

Congress of the United States
House of Representatives
Washington, DC 20515

August 12, 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 request that you withdraw the unilateral subpoena you served on Sunday to the National Labor Relations Board in light of a recent court ruling that effectively eliminates the purported basis for the Committee's investigation.

You have stated that the purpose of the Committee's investigation is to determine whether Board officials "exceeded their authority" by filing a complaint alleging that the Boeing Company discriminated against its workers in Washington State. The complaint asserts that Boeing violated federal law by moving production of its 787 Dreamliner to South Carolina because workers in Washington State were exercising their rights to strike under federal law. You have also asserted that Board officials were "overreaching" when they sought a remedy of returning the 787 Dreamliner operation to Washington State.

Boeing officials made nearly identical arguments in a motion to dismiss the case filed on June 14, 2011. They argued that the Board failed to state a valid claim under the law and that the remedy of returning the operation to Washington State would be "breathtaking, legally indefensible, and profoundly unjust."

On June 30, 2011, after carefully considering all of the arguments in Boeing's motion to dismiss the case, a federal administrative law judge concluded that they were "without merit and should be denied." Although the court noted the "various economic horrors" that Boeing claimed might occur, it ultimately concluded that "the Board carefully matches the remedy for particular unfair labor practices to all the circumstances of the case," and "the remedy under attack is not contrary to general Board remedial policy."

As a result of the court's ruling, the case against Boeing will now proceed. Whether the Board ultimately can prove its allegations will be an issue of fact resolved based on the evidence presented by both sides. In the context of your stated goals for the Committee's investigation, however, the administrative law judge has now answered both questions: the Board did not exceed its authority when it filed the complaint against Boeing, and the remedy sought is not inappropriate for the discrimination alleged.

Rather than stepping back to carefully consider the scope and legitimacy of the Committee's investigation, as Democratic Committee Members requested on July 26, 2011, you now appear to have taken the opposite approach and expanded the Committee's investigation. On Sunday, you served a unilateral subpoena, without any Committee debate or vote, that demands the production of documents relating not only to the actions of the Board, but also to the actions of the administrative law judge currently in the process of deciding this case.

You may personally disagree with the laws Congress enacted to protect workers against discrimination. You may also disagree with the judge's decision in this case upholding those laws. But it is not a legitimate use of the Committee's authority to circumvent those laws on behalf of corporate interests.

Rather than escalating your efforts in this way, we urge you to work with the Board to come to a mutually agreeable compromise that allows both the Board and the Committee to fulfill their respective functions without undue interference.

Allegations that Boeing Discriminated Against its Workers

On April 20, 2011, the Board filed a complaint alleging that Boeing violated federal law by discriminating against its workers in Washington State. Specifically, the complaint alleged that Boeing moved its production of the 787 Dreamliner to South Carolina because workers in Washington State exercised their rights under federal law to strike. The complaint alleged violations of Section 7 of the National Labor Relations Act (NLRA), which states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collecting bargaining or other mutual aid or protection.¹

The complaint also cited Section 8(a)(1) of the Act, which states: "It shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."²

The Board filed its complaint based on evidence that Boeing illegally transferred its 787 Dreamliner operation out of Washington State because its workers there were exercising their rights under the Act. For example, the complaint cited multiple statements by Boeing executives in quarterly earnings conference calls, memoranda to company managers, and various media outlets stating that their decision to move the operation out of Washington State was intended to

¹ National Labor Relations Act, 29 U.S.C. § 157.

² *Id.* at § 158.

reduce the company's vulnerability to worker strikes.³

Challenges to Board's Actions

The fundamental basis for your investigation into the Board's actions has been a claim that the Board exceeded its authority by filing this complaint. You have explained that the purpose of the investigation is to determine "whether the NLRB is properly carrying out its mandate under the NLRA, and, in turn, using taxpayer dollars appropriately."⁴ You have also asserted that the Board's action against Boeing is an "unparalleled and overreaching action."⁵ In addition, at a Committee hearing on June 17, 2011, you stated:

The American people deserve to know if so-called independent regulatory agencies are exceeding their legal authority to pursue a partisan agenda.⁶

The same week, on June 14, 2011, Boeing filed a motion to dismiss the Board's complaint, arguing, like you, that the Board failed to state a valid claim under the law. Boeing argued that the Board was guilty of "misquoting and mischaracterizing" the statements of Boeing executives, disputed that it "transferred the work in dispute because the Unit employees assisted and/or supported the Union," and argued that there was no evidence that current employees "suffered some adverse employment action due to Boeing's decision."⁷

³ Complaint, *NLRB v. The Boeing Company* (Apr. 20, 2011) (No. 19-CA-32431).

⁴ Letter from Chairman Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, to Lafe Solomon, Acting General Counsel, National Labor Relations Board (July 28, 2011).

⁵ 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).

⁶ House Committee on Oversight and Government Reform, *Hearing on Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise*, 112th Cong. (June 17, 2011).

⁷ Motion to Dismiss for Failure to State a Claim, or, In the Alternative, to Strike the Injunctive Relief Sought in ¶ 13(A) of the Complaint, *NLRB v. The Boeing Company* (June 14, 2011) (No. 19-CA-32431).

You and Boeing officials have also challenged the validity of the remedy sought by the Board, which is to order the return of Boeing's 787 Dreamliner operation to Washington State. For example, you have stated:

That a Washington, D.C.-based bureaucracy could dictate the work location and parameters for a world-leading company is unprecedented in a global economy and hobbles a leading American job creator at a time of economic vulnerability.⁸

Similarly, in its motion to dismiss the case, Boeing officials argued that "the remedy sought is breathtaking, legally indefensible, and profoundly unjust."⁹

Court Ruling Against Boeing

On June 30, 2011, a federal administrative law judge considered all of Boeing's arguments against the Board—which are nearly identical to the arguments you have raised—in the company's motion to dismiss the case. After evaluating Boeing's arguments in detail, the court found that they were "without merit and should be denied."¹⁰

The court recited its role in evaluating these arguments, stating:

It shall be the duty of the administrative law judge to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint.¹¹

The court explained that the case was at an early stage and that the Board's allegations "can only be properly evaluated as to their merits on the basis of a full evidentiary record." As a result, he allowed the case to go forward.¹²

⁸ House Committee on Oversight and Government Reform, *Press Release: Oversight Chairman Issa Issues Subpoena to NLRB* (Aug. 8, 2011).

⁹ Motion to Dismiss for Failure to State a Claim, or, In the Alternative, to Strike the Injunctive Relief Sought in ¶ 13(A) of the Complaint, *NLRB v. The Boeing Company* (June 14, 2011) (No. 19-CA-32431).

¹⁰ *NLRB v. The Boeing Company*, No. 19-CA-32431, Ruling on Respondent's Motion to Dismiss Complaint for Failure to State a Claim or, In the Alternative, to Strike the Injunctive Relief Sought in the Complaint (June 30, 2011).

¹¹ *Id.* (citing National Labor Relations board Rule 102.35 and Administrative Procedure Act, 5 U.S.C. § 557).

¹² *Id.*

The court also rejected arguments objecting to the proposed remedy of returning the 787 Dreamliner line to Washington State. According to the court, Boeing advanced “various economic horrors both nationally and to itself from both the imposition of a remedy such as that ... and through delay in resolving the case.”¹³ Nevertheless, the court rejected these arguments, stating:

I find the Board’s determination of appropriate remedies for given cases is highly fact intensive. I also find the Board carefully matches the remedy for particular unfair labor practices to all the circumstances of the case.¹⁴

For these reasons, the court rejected Boeing’s arguments, finding that it was “inappropriate to limit the remedy sought.” As the court stated, “This is particularly true where the remedy under attack is not contrary to general Board remedial policy.”¹⁵

Escalation of Investigation and Issuance of Subpoena

The stated purpose of the Committee’s investigation was to examine arguments, made by you and by Boeing officials, that Board officials were “exceeding their legal authority” in seeking a remedy relating to “the work location and parameters” of Boeing’s operation. In response to these claims, a federal administrative law judge has now ruled that these arguments are “without merit and should be denied” while the case proceeds.

For these reasons, the Democratic Members of the Oversight Committee wrote to you on July 26, 2011, to request that you have a full and open debate to discuss the scope of the Committee’s investigation before issuing any subpoena you had been considering. The letter stated:

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

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

constitute an inappropriate use of the Committee's authority for the benefit of a private party, Boeing.¹⁶

This request for a full debate and vote was based on the commitments you made at the Committee's January 25, 2011, organizational meeting, when you stated, "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." You added, "I will also undoubtedly talk to other members on your side and say, Am I nuts?"¹⁷

Rather than honor your commitments and agree to this request, you instead chose to take the opposite approach by expanding the investigation to include not only the actions of the Board, but the actions of the administrative law judge who just issued his ruling rejecting Boeing's motion to dismiss the case. On Sunday, you served a unilateral subpoena without any debate or vote by the Committee.¹⁸ Your subpoena demands not only documents previously requested from the Board, but it also demands an entirely new set of documents, including those in the custody of the administrative law judge currently in the process of deciding this case.¹⁹

Conclusion

The Supreme Court has held that congressional investigations must serve "a valid legislative purpose."²⁰ The Court has also explained that Congress is not "a law enforcement or trial agency." Instead, it has stated:

These are functions of the executive and judicial departments of government. No inquiry is an end in itself, it must be related to, and in furtherance of, a legitimate task of the

¹⁶ Letter from Democratic Members to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (July 26, 2011) (online at <http://democrats.oversight.house.gov/images/stories/FULLCOM/Letters%20To%20Issa/2011%200726%20EEC%20and%20Dem%20Members%20to%20Issa%20NLRB.pdf>)

¹⁷ Transcript of Organizational Meeting, House Committee on Oversight and Government Reform (Jan. 25, 2011).

¹⁸ House Committee on Oversight and Government Reform, Subpoena to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (signed Aug. 5, 2011; served Aug. 7, 2011).

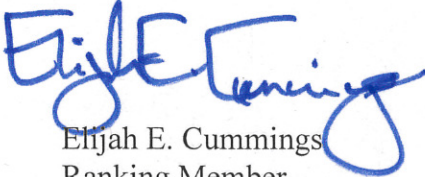

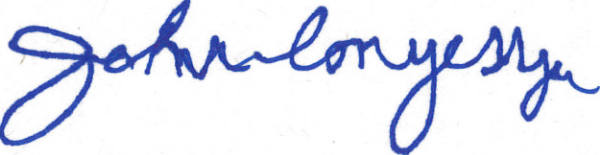
¹⁹ *Id.*

²⁰ *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961).

Congress.²¹

We are aware of no precedent for your actions, and we are particularly concerned that they are taking us down a dangerous path of interfering directly with the decisions of prosecutors and even of judges who are charged with carrying out the laws Congress enacted. We urge you to reconsider your approach, to withdraw your subpoena, and to identify a legitimate purpose for this investigation before taking any further steps.

Sincerely,

		
Elijah E. Cummings Ranking Member Committee on Oversight and Government Reform	George Miller Ranking Member Committee on Education and the Workforce	John Conyers, Jr. Ranking Member Committee on the Judiciary

²¹ *Watkins v. United States*, 354 U.S. 178 (1957). See also Congressional Research Service, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry* (Apr. 7, 1995) (95-464) (“[W]hile the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has admonished 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”).