UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE BOEING COMPANY

and **Case No. 19-CA-128941**

SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES IN AEROSPACE, affiliated with INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, LOCAL 2001, AFL-CIO

ANSWERING BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO EXCEPTIONS OF RESPONDENT TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. PREFACE

Pursuant to §102.46 of the Rules and Regulations of the National Labor Relations Board (Board), Counsel for the General Counsel (General Counsel) submits this Answering Brief to the Exceptions filed by The Boeing Company (Respondent or Boeing), to the July 14, 2015, decision of Administrative Law Judge Dickie Montemayor (ALJ) in the above captioned case.[1] [JD (SF)-26-15] (ALJD or Decision). The ALJ found that Respondent violated §§ 8(a)(5) and (1) of the Act by failing and refusing to provide presumptively relevant information to the Society of Professional Engineering Employees in Aerospace, Local 2001, IFPTE, AFL-CIO (SPEEA or Union). He further found that the Union had not waived its right to request or receive that information.

As will be discussed below, Boeing excepts to the ALJ's findings, relying largely upon self serving and/or discredited testimony and otherwise unsupported record evidence. In addition, Boeing again attempts its same tactical smoke screen of inconsistent positions the ALJ already rejected: Boeing first alleged that it had already provided information to the Union, then that the Union had the opportunity but had not asked for or about the information, and finally, even if it had asked for the information, Boeing was under no obligation or duty to provide it. As such, it is respectfully submitted that the Board sustain the ALJ's finding of fact, conclusions of law, and proposed remedy, all of which are appropriate, proper, and fully supported by the record, and adopt his Decision and Recommended Order.

[1] References to ALJD are noted as (JD _:_-_), which indicates the decision page and line, respectively. References to the official transcript are designated as (Tr. _:_-_), which indicates the appropriate page and line, respectively. References to the General Counsel's Exhibits are designated as (GC Ex. _) with the appropriate exhibit number.

II. THE ALJ'S FACTS AND FINDINGS THAT BOEING FAILED TO RESPOND TO THE INFORMATION REQUEST AND HAD A DUTY TO PROVIDE THE INFORMATION SHOULD BE AFFIRMED

The ALJ found the information requested by the Union on March 27, 2014, was relevant to the Union's performance as bargaining unit representative. Relying on record testimony, the ALJ determined that the information sought directly pertained to the Union's responsibilities regarding both the administration and the enforcement of an existing collective-bargaining agreement because the movement or relocation of bargaining unit work directly impacts the terms and conditions of employment of bargaining unit employees. (JD 10:40-46)(Tr. 38:15-25; 39:1-4; 45:23-25; 46:1-25; 47:1-25)(GC Ex. 2 and 3) As such, he properly concluded that Boeing had a duty to provide the Union with the requested information. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956).

The ALJ further found the requested information not only relevant, but presumptively so because each section of the request facially sought information about the movement, relocation or realignment of bargaining unit work.[2] (JD 10:28-30). Information about the movement of work, including studies, is integral to the Union's function as exclusive collective bargaining representative as it directly impacts the employees' terms and conditions of employment. *Southern California Gas Co*., 344 NLRB 231, 235 (2005). Further, because Boeing admitted that plans to move bargaining unit work, and studies for the movement of this work, could impact the bargaining unit (Tr. 168: 20-25; 169: 22-23), the ALJ's reliance on 35 years' worth of Board decisions holding that the relocation of work directly impacts the terms and conditions of

[2] As stated by the ALJ, "Section 1a sought 'studies' regarding the **movement of work**. Section 1b sought documents relating to the **movement of work**. Section 1c sought information regarding the time line of the **movement of work**. Section 1d sought information regarding the acquisition of property related to **the movement of work**. Section 1e sought information regarding meetings held that related to the **movement of work**. Section 1f sought information regarding 'Operation Dragonridge,' a codename for a study related to the **movement of work**." (JD 10:31-36) (Emphasis added).

employment of affected employees and information including studies regarding such is presumptively relevant, was particularly appropriate. (JD 10: 40-46).

III. THE ALJ APPROPRIATELY FOUND THAT THE UNION DID NOT WAIVE ITS RIGHT TO THE REQUESTED INFORMATION AND THE REQUEST WAS NEITHER OVERLY BROAD NOR UNDULY BURDENSOME

First, contrary to Boeing's contention, the ALJ appropriately rejected Boeing's contention that the Union had waived its right to the information based on any alleged failure to clarify the request. Specifically, the ALJ correctly found that it did not seek to clarify the scope of the information request; rather, its letters from Marx in April 2014 only obfuscated the matter. (JD 12:1-4). Indeed, relying on those sole communications that address this issue, the ALJ found that the Marx letters of April 2 and April 30, 2014 did not provide the Union with any information, other than to say that Boeing has already provided it. (JD 9:40-41; 12:1-2)(GC EX 7 and 9). Further, as the ALJ correctly pointed out, Marx improperly placed Boeing's burden of clarification of the request on the Union, rather than where it belonged under established Board law. (JD 11:45-46; 12:1). *See, e.g., DIRECTTV U.S. DIRECTTV Holdings, LLC,* 361 NLRB No. 124, slip op. at 2 (December 4, 2014), citing Superior *Protection Inc.*, 341 NLRB 267, 269 (2004) (employer may not simply refuse to comply with an ambiguous or overbroad information request, but must request clarification or comply to the extent it encompasses necessary and relevant information).

Moreover, even had the burdens been properly aligned, there was still no waiver because, as the ALJ correctly found, Articles 2 and 8 of the parties' collective bargaining agreement did not clearly give Boeing the unfettered right to relocate the workforce. (JD 12:35-39). Article 2 is a very broad management rights clause; however, broad management rights clauses are disfavored when used to infer waiver of a statutory right and any waiver must be clear and

unmistakable. *Metropolitan Edison Co. vs. NLRB*, 406 U.S. 693, 708 (1983) (clear and unmistakable waiver needed); *Pepsi America Inc.*, 339 NLRB 986 (2003) (disfavored); *Johnson-Bateman Co*, 295 NLRB 180 (1989) (disfavored). Article 8.2 does not clearly define Boeing's workforce management rights or the duty to bargain; rather, it authorizes workforce reduction, not workforce relocation such as here, where the work was being moved to a different location presumably to be performed by nonunion personnel who were not members of the bargaining unit. (JD 12:34-39). Since neither Article affords Boeing the unfettered right to unilaterally relocate bargaining unit work, Boeing must bargain with the Union prior to any job relocations. Whether the Union needs to demand effects bargaining or any bargaining at all can only, as the ALJ properly found, be determined after it obtains the very sort of information requested in this matter. (JD 13:7-10) *Gaetano & Associates*, 344 NLRB 351 (2005)

Any potential past practice does not alter the finding that there was no waiver. E.*R. Steubner, Inc.*, 313 NLRB 459 (1993) citing *NLRB v. Miller Brewing Co.*, 408 F.2d 12 (9th Cir. 1969); *Owens-Corning Fiberglass*, 282 NLRB 609 (1987) (union's past practice permitting unilateral changes … does not constitute waiver of union's right to bargain over such changes or to insist upon adherence to the contract) As the ALJ properly determined, past practice does not and did not here forever waive the Union's future statutory rights. (JD 13:31-32). In fact, as the ALJ indicated, there is no evidence to show that the Union consciously waived its rights even after the parties fully discussed the matter. (JD 13:32-35)

Second, the ALJ accurately determined that the focus of the information request was not overly broad but, rather, was centered on the movement of bargaining unit work. (JD 10:30-36; 12:5-7) Despite Boeing's employment of contortionist tactics in contending that every single shred of paper, even drawings on napkins, concerning potential movement of bargaining unit

work would have to be produced under this information request (Tr. 111:1-2), the ALJ rightly rejected this absurdity, finding the scope of the Union requests to be easily discernible. (JD 10:30-36; 11:13-5; 12:5-7). Moreover, as the ALJ correctly pointed out, the request itself was prompted by Boeing's several announcements about its plans to move thousands of bargaining unit jobs out of the Puget Sound area and studies associated with those and other planned relocations. (JD 11:12-16).

Despite its fallacious arguments to the contrary, Boeing could and did discern the focus of the information request as well as its breadth without question. If Boeing was so inclined it could have easily produced information about decisions that it had already made, including information about ongoing studies and plans to move bargaining unit work out of the Puget Sound area. Therefore, it was eminently appropriate for the ALJ to find that the information request was not burdensome or overbroad, and his decision should be affirmed.

IV. CONCLUSION

Based on the foregoing, it is respectfully submitted that the Board should deny Boeing's Exceptions and adopt the findings of fact and conclusions of law of the ALJ that Boeing violated §§ 8(a)(5) and (1) of the Act by failing and refusing to provide relevant and necessary information requested by the Union.

DATED at Seattle, Washington, this 25th day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Answering Brief of Counsel for the General Counsel to Exceptions of Respondent to the Decision of the Administrative Law Judge was served on the 25th day of August, 2015, on the following parties:

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