

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE BOEING COMPANY,  
Respondent,

and

SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES  
IN AEROSPACE, IFPTE LOCAL 2001,  
Charging Party

Case No. 19-CA-128941

Respondent's Reply Brief in Support of its Exceptions to the Decision of  
the Administrative Law Judge, Honorable Dickie Montemayor,  
in Case No. 19-CA-128941

## I. INTRODUCTION

Counsel for the General Counsel's and the Union's assertions notwithstanding, this is not a case where The Boeing Company ("Boeing" or "the Company") refuses to provide any information to the Society of Professional Engineering Employees in Aerospace ("SPEEA" or "the Union") regarding potential movement of bargaining unit work. To the contrary, Boeing freely and regularly shares such information with the Union before it is legally required to do so. Rather, this case is about the Union attempting to take advantage of an overbroad information request to obtain what the Union is not otherwise entitled to, and the Union is, unfortunately, doing everything that it can to accomplish that objective, including misrepresenting the record and obscuring the real issues.

To clear the morass created by Counsel for the General Counsel's and the Union's briefs, Boeing does not dispute that it has made decisions that have resulted in the relocation of bargaining unit work, nor does it dispute that it announced two such decisions in December 2013 and April 2014. As such, Boeing does not dispute that, subject to a proper information request, it would have had an obligation to provide the Union with certain information regarding the planned movement of work *after* those decisions were announced. What Boeing does dispute, and what the record evidence utterly fails to establish, is the ALJ's finding that the information request was limited only to movement of work decisions Boeing had already made.

The record evidence demonstrates that the request Boeing actually received from the Union referred to "possible" movement of work and included no specific request regarding any prior decision announced by Boeing. In contrast to the Administrative Law Judge's (ALJ) pivotal finding that "[i]t simply was not true (as alleged by Respondent) that the union sought information about 'potential movement of work for which Boeing had not yet made a decision,'" the Union's April 11, 2014 letter and both the Union's and the Counsel for the General

Counsel's briefs make clear that the request seeks information about "potential"—*i.e., possible*—movement of work. Accordingly, the ALJ's finding, upon which the whole decision hinges, is in clear error and must be reversed.

Because the request improperly sought information about potential movement of work for which Boeing had made no decision, Boeing requested clarification from the Union, and the Union provided *none*, Boeing satisfied its obligations under the Sections 8(a)(5) and (1) of the National Labor Relations Act. Therefore, the ALJ Decision must be reversed and the Complaint dismissed.

## II. ARGUMENT

### A. The Entire Request Was Improper Because It Sought Information About Possible Movement of Work For Which Boeing Had Made No Decisions

#### 1. Counsel for the General Counsel and the Union agree that the request sought information about potential movement of work.

Because arguing otherwise would prevent the Union from getting what it ultimately wants, the Union argues that the ALJ did not find that the Union's request only sought information regarding "decisions already made by Boeing to move bargaining unit work." (Union Br. at p. 7). The Union's argument is both baseless and illogical given that the ALJ expressly refused to follow the Board's decision in *Valley Mould and Iron Co.*, 226 NLRB 1211, 1213 (1976), and dismiss the Complaint because, according to the ALJ: "[i]t simply was not true (as alleged by Respondent) that the union sought information about 'potential movement of work for which Boeing had not yet made a decision.'" (ALJD at 11:16-20). As such, it is obvious the ALJ found that the request did *not* seek information about potential movement of work.

Nevertheless, the Union is correct in stating that the March 27, 2014 request sought information about possible movement of work, and this fact is undisputed:

- “The information about *potential* relocation of SPEEA work or work opportunities is presumptively relevant information which the Union is entitled to upon request.” (GC Ex. 8) (emphasis added);
- “As stated in the request, SPEEA requires information about the *potential* transfer and movement of work currently performed by SPEEA-represented employees...” (GC Ex. 8) (emphasis added);
- “If Boeing was so inclined it could have easily produced information about...*ongoing studies*...to move bargaining unit work out of the Puget Sound area.” (Counsel for the General Counsel’s Br. at p. 5) (emphasis added);
- “information about Boeing plans to relocate work – whether in the *preliminary* or implementation stages – is relevant and discoverable (Union Br. at p. 5) (emphasis added); and
- “Board law supports SPEEA’s Request for information about not only actual, but *prospective*, work relocation decisions.” (Union Br. at p. 11) (emphasis added).

These admissions, along with the request itself, demonstrate that the ALJ Decision is predicated on an erroneous fact, and must be reversed.<sup>1</sup>

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<sup>1</sup> The Union apparently disputes Boeing’s claim that “Dragon Ridge” is an overarching term used to describe a series of different operating opportunities and realignments under review by the Company—*i.e.*, potential movement of bargaining unit work. (Union Br. at n.12). The Union, however, has no basis to dispute Boeing’s evidence on this issue, (Tr. 100, 117), as the Union’s witness admitted that he did not know what Dragon Ridge is:

Q ...Do you know sitting here today what Operation Dragon Ridge [is]?

A *Not specifically.*

Q Do you have a general knowledge of what it is?

A I have a *suspicion* – an idea of what it *might* be about.

...

A Well, from my experience, I know that Boeing often gives these code names to their plans and decisions to relocate work and Mr. Goforth told me to put that on there, *I believed* that it was a code name for relocation of work.

Q *But you don’t know that; do you?*

A *I do not know that.*

(Tr. 88:18 – 89:10) (emphasis added).

2. The Union is not entitled to information about movement of work decisions Boeing has not yet made.

Until Boeing decides that it wants to move bargaining unit work, it has no obligation to bargain over such decisions, and thus no obligation to provide information relating to that decision. Despite the Union's efforts to argue that it is entitled to information about potential movement of work before Boeing has made any decision to implement, Board law regarding decisional bargaining and *Valley Mould* confirm that an employer has no obligation to disclose information about a decision it is only contemplating and has not yet made. *See Salem College*, 261 NLRB 327 (1981); *Paramount Liquor Co.*, 270 NLRB 339, 343 (1984); *Globe-Union, Inc.*, 222 NLRB 1081 (1976). *Ingham Regional Medical Center*, 342 NLRB 1259, 1262 (2004); *BC Industries, Inc.*, 307 NLRB 1275 n.2 (1992).

Neither the Union nor Counsel for the General Counsel cite to any case in which the employer was required to provide information about a movement of work or similar decision **before** it made the decision. Rather, in each of the cases they cite, the request for information was made after the decision had already been made and announced. For example, the Union cites *Litton Microwave Cooking Products Division*, 283 NLRB 973 (1987), purportedly for the assertion that employers have an obligation to produce exploratory and prospective materials **before** a decision has been made. However, the request for information in *Litton* came **after** the employer notified the Union of its decision to transfer work.<sup>2</sup> *Id.* at 974-75, 981-82. *See Leach Corp.*, 3121 NLRB 990, 990-91 (1993) (request made after decision announced); *North Star Steel*, 347 NLRB 1364, 1368 (2006) (request made after the transfer of work had occurred and

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<sup>2</sup> Both Counsel for the General Counsel and the Union appear to believe that Boeing is arguing that a union is **never** entitled to studies and other exploratory information relied upon by an employer to make a movement of work decision, even if the information is requested after the employer makes its decision to move work. That is not Boeing's argument.

request did not even concern the decision to transfer work); *E.I. du Pont de Nemours & Co.*, 346 NLRB 553, 555, 557, 577 (2006) (request for information regarding the employer’s “transformation plan” occurred after employer announced its decision); *Whitehead Brothers Co.*, 263 NLRB 895, 896-97 (1982) (information request related to announced decision to discontinue operations); *Safeway Stores, Inc.*, 252 NLRB 682 (1980) (request made after the employer announced decision to install equipment).<sup>3</sup>

Finally, the Union attempts to distinguish *Valley Mould* on the basis that the employer there had not “formed an intention” to effect layoffs when confronted by the union. The Union’s argument fails, however, because until Boeing makes a decision to implement, there is no “intention” to move work. *See* INTENTION, Black's Law Dictionary (10th ed. 2014) (“The willingness to bring about something planned or foreseen; the quality, state, or condition of being set to do something.”). *See also E.I. du Pont de Nemours & Co.*, 346 NLRB at 578-79 (using “intention” interchangeably with “decision”). This is especially true for Boeing as it is undisputed that only a very small percentage of Boeing’s studies ever advance past the exploratory stage. (Tr. 131, 142-43, 178-79). Consequently, the fact that Boeing notifies the Union of a study it is conducting does not mean it has “formed an intention” obligating it to provide the Union with information. As such, the Union’s entire March 27, 2014 request was impermissibly overbroad.

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<sup>3</sup> The Union’s reliance on *Galicks, Inc.*, 354 NLRB No. 39 (2009), is similarly misplaced. *Galicks* is not applicable because the requested information did not concern a future decision to be made by the employer. Rather, it concerned “future projects,” engagements that the employer, a sheet metal contractor, had already secured with its customers. *Id.* at \*1-2.

3. Boeing was excused from responding when the Union failed to clarify the request.

Contrary to the Union's claims, the record compels the finding that Boeing sought clarification of the Union's overbroad request. First, Boeing expressly communicated to the Union that it understood the request was only seeking information about "possible" movement of work:

I am writing in response to your request for information dated March 27, 2014 in which you request extensive information regarding the *possible future* relocation of SPEEA-represented work.

(GC Ex. 7) (emphasis added). Reaffirming its interpretation, Boeing also highlighted the fact that its studies are "often speculative business planning exercises, many of which never progress further than mere exploration." (GC Ex. 7). Yet, the Union never advised Boeing that it wanted information about movement of work decisions Boeing had already announced. Instead, the Union confirmed *twice* in its reply that it wanted information about "*potential*" transfers and movement of unit work. (GC Ex. 8) (emphasis added).

Given the Union's affirmation that it sought information about possible movement of work, and the fact that Boeing had no obligation to provide such information as set forth above, the record evidence conclusively demonstrates that Boeing did all that was required of it: it expressly asked the Union for clarification. Specifically, Todd Zarfos asked Rich Plunkett in April and May 2014, what information the Union needed "above and beyond what we've already provided [at the Joint Workforce Meetings]?" (Tr. 174-75). However, the Union refused to clarify despite the fact that all it needed to do to compel a response from Boeing was indicate that the Union wanted information about movement of work decisions already made by Boeing, information about Boeing's decision to move BR&T work, and/or information about Boeing's

decision to move CAS jobs to Southern California.<sup>4</sup> Given the Union's failure to specify any of those, Boeing was excused from providing any further response. *Good Life Beverage Co.*, 312 NLRB 1060, 1061-62 (1993) (holding that employer did not violate Section 8(a)(5) when it expressed confidentiality concerns in response to information request and the union's conduct prevented the parties from discussing those concerns).<sup>5</sup>

Conspicuously, Counsel for the General Counsel did not address these facts in its response, and the Union merely offers a derisory argument that Boeing failed to meet its burden of proof on this issue.<sup>6</sup> The Union's argument cites no evidence to refute Mr. Zarfos' testimony that he asked Mr. Plunkett for clarification, nor does the Union proffer any valid explanation as to why Mr. Plunkett failed to testify to rebut Mr. Zarfos' testimony. (Union brief at p. 17, 19-20). Accordingly, Boeing more than satisfied its obligations under the Act, and the Complaint must be dismissed.

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<sup>4</sup> As such, Boeing does not claim that SPEEA needed to provide it with "the very same specificity SPEEA was attempting to discover" as asserted by the Union. (Union Br. at p. 19).

<sup>5</sup> Again, Boeing does not deny that it announced a movement of work decision a few months earlier, but the request did not specifically request information about that decision. Even if the request was also directed at decisions Boeing had already made in addition to potential movement of work, the fact that the request sought information about possible movement of work for which Boeing had made no decisions made it overbroad, and Boeing's obligation to respond ceased once it asked for clarification and the Union refused to provide any. *Id.*; *Superior Protection, Inc.*, 341 NLRB 267, 269 (2004), enf'd. 401 F.3d 282 (5<sup>th</sup> Cir. 2005).

<sup>6</sup> The Union also asserts that Boeing's exceptions are merely disagreement with the ALJ's credibility assessments. Not only is the Union's characterization of Boeing's exceptions inaccurate, but as set forth in Boeing's initial brief in support of its Exceptions, the ALJ's only basis for not crediting Mr. Zarfos' testimony about his conversation with Mr. Plunkett was that it was "vague" and unconfirmed in writing. As such, the Board is free to, and based on the record evidence should, overrule the ALJ's finding in this regard. *See Starcraft Aerospace, Inc.*, 346 NLRB 1228, 1231 (2006) (holding that the ALJ failed to acknowledge and credit un rebutted testimony and Board can conduct independent evaluation when ALJ's credibility findings are based upon factors other than demeanor).

## **B. Boeing Had No Obligation to Produce Decisional Information**

Once again, the Union misconstrues Boeing's arguments to avoid the real issue before the Board. Boeing has never asserted that the parties bargained over entitlement to information and thus the Union waived its right to request information regarding the movement of work. What Boeing argues, and what Board law and the record evidence establish, is that the Union's clear and unmistakable waiver of its right to *bargain* about movement of work means that Boeing had no obligation to provide the Union with information for decisional bargaining purposes. As such, the Union must provide some other basis to establish relevancy for decisional information. *See BC Industries, Inc.*, 307 NLRB at 1275; *California Pacific Medical Center*, 337 NLRB 910 (2002); *Ingham Regional Medical Center*, 1259 (2004).

For example, in the Board's recent decision in *Chemical Solvents, Inc.*, 362 NLRB No. 164 (2015), it reversed the ALJ who concluded that the employer did not have to comply with the union's information request to the extent it dealt with the employer's decision to close as the union had waived its right to bargain that decision. In overruling the ALJ, the Board did not overturn *BC Industries* or *Ingham Regional Medical Center* relied upon by the ALJ. Instead, the Board found that the employer had an obligation to provide the requested decisional information because it was relevant to a pending grievance challenging the decision. *Id.* Here, there was no pending grievance challenging the Company's decision to relocate bargaining unit work, and the Union proffered no other reason to which the decisional information would have been relevant given that it had waived its right to bargain such decisions.

Finally, both Counsel for the General Counsel and the Union, just like the ALJ, completely failed to address Mr. Zarfos' testimony that SPEEA proposed changes to Article 8 during *every* collective bargaining negotiations since at least 2002 in an effort to limit Boeing's

ability to move bargaining unit work without first bargaining with the Union. (TR. 124, 161, 165). They also conspicuously did not address the Union's failure to refute Boeing's stated interpretation of the collective bargaining agreement. (GC Ex. 7; GC Ex. 8). Given that Article 8.2 gives Boeing the unfettered right to decide which employees it wants to retain to maintain or improve the efficiency of the company, as well as to determine "[t]he location, occurrence and existence of any condition" necessitating layoffs, it is implicit in Article 8.2 that Boeing has the right to transfer bargaining unit work resulting in, or to effectuate, layoffs. (GC Ex. 2, Art. 8.2; GC Ex. 3, Art. 8.2). At worst, the collective bargaining agreements are ambiguous as to whether Article 8.2 gives Boeing that implicit right, to which the parties' long-standing past practice necessarily gives meaning. *See Pan-Adobe, Inc.*, 222 NLRB 313, 325 (1976). As Boeing has made unilateral decisions to relocate bargaining unit work for decades, it is clear that the parties interpret the collective bargaining agreements to give Boeing that right.

The Union's reliance on *E. R. Steubner, Inc.*, 313 NLRB 459 (1993), to argue that a union's "acquiescence in previous unilateral conduct does not necessarily operate *in futuro* as a waiver of its statutory rights" is misplaced. In *E. R. Steubner*, the parties' collective bargaining agreement required that the employer subcontract work only to employers signatory to a collective bargaining agreement with the union. The Board held that the employer's previous *violations* of that provision did not constitute a waiver of the union's right to bargain modifications to that provision. *Id.*

Here, there is no provision in the parties' collective bargaining agreements limiting Boeing's ability to relocate work, and thus no violation of the collective bargaining agreements. Consequently, *E. R. Steubner* does not apply, and the parties' undisputed and long-standing past

practice can be used to demonstrate that the Union has waived its right to bargain over the relocation of bargaining unit work.<sup>7</sup>

### III. CONCLUSION

For these reasons and those cited in Boeing's Exceptions and Brief in Support, Boeing respectfully requests the Board reverse the ALJ Decision in this matter, find that Boeing did not violate Sections 8(a)(1) and (5) of the Act, and dismiss the Complaint.

Respectfully submitted this 8th day of September, 2015.

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<sup>7</sup> The Union makes the strange claim that "Boeing cites new evidence in its brief concerning its exceptions; the brief discussed Article 2 of the CBA as a basis for finding waiver. However, Boeing did not make this argument to the ALJ at trial and has waived it for appeal." (Union Br. at p. 25). This is a blatant and intentional misrepresentation of the record. Boeing referred to Article 2 during its opening statement at the hearing (Tr. 14-15), Mr. Zarfos testified about Article 2 at the hearing (Tr. 125, 160-61), Boeing quoted Article 2 in its brief to the ALJ (pp. 2-3), and cited it as a basis for waiver in the argument section of its brief to the ALJ (p. 31). Unfortunately, this is entirely consistent with the Union's questionable efforts to secure information to which it is not entitled throughout this proceeding. For example, the sole union witness at the hearing grossly misrepresented the facts by testifying that Boeing was not providing "any information" about potential movement of work until after the decision had been made, (*See, e.g.*, Tr. 29, 39, 44-45, 70-74, 138; Boeing's Br. to the ALJ at pp. 17-20), a misstatement that the Union repeated in its brief to the Board. (Union Br. at n.7).

**CERTIFICATE OF SERVICE**

This is to certify that I have served a true and correct copy of the **RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** was served via electronic mail upon the following individuals:

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