



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlr.gov](http://www.nlr.gov)

July 26, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

I write in response to your July 12, 2011 letter concerning the Committee's request for documents related to Case No. 19-CA-032431 ("The Boeing case"). The Office of the General Counsel has previously supplied the Committee with a number of relevant public documents concerning this ongoing enforcement action, now pending before an administrative law judge. In addition, the Acting Deputy General Counsel, Celeste J. Mattina, and I have previously replied to your inquiries about communications between the Office of the General Counsel and the White House, as well as between the Office of the General Counsel and the National Labor Relations Board, about the Boeing case, by indicating that there have been none. We have repeatedly offered to provide the Committee with a substantial amount of additional documentary information, including all hearing transcripts, exhibits, motions, orders, and post-hearing briefs. I continue to believe that this offer is responsive to your request and properly balances the Committee's legitimate informational needs with our legitimate needs to safeguard the due process rights of the parties and maintain the integrity of the ongoing legal proceeding. Therefore, I respectfully ask that you reconsider our request to apply your June 17 ruling at the South Carolina hearing to our production of documents, which would allow the Committee to have access to requested information as soon as it becomes available to the parties and the administrative law judge at the hearing.

On May 12, you sent me an oversight request regarding the Boeing case.<sup>1</sup> The request sought "[a]ll documents and communications referring or relating to the Office of the General Counsel's investigation of Boeing, including but not limited to all communications between the Office of the General Counsel and the National Labor Relations Board," and communications between the Agency and Boeing and the Machinists.<sup>2</sup> Acting Deputy General Counsel Celeste J. Mattina replied to this oversight

<sup>1</sup> Letter from Reps. Darrell Issa, Dennis Ross, and Trey Gowdy to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (May 12, 2011).

<sup>2</sup> *Id.*

request on May 27.<sup>3</sup> The response expressed our concern that the disclosure of documents and information not available to both Boeing and the Machinists could result in an unfair advantage to one party over another and risk harm to the integrity of the Agency's legal process. The response also provided the Committee with documents that contained the facts and legal theories of our case, and informed the Committee that there are no documents constituting or recording communications between the Office of the General Counsel and the National Labor Relations Board related to the Boeing matter. Finally, the response offered to provide the Committee with copies of the transcripts and exhibits from the hearing contemporaneous with their availability, as well as copies of all post-hearing briefs filed.

On May 26, you sent me a letter requesting my testimony at a Committee hearing on Friday, June 17, in North Charleston, South Carolina.<sup>4</sup> The letter stated the purpose of the hearing was to explore the NLRB's decision to file a complaint against Boeing for alleged violations of federal labor law. On June 3, I respectfully declined your invitation, advising that my appearance at the Committee hearing could threaten the rights of Boeing and the Machinists to a fair trial before the administrative law judge.<sup>5</sup> On June 7, you requested that I reconsider your invitation to testify at the Committee hearing in South Carolina.<sup>6</sup> You acknowledged the due process rights of the parties to the Boeing case, but expressed your view that my testimony before the Committee did not jeopardize those rights because the hearing did not "concern [my] decision-making strategy or [my] legal strategy." I responded on June 10, reiterating the concerns I had previously expressed, and offering to have Associate General Counsel Richard Siegel, who was not involved in the determination of the merits of this case, testify in the hearing, in a further attempt to meet the needs of the Committee without adversely impacting the rights of the litigating parties or unduly interfering with an enforcement action. On June 14, you rejected all of my offers and insisted upon my presence at the hearing.<sup>7</sup>

On June 17, I reluctantly appeared, under threat of subpoena, to testify at the Committee hearing in South Carolina. After discussion among Committee members, and prior to the acceptance of any testimony, you ruled that "[a]ny item which is not discoverable by the defendant, will be considered out of bounds for any question."<sup>8</sup> In

---

<sup>3</sup> Letter from Celeste J. Mattina, Acting Deputy General Counsel, National Labor Relations Board, to Reps. Darrell Issa, Dennis Ross, and Trey Gowdy (May 27, 2011).

<sup>4</sup> Letter from Rep. Darrell Issa to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (May 26, 2011).

<sup>5</sup> Letter from Lafe E. Solomon, Acting General Counsel, National Labor Relations Board, to Rep. Darrell Issa (June 3, 2011).

<sup>6</sup> Letter from Rep. Darrell Issa to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (June 7, 2011).

<sup>7</sup> Letter from Rep. Darrell Issa to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (June 14, 2011).

<sup>8</sup> *Field Hearing on Unionization and Regulation Issues as It Relates to the National Labor Relations Board's Complaint against Boeing; Hearing before the House Oversight and Government Reform Committee*, 112th Cong. (2011) (excerpts from unofficial transcript) (although the Agency has requested the official transcript from the Committee, it is not yet available).

other words, you concluded that it would be inappropriate for Committee members to ask me to provide information not yet available to Boeing. As a result of the ruling, the hearing continued with a reduced risk of harm to the due process rights of the litigants.

On June 29, I sent additional documents for the Committee's review, accompanied by a cover letter wherein I expressed my view that your ruling at the June 17 Committee hearing "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" and stated that "extending the application of your ruling to the document request would continue to ensure fairness to the litigants."<sup>9</sup> Responding on July 12, you rejected my view that your approach at the South Carolina hearing, which limits production of information to that which is discoverable by Boeing in order to protect the due process rights of the litigants to the case, was the fairest way to proceed.<sup>10</sup>

It remains my belief that premature disclosure of the Boeing case file would severely impact the parties' due process rights and the Agency's legal processes. You have asserted that these concerns are overcome by the Committee's need to assess the claims made by Boeing that the complaint issued against it is "legally frivolous."<sup>11</sup> Indeed, Boeing, in its Motion to Dismiss, contended to Administrative Law Judge Clifford Anderson that the complaint was legally frivolous. Administrative Law Judge Anderson has denied that Motion, thus supporting my position that the Boeing complaint has legal merit.<sup>12</sup> This ruling has come at an early stage of the ongoing legal proceeding. Clearly, Boeing has a right to continue to challenge our facts and legal theories throughout the legal process and will be afforded the due process protections prescribed by Congress at every step of the proceeding. The documents related to Judge Anderson's decision have been previously provided to the Committee. The documents are noteworthy because they clearly demonstrate the correctness of your June 17 ruling. They demonstrate that the Agency can satisfy the Committee's need for information by continuing to provide documents consistent with that ruling.

The Agency's interests are both clear and critical: to safeguard the rights of the parties to the case and maintain the integrity of the Agency's legal process. We were therefore in agreement when you ruled at the hearing in South Carolina that it would be inappropriate for Committee members to ask me to provide information not yet available to Boeing.

With all due respect, we urge you to continue to apply the above ruling as it relates to documents involving the Boeing case. We frankly find no rationale for distinguishing information provided to the Committee in the form of testimony from

---

<sup>9</sup> Letter from Lafe E. Solomon, Acting General Counsel, National Labor Relations Board, to Rep. Darrell Issa (June 29, 2011).

<sup>10</sup> Letter from Rep. Darrell Issa to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (July 12, 2011).

<sup>11</sup> *Id.*

<sup>12</sup> See Resp.'s Mot. To Dismiss and Strike Injunctive Relief, AGC's Opposition to Resp.'s Motion to Dismiss and Strike, ALJ Ruling on Resp. to Motion to Dismiss.

information provided to the Committee in the form of documents. Rather, the framework that you established at the hearing remains necessary as long as this legal proceeding remains active while the Committee is conducting oversight.

Your July 12 letter seeks the following three broad categories of “documents and information” attendant to the Boeing case: intra-Agency and external documents and communications related to the underlying investigation; communication logs and messages pertaining to dealings between Agency personnel and the Machinists; and communication logs and messages pertaining to dealings between Agency personnel and Boeing. These three broad categories duplicate, in large part, the information sought by Boeing in its Subpoena Duces Tecum B-647901, served upon Counsel for the Acting General Counsel in the ongoing proceeding. Specifically, Boeing’s information requests 1, 2, 5 through 17, and 23 (set forth on pages 5 through 9 of its subpoena), which were attached as Exhibit A to our petition to revoke the subpoena and provided to the Committee on June 29, 2011, explicitly encompass those documents sought by the Committee.

Notably, Administrative Law Judge Anderson denied the requests made by Boeing for substantially the same information you are also seeking. He properly determined that it is not appropriate for Boeing to have the documents that it seeks at this point in the process since it is tantamount to pre-trial discovery, which is not afforded to litigants in NLRB proceedings. He cited two cases (*Red Way Carriers*, 274 NLRB 1359, 1371 (1985), and *Ross M. Madden v. HOD Carriers Local 41*, 277 F.2d 688 (7<sup>th</sup> Cir. 1960), cert. denied, 364 U.S. 863 (1961)) in his ruling regarding the appropriateness of protecting Agency documents, and was clear that precedent dictates that the proper way to test the quality of the investigation is through the trial process. Indeed, he agreed that it is inappropriate for such information to be prematurely disclosed, rather than as evidence is made available by the parties through the litigation process. The only exception to his ruling related to information dealing with expert witnesses, which is not part of the investigatory file, wherein he ordered that the parties exchange that information should it exist.

Administrative Law Judge Anderson’s ruling demonstrates why the disclosure of information to the Committee prior to the time when it is appropriate for the parties to have it, and for him to consider it, risks harm to the right of the parties to a fair trial. Consistent with this, I reiterate my offer to provide you with all record evidence, including Administrative Law Judge Anderson’s rulings, as it becomes available. Further, as you know, under the rules of the House of Representatives, any document that we produced to the Committee is a “committee record.”<sup>13</sup> As such, each Member of the House of Representatives has a right to access those documents. For all practical purposes, documents that Administrative Law Judge Anderson has ruled should not be available to the parties at this time would therefore be exposed to all 435 Members of the House of Representatives should we prematurely produce them pursuant to your request. No assurances have been given that all Members with access to these documents will keep them confidential, consistent with Administrative Law Judge

---

<sup>13</sup> Rules of the House of Representatives, Rule XI, clause 2, § 794(e)(2)(A).

Anderson's ruling. Any disclosure of this information would undermine the due process rights of the litigants, the administrative law judge's ability to effectively preside over the case, and the integrity of the hearing now under way.

For the reasons outlined above, I respectfully request that you reconsider your decision not to apply your June 17 ruling to our ongoing production of documents to the Committee. To be clear, allowing us to produce documents to the Committee consistent with your June 17 ruling does not mean that the Committee will not have access to the documents it seeks. Rather, it means that the Committee will have access to the requested information contemporaneously with its availability to the parties in the pending litigation. On the other hand, the issuance of a subpoena in an attempt to obtain the requested documents of an open and ongoing enforcement proceeding would severely undermine the integrity of the ongoing legal proceeding and cause serious damage to the due process rights of the parties to that proceeding.

If you have other specific questions about the case, we would be happy to work with you to accommodate your legitimate needs without compromising our mutual interest in preserving the rights of the parties. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700, if you wish to discuss this matter further.

Sincerely,

A handwritten signature in black ink that reads "Lafe E. Solomon". The signature is written in a cursive style with a large initial "L" and a long, sweeping underline.

Lafe E. Solomon  
Acting General Counsel

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