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May 9, 2012

Lafe E. Solomon
Acting General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Dear Acting General Counsel Solomon:

I respectfully request information, documents, and communications relating to the new National Labor Relations Board (NLRB) policy requiring that representational pre-election hearings be scheduled seven days from the date the Notice of Representation Hearing (NOH) is issued. The Workforce Democracy and Fairness Act, passed last year by the U.S. House of Representatives, required at least 14 days between the NOH and the pre-election hearing. The 14 days would provide employers with a fair opportunity to hire an attorney, identify issues, and prepare their case for the pre-election hearing and give parties an opportunity to compromise and agree on election issues. Ensuring a fair pre-election hearing, an opportunity for compromise and agreement, and the ability of employees to make an informed decision with respect to union representation continues to be a priority for the committee.

On June 22, 2011, the NLRB proposed a number of changes to the union representational election process, including requiring the pre-election hearing to be scheduled seven days after the issuance of the NOH absent special circumstances. Small employers were particularly concerned with this requirement, as many had no previous experience with union elections or NLRB procedures. On July 7, 2011, John Carew, President of Carew Concrete & Supply Company, stated before the House Committee on Education and the Workforce that "it frequently takes longer than seven days to find and hire a consultant to advise them on their rights, abilities, and the complexity of union election regulations."¹ By the close of the comment

¹ Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice, Hearing before the Education and the Workforce Committee, 112th Cong., 1st Sess. at 3 (2011) (written testimony of John Carew).

period, the Board had received more than 65,000 public submissions.² Many of the comments argued the proposal would significantly shorten the time between the petition and the election, thus limiting employer free speech and employee free choice.³

Six months after introduction of the proposed rules, on December 21, 2011, the NLRB issued a final rule implementing a portion of the proposed rule. The seven day pre-election hearing requirement was not among those adopted. In the final rule, the Board specifically “decided to take no action at this time ... in order to permit more time for deliberation.”⁴

Despite this clear statement that further deliberation by the Board was necessary, on April 26, 2012, you implemented a similar seven day pre-hearing requirement. Specifically, the new guidance requires NLRB regional offices to schedule the pre-election hearing seven days from the date of issuance of the NOH.⁵ Under the new guidance, a postponement of seven days or less “will not be granted unless good and sufficient grounds are shown,” and a postponement of more than seven days will only be granted in “extraordinary circumstances.”⁶ This new requirement could impede a fair pre-election hearing, particularly for small employers; reduce opportunities for compromise and agreement; and undermine a worker’s ability to make an informed decision.

To ensure the new seven day requirement does not impede fair pre-election hearings, opportunities for compromise and agreement, or employee free choice, and to better understand the basis for this new requirement, please provide the following no later than May 23, 2012:

1. Documents and communications relating to the seven day pre-election hearing requirement, including any communications between the General Counsel’s office and Board members;
2. Identify each NLRB regional office in which, prior to this guidance, it was the policy that pre-election hearings were scheduled seven days after the issuance of the NOH, and include the date in which this policy was implemented;
3. Identify each NLRB regional office in which, prior to this guidance, it was not the policy that pre-election hearings were scheduled seven days after the issuance of the NOH;
4. List each case since January 1, 2000, in which the time between the notice and pre-election hearing was extended or a request to extend the time between the notice and pre-election hearing was denied, including grounds for the denial or granting of the extension, the region in which the case occurred, the number days granted, and the size of the unit;

² Regulations.gov, NLRB-2011-0002, RIN 3142-AA08, available at <http://www.regulations.gov/#!docketDetail;dt=FR%252BPR%252BN%252BO%252BSR;rpp=10;po=0;D=NLRB-2011-0002> (last visited 10/27/11).

³ 76 FR 80138, 80150 (December 22, 2011).

⁴ *Id.* at 80162.

⁵ Office of the NLRB General Counsel Memorandum GC 12-04, pg. 4 (April 26, 2012).

⁶ *Id.* at 5.

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5. The annual average and median time between the notice and pre-election hearing nationally and by region since 2000; and
6. Documents and communications relating to what qualifies as “good and sufficient grounds” for extension.

If you have any questions regarding this request, please contact Marvin Kaplan, House Committee on Education and the Workforce Committee, at (202) 225-7101.

Sincerely,



JOHN KLINE

Chairman

Committee on Education and the Workforce

cc: The Honorable George Miller, Senior Democratic Member, Committee on Education and the Workforce

Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i. e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents should be delivered, one set to the Majority Staff in Room 2181 of the Rayburn House Office Building and one set to the Minority Staff in Room 2101 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.