

July 29, 2011

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

Mr. Chairman:

We are writing regarding your letter of July 12, 2011, addressed to Mr. Lafe Solomon, Acting General Counsel of the National Labor Relations Board (NLRB). As national legal and labor policy experts, we are gravely concerned by the undue pressure that this letter, and its threats to compel disclosure of privileged documents, have placed on an independent law enforcement agency.

We are particularly concerned because the documents at issue relate to a case currently being tried before an Administrative Law Judge in Seattle, Washington. We therefore strongly urge the Committee to let this case proceed according to the policies established in the National Labor Relations Act without further interference.

We appreciate your Committee's broad oversight responsibilities and extensive investigatory powers. Yet the Committee also has the responsibility to use its powers wisely, judiciously and in the public interest -- including allowing an independent federal law enforcement agency, such as the NLRB, to do its job without undue interference.

In this light, it is disconcerting that the Committee is seeking immediate production of "[a]ll documents and communications relating to the [NLRB's] Office of General Counsel's investigation of Boeing..." up until the Complaint was filed. This broad request could seriously undermine the authority of those charged with enforcing the nation's labor laws. History further suggests that this request is unnecessarily broad, as other congressional committees routinely manage to carry out their oversight functions without intruding into active cases.

We also urge caution if the Committee continues this intervention in an ongoing legal action. Given past case law, the courts could overturn the final ruling by the NLRB if Congress acts too aggressively at this stage. As the House Ethics Manual notes:

Federal courts have nullified administrative decisions on grounds of due process and fairness towards all of the parties when congressional interference with ongoing administrative proceedings may have unduly influenced the outcome. In a seminal case, the court set aside a decision of the Federal Trade Commission because of aggressive questioning of agency officials by a Senate committee regarding their rationale for deciding an issue still pending before the officials in a formal setting. The court's concern had nothing to do with undisclosed

communications; the questioning occurred during public hearings. Nonetheless, the court held that “common justice to a litigant requires that we invalidate the order entered by a quasi-judicial tribunal that was importuned by members of the U.S. Senate, however innocent they intended their conduct to be, to arrive at the ultimate conclusion which they did reach.”<sup>1</sup>

We believe that this document request, combined with recent statements noting the desire to possibly “eliminate the NLRB,”<sup>2</sup> may well cross the line delineated by the courts in the *Pillsbury* and subsequent cases.

In addition, this document request seems especially ill-timed, coming on the heels of Administrative Law Judge Clifford H. Anderson’s decision to deny similar requests by the Boeing Corporation in the pending matter. Under current law, Congress must look to how the courts would handle the assertion of attorney-client and work product privilege claims when determining whether to press for these documents.<sup>3</sup> Given the ALJ’s recent decision that these privileges should not be waived in the pending action, we believe the Committee’s request should not be pursued at this time. The Committee’s timing also makes the request appear less about oversight and, instead, more about intervening in a particular case in support of one of the named parties.

The Committee’s stance that its request “does not affect a decision-making process” because it seeks only documents created prior to issuance of the Complaint, also does not withstand serious scrutiny. While these documents relate only to one stage of the adjudicatory process, they are likely to include settlement discussion notes, litigation strategy approaches, and other key factors in deciding whether to file the Complaint. Since the case has proceeded to review before an ALJ, we believe it is an inopportune time to have these documents released to any third party.

Finally, we are troubled by recent news reports that Members of the Committee have allowed confidential documents to be shared publicly on at least two occasions.<sup>4</sup> If future leaks occur, the privileges now attached to some of these NLRB documents could be waived. In addition, a leaking of these documents could also lead to access by the defendant, thereby providing the Boeing Corp. with an unfair advantage, or an invalidation of the Complaint.

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<sup>1</sup> House Ethics Manual, 2008 Edition, page 303 et seq. See *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966).

<sup>2</sup> “We could eliminate the NLRB or take the premise and statutorily change it,” said Issa, “This [lawsuit] could lead to repercussions in America’s competitiveness.” - Rep. Darrell Issa, House Oversight and Government Reform Committee hearing in North Charleston, South Carolina, on June 17, 2011.

<sup>3</sup> CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, by Morton Rosenberg (1995), pages 32-37.

<sup>4</sup> See “Lawmakers dispute TSA’s definition of ‘sensitive’ information,” *Washington Post*, July 15, 2011 (“Joseph B. Maher, DHS deputy counsel, wrote Chaffetz in a letter dated Wednesday that ‘sensitive security information’ provided by the Transportation Security Administration was illegally disclosed to the media.”). See also, “Darrell Issa, Department of Justice clash at hearing,” *Politico*, June 15, 2011 (“Administration officials also charge that Issa and Sen. Charles Grassley (R-Iowa) released highly confidential information about the identity of a former target of the probe and his dealings with an informant working with the Bureau of Alcohol, Tobacco, Firearms and Explosives.”)

In our view, independent federal law enforcers must be protected from undue interference by Congress. If the Committee continues to inappropriately interfere in this process, these serious charges of illegal behavior may never be properly adjudicated, thereby denying both parties the opportunity to tell their full story. Such a result would jeopardize our long-held democratic principles and respect for the rule of law.

Sincerely,

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Cc: The Honorable Elijah E. Cummings, Ranking Member  
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