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 STATEMENT IN SUPPORT OF CHARGING PARTY'S MOTION TO STRIKE AND REPLY TO RESPONDENT'S RESPONSIVE PLEADING

Respondent The Boeing Company ("Respondent") has taken it upon itself to characterize the other parties' positions regarding the need for a protective order in this case. Respondent supports its assertions by characterizing the parties' positions taken during their failed attempts to negotiate a compromise regarding the need for and the procedures that ought to govern a protocol for the disclosure, use, and protection of confidential information that might be at issue in this case. Rather, it is the parties' positions of record, and as supplemented by their August 5, 2011, filings, that reflect their positions on these important issues.

The Acting General Counsel files this Statement in Support of the Charging Party's Motion to Strike in Part Respondent's Brief in Support of Its Motion for Approval of a Protective Order inasmuch as the positions taken during negotiations for a compromise order (whether or not they are properly described and regardless of the circumstances under which they may have been proposed) should be inadmissible as

"proof" of any party's "acknowledgment" or "admission" of anything. Specifically, an attempted compromise on a protective order in this case does not constitute any admission or acknowledgement that:

- Respondent has made the required good cause showing for a protective order in this case, or has established that any documents are "presumptively confidential";
- Respondent's claimed confidentiality interests can only be protected and enforced through entry of a federal district court protective order;
- Respondent has demonstrated a need to deny access to any information in this case to Charging Party International Association of Machinists and Aerospace Workers, District Lodge 751, affiliated with International Association of Machinists and Aerospace Workers (the "Charging Party"); or
- Respondent has met the standards for sealing documents that might be introduced into evidence during the hearing.

As such, the Acting General Counsel joins in the Charging Party's request that the Administrative Law Judge strike, or at the very least disregard, Respondent's representations of the other parties' positions. Further, in addition to joining Charging Party's request, Counsel for the Acting General Counsel finds it necessary herein to clarify and/or correct certain representations made in Respondent's Response to the Charging Party's Motion to Strike.

Federal Rule of Evidence 408, as written, is not limited to settlement negotiations. To the contrary, the plain language of the Rule contemplates all offers of compromise regarding material issues in a case. 23 Wright & Graham, *Federal Practice & Procedure* § 5306 (Supp. 2010). In this case, the material issue is whether Respondent has made the required good cause showing to warrant the issuance of a protective order and, if so, what the scope and procedures that ought to govern such an order should be. The fact that Respondent itself has characterized the negotiations as

the parties' attempt to reach a compromise is more than enough to invoke the principle behind the Rule; *i.e.*, that to promote compromise, the parties' positions ought not to be taken out of context and used against them in the event the negotiations fail to yield the sought after agreement. Administrative Law Judge Anderson spoke to this prior to the parties' meeting to negotiate just such a potential compromise. (Tr. 919: 14-22; 922:1-12)

Without addressing each of Respondent's various assertions, the Acting General Counsel respectfully submits that any position taken by any party during negotiations assumed, *ab initio*, that a protective order would likely be necessary to govern the disclosure, use and protection of *some* information. However, that does not mean each party agreed that every potential document would be encompassed. This is particularly true given that both Counsel for the Acting General Counsel and the Charging Party represented to the Administrative Law Judge their positions that Respondent had not meet its obligations to show good cause for a protective order. Therefore, Counsel for the Acting General Counsel has not "acknowledged" or "admitted" anything regarding Respondent's asserted need for a protective order at this stage in the litigation, simply because she engaged in negotiations and attempted to reach a good faith compromise.

Respondent has asserted in its Response to Charging Party's Motion to Strike that Rule 408 does not warrant striking or disregarding portions of its Supplemental Brief because that rule only governs the admissibility of evidence. Respondent distinguishes its characterizations of the other parties' positions from the types of evidence excluded under Rule 408 by asserting that those characterizations were made to differentiate its position from those of the other parties. However, in its Supplemental

Brief, Respondent goes beyond merely differentiating its positions from its characterizations of the other parties' positions and, instead, wields certain of its characterizations of the other parties' positions in support of factual claims. Specifically, Respondent then employs its own constructed characterizations in support of its argument that it has made an adequate showing of cause for its proposed protective order. As explained in detail on pages 2 through 6 and 13 through 15 of the Acting General Counsel's Response to Respondent's Request for Protective Order, the required showings of good cause for imposition of a protective order and of compelling reasons for sealing of documents are *factual* showings. Thus, Respondent's attempt to use its own characterizations of the other parties' positions in support of such factual claims brings those characterizations within the ambit of Rule 408.[1]

Even if the Administrative Law Judge were to consider the parties' negotiations for a compromise outside the scope of Rule 408, Respondent's ill-founded position regarding compromise negotiations cannot stand. As both the Advisory Committee and the Court of Appeals for the Ninth Circuit have long recognized, no party to compromise negotiations has the authority to unilaterally extract binding commitments from the other without consent or consideration. Fed. R. Evid. 408 Advisory Committee Note; *U.S. v. Contra Costa County Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982) (evidence of positions taken during compromise negotiations is irrelevant because they are motivated by a desire for peace, not an intent to make concessions about the claims at issue). Similarly, it is inappropriate to extrapolate from one party's expressed willingness to

[1] Unlike Respondent's attempt to use alleged "admissions" and "acknowledgements" of other parties to meet its burdens to make certain factual showings, the Acting General Counsel's reference to positions taken by Respondent referenced in Section V of the Acting General Counsel's Supplemental Position Regarding Protective Order were merely made to differentiate the Acting General Counsel's position from Respondent's anticipated position.

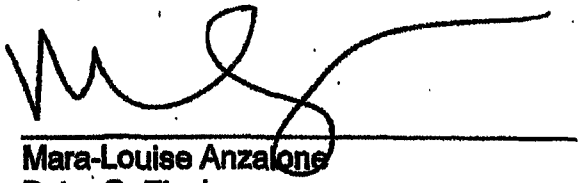
consider various outcomes (in the context of reaching a complete agreement that reflects multilateral compromise) any admission that the opposing party's position is valid. Fed. R. Evid. 408 Advisory Committee Note; *U.S. v. Contra Costa County Water Dist.*, 678 F.2d at 92.

Regardless of any inappropriate characterizations, at this juncture the various proposals the parties might have considered as part of negotiations for the elusive compromise are irrelevant. Whatever the parties may have been willing to consider as part of an all-encompassing compromise has no bearing on what the Administrative Law Judge must consider in the absence of such a compromise. Judge Anderson correctly noted as much already. (Tr. 919: 14-22; 922:1-12)

In these circumstances, the Acting General Counsel respectfully submits that Respondent's characterization of the parties' negotiations and their resultant positions regarding Respondent's asserted need for a protective order are improper and should be stricken or, in the alternative, disregarded in favor of the parties' position of record, and as supplemented by their August 5, 2011, filings.

DATED at Seattle, Washington, this 10th day of August, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Acting General Counsel's Statement in Support of Charging Party's Motion to Strike and Reply to Respondent's Responsive Pleading was served on the 10th day of August, 2011, on the following parties:

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