UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH 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 INTERVENE

On June 1, 2011, three individuals: Dennis Murray, Cynthia Ramaker and Meredith Going Sr., through counsel, filed a joint motion to intervene in the above-captioned case with the Regional Director of Region 19 of the National Labor Relations Board (the Regional Director). On June 2, 2011, the Regional Director issued an order referring the motion to me. This case is currently pending the commencement of an unfair labor practice hearing on June 14, 2011.

Board Rule 102.29 Intervention, states in part:

> The administrative law judge shall rule upon all such motions [to intervene] made at the hearing or referred to him by the Regional Director, in the manner set forth in section 102.25. The Regional Director or the administrative law judge, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper.

The motion to intervene is therefore properly before me for consideration and ruling. *Auto Workers v. NLRB*, 392 F.2d 801, 809 (D.C. Cir. 1967), cert. denied 392 U.S. 906 (1968) and *Biles-Coleman Lumber Co.*, 4 NLRB 679, 682 (1937).

On June 3, 2011, I issued an Order providing the parties herein an opportunity to submit positions on the motion to intervene.

The General Counsel filed a response opposing the motion on grounds, *inter alia*, that the movants lack cognizable interests supporting intervention and because the participation by the movants in the trial would delay and complicate an already complex proceeding.

The Boeing Company (Boeing) filed a response supporting the motion "because Intervenors have a direct interest in the outcome of this case." Boeing points out that the moving parties' South Carolina employment is at risk should the General Counsel's proposed remedy require Boeing work to be shifted from South Carolina to the Northwest and the movants should therefore be regarded as interested parties.

The International Association of Machinists and Aerospace Workers District Lodge 751, affiliated with the International Association of Machinists and Aerospace Workers (the Machinists) opposes the motion to intervene. The Machinists assert the movants have no

legally significant or direct interest in the proceeding and that the Board's policies do not support a right of intervention for secondary parties who might be adversely affected by a Board remedy of unfair labor practices directed to others. The Machinists further assert that granting the intervention would transform an already complicated and lengthy hearing into an unwieldy and unmanageable proceeding.

Based on the motion to intervene, the positions of the parties, and the record of the instant proceeding to date, I find and rule as follows:

Consideration and Ruling

In order to put the instant motion to intervene in context, it is well to very briefly and in a summary fashion describe the primary allegations of wrongdoing in the complaint in the instant case and the remedy being sought by the General Counsel of the National Labor Relations Board (the General Counsel) in that complaint. The General Counsel's complaint alleges, and the answer denies, that in 2009, Boeing improperly decided to transfer work respecting a new commercial aircraft, the 787 Dreamliner, from existing locations in the Northwest United States to a facility in South Carolina in violation of Sections 8(a)(3) and (1) of the National Labor Relations Act (the Act). Generically, such a theory of violation of the Act is a variant of what is sometimes referred to as a "runaway shop" case in which an employer moves its facility or moves work from that facility to a separate facility for improper reasons. The General Counsel's complaint seeks in remedy of the alleged violation of the Act, among other things, that Boeing be required to:

> ... operate its second line of 787 Dreamliner aircraft assembly production in the State of Washington, utilizing supply lines maintained by the [collective bargaining unit employees] in the Seattle, Washington, and Portland, Oregon, area facilities.

Thus, the General Counsel is, in essence, contending in his complaint that Boeing improperly shifted work to South Carolina and the General Counsel, by way of remedy, wants an order requiring the work be shifted back to the Northwest, where the General Counsel asserts it would have remained, but for Boeing's wrongdoing.[1] The Machinists, who filed the initiating charge in this proceeding, support the complaint.

The moving parties here identify themselves as three out of potentially thousands of Boeing and contractor employees who have been, are now, or will be in the future, employed to work on the allegedly shifted work that Boeing now plans to do in South Carolina and who, the motion to intervene asserts, would be adversely affected were Boeing to be required as a result of the instant litigation to relocate the South Carolina work to the Pacific Northwest.

The three individuals in their motion to intervene first seek to be granted unlimited intervention rights to participate fully in all aspects of the case, i.e. the evidentiary stage before

[1] It must be noted that these allegations are currently simply unlitigated complaint allegations, opposed by Boeing, in a case that has not yet been adjudicated.

the trial administrative law judge,[2] as well as participating in the argument or briefing stage of the unfair labor practice proceeding at the trial level and presumably in any subsequent process of review. Thus, they seek the right to participate fully in the litigation, participating in settlement negotiations, recommending and or opposing settlement, contesting the alleged unfair labor practices, i.e. the complaint allegations of wrongdoing, and litigating all aspects of the question of what an appropriate remedy might be, should Boeing be found to have wrongfully placed the work in South Carolina. Alternately, if a full intervention is not granted, the moving parties seek the right to file a post-hearing brief with the administrative law judge on all aspects of the alleged violations and the remedies then at issue.[3]

Although Board Rule 102.29, quoted in part above, permits the administrative law judge to grant "intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper," such judicial discretion is not unlimited and the Board has and will review such administrative law judge determinations in appropriate circumstances. Thus, the Board has on many occasions considered issues of intervention by moving parties in many different circumstances reversing judges and both allowing intervention or denying it in given cases. The Board has therefore provided significant guidance to its administrative law judges on the question of intervention in various types of cases. Importantly however, the Board's discussion and analysis of various intervention situations depends heavily on the type of Board case involved and the type of entity seeking intervention in any given case. It is therefore necessary to be mindful of the type of relationships at issue in the various Board cases that offer guidance, the identity of the intervenor to be, and the relationship between the two in light of the general type and nature of the given case. An important question is whether or not the moving parties are interested parties and, if so, the nature of their interest.

The counsel for the moving parties and Boeing cite a host of Board and court cases dealing with intervention. The General Counsel and the Machinists argue these cases are not on point. I have closely considered the cases with focus on the nature of the relationship of the intervenors or potential intervenors to the issues in the unfair labor practice cases involved. In agreement with the General Counsel, I find the bulk of the cited cases of little value in deciding the instant issue because the interests of the parties whose motions for intervention were under consideration in those Board and court cases are clearly distinguishable, i.e. importantly different, from the instant case.

Many of those Board and court cases cited by counsel for the individuals who here seek to be intervenors and Boeing, while dealing with unfair labor practice intervention, involved

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[2] The motion states at 2:

Intervenors seek to fully participate as parties in this case, as they have relevant evidence concerning their opposition to representation by the IAM at the Boeing facility in North Charleston, South Carolina, including Mr. Murray's successful decertification of the same union in *The Boeing Company/IAM,* Case No. 11-RD-723. Intervenors also wish to participate to oppose the draconian remedies sought by the General Counsel, to wit: the disabling of their work site and their discharge by Boeing in South Carolina.

[3] The motion to intervene states at 2:

Alternatively, Intervenors wish to submit a post-hearing brief on behalf of themselves and all other employees at Boeing's North Charleston plant, particularly as the case relates to: a) the remedies sought by the General Counsel; b) Intervenors' exercise of their Section 7 rights to reject unionization by the IAM; and c) Intervenors' desire to work in South Carolina in a nonunion setting and to enjoy the protections of Section 14(b) of the Act, 29 U.S.C. § 164(b), and the South Carolina Right to Work Law, S.C. Code Ann. §§ 41-7-10 through 90.

representation cases or issues of representation or majority status issues in bargaining units in unfair labor practice cases. See e.g. *Taylor Bros., Inc.*, 230 NLRB 861, 861 fn. 1 (1977), *J. P. Stevens & Co.*, 179 NLRB 254, 255 (1969), enfd. 441 F.2d 514 (5th Cir. 1971, cert. denied 404 U.S. 830 (1971) and *Spruce Pine Mfg.*, 153 NLRB 309, 309 fn. 1 (1965), enfd. in part 365 F.2d 898 (D.C. Cir. 1966). Employee support for or opposition to union representation is a significant interest found by the Board to support intervention in many cases. The instant case does not involve representational questions in any bargaining unit and the extent of support for the Machinists or any other labor organization among Boeing's South Carolina employees, including the potential intervenors herein, is not material to the merits of the allegation of the complaint or the General Counsel's proposed remedy. Therefore the Board cases dealing with such representational situations do not apply to the instant circumstances.

A separate line of Board intervention cases deals with interventions by pension or trust funds which move to intervene to protect assets under the requirements of other federal and state statutes such as ERISA. See e.g. *Operating Engineers Local 12 (Griffith Co.)*, 212 NLRB 343, 345 (1974), revd. on other grounds 545 F.2d 1194 (8th Cir. 1976). *Camay Drilling Co.*, 239 NLRB 997, 998–998 (1978).[4] These Board and court cases involve fiduciary and other financial obligations under various financial regulations and the unique intervention factors in such circumstances. Again these cases are not relevant to the issues here.

Other cited Board cases dealing with intervention address employee intervenors being allowed to participate in unfair labor practice cases dealing with dues obligation of groups that include the employees seeking intervention. A direct financial interest in the outcome of the unfair labor practice case is evident in such a context. That is not the case herein. Finally, there are Board discussions of employee intervention in post-election representation cases involving the intervening employees and cases again where the majority status of employee, including the employees involved in the intervention question, or employee support for a labor organization in certain circumstances, is being litigated. Again these cases are importantly distinguishable.

In my view all the above-discussed types of cases are distinguishable from the intervention issue before me because they do not address or involve the specific interests of the moving individuals here, i.e. employees who, under the theory of the complaint, are employee beneficiaries of an employer's prior discriminatory conduct respecting other employees and who, having gained at others wrongful loss, are at risk of losing such post-discrimination awarded benefits, if the unfair labor practice case against the employer is lost and the employer is ordered to return the wrongfully removed benefits to the original discriminatees.

The moving employees advance on brief the District of Columbia Circuit Court's decision in *Local 57, International Ladies' Garment Workers Union v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967), denying enforcement of *Garwin Corporation*, 153 NLRB 664 (1965). The General Counsel argues it is distinguishable. The decision and the Board case it reviews are worth of examination. In *Local 57*, the District of Columbia Circuit Court considered and denied enforcement of a runaway shop violation remedy directed in a Board decision in which a New York employer was found to have discrimatorily closed its New York facility, moved to a Florida

[4] In this context the Board cited Section 554(c) of the Administrative Procedure Act 75 U.S.C. Sec. 551-559. (hereinafter referred to as the APA) which provides, in pertinent part:

> (c) The agency shall give all interested parties opportunity for denied
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> (1) submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit.

location, and there resumed its New York operations with new employees. The Board in the decision under review, differently titled from the Circuit Courts decision as *Garwin* Corporation, changed its up-till-then traditional remedy in runaway shop cases. In *Local 57 the* District of Columbia Circuit Court considered the Board's new remedy.

In earlier Board cases, and in the remedial order of the Trial Examiner in *Garwin, 153 NLRB 664, (TXD)* at 664, which trial examiners decision was the trial judges decision that the Board considered in its *Garwin* decision, the up-to-that time traditional remedial order for runaway shop violations under Section 8(a)(3) of the Act directed the runaway employer to either return to the original (here New York) location and resume operations there or, in the alternative, if the employer chose to continue operations only at the new facility (here Florida), it must, as part of the directed Board remedy in such a circumstance, undertake certain actions and obligations at that new facility. More specifically, if the employer's election was to stay at the new facility, the employer under this older runaway shop remedy would be ordered to bargain with the union "contingent 'only upon proof' that the Union represents a majority of employees at that facility", 153 NLRB 664, (TXD) at 665.

The Board in *Garwin*, modifying the remedial order of the trial examiner, which was as described above, explicitly changed the trial examiner's traditional remedy in the case and ordered as part of its new remedy that the employer, if it elected to stay in Florida, must recognize and bargain with the union as the representative of the new location's unit employees irrespective of the union's majority status within that employee complement. The Court in *Local* 57, reviewing the Board's *Garwin decision,* rejected the Board's new remedial bargaining obligation imposition because, the court analyzed, the Board order imposed a bargaining obligation on employees at the new facility independent of consideration of those employee's support for the union in the bargaining unit at that facility and therefore the remedial order potentially imposed union representation on the new employees without the union enjoying majority support among those employees. The Circuit Court decision thus considered the question of union support among the new employees in the new facility, i.e. the shop that ran away, in reviewing the Board decision. In *Local* 57 then, the representational interests of new facility employees were a critical factor in the Court's decision.

The moving employees argue that the Circuit Court in *Local* 57, in considering the union sentiments of the new employees at the employer's new facility, supports the notion that the rights of employees in the instant case at the new site of work – those in South Carolina - should have their views on union representation considered and this fact, the counsel for the three argues, further supports and sustains the employees' motion to intervene herein.

The problem with the rationale asserted by counsel for the moving employees is that in the instant case neither the complaint allegations nor the remedy sought by the General Counsel considers South Carolina employee union sentiments or the representation rights of South Carolina employees at all. Nor does General Counsel via his sought after remedy seek to impose on South Carolina employees a bargaining obligation, or seek to award, conditionally or unconditionally, the Machinists any representational rights whatsoever respecting any employees in the new South Carolina location. The General Counsel's complaint and proposed remedy simply do not address or seek to effect in anyway a change in the representational rights of the South Carolina employees who received the alleged runaway work. That being so, employee sentiments at the new location, contrary to the circumstances in Local 57, are not at issue in the instant case and are irrelevant and immaterial to the theories of the complaint violations and the appropriateness of the remedy sought. To repeat, the question of union representation or non-representation of the South Carolina employees by the Machinists or any other labor organization will not be affected by any possible application of the remedy sought by the General Counsel. Thus in my view *Local* 57 is distinguishable for the instant case and

gives no succor to the moving parties quest for intervention to address employee union sentiments.

I consider the closest situation to the circumstances of the current moving parties to be a Board unfair labor practice case dealing with Section 8(a)(3) and (1) discriminatory conduct violations of the Act, wherein an employee or employees obtained a position or other benefit as a result of complaint alleged wrongful discrimination against other employees and those benefitting employees sought to intervene in the Board unfair labor practice case to preserve the benefit they received from the Employer's alleged discrimination against others. Thus, for example, this situation might arise if a new employee who replaced a wrongfully discharged employee feared his or her newly obtained work benefits or job would be threatened, or even lost if the wrongdoing termination that created the job vacancy that was thereafter given to the potential intervenor to obtain the work was undone by a Board remedial order directing the employer to take back the wrongfully discharged employee or restore the benefits wrongfully passed to other employees. Thus, the new or replacement employee i.e. the employee receiving the benefit lost by the original employee earlier discriminated against, might understand that his or her benefits were threatened by such an NLRB adjudication and NLRB remedy of such employer discrimination and, this employee might seek on that basis to intervene in the wrongful discrimination litigation and oppose any remedy that might reinstate the former employee or transfer work back to the discriminated against employee to the intervening employee's detriment.

Since unfair labor practice cases involving allegations of violations of Section 8(a)(3) of the Act are common, it might be expected that the myriad beneficiaries of such discrimination might commonly seek to intervene in Board cases. Indeed the fact that such Board intervention cases are rare if extant at all, the General Counsel and the Machinists argue, supports the proposition that such interventions are not proper. Further they argue that were such interventions proper, the nature of Board unfair labor practice cases would be significantly different.

Highly relevant to that specific relationship of potential intervenor and unfair labor practice case, however, are two squarely in point cases from the United States Courts of Appeals for the 9th Circuit addressing intervention decisions made in United States Federal

District Court litigation under Federal Rule of Civil Procedure 24.[5] In my view they provide important guidance and instruction in this connection. In the first case, *Donnelly v.Glickman*, 159 F3d 405 (9th Cir. 1998), the Circuit Court sustained the United States District Court's denial of a motion to intervene stating, in part, at 411:

> The proposed intervenors also argue that they have an interest in Donnelly's and O'Connor's individual remedial requests involving work assignments and promotions. However, the proposed intervenors have no protectable interest in positions that they may have obtained due to specific discriminatory employment decisions.

In the second case, *Dilks v. Aloha Airlines, Inc.* 642 F.2d 1155, 1157 (9th Cir. 1981)(per curiam), the Circuit Court under FRCP Rule 24 considered the US District Court's denial of a motion to intervene in an action by an individual alleging wrongful discharge. ALPA, a labor organization, sought to intervene. The Court noted at 642 F.2d at 1157:

> Finally, ALPA contends that it must defend the rights of pilots junior to Dilks, who may be adversely affected if Dilks is reinstated. It is, of course, true that whenever someone is discharged, those junior to him may improve their seniority, and, if a reinstatement is required, the juniors will revert to a lesser seniority. [Citation omitted.] But the juniors have no legally protectable right to benefit from an invalid discharge.

I find the moving employees herein to be similarly situated to the intervenors in the Court of Appeals *Donnelly* and *Dilks* cases discussed immediately above. As in the cited cases, if the work at issue in the instant case is found to have been improperly taken from the Northwest and sent to South Carolina, and if the General Counsel's proposed remedy is adopted, i.e. sending the work back North, then the South Carolina employees, including the moving parties herein, were and are, respectively, at risk to lose the benefit of that illegally transferred work and have the benefits to them of being employed to do work that Boeing illegally transferred withdrawn. In this situation they are legally equivalent to those who were seeking intervention in the 9th Circuit cases cited above. I find therefore the proposed intervenors herein, as was true concerning the potential intervenors in the cited cases, have no protectable interest in the positions they seek to protect or the work they may have obtained or

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[5] FRCP Rule 24. Intervention

(a) Intervention of Right.

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention.

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

will obtain due to the complaint alleged specific discriminatory employment decisions of Boeing. Without such protectable interest, as in the cases cited, the movants' motion to intervene is not well founded. The movants are not simply not directly interested parties with a legitimate direct interest in the outcome of the unfair labor practice proceeding under the cases cited.

I have found the two cited 9th Circuit Court of Appeals cases persuasive in establishing the moving parties here have no protected or direct interest in the instant case. I further find this lack of direct interest sufficient, standing alone, under the above analysis, to justify denying the motion to intervene. In addition, however I find there are important independent factors supporting a denial of the motion for intervention in this case.

First, there is no contention, nor based on my experience with the litigation to date would I find, that Boeing or any other party is not well represented by counsel and is not devoting sufficient time, attention and resources to make this a well litigated case in which all the relevant issues under the complaint and the proposed remedy are rigorously dealt with. The adversary system of jurisprudence will work in this case without additional parties. Thus, there is no suggestion that intervention by anyone is needed to provide rigorous representation on behalf of any current party or any complaint allegation or complaint proposed remedy.[6]

Second, if intervention offers no prospect of improving or enhancing the quality of unfair labor practice representation or the speed or efficiency of the instant litigation, it does to the contrary threaten to complicate and delay the trial. It is clear, and I find, the litigation of the General Counsel's theories of discrimination and Boeing's economic defenses to those allegations and to the proposed remedy in the instant case will involve substantial and complicated procedural and evidentiary issues regarding disputes regarding discovery, privilege and admissibility, complications respecting the production and management of voluminous documents and the production, organization and management of information of a confidential and proprietary nature, the handling of which will involve procedures, protocols and agreements among the parties to insure confidentiality, limited circulation and use, circumspection in document handling, and the probable initiation of sealed exhibit protocols. Such processes, as well as the disputes that arise respecting the obtaining and use of such information, are best handled with the fewest parties proper under the circumstances. In a case involving very substantial disputed documentary and confidential evidence of this type, this is no light or inconsequential matter. Adding another party litigant to the trial mix is a seriously complicating event. Even with the possibility of limitations on an intervenor's participatory rights, as Boeing suggests,[7] granting the motion to intervene would both further complicate and protract and delay the proceeding.

Given all the above and considering the motion to intervene, the arguments of the movants, the positions of the other parties as described, the Board and court guidance cited,

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[6] To the extent the moving parties in their motion to intervene represent they have personal evidence to offer, they are not precluded from becoming witnesses on behalf Boeing or any other party to the litigation. Witnesses of any party, or potential witnesses, who have relevant evidence to offer, howsoever important, are not elevated to the status of intervenors simply by virtue of their self declared value as witnesses.

[7] Boeing in its position statement at 3 asserts:

Boeing is mindful that proceedings in this case are expected to be lengthy and that, accordingly, it may be appropriate to place reasonable limitations on the time allocated to Intervenors to present their case. Boeing also reserves the right to object to particular evidence offered by Intervenors on the basis of relevance and other grounds, including evidence identified in Intervenors' Motion.

and the record of the litigation as a whole to date, and noting the discretion the Board's Rule 102.29 affords an administrative law judge hearing an unfair labor practice case on motions to intervene, I find there is no reasonable basis under all the circumstances to allow the intervention. I shall therefore exercise my discretion to deny the motion to intervene.[8]

Based upon all the above, I issue the following:

ORDER[9]

The Motion to Intervene shall be, and it hereby is, denied.

Issued at San Francisco California, this 8th day of June, 2011.

Clifford H. Anderson
Administrative Law Judge

[8] The motion's alternate request that the movants be allowed to brief the issue of remedy, in essence a request to file an *amicus curiae* brief, seems to me to be best directed to the Board in considering any remedy in this case on exceptions. It is only at the Board level and thereafter that policy arguments should be made. Administrative law judges, including this one, simply apply current law. At the trial level precedent not policy prevails. Motions concerning amicus filings, should the matter come before the Board on exceptions, would properly be directed to the Board at the appropriate time.

[9] Appeals of administrative law judge rulings on motions to intervene filed pursuant to the Board's Rule 102.29 are governed by the Board's Rule 102.26.

FORM NLRB 577
(4-84)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

AFFIDAVIT OF SERVICE OF – Ruling on Motion to Intervene

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by facsimile transmission upon the following persons, and by regular mail addressed to them at the following addresses:

Richard Ahearn, Regional Director Mara-Louise Anzalone, Esq. Peter Finch, Esq. Rachel Harvey, Esq.	(206)220-6305
The Boeing Company Richard B. Hankins Drew E. Lunt of McKenna Long	(206)544-2020 (404)527-7088 (404)527-4198
William J. Kilberg Alston D. Correll, Esq. Daniel J. Davis, Esq. Paul Blankenstein Matthew D. McGill Eugene Scalia of Gibson Dunn	 (404)527-6866 (202)530-9557 (202)530-9532 (202)530-9662 (202)467-0539
David Campbell, Esq., Carson Glickman-Flora, Esq., Robert L. Lavitt, Esq. and Jennifer Robbins, Esq. of Schwerin Campbell	(206)378-4132
Christopher Corson, Esq. of IAMAW	(301)967-4594
Tom Wroblewski, President Machinists, DL 751	(206)764.0303
Glen M. Taubman, Esq. and Matthew C Muggeridge, Esq. of NRTW for the Individuals	(703)321-9319

MARA-LOUISE ANZALONE, ESQ., PETER FINCH, ESQ. AND RACHEL HARVEY, ESQ.
NLRB REGION 19
915 SECOND AVENUE, ROOM 2948
SEATTLE, WA 98174-1078

THE BOEING COMPANY
ATTN: MR. DOUGLAS P. KIGHT, ATTORNEY
PO BOX 3707, MS 13-08
SEATTLE, WA

RICHARD B. HANKINS
DREW E. LUNT, ESQ.
ALSTON D. CORRELL, ESQ.
MCKENNA LONG & ALDRIDGE, LLP
303 PEACHTREE STREET, NE, SUITE 5300
ATLANTA, GA 30308-3265

CHRISTOPHER CORSON, GENERAL COUNSEL
IAMAW
9000 MACHINISTS PLACE
UPPER MARLBORO, MD 20772-2687

DENNIS MURRAY, CYNTHIA RAMAKER & MEREDITH GOING, SR.
C/O GLEN M. TAUBMAN, ESQ.
MATTHEW C. MUGGERIDGE, ESQ.
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 BRADDOCK ROAD, SUITE 600
SPRINGFIELD, VA 22151-2110

TOM WROBLEWSKI, PRESIDENT
MACHINISTS, DL 751
9135 15TH P1. S
SEATTLE, WA 98108-5100

WILLIAM J. KILBERG, ESQ., DANIEL J. DAVIS, ESQ.
PAUL BLANKENSTEIN, ESQ. AND
MATTHEW D. MCGILL, ESQ.
EUGENE SCALIA, ESQ.
GIBSON, DUNN & CRUTCHER, LLP
1050 CONNECTICUT AVENUE, NW
WASHINGTON, D.C. 20036-5306

DAVID CAMPBELL, ESQ.,
CARSON GLICKMAN-FLORA, ESQ.
ROBERT L. LAVITT, ESQ.
JENNIFER ROBBINS, ESQ.
SEAN LEONARD, ESQ.
SCHWERIN, CAMPBELL, BARNARD, IGLITZIN $ LAVITT, LLP
18 WEST MERCER STREET, SUITE 400
SEATTLE, WA 98119-3971

Subscribed and sworn to before me this
8th day of June 2011.

Vanessa Lee
Designated Agent

United States Government

NATIONAL LABOR RELATIONS BOARD

Division of Judges
901 Market Street – Suite 300
San Francisco, CA 94103-1779
Phone (415) 356-5255 Fax (415) 356-5254

June 8, 2011

TO:

Richard Ahearn, Regional Director Mara-Louise Anzalone, Esq. Peter Finch, Esq. Rachel Harvey, Esq.	(206)-220-6305
The Boeing Company	(206)544-2020
Richard B. Hankins Drew E. Lunt of McKenna Long	(404)527-7088 (404)527-4198
William J. Kilberg, Esq. Alston D. Correll, Esq. Daniel J. Davis, Esq. Paul Blankenstein Matthew D. McGill Eugene Scalia of Gibson Dunn	(202)530-9559 (404)527-6866 (202)530-9557 (202)530-9532 (202)530-9662 (202)467-0539
David Campbell, Esq., Carson Glickman-Flora, Esq., Robert L. Lavitt, Esq., Jennifer Robbins, Esq., and Sean Leonard, Esq. of Schwerin Campbell	(206)378-4132
Christopher Corson, Esq. of IAMAW	(301)967-4594
Tom Wroblewski, President Machinists, DL 751	(206)764-0303
Glen M. Taubman, Esq. and Matthew C Muggeridge, Esq. of NRTW for Individuals	(703)-321-9319

FROM: Judge Clifford H. Anderson

RE: THE BOEING COMPANY, 32-CA- 32431 - ADMINISTRATIVE LAW JUDGE'S RULING

12 pages