The Boeing Company *and* Society of Professional Engineering Employees in Aerospace, Affiliated with International Federation of Professional & Technical Engineers, Local 2001. Case 19–CA–093656

June 9, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On July 31, 2014, Administrative Law Judge Dickie Montemayor issued the attached decision. The Boeing Company (the Respondent) filed exceptions and a supporting brief. The General Counsel and Society of Professional Engineering Employees in Aerospace, affiliated with International Federation of Professional & Technical Engineers, Local 2001 (the Union) filed answering briefs, and the Respondent filed a reply brief. The Union filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions and

[1] The Respondent's exception that the Board lacked a quorum at the time that it announced the appointment of Ronald K. Hooks as Regional Director for Region 19, and that consequently the issuance of the complaint was unauthorized and void, is without merit. Although Regional Director Hooks' appointment was announced on January 6, 2012, the Board approved the appointment on December 22, 2011, at which time it had a quorum. See *Longshoremen ILWU, Local 4 (Tidewater Barge, Inc.)*, 362 NLRB 334, 334 fn. 1 (2015); see also *Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812, 813 (D.C. Cir. 2014) ("[T]he President's recess appointment of Member Becker was constitutionally valid."); *Gestamp South Carolina, LLC v. NLRB*, 769 F.3d 254, 257–258 (4th Cir. 2014) (same).

On August 18, 2015, the Respondent submitted to the Executive Secretary a document that it describes as "supplemental authority in support of Exception No. 37 to the decision of the Administrative Law Judge." That document cites *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015). In its Exception 37, the Respondent excepts to the judge's "failure to find that the issuance of the Complaint against [the Respondent] was unauthorized and void." In its brief in support of its exceptions, the Respondent states that "this case presents the jurisdictional question of whether the issuance of the complaint was unauthorized and void," and cites *Hooks v. Kitsap Tenant Support Services*, No. C13–5740 BHS, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), for the proposition that the "Acting General Counsel could not delegate authority to initiate legal action to Regional Director for Region 19 because Acting General Counsel was not validly appointed."

For the reasons set forth below, we find no merit in the Respondent's assertion that the Acting General Counsel was not validly "appointed." At the outset, we note that under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., a person is not "appointed" to serve in an acting capacity in a vacant office that otherwise would be filled by appointment by the President, by and with the advice and consent of the Senate. Rather, either the first assistant to the vacant office performs the functions and duties of the office in an acting capacity by operation of law pursuant to 5 U.S.C. § 3345(a)(1), or the President directs another person to perform the functions and duties of the vacant office in an acting capacity pursuant to 5 U.S.C. § 3345(a)(2) or (3).

On June 18, 2010, the President directed Lafe Solomon, then-Director of the Board's Office of Representation Appeals, to serve as Acting General Counsel pursuant to subsection (a)(3)—the senior agency employee provision. Under the strictures of that provision, Solomon was eligible to serve as Acting General Counsel at the time that the President directed him to do so. See *SW General*, supra. Thus, Solomon properly assumed the duties of Acting General Counsel, and we find no merit in the Respondent's argument that the Acting General Counsel was not validly "appointed."

We acknowledge that the decision in *SW General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. While that question is still in litigation, the Respondent failed to raise that argument to the judge or in timely filed exceptions, and we find that the Respondent thereby has waived the right to do so.

Finally, on February 9, 2016, General Counsel Richard F. Griffin, Jr., issued a notice of ratification that states, in relevant part,

> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in SW General. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by SW General are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. [(Citation omitted.)]
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> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

Even if the Respondent had not previously waived its right to challenge the continued authority of the Acting General Counsel following his nomination by the President, this ratification by the General Counsel would render moot any argument that the *SW General* holding concerning the former Acting General Counsel's authority precludes further litigation in this matter.

[2] The Respondent excepts to the judge's rejection of its Exhs. 11(a), 11(b), and 12. We find that the judge did not abuse his discretion by rejecting those exhs.

[3] The Respondent excepts to the judge's reliance on GC Exh. 7 in finding that the Union demonstrated the relevance of its information requests. GC Exh. 7 is a September 6, 2012 Bloomberg article titled "Boeing May Use Non-Seattle Engineers as Seattle Costs Up," and it contains statements attributed to Boeing Commercial Airplanes Vice President of Engineering Mike Delaney. The judge admitted this exhibit to show what is on the face of the article, not to show the truth of any matter asserted in the article. The Board has established that a union is "not required to show that the information which triggered its request was accurate or ultimately reliable," and that "a union's information request may be based on hearsay." *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994); see also *Dodger Theatricals Holdings, Inc.*, 347 NLRB 953,

to adopt the recommended Order as modified and set forth in full below.[4]

We affirm the judge's findings that the Union demonstrated the relevance of the disputed portions of its September 11 and 20, 2012 information requests, and, thus, that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide this requested information to the Union.

The Respondent contends, however, that it satisfied certain portions of the Union's September 11 information request. We find no merit to that contention.

In its September 11 request, the Union asked what "premium" was currently paid to engineering employees in the Puget Sound area and how it was calculated. The Union also asked for data supporting the calculation, and data showing how employees in other areas received no such premium. On September 25, 2012, the Respondent answered, in relevant part, as follows:

> 1. As the Company has communicated consistently throughout the negotiation process, wage rates in the Puget Sound are well above the national market. This information is available publicly from sources to which the Union has ample access. The Company also has information available through ERI illustrating the differences between the specific markets identified in your request. Moreover, the Company has also presented extensive data to the Union in previous meetings regarding our position on wages relative to market. Much of that data was presented months ago, in our April 19th and 20th sessions.
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> . . .
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> 2. It is a statistical and publicly available fact that the Puget Sound has higher wage rates than other geographic regions.

The Respondent argues that any references to a "premium" paid to employees were references to the fact that under the Respondent's three-tiered compensation system, Puget Sound employees receive Tier 1 compensation (7 percent more than the national average). The Respondent contends that the Union was well aware of the three-tiered compensation system and that the Respondent had provided information about that system during bargaining.

We reject the Respondent's contention that its September 25 response adequately answered this part of the Union's request. That response never mentioned either "premiums" or the Respondent's three-tiered compensation system, and certainly never stated that the Respondent's references to a "premium" or a lack of a "premium" were referring to the three-tiered system. Further, the response neither provided the data that the Union requested nor referred the Union specifically to any information that the Respondent might previously have provided. Assuming that "premium" refers to the Respondent's Tier 1 level of compensation, the Respondent could simply have said so. In addition, it could have explained how its Tier 1 compensation level is calculated[5] and provided the data underlying its three-tiered compensation system or, at a minimum, directed the Union to specific information, previously provided, that would have explained those matters.[6] See *Postal Service*, 332 NLRB 635, 638 (2000) (finding that the employer failed to satisfy the union's information request by directing the union generally to its Employment and Labor Manual (ELM) 513 instead of specifically to the subsection of ELM 513 that explained why an employee's absence documentation was insufficient).[7]

968–969 (2006); *Magnet Coal*, 307 NLRB 444, 444 fn. 3 (1992), enfd. 8 F.3d 71 (D.C. Cir. 1993). Therefore, we find no merit to the Respondent's exception.

The Union excepts to the judge's inadvertent omission of paragraph 2b of its September 11, 2012 information request from the list of paragraphs that the Union demonstrated to be relevant. We agree with the Union that it demonstrated the relevance of the information requested in that paragraph, as the judge's discussion elsewhere makes clear.

[4] We have amended the judge's conclusions of law consistent with the unit descriptions in the Respondent and the Union's collective-bargaining agreements and amended the judge's remedy consistent with our legal conclusions herein. We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[5] Our review of the record indicates that, during negotiations, the Respondent gave the Union only an overview of how it establishes its three-tiered compensation system.

[6] The Respondent claims that it offered to share the underlying survey data with the Union but that the Union declined this data. However, this claim is not an accurate reflection of the record. The Respondent's Director of Employee Compensation Jeannie Denbo merely testified that the Respondent previously offered to share this data with the Union each year when the Respondent updated its Salary Reference Tables, but that, "about a couple of years ago," the Union indicated that it no longer wished to receive this data annually. However, there is no evidence that the Respondent offered this data in response to the Union's September 11 information request or that the Union declined to accept it during the 2012–2013 negotiations. Indeed, on October 5, 2012, the Union entered into a confidentiality agreement with the Respondent in order to receive such confidential data, but the Respondent still failed to provide it.

[7] Member Miscimarra would find that the Respondent adequately responded to the Union's request for information regarding a wage "premium" and thus did not violate Sec. 8(a)(5) and (1) in this respect. The relevant part of the Union's request states:

> 2. With respect to your statement that Boeing is willing to pay a "premium" to do engineering in Seattle and the Puget Sound area. Please provide the following information:
>
> a. What is the current "premium" paid to the engineering employees, if any?

In its September 11 request, the Union also asked for data, including assumptions and analyses, supporting the Respondent's September 7, 2012 statement to employees that "Boeing cannot sustain the rate of growth [of wages] outlined in the previous contract." The Union also asked for a projected date at which the growth rate would become unsustainable, along with data, assumptions, and analyses on which that projection was based. The following is the relevant portion of the Respondent's September 25 response:

> 4. As noted in response to the above requests 1–3, while the Company seeks to remain market leading, it must provide compensation that is sensitive to the current market. No company can sustain its competitiveness if its cost of labor continues to significantly outpace the growth among its market competition. . . . [W]age increases must be based on fiscally prudent analysis of the Company's position relative to market in order to remain and sustain the Company's competitive position. We shared the basis for our opinions in detail during the Company's presentation on the competitive business environment delivered during our August 16, 2012 meeting and throughout the negotiations to date.

Again, the Respondent argues that it provided an adequate response to the Union's request, and again we disagree. When asked by the Union to support its assertion that wages could not continue to grow at the current rate, the Respondent merely restated that proposition in different words. It provided none of the data, none of the assumptions (other than, implicitly, that the Respondent could not continue indefinitely to raise wages faster than its competitors), and none of the analysis that the Union had specifically requested. And the Respondent did not even mention the Union's request for a projected date by which the growth of wages would become unsustainable, let alone furnish the evidentiary or analytical basis for any such projection. In essence, it simply said, "We told you all this before." As indicated above, that is not enough. If the Respondent had actually previously furnished the Union with the information needed to assess the Respondent's contentions, it should have indicated what specific information it relied on and when specifically it disclosed that information to the Union. See *Postal Service*, supra, 332 NLRB at 638.[8]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 3.

3. At all material times the Union has been the designated exclusive collective-bargaining representative of the following bargaining units of the Respondent's employees:

a. Professional Unit

> Professional employees, including those working at the Respondent's facilities in the State of Washington, the State of Oregon, Edwards Air Force Base, California, Palmdale, California, Weber and Davis Counties, Utah, and Boeing Atlantic Test Center, Florida, as set forth in Article 1 and Appendix B of the Collective-Bargaining Agreement for the Professional Bargaining Units.

b. Technical Unit

> Technical employees, including those working at the Respondent's facilities in the State of Washington and the State of Oregon and at its Inertial Upper Stage program at Cape Canaveral Air Force Station, Florida, as set forth in Article 1 and Appendix B of the Collective-Bargaining Agreement for the Technical Bargaining Units.

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b. Provide a detailed explanation of how that "premium" is calculated, the data supporting that calculation and the data from other [Boeing] locations [where similar work is performed] showing how they do not pay such a "premium".

The Union's information request came in response to statements quoted in a September 6, 2012 Bloomberg article titled, "Boeing May Use Non-Seattle Engineers as Seattle Costs Up." In this article, Boeing Commercial Airplanes Vice President of Engineering Mike Delaney was quoted as saying, "We're willing to pay a premium to be in Seattle because there's a base, there's capability, we've got a great team." In Member Miscimarra's view, the term "premium" was plainly a figure of speech referring to the higher wages in the area and not, as the Union made it out to be, a specific amount that the Respondent calculated and added only to the wages of Seattle and Puget Sound-area employees. Member Miscimarra believes that Boeing's response—stating that "[i]t is a statistical and publicly available fact that the Puget Sound has higher wage rates than other geographic regions"—adequately informed the Union what Delaney meant by "premium." Moreover, the Union was aware that the Seattle and Puget Sound-area employees are paid in the same top tier of Boeing's three-tier compensation system as employees in other high-wage markets, such as Southern California, Washington, D.C., and Chicago, which Member Miscimarra believes reinforces the adequacy of the response.

[8] At the hearing, the Respondent introduced certain evidence on which it purportedly relied in making its September 7 statement to employees. Even if that information would have been responsive to the Union's request, it was provided more than a year after the Union made that request; the disclosure, thus, was obviously untimely. See, e.g., *Public Service Co. of New Mexico*, 356 NLRB 1275, 1280 (2011), enfd. 692 F.3d 1068 (10th Cir. 2012); *Earthgrains Co.*, 349 NLRB 389, 400 (2007), enfd. in pertinent part sub nom. *Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422 (5th Cir. 2008).

AMENDED REMEDY

Although we find that the Respondent violated the Act by failing and refusing to provide the Union with the information requested on September 11 and 2012, we must separately consider whether it is appropriate to order the Respondent to provide that information to the Union at this time.[9]

As the Board has explained with respect to information-request cases:

> [T]he issue of whether there is a violation is to be determined by the facts as they existed at the time of the union request. However, the *remedy* for that violation must take into account the facts as they exist at the time of the Board's order.

Borgess Medical Center, 342 NLRB 1105, 1107 (2004) (emphasis in original). If the requesting union has no need for the information requested, the Board will not order the employer to produce it, despite finding the violation. Id. at 1106–1107. Here, the Union requested information to assist it in bargaining during the 2012–2013 negotiations, but, on May 3, 2013, the Respondent and the Union executed new collective-bargaining agreements for the professional and technical units.[10]

The employer bears the burden of proof of establishing that the union has no need for the requested information. *Borgess Medical Center*, supra at 1107 (declining to order production of information after finding that employer had "met its burden of showing that the stated need for the information is no longer present" and that there was "not even a contention by the union" of "another need for the information"). Where the employer has demonstrated that the original, stated need for the information is no longer present, the General Counsel or the union—in order to join the issue—must articulate a present need for the information. See *Finley Hospital*, 362 NLRB 915, 924 (2015) (ordering production of information only "if the Union articulates a present need for this information").

The Board's decisions have not set out a clear procedural framework for litigating this remedial issue. We do so today, to provide guidance to the parties before the Board and to ensure that the Board may accurately and efficiently decide the issue:

> 1. If a respondent, based on evidence available before or during the merits hearing before the administrative law judge, wishes to argue that production should not be ordered because the union has no need for the information, the respondent must introduce the relevant evidence during the merits hearing and argue the issue to the judge. The judge should permit the General Counsel and the charging party to contest the respondent's claim and/or to state an ongoing need for the requested information and to introduce evidence accordingly.
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> 2. If evidence that the union has no need for the information first becomes available after the merits hearing has closed, the respondent may raise the issue in the compliance stage of the case.[11] If the issue is not resolved informally, the respondent must plead in its answer to the compliance specification the absence of a need for the information as the equivalent of an affirmative defense, and then introduce evidence establishing its contention, which the General Counsel and the charging party should be permitted to contest, as described. As stated above and in prior decisions, the respondent has the burden of establishing that the union has no need for the information.[12]

[9] We address two other remedial matters, as well. First, the Union excepts to the judge's failure to order the Respondent to post the notice at all of its facilities that employ employees in the professional and technical bargaining units. We agree that all of the professional and technical unit employees were affected by the bargaining, and shall order the Respondent to post the notice at those facilities because the notice must be adequately communicated to all employees affected by the unfair labor practices found. Second, we shall change the date in the final sentence of par. 2(b) of the Order to reflect the date of the first unfair labor practice, September 11, 2012. See *Excel Container, Inc.*, 325 NLRB 17 (1997).

[10] The execution of a collective-bargaining agreement does not necessarily eliminate the need for relevant information that was requested by the union during bargaining, if the union has an ongoing need for the requested information. See, e.g., *Dodger Theatricals Holdings, Inc.*, supra, 347 NLRB at 972 fn. 44 ("Although the 2004 contract has been negotiated and agreed on, the issue is not moot, since by the time this case is finally decided by the Court of Appeals, it could very well be time to negotiate a new agreement."); *LBT, Inc.*, 339 NLRB 504, 506 (2003) (the union needed the requested information to understand how the layoff process actually worked under the new agreement and to formulate a layoff proposal for the next contract); *Merchant Fast Motor Lines, Inc.*, 324 NLRB 562, 563 (1997) (requested information was still relevant to the union's ongoing concern about the employer's compliance with the 401(k) plan and the union's grievance regarding the employer's previous failure to make contributions to the plan); *Armored Transport of California*, 288 NLRB 574, 579 (1988) (requested information was still relevant to the union's negotiations at the employer's other facilities); *Lumber & Mill Employers Assn.*, 265 NLRB 199, 204 (1982) (the union still needed the requested information "for its probable and potential use in determining the advisability of grievances or other action over the nonapplication of the agreement to certain firms or locations"), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984).

[11] The respondent may alternatively move to reopen the record pursuant to Sec. 102.48 of the Board's Rules and Regulations, if applicable.

[12] In Member Miscimarra's view, the procedural framework set forth above should not affect the Board's established distinction between information that is presumptively relevant to the union's role as collective-bargaining representative and information that is not. Thus, where the information requested concerns wages, hours, and other terms and conditions of employment for unit employees and is therefore presumptively

Under the circumstances of this case, which, of course, predates our articulation of the framework laid out here, we refer the issue of need to the compliance proceeding, rather than parse the conduct of the parties and the judge during the merits proceeding.[13] Accordingly, we will order the Respondent to produce the requested information, unless the Respondent establishes in the compliance proceeding that the Union has no need for this information. During the compliance proceeding, the procedure described above should be followed, as appropriate.

ORDER

The National Labor Relations Board orders that the Respondent, The Boeing Company, Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Society of Professional Engineering Employees in Aerospace, affiliated with International Federation of Professional & Technical Engineers, Local 2001 (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the information requested by the Union in paragraphs 1, 2, 3b and d, and 4b and c of its September 11, 2012 information request and in paragraphs 1 and 3 of its September 20, 2012 information request (excluding the wage information previously provided) unless it is established in the compliance proceeding that the Union has no ongoing need for this information.

(b) Within 14 days after service by the region, post at its State of Washington, State of Oregon, Edwards Air Force Base, California, Palmdale, California, Weber and Davis Counties, Utah, Boeing Atlantic Test Center, Florida, facilities and at its Inertial Upper Stage program at Cape Canaveral Air Force Station, Florida, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at those facilities at any time since September 11, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

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relevant, and the employer shows that the union has no need for the information, the union need only state an ongoing need for the requested information. But where the information requested is not presumptively relevant, Member Miscimarra would require that the union both state an ongoing need for the requested information and demonstrate the relevance of the information in relation to that stated need, unless it is apparent from the circumstances that the demonstration of relevance in relation to the original (but no longer existing) need equally applies to the stated ongoing need.

[13] During the hearing, the General Counsel attempted to elicit testimony from the Union's Director of Strategic Development Rich Plunkett about any possible ongoing need that the Union has for the requested information. The Respondent objected to this line of questioning, and the judge sustained the objection. (The Respondent incorrectly states in its supporting brief that the judge improperly shut down *its* attempt to question Plunkett about any possible ongoing need for the information.) Neither the General Counsel nor the Union now argues that the judge abused his discretion in this respect, but in the exercise of our remedial discretion, we find that the judge's action supports referring the mootness issue to compliance.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Society of Professional Engineering Employees in Aerospace, affiliated with International Federation of Professional & Technical Engineers, Local 2001 (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner the information requested by the Union in paragraphs 1, 2, 3b and d, and 4b and c of its September 11, 2012 information request and in paragraphs 1 and 3 of its September 20, 2012 information request (excluding the wage information previously provided) unless it is established in the compliance proceeding that the Union has no ongoing need for this information.

THE BOEING COMPANY

The Board's decision can be found at www.nlrb.gov/case/19-CA-093656 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Anastasia Hermosillo Esq., for the General Counsel.
Charles N. Eberhart, Esq., for the Respondent.
Thomas B. Buescher, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried before me on February 4, 2014, in Seattle, Washington. The case involves an allegation that Boeing (the Respondent) failed to provide the Society of Professional Engineering Employees in Aerospace, affiliated with International Federation of Professional & Technical Engineers, Local 2001 (the Union) certain information requested by the Union. The employer, for its part, denies that it failed to bargain in good faith, or that it failed to provide the Union information it was required to provide under the Act. I find that Respondent violated the Act as alleged.

This case was originally a part of a group of four cases that were consolidated pursuant to a complaint and notice of hearing dated April 29, 2013. Prior to the hearing on the consolidated cases, Respondent on May 10, 2013, moved to sever this case. By Order dated May 14, 2013, Respondent's motion to sever was granted and this matter proceeded to trial independently of the other three consolidated cases.[1]

The complaint alleged that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union certain relevant requested information. Respondent filed a timely answer to the complaint denying all violations of the Act.

Counsel for the General Counsel, the Union, and the Respondent filed briefs in support of their positions on March 12, 2013. On the entire record, I make the following findings, conclusions of law, and recommendations.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that at all material times, Respondent has been a State of Delaware Corporation with its headquarters in Chicago, Illinois, that manufactures and produces military and commercial aircraft at various facilities throughout the United States, including Everett, Washington, and others in Seattle, Washington, and the Portland, Oregon metropolitan areas.

The complaint further alleges, Respondent admits, and I find that at all material times Respondent, in conducting these operations, derived gross revenues in excess of $500,000 and purchased and received at its corporate headquarters products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Washington.

The complaint alleges, Respondent admits, and I find that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and further, the Union, is, and has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the act.

[1] On May 15, 2014, Administrative Law Judge (ALJ) Gerald Etchingham issued a decision in The Boeing Company and Society of Professional Engineering Employees in Aerospace, IFTPE Local 2001, JD(SF)–23–14. In that case, the ALJ concluded that Respondent violated Sec. 8(a)(1) of the Act by "surveilling employees" and "creating an impression of surveillance" of employees. I make my findings that the employer violated the Act independently, and without reliance upon, Judge Etchingham's decision in the prior case.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent, is an airplane manufacturer, with facilities located in Washington; Oregon; California; Mesa, Arizona; Texas; Charleston, South Carolina; St. Louis, Missouri; Philadelphia, Pennsylvania; and Huntsville, Alabama. (Tr. 47–49:193.) Respondent employs between 150,000 and 200,000 employees nationwide. (Tr. 47.) Respondent is divided into four major groups: (1) Boeing Commercial Airplanes (BCA); (2) Boeing Defense and Space Group (BDS); (3) Engineering Operations and Technology (EO&T); and (4) Shared Services Group (SSG). (Tr. 45.)

1. The professional and technical bargaining units

The Union has a long history of representation with Respondent and has represented many employee bargaining units dating back to the 1940s. (Tr. 143–144.) This case involves the professional and technical units whose work is covered by the professional and technical collective-bargaining agreements ("professional agreement" and "technical agreement"; collectively, the "agreements"). (GC Exh. 3; GC Exh. 2.) The professional agreement covers five bargaining units. (Tr. 43; GC Exh. 3 at 1–2). Employees covered by the professional agreement perform engineering work. (Tr. 43–44). The technical agreement covers three bargaining units. (GC Exh. 2 at 1.) Those covered by the technical agreement perform jobs connecting engineering to manufacturing, such as sequencing or drafting. (Tr. 44.)

2. Respondent's use of non-Boeing and nonbargaining unit labor

In addition to its own employees, Respondent also utilizes "Non-Boeing labor." Non-Boeing labor refers to work performed by third parties, such as a contractors or vendors. Non-Boeing labor may work in the same facilities as represented employees and perform bargaining-unit work. (Tr. 49.) "Non-Bargaining-unit labor" refers to Respondent's employees who are not part of the bargaining units. (Tr. 50.) These employees may also perform bargaining unit work at the same facilities as SPEEA represented employees; if, for example, the employee is on travel assignment from an unrepresented facility. (Tr. 50.) However, these employees generally work at nonunionized facilities. (Tr. 50.) Nonbargaining unit labor may perform both engineering and technical work. (Tr. 50.)

3. Professional and technical employee compensation

The compensation scheme for SPEEA-represented professional and technical employees can best be described as a salary or wage pool wherein specific rates or wages are not identified but rather wage raises are pooled together and divided amongst employees. (Tr. 44.) The agreements provide for a guaranteed "minimum increase percentage," the amount received beyond the minimum is determined by two other variables: (1) individual employee performance; and (2) how the employee's current pay compares to the Respondent's salary reference table (SRT). (Tr. 45, 173–174; GC 2 at 24–25; GC 3 at 24.) Respondent's SRTs are charts which "display the range of salaries [Respondent] has established for the jobs . . . performed by nonexecutive salaried employees." (R. 13 at 3.) Respondent maintains an SRT for each employee position. (Tr. 235.)[2]

B. Negotiations

1. Overview

During all times material to this case, the parties were engaged in contract negotiations which formally began in April of 2012. (Tr. 55.) At the time of negotiations, the Union sought to reach a "status-quo agreement." Their desire was to extend the prior agreement for 4 more years. (Tr. 62.) When Respondent presented its first proposal it proposed to cut the current five-percent wage pools to three percent. (Tr. 150, GC Exh. 5 at 37, GC Exh. 6 at 34.) The Union presented the proposal to its membership. The union members rejected the proposal. (Tr. 157, 229.)

2. The bargaining teams

The Union's bargaining team consisted of 25 members; 10 of whom were bargaining unit employees and 15 were SPEEA staff. (Tr. 57.) Director of Strategic Development Rich Plunkett ("Plunkett") was a SPEEA staff member on the Union's bargaining team. (Tr. 41.) Plunkett's role on the team was to advise and speak on behalf of the Union. (Tr. 53–54.)

Respondent's negotiation team principals were: BCA Vice President of Engineering Mike Delaney; Vice President of Commercial Aviation Services Support Todd Zarfos; Director of Engineering Conrad Ball; Director of EO&T Mark Burgess; Western Region Director of Employee Relations Bill Hartman; BCA Vice President of Human Resources Julie Ellen Acosta; Director of Human Resources Engineering Rich Hartnett; and Vice President of Labor Relations Gene Woloshyn. (Tr. 58–59.)

IV. The Information Violation

A. The Information Requests at Issue in This Case

The allegations in this case rest on information requests that were sent by the Union to the Respondent on September 11 and 20, 2012. The information requests were triggered by a Bloomberg news article and statements made at the bargaining table. The article was published online September 6, 2012, and was titled "Boeing May Use Non-Seattle Engineers as Costs Up." The thrust of the article was that Boeing was considering having some work done at other less expensive sites. The article quoted Mike Delaney, Boeing of America chief engineer as saying, "we're committed to Puget Sound . . . But we will do—and I have told SPEEA this—when we do the next airplane, I will do and use whatever resources it takes to launch the airplane." (GC Exh. 7 p. 1.) "We're willing to pay a premium to be in Seattle because there's a base, there's great capability, we've got a great team, but you if took SPEEA's proposal, Boeing's costs would balloon and it wouldn't be competitive. No customer will pay that kind of premium." (GC Exh. 7 p. 2.) The "proposal" was a clear reference to the Union's proposal to maintain the status quo.

Within 2 days of the article's publication, the Union on

[2] See GC Br. at p. 3 and 4 for a more detailed, concise, and accurate explanation of how the SRTs are created.

September 11, 2012, submitted an information request which directly referenced statements made at the bargaining table and statements made to the media presumably referring to the statements attributed to Delaney. Some of the initial requests are no longer in issue in this litigation and have been purposely omitted. The requests which are still in issue are set forth below:

> 1. With respect to your statements that engineering costs are higher in Puget Sound than many other Boeing locations. Please provide the following for each of the past three fiscal years for the Puget Sound area, St. Louis. MO. Philadelphia, PA. Houston, TX, San Antonio, TX, Huntsville, AL, Charleston. SC and any other Boeing location where engineers and technical employees perform work similar to that performed by members of the SPEEA bargaining units in Puget Sound:
>
> > a. Detailed calculations and explanations of how Boeing calculates productivity at each of these locations, including a line by line item breakout of local engineering labor costs at each location including benefits and any other costs allocated as engineering labor costs.
> >
> > b. Detailed calculations and explanations of how Boeing calculates engineering costs per Unit of production (including specifically defining the unit of production).
> >
> > c. A detailed line by line summary of engineering overhead for each location.
>
> 2. With respect to your statement that Boeing is willing to pay a "premium" to do engineering in Seattle and the Puget Sound area. Please provide the following information·
>
> > a. What is the current premium paid to the engineering employees, if any?
> >
> > b. Provide a detailed explanation of how that "premium" is calculated, the data supporting that calculation and the data from other locations described in request number 1 above showing how they do not pay such a "premium".
>
> 3. With respect to your statement that with SPEEA's current proposal Boeing's engineering costs would "balloon and it [Boeing] would not be competitive" and ''no customer would pay that kind of premium", please provide the following:
>
> > b. All information available or known to you about projected changes in engineering costs for the competitors over the next three years.
> >
> > d. A detailed statement of exactly how the "premium'' you claim that no customer would pay is calculated and all information available or known to you support such a statement.
>
> 4. With respect to the statement in the September 7, 2012, message to employees that "Boeing cannot sustain the rate of growth outlined in the previous contract'', please provide the following information:
>
> b. All data, including all assumptions and analyses used to make this determination.
>
> c. A projected date for when growth rate becomes unsustainable, including all data, assumptions and analysis used to make this determination. (GC Exh. 8.)

On or about September 20, 2012, the Union submitted another request for information. The Union asked to be provided information. The requests that are still in issue are set forth below:

> 1. Amounts paid by Boeing to outside entities of any kind for persons who perform bargaining unit work. Data should be broken down to indicate the number of engineers, the type of engineers and the time period they have worked each year. The same breakdown should be made for technical employees. To be clear, the data should be provided in a manner that will allow SPEEA to do a simple arithmetic calculation showing the cost per hour of a contract employee to Boeing for the period of time he/she worked during these four years.
>
> 3. The compensation paid to engineers and technical employees provided by outside entities of any kind to Boeing who are performing bargaining unit work. This data should be broken down by skill type and separately list not just base pay but things like overtime and fringe benefits, to the extent they exist. (GC Exh. 10.)

Respondent did not provide the information that was requested by the Union instead, on September 25, 2012, Mark Brenaman, the employee relations specialist, responded via email to the first request. In his email he stated:

> 1. As the Company has communicated consistently throughout the negotiation process, wage rates in the Puget Sound are well above the national market. This information is available publicly from sources to which the Union has ample access. The Company also has information available through ERI illustrating the differences between the specific markets identified in your request. Moreover, the Company has also presented extensive data to the Union in previous meetings regarding our position on wages relative to market. Much of that data was presented months ago, in our April 19th and 20th sessions. Given the confidential nature of much of the ERI data and the information presented during our meetings, the Company agreed to provide the presentations subject to a confidentiality agreement. We iterated on a proposed confidentiality agreement to the Union, but received no final response. If the Union now wishes to revisit its position on the execution of a confidentiality agreement, the Company would be happy to discuss it further.
>
> 2. It is a statistical and publicly available fact that the Puget Sound has higher wage rates than other geographic regions. See the Company's response to request number 1 above.
>
> 3. This request is vague, ambiguous, and overbroad, and calls for information with at best tangential relevance to the ongoing negotiations. It contains such vague requests as "information on the "quality differences (perceived and actual), materials, workmanship, engineering, functionality, service, on time delivery and any kind of government subsidy received between Boeing products and the competitors' products that would be purchased by customers. If there are specific questions the Union has relating to these topics, we ask that it pose those specific questions and state their relevance to the ongoing collective bargaining.

> As to the requests that the Company cost out the Union's proposals article by article, the Company is under no obligation to cost out the Union's proposals in this fashion. However, the Company has evaluated the Union's wage proposal of 7.5% each year and determined that if accepted, it would place the bargaining unit's salaries at almost 30% above the market. (See Respondent's Chart) [3]
>
> 4. As noted in response to the above requests 1–3, while the Company seeks to remain market leading, it must provide compensation that is sensitive to the current market. No company can sustain its competitiveness if its cost of labor continues to significantly outpace the growth among its market competition. The Company is not financially insolvent or claiming a present inability to pay. It is simply reiterating that wage increases must be based on fiscally prudent analysis of the Company's position relative to market in order to remain and sustain the Company's competitive position. We shared the basis for our opinions in detail during the Company's presentation on the competitive business environment delivered during our August 16, 2012 meeting and throughout the negotiations to date.

On October 5, 2012, Boeing and the Union entered into the confidentiality agreement referenced in paragraph one of Brenaman's emails. (GC Exh. 12.) Similarly on October 5, 2012, William Hartman, the director of employee relations responded to the Union's October 5, 2012 request pertaining to Non-Boeing Labor and stated among other things that the requested, "data remains presumptively irrelevant to the current negotiations, and the Union still would be required to articulate a basis for the request." (GC Exh. 17.) Enclosed with the response was a matrix with information pertaining to contractors. The chart however did not contain information that was specifically requested by the Union including amounts paid to outside entities, compensation paid to employees by outside entities including any overtime and fringe benefits. (GC Exh. 18.)

Thereafter, on November 1, 2012, the Union sent an email asserting that despite signing the confidentiality agreement that Brenaman asserted was a prerequisite to Respondent complying with the request, and the Union's explanation of the relevance of the information sought, Respondent still had not provided information responsive to its requests. Specifically Respondent failed to provide information pertaining to "rates paid to non-Boeing personnel performing bargaining unit work." (GC Exh. 19, p. 2.)

On November 7, 2012, Respondent provided a chart which contained information regarding the hourly rates paid to contractors listing the minimum, average, and highest amounts paid. (GC Exh. 20.)[4] The chart however did not provide any information regarding contract house fees, overtime, or fringe benefits. (GC Exh. 20.)[5]

After receiving the chart, the Union's representative, Rich Plunkett contacted Brenaman by phone to discuss the information requests. Brenaman when questioned about information that still had not been provided told Plunkett, "what you've got is all you're going to get" (Tr. 140:18). Thereafter, no other information was received regarding either the September 11 or 20, 2012 requests.

B. The Duty to Provide Information

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5). As the Board explained in *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011): An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956) [parallel citations omitted]. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). By contrast, information concerning nonunit employees is not presumptively relevant; rather, relevance must be shown. *Shoppers Food Warehouse Corp.*, 315 NLRB 257, 259 (1994). The burden to show relevance, however, is "not exceptionally heavy," *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983); "[t]he Board uses a broad, discovery-type standard in determining relevance in information requests." *Shoppers Food Warehouse*, supra at 259.

Notably, once the burden of showing the relevance of nonunit information is satisfied, the duty to provide the information is the same as it is with presumptively relevant unit information. Depending on the circumstances and reasons for the union's interest, information that is not presumptively relevant may have "an even more fundamental relevance than that considered presumptively relevant." *Prudential Insurance Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir.), cert. denied 396 U.S. 928 (1969). "[A]n employer's duty to bargain includes a general duty to provide information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations." *Caldwell Mfg. Co.*, 346 NLRB 1159, 1159–1160 (2006). *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956). As the Supreme Court explained in *Truitt*, when a party asserts its positions without permitting proof or independent verification, "[t]his is not collective bargaining." 351 U.S. at 153 (quoting *Pioneer Pearl button Co.*, 1 NLRB 837, 842–843 (1936)).

C. Relevance

1. The presumptively relevant information requests

The evidence of record establishes, and I find that some of the information requested by the Union was presumptively relevant.

[3] Respondent's email provided a chart supporting its calculation which appears in the original email but was omitted. (See GC Exh. 11 p. 2.)

[4] The actual dollar amounts that appeared in the original exhibit were redacted to preserve the confidentiality of the information. (GC Exh. 20.)

[5] Counsel for the General Counsel conceded in its brief that only two items from the September 20, 2012 request remain at issue. The first being the Union's request for the amounts paid to outside entities and second, the compensation including overtime and fringe benefits paid to contractors. (See GC Br. at 28.)

More specifically, I find that the request for information regarding "premiums" paid to engineering employees represented by the Union (September 11, 2012) Item Number 2(a) and (b) were presumptively relevant as it directly related to wages paid unit employees. See *Maple View Manor, Inc*., 320 NLRB 1149 (1996).

2. The other relevant information requests

The discovery standard for relevance is construed "broadly to encompass any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978), *Hickman v. Taylor*, 329 U.S. 495, 51 (1947). Although not presumptively relevant, I find that items 1a, 1b, 1c, 3 b, 3d, 4b, and c of the September 11, 2012 request and items 1 and 3 of September 20, 2012, all relevant.

In this case, the Union sought the information because the Union wanted to know first and foremost the rationale underlying the statements made at the bargaining table and those attributed to Delaney in the news article. The question is whether the requests for the information satisfy the "broad, discovery-type standard" of relevance utilized by the Board. I find that they do. The information regarding calculations and explanation of productivity costs, engineering costs, and engineering overhead all directly relate to statements made at the bargaining table, and the news article statements attributed to Delany regarding the expense associated with the Union at Puget Sound and the inference that work would be sent elsewhere absent some agreement that contained costs. (Tr. 78:11–21, Tr. 70:11–18, 73:4–18, Tr. 69–70, Tr. 73). This information is directly relevant to the Union's evaluation and/or reevaluation of their bargaining position as it related to the fundamental and basic underlying contract wage issues.

Similar reasoning is applicable to the data and calculations showing how premiums are not paid at other facilities, projected changes in engineering costs for the next 3 years, a detailed statement of how the "premium" referenced at the bargaining table and attributed to Delaney in the news article is calculated, information regarding whether Respondent could sustain the rate of growth (referenced both in a memo to employees and the news article), along with information when rate of growth would become unsustainable. (GC Exh. 9.) I find that all these information requests are directly relevant to the Union's evaluation of its position regarding Respondent's claims that the Union's initial bargaining position would harm its competitiveness. The relevance of the information was generally explained by Plunkett who testified "[i]f we're going to price them out of business, we're out of work. So we needed to know what is this premium. And if no customer is going to pay, we need to understand that." (Tr. 90:10–16.)

So too, I find relevant the two September 20, 2012 information requests pertaining to the amounts paid to outside entities during the prior 4 years and compensation including overtime and fringe benefits paid to contractors for the last 4 years. This information was also directly relevant to underlying contractual wage issues that were at the heart of the negotiations between the parties. The information was relevant to the Union's evaluation of the overall "market rate" referenced by Respondent and whether the rate took into account rates being paid contract workers and those paid to a "contract house." (Tr. 104:10–20.) Mr. Plunket generally described the relevance stating, "we wanted to understand the market . . . and we're trying to understand the market to the greatest level of detail so we could structure a counter or have a dialogue about interests not simply I want to be x percent in the market." (Tr. 105:10–16.).

In sum, Respondent's proposal to reduce the annual wage growth percentage, its direct statements (and those attributed to Delany) directed at the Union's initial "status quo" proposal asserting that Boeing's costs would "balloon and it wouldn't be competitive" were a public invitation and/or warning to the Union to reevaluate its bargaining position. This triggered the Union's duty to evaluate in detail Respondent's statements to determine the accuracy of such statements and whether in fact their position required some alteration.

I further find that it is inherently contradictory for Respondent on the one hand to assert at the bargaining table and publicly that these matters are broadly relevant to bargaining and then during the litigation assert that these very matters have absolutely no relevance to the negotiations. I find that all of the information requests referenced above would have assisted the Union in assessing the accuracy of the Respondent's factual assertions and developing its own counterproposals. The record evidence unambiguously demonstrates that the Union's requests were made directly in response to specific assertions made by the Respondent while bargaining was ongoing.

D. The Failure to Provide Relevant Information.

The Union was entitled to all of the relevant information referenced above and I find that Respondent's refusal and/or failure to provide the information violated the Act. "The refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the act without regard to the employer's subjective good or bad faith." *Piggly Wiggly Midwest, LLC*, 357 NLRB 191 (2012); *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979). The failure to provide the information is in direct contravention to the fundamental objectives of the Act. "The objective of the disclosure [of requested information] obligation is to enable the parties to perform their statutory function responsibly and 'to promote an intelligent resolution of issues at an early stage and without industrial strife." *Clemson Bros.*, 290 NLRB 944, 944 fn. 5 (1988).

The Respondent's arguments to the contrary are unavailing. Respondent contends that it had no duty to provide the information because (1) "Boeing never claimed an inability to pay; (2) Boeing never put "engineering costs" at issue; (3) NBL costs and compensation is irrelevant to SPEEA employee compensation and (4) SPEEA did not need the information to perform its bargaining function."

1. Inability to pay

Respondent argues that it never claimed, "inability to pay" and therefore the duty to provide information was never triggered. Respondent's assertions regarding "inability to pay" fall short. The Board in *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006),

openly rejected the notion that only assertions of "inability to pay" will trigger a duty to disclose information. The Board instead held that "when there has been a showing of relevance, the Board has consistently found a duty to provide information such as competitor data, labor costs, production costs, restructuring studies, income statements, and wage rates for nonunit employees." In *Caldwell*, the Board specifically held that "the General Counsel established that the information was relevant, because it would have assisted the Charging Party in assessing the accuracy of the Respondent's proposals and developing its own counterproposals. The record evidence demonstrates that the Charging Party's requests were made directly in response to specific factual assertions made by the Respondent in the course of bargaining." (Id. at 1160.) A similar result was reached in *KLB Industries, Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012), wherein the company sought wage concessions on the basis of competitive pressures it claimed to be facing. In *KLB*, the court reaffirmed the Board's holding that when the company relied on competitive pressures to justify wage concessions it "made the veracity of that claim relevant to the negotiations." (Id. at 557.) The reasoning and rationale of *Caldwell* and *KLB* is particularly applicable to the facts of this case and directly addresses the very questions presented.

2. Respondent directly and indirectly put engineering costs in issue

Respondent's assertion that it never put "engineering costs" in issue ignores the plain and obvious statements attributed to Delaney, statements made at the bargaining table, and statements made by Brenaman in response to the information requests themselves. Unmistakably, the news article's plain focus was on "engineering costs." Wage rates are undoubtedly a part of what makes up "engineering costs." Brenaman, in his September 25, 2102 response to the Union's request for information regarding "engineering costs" stated, "**as the company has communicated consistently throughout the negotiation process**, wage rates in the Puget Sound are well above the national market (emphasis added)." (GC Exh. 11.) Brenaman's statement is a clear admission that "throughout the bargaining process" engineering costs were in fact "in issue."

Respondent further argues that the requests for information were "based upon the false premise derived from an inaccurate and unreliable news article." (R. Br. at 31.) Respondent further argues that the Bloomberg article was not "substantive evidence" and "unsubstantiated hearsay." (Id.)

The news article falls outside the definition of hearsay because it was never offered to prove the truth of the matters asserted therein. (Tr. 81.) See Fed. Rules of Evidence 801(c)(2). I also reject the underlying premise of Respondent's argument that somehow it was insulated from responding to the requests for information because the requests were partly triggered by quotes attributed to Boeing's VP of engineering and chief spokesperson for Boeing Commercial Airplanes (BCA). The article was published while negotiations were ongoing and specifically referred to the Union's proposal. The language used in the news article mirrored other statements made in bargaining. I find the totality of these to facts sufficient to trigger the Union's statutory duties and responsibilities. The information sought clearly had a bearing on the bargaining process and the Union had a reasonable belief supported by objective evidence i.e. a printed news article with statements attributed to the chief spokesperson for BCA requesting the information. See *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

Further, there is no evidence in the record from which to conclude that the news article was either inaccurate or unreliable. Delany was never called as a witness and no person who was called to testify called into question the accuracy or reliability of the article. Nor did any of Respondent's officials suggest during the various communications between the parties during bargaining that the news article was inaccurate or unreliable. There was no testimony or evidence offered which established that Delany, the chief spokesperson for BCA, was not authorized to speak on behalf of Boeing in his official capacity. There was also no evidence introduced which established that Boeing sought any retraction or correction from Bloomberg. Nevertheless, the information request was not predicated solely on the news article. The Union's request on September 12, 2012, on its face referenced both, "statements made at the bargaining table and to the media." (GC Exh. 8.)

3. Non-Boeing Labor (NBL) costs and compensation was relevant.

Respondent's assertions that NBL costs and compensation were irrelevant are also misplaced. The comparison of what others were paid is directly relevant to the Union's evaluation of the market rate of pay. This is especially true given the fact that Non-Boeing contract workers can perform the same work and in fact work side by side with bargaining unit employees. (Tr. 49:9–24.) As previously noted, wage rates and their comparison with what Boeing was characterizing as the "market rate" were matters that were at the heart of the negotiations and were directly relevant to bargaining.

E. Respondent Has No Legal Right to Unilaterally Decide What Information the Union Needs to Perform its Statutory Responsibilities.

Respondent's assertion that the Union did not need the information to perform its bargaining function also lacks merit. Respondent has no legal right to determine unilaterally what information the Union needs to engage in meaningful negotiations nor to unilaterally force the Union to rely upon the accuracy of its assertions without independent verification. The need for the information was directly triggered by the actions of Respondent and the assertions it made and/or were attributed to it in the news article. It was the Union's legal right and responsibility to assess and verify for itself the accuracy of the Respondent's claims in bargaining. *Shoppers Warehouse*, supra. As the Supreme Court noted in *Truitt*, supra, if "an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. at 152–153. The Supreme Court in *Truitt* recognized the right for independent verification noting that without permitting proof or independent verification, "[t]his is not collective bargaining." 351 U.S. at 153 (quoting *Pioneer Pearl Button Co.*, 1 NLRB at 842–843.

Respondent's Other Defenses

I reject the Respondent's other asserted defenses as being contrary to clearly established Board law. The Respondent's contention that the Union's information requests were made in bad faith is without any factual support. "[T]he presumption is that the union acts in good faith when it requests information from an employer until the contrary is shown." *Hawkins Construction Co.*, 285 NLRB 1313, 1314 (1987), enf. denied on other grounds, 857 F.2d 1224 (8th Cir. 1988); *International Paper Co.*, 319 NLRB 1253, 1266 (1995), enf. denied on other grounds, 115 F.3d 1045 (D.C. Cir. 1997). There is not a scintilla of evidence to support the assertion the Union acted in bad faith. In *Land Rover Redwood City*, 330 NLRB 331, 331–332 fn. 3 (1999), the Board held that "the requirement that an information request be made in good faith is satisfied if at least one reason for the demand can be justified." As was discussed above, the Union's requests were all relevant to the ongoing bargaining and therefore justified. Respondent asserted that the timing of the requests suggests that the real purpose behind the requests was to "delay-not facilitate-the negotiations." (R. Br. at 35.) I disagree, the timing of the requests were triggered by statements made at bargaining and those attributed to Delany and there was no showing to the contrary. Respondent also argues that the "sheer quantity of SPEEA's information requests established bad faith." (Id. at 36.) While it is clear that in some circumstances an overly burdensome request can constitute bad faith, the requests in this case simply do not fall within that category. I find that the requests were not overly burdensome or "excessive" as characterized by Respondent. Rather, they were carefully and narrowly tailored and sought relevant information that was put in issue directly by Respondent.

Respondent's assertions of waiver similarly lack merit. Respondent can point to no evidence in the record (and there is none) which would support a finding that the Union relinquished its rights to the information sought. See *Clinchfield Coal Co*., 275 NLRB 1384 (1985). Nor has there been the requisite showing that the Union expressly waived its right to information. *NLRB v. Perkins Mach. Co*., 326 F.2d 488 (1st Cir. 1964).

I also find Respondent's assertions that the subsequent reaching of a collective-bargaining agreement renders moot the Union's claims unpersuasive. Respondent's assertions ignore well-established Board precedent to the contrary. See *Lumber Mills Employers Assn's*, 265 NLRB 199, 204 (1982), enfd., 736 F.2d 507 (9th Cir. 1984), cert. denied, 469 U.S. 934 (1984).

F. The Practical Effects of the Failure to Provide Relevant Information

I find Respondent's failure to provide requested information undermined and tainted the bargaining process. "Collective bargaining is often described as a struggle of brute economic power between an employer and union. It is, but at the same time the Act regulates the process of that struggle by requiring good-faith bargaining that encourages reasoning, problem solving, and honest discussion. This reasoned side of the Act is essential if the Act's goal of industrial peace is to be furthered. There is a right to engage in knowledge-based bargaining where parties can verify each other's statements, and just as importantly, have information necessary to creatively search for solutions to the problems and differences that arise in collective bargaining." *National Extrusion & Mfg. Co.*, 357 NLRB 127 (2011). Respondent's actions in failing to provide the requested information deprived the Union of its right to engage in "knowledge based bargaining."

CONCLUSIONS OF LAW

1. The Respondent, The Boeing Company, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party the Society of Professional Engineering Employees in Aerospace, affiliated with International Federation of Professional and Technical Engineers, Local 2001 (Union) is a labor organization with the meaning of Section 2(5) of the Act.

3. At all material times the Union has been the designated exclusive collective-bargaining representative of the following bargaining units of Respondent's employees:

a) Professional Unit

Professional employees, including but not limited to those working at [Respondent's] facilities in the State of Washington and the State of Oregon, as set forth in Appendix B of the Collective-Bargaining Agreement for the Professional Bargaining Units.

b) Technical Unit

Technical employees, including but not limited to those working at [Respondent's] facilities in the State of Washington and the State of Oregon, as set forth Article 1 and Appendix B of the Collective-Bargaining Agreement for the Technical Bargaining Units.

4. By failing and refusing to provide information requested by the Union and relevant to the Union's representational duties Respondent violated Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall provide the Union with the information requested in paragraphs 1, 2, 3b and d, and 4 b and c of its September 11, 2012 request for information. Respondent shall also provide the Union with the information requested in paragraphs 1 and 3 (excluding the wage information previously provided) in its September 20, 2012 request for information.

To remedy the Respondent's unlawful failure to bargain in good faith with the Union, the Respondent shall be ordered to bargain in good faith with the Union.

[Recommended Order omitted from publication.]