

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

THE BOEING COMPANY

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS DISTRICT LODGE 751,
affiliated with INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS

Case 19-CA-32431

**CHARGING PARTY’S RESPONSE TO
BOEING’S MOTION FOR CLARIFICATION
REGARDING PROTECTIVE ORDER**

Within days after Administrative Law Judge Clifford Anderson (“ALJ”) resolved a protracted protective order debate through a carefully crafted Ruling and Protective Order,¹ Respondent The Boeing Company (“Boeing”) filed a “Motion for Clarification Regarding Protective Order.” By its motion, Boeing attempts to gain through “clarification” certain aspects of its proposed protective order that it did not achieve through negotiation, briefing or argument. The Charging Party, International Association of Machinists and Aerospace Workers, District Lodge 751 (“District 751”), affiliated with International Association of Machinists and Aerospace Workers (“IAM”), hereby files this Response to Boeing’s “Motion for Clarification.” In sum, District 751 requests that the ALJ 1) treat Boeing’s Motion for Clarification as a Motion for Modification of the Protective Order, 2) reject Boeing’s proposed language changes and requests for clarification, 3) adopt the Charging Party’s proposed alternative language, where

¹ The ALJ issued his Ruling on the Parties’ Motions for Approval of Their Respective Protective Orders, The Respondent’s Motion to Strike and Issuance of Protective Order on August 12, 2011.

applicable, and 4) in the event the ALJ grants Boeing's motion in whole or in part, issue a Revised Protective Order.

I. BOEING'S MOTION SHOULD BE TREATED AS A MOTION FOR MODIFICATION OF THE PROTECTIVE ORDER, AND, IF THE ALJ GRANTS BOEING'S MOTION IN WHOLE OR IN PART, THE ALJ SHOULD ISSUE A REVISED PROTECTIVE ORDER INCORPORATING THOSE MODIFICATIONS.

District 751 respectfully requests that the Court treat Boeing's motion as a Motion for Modification of the Protective Order pursuant to Article XII of the Protective Order. In most of Boeing's enumerated requests, Boeing proposes to alter the language of the existing Protective Order. Certain of these changes would substantively alter the standards, procedures and obligations of the parties as set forth in the Order. Rather than "clarifying" a word, phrase or provision that is ambiguous, Boeing actually asks the judge to reconsider and/or modify issues previously briefed and adjudicated. The motion is thus properly handled as a request for modification.

In the event the ALJ modifies the Protective Order, the Charging Party requests that the ALJ issue a Revised Protective Order incorporating those modifications in a self-contained order supplanting the August 12, 2011, Protective Order. Article I of the Protective Order provides, in part:

Confidential Information shall not be disclosed to persons described in (e), (f), (g) or (i) unless or until such persons have been provided with a copy of this Order and have agreed in writing in a declaration submitted to and thereafter maintained by the requesting counsel to abide by and comply with the terms and provisions therein.

Because disclosure to certain "Qualified Persons" is contingent upon their having reviewed and agreed to abide by the Protective Order, it will be important that the Protective Order at all times remains a complete, all-inclusive document that does not

require reference to independent orders or rulings, whether those rulings are contained in a written order or in the hearing transcript.

II. CHARGING PARTY'S RESPONSES TO INDIVIDUAL REQUESTS FOR MODIFICATION.

For ease of reference, District 751 responds in serial fashion to each of Boeing's requests.

1. Boeing requests that Section IV.B be modified as follows (modification shown in italicized text): "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 adjudicated not to be confidential.*"

The Charging Party agrees that there is an internal inconsistency in terminology used between the Definitions Section and Section IV.B, and also agrees that the Protective Order does not expressly limit access to Respondent Designated Confidential Information prior to the designations being agreed or disputed. However, Boeing's proposed language would not completely resolve the problem. The ALJ obviously intended that access to Respondent Designated Confidential Information only be limited if all parties agree a document should be subject to the Protective Order or if the confidential designation has been disputed and the document has been adjudicated to be subject to the Protective Order. Boeing's proposed language goes further, by restricting access to Qualified Persons for all Respondent Designated Confidential Information "unless and until such information is finally adjudicated not to be confidential," regardless of the parties' agreement as to the confidentiality of the document. The Charging Party proposes, as an alternative, the following language, which, importantly,

ensures internal consistency in the use of the term Confidential Information and the various iterations thereof:

Only Qualified Persons may have access to All Party Agreed Confidential Information and to Adjudged Confidential Information. Only Qualified Persons may have access to Respondent Designated Confidential Information unless and until such information is a) agreed by all parties not to be Confidential Information, or b) adjudged under this Protective Order not to be Confidential Information. 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.

2. Boeing proposes the word “timely” be added to the definition of “All Party Agreed Confidential Information” as follows (modification shown in italicized text): “Respondent Designated Confidential Information which has not been *timely* challenged by any party under the terms of this Protective Order.”

District 751 opposes this change. The definition of “All Party Agreed Confidential Information” already references the challenge procedure under the terms of the Protective Order and, implicitly, the corresponding time periods for challenges to Respondent’s designation of any document as Respondent Designated Confidential Information. The addition of the word “timely” as proposed by Boeing would not alter the already clear procedure set forth in the existing Protective Order by which Respondent Designated Confidential Information becomes All Party Agreed Confidential Information, but its addition is unnecessary and would be redundant.

3. Boeing proposes modifying “Qualified Persons” as follows (modification shown in italicized text): “ ‘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 Boeing that has not been the subject of a successful final challenge.”

District 751 opposes this change. The ALJ clearly ruled that the Protective Order did not diminish, modify or amend any party’s rights. Ruling on Parties’ Motions at 5-6. He further ruled that “the issuing protective order herein will apply the same legal standards and the parties will have the same rights to litigate confidential document status, confidential document disclosure and its regulation.” *Id.* at 6. Thus, where the Protective Order excludes from “Qualified Persons” those individuals who “have been specifically limited by name or category to have access to specific confidential information,” it provides that Boeing’s specific access limitations above and beyond the “Standard Protective Order Confidential Information Restrictions” will control only after and unless the designation is agreed to by all parties, or it is challenged and adjudicated in Boeing’s favor. Thus, in the first sentence of the definition of “Qualified Persons,” where the Order reads “unless such individuals have been specifically limited by name or category,” the Order establishes that *adjudicated limitations*, if any, and not Boeing’s proposed limitations, will apply to “Qualified Persons.”

“Clarifying” the Protective Order in the manner proposed by Boeing would greatly diminish the right of the Charging Party to full participation in all or part of the unfair labor practice proceeding, because Boeing would be permitted to withhold self-designated Confidential Information from the Charging Party, or certain Charging Party representatives or counsel, pending final adjudication of designation disputes. Such language and interpretation directly contravenes the ALJ’s rulings, which were made after careful consideration of briefing and argument on exactly this important issue;

namely, Boeing's attempt to deny the Charging Party the full participation in the proceedings to which it is entitled. *See, e.g.*, Charging Party's Brief Regarding Respondent's Request for Protective Order at 14-19.

Finally, Boeing's proposed language does not address the possibility that, pursuant to Section III.A, the restriction proposed by Boeing may be withdrawn by agreement.

4. Boeing requests "clarification" of the standard that this tribunal will use to adjudicate challenges concerning Boeing's proposed restrictions on Charging Party's access. The ALJ's Ruling and Order clearly, unambiguously and repeatedly establishes the rules and standards that the ALJ will apply under the terms of this Protective Order, including to adjudicate challenges to Boeing's designations of confidentiality, regardless of whether those designations are Standard, Additional Restrictions on Charging Party Access or some other proposed restriction. *See*, Ruling on Protective Order at 2, 4, 5, 6, 7 and 8; Protective Order at 1, 5. For example, the ALJ specifically addressed this point when he wrote:

- "The rules and standards of FRCP 26, save where the Board has specifically held otherwise, shall be applied under the terms of this protective order." Ruling on Protective Order at 6.
- "This Protective Order does not modify the factual and legal standards to establish "good cause" for applicability of this Order to a Designated Confidential document based on a showing that a) the Document in fact constitutes 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 b) disclosure of the Document will cause specific financial and/or competitive harm to the Disclosing Party." Protective Order at 5.

A more clear articulation of the applicable standard to adjudicate challenges concerning Boeing's proposed restrictions is difficult to imagine.

Furthermore, the ALJ issued a protective order “explicitly intended to avoid diminishing the rights of any party under FRCP 26.” Ruling on Protective Order at 5. Yet, diminishing the Charging Party’s rights is exactly what Boeing again requests the ALJ do, by asking him to supplant the “good cause” standard with a standard permitting non-disclosure based on a determination that access by the Charging Party would “provide [the IAM] with an unfair advantage in its future collective bargaining with Boeing” regardless of whether such disclosure meets the FRCP 26 “good cause” standard. Boeing seeks not a “clarification,” but rather for the ALJ to modify his decision concerning what standards and substantive law will be applied to establish confidentiality. Boeing’s renewed request for a different standard should be summarily rejected for the reasons set forth in the ALJ’s ruling, the Charging Party’s Brief Regarding Respondent’s Request for Protective Order at pp. 9-12, and the Charging Party’s Supplemental Brief at pp. 9-11.

5. Boeing requests that the second paragraph of Section II.B be modified to read: “*At such time as any party challenges the basis for Respondent’s designations, the Respondent shall also submit to the other parties a showing of good cause . . .*” This request likewise attempts to modify, rather than clarify an ambiguity in, the ALJ’s order. It further seeks to alter the applicable FRCP standards and substantive law for establishing confidentiality by postponing Boeing’s obligation to make a showing of “good cause” until after a challenge has been initiated. FRCP 26 and related case law place the burden squarely on Boeing to make an up-front showing of good cause for applicability of the Protective Order to a particular document. *See*, Charging Party’s Brief Regarding Respondent’s Request for Protective Order, pp. 11-12. The current

language of Section II.B adheres to the case law in this regard and is the only process that will enable the Charging Party and Counsel for the Acting General Counsel to mount an informed challenge to Boeing's designation where it believes "good cause" is lacking.

6. As with request numbers 4 and 5, Boeing in request 6 seeks to modify an issue that was fully briefed, argued and adjudicated. The Bodensteiner Declaration set forth a number of categories of purportedly confidential information, and the ALJ has required that Boeing identify the applicable category to a particular document upon request. This process articulates another manner in which the parties can obtain information allowing them to understand Boeing's asserted basis for a document's confidential designation. Request 6 should be rejected.

7. Boeing seeks clarification as to the difference between a "redacted document" and a "modified document" in Section II.B of the Protective Order. By the plain language used, the words "redacted" and "modified" are not synonymous but rather have different meanings that the ALJ's has already described on the record. No modification or clarification of these clear and unambiguous terms is necessary.

8. Boeing requests clarification regarding the intended use of the "cover sheet" required under Section II.A. Boeing's obligations regarding the contents and use of the cover sheet are detailed at length in the Protective Order. Questions concerning ministerial responsibilities related to designation-tracking can be addressed on or off the record, without a modification of the Protective Order.

III. CONCLUSION

For the foregoing reasons, District 751 respectfully requests that the ALJ 1) treat Boeing's Motion for Clarification as a Motion for Modification of a Protective Order, 2) reject Boeing's proposed language changes and requests for clarification, 3) adopt the Charging Party's proposed alternative language, where applicable, and 4) in the event the ALJ grants Boeing's motion in whole or in part, issue a Revised Protective Order.

Respectfully submitted this 19th day of August, 2011.



David Campbell, WSBA No. 13896
Carson Glickman-Flora, WSBA No. 37608
Lawrence R. Schwerin, WSBA No. 4360
Robert H. Lavitt, WSBA No. 27758
Jennifer L. Robbins, WSBA No. 40861
Sean Leonard, WSBA No. 42871
SCHWERIN CAMPBELL BARNARD
IGLITZIN & LAVITT LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
206.285.2828
206.378.4132 (fax)
Campbell@workerlaw.com
Flora@workerlaw.com
Schwerin@workerlaw.com
Lavitt@workerlaw.com
Robbins@workerlaw.com
Leonard@workerlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2011, I caused the foregoing Charging Party's Response to Boeing's Motion for Clarification Regarding Protective Order to be e-filed with the National Labor Relations Board Division of Judges and a copy to be e-mailed to the following:

Hon. Clifford H. Anderson
Administrative Law Judge
NLRB San Francisco Division of Judges
Clifford.Anderson@nlrb.gov

Richard Ahearn, Regional Director, NLRB Region 19
Richard.ahearn@nlrb.gov

Counsel for the Acting General Counsel:
Mara-Louise Anzalone
Mara-louise.anzalone@nlrb.gov

Peter Finch
Peter.finch@nlrb.gov

Rachel Harvey
Rachel.harvey@nlrb.gov

Counsel for The Boeing Company:
William J. Kilberg
wkilberg@gibsondunn.com

Paul Blankenstein
pblankenstein@gibsondunn.com

Eugene Scalia
escalia@gibsondunn.com

Matthew D. McGill
mmcgill@gibsondunn.com

Daniel J. Davis
ddavis@gibsondunn.com

Richard B. Hankins
rhankins@mckennalong.com

Drew E. Lunt
dlunt@mckennalong.com

Alston D. Correll
acorrell@mckennalong.com

and to:

Matthew C. Muggeridge
National RTW Legal Defense Foundation, Inc.
mcm@nrtw.org



Terrance M. Costello