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ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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July 26, 2011

The Honorable Darrell E. Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We are writing to respectfully request that you schedule a full Committee debate and vote to authorize a subpoena you may be considering to compel the production of additional documents from the National Labor Relations Board (NLRB) relating to ongoing litigation against the Boeing Corporation for allegedly retaliating against workers in Washington State.

Background

On May 12, 2011, you and Representatives Gowdy and Ross sent a letter to Lafe Solomon, Acting General Counsel of the National Labor Relations Board, requesting a wide range of documents, including all documents and communications related to the investigation of Boeing, the Board's communication with the Office of General Counsel, and communications between the NLRB and Boeing.¹

On May 27, 2011, Mr. Solomon responded on behalf of the NLRB by providing some documents, but explaining that most of the documents are confidential and privileged information, internal deliberative materials, attorney work product, and settlement communications in an ongoing law enforcement action. He explained:

When investigating unfair labor practice charges, the Agency elicits testimonial evidence under a promise of confidentiality and bars pre-trial discovery in its administrative

¹ Letter from Chairman Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, Chairman Dennis Ross, Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy, and Chairman Trey Gowdy, Subcommittee on Health Care, District of Columbia, Census and the National Archives, to Lafe Solomon, Acting General Counsel, National Labor Relations Board (May 12, 2011).

hearings. Thus, in open cases, statements of witnesses obtained during the investigation are not disclosed unless the witness is called to testify at trial and, even then, are provided, only upon request, and only after the witness has testified on direct examination. Moreover, the investigative/litigation file contains material prepared by those working on the case, such as file notes revealing research, analysis, potential and actual recommendations and internal memoranda that form the basis for the Agency's decisions. All of these documents are not only protected by the deliberative process, but, along with drafts of pleadings and other litigation documents, are protected as attorney work product.²

On June 17, 2011, the Committee held a hearing in South Carolina in which you insisted on Mr. Solomon's appearance, despite the concerns he raised in his letter. At that hearing, the Committee arrived at a compromise regarding the scope of Mr. Solomon's testimony that served the interests of both the Committee and the NLRB. You explained:

[Q]uestions related to that which you have already decided, but not related to the strategy you will pursue in the pending case, are inbounds. Facts which are entitled to be received by the defendant and others, will be considered reasonable to ask for. ... Any item which is not discoverable by the defendant, will be considered out of bounds for any question.³

On June 29, 2011, Mr. Solomon provided additional documents in response to your May 12 letter and requested that the agreement reached at the June 17 hearing be applied to the remaining documents requested from the Committee. Mr. Solomon stated that the agreement "strikes an appropriate and fair balance between the Committee's legitimate informational needs and the Agency's legitimate need to secure the due process rights of the parties to a fair trial."⁴

On July 12, 2011, you responded by abandoning the agreement reached at the June 17 hearing, declining the NLRB's claims of privilege, and demanding the full production of all documents previously requested. You also warned that "if the entirety of the documents

² Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, Chairman Dennis Ross, Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy, and Chairman Trey Gowdy, Subcommittee on Health Care, District of Columbia, Census and the National Archives (May 27, 2011).

³ House Committee on Oversight and Government Reform, *Hearing on Unionization and Regulation Issues as It Relates to the National Labor Relations Board's Complaint Against Boeing*, 112th Cong. (June 17, 2011).

⁴ Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 29, 2011).

requested are not received by 5:00 p.m. on July 26, 2011, the Committee will be required to consider the use of the compulsory process.”⁵

Concerns with Scope of Subpoena

One serious concern with compelling the production of these documents at this time is that you appear to be using the authority of the Committee in an inappropriate manner to assist a private party, Boeing, during ongoing litigation.

On June 16, 2011, Ranking Member Cummings and Representative George Miller, the Ranking Member of the House Committee on Education and Workforce, wrote to explain these concerns in detail. They stated:

[Y]ou have demanded internal deliberative documents from Mr. Solomon that could include, among other things, documents revealing the prosecution’s trial strategy. Such information, if disclosed during the pendency of the case, would unfairly advantage the respondent, Boeing, and disadvantage the prosecution and the charging party.⁶

As written, your document request would require the production of documents that would reveal the trial strategy of the prosecution, as well as documents related to settlement discussions. We believe that forcing the production of these non-discoverable documents at this time would unduly interfere with this legitimate law enforcement action and would constitute an inappropriate use of the Committee’s authority for the benefit of a private party, Boeing.

This request also appears to be part of a broader strategy to significantly weaken the NLRB. For example:

- On February 17, 2011, the House unsuccessfully attempted to slash the NLRB’s funding for the remainder of the 2011 fiscal year.⁷

⁵ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform to Lafe Solomon, Acting General Counsel, National Labor Relations Board (July 12, 2011).

⁶ Letter from Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, and Ranking Member George Miller, House Committee on Education and Workforce, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 16, 2011).

⁷ AFL-CIO, *Effort to Defund NLRB Fails 250-176* (Feb. 17, 2011).

- On May 13, 2011, several Members of the Committee criticized the NLRB for its “activist, job-destroying agenda” and demanded that Mr. Solomon “cease [his] bureaucratic activism immediately and restore the objectivity that is essential to the effectiveness and credibility of the General Counsel’s office.”⁸
- This week, the House is scheduled to vote on legislation to strip the NLRB of its remedial authorities.⁹ This bill would apply retroactively to any complaint that has not been resolved by the time of enactment, including the ongoing Boeing action.

There is no dispute that you have authority under the House Rules to issue a unilateral subpoena to further legitimate oversight efforts by the Committee. But you also have an obligation to use this power responsibly and not to exercise it to affect the outcome of an ongoing legal proceeding.¹⁰

As the Committee heard in testimony last month, Congress historically has been very careful to avoid interfering with ongoing proceedings. As Professor Charles Tiefer testified, if a congressional inquiry is aimed at an “immediate pending trial,” there should be “something other than the congressional committee proceeding full speed ahead without thinking about the consequences.”¹¹

⁸ Letter from Republican Members of Congress to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (May 13, 2011).

⁹ H.R. 2587, the “Protecting Jobs from Government Interference Act,” would prohibit the NLRB from directing employers to restore or reinstate work that has been unlawfully transferred, outsourced, or subcontracted away from workers in retaliation for exercising their rights.

¹⁰ *Watkins v. United States*, 354 U.S. 178, 187 (1957) (stating that the power to investigate may be exercised only “in aid of the legislative function” and “cannot be used to expose for the sake of exposure alone”). See also Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 Mich. L. Rev. 1 (1996-1997) (citing a 1996 American Bar Association Resolution recommending that Members of Congress and their staff should “work with staff of the agencies to ensure that oversight proceedings consider general issues of law and policy and avoid reference to any particular pending formal proceeding before an agency”).

¹¹ Testimony of Charles Tiefer, House Committee on Oversight and Government Reform, *Obstruction of Justice: Does the Justice Department Have to Respond to Lawfully Issued and Valid Congressional Subpoenas*, 112th Congress (June 13, 2011) (citing *Hutcheson v. United States*, 369 U.S. 599, 625 (1962) (Brennan, concurring) (“Even within the realm of relevant inquiry, there may be situations in which fundamental fairness would demand postponement of inquiry until after an immediately pending trial”).

Your Commitment to Bringing Controversial Subpoenas Before the Committee

At our Committee's organizational meeting on January 25, 2011, you reversed the policy of previous Chairmen to seek the concurrence of the Ranking Member or a vote of the Committee prior to issuing subpoenas. You committed, however, to consulting with the minority and considering requests for a full debate and vote when requested in select cases. We believe this is such a case and therefore request that you schedule a debate and vote by the full Committee prior to authorizing a subpoena in this matter.

Under the House Rules, you have the authority to issue unilateral subpoenas. As Ranking Member Cummings explained in a letter to you on January 24, 2011, however, the historical practice of all but one of your predecessors has been to refrain from issuing subpoenas unilaterally. Recognizing that the subpoena power is one of the most coercive powers of Congress, the policy of both Republican and Democratic chairmen alike has been to obtain (1) the concurrence of the ranking member or (2) a Committee vote.¹²

You reversed this policy and returned to the practice of issuing subpoenas unilaterally. In response to concerns raised by the Ranking Member and others, however, you committed to consulting closely with the minority prior to issuing subpoenas. You stated:

[I]f I want to subpoena and you really object, I am going to take your thoughts on why you object seriously. To be honest, I will ask other members of my committee, am I doing the right thing, and seek their guidance, and, by the way, not just former chairmen. I will also undoubtedly talk to other members on your side and say, Am I nuts? Am I wrong? Is this somehow a subpoena that is outside the mainstream? So I don't intend on simply writing subpoenas endlessly. ... I intend on notifying you personally if we intend to send a subpoena out.¹³

You also stated that you would consider requests for votes on subpoenas in select cases. In response to concerns that you would never schedule votes on any subpoenas, you stated:

¹² Letter from Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform Committee (Jan. 24, 2011).

¹³ Transcript of Organizational Meeting, House Committee on Oversight and Government Reform (Jan. 25, 2011).

I did not intend and do not believe I said that I would never seek. Just the opposite, I would consider seeking full committee votes. As a matter of fact, I would consider seeking that even if the ranking member and I agreed on a subpoena.¹⁴

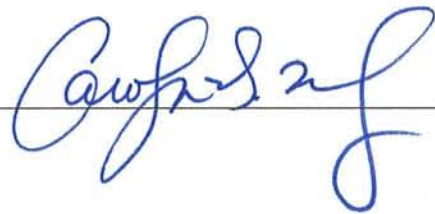
Conclusion

During this Congress, you have issued 18 subpoenas unilaterally without a vote of the Committee. Due to the significant concerns raised in this specific case, and based on your commitment to consider minority requests to vote on select subpoenas, we respectfully request that you schedule a vote to authorize a subpoena you may be considering to compel the production of additional documents from NLRB in this matter.

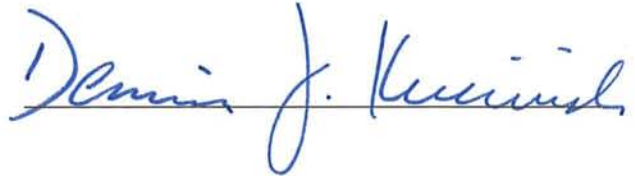
Rather than issuing a unilateral subpoena, we believe a full and frank debate relating to the scope of this subpoena would assist members of the Committee in fulfilling the objectives of both the Committee and the NLRB.

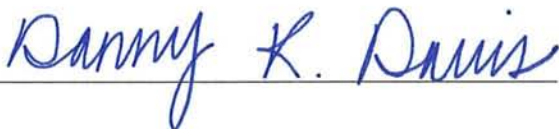
Sincerely,













¹⁴ *Id.*

Peter Welch

Alfred G. Kelly

John

Jodi Sp.

Quinn

Mike Quigley

Pat

Wm. Lacy Clay

Chris Murray

Severald E. Connolly

John F. Tierney