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COMMITTEE ON PRACTICE AND PROCEDURE UNDER THE NLRA

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Congressional Review of the National Labor Relations
Board:

Oversight or Over-the-Top?

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TOP TEN ATTACKS ON THE NATIONAL LABOR RELATIONS BOARD:

10. Requiring that the Acting GC travel to South Carolina, under threat of subpoena, for a “field” hearing by House Committee on Oversight and Government Reform, with the Governor of South Carolina and its Attorney General.
9. Subpoenaing internal deliberative documents from the General Counsel’s office during the active prosecution of an unfair labor practice case against Boeing, (Case No. 19-CA-32431).
8. Making repeated, burdensome and intrusive information demands, including : (a) work emails from 41 NLRB employees, for a total of over 150,000 emails; (b) the ballots of any elections pending when *Lamons’ Gasket* was decided; (c) transcribed interviews of 6 NLRB employees; (d) RC hearing documents from 2000-2011 in which the community of interest standard was applied.
7. Introducing a bill, HR 2926, in September, to abolish the NLRB and transfer its authority to the Department of Justice; proposing legislation to void the notice posting rule.
6. Proposing to totally defund the NLRB [in February, 176 GOP members voted to 100% defund]; proposing a budget that would force the Board to furlough all its employees for most of the remaining days of FY 2011; proposing for FY 2012 to reduce the Board’s budget by 17% from last year and proposing an appropriations rider to block NLRB rules and procedures.
5. Personal attacks on the Acting General Counsel, including an allegation against him that: “it now appears you have intentionally withheld responsive documents,” which, the letter says, constitutes “a federal crime to obstruct a congressional investigation.” Accusing the Acting GC of involving “politically connected special interests” in his decision to issue complaint against Boeing. Threatening debarment of the Acting GC and other NLRB attorneys for refusing to comply with a Congressional subpoena. [Darrell Issa, Chairman, House Oversight and Government Reform Committee.]
4. Passing legislation to block the NLRB’s proposed election rules, amend the NLRA to expand the issues for pre-election hearings delay elections, and overturn *Specialty Healthcare*. Proposing an appropriations’ rider to defund issuance/enforcement of the NLRB’s election rules.
3. Conducting 9 House hearings in 13 months, before 4 different House committees: Education & Workforce, Appropriations, Small Business, Oversight and Government Reform.
2. Passing legislation in the House to deny the NLRB authority to remedy illegal conduct when a company eliminates or transfers work in order to deny workers their rights.
1. Announcing in early May that Republican Senators would use every means possible to oppose the President’s nominations for the Board and General Counsel and creating a construct to prevent the President from exercising his Constitutional power to make recess appointments.

Summary:

The last thirteen months have witnessed unprecedented attacks on the National Labor Relations Board, its Members, its Acting General Counsel, and even its staff. These attacks seem primarily driven, and certainly implemented, by Republicans in the U.S. House of Representatives, with the assistance, or at least complicity, of certain sectors of the business community. There have been nine hearings in the House; various pieces of legislation have been introduced and two bills were passed; there were threats against the Agency's funding; and voluminous information has been requested and subpoenaed. This war on the NLRB has included personal attacks and vitriolic rhetoric.

These attacks started before the Board had issued decisions of significance, but after several requests for amicus briefs. A laundry list of minor complaints against the Board early in 2011 devolved even further into an unfocused and meandering witch hunt in search of a *raison d'être*.

Then, on April 20, 2011, the NLRB's Acting General Counsel issued a complaint against the Boeing Company for allegedly transferring work in retaliation for workers' engaging in Section 7 rights and the Republicans had an issue they believed they could ride all the way to the 2012 elections. The scope and ferocity of the attacks escalated quickly. So much so, that the settlement of the Boeing case and the dismissal of the complaint were really beside the point. The high velocity attacks continued regardless of the content of the Board's decision-making or rule-making.

The breadth and volume of this war against the NLRB are aimed at forcing the Agency to divert valuable resources from its work in protecting workers' rights to, instead, preparing documents and testimony for presentation to the various committees. The intensity and relentlessness of Congressional intervention and interference has raised the specter of impermissible influence on the actions of the Agency, in which decision making is driven by those interested in political gain rather than in furtherance of the Agency's mission of effectuating the purposes of the Act.

In 2003, the Congressional Research Service issued a report entitled *Congressional Intervention in the Administrative Process: Legal and Ethical Considerations*.¹ It reviews then-existing caselaw, which attempts to balance "Congress' ability to communicate as freely as possible with the administrative bureaucracy" in order to "sustain[] the public acceptability of the modern administrative state," with the preservation of the integrity of the judicial aspect of the administrative process. CRS-40. The CRS report concludes that "in most of the cases of constituents asking for assistance, a contact or intervention consisting of no more than a status inquiry, a request to be kept informed of the process, an introduction of the constituent to the agency, and/or a request for a fair and expeditious resolution of the issue" would be sufficient.

¹ <http://www.fas.org/sgp/crs/misc/RL32113.pdf>

CRS-84. What happened in 2011 and 2012 went far, far, beyond the sort of oversight envisioned by the CRS in 2003. The CRS also points out that congressional interventions which exert undue political influence on agency decision makers can violate the due process rights of participants and impugn the integrity of the agency decisional processes. CRS-1. That is exactly what the Board is facing with these attacks.

Below is a summary of the various actions taken against the NLRB, all in the name of “government oversight.”

REQUESTS FOR INFORMATION:

Information requests were rampant. First came requests to Board members for documents regarding a case under their active consideration, *Specialty Healthcare*, 357 NLRB No. 83 (2011). Requests for similar internal deliberative documents involving the Boeing case followed, even though it was being actively litigated at the time. The requests included documents regarding the Board’s internal consideration of the charges filed by the union, the Agency’s deliberations leading up to the decision to issue complaint, and the development and implementation of its trial strategy. Such requests for sensitive internal strategy documents relating to a case currently being prosecuted was described by some as an effort to interfere with an on-going trial and deny the parties legal due process.² Requests also came from U.S. House Republicans requesting internal deliberative documents in connection with the SOS Ballot amendments as to which the Board was contemplating legal action. Also demanded were 150,000 emails of 41 Board employees. The process degenerated into a wholesale fishing expedition.

Here are many of the information requests:

March 3, 2011: Letter from John Kline, Chairman, House Education and the Workforce Committee: Request for all documents justifying a joint statement by NLRB Chairman Wilma Liebman and Acting General Counsel Lafe Solomon that proposed cuts to the NLRB budget would cause employee furloughs and for “all documents and communications relating to the February 18, 2011, joint statement” issued by the two.

² July 29, 2011 letter from distinguished labor law scholars to Darrell Issa, Chairman of the House Committee on Oversight and Government Reform, “urg[ing] caution if the Committee continues this intervention in an ongoing legal action.”

<http://democrats.oversight.house.gov/images/stories/MINORITY/2011%200729%20Law%20Professors%20response%20to%20July%2012%20Issa%20letter.pdf>

March 8, 2011: Letter from John Kline, Chairman, House Education and the Workforce Committee and Darrell Issa, Chairman, House Committee on Oversight and Government Reform: Requesting hearing records from RC cases between 2000 and 2011, involving, inter alia, application of a community of interest standard; and “all documents and communications referring or relating to *Specialty Healthcare*.”

May 5, 2011: Letter from John Kline, Chairman, House Education and the Workforce Committee: Request for “all documents and communications” that support the NLRB’s position and that describe what led to the issuance of the complaint; and all documents and communications between the NLRB and its regional office “addressing the Boeing complaint.”

May 11, 2011: Letter from House Education and Workforce Committee Chairman John Kline: Reiterating request for “all documents and communications relating to *Specialty Healthcare*.”

May 12, 2011: Letter from the Chairman of the House Committee on Oversight and Government Reform: Requesting “all documents and communications referring or relating” to Boeing; “all documents, including emails and call logs, and communications” between the NLRB and the Machinists and between the NLRB and Boeing; and “all documents referring or relating to” the “investigations of the union election laws in Arizona, South Carolina, South Dakota, and Utah.”

June 6, 2011: Letter from Senator Jim DeMint (R-SC). questioning whether political support by the union to the Democratic Party played any role in the decision to issue the Boeing complaint and requesting “all documents and communications – including email, call logs, memoranda or meeting notes – to and from: Board Members, Board Members and the Office of the President, Board members and the IAM, Board members and “any government employee in the State of Washington or Oregon,” Board Members and any Member of Congress; and any documents “generated by NLRB Board members, staff, or any outside consultants regarding the legal authority of the NLRB to issue complaint or used to support the filing of the Complaint.

August 7, 2011: House Oversight and Government Reform Committee Chairman Darrell Issa (R-CA) subpoenas documents related to the NLRB’s complaint against Boeing.

August 17, 2011: Letter from Darrell Issa, Chairman, Committee on Oversight and Government Reform: “I trust you stand ready to accept the severe consequences of your decision to avoid compliance with the subpoena.” “In response to your continued attempts to invoke various privileges and confidentiality interests,”... “I remind you”...[that] “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.”

October 14, 2011: Letter from John Kline, Chairman of the House Committee on Education and the Workforce, requesting a list of all *Dana* election petitions pending at the time of the *Lamons Gasket* decision, all cases dismissed due to the holding in *Lamons Gasket*, any related ULP charges, and the ballots from each case dismissed pursuant to the holding in *Lamons Gasket*.

October 17, 2011: Letter from House Committee on Oversight and Government Reform Chairman Darrell Issa requesting that six senior NLRB staff be “available for transcribed interviews.”

October 27, 2011: Letter from House Committee on Education and the Workforce Chairman John Kline requesting information on the Board’s rulemaking affecting representation cases, including a timeline and summary, a list of NLRB staff working on the rule, and a breakdown by month of Board decision issued from January 2010 to October 2011.

LEGISLATION & RESOLUTIONS:

The House passed two bills; neither were voted on by the Senate.

HR 2587, *Protecting Jobs from Government Interference Act*, introduced July 19 and passed September 15, 2011: Prohibits the Board from ordering any employer to “restore or reinstate any work, product, production line, or equipment, to rescind any relocation, transfer, subcontracting, outsourcing, or other change regarding the location, entity, or employer who shall be engaged in production or other business operations, or to require any employer to make an initial or additional investment at a particular plant, facility, or location.” The bill applies to “any complaint for which a final adjudication by the NLRB has not been made by the date of enactment of the Act.”

HR 3094, *The Workplace Democracy and Fairness Act*, introduced October 5, and passed November 30, 2011: Amends the NLRA to establish a multi-factor test for determining bargaining units, a timeline for conducting elections, issues to be litigated at pre-election hearings, and a timeline for and the contents of voter lists.

The following bills were introduced in the House and Senate, but not voted on. They include bills to eliminate the NLRB and to rescind and nullify many of the actions taken by the Board and Acting General Counsel:

HR 972, *Secret Ballot Protection Act*, introduced March 9, 2011: Creating a new ULP under 8(b), for a union to attempt to cause an employer to bargain with a union not selected via an NLRB-conducted election.

HR 1047, *State Right to Vote Act*, introduced March 11, 2011: Adding a state option under Section 14(b) to allow states to require union representation elections.

HR 1976, *Job Protection Act*, May 24, 2011: A version of HR 2587 which also protects as Section 8(c) speech, employer statements that regarding the “costs associated with collective bargaining, work stoppages, or strikes.”

HR 2040, *National Right to Work Act*, introduced, May 26, 2011.

HR 2118, [*No Name*], introduced June 3, 2011: Amending the NLRA to eliminate its authority to enjoin state laws that are preempted by or that conflict with the Act.

HR 2153, *Truth in Employment Act*, introduced June 13, 2011: Eliminating “salting.”

HR 2335, *Tribal Sovereignty Act*, introduced June 23, 2011: Removing tribal enterprises from the jurisdiction of the NLRA.

HR 2833, *Employee Workplace Freedom Act*, introduced September 2, 2011: Repealing the NLRA notice posting rule.

HR 2854, *Employee Free Choice Act*, introduced September 7, 2011: Repealing the NLRB notice posting rule.

HR 2926, *National Labor Relations Reorganization Act*, introduced September 14, 2011: Abolishing the NLRB and transferring enforcement authority to the Department of Justice and oversight of elections to the Department of Labor’s Office of Labor Management Standards.

HR 2978, *Protecting American Jobs Act*, September 20, 2011: Prohibiting rulemaking by the NLRB, and removing its prosecutorial authority and instead, providing a private right of action.

H.J. Re. 103 and S.J. Res. 63, introduced February 16, 2012: Resolutions introduced, under the Congressional Review Act to block the NLRB’s representation case rules which issued in December 2011.

Senate Bills:

S 964, *Job Protection Act*, introduced May 12, 2011: Amending the NLRA to except employer statements from Section 8(a)(3) and to deny the Board authority to order an employer to relocate, shut down, transfer, or expand, except in certain circumstances.

S 1666, introduced October 6, 2011: Prohibiting the Board from proceeding with final implementation of its notification of employee rights rule; there has been no action on the bill.

S 1720, introduced October 17, 2011: Companion to HR 2587.

S 1843, introduced November 10, 2011: Companion to HR 3094.

PERSONAL ATTACKS AND RHETORIC:

The attacks were not limited to legislative action, but included personal attacks on not only the Board members and Acting General Counsel, but also on Board staff. Here is a sampling of some of the more colorful missives:

May 3, 2011: Letter from Republican Senators on the Committee on Health, Education, Labor and Pensions to Lafe Solomon: “While we understand the complaint process is still in the early stages, there is a need for the Board to explain the reasoning in this case to Congress. As your nomination is brought before our Committee, we will be asking for a greater explanation of your actions.” [<http://thehill.com/business-a-lobbying/162513-senate-dems-tell-top-nrlb-lawyer-not-to-give-away-boeing-strategy?page=3>]

May 5, 2011: Letter from Jim DeMint (R-SC): “We consider this [the NLRB complaint in Boeing] an attack on millions of workers in 22 right-to-work states, as well as a government-led act of intimidation against American companies that should have the freedom to choose to build plants in right-to-work states.”

May 13, 2011: Letter from House Republicans from South Carolina: “We have ... become increasingly concerned by what we perceive to be an activist, job-destroying agenda.” [<http://edworkforce.house.gov/News/DocumentSingle.aspx?DocumentID=241343>]

June 10, 2011: Republican Senator Lindsey Graham, (R-SC), said that he would place a hold on President Obama's nominee to be the next commerce secretary unless the White House disavows a legal complaint filed against airplane manufacturer Boeing for opening a new plant in the senator's home state South Carolina.

June 28, 2011: Presidential candidate Mitt Romney called the NLRB complaint against Boeing a “job killer.” [<http://articles.latimes.com/2011/jun/28/news/la-pn-romney-obama-boeing-nlr-20110628>.]

August 8, 2011: Representative Darrell Issa of California disparaged the Board as a “rogue agency.” [<http://dailycaller.com/2011/08/12/issa-democrats-nlr-spar-over-oversight-committee-document-demands/> .]

August 17, 2011: Letter from Darrell Issa, Chairman, Committee on Oversight and Government Reform: “I trust you stand ready to accept the severe consequences of your decision to avoid compliance with the subpoena.” “I remind you”...[that] “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.”

[http://oversight.house.gov/images/stories/Letters/2011-08-17_DEI_to_Solomon-NLRB_-_subpoena_response.pdf]

October 12, 2011: Statement by Representative John Kline (R-MN): “The NLRB is wreaking havoc on the nation’s workforce, and it must be stopped.”

[<http://edlabor.house.gov/News/DocumentSingle.aspx?DocumentID=263985>]

September 12, 2011: The U.S. Chamber aired TV ads “highlighting the economic damage caused by the NLRB’s regulatory overreach,” and specifically referencing the Boeing campaign: “Tell Washington, we need jobs – not union paybacks.”

[<http://www.uschamber.com/press/releases/2011/september/us-chamber-releases-new-radio-ads-nlrbs-and-dols-aggressive-agenda>]

NOMINATIONS:

May 2011: Letter from Republican senators to President Obama requesting the withdrawal of the nominations of Lafe Solomon and Craig Becker for Acting General Counsel and Board Members, respectively: “If you do not [withdraw both Mr. Solomon’s and Mr. Becker’s nominations], we will vigorously oppose both nominations, vote against cloture and use all procedural tools available to defeat their confirmation in the Senate.”

[http://www.demint.senate.gov/public/index.cfm?p=JimsBlog&ContentRecord_id=ebbab154-9d09-416d-bfcb-46d7e116549f&ContentType_id=bf0907bb-57a8-4718-a10a-b2601f161302&Group_id=4cb9fcd4-3270-432c-a83f-bc5b9bd50258&MonthDisplay=5&YearDisplay=2011]

June 10, 2011: Republican Senator Lindsey Graham, (R-SC), said that he would place a hold on President Obama's nominee to be the next commerce secretary unless the White House disavows a legal complaint filed against airplane manufacturer Boeing for opening a new plant in the senator's home state South Carolina.

[<http://www.lindseygraham.com/2011/06/post-and-courier-graham-to-play-political-hardball-over-nlrbs-lawsuit/>]

HEARINGS

Ten hearings in the past thirteen months before three different Congressional committees have examined virtually every action taken by the Board and its Acting General Counsel in the performance of their statutory duties.

February 11, 2011

House Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor and Pensions: *Emerging Trends at the National Labor Relations Board.*

April 6, 2011

House Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education, and Relations Agencies: *Budget Hearing – National Labor Relations Board.*

May 26, 2011

House Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor and Pensions: *Corporate Campaigns and the NLRB: The Impact of Union Pressure on Job Creation.*

June 17, 2011

House Committee on Oversight & Government Reform: *Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise.*

July 7, 2011

House Committee on Education and the Workforce: *Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice.*

September 22, 2011

House Committee on Education and the Workforce: *Culture of Union Favoritism: Recent Action of the NLRB.*

October 5, 2011

House Committee on Small Business: *Adding to Uncertainty: The Impact of DOL/NLRB Decisions and Proposed Rules on Small Businesses.*

October 12, 2011

House Committee on Education and the Workforce: *Workforce Democracy and Fairness Act.*

February 1, 2012

House Committee on Oversight & Government Reform: *Unchartered Territory: What are the Consequences of President Obama's Unprecedented "Recess" Appointments.*

February 7, 2012

House Committee on Education and the Workforce: *The NLRB Recess Appointments: Implications for America's Workers and Employers.*

BUDGET PROPOSALS:

The budget process throughout 2011 was tortuous. A series of Continuing Resolutions presented opportunities for riders aimed at curtailing NLRB action. The evolution of these attacks mirrored what was happening on the non-budget side, with the attacks in sync and coordinated.

On February 14, 2011, HR 1 Amendment No. 410 was defeated 176 – 250, with all Democrats and 60 Republicans voting to defeat. **The amendment would have eliminated ALL funding for the NLRB.**

February 2011, Continuing Resolution: Would have eliminated \$50 million, or 18%, of the NLRB's budget — a reduction that would be squeezed into the final seven months of the fiscal year, which ends on September 30. According to then-Chairman Wilma Liebman and Acting General Counsel Lafe Solomon, such a dramatic cut would require it to “furlough all of the NLRB's 1,665 employees for 55 workdays, or nearly three months, between now and the end of September.”

H.AMDT.168 to H.R.1: An amendment to prohibit the use of funds for the National Labor Relations Board to certify the results of an election of a labor organization under section 9(c)(1) of the National Labor Relations Act (29 U.S.C. 159(c)(1)) that is not conducted by secret ballot, was introduced, but withdrawn.

Late September 2011, proposed budget, HR 3070: Called for a decrease in the NLRB budget of 17% over FY 2010 and riders aimed at prohibiting the Board's adoption of proposed election rules, electronic voting or designation of union representation, and procedures inconsistent with the *Dana* case and the standards articulated in *Specialty Healthcare*; or to implement or enforce its employee notification rule; or to exercise jurisdiction over small businesses.

Conclusion:

The war continues. These attacks signal, to many, that lessons were learned during the assault of workers' rights in Wisconsin last year: attacks on workers and their rights are unpopular, but attacks on the institutions that protect workers and their rights can be used to serve the same purpose, without so much self-inflicted political damage. This new strategy, and the opportunity it offers for significant political fund-raising, seems to be the motivation for going after this particular Agency. And collateral damage to its integrity and to its ability to do its statutory work is treated as beside the point.