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 INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

RULING ON GENERAL COUNSEL'S MOTION TO STRIKE INADMISSIBLE HEARSAY

On June 14, 2011, the Respondent filed a motion to dismiss the complaint for failure to state a claim or, in the alternative, to strike the remedy sought by the complaint. On June 21, 2011, the General Counsel filed a motion to strike portions of the Respondent's motion as inadmissible hearsay. On June 27, 2011 the Charging Party filed a brief in support of the General Counsel's motion.

The General Counsel, with the concurrence of the Charging Party, argues that the Respondent's motion to dismiss the complaint for failure to state a claim or, in the alternative, to strike the remedy sought by the complaint, must be decided on the pleadings without consideration of additional non-agreed upon documents and information. They argue further that the Respondent improperly submitted documents and made factual assertions with its motion which documents and facts are disputed and are improper to include with the motion. The General Counsel and the Charging Party seek to strike documents attached to the motion and ask that I disregard the additional factual assertions it contains.

There is no dispute the Respondent in its motion to dismiss included extra complaint documents and argued extra complaint facts in support of its motion. The Respondent in its motion at 4 stated:

> The factual background offered below recounts the facts alleged in the complaint as well as other facts necessary for context or for evaluating the proposed remedy. To the extent facts outside the complaint are discussed, it is Boeing's position that those facts are not necessary to a determination that the complaint fails to state a claim, but rather are responsive to the court's request for pre-hearing briefs on this subject, and to further establish the inequity of the remedy sought by the Acting General Counsel in this case.

The Respondent did not file a response to the General Counsel's instant motion to strike inadmissible hearsay, but did file a reply brief to the filed oppositions of the General Counsel and the Charging Party's to the Respondent's motion to dismiss the complaint for failure to state a claim or, in the alternative, to strike the remedy sought by the complaint. In that reply filing the Respondent addressed the instant motion at 5.

> The Acting General Counsel also contends that Boeing improperly "attached inadmissible facts and documents to its Motion" that cannot be considered in conjunction with its motion to dismiss. AGC Opp'n 5; *see also* Mot. to Strike Respondent's Inadmissible Hearsay Including Exhibits A Though F to Its Motion to Dismiss. The "inadmissible . . . documents" to which the Acting General Counsel refers are Boeing's collective bargaining agreement with the IAM, referenced in ¶ 5(c) of his complaint, and the five assertedly coercive and threatening statements referenced in ¶¶ 6(a)–(e) of his complaint. Under the applicable federal standard for assessing the sufficiency of a complaint, all of those documents are appropriately considered, and the motion to strike is not well taken.

The Respondent's argument in its reply is that documents referred to or incorporated by reference in the complaint are, like the complaint, a proper source for evidence and argurnent on behalf of a motion to dismiss the complaint for failure to state a claim under the Federal Rules of Civil Procedure (FRCP). The General Counsel argues non-complaint evidence, including materials or documents referred to in the complaint, may not be included with such a motion.

Considering both the Board's relevant rules and the FRCP, I agree with the Respondent as to the principle of inclusion asserted, but find that the only document sufficiently incorporated by reference into the complaint at issue herein is the contract. That document shall remain with the motion and will not be struck. To that extent the General Counsel's motion to strike is limited. The other attached purported documentation of the factual basis for the allegations of paragraphs 6(a) though (f) of the complaint are not incorporated by reference in the complaint or, to the extent they are, as the newspaper articles and presumed records of public broadcasts, are not necessarily the best evidence of what Respondent's agents actually said or are responsible for disseminating. For example, newspaper articles do not necessarily provide conclusive evidence of an interviewee's remarks. See e.g. *B. N. Beard Co.*, 248 NLRB 198, 199 fn. 9 (1980). And in the world of high tech editing, recordings of all

types no longer necessarily comport with unedited "real" events, but may be edited or distorted. These documents therefore are not incorporated in the complaint and shall therefore be stricken.

Further I find that the other non-documentary factual inclusions in the Respondent's motion and argument are not established as fact, and are in many cases disputed. Indeed from the Respondents quoted statement supra, I do not find the Respondent currently urges their inclusion in its motion. They will be disregarded. No factual assertions inconsistent with the specifics of this order and equally no determinations of admissible evidence will be undertaken in ruling on these preliminary motions. None the less, some background information is contained in portions of the parties' arguments that is not properly evidence in the hearing. Preliminary matters may involve such evidentiary exceptions. Federal Rule of Evidence 104. I find no prejudice in this residuum.

Given all the above, the submissions and positions of the parties, and the entire record to date, I find it is appropriate to grant the General Counsel's motion to strike portions of the Respondent's motion save that the collective bargaining agreement referred to in the complaint will remain with and a part of the Respondent's motion. I shall therefore issue the following:

ORDER[1]

The General Counsel's motion to strike portions of the Respondent's motion as inadmissible hearsay is granted with the exception that the collective bargaining agreement referred to in the complaint will remain attached to and a part of the Respondent's motion.

Issued at San Francisco, California this 28th day of June, 2011.

Clifford H. Anderson
Administrative Law judge

[1] Appeals from administrative law judge rulings on motions are governed by the Board's Rule 102.26.

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SERVICE OF: Ruling on GC Motion to Strike Inadmissible Hearsay by Judge Clifford Anderson dated 6-28-2011

-BY FAX TO:

Richard Ahearn, Regional Director, NLRB Reg. 19 Mara-Louise Anzalone, Esq. Peter Finch, Esq. Rachel Harvey, Esq.	(206) 220-6305
Richard B. Hankins, Esq. and Drew E. Lunt, Esq. - of McKenna Long	(404)527-7088 (404)527-4198 - Main
William J. Kilberg, Esq. and Alston D. Correll, Esq. Daniel J. Davis, Esq. Paul Blankenstein, Esq. Matthew D. McGill, Esq. Eugene Scalia, Esq. of Gibson Dunn	(404)527-6866 (202)530-9557 (202)530-9532 (202)530-9662 (202)467-0539 - Main
David Campbell, Esq., Carson Glickman-Flora, Esq., Robert L. Lavitt, Esq. Jennifer Robbins, Esq. Sean Leonard, Esq. of Schwerin Campbell	(206)257-6036 (206)257-6041 (206)257-6039 (206)257-6043 (206)257-6044 (206)378-4132 - Main
Christopher Corson, Esq. of IAMAW	(301)967-4594
Tom Wroblewski, President Machinists, DL 751	(206)-764-0303
Office of the Executive Secretary Les Heltzer, Exec. Secty. Gary Shinners, Assist. Exec. Secty	VIA E-MAIL

Served by: Susan George, at 415 356-5255, June 28, 2011