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 the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

RULING ON MOTION TO FILE AMICUS CURIAE BRIEF

On June 9, 2011, the Attorneys General of Sixteen States filed a joint motion to file an amicus curiae brief with the Regional Director of Region 19 of the National Labor Relations Board who referred the motion to me on the same day. I provided all parties until June 13, 2011 to submit a position on the motion.

On June 13, 2011, the General Counsel and the Charging Party filed positions in opposition to the amicus motion and the Respondent filed a position in support. All were useful.

Arguments, Consideration, and Ruling

Based on the filings of the parties and the proceedings to date, I consider and rule as follows.

While the Board regularly allows the submission of amici curiae briefs to itself and on occasion solicits them, such submissions to trial administrative law judges are far less common and no procedural rule or decisional law on the issue is in place. This is likely because an administrative law judge in an unfair labor practice proceeding is bound to follow current law without considering any argument that Board law should be changed. None the less, receiving and considering such filings falls in my view within the general authority inherent in an administrative law judge's duties and powers to regulate the course of the hearing. *George Joseph Orchard Siding, Inc.*, 325 NLRB 252 (1998).

The Respondent emphasizes in its response that the motion to file the amicus brief at issue is from States' Attorneys General. Respondent notes:

> An *amicus* filing by a State should receive the same special deference by this tribunal that it receives under the federal rules: acceptance without condition.

GENERAL COUNSEL
EXHIBIT NO. 16(y)

> "[A] state may file an amicus-curiae brief without the consent of the parties *or leave of court."* Fed. R. App. Proc. 29(a) (emphasis added); *see also* Supreme Court Rule 37(4) ("No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented ... on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General ... "). Recognizing that the interests of the several States may be affected by federal litigation, those rules give States the unqualified right to have their views heard on issues that the States have determined affect their interests through *amicus* participation.

The Respondent argues further:

> As the States' motion relates, their "interest in the case arises from the potential economic impact on their states of the NLRB's proposed course of action and from their desire to promote evenhanded application of the labor laws." Motion 1. The discussion in the proposed *amicus* brief of the potential consequences to the respective States and the general public interest regarding the remedy sought by the Acting General Counsel plainly are views that warrant this tribunal's careful consideration. *See eBay Inc.* v. *mercExchange, L.L.C.*, 547 U.S. 388, 390 (2006); *Winn-Dixie Stores, Inc.*, 147 N.L.R.B. 788, 790 (1964) (citing *Renton News Record,* 136 N.L.R.B. 1294 (1962)).

> The General Counsel argues:

> [A] judge should not "grant rote permission to file an amicus curiae brief," and should never "grant permission to file an amicus curiae brief that essentially merely duplicates the brief of one of the parties." *Natl Org. for Women v. Scheidler,* 223 F.3d 615, 617 (7th Cir. 2000). Movants' asserted interests in this proceeding are closely aligned with those of Respondent, which shares with Movants the objective of opposing the Complaint and the requested remedy.

Further counsel for the General Counsel notes that consideration of policy questions are best addressed to reviewing bodies who may fairly consider policy questions in evaluating existing or considering new doctrine.

The Charging Party in its opposition argues, inter alia, that the current parties will fully litigate the case and the proposed brief will "merely mimic and restate the assertions already made by the Respondent." Counsel for the Charging Party further argues that the brief deals with matters outside the scope of the instant case and, to the extent the brief addresses issues unrelated and irrelevant to the complaint and remedy at issue in the unfair labor practice proceeding, the motion must be denied citing *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council,* 589 F.3d 458,467 (1st Cir. 2009) (citing *Pharm. Research & Mfrs. of Am. v. Concannon,* 249 F.3d 66, 74 n. 5 (1st Cir.2001)).

The Charging Party argues:

> The rehash of Boeing's arguments offered by the proposed amici about the facts in this case, prior to the start of the actual evidentiary trial, would prejudice the Charging Party, and, in light of the fact that the proposed amici have failed to articulate how the Administrative Law Judge would benefit from the proposed amicus curiae brief, their request should be denied.

The parties raised relevant issues and argument on the motion. Initially, I find the rules cited by the Respondent suggesting filings by States Attorneys General should be greatly favored as amici deal with appellate proceedings not trial actions. Thus the cited provisions, as the General Counsel argues, may well bear on the Board and higher reviewing bodies, but are not directly relevant to the instant proceeding at the trial level. None the less the rules do reflect the public interest perspective of amici briefs by such public servants.

The opposing parties each emphasize that an amicus curiae brief is not appropriately simply a second iteration of a party's position and that the offered brief does not contribute to litigation of the merits of the unfair labor practices herein. As noted in the quoted argument of the Respondent, it argues that public policy arguments are advanced by the Attorneys General brief concerning the remedy sought by the General Counsel which should be considered.

I find the parties arguments do not directly oppose one another. Two separate and independent elements of the instant litigation are at issue. First, have unfair labor practices been committed? Second, and conditional on my finding that such unfair labor practices have in fact been committed, what is the appropriate remedy for those unfair labor practices? Indeed the Board treats these two elements of every unfair labor practice case differently at the trial level finding the control of the theory of the unfair labor practice allegations of the complaint under the sole control of the General Counsel, but allowing all parties to offer evidence and argument on the issue of appropriate remedy.

Here the Charging Party and the General Counsel, I find, have established that it would be inappropriate at the trial level, my level, to receive the instant offered brief on the merits of the unfair labor practice allegations. I find the arguments they have made as set forth above, under all the circumstances, persuasive as to the question of considering the brief in determining if unfair labor practices have been committed. I will therefore exercise my discretion to find the offered brief inapplicable and not to be considered as to that aspect of the instant case. As to the merits of the complaint allegations, the brief will be disregarded.

The Respondent however has persuaded me, and I find, that it is appropriate to receive the brief on the issue of appropriate remedy for any unfair labor practices found. Here the public interest, as reflected in the proffered brief, may more properly be considered in fashioning a remedy to violations of the Act consistent with the public

interest, should such violations be found.

The consequence of this bifurcation, or split ruling, is that I find it is appropriate to receive and consider the amicus brief only in conjunction with the issue of remedy. It shall be disregarded, not considered, and is not received for, determining if a violation of the Act has occurred herein.

Having found the amicus brief should be considered only on the question of remedy and not for the determination of the commission or noncommission of unfair labor practices, I will receive it in its entirety into the record, but explicitly limit its application and consideration to the matter of remedy.

Based upon all the above, I issue the following:

ORDER

The Attorneys General of Sixteen States Joint Motion to File an Amicus Curiae Brief is granted in part and denied in part:

1. **To the extent the Amicus Curiae Brief is offered to address the violations of the Act alleged in the complaint herein, the motion is denied.**

2. **To the extent the Amicus Curiae Brief is offered to address the issue of appropriate remedy, should the allegations of the complaint be sustained in whole or in part, the motion is granted.**

3. **With the limitations of use noted, the brief is received into the record.**

Issued at San Francisco California, this 13th day of June, 2011.

Clifford H. Anderson
Administrative Law Judge

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Service of Ruling on Motion to File Amicus Curiae Brief
June 13, 2011

FROM: Judge Clifford H. Anderson

RE: THE BOEING COMPANY, 32-CA- 32431 -

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