

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

**MERCEDES-BENZ U.S. INTERNATIONAL, INC.)
(MBUSI))**

and)

Case 10-CA-169466

**MICHAEL KIRK GARNER, An Individual)
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)
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MOTION FOR PROTECTIVE ORDER

Respondent Mercedes-Benz U.S. International (“MBUSI”) respectfully moves Administrative Law Judge Donna Dawson for entry of a Protective Order to safeguard the confidentiality of its sensitive business, commercial and proprietary information. In support of its Motion, MBUSI states as follows:

I. PROCEDURAL AND FACT BACKGROUND

1. On February 11, 2016, MBUSI Team Member Kirk Garner filed an unfair labor practice charge challenging MBUSI’s Cameras and Picture Taking rule.

2. On April 11, 2016, the Regional Director issued a Consolidated Complaint and Notice of Hearing, pursuant to the charge.

3. The Complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining a rule that required proper authorization prior to taking pictures or making video recordings.

4. On April 25, 2016, MBUSI timely filed an Answer, admitting the existence of the challenged camera rule but denying all the material allegations and asserting affirmative defenses, including that employees would not have reasonably construed the challenged rule to prohibit Section 7 activity, that the rule is justified based on legitimate business reasons, and business justifications outweigh any purported adverse impact on Section 7 activity.

5. On May 10, 2016, the General Counsel filed a Motion for Summary Judgment arguing that employees understood the camera rule to interfere with Section 7 rights and that employees' Section 7 rights outweigh MBUSI's business justifications for the rule.

6. MBUSI opposed General Counsel's Motion and argued that it would present substantial evidence of its confidential information needing protection from disclosure that outweigh any Section 7 rights implicated. For example:

- ***Propriety information and confidential information in its plant.*** The evidence will show that confidential and proprietary information, such as new vehicle designs, engineering documents and designs, parts and assembly configurations, specialized tools and equipment, and unique manufacturing methods and processes are throughout the facility.
- ***Proprietary and confidential information discussed in meetings.*** The evidence will show that every day MBUSI conducts various meetings, including shift start meetings, all Team Member communication meetings, lunch box meetings, Horseshoe meetings, one-on-one meetings *etc.*, in which sensitive business information may be discussed, including issues related to quality, production goals, strategic decisions, personnel decisions, and medical issues, among others.
- ***Marketing concerns.*** The evidence will show that tens of millions of dollars and significant resources are spent in creating and marketing the new vehicles manufactured in the plant, which includes protecting the secrecy of the model design until its public reveal.
- ***Property Concerns.*** The evidence will show that vehicle designs and other proprietary equipment and processes are valuable private property of MBUSI and that disclosure to the public of the property would diminish the properties' value.
- ***The competitive automotive market and industrial workplace setting.*** The evidence will show the extremely competitive automotive market and the

competitive advantage that possession of proprietary and confidential information of a competitor could provide.

7. The General Counsel's Motion was denied by the Board, which stated: “the Board has permitted employers to adduce evidence regarding asserted business justifications, and about whether the rules were communicated or applied in a manner that clearly conveyed an intent to permit protected activity.” *Mercedes-Benz U.S. Int'l, Inc.*, 365 NLRB No. 67, n. 1 (May 5, 2017).

8. MBUSI and the Counsel for the General Counsel have attempted to reach a joint protective order but have not been successful. MBUSI now submits this Motion.

II. ARGUMENT

MBUSI requests a protective order to limit disclosure and use of information that will be disclosed at hearing and to seal the hearing record to prevent disclosure of its non-public proprietary business, commercial and financial information. MBUSI must show at hearing the type of confidential information the camera rule protects from disclosure. Without a protective order, MBUSI will be forced to disclose confidential information *to the public at hearing without any safeguards* in order to justify its rule designed to prevent such disclosure. Accordingly, MBUSI will have to choose between disclosing highly confidential information at hearing (and jeopardizing that information) or not being able to adequately present its case. Courts routinely grant protective orders to protect confidential business information. No basis exists here for refusing a protective order. Because of the volume of HIGHLY confidential information and the complexity of creating a piece-mail protective order, MBUSI requests that the entire record be placed under seal.

A. **Applicable Legal Standard**

“NLRB judges have the authority to issue protective orders in appropriate circumstances.” ALJ Bench Book. § 8-415 of the NLRB Division of Judges Bench Book; *Nat'l*

Football League, 309 NLRB 78, 88 (1992) (ordering that protective order entered into during hearing continue in full force and effect and exhibits introduced under seal remain under seal). In issuing protective orders, Administrative Law Judges apply Federal Rule of Civil Procedure 26(c), which provides that a protective order is appropriate if it is justified by “good cause.” See *Richmond Times Dispatch*, 346 N.L.R.B. 74 (2005); *Sec. Walls, LLC*, 2010 NLRB LEXIS 105 (N.L.R.B. Apr. 21, 2010)(finding of “good cause” under FRCP 26(c) to issue a protective order); Fed. R. Civ. P. 26(c). “Good cause” includes, but is not limited to, protecting “a trade secret or other confidential research, development, or commercial information” or protecting against a specific prejudice or harm. Fed. R. Civ. P. 26(c)(1)(G). The ALJ Bench Book provides that if a protective order is entered into forbidding disclosure of documents and information, “it is essential that the judge place the documents [and information] under seal.” ALJ Bench Book. § 8-415 of the NLRB Division of Judges Bench Book.

B. Good Cause Exists For Entry Of A Protective Order Because it Will Protect Confidential Information

Courts routinely find “good cause” justifying a protective order to prevent disclosure of the type of confidential information at issue here. Courts have held that confidential information regarding the design and manufacturing process of a commercial product warrants protection from disclosure.¹ Here, MBUSI intends to produce confidential business information related to engineering processes, parts and assembly configurations, specialized tools and equipment, unique manufacturing methods, engine design, fuel efficiency and environmental standards,

¹ See, e.g., *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1469 (9th Cir. 1992) (entering protective order to prevent disclosure of a computer program’s “source code,” as well as the “developmental plans” for that program”); *DDS, Inc. v. Lucas Aerospace Power Transmission Corp.*, 182 F.R.D. 1 (N.D.N.Y. 1998) (finding that the manufacturing process for production of a pivoting device for mechanical assemblies was a trade secret because it provided a business advantage and could not easily be duplicated or acquired by others); *Fireman’s Fund Ins. Co. v. ECM Motor Co.*, 132 F.R.D. 39 (W.D. Pa. 1990) (entering protective order to preserve the confidentiality of laboratory files regarding a motor manufactured by the defendant even though the defendant had not shown that a specific injury would result from their disclosure).

vehicle assembly structure from sub-frame, design materials used, user interface and software development and frame architecture that all relate to the design and manufacture of its vehicles. Confidential information has been created at great expense to MBUSI; MBUSI has taken great care to prevent disclosure; and the confidential information provides the company a competitive advantage.

Likewise, Courts have held that confidential information regarding the cost, pricing, and marketing of commercial products warrants protection from disclosure.² Here, MBUSI intends to produce confidential business information related to performance metrics, financial performance, manufacturing costs, and the resources invested in creating and marketing vehicles manufactured in MBUSI's plant. Confidential information is essential to MBUSI's business operations; MBUSI has taken great care to prevent disclosure; and the confidential information would be of great value to MBUSI's many competitors, suppliers, and third-party investors. A protective order limiting disclosure and use of information and sealing the hearing record is necessary to prevent the disclosure of MBUSI's confidential information to the public.

C. Good Cause Exists For Entry Of A Protective Order Because it Will Prevent Harm to MBUSI

Disclosure of confidential information would cause significant harm to MBUSI that warrants entry of a protective order. MBUSI's unique and proprietary work processes, manufacturing designs, and specialized tools provide the company a competitive advantage

² *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965) (entering protective order to protect against disclosure of "price, cost, and volume of sales of gasoline."); *Star Scientific, Inc. v. Carter*, 204 F.R.D. 410 (S.D. Ind. 2001) (information relating to tobacco company's customer lists, consumer purchasing habits, pricing information, and sales techniques constituted trade secret). *Tillman v. C.R. Bard, Inc.*, 297 F.R.D. 660 (M.D. Fla. 2014) (Good cause existed to issue a protective order preventing plaintiff in product liability action from disclosing to the public and the Food and Drug Administration (FDA) documents medical device manufacturer produced to plaintiff in discovery pursuant to a stipulation of protection and confidentiality, where such documents contained proprietary and trade secret information, the disclosure of which would unfairly advantage manufacturer's competitors).

disclosure of which would create a risk of significant competitive injury. Premature disclosure of new model information and pictures impact sales of outgoing models and dampens enthusiasm for new models if a vehicle is seen but not available for purchase for an extended period. Premature disclosure of new model information and pictures will alert MBUSI's competitors to new models and technology, as well as the timing for development and implementation. Disclosure of sensitive financial and production information could adversely impact MBUSI's brand and image and impact MBUSI's parent company Daimler AG (which is a publicly traded company). Disclosure of MBUSI's confidential financial information could impact MBUSI's relationship with suppliers. Disclosure of confidential information to the UAW could provide the UAW unique insight into MBUSI's financial condition and competitive information providing it unfair advantage over MBUSI in its efforts to organize the team members.³ These are a few examples of the myriad harms MBUSI would be exposed to from disclosure of confidential information. A protective order limiting disclosure and use of information and sealing the hearing record is necessary to prevent significant harm to MBUSI.

III. CONCLUSION

MBUSI requests a protective order to limit disclosure and use of information that will be disclosed at hearing and to seal the hearing record to prevent disclosure of its non-public proprietary business, commercial and financial information. Courts routinely grant protective orders to protect confidential business information. No basis exists for denying MBUSI's request for entry of reasonable protective order.

³ It is well established that in bargaining a union cannot compel production of information related to an employer's financial condition, relative profitability, and competitive information unless the employer claims an inability to pay. *See Nielsen Lithographing Co.*, 305 N.L.R.B. 697 (1991), *enf'd*, *Graphic Communications, Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992); *United Steelworkers of Am., Local 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993) ("There is no presumption of relevance when a union seeks access to financial information to test an employer's need for concessions on labor costs").



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the NLRB via Electronic Filing, a copy has also been served via email and/or U.S. First-Class Mail on the following, on this the 2nd day of October, 2017:

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