IN THE MATTER OF THE ARBITRATION BETWEEN	)	
THE BOEING COMPANY	)	**OPINION AND AWARD**
and	)	**Grievance: Application of CBAs to Edwards/Palmdale**
THE SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES IN AEROSPACE, IFTPE, LOCAL 2001, AFL-CIO (SPEEA)	)	**Date: November 1, 2012**

OPINION AND AWARD OF THE ARBITRATOR

Arbitrator

Michael H. Beck

Appearances

For The Boeing Company:	**Richard B. Hankins, Alston D. Correll and Drew E. Lunt, McKenna, Long & Aldridge, LLP**
For the Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001, AFL-CIO (SPEEA):	**Joseph L. Paller Jr. and Michael D. Weiner, Gilbert & Sackman, A Law Corporation**

OPINION AND AWARD OF THE ARBITRATOR

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OPINION OF THE ARBITRATOR

PROCEDURAL MATTERS

The Arbitrator, Michael H. Beck, was selected by the parties pursuant to the parties 2008-2012 Collective Bargaining Agreements. One of the two Collective Bargaining Agreements covers professional employees (also referred to as engineering employees) and is hereinafter referred to as the 2008 Professional Agreement or as the Current Professional Agreement. The second Collective Bargaining Agreement covers technical employees and is hereinafter referred to as the 2008 Technical Agreement or as the Current Technical Agreement.

The Employer, The Boeing Company, also referred to as the Company, was represented by Richard B. Hankins, Alston D. Correll, and Drew E. Lunt of the law firm

McKenna, Long & Aldridge, LLP. The Union, Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001, AFL-CIO (SPEEA) was represented by Joseph L. Paller, Jr. and Michael D. Weiner of the law firm of Gilbert & Sackman, A Law Corporation.

A hearing in this matter was held at Los Angeles, California on May 16 and 17, 2012. The parties provided for a court reporter and your Arbitrator was provided with a verbatim transcript for his use in reaching a decision in this case. At the hearing the testimony of witnesses was taken under oath and the parties submitted a very substantial amount of documentary evidence.[1] The post hearing briefs were received in my office by e-mail on September 14, 2012 and each party also provided me with a copy of their brief by U.S. mail.

ISSUE

The parties were not able to agree to a stipulated issue on the merits. I have carefully reviewed the record and find that the following constitutes an appropriate statement of the issue on the merits:

> Did the Company violate Article 1, Section 1.1 of the 1999, 2002, 2005 and 2008 Professional (Engineering) and Technical Agreements by refusing to apply those Agreements to certain employees working at Edwards Air Force Base, California and Palmdale, California and if so, what is the appropriate remedy?

The Employer also raises two procedural defenses, namely that:

1. The grievance was not timely filed under the applicable Agreements and

[1] The record contains several thousand pages of exhibits, 273 pages of hearing transcript, over 200 pages of briefs counting prehearing and post hearing briefs, approximately 75 case citations and cites to several treatises.

2. The Union did not file its request for arbitration in a timely manner under the applicable Agreements.

RELEVANT PROVISIONS OF THE APPLICABLE AGREEMENTS

The grievance in this matter was filed on March 5, 2001 at a time when the parties 1999 Agreements were in effect. The request for arbitration was filed by the Union on June 4, 2003 at a time when the parties 2002 Agreements were in effect. The hearing in this matter was held in May of 2012 at a time when the parties 2008 Agreements were in effect. The relevant language of the Professional Agreements has remained essentially unchanged since the 1999 Agreement. The same is true with respect to the Technical Agreements. There are some differences in language between the Professional Agreements and the Technical Agreements. However, the parties agree that the Arbitrator's decision should be the same whether he is construing the Professional Agreements or the Technical Agreements. In other words, the parties agree that the language of the Professional Agreements and the Technical Agreements are substantially similar, so that any differences in language should not be taken to indicate a different result. In view of the foregoing and for the convenience of all concerned, I have determined to set forth the relevant language of the 2008 Professional Agreement. Again, my findings with respect to the Professional Agreements are the same with respect to the Technical Agreements.

The relevant provisions of the 2008 Professional Agreement are set forth below:

ARTICLE 1
RECOGNITION

Section 1.1 Recognition. For the purposes of collective bargaining with respect to rates of pay and other conditions of employment, the Company recognizes the Union as the exclusive bargaining agent for the following collective bargaining units:

1.1(a) All persons working in the Company's plants in the State of Washington, including persons who are on travel status from such plants, who are classified by the Company in one of the classifications listed in Appendix B and including those persons assigned (other than on travel status) at Edwards AFB, California or Palmdale, California who are classified by the Company in one of the classifications listed in Appendix B.

* * *

ARTICLE 3
GRIEVANCE PROCEDURE AND ARBITRATION

* * *

Section 3.3 Union Versus Company and Company Versus Union Grievances. Grievances which the Union may have against the Company or the Company may have against the Union, limited as aforesaid to matters dealing with the interpretation or application of terms of this Agreement, shall be handled as follows:

3.3(a) Such grievances shall be submitted to the designated Company Representative or President of the Union, as the case may be, or to their designated representatives, within ten (10) workdays following the occurrence of the event giving rise to the grievance and shall contain the following:

1) Statement of the grievance setting forth in detail the facts upon which the grievance is based.

2) The section(s) of the Agreement alleged to have been violated.

3) The remedy sought.

3.3(b) The grievance shall be signed by the President of the Union or the designated Company Representative, as the case may be, or their designated representatives. If no settlement is reached within ten (10) workdays from the submission of the grievance to the designated Company Representative or the designated representative of the Union, as the case may be, both shall sign the grievance and indicate it has been discussed and considered by them and that no settlement has been reached and the party responding to the grievance will promptly confirm in writing to the other party the denial of the grievance. Within ten (10) workdays thereafter either party may in writing request that the matter be submitted to an arbiter for a prompt hearing as provided in 3.4 through 3.6.

> **3.3(c)** No matter shall be considered as a grievance under this 3.3 unless it is presented to the designated persons within ten (10) workdays after occurrence of the last event on which the grievance is based.

BACKGROUND

Since at least 1975, the Employer has recognized the Union as the collective bargaining representative of certain classifications of professional and technical employees "working in the Company's plants in the State of Washington, including persons who are on travel status from such plants. . . ." (A-Union Exhibit No. 2, pg. 4.) Since the 1970s the Employer has contracted with the US Air Force to perform flight testing and other aerospace work at Edwards Air Force Base (Edwards).

In July of 1976 the Employer established the Boeing Mojave Test Center (BMTC) at Edwards as a permanent location, that is the facility would serve as a permanent work location for certain employees. The employees already working at Edwards on temporary assignments from plants in the State of Washington were given the option of transferring permanently to the Edwards location, that is either being removed from travel status or returning to their permanent positions in the State of Washington.

In August of 1976 the Union filed two representation petitions with the National Labor Relations Board (NLRB or Board) seeking to represent, in separate units, professional and technical employees employed by the Company at Edwards. In lieu of having representation elections, the parties on October 5, 1976 entered into a Memorandum of Agreement (1976 MOA) which provided that the Company recognizes the Union "as the collective bargaining representative of the Company's engineering and

technical employees assigned to Edwards AFB . . . ." (A-Joint Exhibit No. 3.) Further the 1976 MOA provided that the Engineering (Professional) and Technical Agreements would be amended at Section 1.1(a) to include, after Article 11, in the case of the engineers, and after Appendix A in the case of the technical employees, the phrase "and including those persons at Edwards AFB, California identified by the Company – SPEEA Memorandum of Agreement dated October 5, 1976." (A-Joint Exhibit No. 3.)

The first Agreements after the execution of the 1976 MOA were the 1978 Agreements. The 1978 Professional Agreement was executed on February 1, 1978 and recognition language provides at Section 1.1(a):

> **1.1(a)** All persons working in the Company's plants in the State of Washington, including persons who are on travel status from such plants, who are classified by the Company in one of the classifications listed in Article 11 and including those persons at Edwards AFB. California identified by the Company—SPEEA Memorandum of Agreement dated October 5, 1976. (A-Joint Exhibit No. 5, U-04.)

The next three agreements, namely the 1980, 1983 and 1986 Agreements contain essentially the same language as did the 1978 Agreements. Thus, as the Employer points out in its brief,[2] those Agreements recognized the Union as representative of "persons working in the Company plants in the State of Washington, including persons who are on travel status from such plants," and as a result of the incorporation of the October 5, 1976 MOA, also recognized the Union as the representative of "employees assigned to Edwards AFB. . . ." This is because the 1976 MOA provided that:

> The Company hereby recognizes SPEEA as the collective bargaining representative of the Company's engineering and technical employees assigned to Edward AFB, . . . (A-Joint Exhibit No. 3.)

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[2] All references to either party's brief is to their post hearing brief.

On May 30, 1989 the Employer and Union entered into a Letter of Understanding (1989 LOU) which provided that:

> The Boeing Company ("Company") and the Seattle Professional Engineering Employees Association ("SPEEA") agree there has been, and will continue to be, an interchange of engineering and technical employees between the Company's operations at Edwards AFB, California and its operations at Palmdale, California. Accordingly, the parties agree that SPEEA is recognized as the collective bargaining representative of the engineering and technical employees at Palmdale and that such employees shall be considered as accretions to, and will be included in, the Edwards AFB engineering and technical units, as described and provided for in the Memorandum of Agreement Relating to Edward AFC dated October 5, 1976, and Section 1.1(a) of both the Professional/Engineering Bargaining Units Collective Bargaining Agreement and the Technical Bargaining Units Collective Bargaining Agreement. (A-Joint Exhibit No. 4.)

In negotiating the 1989 Agreements, the parties agreed to delete the reference to the 1976 MOA but did continue to include in both the professional and technical units persons, ". . . working in the Company's plants in the State of Washington, including persons who are on travel status from such plants" and "persons assigned (other than on travel status) at Edwards AFB, California or Palmdale, California." The specific recognition language of the 1989 Professional Agreement is set forth below:

> [T]he Company recognizes the Union as the exclusive bargaining agent for the following collective bargaining units:
>
> > 1.1 (a) All persons working in the Company's plants in the State of Washington, including persons who are on travel status from such plants, who are classified by the Company in one of the classifications listed in Article 11 and including those persons assigned (other than on travel status) at Edwards, California or Palmdale, California who are classified by the Company in one of the classifications listed in Article 11. (A-Joint Exhibit No. 1, pg. 7.)

The six collective bargaining agreements regarding both professional and technical employees negotiated since the 1989 agreements, namely the 1992, 1995, 1999,

2002, 2005 and 2008 agreements, contain essentially the same language recognizing the Union as the collective bargaining representative of the professional employees and the technical employees. The Edwards and Palmdale facilities are located approximately 35 miles apart.

In December of 1996 the Employer acquired the aerospace interests of Rockwell International Corporation (Rockwell), and in 1997, the Employer merged with McDonnell Douglas Corporation (McDonnell Douglas). Both Rockwell and McDonnell Douglas, before the acquisition and merger, had operations at Edwards and Palmdale, hereinafter Edwards/Palmdale. The Employer, after the acquisition and merger, initially kept the heritage Rockwell and heritage[3] McDonnell Douglas operations at Edwards/Palmdale administratively and functionally separated from the Boeing operations at Edwards/Palmdale.

In July of 1998, the structure of operations at Edwards/Palmdale began to change when Boeing announced the creation of the Boeing High Desert Assembly Integration and Test Facility (HDAIT). The creation of HDAIT resulted in the consolidation and integration of various facets of the heritage Rockwell, heritage McDonnell Douglas and Boeing operations.

By January 1, 1999 the integration of the Boeing, Rockwell, and McDonnell Douglas operations under HDAIT was, for the most part, completed with the consolidation of the various programs into a single cost center.

[3] The parties have used the term "heritage" to refer to Rockwell and McDonnell Douglas operations prior to the acquisition and merger, and to employees working at those two companies who did not transfer to job classifications covered by Boeing/SPEEA Agreements.

EVENTS LEADING TO THE FILING OF THE GRIEVANCE AND THE REQUEST FOR ARBITRATION

On September 25, 2000 Rich Plunkett who was then a Contract Administrator for the Union learned from Jeffrey Lewis, an engineer working at Palmdale, who was also a Union Counsel Representative, that a SPEEA represented employee was going on medical leave and that his replacement, Milt Canhan, who was a McDonnell Douglas heritage employee, would not be represented by SPEEA. The next day Plunkett telephoned Gerry Gilbert a Company management official dealing with workforce issues and explained to him what he had learned from Mr. Lewis. According to Plunkett, Gilbert told him that he had never heard of this and that he would look into the matter.

After Mr. Plunkett's discussion with Mr. Gilbert, Plunkett had discussions about the matter with several other management officials. However, according to Plunkett, he did not receive a satisfactory answer regarding why the Company classified Canhan as a non-represented employee. Over the next few months Plunkett learned that other employees were being placed in what the Union understood were bargaining unit positions but were designated as non-represented employees by the Company.

On March 5, 2001 the Union filed a Step 3 grievance which stated:

> I write to request a third step grievance meeting for purposes of discussing the on-going, willful violation of the SPEEA/Boeing Collective Bargaining Agreements (CBAs). Specifically, management at the BHDAIT (EAFB and Palmdale) is ignoring the recognition language in both the Technical and Professional CBAs. At these facilities non-represented employees are being placed into positions that have traditionally been held by SPEEA-represented employees.
>
> SPEEA has attempted to address this issue locally and the result has been local management's refusal to comply with the CBAs.
>
> Please schedule the meeting as quickly as possible . . .

Remedy:

We request that the Company immediately recognize all employees in positions designated as SPEEA represented per the CBAs as being represented by SPEEA. (A-Joint Exhibit No. 2, 1st pg.)

On April 9, 2001 the Company provided its Step 3 response which stated:

Your letter of March 5, 2001 requested a third step grievance meeting regarding hiring issues at the BHDAIT (Palmdale and Edwards Air Force Base). The Company's position on this issue is as follows:

1. The subject matter raised in your letter is not a proper subject for the grievance and arbitration procedure under the collective bargaining agreement.

2. Even if the subject matter were a proper subject, any grievance regarding this issue would be untimely.

3. Notwithstanding the above, the Company has in no way violated the collective bargaining agreement with respect to recognition and hiring at the BHDAIT.

We would be happy to meet with you to discuss this issue; however, it must be understood that any such discussions shall not constitute a waiver of any defense the Company may have regarding the union's allegations. (A-Joint Exhibit No. 2, 3rd pg.)

Beginning in April of 2001 the Union began requesting information for the purpose of investigating its March 5, 2001 grievance. Between April and October of 2001 the parties, via correspondence and in meetings, discussed the Union's information request with Employer management officials, who maintained that the Union's information request was overly broad.

On November 5, 2001, Geoff Stamper, Company Director of Labor Relations, wrote to then Executive Director of the Union, Charles Bofferding stating that only five programs at HDIAT had ever had SPEEA represented employees, namely the F-22, B-1 (software), B-52, B-2, and certain aspects of JSF. Mr. Stamper then went on to state that with respect to the five programs he had identified:

> . . . any employee on travel status from the Seattle payroll who is in any of the job classifications specified in SPEEA's contracts has been treated as SPEEA-represented. In addition, any employee who is directly assigned from the Seattle payroll to one of the five programs who is in any of the job classifications specified in SPEEA's contracts with the Company has been treated as SPEEA-represented. In contrast, if an employee is a local hire into an open position in one of those programs at the HDAIT, he or she is not treated as SPEEA-represented. If you have any disagreement with this situation, please explain your position. (A-Joint Exhibit No. 2, 15th pg.)

After the Employer issued the November 5, 2001 letter, the parties continued to discuss the grievance and the information request. In a meeting held on March 6, 2002 the Union threatened to file an unfair labor practice charge against the Employer for its failure to provide information requested regarding the March 5, 2001 grievance. The Employer agreed to continue to negotiate regarding the information request and no unfair labor charge was filed.

In approximately early June of 2002, the Employer did provide some additional information to the Union regarding the March 2001 grievance, and the parties discussed the matter further at a June 5, 2002 meeting. In July of 2002, the parties again exchanged correspondence regarding the Union's information request, with the Employer and Union pretty much taking the same positions regarding the Union's information request as each had done in earlier correspondence. In this regard, the Employer made clear its position, which was that it was not obligated to provide information regarding employees it determined were not represented by SPEEA.

During the negotiations for the 2002 Agreements the parties did discuss their dispute regarding recognition of employees at Edwards/Palmdale but the matter remained unresolved. Thereafter the parties continued both in correspondence and at the meetings to discuss the March 2001 grievance and the Union's information request.

At a meeting on May 27, 2003, the Union made clear to the Employer that it would be filing a request for arbitration with respect to the March 2001 grievance as the grievance remained unresolved. By letter dated June 4, 2003 to Jeff Janders, a Company official who dealt with Company – SPEEA relations, the Union filed its request for arbitration of the March 2001 grievance. The Union's letter stated:

> As you are aware, we have had numerous discussions regarding our firm belief that The Boeing Company was violating the recognition language contained in our Professional and Technical Collective Bargaining Agreements. In fact, we have even discussed the Company's denial of our data requests to resolve this issue on at least 3 occasions.
>
> SPEEA continues to assert that ALL engineers and technical workers employed at Edwards and Palmdale, performing work described in Article 11 of the Puget Sound Professional Unit and Technical Unit Collective Bargaining Agreements, are represented by SPEEA per Articles 1 of the same. This is substantiated by the Memorandum Of Agreement signed by Phil Beatty on October 5th, 1976 that first recognized SPEEA as the collective bargaining agent for these employees. We have attached a copy of the MOA for reference.
>
> Given our history on this issue including the continuing denial of data requests to determine the details of the situation, we are now asking that Boeing either accept that the employees are SPEEA represented or accept this letter as our request for arbitration to resolve the matter in accordance with Article 3. (A-Joint Exhibit No. 2, 43rd pg.)

On June 19, 2003 the Company responded to the Union, stating that the Union's claim:

> . . . presents a question concerning representation within the jurisdiction of the National Labor Relations Board. Accordingly, we are not amenable to arbitration of this issue." (A-Employer Exhibit 2, 78th pg.)

On November 25, 2003, the Union sought to compel arbitration by filing suit in the U.S. District Court for the Western District of Washington. On January 3, 2005, U.S.

District Judge James L. Robart held that the Union's grievance was subject to arbitration and "shall be decided before an arbitrator." (A-Union Exhibit No. 1, pg. 11)

THE UNIT CLARIFICATION PETITION

On April 8, 2005, the Employer filed a Unit Clarification Petition with respect to both the Professional and Technical units with the NLRB (the Board). On October 4, 2005, which was the first day of hearing before the Board hearing officer, the Employer amended its unit clarification petitions with respect to both the Professional and Technical bargaining units. Thus, with respect to both units, the Employer sought to exclude "all employees at Edwards AFB, California or Palmdale, California whose current job requisition was not filled through the Seattle, Washington staffing offices." (A-Union Exhibit No. 2, pgs. 2-3.) The Employer contended that these unit clarifications were warranted because the Union had attempted to expand the scope of the units to gain recognition over employees who had historically been excluded. The Union asserted that the clarification petitions were untimely and unwarranted. The arbitration proceeding was held in abeyance pending the Regional Director's decision.

The Regional Director, James J. McDermott, of Region 31 of the NLRB on October 8, 2006 issued his Decision and Order and concluded as follows:

> Based on the above and the record as a whole, I find that I cannot and will not clarify the units based on the language proposed by the Employer. Further, noting particularly the inapplicability of the accretion doctrine to the facts of this case and the absence of community of interest evidence with the existing bargaining units, I find the parties have failed to provide sufficient evidence for me to make an alternative clarification of either unit. (A-Union Exhibit No. 2, pg. 33.)

The Employer's request for review of the Regional Director's Decision and Order was granted by the Board, and on April 30, 2007, the Board issued its Decision On Review and Order Remanding. The Board concluded:

> [W]e reverse the Regional Director's dismissal of the petition and remand to the Regional Director for further processing of the petition, including reopening the record, focusing particularly on eliciting additional evidence with respect to elements critical to resolving the unit composition issues. (A-Union Exhibit No. 3, pg. 2.)

After the remand, a hearing was held before a Board Hearing Officer. Acting Regional Director of Region 31, Gary W. Muffley issued his Supplemental Decision and Order Dismissing Petition on August 5, 2011. In reaching his decision, the Acting Regional Director (ARD) made an analysis of the community of interest among employees considering a number of factors. As a result of his analysis, ARD Muffley found that:

> 5. The bargaining units currently represented by the Union shall not be clarified as requested by the Employer-Petitioner. (A-Union Exhibit No. 4, pg. 27.)

By letter dated October 7, 2011, I was notified by Union Counsel Joseph Paller, Jr. that the arbitration for which I had been selected in 2005 was no longer in abeyance and that the parties had now agreed to proceed to arbitration. As stated above, the arbitration hearing was then held in Los Angeles on May 16 and 17, 2012.

DISCUSSION

A. Was the Grievance Timely Filed

The grievance was filed at the time the 1999 Professional and Technical Agreements were in effect. The Grievance Procedure and Arbitration section of those Agreements continued essentially unchanged in the following Agreements up to and including the current Agreements. The applicable Agreements reference two types of grievances, namely (1) Employee Grievances and (2) Union Versus Company and Company Versus Union Grievances. In discussing the question of whether the grievance here was timely filed, both parties referenced Section 3.3 relating to, in this case, the Union Versus Company Grievance. In this regard, the Employer takes the position that pursuant to Section 3.3(a), the Union is required to submit its grievance in writing "within ten (10) workdays following the occurrence of the event giving rise to the grievance. . . ." The Employer argues that if the event which gave rise to the grievance occurred in late September of 2000 as the Union contends, then the filing of the grievance in early March of 2001 took place more than four months after "the occurrence of the event giving rise to the grievance. . . ."

In response the Union raises three contentions which it believes establishes that the grievance was timely filed. Thus, the Union contends that:

1. The Union did not initially have knowledge of the violation or sufficient information to, in the words of Section 3.3(a) of the applicable Agreements to "set forth in detail" the facts underlying the grievance, and the Company's failure to respond to the Union's information request caused the delay.

2. The Union takes the position that the parties' established practice is to ignore the timelines set forth in the Agreements and engage in lengthy informal discussions prior to the filing of formal grievances.

While I find there is evidence in the record supporting each of these contentions, I do not find that the Union has provided sufficient evidence to overcome the filing requirements of Section 3.3 relating to Union Versus Company Grievances.

However, I do find that the Union's third contention, namely that the grievance here constitutes a continuing violation warrants a finding that the grievance was timely filed. As the Union points out in its brief, Professors Elkouri in How Arbitration Works[4] conclude that:

> Many arbitrators have held that "continuing" violations of the agreement (as opposed to a single isolated and completed transaction) give rise to "continuing" grievances in the sense that the act complained of may be said to be repeated from day to day with each day treated as a new "occurrence." (Footnote citing cases omitted, pgs. 218-19.)

I have carefully reviewed the four arbitration decisions cited by the Union in its brief at page 51, which are in addition to those cited by Professors Elkouri in their footnote, and those four Union cited decisions provide further support for the Union's position.[5]

Additionally, I note that the Employer continued, both before and after the occurrence that led to the grievance in this matter, namely the placing of Mr. Canhan in a

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[4] Elkouri and Elkouri, How Arbitration Works, Sixth Edition, Alan Miles Ruben, Editor-in-Chief, Bureau of National Affairs, Inc. (2003).

[5] The four cases are: (1) Union Tank Car Co., 55 LA 170, 177 (Platt, 1970) (failure to apply collective bargaining agreement to employees at new plant location is continuing violation); (2) Peoria School Dist. No. 150, 120 LA 999, 1006 (Bierig, 2004) (exclusion of quality assurance position from bargaining unit is continuing violation); (3) Lebanon School Dist., 83 LA 817, 822 (Raffaele, 1984) (exclusion of substitute teacher from bargaining unit is continuing violation); and (4) General Tire & Rubber Co., 71 LA 579, 581 (Barnhart, 1978) (exclusion of crib clerk position from bargaining unit is continuing violation.)

non-represented position, to place new hires, as well as heritage Rockwell and McDonnell Douglas employees who were working in classifications under the Agreements, in non-represented positions. Thus, the grievance here is one of a continuing nature.

B. Was the Request for Arbitration Timely Filed

The Employer contends that the Union's request for arbitration was untimely pursuant to the terms of the applicable Agreements in that the Union did not request arbitration within 10 workdays from the Employer's denial of the grievance on April 9, 2001. It is true, as the Employer points out in its brief, that in its April 9, 2001 denial of the grievance, the Employer did state that the grievance filing was untimely. However, as the Union points out in its brief, the Employer, in its June 19, 2003 denial of the Union's June 4, 2003 request for arbitration, did not give as a reason the lack of timeliness of the Union's request for arbitration. Rather, that letter stated:

> Your claim presents a question concerning representation within the jurisdiction of the National Labor Relations Board. Accordingly, we are not amenable to arbitration of this issue. (A-Joint Exhibit No. 2, 78th pg.)

Further, as described in detail above, during the approximately 27 month period between March 5, 2001 and June 4, 2003, the parties engaged in numerous discussions and correspondence regarding the grievance being moved to arbitration and never once did the Employer take the position that a request for arbitration would be or was untimely. In this regard, I note that Mr. Plunkett, at the monthly status meeting of March 25, 2003, indicated that the Union may have to file for arbitration and none of the

Employer officials at that meeting indicated that a request for arbitration would be untimely.

In the monthly status meeting of May 27, 2003 Mr. Plunkett stated that the Union would be "filing a request for arbitration on Edwards Air Force Base recognition language." (A-Joint Exhibit No. 2, 39th pg.) Again, no Employer official at that meeting indicated that a Union request for arbitration would be untimely.

On August 19, 2003, at a monthly status meeting, then Union General Counsel Phyllis Rogers noted that the Employer had stated that it did not want to arbitrate the grievance stating that "I think we [the Union] will file to compel arbitration." (A-Joint Exhibit No. 2, 51st pg.) Again, there was no statement by any of the Employer officials at that meeting that the Union's June 4, 2003 request for arbitration had not been timely filed.

At a monthly status meeting on October 28, 2003 the parties discussed the Union's threat to file a suit to compel arbitration. Again, there was no indication by any of the Employer officials present that the Employer took the position that the request for arbitration had not been timely filed.

On November 25, 2003 the Union filed a lawsuit to compel arbitration. As reported earlier, U.S. District Judge James L. Robart ordered that the ". . . dispute between SPEEA and Boeing shall be decided before an arbitrator." (A-Union Exhibit No.1, pg.11.) In setting forth Boeing's argument against arbitration, Judge Robart stated that it was that ". . . the NLRB, rather than an arbitrator, should decide the underlying dispute because it is a 'representational' matter." (A-Union Exhibit No. 1, pg. 4.)

Judge Robart did reference the possibility that SPEEA did not timely request arbitration pursuant to the parties' grievance procedure. However, he did not specifically indicate that Boeing had made this argument to the Court. In any event, he found that this question was one for the arbitrator to determine.

Finally, I note the following conclusion reached by Professors Elkouri in How Arbitrator Works, supra, at page 219 under the heading, "Untimely Filings":

> If the parties allow the grievance to move from step to step in the procedure without making objections of untimeliness, the right to object may be deemed to have been waived. (Footnote citing cases omitted.)

Based on all of the foregoing, I find, in agreement with the Union, that the Company has waived the right to invoke timeliness as a defense to the Union's demand for arbitration. I therefore find that the matter is subject to arbitration before me on the merits.

C. The Merits

The Union contends that the Arbitrator should defer to the NLRB's findings and hold that the Company violated the recognition provisions by failing to apply the Agreements to Edwards/Palmdale. In this regard, the Union contends that the Company seeks to relitigate "the same issues that were thoroughly considered and conclusively decided by the NLRB. . . ." (Union brief pgs. 38-39.) In support of this position, the Union cites the concept of *res judicata.* The Employer contends that the concept of *res judicata* is inapplicable to the instant case.

The Union cites a number of arbitration decisions in which arbitrators have applied *res judicata* concepts in determining not to rule on the merits with respect to an issue which the parties have previously litigated and which was decided on the merits in a prior proceeding. Of the cases cited, one is particularly instructive and is discussed below.

Regions Hospital, 118 LA 26 (Bognanno, 2002) dealt with a contract dispute regarding the recognition clause in the parties' collective bargaining agreement. The parties had had collective bargaining agreements covering pharmacists since 1971. Initially, the employer was a public employer regulated pursuant to the laws of the State of Minnesota. The union had argued, and the arbitrator in a prior arbitration found that resident pharmacists from the University of Minnesota School of Pharmacy were included in the unit covered by the parties' collective bargaining agreement if they were assigned to perform unit work on a regular basis and an excess of the 32 hours per week.

Since that arbitration decision, the Employer had become a private hospital and no longer taught residents from the University of Minnesota School of Pharmacy. In the current arbitration, the union contended that all pharmacists, even if working less than 32 hours a week, are covered by the agreement, a position the employer opposed. In the current arbitration, the arbitrator recognized that the hospital as a private hospital no longer teaches residents from the University of Minnesota School of Pharmacy but found that the prior arbitration award was ". . . still binding and serves as controlling precedent." (Pg. 28.) In this regard, Arbitrator Bognanno pointed out that in the prior arbitration, the union took the position under the same contract language that it was now seeking to avoid. Arbitrator Bognanno concluded that:

> The doctrine of *res judicata* should and does prohibit the Union's argument at this time. *Res judicata* includes two (2) separate doctrines: issue preclusion and claim preclusion. Issue preclusion controls this case. Issue preclusion prevents a party to a prior action from relitigating in a subsequent action issues *raised* and *resolved* in the prior action. (Emphasis in original. Pg. 28.)

Arbitrator Bognanno went on to set forth what he stated were the four prerequisites for issue preclusion to apply, namely:

> (1) the issue determined in the prior action and the present issue are the same; (2) final adjudication was reached on the issue; (3) the estopped party was the prior party; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. (Pg. 28.)

In How Arbitration Works, supra, Professors Elkouri provide a similar analysis regarding the elements necessary to a finding of issue preclusion; namely that:

> 1. The issue at stake is identical to the one involved in the prior litigation;
> 2. The issue has been actually litigated in the prior suit;
> 3. The determination of the issue in the prior litigation was a critical and necessary part of the judgment in the action; and
> 4. The party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. (Footnote citing case citation omitted. Pg. 387.)

In support of its position that the doctrine of *res judicata* is inapplicable to the instant case, the Employer cites three arbitration decisions at page 34 of its brief, namely Geauga, Co. v. Amalgamated Clothing and Textile Workers Union of America, Local 1902, 92 Lab. Arb. 54 (1988) (Fullmer, Arb.); Boardman Co. v. United Steelworkers of America, 91 Lab. Arb. (BNA) 489 (1988) (Harr, Arb.) and Anderson-Tully Co. v. Int'l Woodworkers of America, Local 5-293, 88 Lab. Arb. (BNA) 7 (Hart, 1986). In each of

those three cases, unfair labor practice charges were filed and dismissed without a complaint being issued by the Regional Director and the appeal to the NLRB's Office of the General Counsel failed. Therefore, no hearing was held before an administrative law judge. Such dismissals do not constitute adjudications on the merits and, therefore, do not have *res judicata* effect. Kelly's Private Car Service, 289 NLRB 30, 39 (1988), enfd. 919 F.2d 839 (2d Cir. 1990).

The Employer, in support of its position, also cites the arbitration decision in Holleb & Co., 1991 WL 706484 (Goldstein, 1991). In that case, as the Employer points out in its brief, the arbitrator was faced with a situation in which the NLRB had issued a decision in response to a unit clarification petition by the employer and the arbitrator had before him a grievance that addressed the same issue. As the Employer here states in its brief, the arbitrator in Holleb & Co. did refuse to accept the NLRB's unit clarification decision as determitive of the grievance.

Holleb & Co. involved a grievance filed by the union contending that an employee named Tony Selio, a non-union, non-bargaining unit employee, was performing delivery work that properly belonged to bargaining unit truck drivers. Holleb & Co. filed a unit clarification petition with the NLRB. The Regional Director concluded that Selio, who was classified as a sales support employee, did not share a community of interest with the truck drivers so as to warrant the inclusion of that job title in the bargaining unit.

The Union here in its brief points out that as indicated in the Holleb & Co. decision, the union there did not participate in the NLRB proceeding and that the employee, Tony Selio, whose duties were at issue, did not testify at that hearing. Selio

did testify at the arbitration hearing and contradicted the management witnesses' testimony that had been given in the NLRB proceeding. The arbitrator found, based on Selio's testimony at the arbitration hearing, that a substantial majority of the work he performed was bargaining unit work. Based on the foregoing, Arbitrator Goldstein determined not to accept the decision of the NLRB as binding upon him and found instead, that the company violated the collective bargaining agreement there by assigning bargaining unit work to a non-bargaining unit employee. Thus, Holleb & Co. is clearly distinguishable from the instant case because in Holleb & Co., unlike the instant case, the union did not have a full and fair opportunity to be heard on the adjudicated issue since it did not participate in the unit clarification proceedings.[6]

The Employer in the instant case contends that the Acting Regional Director's decision in the unit clarification case only resolved the disputes between the parties related to federal labor law and did not resolve the parties' contractual dispute. The Employer further contends that the Union "principally relies" on the original Regional Director decision which the Employer states was "found insufficient by the Board to resolve the unit clarification issue." (Employer brief at pg. 36.)

The Employer further argues that the Regional Director's decision was not a final decision of the Board and, furthermore, that that decision was essentially rejected by the Board when the Board remanded the case for further proceedings. Further, the Employer argues that the post remand decision by the Acting Regional Director "does not constitute a final and enforceable Board order." (Employer brief at pg. 36.)

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[6] The arbitrator in Holleb & Co. did not indicate why the union there did not participate in the NLRB proceeding.

I have carefully reviewed the decision of Regional Director James McDermott issued on October 18, 2006; the Board's remand decision of April 30, 2007 and Acting Regional Director Gary Muffley's decision dated August 5, 2011. It is my conclusion that the unit clarification proceedings resulted in a final decision pursuant to which the doctrine of *collateral estoppel* is applicable with respect to the instant arbitration dispute.

As the Union points out in its brief, it is clear that Regional Director McDermott's decision did address the contract interpretation issue before me. In this regard, I set forth the following from his decision:

> The Employer proposes that the Region clarify the units based on employees' requisition location, stating: "the unit descriptions proposed by the Company protect employee free choice while honoring the spirit of the original Palmdale/Edwards recognition." I disagree. First, the proposed clarification does not specifically relate to any of the community of interest factors, as described above. Second, the Board does not clarify units in order to leave the matter of who is included or excluded completely in the unilateral control of one of the parties. See *The Sun*, 329 NLRB 854,859 (1999) ("To permit reliance on factors that an employer can manipulate in an effort to exclude employees from the unit would be a patent form of circular reasoning"). Third, the record does not establish a past practice and/or an historical exclusion of employees from the units based on their requisition location. Finally, the evidence is insufficient to establish that the parties understood the CBAs' language "assigned to" as limiting who is in the units based on requisition location. (A-Union Exhibit No. 2, pg. 25.)

With respect to the Employer's contention that there was a historical practice of including employees in the professional and technical units based on their requisitions being processed through Seattle, Regional Director McDermott rejected this claim holding that:

> [T]he record does not establish that, historically, Edwards/Palmdale employees were not locally hired and/or locally placed in the units. I find the processing of employee requisition paperwork has little if any effect in determining whether an employee is included or excluded from a unit because that requisition processing does not bear upon community of interest factors directly affecting employee working

> conditions. Additionally, the Employer cites no Board decision holding that where a newly-hired employee's paperwork is processed is a determinative or even [a] significant factor in deciding unit scope or composition. (A-Union Exhibit No. 2, pg. 27.)

The Employer also contended that the Board in its remand decision found that the parties during their negotiations and with respect to the language of their collective bargaining agreements did not agree on the composition of the unit, but rather took conflicting positions regarding unit composition. However, this finding by the Board does not in any way indicate a rejection by the Board of the Regional Director's findings regarding the parties' contract language. The Board did not reverse the Regional Director's dismissal of the unit clarification petition due in any way to his findings regarding the contractual language but instead, remanded the matter to the Regional Director:

> . . . for further processing of the petition, including reopening the record, focusing particularly on eliciting additional evidence with respect to elements critical to resolving the unit composition issues. (Boeing Company 349 NLRB No. 91 slp. op. at 3; A-Union Exhibit No. 3, pg. 2.)

Furthermore, the Board found:

> . . . contrary to the Regional Director, that the representation issues presented pertaining to whether the disputed employees are excluded from or included in the units are matter for resolution by the Board and not by an arbitrator. . . .
>
> Resolution of representation matters is within the province of the Board. Where a dispute involves representation as well as contractual matters, the Board will not defer to arbitration, but will resolve the dispute. *United States Postal Service,* 348 NLRB No. 3 (2006); *Advanced Architectural Metals,* 347 NLRB No. 111 (2006). Here, as found by the Regional Director and contrary to the Union's claim, the instant dispute involves representational as well as contractual issues. [1]

[1] We do not believe that the Board's deferral doctrine in unfair labor practice cases necessarily warrants deferral in representation cases. Indeed, the Board has historically

> eschewed this course. It has done so, inter alia, because of its special role in representation matters, and the need for speed in those matters.
> (A-Union Exhibit No. 3, pg. 1.)

The Board did respond to the dissenting opinion by Board Member Liebman, who, in her dissent, suggested a two step process; first arbitration and then, if representation issues remain, Board intervention. The Board majority found that there was:

> . . . no need or warrant in the instant case to adopt this two-step process. That process has at least three defects. First, it permits an arbitrator to resolve representation case issues, subject only to a deferential review by the Board. Secondly, it delays the Board proceeding until after the arbitration proceeding has run its course. Third, it provides for a two-tribunal process, rather than the one process envisioned by the act.[3]
>
> [3] We acknowledge that there are contractual issues relevant to the representation case issue. The Board can consider these issues and resolve all of them in one proceeding.
> (A-Union Exhibit No. 3, pg. 2.)

The Employer, in support of its position, points out that the Acting Regional Director's findings were:

> . . . limited to the traditional community of interest factors that are at the heart of representation issues under the NLRA and not contractual interpretation. (Employer brief pg. 35.)

However, as pointed out above, the Board remanded the matter to the Regional Director in order that additional evidence could be provided "with respect to elements critical to resolving the unit compensation issue. . . ." (A-Union Exhibit No. 3, pg. 2.) The Board remand did not seek from the Regional Director findings regarding interpretation of contract language. It is clear from a reading of the Board's remand decision that if the Board believed that it had sufficient evidence of community of interest factors in the record before the Regional Director, it would not have remanded the case for the taking of additional evidence, ". . . with respect to elements critical to resolving

unit composition issues," that is for "an examination of community of interest factors." (A-Union Exhibit No. 3, pg. 2.) As described in detail above, the Board already had before it the Regional Director's findings regarding his interpretation of the contractual language in dispute between the parties.

Finally, the decision by the United State Supreme Court in Carey v. Westinghouse Electric Corp. 375 U.S. 261 (1964) clearly precludes my resolving the issues raised by the grievance in this matter as those issues, as described above, were resolved by the NLRB pursuant to the Employer's unit clarification petition. In this regard, I note the conclusion of the Supreme Court in Carey, supra:

> Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301. (Pg. 272.)

REMEDY

A. Failure to Request Monetary Damages in the March 5, 2001 Grievance

The Union seeks three remedies, namely:

1. That the Arbitrator should order the Company to recognize SPEEA as the representative of the disputed Edwards/Palmdale employees and to apply the Professional and Technical Agreements to such employees.
2. The Arbitrator should order the Company to make the Union whole for lost dues and fees.

3. The Arbitrator should order Boeing to make wrongly excluded employees whole for lost contractual pay and benefits.

The Employer contends that only the first requested remedy set forth above is appropriate since the Union, in its grievance, only requested that remedy. In this regard, the Employer points to the fact that the March 5, 2001 grievance did not seek monetary damages either for the Union or for any employees.

The Union responds with several arguments. First, the Union points out that while the Agreements state in Section 3.3(a) that "[t]he remedy sought" should be included in the grievance, the grievance does not provide that the grieving party waives the right to seek a remedy by failing to fully describe it in the grievance. I note that under the heading "Avoidance of a Forfeiture," Professors Elkouri in How Arbitration Works, supra, conclude as follows:

> It is a familiar maxim that the law abhors a forfeiture. If an agreement is susceptible of two constructions, one of which would work a forfeiture and one of which would not, the arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture. (Footnotes citing cases omitted. Pg. 482.)

Furthermore, Professors Elkouri cite with approval the following conclusion by Arbitrator Cheney:

> A party claiming a forfeiture or penalty under a written instrument has the burden of proving that such is the unmistakable intention of the parties to the document. In addition, the courts have ruled that a contract is not to be construed to provide a forfeiture or penalty unless no other construction or interpretation is reasonably possible. Since forfeitures are not favored either in law or in equity, courts are reluctant to declare and enforce forfeiture if by reasonable interpretation it can be avoided. (Footnote citing cases omitted. Pg. 483.)

Based on the foregoing, I find that the absence of any language in the Agreements' Article 3, Grievance Procedure, setting forth the effect of failing to include a specific remedy request in the grievance, leaves the language in question, in the words of Professors Elkouri in How Arbitration Works, supra, "susceptible of two constructions." Here, if I found in favor of the Employer, I would be ignoring the fact that no remedy for failing to provide the full "remedy sought" in the grievance is provided by the contractual language of the Agreements. Furthermore, as indicated by the quote in How Arbitration Works, supra, at page 483 from Arbitrator Cheney, the language simply does not establish "the unmistakable intention of the parties" to provide a forfeiture of a damages remedy. As I have indicated above, the Agreements can reasonably be interpreted not to provide for a forfeiture of a monetary damages remedy based on the absence of any language in the Agreements requiring that to be the case.

I now turn to considering the specific monetary damages sought by the Union.

B. Monetary Damages

The Union seeks a make whole remedy for those employees wrongly excluded from the professional bargaining and technical bargaining units. Additionally, the Union seeks a dues reimbursement remedy from the Employer for lost dues and fees.

It is a widely accepted principle in labor arbitration that contract violations by employers entitle employees injured by those violations to monetary damages. In this regard, I note the conclusion by Professors Elkouri in How Arbitration Works, supra:

> [A]rbitrators adhere to the principle that on finding a contract violation, arbitrators have inherent power under a contract to award monetary damages to place the parties in the position they would have been in had there been no violation. (Footnote citing cases omitted. Pg. 1202.)

Therefore, my Award will include monetary damages to employees wrongly excluded from either the professional bargaining unit or the technical bargaining unit.

With respect to the Union's claim for dues and fees reimbursement from the Employer, I find such a remedy is appropriate. Each of the collective bargaining agreements in effect since the filing of the grievance in this matter has contained union security clauses, including a check-off provision.

Elkouri and Elkouri in How Arbitration Works, supra, conclude as follows under the heading, "Employer Violations:"

> Claims for damages in favor of the union as an entity have been based on injury caused by company violation of contract provisions respecting union representational rights, union-security clauses, and contractual violations regarding plant removals, discontinuance of a department, and subcontracting. (Footnotes citing cases omitted. Pgs. 1213-14.)

I recognize that the excluded employees did not execute dues check-off authorization forms. However, as the Union points out in its brief, it would have been pointless for the Union to seek check-off authorizations from employees whom the Employer refused to recognize as Union represented employees. Additionally, as described above, the Employer refused Union information requests regarding employees whom the Employer contended were excluded from the professional and technical bargaining units.

With respect to the time period for which the remedy should be granted, I find that it can go no further back than the date the grievance was filed, since I have found

that the grievance was timely filed pursuant to the arbitral doctrine of continuing violation.

With respect to the Union's request for interest, the modern trend in labor arbitration is to award interest. In this regard, I note the following conclusion by Professors Elkouri in How Arbitration Works, supra at page 1219:

> The modern view is that the award of interest is within the inherent power of an arbitrator, and in fashioning a "make-whole" remedy it appears that a growing number of arbitrators are willing to exercise the discretion to award interest where appropriate. (Footnotes citing approximately 75 cases omitted.)

Here, from the time the grievance was filed in this matter until the time of my decision more than 11 and one-half years have gone by. Clearly, the employees who were wrongfully excluded from the professional and technical bargaining units suffered a loss due to the time value of money. The same is true with respect to the Union which did not receive dues and fees because of the improper exclusion of employees from the professional and technical bargaining units by the Employer.

Interest shall be awarded at the California statutory rate of 10% per annum pursuant to California Civil Code Section 3289(b).

AWARD OF THE ARBITRATOR

It is the Award of your Arbitrator that:

I. The Employer, The Boeing Company, violated the 1999, 2002, 2005 and 2008 Professional and Technical Collective Bargaining Agreements between The

Boeing Company and the Union, the Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001, AFL-CIO (SPEEA), hereinafter referred to as the Agreements, by failing and refusing to recognize SPEEA as the exclusive representative of employees assigned to Edwards AFB, California and Palmdale, California (Edwards/Palmdale) and working in job classifications covered by the Agreements with the exception of heritage Rockwell and heritage McDonnell Douglas employees who remain in their original positions.

II. Therefore, it is ordered that:

a. The Employer cease and desist from conduct described in Paragraph I above and

b. Recognize SPEEA as the exclusive representative of employees assigned to Edwards/Palmdale and working in job classifications covered by the Agreements with the exception of heritage Rockwell and heritage McDonnell Douglas employees who remain in their original positions.

III. The Employer shall "make whole" all employees injured as a result of the violation set forth in Paragraph I above.

IV. The Employer shall "make whole" the Union for lost dues and fees resulting from the violation set forth in Paragraph I above.

V. The remedies ordered in Paragraphs III and IV above shall be retroactive to March 5, 2001.

VI. The Employer shall pay to each employee described in Paragraph III above and to the Union as described in Paragraph IV above interest at the California Statutory Rate of 10% per annum pursuant to California Civil Code Section 3289(b) and such Employer interest payments shall be retroactive to March 5, 2001.

VII. Pursuant to Section 3.6(f) of both the Professional and Technical Collective Bargaining Agreements, I find that the Employer, The Boeing Company, is the party ruled against by the Arbitrator and, therefore, shall pay the compensation of the Arbitrator including necessary expenses.

VIII. Your Arbitrator shall retain jurisdiction for the sole purpose of resolving any disputes which may arise between the parties regarding compliance with this Award.

Dated: November 1, 2012

Seattle, Washington

Michael H. Beck, Arbitrator