



Advocates for Government Accountability

A 501(c)(3) NONPROFIT CORPORATION

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WASHINGTON, D.C. 20037

November 22, 2011

VIA E-MAIL AND FIRST CLASS MAIL

David P. Berry
Inspector General
National Labor Relations Board
1099 14th Street, NW Room 9820
Washington, DC 20570
E-mail: OIGHOTLINE@nrlrb.gov

RE: REQUEST FOR INVESTIGATION

Dear Inspector General Berry:

We write on behalf of Cause of Action, an independent 501(c)(3) public interest organization that uses public advocacy and legal reform strategies to ensure greater transparency in government, protect taxpayer interests and promote economic freedom.

On August 30, 2011, Cause of Action sent a Freedom of Information Act (“FOIA”) to the National Labor Relations Board (“NLRB”) requesting communications and records concerning the NLRB’s decision to sue Boeing. On September 12, 2011, Cause of Action sent a FOIA request to the NLRB requesting the daily calendars of Board members, documents concerning the operating budgets of NLRB regional offices, and certain advertising documents. On the basis of the documents received and reviewed by Cause of Action, we have serious concerns about (i) *ex parte* communications, (ii) pro-union bias, and (iii) a fundamental lack of internal accountability and oversight at the National Labor Relations Board.

I. Former Member and Chairman Wilma Liebman and Acting General Counsel Lafe Solomon Engaged in Improper *Ex Parte* Communications.

An e-mail dated January 7, 2011 reflects that just a few months before General Counsel Lafe Solomon filed suit against Boeing, there was a taxpayer-funded meeting between Seattle NLRB region-19 regional director Richard Ahearn, General Counsel Lafe Solomon, and the International Association of Machinists lawyers:¹

From: Baniszewski, Joseph
Sent: Friday, January 07, 2011 1:01 PM
To: Siegel, Richard A.
Cc: Roberts, Crystal; Ahearn, Richard L.; Snook, Dennis
Subject: Travel Order for Region 19 RD Rich Ahearn

Crystal,

Please prepare a travel order for Region 19 RD Rich Ahearn to travel to Washington January 18, 19 and 20, to meet with the General Counsel, Advice and lawyers representing the Machinists' Union in Boeing Corp., 19-CA-32431.

Rick,

Please note your approval and forward this E Mail to Crystal.

Thanks,

Joe

Within the same month that Richard Ahearn was meeting with the General Counsel, Department of Advice, and the IAM's lawyers, Richard Ahearn sent an e-mail to Solomon and Kearney, among others, citing an anti-Boeing article in the *Seattle Times*.²

¹ E-mail. Joseph Baniszewski to Richard A. Siegel, Crystal Roberts, Richard L. Ahearn and Dennis Snook (Jan. 7, 2011, 13:01 EST) [NLRB-FOIA-00000570].

² E-mail, Richard Ahearn to Lafe Solomon *et al.*, (Jan. 27, 2011, 10:52 EST) [NLRB-FOIA-00000822].

Microsoft Outlook

From: Ahearn, Richard L.
Sent: Thursday, January 27, 2011 10:52 AM
To: Solomon, Lafe E.; Mattina, Celeste J.; Kearney, Barry J.; Farrell, Ellen; Willen, Debra L; Katz, Judy; Omberg, Bob
Subject: Boeing's next delivery: bonuses

Boeing's next delivery: bonuses

Despite lower revenue in 2010 than a year earlier and higher-than-expected spending on the 787 and 747-8 programs, Boeing booked \$4.5 billion in pretax profits. As a result, about 48,500 Washington state employees will qualify for bonuses worth almost three weeks' extra pay.

http://seattletimes.nwsourc.com/html/business/technology/2014048927_boeing27.html

Normally, these communications would not be problematic under the law; but where evidence has shown Lafe Solomon to have discussed the Boeing matter with Chair Wilma Liebman, the above communications may reflect a knowing intent to influence the Board's decision-making. Indeed, these e-mails reflect post-Boeing lawsuit communications between Public Affairs Director Nancy Cleeland and Richard Ahearn,³ between Nancy Cleeland and Lafe Solomon and Chair Wilma Liebman,⁴ between Richard Ahearn and Lafe Solomon, Nancy Cleeland, and Barry Kearney,⁵ from New Media specialist Anthony Wagner to Wilma Liebman, Lafe Solomon, and Nancy Cleeland regarding Boeing,⁶ from Nancy Cleeland to Richard Ahearn and Barry Kearney,⁷ and from Adam Naill of the Senate Health, Education, Labor and Pensions (HELP) Committee to Jose Garza of NLRB Public Affairs, who forwarded Senator Harry Reid's statements in support of the NLRB's decision to sue Boeing to Lafe Solomon and Wilma Liebman:

Mr. Reid: Madam President, I Recognize That we're in a partisan environment . . . Founders created a system of checks and balances. . . . Long after that system was created [a] new independent federal agency was created in the same spirit of checks an[d] balances. That agency is the National Labor Relations Board. It acts as a check on employers an[d]

³ E-mail, Nancy Cleeland to Richard Ahearn (Apr. 21, 2011 14:29 EST) [NLRB-FOIA-00000573].

⁴ E-mail, Nancy Cleeland to Lafe Solomon, Wilma Liebman, Jose Garza, & John Ferguson (Apr. 28, 2011 15:14 EST) [NLRB-FOIA-00000763]; E-mail, Nancy Cleeland to Lafe Solomon, Wilma Liebman, Jose Garza, & John Ferguson (Apr. 28, 2011 15:20 EST) [NLRB-FOIA-00000658-659].

⁵ See E-mail, Nancy Cleeland to Richard Ahearn (May 3, 2011, 14:27 EST) [NLRB-FOIA-00000588].

⁶ E-mail, Anthony Wagner to Wilma Liebman, Lafe Solomon, Nancy Cleeland, *et al.* (May 3, 2011, 16:38 EST) [NLRB-FOIA-00001063].

⁷ E-mail, Nancy Cleeland to Barry Kearney & Richard Ahearn, May 4, 2011, 11:25 EST) [NLRB-FOIA-00000593].

employees alike. It safeguards employees' rights to unionize or not unionize. It mediates allegations of unfair labor. . . . The acting general counsel is a man who is as nonpartisan and independent Last week they issued a complaint against Boeing. . . . Our Republican colleagues have attacked the NLRB and tried to poison the decision process. For example, every Republican Senator on the "HELP" Committee, and, Madam President, let's remind everyone the L in HELP stands for labor, they sent a letter to the acting general counsel defending Boeing. The [fact that the] letter itself was sent six weeks before a hearing [took] place seems questionable at the very best. But these 10 Republicans went further. They went out of their way to link their request to the acting General Counsel's pending nomination. If there [was] ever a case of intimidation, that sounds like it to me.⁸

An additional e-mail from Richard Ahearn to NLRB Executive Secretary Les Heltzer forwarded a press release from the Democratic Policy and Communications Center, which quoted Senator Reid's above remarks:⁹

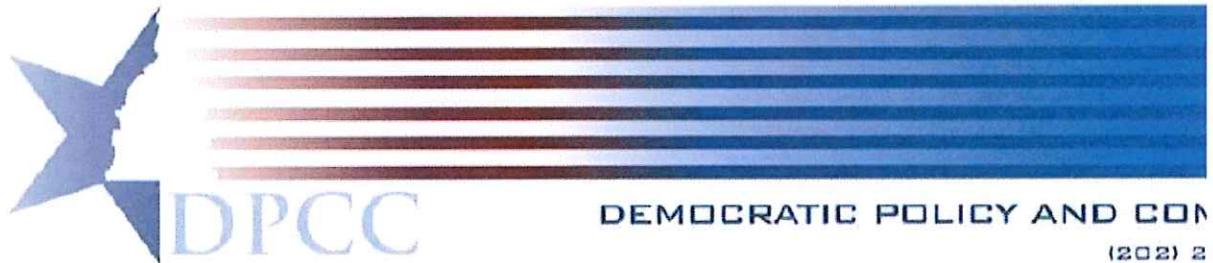
⁸ E-mail from Jose Garza to Lafe Solomon, Wilma Liebman, Nancy Cleeland *et al.* (forwarding e-mail from Adam Naill (Senate HELP) to Jose Garza), (May 11, 2011, 9:45 EST) [NLRB-FOIA-00000777-778].

⁹ E-mail from Richard Ahearn to Les Heltzer (May 11, 2011 14:54 EST) [NLRB-FOIA-00000640-642].

Microsoft Outlook

From: Ahearn, Richard L.
Sent: Wednesday, May 11, 2011 2:54 PM
To: HELTZER, LES (Hdqs)
Subject: Sen REID - MUST KEEP INDEPENDENT AGENCIES INDEPENDENT - OPERATE FREELY AND WITHOUT POLITICAL PRESSURE
Attachments: image001.jpg

<http://democrats.senate.gov/newsroom/record.cfm?id=332789&>



For Immediate Release

Date: Wednesday, May 11, 2011

CONTACT: Jon Summers, (202) 224-2939

REID: WE MUST KEEP INDEPENDENT AGENCIES INDEPENDENT, ALLOW THEM TO OPERATE FREELY AND WITHOUT POLITICAL PRESSURE

An e-mail from IAM's attorney David Campbell to Richard Ahearn earlier that day revealed that Ahearn merely forwarded to others at the NLRB the press release he received from David Campbell:¹⁰

¹⁰ E-mail, David Campbell to Richard Ahearn (May 11, 2011, 11:18 PST) [NLRB-FOIA-00000672].

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Microsoft Outlook

From: David Campbell [campbell@workerlaw.com]
Sent: Wednesday, May 11, 2011 11:18 AM
To: Ahearn, Richard L.
Subject: FW: Sen REID - MUST KEEP INDEPENDENT AGENCIES INDEPENDENT - OPERATE FREELY AND WITHOUT POLITICAL PRESSURE
Attachments: image001.jpg

Thanks, Dave

Sincerely, David Campbell

campbell@workerlaw.com

Schwerin Campbell Barnard Iglitzin & Lavitt

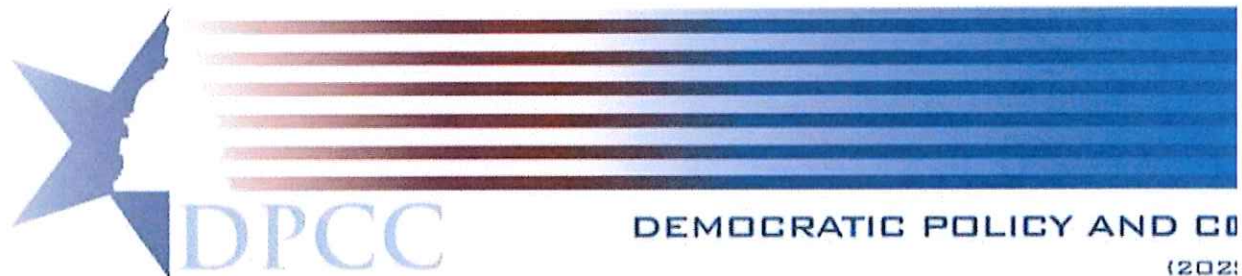
18 W Mercer Suite 400

Seattle, Washington 98119-3971

Phone (206)285-2828; FAX (206)378-4132

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<http://democrats.senate.gov/newsroom/record.cfm?id=332789&>



For Immediate Release

Date: Wednesday, May 11, 2011

CONTACT: Jon Summers, (202) 224-2939

REID: WE MUST KEEP INDEPENDENT AGENCIES INDEPENDENT, ALLOW THEM TO OPERATE FREELY AND WITHOUT POLITICAL PRESSURE

Under the Administrative Procedures Act (“APA”), a member of the NLRB must not make a prohibited communication with interested persons outside the agency.¹¹ The American Bar Association’s Model Code of Judicial Conduct bars *ex parte* communications except those limited to “consultation with court personnel . . . or with other judges.”¹² The NLRB’s own *ex parte* rules prohibit communications with outside, interested persons.¹³ The rules define an *ex parte* communication as “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given[.]”¹⁴ Prohibited communications include written communications “if copies thereof are not contemporaneously served by the communicator on all parties to the proceeding” as well as oral communications “unless advance notice thereof is given by the communicator to all parties in the proceeding and adequate opportunity afforded to them to be present.”¹⁵

According to the NLRB rules, “[n]o interested person outside this agency shall . . . make or knowingly cause to be made any prohibited *ex parte* communication to Board agents . . . relevant to the merits of the proceeding.”¹⁶ Moreover, no agent of the Board shall request any prohibited *ex parte* communications or “make or knowingly cause to be made” any prohibited *ex parte* communications about the proceeding to any interested person outside the agency relevant to the merits of the proceeding.”¹⁷ The NLRB rules define “person outside this agency” to include “any individual outside this agency, partnership, corporation, association, or other entity, or an agent thereof, **and the general counsel or his representative when prosecuting an unfair labor practice proceeding before the Board pursuant to section 10(b) of the Act.**”¹⁸ Under the rules, an on-the-record proceeding subject to *ex parte* communications would include “an unfair labor practice proceeding pursuant to section 10(b) of the Act, communications to . . . members of the Board and their legal assistants, from the time the complaint and/or notice of hearing is issued, or the time the communicator has knowledge that a complaint or notice of hearing will be issued, whichever occurs first.”¹⁹ Thus, any communication by Acting General Counsel Lafe Solomon to then-NLRB Chair Wilma Liebman relevant to the Boeing case would appear to violate the statute. Likewise, communications by Board Chair Wilma Liebman to Lafe Solomon and third-parties would similarly constitute statutory violations.

Moreover, it would appear that the conduct of the NLRB does not meet any of the exceptions, whether under the APA, the ABA Rules of Judicial Conduct, or even the NLRB’s own rules.²⁰

¹¹ 5 U.S.C. § 557(d)(1)(C).

¹² AMERICAN BAR ASS’N, MODEL CODE OF JUDICIAL CONDUCT CANON 3(B)(7) (1990).

¹³ 29 C.F.R. § 102.126 (1998).

¹⁴ 29 CFR § 102.127(b).

¹⁵ 29 CFR § 102.129(a),(b).

¹⁶ *Id.* at 102.126(a).

¹⁷ *Id.* at 102.126(b).

¹⁸ 29 CFR § 102.127(a) [emphasis added].

¹⁹ 29 CFR § 102.128(e).

²⁰ See *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939 (D.C. Cir. 1999).

II. Chair Wilma Liebman's Own Communications, in Addition to the Communications Between the NLRB and the International Association of Machinists' (IAM) lawyers as well as with Senator Harry Reid's office, reflect a pro-union bias.

On May 3, 2011, then-Chair Wilma Liebman forwarded an e-mail from the Labor and Employment Relations Association (“LERA”) listserv hosted by the University of Illinois to NLRB Director of Public Affairs Nancy Cleeland and NLRB Acting General Counsel Lafe Solomon. The e-mail forwarded an unpublished draft editorial by Retired U.S. Office of Personnel Management employee George DeMarse, in which he stated:

I am attaching a would-be editorial “states' rights” op-ed piece which the Washington Post declined to publish. I like it. It is “cutting,” but so are scissors. Don't get me wrong—I love the Post. . . . However, their Board is highly anti-organized labor, particularly public sector labor. . . . In this piece I take issue with Kathleen Parker's Post column of April 24, in which she declares “war” on the NLRB who decided the recent Boeing case in favor of the union . . . The decision of the NLRB represents a “big picture” approach which is sorely needed, and my article says to the contrary that the decision is “gluten free” blood pudding for the progressives. My suspicions concerning the non-appearance of any criticism to the article by Ms Parker were confirmed when the Post came out with another anti-public sector union editorial today (May 3) in which it declares that the whole of collective bargaining and binding arbitration are “heavily tilted in favor of the unions.”²¹

Although LERA (i) is hosted by the University of Illinois, a 501(c)(3) tax-exempt corporation, (ii) supports a listserv for which Wilma Liebman, an executive-branch employee, is a member, and (iii) seeks to use the listserv as a forum for partisan opinion as well as to influence official policy, LERA has not filed a Lobbying Disclosure Act (“LDA”) registration with either the clerks of the U.S. Senate or House of Representatives nor has it registered as a lobbyist in the state of Illinois.²²

It would also appear that the NLRB exercises bias in the way it processes labor complaints against employers under Section 8 of the National Labor Relations Act (“NLRA”). Printed on the March 26, 2010 charging document by the International Association of Machinists (“IAM”) against Boeing are notes by the NLRB which clarify the charge as a category “3” and

²¹ E-mail, Labor and Employment Relations Association to LERA-L@Listserv.Illinois.edu (May 3, 2011 13:11 EST) [NLRB-FOIA-0000901-902].

²² See QUERY THE LOBBYING DISCLOSURE ACT DATABASE, available at <http://soprweb.senate.gov/index.cfm?event=submitSearchRequest> (search “Labor and Employment Relations Association” in “client name” or “registrant name”). See also ELECTRONIC LOBBYIST SYSTEM, available at <http://www.cyberdriveillinois.com/departments/index/lobbyist.html> (search “Labor and Employment Relations Association” in “lobbyist name”).

assign the case to hearing officer Dianne Todd “due to political/sensitive nature [and] local interest importance.”²³

As early as April 2, 2010, over a year before the NLRB used its Office of General Counsel to sue Boeing, Richard Ahearn communicated with and had meetings with David Campbell and other lawyers and staff of the International Association of Machinists (“IAM”) concerning the IAM’s lawsuit against Boeing.²⁴

Microsoft Outlook

From: David Campbell [campbell@workerlaw.com]
Sent: Friday, April 02, 2010 1:25 PM
To: Ahearn, Richard L.
Cc: Corson Christopher; mblondin@iamaw.org; tomw@iam751.org; Carson Glickman-Flora; Kathy Barnard; Jude Bryan
Subject: Boeing Unfair Labor Practice Charges

Director Ahearn, We propose to meet with you and your staff regarding the latest Boeing charges at 1:30 PM on April 12, 2010 at your offices. Please advise if this will work with your schedule.

Thanks, Dave

Sincerely, David Campbell
campbell@workerlaw.com

18 W Mercer Suite 400
Seattle, Washington 98119-3971
Phone (206)285-2828; FAX (206)378-4132

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Further communications between the IAM and the NLRB affirm suspicions that the IAM influenced the NLRB Office of General Counsel’s ultimate decision to sue Boeing as reflected by the following e-mail, just days before Lafe Solomon sued Boeing:²⁵

²³ United States of America, National Labor Relations Board, Charge Against Employer, at 2 [NLRB-FOIA-00000646].

²⁴ E-mail, David Campbell (IAM Counsel) to Richard Ahearn, (Apr. 2, 2010, 13:25 EST) [NLRB-FOIA-00000560].

²⁵ E-mail, Barry Kearney to Richard Ahearn (Apr. 1, 2011, 14:30 EST) [NLRB-FOIA-00000572].

Microsoft Outlook

From: Kearney, Barry J.
Sent: Friday, April 01, 2011 2:30 PM
To: Ahearn, Richard L.
Subject: FW: Why am I not surprized

From: Kearney, Barry J.
Sent: Friday, April 01, 2011 2:29 PM
To: Solomon, Lafe E.; Mattina, Celeste J.
Cc: Farrell, Ellen; Sophir, Jayme
Subject: Why am I not surprized

I just received a call from Dave Campbell and Chris Corsen. The call they have been waiting for all week came today at 1:15 to Corsen from a Boeing lawyer in Seattle named Brent Gerry. Corsen wasn't in and when he returned the call Gerry was unavailable until 5pm. After the 5pm call I will be in contact with them

Three months before the Office of General Counsel (OGC) sued Boeing, Lafe Solomon met with the IAM:²⁶

Microsoft Outlook

Subject: Machinists Union meet with GC re Boeing
Location: GC Conference Room
Start: Wed 1/19/2011 1:30 PM
End: Wed 1/19/2011 3:00 PM
Recurrence: (none)

III. The NLRB Lacks Regional Office Budget Information

Relevant budget data is vital to the NLRB's ability to analyze its effectiveness. The press, the public, and the government cannot adequately ascertain whether taxpayer money is being used efficiently if budgetary information is not made transparent. In response to the Cause of Action's FOIA request for regional office budgets, the NLRB stated that:

As to item 2 [request for regional budgets], as we informed you in our September 19 phone call, in accordance with FOIA, inquiries were made to the Division of Administration's Budget Office and to the Division of

²⁶ Outlook Calendar Appointment, (Jan. 19, 2011) [NLRB-FOIA-00000657].

Operations –Management. Both of these Offices reported that there are no individual operating budgets for each of the regional offices.²⁷

The fact that the NLRB does not perform regional budget analyses raises the concern that the NLRB is unable to account for differences in caseload or activity relative to its funding levels. In short, the NLRB lacks an effective tool for measuring how effectively it manages (or wastes) taxpayer dollars.

IV. The NLRB Obtained Google Advertisements to Encourage Union Organizing

Documents received by Cause of Action regarding the creation of an NLRB Google Adwords© account by an unnamed NLRB employee suggest that taxpayer dollars were used to create the account. According to the NLRB,²⁸ no taxpayer dollars were used, as Google provided the account and ads for free. This assertion by the NLRB raises a number of issues.

First, while the NLRB may never have submitted a payment to Google for the ads, it remains unclear whether the account was set up in the NLRB's official capacity by an NLRB employee and whether this was done during government time, on government computers, with government personnel involved. If NLRB personnel and computers were used to obtain the advertisements then the OIG should investigate why the ostensibly impartial NLRB chose to run such clearly pro-union ads using taxpayer-funded resources.

Second, according to Google's grants program eligibility requirements,²⁹ only 501(c)(3) organizations may obtain in-kind advertising donations from Google. As a government agency, the NLRB is, by definition, not a 501(c)(3) and so does not qualify for these donations. The question then remains whether the NLRB's assertion that they did not pay for the ads is correct, and if so, how it was they obtained the advertising for free.

V. Conclusion

The attached documents raise serious questions about the integrity of the NLRB and the process of bringing complaints. We respectfully ask that the Office of Inspector General launch a comprehensive investigation to insure that the NLRB is operating according to well-established conceptions of integrity and due process. Specifically we ask that:

1. OIG investigate to what extent impermissible ex parte communications occurred between former NLRB board member Wilma Liebman and NLRB General Counsel Lafe Solomon regarding the complaint filed against Boeing.

²⁷ Letter from Jacqueline Young, Freedom of Information Officer, to Freedom Through Justice Foundation (now Cause of Action) (October 7, 2001) (on file with recipient and author)

²⁸ FACT CHECK, *available at* <http://www.nlr.gov/news-media/fact-check/fact-check-archives>

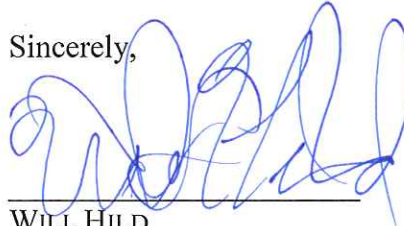
²⁹ LEGAL REQUIREMENT, *available at* <http://www.google.com/grants/grantees/legal.html>

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2. OIG discern whether regional budgets exist for NLRB offices, and if not, conduct an audit and make a formal recommendation that regional budget information be calculated for future fiscal years.
3. OIG investigate what government resources, including computers, personnel, or funds were used to obtain improper Google Adwords© advertisements. Additionally, determine whether the Google Adwords ads created by the NLRB were in compliance with the NLRB's mission and the National Labor Relations Act ("NLRA").

Should you have any questions, comments, or concerns, please do not hesitate to contact Amber Taylor or Will Hild at Amber.Taylor@causeofaction.org, Will.Hild@causeofaction.org, or (202)-507-5880. Thank you for your attention to this matter.

Sincerely,



WILL HILD
Associate Attorney

Encl.: Exhibits