2014

Plaintiffs' Comments on Defendant's Remand Results and Motion for Second Remand, Former Employees of Boeing Co. v. U.S. Sec'y of Labor, Docket No. 1:13-cv-00281-GWC, 6 F.Supp.3d 1348 (United States Court of International Trade 2014)

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UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE THE HONROABLE GREGORY W. CARMAN, JUDGE

FORMER EMPLOYEES OF THE BOEING COMPANY, WICHITA, KANSAS,	)	
Plaintiffs,	)	
v.	)	Court No. 13-00281
SECRETARY OF LABOR,	)	
Defendant.	)	

ORDER

Upon consideration of the Plaintiffs' Comments on Defendant's Remand Results and Motion for Second Remand, and any replies thereto, it is hereby

ORDERED that the plaintiffs' motion is granted; and it is further

ORDERED that this action is remanded to the United States Department of Labor to obtain additional information regarding the allegations in the plaintiffs' complaint, to analyze that information, and to determine whether the plaintiffs qualify for certification; and it is further

ORDERED that the remand results and the administrative record shall be filed no later than 60 days after the date of this Order; and it is further

ORDERED that the plaintiffs shall file comments with the Court on the remand results no later than 60 days after the remand results are filed with the Court; and it is further

ORDERED that the defendant may respond to any such comments no later than 30 days after filing.

Judge Gregory W. Carman

Date

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE THE HONROABLE GREGORY W. CARMAN, JUDGE

FORMER EMPLOYEES OF THE BOEING COMPANY, WICHITA, KANSAS,	)	
Plaintiffs,	)	
v.	)	Court No. 13-00281
SECRETARY OF LABOR,	)	
Defendant.	)	

PLAINTIFFS' COMMENTS ON DEFENDANT'S REMAND RESULTS AND MOTION FOR SECOND REMAND

Plaintiffs Former Employees of the Boeing Company, Wichita, Kansas, respectfully file the following Comments on the Defendant's Remand Results and Motion for a Second Remand to the United States Department of Labor for further consideration.

INTRODUCTION

On August 6, 2013, the plaintiffs appealed the negative determination by the Department of Labor (the "Department") on their Certification of Group Eligibility for Worker Adjustment Assistance.[1] Complaint (Aug. 6, 2013). The Department subsequently moved for a voluntary

[1] On August 20, 2013, this Court accepted the plaintiffs' letter as a summons and complaint. Letter issued by Steve Taronji to Plaintiffs (Aug. 20, 2013).

remand of that determination, and, on October 22, 2013, this Court granted the Department's motion. This Court's order required the Department on remand

> to obtain additional information regarding (i) the allegations set forth in plaintiff's complaint; and (ii) whether the worker group activities at the Boeing Company, Defense and Space Division, Wichita, Kansas, are covered by the International Traffic in Arms Regulation, 22 U.S.C. § 2778, 22 C.F.R. § 120.1-130.17 (ITAR) . . . .

Order (Oct. 22, 2013). The plaintiffs' complaint, in turn, contained the following allegations:

> Our 737 tanker program[2] has been moved to Seattle, Washington, Boeing. We were just informed they received a positive determination. District 70 believes the Wichita, Boeing site should fall under this umbrella as our work has been shifted out of state and then out of the country.

Complaint (Aug. 6, 2013).

On December 20, 2013, the Department issued its Notice of Negative Determination On Remand. The Department again determined that the plaintiffs were not eligible to apply for Trade Adjustment Assistance ("TAA"), this time because the plaintiffs' work was covered by the International Traffic in Arms Regulation ("ITAR") and because the plaintiffs did not satisfy the requirements for group eligibility. Notice of Negative Determination On Remand at 4-6.

The plaintiffs now file their Comments indicating their dissatisfaction with the defendant's remand results and, in light of their dissatisfaction, a Motion for a Second Remand. The plaintiffs' comments and argument follow.

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[2] Ms. Ledbetter confirmed with the Department that her complaint referred to the 767 tanker program, not the 737 tanker program. C.A.R. at 160. (Citations to the Confidential Administrative Record appear as "C.A.R. at _____.")

COMMENTS AND ARGUMENT

The Trade Adjustment Assistance program is designed to aid workers who have lost their jobs because of increased import competition or shifts in production to other countries. *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 30 C.I.T. 1315, 1318, 454 F. Supp. 2d 1306, 1309 (2006). The program is remedial and, as such, should be construed liberally to effectuate its intended purpose. *Former Employees of BMC Software, Inc.*, 30 C.I.T. at 1320, 454 F. Supp. 2d at 1311 (citing *UAW v. Marshall*, 584 F.2d 390, 396 (D.C. Cir. 1978)). "Moreover, both '[b]ecause of the the *ex parte* nature of the certification process, and the *remedial purpose* of the [TAA] program,' the Labor Department is obligated to 'conduct [its] investigation with *the utmost regard* for the interest of the petitioning workers.'" *Former Employees of BMC Software, Inc.*, 30 C.I.T. at 1321, 454 F. Supp. 2d at 1312 (quoting *Local 167, Int'l Molders and Allied Workers' Union, AFL-CIO v. Marshall*, 643 F.2d 26, 31 (D.C. Cir. 1981) (emphasis added in *Former Employees of BMC Software, Inc.*)). That means that "there exists a threshold requirement of reasonable inquiry." *Former Employees of Hawkins Oil & Gas, Inc. v. U.S. Sec'y of Labor*, 17 C.I.T. 126, 130, 814 F. Supp. 1111, 1115 (1983). Moreover, by its own regulations, the Department is required "to marshall all relevant facts to make a determination." 29 C.F.R. § 90.12. *See also Former Employees of BMC Software, Inc.*, 30 C.I.T. at 1372, 454 F. Supp. 2d at 1357 ("Quite to the contrary, the Labor Department is charged with an *affirmative* obligation to *proactively* and thoroughly investigate all TAA claims filed with the agency . . . ."). "Courts have not hesitated to set aside agency determinations which are the product of perfunctory investigations." *Former Employees of BMC Software, Inc.*, 30 C.I.T. at 1321, 454 F. Supp. 2d at 1312.

In this case, the Department was charged with investigating two sets of allegations. The first was based on Ms. Ledbetter's original complaint, where she wrote,

> Our [767] tanker program has been moved to Seattle, Washington, Boeing. We were just informed they received a positive determination. District 70 believes the Wichita, Boeing site should fall under this umbrella as our work has been shifted out of state and then out of the country.

Complaint (Aug. 6, 2013). The second was based on this Court's remand order, which required the Department of Labor

> to obtain additional information regarding (i) the allegations set forth in plaintiff's complaint; and (ii) whether the worker group activities at the Boeing Company, Defense and Space Division, Wichita, Kansas, are covered by the International Traffic in Arms Regulation, 22 U.S.C. § 2778, 22 C.F.R. § 120.1-130.17 (ITAR) . . . .

Order (Oct. 22, 2013).

The Department's investigations of both sets of allegations fell far short of the mark. As detailed below, the Department utterly failed to investigate certain key issues raised in the Complaint and Order; it blindly and categorically accepted Boeing's representations and legal conclusions on other central questions; and it initially failed to contact Ms. Ledbetter and, after it finally contacted her, later failed to follow up with her on new and material information that she introduced into the record. The Department even failed to take the very simple step of verifying Boeing's representations about its operations at its Wichita facility against contrary information that is publicly available on *Boeing's own web-site*.

These haphazard, perfunctory, and sloppy investigations fell far short of the "reasonable inquiry" and "marshal all relevant facts" standards.[3] Indeed, they recall the kinds of

[3] The Department's inadequate investigations are reflected in other, less significant ways, too. For example, throughout the investigations, the Department appears to confuse the planned closing date of the Wichita facility, sometimes referring to 2013 as the closing year, and sometimes referring to 2014. *Compare* C.A.R. at 30 (stating the year as 2014) *with* C.A.R. at 55

investigations that this Court so roundly criticized in *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*. 30 C.I.T. 1315, 454 F. Supp. 2d 1306 (2006).[4] In that case, this Court detailed the pattern of inadequate investigations by the Department and the Department's abysmal record at this Court. *Former Employees of BMC Software, Inc.*, 30 C.I.T. at 1339-58, 454 F. Supp. 2d at 1328-73. It explained that the Department developed a practice of rejecting TAA applicants out-of-hand, based on inadequate investigations, then requesting a voluntary remand if and when a rejected applicant appealed to this Court. *Id*. As this Court recognized in both *Former Employees of BMC Software, Inc.*, and *Ameriphone*, "[T]he Labor Department's *modus operandi* increasingly is to seek a voluntary remand in TAA cases that are appealed to the court." *Former Employees of BMC Software, Inc.*, 30 C.I.T. at 1352, 454 F. Supp. 2d at 1339 (citing *Former Employees of Ameriphone Inc. v. U.S.*, 27 C.I.T. 1611, 1618, 288 F. Supp. 2d 1353, 1359 (2003)). As a result, the Department could "sweep much of the worst of its dirt [in its initial inadequate investigations] under the rug." *Former Employees of BMC Software, Inc.*, 30 C.I.T. at 1353-54, 454 F. Supp. 2d at 1341. Worse: the Department could delay granting

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(stating the year as 2013). In a similar vein, the Department appears to have used the wrong case number in the original Business Data Request. C.A.R. at 29.

A Department e-mail exchange with a Boeing representative at the beginning of the initial investigation, and its lack of follow up, is characteristic of the Department's lackadaisical approach. In an e-mail on May 21, 2013, a Boeing representative asked, "So this was the extent of the petition . . . no letter or any other accompanying information/documents filed by the union?" The Department investigator responded, "yes that was it." The Boeing representative replied, "Rather skimpy . . . ." C.A.R. at 20. Yet the Department utterly failed to contact Ms. Ledbetter to get more information during the initial investigation and only contacted her late, with little follow up, in the second investigation.

[4] This Court has sharply criticized the Department's investigations in other cases, too. *See, e.g., Hawkins Oil and Gas*, 17 C.I.T. 126, 130, 814 F. Supp. 111, 1115 (1993) (concluding that the Department's investigation was "sloppy and inadequate," "the product of laziness," and that a four remand would be "futile"); *Local 116, Int'l Union of Electronic, Electrical, Salaried, Machine and Furniture Workers v. U.S. Sec'y of Labor*, 16 C.I.T. 490, 493-94, 793 F. Supp. 1094-97 (2002) (describing agency efforts as "cursory at best," and concluding that "there was actually no investigation done whatsoever").

TAA benefits to qualified applicants. *Former Employees of BMC Software, Inc.*, 30 C.I.T. at 1354-58, 454 F. Supp. 2d at 1341-45.

The Department's tactics in this case match that *modus operandi* exactly. As described above, the Department first denied certification based on a flawed and incomplete investigation. After the plaintiffs appealed, it filed for a voluntary remand to clean up the investigation. *See Former Employees of BMC Software, Inc.*, 30 C.I.T. at 1369, 454 F. Supp. 2d at 1354 ("The Labor Department's need to request a voluntary remand when a case is appealed to the court is, in essence, a confession of error on the part of the agency.") But in this case, even the second investigation was flawed and incomplete. As a result, the plaintiffs are dissatisfied with the Department's investigations and respectfully request a second remand with a proper investigation. *Former Employees of Marathon Ashland Pipeline, LLC v. Chao*, 26 C.I.T. 739, 744, 215 F. Supp. 2d 1345, 1352 (2002) ("Thus, if the court finds that the Secretary's investigation is so marred that it could not be based on substantial evidence, then it is within the court's power to remand the investigation for further evidence and inquiry.").

In particular, the Department failed to meet the "reasonable inquiry" standard, *Former Employees of Hawkins Oil & Gas, Inc,* 17 C.I.T. at 130, 814 F. Supp. at 1115, or the Department's own requirement "to marshall all relevant facts to make a determination." 29 C.F.R. § 90.12. Moreover, the Department failed to comply with this Court's Order of October 22, 2013, (1) by failing to obtain additional information as to whether Boeing activities at its Wichita facilities were covered by ITAR and (2) by failing to obtain additional information as to the allegations in the plaintiffs' complaint.

I. The Department Failed to Analyze Whether the Worker Group Activities at the Boeing Company, Defense and Space Division, Wichita, Kansas, Were Covered by the International Traffic in Arms Regulation.

The Department did not sufficiently investigate and analyze whether Boeing's activities at the Wichita facility were covered by ITAR. Instead, it simply took Boeing's word for it, even in the face of record and readily available non-record evidence against it. This is plainly inadequate.

As the United States Court of Appeals for the Federal Circuit explained, the Department may rely on statements of company officials "if the Secretary reasonably concludes that those statements are creditworthy" and if they "are not contradicted by other evidence." *Former Employees of Marathon Ashland Pipe Line, LLC v. Chao*, 370 F.3d 1375, 1385 (Fed. Cir. 2004). But where there is conflicting evidence, the Department is "precluded . . . from relying on the representations by the employer" and is required to "take further investigative steps before making [its] certification decision." *Id. See also Former Employees of BCM Software, Inc.,* 30 C.I.T. at 1341, 454 F. Supp. 2d at 1329 ("Nor can the Labor Department rely on the unverified statements of company officials in the face of factual discrepancies in the record, as it did in this case."); *Former Employees of Marathon Ashland Pipeline, LLC*, 26 C.I.T. 739, 744, 215 F. Supp. 2d 1345, 1352 (2002) ("In the context of TAA cases, this court has held that 'conclusory assertions alone are not sufficient for Labor to make an accurate determination.") (quoting *Bennett v. U.S. Secretary of Labor*, 18 C.I.T. 1063, 1067 (1994); *Former Employees of Chevron Products Co. v. U.S. Sec'y of Labor*, 26 C.I.T. 1272, 1282-87, 245 F. Supp. 2d 1312, 1325-30 (2002)).

Here, the only indication in the record that the Department investigated whether Boeing activities in Wichita were subject to ITAR was a single question to Boeing representatives,

question 3., in the Boeing Remand Investigation Questions. C.A.R. at 108. Boeing provided a simple response, without citation or elaboration: "All maintenance and modification work performed by Boeing Wichita is subject to ITAR requirements." C.A.R. at 160. The Department did not ask a follow up question, seek clarification, or otherwise investigate whether Boeing activities in Wichita were subject to ITAR requirements, with Boeing or anyone else, let alone make an independent agency judgment. Instead, the Department simply took Boeing's word for it. *Contra Former Employees of Honeywell Intern., Inc. v. U.S. Dep't of Labor*, 33 C.I.T. 558 (2009) (concluding that the company's production was subject to ITAR, but only after the Department confirmed that with "the contact person for Honeywell Aerospace, *and with the local Defense Contract Management Agency Team Leader*") (emphasis added).

The Department simply took Boeing's word for it, despite red flags throughout the investigation. Some of these red flags were in the very same questionnaire in which Boeing represented that its work in Wichita was subject to ITAR requirements. For example, in response to question 1 in that questionnaire, Boeing said that "Boeing Wichita performs or has performed maintenance and modification work on existing military aircraft owned by the United States Air Force and foreign militaries . . . ." C.A.R. at 107. The Department failed to ask a follow up question or otherwise investigate that claim, even though it is not obvious that foreign military aircraft are covered by ITAR. *See* 22 C.F.R. § 121 (identifying items covered by ITAR, on *The United States* munition list) (emphasis added). More, in the same questionnaire, Boeing flatly refused to answer question 6, dealing with facility sales, production, and exports. C.A.R. at 108, 126. This information was critical for the Department to investigate whether Boeing's Wichita activities were covered by ITAR. But Boeing claimed that it was "not readily ascertainable . . . [and] highly confidential and proprietary to the Company." C.A.R. at 126.

Instead of pressing for more information or an answer, the Department simply accepted Boeing's explanation.[5]

Some of these red flags came earlier. For example, in the original investigation, Boeing wrote to the Department that "the only work performed by Boeing has been the modification of existing aircraft for the U.S. (and foreign) military." C.A.R. at 25. But this dramatically understated the portion of work dedicated to foreign military aircraft. According to Boeing's BDR, [redacted] C.A.R. at 50. Indeed, [redacted] C.A.R. at 50. Despite the discrepancies, the Department did not follow up.

Perhaps most telling, Boeing itself acknowledges that, as of June 2010, "Boeing *is building* KC-767s for two major international customers—Italy and Japan—at Boeing Defense, Space & Security facilities in Wichita, Kansas." *See* Boeing, KC-767 International Tanker, Backgrounder, available at http://www.boeing.com/assets/pdf/bds/globaltanker/docs/tanker_overview.pdf (June 2010) (last visited on April 22, 2014) (emphasis added) (describing the work at Boeing's Wichita facility on the 767 tanker for the Japanese and Italian militaries). Boeing's acknowledgment on its own readily and publicly available web-site contrasts with its repeated statements throughout these investigations that its Wichita facility only provided modification services. *See, e.g.,* C.A.R. at

[5] The Department similarly accepted Boeing's partial answer to question 9, without engaging in additional investigation. In a follow-up to that question, the Department asked for "the approximate percentage of the work from the Wichita facility that went to each of the locations listed above?" C.A.R. at 148. Boeing never provided this information, C.A.R. at 149, instead claiming that the Department did not need it. C.A.R. at 141. The Department did not press further.

25 ("With the sale of the Boeing Commercial Aircraft unit in 2005, there has been no Boeing aircraft production work in Wichita since that time. Rather, the only work performed by Boeing has been the modification of existing aircraft for the U.S. (and foreign) military.") While there may be some way to reconcile Boeing's apparently contradictory claims about production of aircraft at its Wichita facility, these apparently contradictory claims at least raised red flags and called for additional investigation by the Department. But the Department failed to investigate. *See Former Employees of BMC Software, Inc.*, 30 C.I.T. at 1352, 454 F. Supp. 2d at 1339 ("Here, a few quick clicks of a computer mouse by a Labor Department investigator would have sufficed to expose the falsity of the information provided to the agency by BMC's [representative], and would have resolved at least some of the issues central to the agency's analysis of the Workers' right to TAA certification.").

Some of these red flags came later. For example, when the Department finally contacted Ms. Ledbetter, she wrote:

> Yes, a portion of the work is Japanese and Italian military. The work was to build the tankers for both countries. We are closing so there were no provisions the tanker went to Seattle, but I am sending a copy of the contract.

C.A.R. at 160. But, again, it is not obvious that building tankers for foreign military are covered by ITAR. Still, the Department did not investigate further.[6]

[6] Instead, the Department found that "the worker group is engaged in activities related to the maintenance and modification of existing military aircraft owned by the United States Air Force and foreign militaries," C.A.R. at 458, but that the modification services performed for foreign militaries were "miniscule." C.A.R. at 459. Nothing in the record supports this conclusion, and, as described above, much evidence directly contradicts it. Based on those findings, the Department concluded that "the maintenance and modification services provided by the workers at the subject firm are covered as stipulated in ITAR and, therefore, cannot be completed outside of the United States. AR 456-564." Notice of Negative Determination On Remand at 4. As described above, this conclusion is based only on the unsupported assertions of Boeing representatives and stands in contrast to other record evidence.

Coming to the point: there was ample record and readily available non-record evidence and information about Boeing's work on foreign military aircraft at the Wichita facility. Boeing's two programs on foreign military aircraft—whatever they entailed, whatever their portion of Boeing's work at the Wichita facility—are not obviously covered by ITAR. *See* 22 C.F.R. § 121 (identifying items covered by ITAR, on *The United States* munition list) (emphasis added). This should have caused the Department to investigate further—into the programs, and into ITAR requirements. Yet the Department failed to investigate: it failed to investigate their size, their portion of the Wichita operations in more recent years, or, apparently, anything else about them; and it failed to investigate and to analyze whether these programs or other activities at the Wichita facility were subject to ITAR.[7]

Because the Department failed to adequately investigate and analyze whether worker activities at the Boeing facility in Wichita were covered by ITAR, the plaintiffs register their dissatisfaction with the voluntary remand results and respectfully ask this Court to order a second remand.

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[7] There were other red flags in the earlier investigation, too. For example, Boeing wrote, "For example, [modification] work on seven aircraft was moved from a foreign company to the Boeing IDS facility in Wichita during the period 3rd quarter 2006 through 1st quarter 2008." C.A.R. at 25 (emphasis in original). There is no additional information about this work in the record, and there is no indication that the Department investigated further. Another example: [redacted] C.A.R. at 50. Again, the Department apparently neglected to investigate this program. These references suggest that there may have been other work at Boeing's Wichita facility—covered by ITAR or not, but relevant to the allegations in the plaintiffs' complaint. The Department's failure to investigate these references violated its duty to conduct a reasonable inquiry. *See Former Employees of Hawkins Oil & Gas, Inc,* 17 C.I.T. at 130, 814 F. Supp. at 1115.

II. The Department Failed to Analyze the Allegations Set Forth in the Plaintiffs' Complaint.

Just as the Department failed to analyze whether Boeing worker activities at the Wichita facility were covered by ITAR, it also failed to analyze the allegations set forth in the plaintiffs' complaint. The Department wholly ignored certain allegations in the complaint, and failed to analyze others. This is plainly inadequate and fails to meet the "reasonable inquiry" threshold. *See Former Employees of Hawkins Oil & Gas, Inc,* 17 C.I.T. at 130, 814 F. Supp. at 1115 (stating that the Department must meet a threshold standard of "reasonable inquiry").

At the outset, the Department nowhere investigated or analyzed the allegation in the complaint that "We were just informed [Boeing-Seattle workers] received a positive [TAA certification] determination," and that "District 70 believes the Wichita, Boeing site should fall under this umbrella as our work has been shifted out of state and then out of the country." Complaint (Aug. 6, 2013). There is no indication in either the original investigation or the second investigation (upon remand) that the Department investigated, considered, or analyzed any certification by Boeing workers in Seattle or whether that certification would cover the plaintiffs. There is also no indication that the Department asked the plaintiffs to clarify these allegations. Moreover, there is no indication in either the original investigation or the second investigation that the Department investigated or analyzed whether the 767 tanker program "shifted out of state and then out of the country." The Department's complete failure to address these allegations alone means that its investigations failed to meet the "reasonable inquiry" standard, *Former Employees of Hawkins Oil & Gas, Inc.*, 17 C.I.T. at 130, 814 F. Supp. at 1115, let alone the Department's own requirement "to marshall all relevant facts to make a determination." 29 C.F.R. § 90.12.

Even when the Department did investigate the allegations in the complaint, however, its investigations were woefully inadequate. Thus, when the Department asked Boeing in its second investigation to provide information about the Wichita facility sales, production, and exports, Boeing flatly refused. C.A.R. at 108, 126. This information was critical for the Department to analyze the allegations in the plaintiffs' complaint. But Boeing claimed that it was "not readily ascertainable . . . [and] highly confidential and proprietary to the Company." C.A.R. at 126. Instead of pressing for more information or an answer, the Department simply accepted Boeing's explanation.

Remarkably, the Department accepted Boeing's explanation even against contrary evidence presented by Ms. Ledbetter. When the Department finally contacted Ms. Ledbetter—on December 4, 2013, 43 days after this Court ordered its remand, 35 days after the Department contacted Boeing for additional information on the remand, and merely 16 days before the Department's remand results were due to the Court—its questions were perfunctory. C.A.R. at 159. Still, in response she wrote:

> Yes, a portion of the work is Japanese and Italian military. The work was to *build* the tankers[8] for both countries. We are closing so there were no provisions the tanker went to Seattle, but I am sending a copy of the contract.

C.A.R. at 160 (emphasis added). This information—that some of the work was to *build* tankers for foreign militaries—was new and different than the information that Boeing provided.[9] Still, the Department did not investigate further.

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[8] Here, Ms. Ledbetter refers to Boeing's KC-767 International Tanker—the same airplane ("767") that she referenced (or intended to reference) in her complaint. *See* Boeing, KC-767 International Tanker, Backgrounder, available at http://www.boeing.com/assets/pdf/bds/globaltanker/docs/tanker_overview.pdf (June 2010) (last visited on April 22, 2014).

Instead, the Department apparently disregarded the information provided by Ms. Ledbetter and deferred only to Boeing.[10] Thus, in the Remand Investigative Report, the Department concluded that "the subject firm does not, and has not for several years, produce[d] or ma[d]e modifications to any 737 or 767 airplanes as described by the plaintiff in this case." C.A.R. at 458. This conclusion directly contradicts Ms. Ledbetter's claim that "[t]he work was to build the tankers" for foreign military. C.A.R. at 160. Still, the Department never investigated when Boeing last produced these airplanes in Wichita or any of the details of their production. Yet the Department concluded,

> [t]he Department determines that the services supplied by the certified worker groups at those Boeing facilities are not like or directly competitive with those provided by the subject worker group. AR 456-465. Specifically, due to the nature of the services supplied by the subject worker group and the laws and regulations governing the services provided by the subject firm worker group, the work is not considered to be interchangeable with the work performed by other certified Boeing facilities. Consequently, the Department determines that the services supplied by the subject worker group are neither like nor directly competitive with those supplied by the above-mentioned former and current workers of Boeing who are eligible to apply for TAA benefits.

Notice of Negative Determination On Remand at 5.

This second investigation plainly fails to reach the "reasonable inquiry" standard, *Former Employees of Hawkins Oil & Gas, Inc.*, 17 C.I.T. at 130, 814 F. Supp. at 1115, let alone the

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[9] As described above, Ms. Ledbetter's new information is buttressed by Boeing's own public representations. *See* Boeing, KC-767 International Tanker, Backgrounder, available at http://www.boeing.com/assets/pdf/bds/globaltanker/docs/tanker_overview.pdf (June 2010) (last visited on April 22, 2014) (emphasis added) ("Boeing *is building* KC-767s for two major international customers—Italy and Japan—at Boeing Defense, Space & Security facilities in Wichita, Kansas.").

[10] Indeed, in the Department's Remand Investigative Report, the Department cites its communications with Ms. Ledbetter after remand just once—to show that Ms. Ledbetter's reference to the 737 aircraft in her initial complaint should have been a reference to the 767 aircraft. C.A.R. at 462.

Department's own requirement "to marshall all relevant facts to make a determination." 29 C.F.R. § 90.12. More: it violates this Courts order on remand.

But if the Department's second investigation was flawed and inadequate, its first investigation was even worse.[11] To begin, the Department apparently did not even contact Ms. Ledbetter during the first investigation. And the Department's investigation with respect to Boeing was wholly inadequate.

From the outset, the Department only requested partial information. For example, in preparing for the BDR, the Department wrote (cryptically):

> Base[d] on the nature of the product and the previous denial, OTAA staff determination that we would only need partial information in the case. We instructed Boeing staff to complete pages 2, 3, and 8 of the [BDR] and include a detailed explanation of the products, and an overview of the customers, and the total number of workers on page 4.

C.A.R. at 53.

In response, in its BDR, Boeing reports that it "[m]anufactur[ed] and modif[ied] . . . military aircraft." C.A.R. at 29. It also reports that "some small parts produced are incorporated into the various aircraft that are modified." C.A.R. at 29. Finally, it reports that "Employees are assigned to programs such as VC-25, E4B, etc[.,] but can frequently be moved from program to program." C.A.R. at 30. But despite Boeing's references to manufactured items and various programs, the Department did not further investigate these items or programs, and it certainly did not investigate them in relation to the allegations in the plaintiffs' complaint. In particular, it did not investigate whether one or more of these programs was related to, or implicated in, the allegations in the plaintiffs' complaint.

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[11] The Department effectively acknowledged this when it moved for a voluntary remand. *See Former Employees of BMC Software, Inc.*, 30 C.I.T. at 1369, 454 F. Supp. 2d at 1354 ("The Labor Department's need to request a voluntary remand when a case is appealed to the court is, in essence, a confession of error on the part of the agency.")

Instead, the Department issued an Investigative Report, in which it cited the BDR and said that modification services will remain in the United States:

> A survey was not conducted as a part of this investigation because the majority of the modification services were performed for the United States military. Some additional modification services were performed for foreign militaries. Aircraft for the United States military and foreign militaries are and will continue[] to be manufactured in the United States. Modification services for the aircraft will remain in the United States.

C.A.R. at 56. But nothing in the BDR or its attachments supports this. Indeed, if anything, the information that Boeing provided in the BDR contradicts portions of this claim. *See supra* at page 9 (showing that by 2009 the programs dedicated to foreign military aircraft were the largest programs at Boeing's operations in Wichita, and not merely "[s]ome additional modification services").

The Department's original investigation and its investigation on remand failed to meet the "reasonable inquiry" standard, *Former Employees of Hawkins Oil & Gas, Inc.*, 17 C.I.T. at 130, 814 F. Supp. at 1115, or the Department's own requirement "to marshall all relevant facts to make a determination." 29 C.F.R. § 90.12. The Department's second investigation failed to obtain additional information regarding the allegations in the plaintiffs' complaint, and thus violates this Court's Order of October 22, 2013. The plaintiffs therefore register their dissatisfaction with the Department's remand results and respectfully ask this Court to order a second remand.

CONCLUSION

For the foregoing reasons, the plaintiffs are dissatisfied with the Department's investigation and determination on remand. The plaintiffs respectfully ask this Court to order a second remand and to direct the Department to fully investigate and analyze all of the allegations in the plaintiffs' complaint.

Respectfully Submitted,

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Attorney for the Plaintiffs
Former Employees of the Boeing Company,
Wichita, Kansas

April 22, 2014

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury that on this 22nd day of April I filed this PLAINTIFFS' COMMENTS ON DEFENDANT'S REMAND RESULTS AND MOTION FOR SECOND REMAND electronically with the Court's CM/ECF system and therefore pursuant to Administrative Order 02-01, Section 7(a), provided electronic service to the following:

Antonia R. Soares
Trial Attorney
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
PO Box 480
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Attorney for the Defendant

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