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August 17, 2011

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

Dear Mr. Solomon:

I am in receipt of your letter of August 12, 2011, and I am deeply disturbed by your stated intent to not fully comply with a lawful subpoena of the United States House of Representatives. Your action is a violation of law and a direct act of obstruction of this Committee's constitutional obligation to conduct legitimate oversight activities "at all levels."¹ This also risks the disapproval of Congress.

The Committee has attempted to work with the National Labor Relations Board (NLRB) in good faith to prioritize documents responsive to the subpoena.² Such attempts sought to provide guidance and constructively address some of the NLRB's concerns. Rather than committing to produce responsive documents on a mutually acceptable schedule, the NLRB maintained, and continues to maintain, that it will not fully comply with the subpoena.³ Further, you have not responded to my request to provide a privilege log despite your sweeping and dubious claims of privilege.⁴ As you well know, no organized discussion of privilege is possible without a privilege log, nor can any claim of privilege be taken in good faith without such a document. I appreciate you producing documents "available to all parties"; however, such production is woefully lacking and shows a complete disregard for the law. I understand search terms have been agreed to and you plan to search for additional responsive documents; however,

¹ House of Representatives Rule X, cl. 3(i).

² Telephone call between House Oversight and Government Reform Committee Majority staff and NLRB staff (Aug. 8, 2011; Aug. 9, 2011); Email from House Oversight and Government Reform Committee staff to NLRB staff (Aug. 9, 2011).

³ See Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (Aug. 12, 2011).

⁴ Email from House Oversight and Government Reform Committee staff to NLRB staff (Aug. 9, 2011).

your letter indicates you do not plan to produce the majority of those documents under any circumstances.⁵

As you know, a congressional subpoena requires full and complete compliance. The congressional investigative power is, in the words of the Supreme Court, “an essential and appropriate auxiliary to the legislative function.”⁶ This broad authority “is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”⁷ Accordingly, a witness or agency subject to a congressional subpoena may not decline to honor the subpoena on the grounds that a lawsuit is pending.⁸ Any challenge to the validity of a congressional subpoena faces an extremely heightened burden.⁹ Further, Congress enjoys a statutory compulsion authority,¹⁰ as well as a contempt power inherent in its legislative duties.¹¹ Therefore, I trust you stand ready to accept the severe consequences of your decision to avoid compliance with the subpoena.

I understand you believe that the production of certain documents to the Committee could jeopardize the rights of litigants because of “any premature release of certain documents.”¹² However, courts recognize that privileged matters disclosed to congressional committees are not assumed to be disclosed to the public.¹³ And even if disclosed, this does not necessarily mean that it will have an effect upon the pending litigation.¹⁴ The courts presume agency adjudicators will make decisions knowing that they are “[men] of conscience and intellectual discipline capable of judging a particular controversy fairly on the basis of its own circumstances.”¹⁵ This principle of course applies to the pending litigation. Nevertheless, while respectful of the rights of litigants, the Committee’s primary concern is its constitutional duty to conduct oversight. Your implication that a preliminary ruling by an administrative law judge working for an agency that was created by Congress in any way weakens the investigatory powers of this body is absurd.¹⁶ Quite simply, the idea that the investigative powers of Congress are bound by non-constitutional, common law rules of the judiciary conflicts with the separation of powers doctrine as well as the constitutional authority granted to each house of Congress to determine its own rules.¹⁷ As I have previously articulated, the NLRB has no valid basis for continuing to withhold the documents the Committee has requested.

⁵ See Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (Aug. 12, 2011).

⁶ *McGrain v. Daugherty*, 273 U.S. 135, 151 (1927).

⁷ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 n.14 (1975).

⁸ *Sinclair v. United States*, 279 U.S. 263, 295 (1929).

⁹ See *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961).

¹⁰ 2 U.S.C. §§ 192, 194.

¹¹ See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

¹² Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (Aug. 12, 2011).

¹³ *In re Provident Life & Accident Ins. Co.*, 1990 U.S. Dist. LEXIS 21067.

¹⁴ *Id.*

¹⁵ *Gulf Oil Corp. v. Federal Power Com.*, 563 F.2d 588, 612 (3rd Cir. 1977).

¹⁶ See CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, by Morton Rosenberg.

¹⁷ U.S. Const., Art. I, Sec. 5, cl. 2.

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In response to your continued attempts to invoke various privileges and confidentiality interests, as I have explained, the recognition of these privileges is in the “sound discretion of a congressional committee regardless of whether a court would uphold the claim in the context of litigation.”¹⁸ Indeed, a federal district court opined that a ruling on attorney-client privilege “is certainly not binding on the Congress of the United States.”¹⁹ Further, in rejecting claims of attorney-client and work product privileges, a congressional subcommittee stated in a formal opinion that “Congress must necessarily have the independent authority to determine the validity of non-constitutional evidentiary privileges that are asserted before the Congress.”²⁰ In short, such privileges and confidentiality interests give you no basis to neglect your lawful obligation to comply with a subpoena. Frankly, such blatant defiance continues to heighten the appearance that you have something to hide, or that you are simply choosing to delay and obstruct this Committee’s oversight.

Further, you claim to be “surprised” by the subpoena.²¹ That is hard to reconcile with the fact that I first asked you for these documents on May 12, 2011, and I twice informed you that the Committee was considering issuing a subpoena.²² Your disregard for the law and authority of Congress is what I find surprising. Lastly, I remind you that consequences for non-compliance with a legally valid congressional subpoena are not limited to NLRB. Your actions may result in consequences for you and other NLRB lawyers working on this matter when brought to the attention of your licensing bar associations. I urge you to reconsider and state your intent to fully comply with this legally valid subpoena as soon as possible.

Sincerely,



Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member

¹⁸ CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, by Morton Rosenberg.

¹⁹ See *Provident Life*, *supra* note 13.

²⁰ Subcommittee on Nuclear Regulation Senate Committee on Environment and Public Works Ruling on Claims of Attorney-Client Privilege (July 19, 1989).

²¹ NLRB Press Release, *Acting General Counsel responds to congressional subpoena*, Aug. 8, 2011.

²² Letters from Chairman Darrell Issa, House Oversight and Government Reform Committee to Lafe Solomon, Acting General Counsel, National Labor Relations Board (May 12, 2011; July 12, 2011; July 28, 2011).