of Machinists and Aerospace Workers ("Charging Party");

(c) correctly places the burden on Respondent, throughout this proceeding, to demonstrate the need to subject particular evidence to a protective order;

(d) incorporates the appropriate standards for determining what subpoenaed material must be treated as confidential by the parties;

(e) incorporates the appropriate standards for determining what evidence may be placed under seal at the hearing;

(f) minimizes impediments to the prompt and orderly presentation of evidence during these proceedings; and

(g) properly addresses the treatment of documents after the termination of this and any related proceeding.

For the reasons set forth below, the Acting General Counsel respectfully requests that, to the extent Respondent requests a protective order, the Administrative Law Judge adopt the AGC Proposal.

I. THE "GOOD CAUSE" LEGAL STANDARD AND RESPONDENT'S BURDEN

Administrative law judges and the Board have the authority to issue protective orders in "appropriate circumstances." NLRB Division of Judges Bench Book § 8-330.

See NLRB v. Engineering Steel Concepts, No. 2:09-MC-72 PRC, 2010 WL 4852640, slip. op. at *2 (N.D. Ind. Nov. 22, 2010); *Teamsters, Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 n.7 (2005); *AT&T Corp.*, 337 NLRB 689, 693 n.1 (2002); *National Football League*, 309 NLRB 78, 88 (1992); *United Parcel Service*, 304 NLRB 693 (1991); *Carthage Heating Co.*, 273 NLRB 120, 123 (1984). As the Administrative Law Judge has expressed, Rule 26 of the Federal Rules of Civil Procedure is the appropriate standard in determining the proper scope of a protective order. Under Rule 26(c)(1)(G), a "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . requiring that trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way." Fed.R.Civ.P. 26(c)(1)(G).

In seeking a protective order, the party seeking protection bears the burden of demonstrating good cause by establishing that there is a specific factual basis for concluding that the material in question is a trade secret or other confidential business information and that, for each particular document the party seeks to protect, a specific prejudice or harm will result if the order is not granted. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130-31 (9th Cir. 2003) (citing *San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d 1096, 1102 (9th Cir. 1999)).

Generalized claims of confidentiality are not sufficient. Instead, the party seeking protection must support its claim with a sufficient description of the nature of the information contained in the document sought to enable the party seeking the information to make an informed response to the claim. *Transcor, Inc. v. Furney*

Charters, 212 F.R.D. 588, 592 (D. Kan. 2003); *Diamond State Ins. Co. v. Rebel Oil Co., Inc.,* 157 F.R.D. 691, 697 (D. Nev. 1994). Similarly, claims of harm must be "[ ]substantiated by specific examples or articulated reasoning." *Beckman Indus., Inc. v. Int'l Ins. Co.,* 966 F.2d 470, 476 (9th Cir. 1992) (broad allegations of harm do not satisfy the Rule 26(c) test), *quoting Cipollone v. Liggett Group, Inc.,* 785 F.2d 1108, 1121 (3d Cir. 1986); *Deford v. Schmid Prods. Co.,*120 F.R.D. 648, 653 (D. Md. 1987) (requiring party requesting a protective order to provide "specific demonstrations of fact, supported where possible by affidavits and concrete examples, rather than broad, conclusory allegations of potential harm"); *Transcor,* 212 F.R.D. at 592 (claims of harm must amount to a "clearly defined and serious injury to the moving party").

Before subjecting evidence to any protective order, an administrative law judge must make an independent finding of good cause for such action. *See Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994); *In re Northshore University Healthsystem*, 254 F.R.D. 338, 341 (N.D. Ill. 2008); *David J. Frank Landscape Contracting, Inc. v. La Rosa Landscape*, 199 F.R.D. 314, 315 (E.D. Wis. 2001). This independent finding guarantees that important public interests are not "sacrificed" by an unwarranted protective order, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994), and ensures that judicial discretion does not yield to the parties' private judgment. *Aetna Cas. & Sur. Co. v. George Hyman Const. Co.*, 155 F.R.D. 113, 116 (E.D. Pa. 1994).

Respondent has not yet presented to the Administrative Law Judge a specific factual showing sufficient to establish good cause for subjecting evidence to any protective order. Instead, Respondent simply claims that seven categories of

documents responsive to Counsel for the Acting General Counsel's Subpoena Duces Tecum B-648185 (the "Subpoena") consist of proprietary and confidential information subject to both confidentiality protections and seal once offered into the record. (*See* Respondent's Petition to Revoke Subpoena Duces Tecum B-648185 at 2-3). Originally, Respondent asserted that the following Subpoena items implicate proprietary and confidential information falling within the following categories:

(1) trade secrets (Items 3, 5, 7, 9, 21, 22, 30 and 32);
(2) proprietary manufacturing information and processes (Items 8, 32)
(3) production needs, planning and forecasting (Item 27);
(4) "non-public strategic and program schedule documentation" (Items 3, 5, 7, 9, 21, 22, 30, 32);
(5) building specifications (Item 41);
(6) contracts with third parties (Item 8);
(7) information about customers and customer concerns (Item 18);
(8) profitability and profit margin analyses (Items 3, 5, 7, 9, 21, 22, 30, 32);
(9) cost projections (Items 3, 5, 7, 9, 21, 22, 30, 32); and
(10) "confidential non-public financial data" (Items 18, 19).

See id., passim. Respondent has subsequently represented that, in light of the Administrative Law Judge's rulings on the scope of the Subpoena Duces Tecum B-648185, it possesses no responsive documents that implicate categories 5 and 6.

In order to assess Respondent's asserted need for a protective order, the Acting General Counsel agreed to examine exemplars of documents falling within the remaining categories. Based on Respondent's limited showing of *redacted* exemplars, the Acting General Counsel does not reject out of hand Respondent's claim that it possesses responsive documents that fall within these identified categories of allegedly confidential information and that such documents *may* be entitled to protection. However, the Acting General Counsel asserts that Respondent has not met its burden

of establishing that either these categories of information or any document asserted to fall within them are confidential or proprietary. Further, Respondent has not, to date, made any effort to establish, through a specific factual showing to the Administrative Law Judge, that production of any document would cause it sufficient harm to justify a protective order. Accordingly, the Acting General Counsel moves that any protective order entered or issued by the Administrative Law Judge require Respondent to produce a log, affidavit, and/or other appropriate evidence demonstrating that good cause exists for subjecting such evidence to such an order, and make an independent determination as to whether Respondent has made an adequate showing of good cause.

II. THE ORDER PROPOSED BY THE ACTING GENERAL COUNSEL SHOULD BE ADOPTED BY THE ALJ

The Acting General Counsel respectfully requests that the Administrative Law Judge adopt the AGC Proposal because, as seen below, it correctly:

- requires Respondent to make the requisite showing that good cause exists to subject certain evidence to a protective order,
- grants the primary role in protective order rulings on the Administrative Law Judge,
- protects the due process rights of Charging Party,
- incorporates the appropriate standards and burdens for determining what subpoenaed material must be treated as confidential and/or placed under seal at the hearing,
- minimizes impediments to the prompt and orderly presentation of evidence during this proceeding, and
- properly addresses the treatment of documents after the termination of this and any related proceeding.

A. Any Protective Order Adopted Should Assign To the Administrative Law Judge the Primary Role in Ruling on Protective Order Matters

It is well settled that agencies such as the Board, "not the courts,...should, in the first instance, establish the procedures for safeguarding confidentiality. *FTC v. Texaco, Inc.*, 555 F.2d 862, 884, n.62 (D.C. Cir. 1977) *(en banc)*, *cert. denied*, 431 U.S. 974 (1977). Section 11(1) of the Act authorizes the Board to require production of evidence pursuant to subpoena and to rule on petitions to revoke subpoenas. In unfair labor practice proceedings, the authority to rule on petitions to revoke subpoenas is delegated to administrative law judges under §§ 102.31(b) and 102.35 of the Board's Rules and Regulations. Administrative law judges' authority to rule on disputes concerning subpoenas includes the authority[1] to enter protective orders, including orders that certain evidence be placed under seal. *See NLRB v. Engineering Steel Concepts*, 2010 WL 4852640, slip op. at *2; *Teamsters, Local 917 (Peerless Importers)*, 345 NLRB at 1011 n.7; *AT&T Corp.*, 337 NLRB at 693 n.1; *National Football League*, 309 NLRB at 88; *United Parcel Service*, 304 NLRB at 693; *Carthage Heating Co.*, 273 NLRB at 123.

Under § 11(2) of the Act, the role of the district court with respect to disputes concerning subpoenas is limited to enforcement of the subpoena, upon application of the Board, in the event that a subpoenaed party fails to comply. In subpoena

[1] To the extent that Respondent claims that administrative law judges effectively cannot issue protective orders because they lack authority to enforce such orders, it is noted that federal courts have found that administrative agencies can appropriately rule on claims concerning confidentiality of subpoenaed documents and that courts enforcing agency subpoenas must give such rulings a high level of deference. *FCC v. Schreiber*, 381 U.S. 279, 290-91, 295-86 (1965); *FTC. v. Texaco, Inc.*, 555 F.2d 862, 885 (D.C. Cir. 1977); *NLRB v. Engineering Steel Concepts, Inc.*, 2010 WL 4852640, slip op. at *2; *FTC v. Stanley H. Kaplan Educ. Ctr. Ltd.*, 433 F. Supp. 989, 993 (D.C. Mass. 1977). To date, the only case Respondent has cited to the Acting General Counsel on this issue is *Peerless Importers*, where an administrative law judge stated that he would not issue a protective order because he could not enforce it, and the Board explicitly rejected the administrative law judge's statement about his authority respecting protective orders. 345 NLRB at 1011 at n.7, 1015 at n.5.

enforcement proceedings, district courts' consideration of protective orders, like their review of Board subpoenas generally, is "sharply limited." *NLRB v. Engineering Steel Concepts*, 2010 WL 4852640, slip op. at *2 ("'[t]he court's consideration of a protective order is guided by the same concerns that underpin the judicial review of an agency investigative subpoena generally,' which is to say, its role is 'sharply limited'"). This limitation is based on the well-established principle that courts should not substitute their judgment for that of regulatory agencies more familiar with the laws they are charged to enforce. *FCC v. Schreiber*, 381 U.S. 279, 296 (1965).

Indeed, in reviewing an administrative law judge's determinations with respect to the propriety of a protective order, district courts are charged to act on the basis of a presumption that he (and the Board, to the extent it reviews his decisions) "will act properly and according to law," *id.*, and agency rulings concerning confidential treatment of subpoenaed information must be upheld unless they are arbitrary and capricious. *FTC v. Stanley H. Kaplan Educ. Ctr. Ltd.*, 433 F. Supp. 989, 993 (D.C. Mass. 1977). Finally, protective orders that "place [district courts] in a position of control over [an administrative agency] in the exercise of its statutory duties" are improper, *FTC v. Texaco, Inc.*, 555 F.2d at 885, as are orders that would enmesh the district court throughout the administrative proceeding. *FTC v. Stanley H. Kaplan Educ. Ctr. Ltd.*, 433 F. Supp. at 993.

Here, to the extent Respondent has described its proposed order as a district court order, rather than the order of an Administrative Law Judge, such an order would improperly consign the Administrative Law Judge's power to enter a protective order in the first instance to the district court, apparently relegating the Administrative Law

Judge's role to issuing "rulings" "in aid of" an ultimate determination by a district court. (Day 14, Tr.10:9-12) Further, to the extent that Respondent's proposed order provides for appeal exclusively to the district court of all rulings by the Administrative Law Judge interpreting the order, such process would amount to impermissible circumvention of the special appeal procedure set forth in § 102.26 of the Board's Rules and Regulations.

Respondent has not alleged anything that justifies overcoming the presumption of administrative regularity in the Administrative Law Judge's rulings, nor has it demonstrated that the Board cannot offer sufficient protections of truly confidential materials. As such, Respondent's proposed order would impermissibly bypass the Board's role as the reviewing authority of the Administrative Law Judge, improperly expand the district court's role in the unfair labor practice hearing, and run afoul of the well-established principle that courts should not substitute their judgment for that of regulatory agencies. *FCC v. Schreiber*, 381 U.S. at 296 (1965); *NLRB v. Engineering Steel Concepts*, 2010 WL 4852640, slip op. at * 2.

B. The AGC Proposal Adequately Protects The Charging Party's Due Process Rights

By filing an unfair labor practice, a charging party is deemed a "party" under the Board's Rules and Regulations. *See* Board's Rules and Regulations § 102.8 ("[t]he term 'party' as used herein shall mean . . .any person named or admitted as a party..., in any Board proceeding, including, without limitation, any person filing a charge or petition under that act[.]") As such, the charging party is entitled to "participate fully" in the underlying unfair labor practice hearing. *Rickert Carbide Die, Inc.*, 126 NLRB 757 n.1 (1960); *John L. Clemmey Company, Inc.*, 118 NLRB 599, 600 n.1 (1957). Full participation expressly includes the right "to appear at such hearing in person, by

counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence[...]," (Board's Rules and Regulations § 102.38), the right to present its case (including submitting rebuttal evidence) for a "full and true disclosure of the fact," (*see* NLRB Statements of Procedure § 101.10), and the right to obtain testimony and documents pursuant to subpoena, including through enforcement. Board's Rules and Regulations § 102.31(a) and (d) (authorizing the Board to issue subpoenas "on the written application of any party"). *See also Hydro Conduit Corp.*, 274 NLRB 1293 (1985).

The Board has emphasized the importance of permitting parties, representatives of parties, and those essential to a party's presentation of its case to be present during unfair labor practice hearings, because their presence both assists with the parties' presentation of evidence and promotes an understanding of proceedings that have a direct bearing on them. *Greyhound Lines, Inc.*, 319 NLRB 554, 554 (1995); *Illinois Bell Telephone Co.*, 255 NLRB 380, n.1 (1981); *Unga Painting Corp.*, 237 NLRB 1306, 1307-08 (1978); *cf. EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600-03 (1981) (finding employer could not insist on nondisclosure to the charging party of documents produced pursuant to an EEOC subpoena, and noting practical values of disclosure of information to charging parties).

The AGC Proposal protects the due process rights of Charging Party by ensuring that its counsel, representatives and members can access those documents. (Exhibit A at 1, § 1) This will allow Charging Party to fully participate in these proceedings by ensuring that its potential witnesses can be prepared to testify and can respond to produced documents during their testimony. It will also allow Counsel for the Acting

General Counsel and Charging Party's counsel to decipher, understand and assess the subpoenaed documents more effectively with the assistance of individuals familiar with them. The protective order proposed by the Acting General Counsel also does not interfere in any way with the right of Charging Party and its counsel to be present during portions of the hearing when information marked as confidential is being discussed.

By contrast, any proposed protective order that denies Charging Party access to subpoenaed documents and the opportunity to be present during testimony about such documents would, by its terms, jeopardize Charging Party's due process rights, particularly where, as here, Respondent has made absolutely no factual showing that disclosure of any subpoenaed documents to Charging Party would cause any specific harm to Respondent. Further, any requirement that Charging Party exclude its Counsel or other representatives from future collective bargaining would interfere not only with Charging Party's right to participate in this proceeding but also with Charging Party's performance of its duties as a collective bargaining representative. Any such requirements should therefore be rejected, and the AGC Proposal, which affords all parties full rights to participate in the hearing, should be adopted.

C. The AGC Proposal Correctly Places the Burden On Respondent, Throughout This Proceeding, to Demonstrate The Need to Subject Particular Evidence to a Protective Order

As explained above, a party asserting the need for a protective order bears the burden of demonstrating that the material in question is a trade secret or other confidential business information and that, for each particular document the party seeks to protect, a specific prejudice or harm will result if the order is not granted. *Foltz*, 331 F.3d at 1130-31; *Beckman*, 966 F.2d at 476; *Miles v. Boeing Co.*, 154 F.R.D. 112, 115-

16 (E.D. Pa. 1994); *Transcor*, 212 F.R.D. at 592; *Diamond State Ins.,* 157 F.R.D. at 697; *Deford*, 120 F.R.D. at 653. The AGC Proposal properly places this burden on Respondent.

Moreover, the AGC proposal sets forth a procedure that permits Counsel for the Acting General Counsel and Counsel for the Charging Party to challenge the confidential designation of any documents they assert are not legitimately classified as confidential. (Exhibit A at 2, § II.B) Upon such a challenge, the Administrative Law Judge would rule on whether disclosure of the document would cause specific harm to Respondent, with the burden of establishing a specific factual basis for confidential treatment appropriately remaining with Respondent.

By contrast, any proposed order that would permit Respondent to designate information as confidential "without affording [the Acting General Counsel and Charging Party] an opportunity to disagree with that designation" and then saddle them with "the burden of mounting a challenge" would effectively allow the "misuse of the confidential designation" and "run afoul of the basic burden-shifting approach mandated by Rule 26(c)." *Miles v. Boeing Co.*, 154 F.R.D. at 115-16.

D. The AGC Proposal Incorporates the Appropriate Legal Standard for Confidentiality

The AGC Proposal properly confines Respondent's designation of information as confidential to information that "contain[s], include[s], or consist[s] of confidential, proprietary, and/or trade secret financial, personal, business, or technical information that [Respondent] maintains in confidence in the ordinary course of business and which [Respondent] reasonably and in good faith believes that, if disclosed, could cause specific financial and/or competitive harm to [Respondent]." (Exhibit A at 1, § I).

The AGC Proposal thus correctly requires that its protections will extend only to documents designated by Respondent that, upon challenge by either of the other parties, are shown (by log or otherwise) to meet the appropriate standards. Specifically, Respondent must be able to demonstrate, upon such a challenge, that, with respect to each document so designated, it constitutes a trade secret or other confidential business information and that a specific prejudice or harm will result if it is not declared subject to the protective order. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d at 1130-31. By contrast, any proposed protective order that fails to require Respondent to meet both prongs of the test set forth in Rule 26(c) would improperly shield documents not entitled to protection, and should be rejected.

E. The AGC Proposal Sets Forth an Appropriate Protocol for Sealing Evidence

Section 102.34 of the Board's Rules and Regulations provide that unfair labor practice hearings "shall be public unless otherwise ordered by the Board or the administrative law judge." Respondent has indicated that it may request that certain evidence in this matter be "sealed" from public view. Thus, the Administrative Law Judge may be called upon during the hearing to assess whether it is appropriate to receive certain evidence non-publicly or to place exhibits or portions of the transcript under seal.

Even assuming that Respondent demonstrates good cause for protecting some information disclosed in response to a subpoena, such a showing is not a sufficient basis to seal evidence in this matter. *See Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 677-78 (9th Cir. 2010). Instead, to establish that evidence should be placed under seal, a party must show that "compelling reasons supported by specific factual findings

outweigh" the presumed right to public access to the judicial record. *Id.*; *Synergy Health, Inc.*, 265 F.R.D. at 404; *Pierson v. Ind. Power & Light Co.*, 205 F.R.D. at 647-48. *See also Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-80 (9th Cir. 2006) (Respondent must demonstrate a compelling reason to overcome the strong presumption in favor of the public's general right to access public records, including judicial records and documents) (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 n.7 (1978) and *Foltz*, 331 F.3d at 1135).

The Court of Appeals for the Ninth Circuit in *Kamakana* explained the heavy burden Respondent must meet to overcome the presumption in favor of access:

> Unless a particular court record is one "traditionally kept secret," a "strong presumption in favor of access" is the starting point. A party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the "compelling reasons" standard. That is, the party must "articulate[ ] compelling reasons supported by specific factual findings," that outweigh the general history of access and the public policies favoring disclosure, such as the " 'public interest in understanding the judicial process.' " In turn, the court must "conscientiously balance[ ] the competing interests" of the public and the party who seeks to keep certain judicial records secret. After considering these interests, if the court decides to seal certain judicial records, it must "base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture."
>
> In general, "compelling reasons" sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such "court files might have become a vehicle for improper purposes," such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets. The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.

447 F.3d at 1178-79 (citations omitted). The appropriateness of making files accessible to the public is accentuated in cases where the government is a party. *See, e.g., FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987). The policies in favor of public access to court documents are even more pronounced where public institutions are charged with protecting issues crucial to the public. *EEOC v. The Erection Co.*, 900 F.2d 168, 172 (9th Cir. 1990).

The AGC Proposal incorporates a requirement that Respondent meet the appropriate standard for the sealing of documents it has designated as confidential and testimony related to such documents. (Exhibit A at 3, § 5.A) Thus, under the AGC Proposal, it will remain Respondent's burden at all times to establish that such compelling reasons justify placing designated documents and related testimony under seal. Respondent's proposed order, by contrast, impermissibly shifts the burden of establishing that there are *not* compelling reasons for sealing evidence to the Acting General Counsel and the Charging Party. As such, to the extent that the protective order proposed by Respondent seeks to weaken the "compelling reasons" standard or improperly shift to the other parties a burden to establish that no compelling reason exists to seal evidence, it should be rejected.

F. The AGC Proposal Minimizes Impediments to the Prompt and Orderly Presentation of Evidence

The provisional sealing process proposed by the Acting General Counsel appropriately provides for a public right of access to all parts of the administrative record that the Administrative Law Judge determines do not meet the "compelling reasons" standard for sealing parts of the judicial record. Federal courts have "uniformly approved the practice of provisionally sealing documents pending assessment of

justification for a request to seal." *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1339 (D.C. Cir. 1985). Such a practice preserves the moving party's argument that the evidence should be sealed without putting a halt to the presentation of the evidence until such time as the trial judge has the opportunity to rule on the claim. The provisional sealing procedure proposed by the Acting General Counsel is particularly well-suited to this administrative proceeding, in view of Respondent's apparent insistence on a right to review by a district court of all determinations made by the Administrative Law Judge with respect to the sealing of documents designated as confidential and any related testimony.

Respondent's proposed order, by contrast, would create unworkable impediments to the prompt and orderly presentation of evidence in this proceeding. For instance, Respondent has proposed that all documents it has designated as confidential and any related testimony automatically be received non-publicly and placed under seal, unless, upon motion by the Acting General Counsel (but not by the Charging Party), presumably either to the Administrative Law Judge or the District Court, there is a finding that Respondent's asserted need to protect the information is outweighed by the public's interest in access to these proceedings.

Although Respondent may contend that the Acting General Counsel and the Charging Party could challenge all of Respondent's confidentiality designations before the Administrative Law Judge and then the district court in advance of the presentation of any evidence, such a process would both interfere with Counsel for the Acting General Counsel's presentation of evidence and seriously delay the presentation of evidence while the parties awaited rulings from the Administrative Law Judge and the

district court on the challenges.[2]

Even in the unlikely case that the designation of *documents* as confidential could be efficiently addressed by the Administrative Law Judge and a district court in advance of the presentation of evidence under the procedure proposed by Respondent, there could well be disputes during the course of the hearing concerning what testimony relates to such documents and whether such testimony should be sealed. Any procedure requiring resolution of such issues by the Administrative Law Judge and a district court before the testimony can be adduced would also be seriously disruptive.

Indeed, any process that would enmesh a reviewing court in making determinations about sealing documents *or* testimony during the course of the hearing would prove entirely unworkable. As explained above in Section II.A, it would also place the district court in an improper position of control over this administrative proceeding. *FTC v. Texaco*, 555 F.2d at 885; *FTC v. Stanley H. Kaplan Educ. Ctr. Ltd.*, 433 F. Supp. at 993.

G. The AGC Proposal Properly Addresses the Treatment of Documents after the Termination of These Proceedings and Any Judicial Review

The AGC Proposal also sets forth appropriate procedures for the treatment of documents in the possession of the General Counsel and the staff of the General Counsel upon termination of these proceedings and any judicial review. Those procedures comport with the Agency's procedures for maintaining documents and responding to requests for documents made under the Freedom of Information Act ("FOIA") and the Federal Records Retention Act. Thus, the Acting General Counsel's

[2] Indeed, assuming there are additional subpoenas served on Respondent and multiple production dates, Respondent's approach would involve multiple delays while the parties sought district court rulings.

proposed order includes a section setting forth the appropriate procedures for responding to FOIA requests encompassing information marked as confidential. (Exhibit A at 4, § VI) It also provides for return or destruction of documents marked as confidential, which have not been made part of the record before the Board, following the Board proceeding and any judicial review. (Exhibit A at 4, § VIII) The AGC proposal does not require return or destruction of portions of the official administrative record that have been permanently sealed.

Any protective order issued by the Administrative Law Judge should avoid imposing on the Acting General Counsel provisions that are simply impracticable or are inconsistent with appropriate procedures for the Agency's handling of records. Thus, to the extent that Respondent's proposal would impose on the Acting General Counsel the responsibility to maintain the security of sealed records by persons over whom the Acting General Counsel has no control, including the Administrative Law Judge, the Board, the district court, or others legitimately possessing copies of those records, including Counsel for the other parties, the court reporter, and any reviewing courts, it is impracticable and inappropriate.

Further, any proposal requiring the Acting General Counsel and Charging Party to return or destroy materials designated as confidential before the completion of any judicial review would improperly and unnecessarily create a risk that documents not placed in evidence will not be available to the Acting General Counsel and Charging Party in the event of any remand for the purpose of adducing additional evidence or in related federal court proceedings. Similarly, cumbersome requirements of certification of compliance by all counsel of record, their clients, and expert consultants would

impose an unnecessary burden on the parties, who will already be bound to comply with the terms of the order.

In addition, to the extent that Respondent's proposal requires return or destruction of sealed portions of the official record upon termination of the Board proceeding, including any judicial review, the Acting General Counsel submits that the return or destruction of any part of the official record is unnecessary and inappropriate, if not unlawful. Portions of the administrative record that have been sealed can be maintained under seal as long as the administrative record is maintained by the Agency in accordance with its records retention policies.

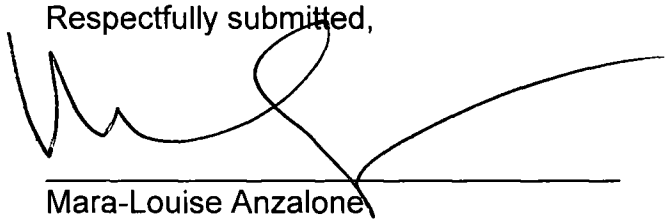
The procedures proposed by the Acting General Counsel are more practicable and minimize unnecessary interference with the Agency's established procedures for maintaining records and responding to requests for records and maintaining records under FOIA and the Federal Records Retention Act.

III. CONCLUSION

For the foregoing reasons, to the extent Respondent asserts a need for a protective order, the Acting General Counsel respectfully urges the Administrative Law Judge to adopt the protective order proposed by the Acting General Counsel.

DATED at Seattle, Washington, this 25th day of July, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Acting General Counsel's Response to Respondent's Request for Protective Order and Brief in Support of Protective Order Proposed by Acting General Counsel was served on the 25th day of July, 2011, on the following parties:

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Patricia K. White

Patricia K. White, Secretary

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

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 Information" means any type of information that is designated as confidential by the Disclosing Party and shall contain, include, or 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, could cause specific financial and/or competitive harm to the Disclosing Party.

EXHIBIT A

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

"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.

"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 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 and employees who are engaged in assisting such counsel in the Board Proceeding or any Related Federal Court Proceeding;

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

e. Individuals assisting Counsel for the Acting General Counsel or the Charging Party, who are designated by Counsel for the Acting General Counsel or Counsel for the Charging Party after review of Confidential Information produced by the Disclosing Party;

f. Witnesses or prospective witnesses, including 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;

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.

Confidential Information shall not be disclosed to persons described in (e), (f) 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. Designation and Disclosure of Confidential Information

A. Regardless of the date or manner of disclosure, before delivering any Documents containing Confidential Information to the Receiving Parties, the Disclosing Party shall designate such Confidential Information 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 contains Confidential Information. 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, the Disclosing Party will, contemporaneous with its production, provide the Receiving Parties with a log setting forth the specific factual bases as

to why the information must be treated as Confidential Information, as that term is defined herein.

2(a) The Receiving Parties will have the right to challenge any designation of confidentiality by the Disclosing Party.

(b) In the event that either of the Receiving Parties challenges the designation of any Document as Confidential Information, the Disclosing Party may then move the Administrative Law Judge under the appropriate standard for designating Confidential Information and state the reasons therefor. Upon such motion, the Receiving Parties shall state on the record whether they agree to or oppose the Disclosing Party's designation. The Administrative Law Judge shall then determine whether or not the Document(s) should be designated as Confidential Information.

C. By marking a Document as confidential in the manner described in Section II-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.

III. 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. 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.

IV. Confidential Information Placed Under Provisional Seal at Hearing

A. Immediately preceding 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 other Parties may then move the Administrative Law Judge under the appropriate standard for sealing documents for an order placing such Document under seal and state the reasons therefor. Upon such motion, the introducing Party shall state on the record whether they agree to or oppose the other Party's motion. The Administrative Law Judge shall then order that the Document be introduced into evidence or filed by the introducing Party under provisional seal.

B. Upon motion 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. Transcripts of proceedings that occur while the hearing room is cleared shall also be placed under provisional seal.

C. Final adjudication of any and all motions to seal Documents and transcripts of proceedings shall be deferred by the Administrative Law Judge until

the closure of the hearing before the Administrative Law Judge as set forth in Section V.

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

A. Within ___ days of the closure of the hearing in the Board Proceeding, 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 IV. The Receiving Parties shall have ___ days to submit briefs in response to the Disclosing Party's motion, and the Disclosing Party shall have ____ days to file a reply. To the extent that any such motion, affidavit, brief or other filing contains, quotes, or summarizes Confidential Information, it too shall be filed under provisional seal.

B. The Administrative Law Judge shall rule on the Disclosing Party's motion in a written order that specifically addresses each Document or transcript excerpt in dispute as well as any papers filed pursuant to Section V-A. Any Documents or transcript excerpts that were provisionally sealed pursuant to Section IV but are not listed in the Disclosing Party's motion for permanent seal shall be ordered unsealed.

VI. 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 Respondent as Confidential Information pursuant to Section II-A 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 Respondent written notice at least 10 business days in advance of the proposed disclosure of such information. Pursuant to the FOIA, in the event of such notice, Respondent shall have the right to file a written statement explaining why the information comes within Exemption 4, and to object to any disclosure. If, after consideration of Respondent's objections, the Acting General Counsel makes an ultimate disclosure determination, the Acting General Counsel acknowledges that Respondent 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.

VII. 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, 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. 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.

VIII. 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 person to whom such information was disclosed seeks to challenge the claim of privilege or lack of waiver, the matter shall be submitted to the Administrative Law Judge.

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.

IX. 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.

X. Modification

Nothing in this Protective Order shall prevent any party from seeking modification of this Protective Order by the Administrative Law Judge.

XI. Duration

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.

XII. 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. 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