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## United States Senate

COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

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<http://help.senate.gov>

August 11, 2011

Ms. Wilma Liebman  
Chair  
National Labor Relations Board  
1099 14<sup>th</sup> St. NW  
Washington, DC 20570-001

Mr. Lafe Solomon  
Acting General Counsel  
Office of the General Counsel  
National Labor Relations Board  
1099 14<sup>th</sup> St. NW  
Washington, DC 20570-001

Dear Ms. Liebman and Mr. Solomon:

I am writing in response to the subpoena sent to the National Labor Relations Board from Chairman Issa of the House Committee on Oversight and Government Reform for documents relating to the NLRB's case involving the Boeing Company and the International Association of Machinists (the "House subpoena"). This subpoena is extremely broad, including both the internal case file of the Board's prosecutorial arm (i.e., the General Counsel's office) as well as all documents related to the case that are within the possession of the Board's adjudicative arm. The House subpoena thus encompasses even the internal deliberative documents of the Administrative Law Judge (ALJ) who is currently deciding this case.

As Chairman of the Senate Committee charged with oversight of the NLRB and with jurisdiction over our nation's labor laws, I have serious concerns that the House subpoena could compromise the due process rights of the parties in this case, give one side an unfair advantage in the case, and set a dangerous precedent of inappropriate political interference into ongoing investigations and litigation.

**Turning over the requested documents could violate the due process rights of parties in this case.** It is well-established law that an agency performing adjudicative functions can violate the due process rights of a party before the agency if its decision making is influenced by political factors extraneous to the merits of the case. In the leading case on the subject, *Pillsbury Company v. Federal Trade Commission*, the Fifth Circuit held that the FTC violated the due process rights of a litigant when intense scrutiny from Congress raised concerns about the appearance of the impartiality of the FTC and external influences tainted the adjudicative process. 354 F. 2d 952, 964 (1966).

The subpoena request in this case raises even more serious concerns, especially to the extent that it encompasses the internal deliberative documents of the ALJ who is currently considering this case. Given the high level of attention this case has received, there is already cause for concern about improper outside influence on the adjudicative process, and the House subpoena only exacerbates this problem. Compliance with this subpoena will make the agency's decision vulnerable to future legal challenge, since publicizing documents from an Administrative Law Judge's active case file is a dramatic departure from the Board's usual procedures – or indeed any adjudicative agency's usual procedures – and clearly has the potential to compromise the integrity and independence of the decisionmaking process.<sup>1</sup>

**This oversight request could give one side in this dispute an unfair advantage in the pending case, which is not the function of Congressional oversight.** My specific concerns about the impropriety of the subpoena are only heightened by the fact that one of the parties in this case has already attempted to use the House Committee's oversight activities to gain strategic advantage in the litigation. While the case was pending before the ALJ, Chairman Issa took the highly unusual step of convening a Congressional hearing in South Carolina about the merits of the pending litigation. Then, testimony from the House hearing was used as evidence in a motion before the Administrative Law Judge.

This subpoena creates the potential for more such mischief in the future. During the federal trial, Boeing demanded the very documents that Chairman Issa now wants to subpoena from the Office of the General Counsel. Under the standard rules of procedure governing NLRB cases, the documents in question are privileged and Boeing is not entitled to them. These privileges exist for important reasons: to prevent retaliation against workers who offer evidence, to encourage frank dialogue in settlement discussions, and to protect attorney work product and ensure a fair trial.

Without any assurances from Chairman Issa about protecting the confidentiality of documents, I am concerned that the documents under subpoena could be used to give one side an unfair advantage in the pending case. Boeing should have the opportunity to present its case, but Congressional oversight should not be used as an opportunity to expand the record in the case before the ALJ, or to give one side the opportunity to conduct discovery that is disallowed under normal NLRB rules. That would be a highly questionable use of government resources.

**The Board must exercise caution to preserve the integrity of its administrative processes from inappropriate political interference.** It is important to make clear that I have not and will not

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<sup>1</sup> Even if the House subpoena were only directed to documents within the possession of the Office of the General Counsel, our concerns would be the same. In his June 7<sup>th</sup> letter to you, Chairman Issa attempted to distinguish the *Pillsbury* case because it involved undue influence on an adjudicator's discretion rather than a prosecutor's discretion. We find that distinction unpersuasive. The fundamental principle at issue in *Pillsbury* relates to the impact of outside interference on an agency performing what are purportedly nonpolitical functions. It does not matter at what stage of the process this interference takes place – the same principle applies regardless of whether this outside influence is seeking to change the way an adjudicator would decide a case, or seeking to influence whether a prosecutorial agency decides to pursue a case, advance an argument, negotiate a settlement, or file an appeal.

advocate for any result in this case. If the facts in this case show that Boeing did not retaliate against striking Washington state workers, the NLRB should find for Boeing. If the facts show that Boeing did retaliate, the Board should find for the workers. If novel issues of law arise, the federal courts will review the NLRB's interpretation, as prescribed by the Constitution. I stand by this process and by the principle that no individual, union, or company is above the law.

Furthermore, while I understand the value of oversight, I do not want to see that authority abused in a manner that could compromise the integrity of an independent agency's adjudicative process. All Committees have the responsibility to exercise their oversight functions without undermining the due process rights of litigants, and I urge both the General Counsel's office and the Board to carefully consider the due process rights of the parties in this case in determining how to proceed in this matter. I hope that it is not too late to find an acceptable way to accommodate Chairman Issa's legitimate role while maintaining respect for the rule of law and the rights of all parties.

Sincerely,



Tom Harkin  
Chairman