

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11**

THE BOEING COMPANY

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

Cases: 10-CA-204795
10-CA-226718
10-CA-227191
10-CA-229378
10-CA-229979
10-CA-231035
10-CA-231815
10-CA-231853
10-CA-231888
10-CA-232626
10-CA-233509
10-CA-234519
10-CA-245435

**RESPONDENT THE BOEING COMPANY'S SUBMISSION OF SUPPLEMENTAL
AUTHORITY IN SUPPORT OF ITS REQUEST FOR SPECIAL PERMISSION TO
APPEAL, AND APPEAL FROM THE ADMINISTRATIVE LAW JUDGE'S ORDER
DIRECTING TRIAL TO BE CONDUCTED BY VIDEOCONFERENCE**

Pursuant to Section 102.26 of the National Labor Relations Board's ("Board") Rules and Regulations, on August 10, 2020, Respondent The Boeing Company ("Boeing" or the "Employer") filed a request for special permission to appeal Administrative Law Judge Geoffrey Carter's (the "Judge") Order Directing Trial to be Conducted by Videoconference in the above-captioned matters, dated August 4, 2020 ("August 4, 2020 Order"). On or about August 13, 2020, the General Counsel filed a one-line response, in which it disputed nothing and indicated it "takes no position" on the requested appeal. By Order dated August 13, 2020, the Board issued a decision in *William Beaumont Hospital*, 370 NLRB No. 9 (Aug. 13, 2020), addressing some of the issues raised in Respondent's appeal. On August 17, 2020, the Charging Party filed a response to the

Respondent's request for permission and appeal, incorrectly suggesting that *William Beaumont Hospital* compels denial of the Respondent's request. In light of the intervening issuance of that decision, Respondent respectfully submits this Supplemental Authority addressing the significant distinctions at issue in its request.

I. UNLIKE THE EMPLOYER IN WILLIAM BEAUMONT HOSPITAL, RESPONDENT HAS NOT MADE A MOTION TO INDEFINITELY POSTPONE THE HEARING.

In *William Beaumont Hospital*, the Employer filed a motion on July 16, 2020 -- six-and-a-half weeks prior to commencement of the hearing -- "requesting that the hearing be held in-person and not by video conference," and alternatively, "that if an in-person hearing cannot be held on August 31, that the matter be continued until such time as the hearing can be conducted in-person." *William Beaumont Hospital*, Case No. 07-CA-244615 (ALJ Order, July 20, 2020). By contrast, Respondent in the instant matter has not sought (a) an in-person hearing held without any safeguards, nor (b) an indefinite postponement of the hearing. To the contrary, Respondent has acknowledged the challenges presented by the COVID-19 pandemic and asked that the Board direct the trial to "commence in-person with appropriate COVID-19 safeguards in place, absent other agreement of the parties or proper written application for videoconference testimony." *Respondent's Special Request* at 3. Moreover, while the General Counsel did not dispute in its response papers that it has made no efforts whatsoever to fulfill its obligations to arrange for such a hearing with appropriate safeguards, Respondent has asked in the alternative that the Board remand the issue to the Judge with directions to "postpone *briefly*" the commencement of the trial so that the proper safeguards can be put in place for *either* an in-person *or* videoconference trial. *Id.* Charging Party mischaracterizes Respondent's position in its response papers, as it must, to make it appear that *William Beaumont* controls, but Respondent's request is clear on its face.

II. THE GENERAL COUNSEL HERE TOOK NO POSITION ON VIDEOCONFERENCE TESTIMONY OR RELATED ISSUES AT ANY POINT, UNLIKE IN WILLIAM BEAUMONT HOSPITAL, IN WHICH THE GENERAL COUNSEL OPPOSED RESPONDENT'S MOTION.

In William Beaumont Hospital, as noted above, the employer made a motion to the Division of Judges to hold the hearing in-person, and to postpone the matter indefinitely until it was safe to do so. The General Counsel opposed that motion:

Moreover, given the uncertain nature of the pandemic, Respondent's request for an in-person Hearing, if granted, could conceivably delay any Hearing to a point where potential Board remedies become stale and ineffective.

In view of the above, Counsel for the General Counsel requests that Respondent's Motion for an In-Person Hearing postponement be denied.

William Beaumont Hospital, Case No. 07-CA-244615, at p. 2 (General Counsel's Opposition, July 17, 2020). Again, as noted above, Respondent here has submitted a very different request, one that contemplates a brief postponement, at most, to ensure health and safety *and* due process safeguards. The allegations at issue in *William Beaumont Hospital* have occurred in the context of an ongoing organizing effort. By contrast, in the instant case, the election at the center of the General Counsel's case was invalidated, and the petition dismissed by the Board, a year ago. There is no risk to the potential Board remedies in the instant case if the Board orders a brief postponement to ensure the lengthy trial in this matter comports with due process.

III. THE COMMITMENT TO APPROPRIATE SAFEGUARDS SOUGHT BY THE RESPONDENT'S REQUEST WILL NOT RESULT IN AN INDEFINITE DELAY OF THIS CASE.

In *William Beaumont Hospital*, in the midst of an active organizing drive, the hearing date had already been postponed twice, resulting in a delay of three-and-a-half months from its original scheduled date. By contrast here, September 1, 2020, has been the date chosen by the Region for the commencement of this trial. There have been no delays, postponements or adjournments, to

date. Notably, the General Counsel does not dispute Respondent's assertions that it has done nothing to prepare for the safe conduct of this hearing, despite the COVID-19 pandemic being well underway when it chose the date and projected location. In contrast to the indefinite postponement sought by the employer in *William Beaumont*, it does not seem unreasonable to impose a brief postponement here to allow for the establishment of appropriate safeguards.¹

Charging Party reiterates its concerns about further delay, but to the extent it has taken time to arrive at this juncture, Respondent is not responsible. The confusing manner in which the Charging Party filed charges, First Amended charges and Second Amended charges -- withdrawing and moving allegations from one case number to another -- and the Region's decision to wait and roll numerous unrelated charges up into one large complaint may have impacted the hearing date. Nothing Respondent has done is responsible for any delay, and Respondent should not now have to sacrifice due process when safeguards can reasonably be addressed in advance.

IV. THE FEDERAL CASES CITED BY THE BOARD IN *WILLIAM BEAUMONT HOSPITAL* WEIGH IN FAVOR OF RESPONDENT'S REQUEST.

In *William Beaumont Hospital*, the Board references three cases in which district courts "have opted to conduct bench trials remotely in light of the ongoing pandemic." 370 NLRB No. 9, slip op. at 1, fn. 1 (Aug. 13, 2020) citing *Gould Electronics Inc. v. Livingston County Road Commission*, No. 17-11130, -- F.Supp. 3d --, 2020 WL 3717792 (E.D. Mich. June 30, 2020); *Argonaut Insurance Co. v. Manetta Enterprises, Inc.*, No. 19-CV-00482 (PKC) (RLM), 2020 WL 3104033 (E.D.N.Y. June 11, 2020); *RFC & ResCap Liquidating Trust Action*, No. 13-CV-3451

¹ At least the parties in *William Beaumont Hospital* had six and a half weeks following the Division of Judges' order to put appropriate safeguards in place for videoconference testimony. 370 NLRB No. 9, slip op. (Aug. 13, 2020). Here, it is now two weeks before the trial date, and there still has been no effort by the General Counsel to address these issues.

(SRN/HB), -- F. Supp. 3d --, 2020 WL 1280931 (D. Minn. Mar. 13, 2020). All of these cases are highly distinguishable from the instant case, and actually confirm Respondent's concerns.

Gould Electronics Inc. v. Livingston County Road Commission, No. 17-11130, -- F.Supp. 3d --, 2020 WL 3717792, slip op. (E.D. Mich. June 30, 2020) is an environmental law case involving only an issue of cost-sharing under the relevant statute. The underlying case was filed eleven years ago, but was voluntarily dismissed by the parties with an agreement to reinstate a case on an "expedited basis" if certain conditions were not met. *Id.* The case was revived on that basis in 2017. *Id.* At the time the hearing was scheduled to occur, June 15, 2020, the courthouse was officially closed, and one party's chief witness was in Canada, unable to travel to Michigan. The court considered all these factors, and the parties' agreement to proceed on an "expedited basis" in directing a video hearing in lieu of a year-long postponement. *Id.* at 5-7. Here, as noted above, the minimal delay caused by a postponement to address appropriate safeguards is far outweighed by ensuring due process.

Argonaut Insurance Co. v. Manetta Enterprises, Inc., No. 19-CV-00482 (PKC) (RLM), 2020 WL 3104033, slip op. (E.D.N.Y. June 11, 2020), was a bench trial solely to determine damages in a case otherwise conceded by the parties. Liability had been decided, and all trial submissions and briefing had been submitted to the court on the limited issue of damages. *Id.* slip op. at 1. The court denied the Defendant's request to "postpone[e] the trial indefinitely," but noted Defendant's concerns about the reliability of "video conference platforms Skype and Zoom." *Id.* at 3. The court ruled that the federal court's superior video platform would not present the issues raised by Defendant: "Moreover, the bench trial in this matter will not be conducted over either Skype or Zoom, given the software currently in use by the courthouse." *Id.* at 3. Similarly, in *RFC & ResCap Liquidating Trust Action*, No. 13-CV-3451 (SRN/HB), -- F. Supp. 3d --, 2020 WL

1280931, slip op. (D. Minn. Mar. 13, 2020), the court ruled that the final two days of a weeks-long hearing could be concluded by video, obviating the need for two attorneys to travel from New York and Utah to Minnesota. But the court specifically ruled the attorneys would participate via video technology “from a local federal courthouse of their choice.” *Id.* at 4.

These directives stand in contrast to the circumstances in this case. The courts in two of these three cases recognized the due process concerns inherent in videoconference testimony, and directed the use of technology consistent with the safeguards the Board has historically required when faced with the issue. *See, e.g., DH Long Point Mgmt, LLC*, Case No. 31-CA-226377 (ALJ Order, Mar. 29, 2019); *EF Int’l Language Sch.*, 363 NLRB No. 20 (2015); *MPE, Inc.*, Case No. 09-CA-084228, 2015 WL 400660 (2015) (not reported in Board volumes). Neither the Board’s past cases, nor the federal court decisions referenced in *William Beaumont Hospital*, have contemplated the casual participation of judges, witnesses, attorneys, and other personnel by Zoom technology via their own respective computing devices,² without the appropriate safeguards in place.

² Perfectly underscoring just a few of the issues highlighted in Respondent’s request and appeal, several General Counsel witnesses have already expressed confusion and concerns about their ability to participate via videoconference technology. By email dated August 13, 2020 (a copy of which is attached hereto as Exhibit A), potential witness Ben Williamson referenced a petition to revoke a General Counsel subpoena and argued “No where in the subpoena does it state that I will be granted teleconference capabilities.” Similarly, by email dated August 14, 2020 (a copy of which is attached hereto as Exhibit B), potential witness Alan Sharkshnas wrote:

I was also not aware that a teleconference was going to be used as the hearing method. The subpoena does not mention anything about a teleconference. Shouldn't that be explained in the subpoena? More importantly, who would be providing the equipment for the teleconference?

It is reasonable to assume that the other twenty-eight or so witnesses the General Counsel has indicated it will call may have similar questions. It makes no sense not to address these issues *before* commencing the hearing, and attempt to avoid a record littered with objections, potential exceptions and issues for appellate courts to sort out.

V. CONCLUSION

For the reasons set forth above, as well as in the Respondent's initial request, the Board should accept Respondent's appeal and reverse the August 4, 2020 Order, directing that the trial be commenced in-person implementing well-recognized safety precautions, absent other agreement of the parties or proper written application for videoconference testimony.

In the alternative, the Board should remand the issue to the Judge with directions to postpone briefly the commencement of the trial affording the General Counsel the opportunity to make the required arrangements and applications promoting due process and in full compliance with Section 102.35(c).

Respectfully submitted this 17th day of August, 2020.

By:  _____

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Attorneys for The Boeing Company

EXHIBIT "A"

From: [Ben Williamson](#)
To: [Crawford, Kevin](#)
Cc: william.r.hartman@boeing.com; [Bolt, Brennan \(DAL\)](#); [Hankins, Richard \(DAL\)](#); [Borden, Seth \(WDC\)](#); edward.rawl@boeing.com; whaller@iamaw.org; lewan@iamaw.org; phillips@workerlaw.com
Subject: Re: The Boeing Company, Case 10-CA-204795
Date: Thursday, August 13, 2020 9:16:12 PM

Mr. Crawford,

Thank you for the update. I have not been contacted since my last conversation with Joel. I do have a question. I have tried calling Joel but have not been able to reach him.

What is the legal process in serving a subpoena?

I came home to a letter on my front door from UPS asking me to come pickup a package. The note then sat on my kitchen table for 4 to 5 days until my girlfriend decided she needed to run to CVS and would pickup said package because it was conveniently left there to be picked up by UPS. Once my girlfriend brought it home it then sat on the kitchen table for another 2 to 3 days until I opened it to find a subpoena from Mr. Mearns.

Are subpoenas required to be signed for? Are they valid no matter the method of delivery at any given time?

I wrote a petition to revoke the subpoena because Joel stated that teleconference was not a guarantee. Now he is saying that it is a guarantee. Is it or is it not?

No where in the subpoena does it state that I will be granted teleconference capabilities. It only states that I am required and directed to appear before a Judge at a location to be determined in or near North Charleston, SC.

On Aug 13, 2020, at 9:53 AM, Crawford, Kevin <Kevin.Crawford@nlrb.gov> wrote:

All,

In the above-referenced case, the attached documents are being forwarded to you as per Field Attorney Joel White. If you have any questions, please contact Mr. White at (336) 582-7144.

Very respectfully,
Kevin S. Crawford, Automation Staff Assistant
National Labor Relations Board - Subregion 11
4035 University Parkway, Suite 200
Winston-Salem, NC 27106-3325
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Fax: (336) 631-5210

Email: Kevin.Crawford@nrb.gov

<CGC Order Referring and Opposition - Ben Williamson.pdf>

EXHIBIT "B"

From: [Alan Sharkshnas](#)
To: [Crawford, Kevin](#)
Cc: william.r.hartman@boeing.com; [Bolt, Brennan \(DAL\)](#); [Hankins, Richard \(DAL\)](#); [Borden, Seth \(WDC\)](#); edward.rawl@boeing.com; whaller@iamaw.org; lewan@iamaw.org; phillips@workerlaw.com
Subject: Re: The Boeing Company, Case 10-CA-204795
Date: Friday, August 14, 2020 8:09:17 AM

Mr Crawford,

Thank you for sending this information, I have not had any update or communications since filing the petition to revoke. I have some concerns with the attached document and I would like for someone to provide clarification.

This subpoena will not only cause a burden to myself, but as I explained in my petition to revoke, also to family members that depend on me. What rights do they, and I, have during this process? Do I need representation if I wish to challenge the subpoena in front of a judge? The revocation process has never been explained to me. In fact, I had to dig around on the NLRB website for hours trying to find out how to file a petition to revoke. What are the next steps in this process?

I am also concerned with the delivery method and how the subpoena was received at my residence. There was no signature made upon delivery and no contact was made prior to delivery to determine how/why/when my testimony was going to be needed or what it specifically was pertaining to. In the document that you sent, I noticed crew cycling and performance reviews. This is the first time that has been shared with me and it is not on the subpoena. I am afraid that I do not have specific recollection about these particular subjects.

I was also not aware that a teleconference was going to be used as the hearing method. The subpoena does not mention anything about a teleconference. Shouldn't that be explained in the subpoena? More importantly, who would be providing the equipment for the teleconference?

Thank you,
Alan Sharkshnas

On Thu, Aug 13, 2020 at 9:46 AM Crawford, Kevin <Kevin.Crawford@nlrb.gov> wrote:

>

> All,

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>

>

> In the above-referenced case, the attached documents are being forwarded to you as per Field Attorney Joel White. If you have any questions, please contact Mr. White at (336) 582-7144.

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>

> Very respectfully,

>
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10-CA-231853
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CERTIFICATE OF SERVICE

I certify that a copy of **Respondent The Boeing Company's Submission Of Supplemental Authority In Support Of Its Request For Special Permission To Appeal, And Appeal From The Administrative Law Judge's Order Directing Trial To Be Conducted By Videoconference** was electronically filed with the Executive Secretary and was served via-email on:

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This 17th day of August, 2020.

By:  _____

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