

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



IN THE MATTER OF:

MICHAEL BRAUN,

ARB CASE NO. 2023-0014

COMPLAINANT,

ALJ CASE NO. 2021-AIR-00014

ALJ WILLIAM P. FARLEY

v.

DATE: May 3, 2023

UNITED AIRLINES, INC.,

RESPONDENT.

Appearances:

For the Complainant:

Michael C. Lueder, Esq.; *Hansen Reynolds LLC*; Milwaukee, Wisconsin

For the Respondent:

Ada W. Dolph, Esq.; *Seyfarth Shaw LLP*; Chicago, Illinois

Before HARTHILL, Chief Administrative Appeals Judge, and PUST, Administrative Appeals Judge

ORDER OF REMAND

PER CURIAM:

This case arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ Complainant Michael Braun alleges that Respondent United Airlines, Inc. unlawfully retaliated against him for engaging in activity protected by AIR 21. On December 12, 2022, a United States Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Granting

¹ 49 U.S.C. § 42121, as implemented by the regulations at 29 C.F.R. Part 1979 (2022).

Respondent's Motion for Summary Decision (D. & O.), in which he dismissed Complainant's claim. Complainant filed a Petition for Review appealing the D. & O. with the Administrative Review Board (ARB or Board) on December 22, 2022.

On January 27, 2023, Complainant filed an Opening Brief and an Appendix with the Board. Both filings contain significant redactions, with many lines and entire pages blacked-out.² Also on January 27, 2023, the parties filed a Joint Motion to File Briefs and Appendices Under Seal (Joint Motion). In the Joint Motion, the parties requested permission to "file unredacted versions of their briefs and appendices under seal" with the Board. In support of their request to file under seal, the parties explained that:

[Respondent] has designated much of the record upon which the briefs rely as confidential pursuant to the ALJ's protective order. As will be seen in the redacted versions of these documents, large swaths of the briefs and appendices have been blacked out. To fulfill its role as an appellate body, it is respectfully submitted that the Board needs to see unredacted versions of these documents.^[3]

The record from the proceedings below reflects that certain briefs and materials filed with the ALJ also contain redactions. As with the appellate materials, Complainant represented to the Board that the redactions in the filings below concern information designated by Respondent as "confidential" pursuant to the terms of a protective order agreed to by the parties and entered by the ALJ on August 12, 2021 (Protective Order). Complainant represented to the Board that, after entering the Protective Order, the ALJ permitted the parties to file redacted briefs and materials using the Office of Administrative Law Judge's (OALJ) electronic filing system, while separately transmitting complete, unredacted versions of the briefs and materials directly to the ALJ's staff via email for confidential filing under seal.⁴

² Likewise, Complainant filed a Reply Brief containing redactions on March 10, 2023. Although Respondent joined with Complainant in the Joint Motion, Respondent's Response Brief, filed on February 24, 2023, does not contain any redactions.

³ Joint Motion to File Briefs and Appendices Under Seal at 1.

⁴ These representations were made in email correspondence with ARB staff between January 24, 2023, and February 14, 2023.

Although it appears from the record below and the representations of the parties on appeal that the ALJ permitted the parties to file materials under seal based on nothing more than the entry of the Protective Order, this was in error. The Protective Order entered by the ALJ below states, in relevant part:

To the extent that any answers to interrogatories, transcripts of depositions, responses to requests for admissions, or any other papers filed or to be filed with the Tribunal reveal or tend to reveal information claimed to be confidential, these papers or any portion thereof must be filed under seal by the filing party utilizing the procedures set forth in 29 C.F.R. § 18.31 and § 18.85.^[5]

Section 18.85,⁶ which is part of the OALJ's Rules of Practice and Procedure, provides that "[o]n motion of any interested person or the judge's own, the judge may order any material that is in the record to be sealed from public access."⁷ Section 18.85 dictates that "[a]n order that seals material must state findings and explain why the reasons to seal adjudicatory records outweigh the presumption of public access."⁸

The Protective Order was not a standing order giving the parties carte blanche to file briefs and other materials under seal after self-designating information as confidential. Instead, the Protective Order and the OALJ Rules of Practice and Procedure cited therein required the parties to utilize the procedures set forth in 29 C.F.R. § 18.85 if they desired to have materials filed under seal, including obtaining an order "stat[ing] findings and explain[ing] why the reasons to seal adjudicatory records outweigh the presumption of public access."⁹

⁵ Protective Order at 4.

⁶ The Protective Order also references 29 C.F.R. § 18.35 which states, in relevant part, that "[f]or good cause shown, the judge may order protection of material pursuant to §§ 18.85 and 18.52." Section 18.85 governs sealing materials, as discussed herein. Section 18.52 governs the issuance of protective orders.

⁷ 29 C.F.R. § 18.85(b)(1).

⁸ *Id.* § 18.85(b)(2).

⁹ *Id.*

It does not appear from the record that the ALJ ever entered an order specifically permitting the filing of materials confidentially or under seal or explaining why the reasons to seal adjudicatory records outweighed the presumption of public access. Although it appears that the ALJ permitted the parties to freely file redacted briefs and other materials under seal without such an order, the Protective Order and the OALJ Rules of Practice and Procedure require more, as further explained in our recent decision in *Furlong-Newberry v. Exotic Metals Forming Corp.*¹⁰ In that case, we stated:

A court must identify compelling reasons supported by specific factual findings in order to outweigh the strong public policies favoring disclosure. A party seeking to seal judicial records must specify facts that causally connect the documents at hand to sufficiently compelling reasons that justify overriding the strong presumption favoring public access. The trial court must weigh relevant factors including the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets. The fact that a protective order has been issued does not present sufficient compelling reasons to seal the record.^[11]

On the current record, the ARB is unable to determine whether there are “sufficiently compelling reasons” to justify maintaining the seal over the materials filed confidentially with the ALJ below, or to justify accepting materials under seal on appeal.¹² The parties have not provided any description of the nature of the information and materials that have been redacted or articulated any justification that may “overrid[e] the strong presumption favoring public access.”¹³ As we stated

¹⁰ ARB No. 2022-0017, ALJ No. 2019-TSC-00001 (ARB Nov. 9, 2022). We recognize and appreciate that when the ALJ accepted confidential materials under seal below, the Board had not yet issued the decision in *Furlong-Newberry* expanding on the standard to seal administrative materials. However, the standard articulated in *Furlong-Newberry* is consistent with the rules governing the sealing of records set forth in the OALJ Rules of Practice and Procedure which were in effect at all times during the proceedings below.

¹¹ *Id.* at 26.

¹² *Id.*

¹³ *Id.*

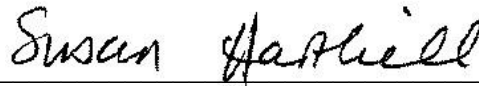
in *Furlong-Newberry*, “the fact that a protective order has been issued does not present sufficient compelling reasons to seal the record.”¹⁴

It is imperative that the preliminary issue concerning seals and redactions be resolved before the ARB addresses the merits of the present appeal, to ensure that the record can be properly and appropriately maintained, received, and considered by the Board. Accordingly, we **REMAND** this case to the ALJ to issue an order with specific factual findings addressing whether there are sufficiently compelling reasons to maintain a seal over materials in the record before the ALJ after conscientiously balancing the competing interests of the public in having access to judicial records, consistent with 29 C.F.R. § 18.85 and the Board’s decision in *Furlong-Newberry*. Specifically, the ALJ is directed to focus his order on the evidence and other information or materials that Complainant has redacted from his briefs and appendix filed with the Board. The ALJ may, as he deems appropriate, confer with the parties to elicit information necessary to prepare such an order.

¹⁴ *Id.*; *accord id.* at 27 (“In effect, the ALJ’s only basis for issuing the Order Sealing D. & O. is the fact that the Protective Order had been issued earlier based on ITAR-related concerns. That, in and of itself, is not sufficient under the law.”).

Complainant may refile his Petition for Review with the Board within ten business days of the ALJ's issuance of such an order. Additionally, either party may petition the Board to review the ALJ's order concerning this seal issue pursuant to 29 C.F.R. §§ 1979.109-110.

SO ORDERED.¹⁵



SUSAN HARTHILL
Chief Administrative Appeals Judge



TAMMY L. PUST
Administrative Appeals Judge

¹⁵ Even if the Board ultimately seals portions of the record in this case, the entire record, including the portions that are sealed, remain subject to disclosure under the Freedom of Information Act, 5 U.S.C. § 552. See *Morgan v. U.S.*, 923 F.2d 195, 199 (D.C. Cir. 1991) (“[T]he mere existence of a court seal is, without more, insufficient to justify nondisclosure under the FOIA.”); *Koeck v. Gen. Elec. Consumer & Indus.*, ARB No. 2008-0068, ALJ No. 2007-SOX-00073, slip op. at 3 (ARB Aug. 28, 2008) (“[T]he Board cannot guarantee confidentiality before it has received a FOIA request to release a document because an agency promise of confidentiality [cannot] in and of itself defeat the right of disclosure.” (internal quotations and citations omitted)); cf. *Muenzberg v. APL Maritime, LTD*, ARB No. 2021-0070, ALJ No. 2018-SPA-00001, slip op. at 3 (ARB May 13, 2022) (sealing documents “subject to the procedures requiring disclosure under FOIA.”).