



United States Government

NATIONAL LABOR RELATIONS BOARD

1099 14th STREET NW
WASHINGTON DC 20570

June 10, 2011

The Honorable Darrell Issa
Chairman, Committee on Oversight
and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Issa:

I write in response to your June 7, 2011 letter asking me to reconsider your invitation to testify at the June 17, 2011 hearing in North Charleston, South Carolina. I recognize that Congressional oversight power is broad and that the rights of litigants can be preserved "without having any adverse effect upon the legitimate exercise of the investigative power of Congress."¹ That is accomplished, however, only when Congressional oversight preserves the "integrity of the judicial aspect of the administrative process."²

As to the assertion in your June 7 letter that concerns about Congressional oversight that may border on Congressional intervention are not the Agency's claim to make, I respectfully disagree. In the context of congressional oversight of independent agencies, the courts make a sharp distinction between on the one hand, an agency being asked in its quasi-legislative capacity to make general policy statements regarding its official positions on various matters, and on the other hand, questioning an agency acting in its quasi-judicial capacity about its decisions in a pending case. In *Pillsbury* the court, in finding a due process violation, stated that "to subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the 'wrong' decision, as the Senate subcommittee did in th[at] case, sacrifices the appearance of impartiality-- the *sine qua non* of American *judicial* justice...." 354 F.2d at 964. The court was troubled by the House and Senate committees' questioning of a number of witnesses about the merits of a pending case, and noted with apparent disapproval, the fact that a number of witnesses, including not only the FTC Chairman, but also the then general counsel and other FTC

¹ *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952, 964 (5th Cir. 1966).

² *Id.*

officials, had been questioned about the merits of the underlying decision. Since *Pillsbury* courts have not only noted that Congressional oversight should uphold the integrity of the legal processes of administrative agencies, they have also recognized that independent agencies have a constitutional and statutory obligation to resist Congressional influence in order to protect the due process rights of the litigants to their administrative proceedings.³ As to the question of who is a decisionmaker, courts have analyzed the impact of hearings and other Congressional oversight on the independence of, for example, a Brigadier General,⁴ the Secretary of Transportation,⁵ and a staff attorney directing an administrative enforcement action,⁶ when determining if that oversight intruded into the thought processes of the decisionmaker. Your June 7, 2011 letter incorrectly characterizes *Koniag v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978) as declining to extend the holding in *Pillsbury* to agency employees or advisors. In fact, the court in that case expressly noted that a close advisor to the Secretary could be viewed as a decisionmaker and assumed that he was for purposes of the *Pillsbury* analysis. The court simply held that in that case there was no due process violation or impairment of the appearance of impartiality because the advisor had not characterized the validity of the claims in the pending case. 580 F.2d at 610.

As Acting General Counsel of the National Labor Relations Board, I am ultimately responsible for overseeing the litigation commencing on June 14, 2011 in Seattle, Washington and for making all strategic decisions related to the prosecution of this case, including the remedial portion of the proceeding. While I agree that conducting Congressional hearings during the pendency of an

³ See, e.g., *SEC v. Wheeling-Pittsburg Steel Corp.*, 648 F.2d 118 (3d Cir. 1981) (ruling the court would not enforce an administrative subpoena if the agency did nothing to prevent the abuse of its process by congressional influence); *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 170 (D.C. Cir. 1983) (administrative decision can only be compromised by congressional intervention if "extraneous factors intruded into the calculus of consideration of the individual decision maker"); *ATX, Inc. v. U.S. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994) (in declining to set aside an administrative decision of the Department of Transportation, the court emphasized that the agency took appropriate steps to insulate itself from Congressional intervention); *Gulf Oil Corporation v. FPC*, 563 F.2d 588 (3d Cir. 1977) (court found that Congressional intervention into the administrative process did not influence the agency because the agency did not accede to Congressional requests).

⁴ See *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 170 (D.C. Cir. 1983).

⁵ See *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971).

⁶ See *SEC v. Wheeling-Pittsburg Steel Corp.*, 648 F.2d 118 (3d Cir. 1981).

administrative proceeding may not be inherently improper, I am sure you would agree that oversight could have harmful consequences in a particular case. Premature disclosure of evidence and legal arguments is likely to have a negative impact on the rights of the litigating parties, breach assurances of confidentiality and other privileges, and generally unduly interfere with an enforcement action. In fact, all parties to this case have resisted production of subpoenaed documents relying upon certain well-established privileges, including attorney work product, confidentiality and proprietary interests. Those arguments are scheduled to be debated and considered by the administrative law judge during the week of June 14, when the unfair labor practice hearing opens in Seattle.

There can be no dispute that both Boeing and the International Association of Machinists and Aerospace Workers must be afforded due process protections and a right to a fair trial during the administrative process, including the remedial portion of the hearing. Fairness to all sides is best assured by allowing the administrative process to take its usual course. The parties will be able to address all issues raised by the complaint, including what is the appropriate remedy for any alleged violation and whether restoration of the status quo ante is appropriate in the circumstances of this case. Boeing has a right to establish that the typical remedy sought in this case, i.e. rescission of the allegedly discriminatory action, is unduly burdensome. See *e.g.*, *Lear Siegler, Inc.*, 295 NLRB 857 at 861-862 (1989). Ultimately, the administrative law judge, the National Labor Relations Board, and the courts will decide whether Boeing's actions were discriminatorily motivated, and, if so, what should be the appropriate remedy for that violation.

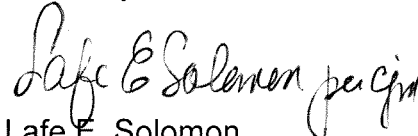
Because I recognize the legitimate oversight role of Congress and your interest in this case, I am committed to working with you to satisfy the Committee's informational needs, while protecting the constitutional and statutory rights of the parties to this case. In addition to providing the Committee with all public documents relevant to this case, I previously offered to provide copies of the transcript and exhibits from the hearing, as well as post-hearing briefs filed, as soon as they are available. Further, my office offered alternative options to my attendance at the hearing in South Carolina next week in an effort to meet the Committee's needs for information, while protecting the legitimate interests that I have previously identified. More specifically, I have offered to provide written testimony, and to send Richard Siegel, my Associate General Counsel of the Division of Operations, to the South Carolina hearing to provide testimony regarding the Board's policies and procedures. Because Mr. Siegel is not a decisionmaker in the Boeing case, his appearance does not raise the same level of concern under *Pillsbury* as would mine.

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The committee has made it clear that it is their intention to subpoena me if I do not voluntarily appear to testify in the hearing scheduled to be conducted in South Carolina on June 17. I am not aware of any other time in the history of the Office of the General Counsel that a General Counsel has been compelled to testify at a Congressional hearing about the merits of a pending case. I continue to have serious concerns about a personal appearance at this hearing and the potential impact that certain areas of inquiry may have on the due process rights of litigants and on the interest of protecting the legal integrity of the decision making process. I have been advised by my staff that as of yesterday evening your staff has not accepted our proposal to have Mr. Siegel attend the hearing. For all of the reasons set forth in this letter, I urge you to reconsider this alternative because I believe this approach best accommodates the Committee's desire to exercise its legitimate oversight without compromising the integrity and independence of the NLRB's enforcement process. If you insist on having me appear personally, I will do so, but cannot and will not compromise the very legitimate interests that I have articulated in all of my communications to you.

If you have any other questions, please feel free to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700.

Sincerely,

A handwritten signature in cursive script that reads "Lafe E. Solomon".

Lafe E. Solomon
Acting General Counsel

cc: The Honorable Elijah Cummings
Ranking Minority Member
Committee on Oversight and
Government Reform
U.S. House of Representatives
2471 Rayburn House Office Building
Washington, DC 20515