

**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 MOTION FOR CLARIFICATION
REGARDING PROTECTIVE ORDER**

Respondent The Boeing Company ("Respondent") has requested that Administrative Law Judge Anderson modify certain provisions of the Protective Order issued on August 12, 2011 (the "Protective Order"). As explained below, the Acting General Counsel does not object to certain minor modifications proposed by Respondent. In addition, the Acting General Counsel does not in principle oppose certain other minor modifications proposed by Respondent but urges the Administrative Law Judge to adopt alternative language in order to ensure internal consistency of the Protective Order. The Acting General Counsel opposes certain other modifications that, in the Acting General Counsel's view, are unnecessary and/or are inconsistent with the rules and standards of Rule 26 of the Federal Rules of Civil Procedure ("FRCP 26").

1. Respondent has requested that Section IV.B. of the Protective Order (at page 6) be modified to clarify that "Respondent Designated Confidential Information" that has not yet been determined to be Confidential Information by agreement or

adjudication may only be accessed by Qualified Persons. The Acting General Counsel does not oppose Respondent's proposal in principle, but submits that the following language (with the following underlined modification of Respondent's proposal) would be more appropriate than the language proposed by Respondent:

Only Qualified Persons may have access to agreed upon or adjudicated confidential information, and to Respondent Designated Confidential Information unless and until such information is finally agreed or adjudicated not to be confidential.

The above language is more consistent with the remainder of the Protective Order because it contemplates the possibility that Respondent, in good faith consultations with the other parties concerning its confidentiality designations pursuant to the dispute resolution procedure set forth in Section III.A. of the Protective Order, may agree that information initially designated as confidential by Respondent does not in fact require confidential treatment.

2. Respondent has requested that the definition of "All Party Agreed Confidential Information" in the Protective Order (at page 2) be modified to encompass: "Respondent Designated Confidential Information which has not been timely challenged by any party under the terms of this Protective Order." The Acting General Counsel does not object to this proposed modification.

3. Respondent has requested that the first portion of the definition of "Qualified Persons" in the Protective Order (at page 2) be modified to specify that, when Respondent proposes to limit access to certain information to individuals by name or category, the proposed restriction must be given full effect pending final adjudication to the contrary. The Acting General Counsel does not oppose Respondent's proposal in

principle but submits that the following language (with underlined additions to Respondent's proposed language) would be more appropriate than the language proposed by Respondent:

"Qualified Persons" includes the following individuals unless such individuals have been specifically limited by name or category from having access to specific confidential information under this Protective Order, including being limited through a restriction proposed by Respondent that has not been lifted by agreement of the parties or final adjudication.

The above language is more consistent with the remainder of the Protective Order because it contemplates the possibility that Respondent, in good faith consultations with the other parties concerning its proposed restrictions pursuant to the dispute resolution procedure set forth in Section III.A. of the Protective Order, may agree that restrictions initially proposed by Respondent are not, in fact, required.

4. Respondent proposes that the Administrative Law Judge incorporate in the Protective Order a standard permitting Respondent to withhold information from the Charging Party if the information would "provide [the Charging Party] with an unfair advantage in its future collective bargaining with [Respondent]." The Acting General Counsel opposes such a modification. The Administrative Law Judge has stated that the Protective Order "is explicitly intended to avoid diminishing the rights of any party under FRCP 26" and "will not modify or amend the rights of the parties which they possessed to address confidential document issues had no protective order been in place." (ALJ Ruling at 5-6) Respondent's proposed modification would interfere with that purpose.

Respondent essentially proposes that the Administrative Law Judge incorporate an unqualified privilege for Respondent to withhold from the Charging Party any document that would give it an “unfair advantage” in future bargaining – no matter how slight the potential advantage in bargaining that would result from disclosure, or how great the inference with the litigation that would result from non-disclosure. To illustrate this point, the Acting General Counsel submits that some yet-to-be-identified document responsive to a subpoena could hypothetically provide the Charging Party with some minor advantage on some individual point in bargaining but that non-disclosure to the Charging Party in this litigation would seriously interfere with the Charging Party’s right to participate as a full party and with the Acting General Counsel’s ability to consult with knowledgeable Charging Party agents in preparation for and litigation of this case. The modification proposed by Respondent would allow non-disclosure to the Charging Party in such a case.

Respondent has cited no case recognizing such an unqualified privilege under FRCP 26. The Acting General Counsel therefore respectfully requests that the Administrative Law Judge decline to incorporate Respondent’s proposed standard for withholding documents from the Charging Party and instead apply the rules and standards of FRCP 26(c).

5. Respondent has proposed that Section II.B. of the Protective Order (at page 4) be modified to provide that Respondent only be required to show good cause for application of the protective order to a particular document if another party challenges the confidentiality designation. The Acting General Counsel opposes such a modification. As explained on page 4 of the Acting General Counsel’s Response to

Respondent's Request for a Protective Order, filed on July 25, 2011, the Administrative Law Judge must make an independent finding of good cause for imposition of a protective order. While the Administrative Law Judge has found cause for imposition of a protective order that "will not modify or amend the rights of the parties which they possessed to address confidential document issues had no protective order been in place," the Administrative Law Judge has also noted that "not a single document has been identified by the Respondent as meriting protection under such a protective order." (ALJ Ruling at 5-6) Thus, whether or not the parties challenge Respondent's confidentiality designations, the Administrative Law Judge is still responsible for finding good cause for application of confidentiality protections to documents designated by Respondent as confidential. The requirement that Respondent submit the showing of good cause ordered by the Administrative Law Judge will promote this purpose. It will also permit the other parties to make a more informed assessment of Respondent's confidentiality claims, thus limiting the number of challenges. The Acting General Counsel therefore respectfully requests that the Administrative Law Judge decline to modify his order to eliminate the requirement that Respondent submit a showing of good cause for confidential treatment of all documents designated by Respondent as confidential.

6. Respondent has proposed that Section II.B. of the Protective Order (at page 4) be modified to provide that Respondent is not required to link every claim of confidentiality to a category of information identified in the Declaration of Respondent agent Stephen Bodensteiner (the "Bodensteiner Affidavit"), which was submitted by Respondent to show cause for a protective order. This is despite the fact that the

Bodensteiner Affidavit constitutes the only good-cause showing Respondent has made, to date. The Administrative Law Judge properly tailored the Protective Order to the good-cause evidence provided him. Pursuant to Section XII of the Protective Order, Respondent is free to request a modification to its provisions, upon submission of additional good-cause evidence. However, such a request is premature at this time, because Respondent has not yet submitted any good-cause evidence warranting application of a protective order to information not identified in the Bodensteiner Affidavit.

7. Respondent has requested that the Administrative Law Judge clarify the terms “redacted document” and “modified document” in Section II.B. of the Protective Order (at page 4). In the Acting General Counsel’s view, the meaning of the terms “redacted document” and “modified document” is self-evident. As the Administrative Law Judge has explained, a document can be modified to “limit[] ... disclosure to utility for the matters in the case,” for example, by conversions of numbers to percentages. (Tr. 889:20-890:3) The Acting General Counsel therefore opposes modification of the protective order to provide further explanation of the meaning of these terms.

8. Respondent has requested clarification concerning the use of cover sheets to designate submitted documents as confidential under Section II.A. of the Protective Order (page 3) and has requested clarification of the roles of the parties in maintaining and revising such “cover sheets.” The Acting General Counsel certainly does not object to a discussion between the Administrative Law Judge and the parties about the logistics of handling cover sheets, but does not believe that this ministerial subject even remotely merits written amendment to the Protective Order.

For the foregoing reasons, the Acting General Counsel respectfully requests that the Administrative Law Judge decline to adopt Respondent's proposed modifications to the Protective Order, except to the extent consistent with the positions of the Acting General Counsel set forth above.

DATED at Seattle, Washington, this 19th day of August, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mara-Louise Anzalone', written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Acting General Counsel's Response to Respondent's Motion for Clarification Regarding Protective Order was served on the 19th day of August, 2011, on the following parties:

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