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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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WASHINGTON, DC 20515–6143

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July 28, 2011

Mr. Lafe Solomon
Acting General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570-0001

Dear Mr. Solomon:

I regret that you continue to prevent the Committee from fully executing its Constitutional obligation to conduct oversight related to the decision by the National Labor Relations Board (NLRB) to file a Complaint against The Boeing Company (Boeing) for alleged unfair labor practices under the National Labor Relations Act (NLRA).[1] As you know, the Committee has requested documents related to your investigation of Boeing on multiple occasions, and I have repeatedly informed you that it is the practice of the U.S. House of Representatives, grounded in Congress' Constitutional power to investigate, to leave to the congressional committee to decide whether claims of privilege, deliberative process, and attorney work product will be accepted.[2] As you correctly recognize, the agreement at the Committee's June 17, 2011, hearing to limit the scope of questioning was for purposes of the hearing, and the hearing only.[3] As I believe I articulated, this ruling was in response to specific concerns presented by a live, public forum which is fundamentally different than document production. Therefore, I respectfully decline your request to apply my agreement at the hearing to limit the scope of the document request.

While I appreciate your continued concerns, I do not appreciate what appears to be a coordinated effort between the NLRB, the Democratic members of this Committee, as well as the Democratic leadership of other Committees to obstruct the legitimate oversight

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[1] *See* Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (July 26, 2011).
[2] CRS Report 95-464, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, by Morton Rosenberg.
[3] *See* Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (July 26, 2011).

responsibilities of this Committee.[4] Indeed, letters from you, the Democratic members of this Committee, as well as others are strikingly similar in substance—even down to the quotations.[5]

As I have explained, I recognize the importance of the due process rights of litigants.[6] The series of letters I have sent to you demonstrate I have gone to great lengths to determine that Congressional oversight of the NLRB's actions is not only appropriate, but also necessary.[7] Congress's power to investigate is extremely broad,[8] and the rights of litigants can be preserved "without having any adverse effect upon the legitimate exercise of the investigative power of Congress."[9] Courts have determined that "communications between Congress and agencies help to guarantee the political accountability of unelected agency-decision makers."[10] The former chairman of this Committee, Henry Waxman, correctly insisted that confidentiality interests in documents that "reflect internal deliberations and/or attorney-client privilege communications" is "not a valid basis for withholding information from the Committee."[11] Further, the U.S. Supreme Court rejected the position that pending lawsuits are a basis to withhold information from a Congressional committee.[12] The court held that such lawsuits do not "operat[e] to divest [Congress] of further power to investigate the actual administration of the land laws....the authority of [Congress], directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."[13] While I appreciate you bringing to my attention the ruling of the Administrative Law Judge regarding Boeing's efforts to subpoena certain documents from the NLRB,[14] you should understand that the Chairman of a congressional committee has different legal rights and, more importantly, far different responsibilities than a private litigant.

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[4] *See* Letters from Ranking Member Elijah E. Cummings, et al., House Oversight and Government Reform, Lafe E. Solomon, Acting General Counsel, National Labor Relations Board, and Ranking Member George Miller, House Education and Workforce Committee and Ranking Member John Conyers, House Judiciary Committee to Chairman Darrell Issa, House Oversight and Government Reform Committee (all three letters dated July 26, 2011) .

[5] Letter from Ranking Member Elijah E. Cummings, et al., House Oversight and Government Reform Committee to Chairman Darrell Issa, House Oversight and Government Reform Committee (July 26, 2011); Letter from Lafe E. Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (July 26, 2011); Letter from Ranking Member George Miller, House Committee on Education and Workforce and Ranking Member, John Conyers, House Committee on the Judiciary to Chairman Darrell Issa, House Oversight and Government Reform Committee (July 26, 2011) (quoting Chairman Issa, "any item which is not discoverable by the defendant, will be considered out of bounds for any question," and quoting Mr. Solomon, "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.").

[6] *See* Letters from Chairman Darrell Issa, House Oversight and Government Reform Committee to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (June 7, 2011, June 14, 2011, July 12, 2011).

[7] *See id.*

[8] *Watkins v. United States*, 354 U.S. 178 (1957).

[9] *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966).

[10] *United States of America v. Mardis*, 670 F.Supp.2d 696, 703 (D. Tenn. 2009); *Sokaogon Chippewa Community v. Department of Interior*, 929 F.Supp. 1165 (D. Wis. 1996).

[11] *See* Letters from Henry Waxman, former Chairman House Oversight and Government Reform Committee to Stephen Johnson, former Administrator, Environmental Protection Agency (February 11, 2008, and March 10, 2008).

[12] *Sinclair v. United States*, 279 U.S. 263 (1929).

[13] *Id.*

[14] *See* Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (July 26, 2011).

To be clear, this investigation is not about benefiting one party or another. The purpose of this investigation is to determine whether the NLRB is properly carrying out its mandate under the NLRA, and, in turn, using taxpayer dollars appropriately. While the Committee needs all the responsive documents to make a final judgment about the NLRB's actions, the fact that you are only willing to turn over public court documents and remain unwilling to produce anymore than that, and seem to be part of a coordinated effort to derail a Congressional investigation heightens speculation there is something you are trying to hide.

To delay or limit the Committee's inquiry and obstruct the Committee's Constitutional obligation to conduct oversight is not something I am willing to do. Therefore, I am requesting, yet again, the following documents and information for the time period from January 1, 2009, to present:

1) All documents and communications referring or relating to the Office of General Counsel's investigation of Boeing, including but not limited to all communications between the Office of General Counsel and the National Labor Relations Board. To clarify, this would include, but is not limited to, all documents and communications between anyone in the Executive Office of the President, other federal agencies, or Member of Congress and the Office of General Counsel or the National Labor Relations Board referring or relating to the International Association of Machinists charge against Boeing or the Office of General Counsel's investigation of Boeing.

2) All documents, including emails and call logs, and communications between anyone in the Office of General Counsel or the National Labor Relations Board and the International Association of Machinists.

3) All documents, including emails and call logs, and communications between the Office of General Counsel or the National Labor Relations Board and any representative(s) of the Boeing Company.

I understand that you have asserted there are no responsive documents to "[my] inquires about communications between the Office of the General Counsel and the White House, as well as between the Office of General Counsel and the National Relations Labor Board, about the Boeing case."[15] However, for completeness, they remain part of the request. If all of the responsive documents that have been requested are not received within 24 hours of receipt of this letter, the Committee will use the compulsory process. When producing documents to the Committee, please deliver production sets to the Majority Staff in room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set

[15] Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (July 26, 2011).

forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

If you have any questions about this request, please contact Kristina Moore or Kristin Nelson of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,

Darrell Issa
Chairman

Attachment

cc: The Honorable Elijah Cummings, Ranking Minority Member
Committee on Oversight and Government Reform

DARRELL E. ISSA, CALIFORNIA
CHAIRMAN

ELIJAH E. CUMMINGS, MARYLAND
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Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.

8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.

12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.

16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.

18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157of the Rayburn House Office Building and the Minority Staff in Room 2471of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.