CAUSE of ACTION
Advocates for Government Accountability
A 501(c)(3) Nonprofit Corporation

December 7, 2012

VIA E-MAIL AND CERTIFIED MAIL

The Honorable Tony West
Acting Associate Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
E-mail: tony.west@doj.gov

RE: REQUEST FOR INVESTIGATION

Dear Honorable West:

We write on behalf of Cause of Action, a nonprofit, nonpartisan organization that uses investigative, legal and communications tools to educate the public on how government accountability and transparency protect taxpayer interests and economic opportunity.

Cause of Action requests that the Department of Justice (DOJ) determine whether potential avenues of prosecution exist that were not duly recommended for review by the National Labor Relations Board (NLRB) Office of Inspector General (OIG) concerning misconduct at the NLRB. For instance, the OIG failed to recommend prosecution after finding Acting General Counsel Lafe Solomon (Solomon) in violation of 18 U.S.C. § 208. Similarly, the OIG determined that members of the General Counsel made prohibited *ex parte* communications, but nevertheless dismissed the violations as "inadvertent."

The OIG also failed to promptly investigate credible allegations of misconduct occurring within the agency, particularly a lack of sufficient firewalls between the General Counsel and Board. The OIG waited five months to initiate an investigation and another seven months to issue a report. In contrast, the OIG quickly investigated two Republican NLRB members over the course of five months. Therefore, the OIG's actions suggest it conducts investigations in an arbitrary and capricious manner.

As a result of Cause of Action's investigation, the full report for which is enclosed, we have made the following findings concerning the NLRB OIG's failure to promptly and impartially conduct investigations against various NLRB members:

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- ***Finding***: **The NLRB OIG Failed to Recommend Prosecution After Finding Solomon in Violation of 18 U.S.C. § 208.**

On September 13, 2012, the OIG determined that Solomon violated conflicts of interest laws under 18 U.S.C. § 208 by personally and substantially participating in a social media case against Wal-Mart while holding over $15,000 worth of Wal-Mart stock. The Inspector General (IG) determined that Solomon's violation stemmed from his participation in a meeting on January 23, 2012 in which he expressed his desire to settle the case and instructed his subordinate to contact Wal-Mart counsel in an effort to reach an agreement. The IG, however, chose to modify the strict liability standard under § 208 by considering various supposedly extenuating and mitigating circumstances, particularly the alleged shortcomings of other agency officials. Instead of recommending either civil or criminal charges against Solomon under 18 U.S.C. § 216, the IG shifted the blame away from Solomon to the NLRB Ethics Office.

Cause of Action recently obtained a memorandum and supporting affidavit from the former Designated Agency Ethics Official (DAEO), Ms. Gloria Joseph, in which she rebuts many of the factual claims underlying the IG's alleged mitigating circumstances. For instance, she claims that the NRLB Ethics Office had a successful track record and that Solomon, as a career executive, was well aware of his ethical obligations. In fact, throughout his involvement in the Wal-Mart case, Solomon remained acutely aware that his financial interests could disqualify him from participating in various NLRB cases. Solomon, however, did not request a waiver until January 30, 2012, one week after the meeting discussing the Wal-Mart case. On February 1, 2012, the DAEO denied Solomon's request for a waiver, stating that "Mr. Solomon did not make any compelling reason why the waiver should be granted," particularly because "there was a Deputy General Counsel who could act in Mr. Solomon's place." After the denial of his waiver request, Solomon sold all of his Wal-Mart stock. Such action did not retroactively cure his ethics violation.

- ***Finding***: **Cause of Action and Congressman Kline Presented Credible Allegations that the NRLB Lacked Appropriate Firewalls Between Its General Counsel Members and Board.**

Cause of Action sent a letter on November 22, 2011 to the NLRB OIG containing evidence that pro-union bias had motivated the NLRB's suit against the Boeing Company and that the NRLB lacked appropriate firewalls between its General Counsel and members of the Board. Specifically, Cause of Action expressed concern that a close relationship between Solomon and former Chairman Wilma Liebman compromised the intended wall of separation between prosecutor and adjudicator. For instance, Cause of Action presented an e-mail communication from Liebman to Solomon which contained an article providing positive commentary on the NLRB's decision to issue a complaint against Boeing. Further, other employees often included Liebman and Solomon as co-recipients on e-mails discussing the Boeing case, suggesting that NLRB members understood Solomon and Liebman to have a close relationship.

Additionally, Cause of Action presented the OIG with evidence that pro-union bias motivated the General Counsel's decision to issue a complaint against the Boeing Company for

unfair labor practices in April 2011. Numerous e-mail communications between union lawyers and the Office of General Counsel indicate a close relationship between the NRLB and union interests—up until the final days before the complaint was issued. Taken in conjunction with evidence that Solomon and Liebman frequently interacted on matters involving pending litigation, Cause of Action is concerned that evidence of pro-union bias tainted the decision-making process within the NLRB and compromised the intended wall of separation between the Board and General Counsel.

In addition to Cause of Action's letter, Congressman Kline on April 13, 2012 submitted a letter to the OIG containing e-mails obtained by a Cause of Action FOIA request. The e-mails, while heavily redacted, suggested that the Board and members of the General Counsel violated NRLB rules against *ex parte* communications by discussing press strategy for the Boeing complaint. Accordingly, Congressman Kline requested that the OIG further investigate the matter.

- ***Finding***: **The OIG's Report into *Ex Parte* Communications Misconstrued the Law and Failed to Hold NLRB Members Personally Responsible for Ethical Misconduct.**

The OIG issued an investigative report into *ex parte* communications on November 19, 2012. The report, however, neglected to establish any ethical misconduct by any NLRB member, instead stating that the Office of Public Affairs could benefit from "more clearly defined policies and procedures." The report concluded that while three General Counsel members sent e-mail responses containing prohibited *ex parte* communications, the e-mail messages were nevertheless "inadvertent." Further, the report improperly found Solomon's e-mail reply to be a mere "restatement of the remedy" when his statement in fact touched on the appropriateness of the remedy, potentially transforming it into an improper *ex parte* communication. Finally, the OIG concluded that Liebman's e-mail did not evidence an attempt to influence Solomon's prosecution of Boeing, despite her allusion to political factors at play in the Boeing case.

Cause of Action argues that the OIG, by finding the e-mail communications "inadvertent," improperly applied the law. Under the applicable regulation, 29 C.F.R. § 102.126(a), there is no specific intent requirement for *ex parte* communications. Therefore, it was enough that Liebman and General Counsel members made *ex parte* communications, without also recognizing that they were prohibited. Rather than properly applying the law, however, the OIG instead chose to ignore a potentially widespread agency problem, as the e-mails evidence an agency culture of non-compliance.

- ***Finding***: **The NLRB OIG Delayed Investigating *Ex Parte* Communications While Promptly Investigating Republican NLRB Members, Suggesting It Conducts Investigations in an Arbitrary and Capricious Manner**

The evidence suggests that the OIG delayed initiating an investigation into *ex parte* communications occurring within the agency. For instance, despite receiving credible

allegations that pro-union bias had motivated the NLRB's suit against the Boeing Company and that the NLRB lacked appropriate firewalls between its General Counsel and members of the Board, the OIG failed to timely respond. Cause of Action informed the OIG of these issues on November 22, 2011, which was followed by a similar letter from Congressman Kline in April 2012. Only upon receiving Kline's letter, however, did the OIG decide to open an investigation. The OIG's failure to respond to Cause of Action's letter suggests that it either completely ignored Cause of Action's claims or deemed its allegations to be non-credible. Considering that Cause of Action's letter contained substantially similar evidence and allegations as Kline's, there is no reason why the OIG should have delayed acting upon Cause of Action's letter.

In contrast to the OIG's delayed investigation into *ex parte* communications, the OIG conducted prompt investigations into two Republican NLRB members, Terence Flynn and Brian Hayes. The investigations were concluded after only five months, and without any Congressional request to investigate. Deposition transcripts also suggest that the IG chose to single out certain individuals rather than genuinely investigate ethical misconduct. This suggests that the OIG conducts investigations in an arbitrary and capricious manner by targeting members based on political motivations.

- ***Finding***: **The NLRB Has Attempted to Stonewall Public and Congressional Inquiry into Potential Misconduct Occurring During Boeing Litigation.**

The NLRB's interactions with both Congress and the public evidence an active attempt to avoid inquiry into allegations of ethical misconduct during the pending Boeing litigation. For example, when Chairman Darrell Issa of the U.S. House Committee on Oversight and Government Reform requested Solomon's testimony at a full Committee hearing, Solomon refused to cooperate. Solomon only attended the hearing under threat of subpoena, despite his later claims that he appeared out of respect for Congress's power of investigation. Similarly, Solomon refused to produce documents in response to a Committee request, ignoring Supreme Court precedent holding that pending lawsuits cannot form a basis on which to withhold information from Congress. Solomon's continued refusal to cooperate ultimately resulted in the Committee issuing a subpoena, requiring Solomon to produce all requested documents.

Further, the NLRB raised numerous exemptions to Cause of Action's September 10, 2012 Freedom of Information Act (FOIA) request which sought, *inter alia*, "[a]ll records, including e-mails, referring or relating to Cause of Action's November 22, 2011 request for an NLRB OIG investigation." The NRLB claimed that exemptions 7(C) and 7(D) applied, which cover records or information compiled for law enforcement purposes as well as personal information contained within those documents. As Cause of Action stated in its FOIA appeal, law enforcement purposes consist of an "investigation to consider an action equivalent to those which the Government brings against private parties" and not "customary surveillance of duties by government employees." Thus, any investigation, report, record or request for investigation created by the NLRB OIG in no way resembles an action by the government against a private party.

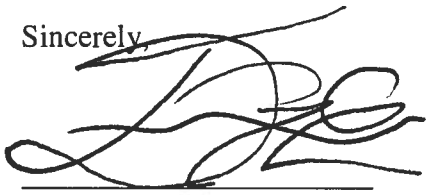
Upon issuance of the OIG's November 19, 2012 report regarding *ex parte* communications, Chairman Pearce sent a letter to Cause of Action stating that our September 10, 2012 FOIA request should now be reconsidered in light of the recent OIG report. The NLRB's decision to produce documents previously withheld based on erroneous exemptions violates Cause of Action's rights under FOIA and further demonstrates the agency's attempts to stonewall public inquiry into misconduct occurring within the NLRB.

Request for Investigation

Based on the above findings indicating a widespread problem of non-compliance within the agency, Cause of Action requests the DOJ to investigate the questionable ethical practices occurring within the NLRB.

Should you have any questions, comments, or concerns, please do not hesitate to contact me (Daniel.Epstein@causeofaction.org) or Robyn Burrows (Robyn.Burrows@causeofaction.org) at 202-499-4232. Thank you for your attention to this matter.

Sincerely,



DANIEL EPSTEIN
EXECUTIVE DIRECTOR

Encl: "Report: The Ethical Failures of the National Labor Relations Board Office of Inspector General"

cc: Hon. Darrell Issa, Chairman, U.S. House of Representatives, Committee on Oversight and Government Reform

Hon. Elijah Cummings, Ranking Member, U.S. House of Representatives, Committee on Oversight and Government Reform

Hon. Tom Harkin, Chairman, U.S. Senate Committee on Health, Education, Labor & Pensions

Hon. Michael B. Enzi, Ranking Member, U.S. Senate Committee on Health, Education, Labor & Pensions

Hon. John Kline, Chairman, U.S. Committee on Education & the Workforce

Don W. Fox, Acting Director, U.S. Office of Government Ethics

Hon. Phyllis K. Fong, Inspector General, U.S. Department of Agriculture and Chair, Council of the Inspectors General on Integrity and Efficiency

Hon. J. Michael Luttig, General Counsel, The Boeing Company

Jack Smith, Chief, Public Integrity Section, U.S. Department of Justice

Jeff Gearhart, General Counsel, Wal-MartCorporation, Inc.

The Ethical Failures of the National Labor Relations Board Office of Inspector General

CAUSE of ACTION
Advocates for Government Accountability

December 7, 2012

About Cause of Action

Mission

Cause of Action (CoA) is a nonprofit, nonpartisan organization that uses investigative, legal and communications tools to educate the public on how government accountability and transparency protect taxpayer interests and economic opportunity. Our mission is to expose the ways our government is playing politics in its use of taxpayer dollars, in its decision-making on behalf of individual Americans, and how it seeks to burden the economic opportunities that employ us and make our lives better. CoA seeks to prevent the federal government from politicizing agencies, rules, and spending by bringing transparency to the federal grant and rule-making processes. CoA's representation of organizations and individuals helps to educate the public about government overreach, waste, and cronyism.

Investigative Function

CoA uses investigative tools to attack federal government waste, fraud, and mismanagement as well as overreach in the form of arbitrary and burdensome regulations. CoA employs "sunshine advocacy" tools to achieve its goals, including document and information requests, lawsuits, ethics complaints, and requests for investigation. Through its use of advocacy and investigatory tools, CoA promotes transparency, integrity, and accountability in government. CoA's investigations help expose the ways our government is mismanaging federal funds and educate the public on how government can be made more accountable. Rigorous oversight can prevent taxpayer dollars from being wasted on improper activities.

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- ***Finding***: *The NLRB OIG Delayed Investigating Ex Parte Communications While Promptly Investigating Republican NLRB Members, Suggesting It Conducts Investigations in an Arbitrary and Capricious Manner*

- ***Finding***: *The NLRB Has Attempted to Stonewall Public and Congressional Inquiry into Potential Misconduct Occurring During Boeing Litigation.*

II. Introduction

On September 13, 2012, the NLRB OIG issued a report which found that Acting General Counsel Lafe Solomon (Solomon) violated 18 U.S.C. § 208 by personally and substantially participating in a matter involving Wal-Mart when he owned over $15,000 worth of Wal-Mart stock. While the ethics violation constitutes a strict liability offense, the OIG report nevertheless concluded that mitigating and extenuating circumstances militated against recommending prosecution. Cause of Action alleges that not only did the OIG incorrectly apply the law, its reliance on mitigating and extenuating circumstances is misplaced as the former Designated Agency Ethics Official (DAEO), Ms. Gloria Joseph, who came forward to Cause of Action investigators, rebutted many of the IG's factual claims.

Further, Cause of Action submitted evidence on November 22, 2011 to the OIG suggesting that the NRLB lacked sufficient firewalls between its Office of General Counsel and Board. Specifically, the evidence indicated that Solomon and former Board Chairman Wilma Liebman frequently communicated on pending litigation. Cause of Action's letter also alleged that the Office of General Counsel was motivated by pro-union bias in issuing its April 2011 complaint against the Boeing Company, as evidenced by frequent e-mails between union counsel and NLRB Acting General Counsel. The Acting General Counsel's bias, considered in light of the close relationship between Solomon and Liebman, may indicate that the wall of separation between the Board and Office of General Counsel has been seriously undermined.

On April 16, 2012, the NLRB OIG initiated an investigation into potential *ex parte* communications, nearly 5 months after Cause of Action submitted credible evidence of potential misconduct. Seven months after the OIG initiated its investigation, on November 19, 2012, the OIG issued a report finding that no NLRB members had committed any ethical misconduct.

While the report acknowledged that e-mails by three Office of General Counsel members constituted prohibited *ex parte* communications, it proceeded to excuse them by claiming that any misconduct was "inadvertent." The governing regulation for *ex parte* communications, 29 C.F.R. § 102.126(a), is a general intent statute. Thus, the OIG's consideration of the mental state of NLRB members was an improper application of the law.

Cause of Action also alleges that the OIG improperly delayed acting upon Cause of Action's November 22, 2011 letter, instead waiting until April 16, 2012 to initiate an investigation. Considering that Congressman Kline's letter contained similar allegations and evidence, there is no valid reason why the OIG chose to either ignore Cause of Action's letter or find its allegations non-credible. Further, the OIG promptly initiated investigations against two Republican NLRB members, concluding its investigation after only approximately five months. Taken as a whole, this evidence suggests that the OIG conducts its investigations in an arbitrary and capricious manner.

The above failures of the OIG have serious implications on the public's confidence in an executive agency's ability to fairly apply the law and strike a balance between labor and business. Therefore, any evidence suggesting that the OIG's investigations are politically motivated must be brought to light.

III. The Wal-Mart Case: The OIG's Use of Blame-Shifting to Protect Solomon

Under 18 U.S.C. § 208 and its implementing regulations (which criminalize certain conflicts of interest), an officer or employee of the NLRB is prohibited from "participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he . . . has a financial interest, if the matter will have a direct and predictable effect on that interest."[1] A disqualifying financial interest is defined as the ownership of publicly traded stock in a corporation if the value of the stock held by the officer or employee exceeds $15,000.[2] Absent a waiver under 18 U.S.C. § 208(b)(1) or (b)(3), an individual may not participate in the matter in an official capacity without exposure to criminal liability.

In an ethics report issued by the NLRB OIG on September 13, 2012, the IG found that Solomon violated the ethical requirements under 18 U.S.C. § 208 by "personally and substantially" participating in his official capacity in a case involving a company in which he had a financial interest. Specifically, the report charged Solomon with assisting in an investigation of Wal-Mart's social media policy when Solomon owned over $15,000 worth of publically traded Wal-Mart stock. The IG, however, chose to modify the strict liability standard under § 208 by considering various supposedly extenuating and mitigating circumstances, particularly the alleged shortcomings of other agency officials. This shifting of blame from Solomon to others resulted in a complete failure of the OIG to recommend either civil or criminal charges against Solomon under 18 U.S.C. § 216.

[1] 5 C.F.R. § 2635.402.
[2] 5 C.F.R. §§ 2640.103(b), 2640.202(a).

A. Solomon's Personal and Substantial Involvement in the Wal-Mart Case

On December 30, 2011, Region 11 of the NLRB submitted a case involving Wal-Mart to the NLRB's Division of Advice for consideration of potential violations of social media regulations under §§ 7 and 8(a)(1) of the National Labor Relations Act (NLRA).[3] The supervisory attorney at the Division of Advice subsequently prepared an Advice Memorandum to send to Region 11, informing the Region to issue a complaint against Wal-Mart's overly-broad social media policy.[4] Solomon reviewed the Advice Memorandum before it was sent,[5] which contained the facts of the case and analyzed whether Wal-Mart's social media policy and its termination of an employee for posting on Facebook violated the NLRA.[6] Upon reviewing the Advice Memorandum, Solomon emailed the NLRB Associate General Counsel, the Deputy General Counsel and the Deputy General Counsel's Executive Assistant, stating:

> I think we need to discuss this case. I don't necessarily disagree, but as the Employer is Walmart, I want to know if the charge specifically alleged that the social media policy was over broad, whether Walmart filed a response, and whether this policy is nationwide. The reaction to this complaint will be huge (and especially the negative reaction), and I want to make sure that we are prepared.[7]

Despite Solomon's failure to first obtain a waiver, a meeting between the Division of Advice and Solomon was subsequently scheduled to discuss these matters on January 23, 2012.[8] At the meeting, Solomon expressed his concern about the negative reaction a complaint against Wal-Mart would generate and explained that he did not want to issue a complaint without Wal-Mart first being informed.[9] Solomon also stated that he preferred to resolve the matter without issuing a public complaint.[10] Therefore, he instructed the Division of Advice to settle the case by contacting Wal-Mart's counsel in order to persuade Wal-Mart to amend its social media policy to conform to the NLRA.[11]

Throughout his involvement in the Wal-Mart case, Solomon remained acutely aware that his financial interests could disqualify him from participating in various NLRB cases. For instance, on January 5, 2012 Solomon provided a list of his investments to the Deputy General Counsel so that she could, consistent with her "gatekeeper" function, ensure that Solomon was not participating in any matters in which he had a conflict of interest.[12] Additionally, Solomon communicated his financial conflict of interest in the Wal-Mart case with at least two other individuals. The Associate General Counsel recalled that on the morning of January 23, 2012,

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[3] NAT'L LABOR RELATIONS BD., OFFICE OF INSPECTOR GEN., REPORT OF INVESTIGATION – OIG-I-475, at 2, ¶ 5 (Sept. 13, 2012), *available at* http://oversight.house.gov/wp-content/uploads/2012/09/1-Investigative-Report.pdf [hereinafter WAL-MART REPORT].
[4] WAL-MART REPORT, *supra* note 3, ¶¶ 12, 14, at 2.
[5] *Id.* ¶ 16, at 2.
[6] *Id.* ¶ 13, at 2.
[7] *Id.* ¶ 19, at 3.
[8] *Id.* ¶ 20, at 3.
[9] *Id.* ¶ 24, at 3.
[10] WAL-MART REPORT, *supra* note 3, ¶ 24, at 3.
[11] *Id.*
[12] *Id.* ¶ 9, at 2.

Solomon "stated that he did not know whether or not he could participate in the Wal-Mart case because he owned Wal-Mart stock and that he was going to need to check with the Designated Agency Ethics Official."[13] Similarly, Solomon informed the Deputy General Counsel before the January 23, 2012 meeting that he had a financial interest in Wal-Mart and that he needed a waiver to participate in the case.[14] **Thus, Solomon was fully aware that due to his Wal-Mart investments, his participation in the matter, absent a waiver, would constitute an ethics violation**.

Solomon did not request a waiver until January 30, 2012, one week after the meeting discussing the Wal-Mart case.[15] In his request, Solomon disclosed that he owned $18,267 in Wal-Mart stock.[16] On February 1, 2012, the Designated Agency Ethics Official (DAEO), Ms. Gloria Joseph, denied Solomon's request for a waiver, stating that "Mr. Solomon did not make any compelling reason why the waiver should be granted," particularly because "there was a Deputy General Counsel who could act in Mr. Solomon's place."[17] After the denial of his waiver request, Solomon sold all of his Wal-Mart stock.[18] **Such action did not retroactively cure Mr. Solomon's ethics and legal violations**.[19]

B. The OIG's Report Established an Ethics Violation but Failed to Hold Solomon Personally Responsible

After receiving a Hotline complaint alleging that Solomon had acted in a matter in which he had a financial interest, the OIG initiated an investigation.[20] Upon completing the investigation, the OIG found that Solomon's involvement at the January 23rd meeting constituted "personal and substantial" participation under 18 U.S.C. § 208 because Solomon reviewed the Advice Memorandum, met with Division of Advice staff to discuss the case, decided that further work was necessary before a decision on the merits could be reached and directed a subordinate to contact Wal-Mart counsel in order to avoid issuing a complaint.[21] Solomon's actions were also "substantial" under § 208 because he made actual, substantive decisions regarding how to persuade Wal-Mart to alter its social media policy.[22] For instance, Solomon stopped the Division of Advice from issuing the Advice Memorandum to the Region 11 Office and instead directed the Division of Advice to contact Wal-Mart's counsel in order to settle the matter.

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[13] *Id.* ¶ 21, at 3.
[14] *Id.* ¶ 22, at 3.
[15] *Id.* ¶ 37, at 6.
[16] WAL-MART REPORT, *supra* note 3, ¶ 37, at 6.
[17] *Id.* ¶ 45, at 7. Even assuming that Solomon was granted a waiver after the meeting, the waiver would still be invalid. The U.S. Office of Government Ethics has held that retroactive waivers are invalid because waivers "must be granted *before* an employee engages in a potentially prohibited activity. Memorandum on Guidance on Waivers under 18 U.S.C. § 208(b), Authorizations under Agency Supplementary Regulations from Don W. Fox, Gen. Counsel, to Designated Agency Ethics Officials (Apr. 22, 2010), *available at* http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=228.
[18] WAL-MART REPORT, *supra* note 3, ¶ 48, at 7.
[19] A federal employee who owns stock in a company that creates a conflict of interest under 18 U.S.C. § 208 may divest the stock. *Resolving Conflicts of Interest*, U.S. OFFICE OF GOV'T ETHICS, http://www.oge.gov/Topics/Financial-Conflicts-of-Interest-and-Impartiality/Resolving-Conflicts-of-Interest/ (last visited Nov. 16, 2012).
[20] WAL-MART REPORT, *supra* note 3, at 1.
[21] *Id.* at 10.
[22] *Id.*

Notwithstanding the finding of a clear ethics violation under 18 U.S.C. § 208(a), which is considered a strict liability offense,[23] **the IG improperly considered extenuating and mitigating circumstances in determining the proper corrective action**.[24] The OIG perhaps attempted to customize the strict liability rule to bring the facts associated with Solomon's conflict within the scope of the holding in *United States v. Hedges*, in which the court held that an entrapment defense could be considered in applying 18 U.S.C. § 208.[25]

In *Hedges*, a former Air Force officer sought advice from his Standards of Conduct (SOC) counselor concerning a potential conflict of interest.[26] The SOC counselor worked closely with Hedges, reviewing and editing his consulting agreement drafts to satisfy conflicts of interest rules. The SOC counselor, however, failed to inform Hedges that a particular negotiation could violate conflicts of interest statutes and should be postponed; instead Hedges was advised that he complied "with all conflicts of interest laws."[27] When Hedges was charged criminally under 18 U.S.C. § 208, the court held that § 208 carried a strict liability standard for the elements in question, but that the lower court should have instructed the jury that entrapment by estoppel could nonetheless be a defense to the charges.[28]

The instant case is distinguishable from *Hedges*, and any attempt by the OIG to conform Solomon's situation to *Hedges* would be inappropriate. Hedges was unaware of any ethical conflict and was in fact told that he complied "with all conflicts of interest laws." Here, Solomon himself realized that he was possibly in violation of federal law and was never told that he was in compliance with ethical and legal standards. Moreover, Solomon requested a conflict waiver from the DAEO, which was denied because "Mr. Solomon did not make any compelling reason why the waiver should be granted," whereas Hedges did not request a waiver, let alone have a waiver rejected, nor did he even know of the potential conflict. Thus, the holding in *Hedges* that the jury should have been instructed regarding the entrapment defense would not apply to Solomon because the facts in his case are clearly distinguishable from those in *Hedges*.

Despite the inapplicability of *Hedges*, the IG ultimately found various extenuating and mitigating circumstances that minimized Solomon's ethics violation. First, the IG stated that the "Office of General Counsel should have had a system in place to screen matters for the possibility of a financial interest before the matters were forwarded to the General Counsel."[29] While the IG admitted that Solomon should have withdrawn from participating in the matter "given his acknowledgement that he was aware of the need for a waiver," the IG ultimately found that a flawed ethics program was to blame, stating that "everything failed to stop Mr. Solomon," which is "evidence of a complete failure of the NLRB's standards of conduct program with regard to the Office of General Counsel."[30]

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[23] *United States v. Hedges*, 912 F.2d 1397, 1400-03 (11th Cir. 1990) (holding that Section 208(a) is a strict liability offense statute).
[24] WAL-MART REPORT, *supra* note 3, at 11.
[25] 912 F.2d 1379 (11th Cir. 1990).
[26] *Id.* at 1399-1400.
[27] *Id.*
[28] *Id.* at 1405-06.
[29] WAL-MART REPORT, *supra* note 3, at 12.
[30] *Id.*

The remainder of the extenuating and mitigating circumstances concern the DAEO's alleged shortcomings in addressing the waiver issue. For instance, the IG found that the DAEO should not have acted upon the waiver because the General Counsel is considered the "head of the agency," and in such cases approval authority for waivers is delegated to the Office of the White House Counsel.[31] However, since the DAEO decided to act, the IG stated that the DAEO should have used the appropriate regulatory framework established by the Office of Government Ethics (OGE) to determine whether to grant the waiver.[32] Further, **rather than considering her own personal views on Solomon's participation, the DAEO should have analyzed the financial interest requiring disqualification, the identity of the holder of the financial interest, the value of the disqualifying financial interest and other relevant factors**.[33] The IG also concluded that the DAEO should have attempted to communicate further with Solomon by "seek[ing] additional information before acting on the waiver request" and providing counseling to Solomon on his ethical duties as they pertained to his involvement with the Wal-Mart case.[34]

Finally, the IG claimed that the ethics program failed as a result of an "adversarial" relationship between Solomon and the Division of Administration. The IG explained that Solomon initiated an assessment of the Division after receiving information that the managers had created a hostile work environment.[35] The assessment would potentially disclose evidence of mismanagement occurring within the Division.[36] The DAEO subsequently received a briefing on the results of that assessment on January 20, 2012.[37] The adversarial nature of the situation was supposedly reflected in an email from the DAEO to Solomon, sent prior to her assessment briefing and containing an inquiry regarding Solomon's position as Acting General Counsel:[38]

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[31] *Id.*
[32] *Id.* at 13.
[33] *Id.*
[34] *Id.*
[35] WAL-MART REPORT, *supra* note 3, at 12.
[36] *Id.* ¶ 57, at 8.
[37] *Id.* ¶ 58, at 8.
[38] *Id.* at 12.

From: Joseph, Gloria
Sent: Friday, January 20, 2012 10.14 AM
To: Solomon, Lafe E.
Subject: RE: Vacancies Act

Never mind. I found the answer.

From: Joseph, Gloria
Sent: Friday, January 20, 2012 10:00 AM
To: Solomon, Lafe E.
Subject: Vacancies Act

Lafe:

What is the status of your nomination? Did it expire when Congress went out or is it one of the ones that Reid carried over? No crisis. I was just trying to figure out when a new 210 day period would begin to run.

Gloria

Contrary to the IG's characterization of the DAEO's e-mail as an adversarial communication, it does not appear that the DAEO's correspondence with Solomon evidenced a hostile tone at all, and therefore would not have discouraged him from timely submitting a waiver request or requesting ethics counseling. In fact, his submission of an ethics waiver ten days later refutes the IG's claim that an adversarial environment frustrated Solomon's attempt to follow the NLRB ethics program.

Due to the presence of the alleged extenuating and mitigating circumstances, the IG's remedial action was limited to requiring the newly appointed DAEO to "set up an appropriate system to prevent future violations."[39] Under 18 U.S.C. § 216, the penalty for violating § 208 could be a fine, prison sentence for up to one year or both—or if the violation is found to be "willful," the maximum prison sentence increases to five years. Based on the IG's failure to assign any consequences to Solomon's violation, Cause of Action believes that the IG did not appropriately apply the law and hold Solomon accountable for his ethics violation despite a clear finding that Solomon personally and substantially participated in the Wal-Mart case without first obtaining a waiver. To the contrary, **the IG went to great lengths to make excuses for Solomon's serious lack of judgment**.

C. Former DAEO Gloria Joseph Rebuts the IG's Alleged Extenuating and Mitigating Circumstances

As previously discussed, the strict liability nature of 18 U.S.C. § 208 and inapplicability of *Hedges* should have precluded the IG from considering any outside factors in analyzing Solomon's ethics violation. Even assuming, however, that consideration of mitigating circumstances was proper, information provided to Cause of Action investigators by Ms. Gloria Joseph, the former DAEO, indicates that the alleged mitigating circumstances were inaccurately stated. Ms. Joseph recently submitted a memorandum and supporting affidavit to Cause of

[39] *Id.* at 14.

Action detailing her experience and rejecting many of the IG's claims.[40] While agreeing with the IG's legal conclusions, Ms. Joseph takes issue with the IG's claim that there was a "complete failure of the NLRB's ethics program."[41] Ms. Joseph states that "[t]he agency's ethics program has long been well-regarded and has been the recipient of the Office of Government Ethics 'Outstanding Ethics Program Award.'"[42] She also disputes any strained relationship between herself and Solomon, stating that she had approved travel vouchers requiring a conflict of interest analysis on numerous occasions for Solomon both before and after the Wal-Mart matter.[43]

Ms. Joseph also defends her actions as the DAEO. First, she contests the IG's determination that she should have sought additional facts in order to provide adequate ethics counseling to Solomon. Ms. Joseph explains that she "specifically invited Mr. Solomon to provide any additional facts for [her] consideration which he believed might alter [her] decision."[44] Solomon failed to do so, completely omitting his prior participation in the Wal-Mart case. As the IG report stated, Solomon's "waiver request was misleading because of the . . . lack of information provided by Solomon . . . [I]t is reasonable to expect that a person requesting a waiver would include his level of participation up to the point of submitting the request for the waiver and a full description of the status and issues involved."[45] Even if she had somehow discovered Solomon's prior involvement in the case, Ms. Joseph argues that any additional fact gathering or counseling would have been futile since Solomon had already violated § 208 as of January 23, 2012—a week before a waiver was requested.[46] Regardless, under 18 U.S.C. § 208(b)(1), the burden is on the applicant, rather than the agency official, to give "full disclosure" when requesting a waiver. Similarly, 5 C.F.R. § 2635.502(a) requires employees of the executive branch to self-report. Therefore, **<u>it was Solomon's sole responsibility to inform the DAEO of all relevant details</u>**.

Ms. Joseph additionally addresses the IG's allegation that she was "looking for a justification to deny the waiver." While the IG interviewed other individuals throughout the course of his investigation, the IG neglected to personally speak with Ms. Joseph.[47] Instead, he improperly assumed that her denial of the waiver was the result of her failure to use the appropriate analytical framework. In her defense, Ms. Joseph explains she did in fact follow the regulatory framework established by the OGE in making her determination, adding that § 208(b) waivers are rare, especially considering the strict ethics rules the current Administration has implemented for appointees.[48] Therefore, "the White House would have been even less likely than the agency's ethics office to approve a waiver in this instance . . . [E]ven if the matter had

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[40] *See* Ex. 1 (attached hereto).
[41] *Id*. at 2.
[42] *Id*. at 3.
[43] *Id*. at 4.
[44] *Id*. at 3.
[45] WAL-MART REPORT, *supra* note 3, at 13.
[46] Ex. 1, at 4.
[47] *Id*.
[48] *Id*.

been referred to the White House counsel, the White House would have been faced with the same problem that the ethics office faced: the violation had already occurred."[49]

Finally, Ms. Joseph takes issue with the IG's failure to "put sufficient emphasis on personal responsibility."[50] The effect of the IG's findings is to minimize Solomon's failure to recuse himself from the Wal-Mart case, despite his many opportunities to do so. As Ms. Joseph stated, the Deputy General Counsel could have acted on Solomon's behalf, thereby avoiding any potential conflict of interest.[51] Further, as Acting General Counsel, Solomon was fully aware of all ethical requirements, especially due to his long tenure with the agency. **According to Ms. Joseph, career executives such as Solomon receive annual ethics training and are required to certify that they have not participated in matters in which they have a financial interest**.[52] Therefore, the real failure lies with Solomon for choosing to ignore his obligations rather than following the rules of the ethics program.

As Ms. Joseph aptly cites in her memorandum,[53] the OGE's *Letter to an Acting Inspector General* emphasizes personal responsibility over blame-shifting in ethics cases:

> [I]t is the personal responsibility of even high level officials to remember their ethical obligations or at least seek ethics advice, and OGE is particularly sensitive to any effort that may be perceived as shifting this personal responsibility from the individual concerned to the agency's ethics officials.[54]

The OGE has clearly set forth a standard which seeks to establish personal responsibility for ethical violations. This standard strongly suggests that the IG should have refrained from focusing on the DAEO's actions and instead assigned Solomon personal culpability for his violation according to the punishment under 18 U.S.C. § 216. Instead, the IG improperly shielded Solomon from the consequences of his actions, despite the IG's intended role as an objective, independent investigator.

As a final point, Cause of Action notes that Congressman John Kline, Chairman of the U.S. House of Representatives Committee on Education and the Workforce, sent a letter on September 17, 2012 to Attorney General Eric Holder requesting an investigation into Solomon's violation of 18 U.S.C. § 208.[55] **As such, we ask that the DOJ seriously consider our request to investigate in light of Chairman Kline's letter, as Cause of Action and Chairman Kline share similar concerns of ethical impropriety with regards to Solomon's actions in the Wal-Mart case**.

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[49] *Id.*
[50] *Id.* at 2.
[51] *Id.*
[52] Ex. 1, at 3.
[53] *Id.* at 5.
[54] Letter on Responsibility of Agency Ethics Officials to Report Ethics Violations from Marilyn L. Glynn, Acting Dir., to Acting Inspector Gen. (Mar. 30, 2006), *available at* http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=2411.
[55] Letter from John Kline, Chairman, Comm. on Educ. and the Workforce, to Eric H. Holder, Jr., Attorney Gen., U.S. Dep't of Justice (Sept. 17, 2012), *available at* http://edworkforce.house.gov/uploadedfiles/09-17-12_-_letter_to_attorney_general_holder_-_solomon_ig_investigation.pdf.

IV. The Boeing Case: The NLRB's Breach of the "Chinese Wall" and Delay in Investigation

On April 20, 2011, Richard L. Ahearn, Regional Director of Region 19 of the NLRB, issued a Complaint and Notice of Hearing against the Boeing Company for allegedly engaging in unfair labor practices in violation of 29 U.S.C. § 151 *et seq*.[56] The complaint alleged that Boeing violated federal labor law by deciding to transfer a second manufacturing production line of 787 Dreamliner airplanes to a non-union facility in South Carolina for discriminatory reasons.[57] Upon issuance of the complaint, Cause of Action and members of Congress raised concerns over the NLRB's potentially biased decision to sue Boeing, including *ex parte* communications occurring post-complaint. In particular, **a close relationship between Acting General Counsel Lafe Solomon and Board Chairman Wilma Liebman created the impression that the agency had failed to maintain a wall of separation between the General Counsel and Board**. Cause of Action alerted the OIG to these issues in November 2011, which was followed by a similar letter from Congressman Kline in April 2012. Despite receiving substantial evidence indicating ethical violations, the OIG waited until April 16, 2012 to open an investigation. A report was subsequently produced seven months later on November 19, 2012. Such delay in responding to credible allegations of impropriety, combined with the OIG's suspiciously prompt investigation of Republican NLRB members, strongly suggests that the OIG operates according to political motivations.

A. Breach of the Chinese Wall

Cause of Action alleges that a close connection between Acting General Counsel Lafe Solomon and former Board Chairman Wilma Liebman indicates that the NLRB lacks sufficient procedures to ensure fairness and objectivity in applying the NLRA. For instance, the OIG's investigation revealed that members of the General Counsel engaged in *ex parte* communications and that Wilma Liebman herself commented on General Counsel matters. The OIG report, however, failed to recognize the seriousness of this agency-wide problem, which has created a culture of non-compliance among NLRB members.

1. Cause of Action Presented the OIG with Credible Evidence of Pro-Union Bias and a Lack of Appropriate Firewalls Between the NLRB's General Counsel and Members of the Board

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."[58] 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."[59] The NLRB rules define "person outside this agency" to

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[56] Complaint at 1, *Boeing Co. v. Int'l Ass'n of Machinists and Aerospace Workers Dist. Lodge 751*, Case 19-CA-32431 (Apr. 20 2011) [hereinafter Complaint], *available at* http://www.nlrb.gov/sites/default/files/documents/443/cpt_19-ca -032431_boeing__4-20-2011_complaint_and_not_hrg.pdf.
[57] Complaint, *supra* note 56, at 5-6.
[58] 29 C.F.R. § 102.126(a).
[59] *Id*. § 102.126(b).

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**."[60] 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."[61] Thus, any communication by the General Counsel to the Board relevant to the Boeing case would appear to violate the statute.

On the basis of documents received by Cause of Action through FOIA requests, Cause of Action submitted a Request for Investigation on November 22, 2011 to the NRLB OIG regarding potential *ex parte* communications between then-Chairman of the Board Wilma Liebman and Acting General Counsel Lafe Solomon relating to the Boeing case.[62] Cause of Action's letter contained evidence that on May 3, 2011, 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 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."[63]

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[60] *Id.* § 102.127(a) (emphasis added).
[61] *Id.* § 102.128(e).
[62] On August 30, 2011, Cause of Action sent a FOIA to the NLRB requesting communications and records concerning the NRLB's decision to sue Boeing. Letter from Cause of Action, to Jacqueline A. Young, NLRB Freedom of Information Officer, Office of the Gen. Counsel, NLRB (Aug. 30, 2011) (on file with author). Subsequently, on September 12, 2011, Cause of Action sent a FOIA request to the NLRB requesting daily calendars of Board members, documents concerning the operating budgets of NLRB regional offices, and certain advertising documents. Letter from Cause of Action, to Jacqueline A. Young, NLRB Freedom of Information Officer, Office of the Gen. Counsel, NLRB (Sept. 12, 2011) (on file with author). These two FOIA requests were consolidated and Cause of Action began receiving production on September 19, 2011.
[63] E-mail from Wilma B. Liebman, Former Chairman, NLRB, to Nancy Cleeland, Dir., Office of Pub. Affairs, NLRB; Lafe E. Solomon, Acting Gen. Counsel, NLRB (May 3, 2011, 1:36 PM EST) (on file with author) [NLRB-FOIA-00000901-902].

The above-mentioned article is clearly written from a pro-union perspective and even specifically supports the NLRB's suit against Boeing. **By exchanging an e-mail expressing pro-union sentiments in relation to the NLRB's recent complaint against Boeing, it appears that Solomon and Liebman freely shared and discussed pending litigation, potentially compromising the intended separation between the Board and General Counsel**.

Furthermore, Liebman and Solomon were often co-recipients of e-mails, suggesting that others in the agency were aware of their close interactions. For example, Jose Garza of the NLRB Public Affairs Office forwarded an e-mail to Solomon and Liebman containing Senator Harry Reid's statements in support of the NLRB's decision to sue Boeing:

> 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] 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.[64]

While not part of the November 2011 letter, Cause of Action recently received a copy of a letter sent to Darrell E. Issa, Chairman of the U.S. House Committee on Oversight and Government reform. An insider described Solomon and Liebman as "close personal friends which has led to the "[b]reach of the 'Chinese Wall'" between the Board and the General Counsel.[65] The letter states that

> [i]n addition to their unprecedented daily morning meetings in her office, [Liebman's] Chief of Staff, Robert Schiff, who has been retained in that capacity by current Chairman Mark Pearce, attends Solomon's twice-weekly management meetings.[66]

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[64] E-mail from Jose Garza, Special Counsel for Cong. & Intergovernmental Affairs, Office of Pub. Affairs, NLRB, to Lafe E. Solomon, Acting Gen. Counsel, NLRB; Wilma Liebman, Former Chairman, NLRB; Nancy Cleeland, Dir., Office of Pub. Affairs *et al.*) (May 11, 2011, 9:45 EST) (on file with author) (forwarding e-mail from Adam Naill (Senate HELP) to Jose Garza) [NLRB-FOIA-00000777-778].

[65] Letter from Insider, to Darrell E. Issa, Chairman, Comm. on Oversight and Gov't Reform (Sept. 20, 2012) (on file with author).

[66] *Id.* at 2.

The author explained that these meetings have traditionally been attended only by the General Counsel's top managers in order to avoid the appearance that the General Counsel was being advantaged over other party-litigants.[67] However,

> [s]uch discussions are now routinely initiated by Mr. Solomon in the presence of Mr. Schiff. In fact, in the spring of 2011, the discussion of the upcoming issuance of complaint against Boeing was discussed in the General Counsel's staff meeting in the presence of Mr. Schiff.[68]

Taken as true, **the insider's allegations confirm Cause of Action's belief that Solomon and Liebman frequently interacted on matters involving pending litigation, in violation of the NLRB rules prohibiting *ex parte* communications and establishing a wall of separation between the Board and General Counsel**.

The seriousness of Solomon's communications with Liebman is demonstrated in Cause of Action's November 22, 2011 letter, which contains communications between the International Association of Machinists (IAM) and the Office of General Counsel indicating that the NLRB was motivated by pro-union bias in issuing its complaint against Boeing. If the General Counsel's motivation to issue a complaint was influenced by a pro-union bias, Solomon's frequent contact with the Board Chairman becomes even more problematic, especially considering that Solomon's communications with Liebman often involved sharing articles with a pro-union slant.

Under *Pillsbury Co. v. Federal Trade Commission*, **an agency performing adjudicative functions violates a party's due process rights if its decision-making is influenced by political factors extraneous to the merits of the case**.[69] As evidence of pro-union bias, Cause of Action attached an e-mail dated January 7, 2011 reflecting that Seattle NLRB Region 19 Regional Director Richard Ahearn, Solomon and IAM lawyers met only months before Solomon filed a complaint against Boeing:[70]

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[67] *Id.*
[68] *Id.*
[69] 354 F.2d 952, 964 (1966).
[70] E-mail from Richard Ahearn, Reg'l Dir., NLRB, to Lafe Solomon *et al*., (Jan. 27, 2011, 10:52 EST) [NLRB-FOIA-00000822].

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

In fact, the NLRB's communications with the IAM began as early as April 2, 2010, over a year before the Office of General Counsel sued Boeing. For instance, Richard Ahearn communicated with and had meetings with IAM attorney David Campbell, as well as other IAM lawyers and staff concerning the IAM's lawsuit against Boeing:[71]

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
This communication is protected by the attorney client and attorney work-product privileges. Please do not copy, forward or append.

[71] E-mail from David Campbell, Counsel to IAM, to Richard Ahearn, Reg'l Dir., NLRB (Apr. 2, 2010, 13:25 EST) (on file with author) [NLRB-FOIA-00000560].

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 sent just days before the complaint was issued:[72]

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

In addition to the NLRB's extensive contact with the IAM, pro-union bias within the NLRB is evidenced by an e-mail from Richard Ahearn to Lafe Solomon containing an anti-Boeing article in the *Seattle Times*, sent during the same month that Ahearn was meeting with IAM lawyers:[73]

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.nwsource.com/html/businesstechnology/2014048927_boeing27.html

[72] E-mail from Barry Kearney, Assoc. Gen. Counsel, Division of Advice, NLRB, to Richard Ahearn, Reg'l Dir., NLRB (Apr. 1, 2011, 14:30 EST) (on file with author) [NLRB-FOIA-00000572].
[73] E-mail from Richard Ahearn, Reg'l Dir., NLRB, to Lafe E. Solomon *et al.*, (Jan. 27, 2011, 10:52 EST) (on file with author) [NLRB-FOIA-00000822].

Communications evidencing a pro-union bias continued even after the complaint was issued. For instance, various e-mails were exchanged between members of the NLRB discussing news updates on Boeing—even praising articles giving positive coverage to the case. One such exchange occurred between Nancy Cleeland and Richard Ahearn:[74]

Microsoft Outlook

From: Cleeland, Nancy
Sent: Thursday, April 21, 2011 2:29 PM
To: Ahearn, Richard L.
Subject: RE: seattletimes.com: NLRB ruling: A speed bump on the race to the bottom

One of the better things I've read on this...

Nancy Cleeland
NLRB Director of Public Affairs
(202) 273-0222
nancy.cleeland@nlrb.gov

-----Original Message-----
From: Ahearn, Richard L.
Sent: Thursday, April 21, 2011 1:59 PM
To: Solomon, Lafe E.; Mattina, Celeste J.; Cleeland, Nancy; Kearney, Barry J.
Subject: seattletimes.com: NLRB ruling: A speed bump on the race to the bottom

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NLRB ruling: A speed bump on the race to the bottom

Excuse me for not getting hysterical over the National Labor Relations Board ruling that Boeing violated federal labor law by building a second 787 line at a non-union plant in South Carolina to retaliate against union workers here for past strikes.

http://seattletimes.nwsource.com/html/soundeconomywithjontalton/2014835671_nlrb_ruling_a_speed_bump_on_th.html

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http://www.seattletimescompany.com/advertise
for information.

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[74] E-mail from Nancy Cleeland, Dir., Office of Pub. Affairs, NLRB, to Richard Ahearn, Reg'l Dir., NLRB (Apr. 21, 2011 14:29 EST) (on file with author) [NLRB-FOIA-00000573].

An additional e-mail from Richard Ahearn to the NLRB Executive Secretary Les Heltzer forwarded a press release from the Democratic Policy and Communications Center, which quoted Senator Reid's above remarks:[75]

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&

DPCC DEMOCRATIC POLICY AND CON
(202) 2

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

[75] E-mail from Richard Ahearn, Reg'l Dir., NLRB, to Les Heltzer, Exec. Sec'y, Office of the Exec. Sec'y, NLRB (May 11, 2011, 14:54 EST) (on file with author) [NLRB-FOIA-00000640-642].

An e-mail from IAM 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 Campbell, once again demonstrating that the General Counsel kept union interests close:[76]

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
This communication is protected by the attorney client and attorney work-product privileges. Please do not copy, forwa
or append.

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

DPCC DEMOCRATIC POLICY AND C
(202

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

The above evidence of pro-union bias, in conjunction with Solomon's close contact with Liebman, suggests that the NLRB lacks firewalls to prevent General Counsel members from

[76] E-mail from David Campbell, Counsel to IAM, to Richard Ahearn, Reg'l Dir., NLRB (May 11, 2011, 11:18 PST) (on file with author) [NLRB-FOIA-00000672].

potentially influencing the Board. Further, the communications contradict Solomon's claim that his decision to issue a complaint "was not in any way influenced by any external factors."[77] In fact, the NLRB ultimately withdrew its complaint against Boeing in December 2011, bolstering the claim that the suit was merely a "shameless campaign to bully an American employer."[78]

2. Congressman Kline's April 13, 2012 Letter to the OIG Regarding *Ex Parte* Communications Between Solomon and Liebman

On April 13, 2012, five months after Cause of Action submitted its Request for Investigation to the NLRB OIG, Congressman Kline requested that the OIG "commence an investigation to determine whether Acting General Counsel Lafe Solomon or his staff made any ex parte communications regarding the Boeing case."[79] Kline expressed concern that Solomon and Liebman improperly discussed the Boeing case in April 2011, while litigation was pending. Kline's letter cited a chain of e-mails obtained through Cause of Action's FOIA requests, beginning with an e-mail from Nancy Cleeland, Director of the Office of Public Affairs at the NLRB, to Tom Bettag, executive producer of CNN's State of the Union, in which she communicated her concern in how the media was characterizing the Boeing complaint:[80]

[77] Letter from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to Darrell Issa, Chairman, Comm. on Oversight and Gov't Reform, U.S. House of Representatives (Oct. 21, 2011), *available at* http://www.nlrb.gov/sites/default/files/documents/967/10-21.pdf.

[78] Press Release, U.S. House Comm. on Educ. & the Workforce, Kline Statement on NLRB Decision to Withdraw Boeing Complaint (Dec. 9, 2011), *available at* http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID= 271939.

[79] Letter from John Kline, Chairman, Comm. on Educ. and the Workforce, U.S. House of Representatives, to David P. Berry, Inspector Gen., NLRB (Apr. 13, 2012) (on file with author).

[80] Letter from Nancy Cleeland, Dir., Office of Pub. Affairs, NLRB, to Tom Bettag (Apr. 29, 2011) (on file with author) [FOIA-00002859]; Letter from Tom Bettag, to Nancy Cleeland, Dir., Office of Pub. Affairs, NLRB (Apr. 29, 2011) (on file with author) [FOIA 00002859-60].

NLRB Director of Public Affairs
(202) 273-0222
nancy.cleeland@nlrb.gov

From: Tom Bettag [mailto:Tom.Bettag@turner.com]
Sent: Friday, April 29, 2011 1:31 PM
To: Cleeland, Nancy
Subject: Re: Senator Graham's statements

Dear Nancy,
Let me come back to you at the end of the week with where we are. We'll do something on Sunday, but it will be very short.

It seems there are two significant points, and correct me if you think there are more:
1) You say in your fact check that news organizations erroneously report that Boeing is being ordered to close its plant when it is only being challenged on its production of Dreamliners. That should be duly noted, but Boeing and Sen. Graham (among others) contend that the purpose of the plant was to specifically produce Dreamliners. I understand your point, but isn't it fair to say that both things can be true?

2) You make a point of the separation between the Board and the General Counsel and point to the show's title as being "NLRB rules against Boeing." I can only point to your news release which uses this headline: "National Labor Relations Board issues complaint against Boeing Company for unlawfully transferring work to a non-union facility." Everyone we turn to for guidance says this is a blurry line, and that a complaint by the General Counsel can be called a complaint by the NLRB. Is this as critical as your desire do be clear about not ordering the plant closed?

I can see that this has become broad enough that this will quickly get to be a headache for you. We're going to try to get past it. And FYI the White House declines comment.

Tom

On 4/27/11 3:52 PM, "Cleeland, Nancy" <Nancy.Cleeland@nlrb.gov> wrote:

Hi Tom,

Thanks so much for getting back to me. I appreciate the opportunity to explain my concerns. Yesterday, we put out a 'Fact Check' that attempted to correct the misinformation we've seen out there, which was repeated on your show – not only by Sen. Graham but by Candy Crowley herself. This is what we said:
Several news outlets have erroneously reported in recent days that the National Labor Relations Board has ordered the Boeing Company to close its operations in South Carolina. In fact, the complaint issued on April 20 by the Acting General Counsel <http://www.nlrb.gov/news/national-labor-relations-board-issues-complaint-against-boeing-company-unlawfully-transferring-> does not seek to have the South Carolina facility closed. It seeks to halt the transfer of a specific piece of production work due to allegations that the transfer was unlawfully motivated. The complaint explicitly states that Boeing may place work where it likes, including at its South Carolina facility, as long as the decision is not made for discriminatory reasons.

In addition, the Board has not yet considered or ruled on the allegations in the complaint. Under the NLRB's statute, the General Counsel and the Board are separate and independent, with the General Counsel functioning as prosecutor and the Board functioning as a court. The case is scheduled to be tried before an administrative law judge, acting under the Board's authority. That decision could then be appealed to the Board itself for its decision.

These may seem to be fine points, but in fact they are very significant. When the show's title said "NLRB rules against Boeing', it fed into the idea that this was a political decision made by a political body. In fact, the Acting General Counsel – who is a career NLRB attorney recently named to the job - merely issued a complaint, which is the first step in the

process. He alleged that Boeing broke the law, but now the case must be heard by an NLRB judge and perhaps ultimately the Board.

Also, both Candy Crowley and Sen. Graham repeatedly said that the NLRB told Boeing they had to close the South Carolina plant. That is absolutely not true. There is a finite amount of work in question – basically 3 planes a month. Boeing has tremendous backlogs and could locate more work in SC.

I'd be happy to discuss this further. For better or worse, we've been in the news a fair amount lately, and probably will continue to be. I'm a long time journalist myself – just left the LATimes three years ago after a decade as their labor writer, and have been here at the NLRB for a year and a half. I'm also a fan of Candy Crowley's, so was sorry to have to write that comment.

Thanks again,

Nancy Cleeland

NLRB Director of Public Affairs

(202) 273-0222

nancy.cleeland@nlrb.gov

From: Tom Bettag [mailto:Tom.Bettag@turner.com]
Sent: Wednesday, April 27, 2011 3:26 PM
To: Cleeland, Nancy
Subject: Senator Graham's statements

Dear Ms. Cleeland,
I am the executive producer of State of the Union. Your e-mail was passed to me, and I am the correct person to deal with.

You say there are "some errors," and:
Please contact me to avoid repeating them. Also, why no attempt to contact us to balance your piece with Sen. Graham?

There is a simple answer to your question. We are a Sunday morning talk show where we allow guests to have their say, and we are more than happy to continue reporting on what they say if the record needs correcting. We made it clear after we aired Senator Graham's statements that we would continue reporting in order to give the full story. The truth of the matter is that we did send word to our contact at the White House that this issue was going to come up, and there has been no response whatsoever.

We pride ourselves on accurate and fair reporting, and we are more than happy to pursue this further. What is it in Sen. Graham's statements that you consider to errors?

Tom Bettag

Various other members of the NLRB also weighed in on the media issue:[81]

Microsoft Outlook

From: Cleeland, Nancy
Sent: Friday, April 29, 2011 3:58 PM
To: Ahearn, Richard L.; Solomon, Lafe E.; Liebman, Wilma B.; Garza, Jose
Cc: Farrell, Ellen; Kearney, Barry J.; Sophir, Jayme
Subject: RE: CNN questions on correction

Thanks for the great ideas everyone. I will try to consolidate them into a couple of answers and circulate them for suggestions.

Nancy Cleeland
NLRB Director of Public Affairs
(202) 273-0222
nancy.cleeland@nlrb.gov

From: Ahearn, Richard L.
Sent: Friday, April 29, 2011 3:55 PM
To: Cleeland, Nancy; Solomon, Lafe E.; Liebman, Wilma B.; Garza, Jose
Subject: RE: CNN questions on correction

[redacted]

Exemption 5

Rich

From: Cleeland, Nancy
Sent: Friday, April 29, 2011 12:16 PM
To: Solomon, Lafe E.; Liebman, Wilma B.; Garza, Jose; Ahearn, Richard L.
Subject: CNN questions on correction

[redacted]

Exemption 5

Thanks

Nancy Cleeland

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[81] Letter from Nancy Cleeland, Dir., Office of Pub. Affairs, NLRB, to Richard Ahearn *et al*. (Apr. 29, 2011) (on file with author) [NLRB FOIA-00002858].

In fact, it appears that Wilma Liebman and Lafe Solomon communicated on this very issue:[82]

Microsoft Outlook

From: Liebman, Wilma B.
Sent: Friday, April 29, 2011 6:24 PM
To: Farrell, Ellen; Solomon, Lafe E.; Cleeland, Nancy; Garza, Jose; Ahearn, Richard L.; Kearney, Barry J.; Sophir, Jayme
Subject: RE: CNN questions on correction

[redacted]
Exemption 5

From: Farrell, Ellen
Sent: Friday, April 29, 2011 3:49 PM
To: Solomon, Lafe E.; Cleeland, Nancy; Liebman, Wilma B.; Garza, Jose; Ahearn, Richard L.; Kearney, Barry J.; Sophir, Jayme
Subject: RE: CNN questions on correction

[redacted]
Exemption 5

Ellen

Ellen Farrell
Deputy Associate General Counsel
Division of Advice, NLRB
202-273-3810
Ellen.Farrell@nlrb.gov

From: Solomon, Lafe E.
Sent: Friday, April 29, 2011 3:31 PM
To: Cleeland, Nancy; Liebman, Wilma B.; Garza, Jose; Ahearn, Richard L.; Kearney, Barry J.; Farrell, Ellen; Sophir, Jayme
Subject: RE: CNN questions on correction

[redacted]
Exemption 5

From: Cleeland, Nancy
Sent: Friday, April 29, 2011 3:16 PM

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As Kline acknowledged, the redaction of the substance of the e-mails makes it difficult to determine whether they definitively contained prohibited *ex parte* communications. The e-mails, however, are part of a chain of conversations among NLRB employees discussing how to handle media messaging for the Boeing complaint in order to avoid the perception that it was a political decision. In fact, in a letter from Lafe Solomon to Cause of Action, dated April 9, 2012,

[82] Letter from Wilma Liebman, Former Chairman, NLRB, to Lafe E. Solomon, Acting Gen. Counsel, NLRB *et al.* (Apr. 29, 2011) (on file with author) [NLRB FOIA-00002900].

Solomon stated that "[t]he previously redacted portions of these documents . . . demonstrate that [the] Agency's internal deliberations were structured to specifically respond to the two questions posed by the CNN producer."[83] Thus, Solomon clearly acknowledged that he and Liebman were engaged in communications about press strategy concerning the Boeing case. This is particularly troublesome since Liebman, as the then-Chairman, would preside over the Boeing case in the event it reached the appellate level after being heard by an administrative law judge. Such communications cast doubt on Solomon's claim that the "NLRB takes seriously the separation between the Office of the General Counsel and Board."[84]

3. Wal-Mart Redux: The OIG's Failure to Hold NLRB Members Responsible for *Ex Parte* Communications

On April 16, 2012, the OIG responded to Chairman Kline's request for investigation, stating that "[w]e will take appropriate investigative action and provide a report to the Committee . . . upon completion of our work."[85] On November 19, 2012, the OIG released a report to the Committee which concluded that "NLRB personnel did not engage in misconduct," although "the Agency's public affairs activities could benefit from more closely defined policies and procedures."[86]

The OIG's report contained the same e-mails obtained by Cause of Action and attached to Kline's letter, although all redactions were removed. Removal of the redactions revealed Solomon's response to Nancy Cleeland's question about press strategy:[87]

From: Cleeland, Nancy
Sent: Friday, April 29, 2011 3:16 PM
To: Solomon, Lafe E.; Liebman, Wilma B.; Garza, Jose; Ahearn, Richard L.
Subject: CNN questions on correction

The CNN Sunday morning show has spent a lot of time this week looking into our complaint about last week's show, where they aired Sen. Graham and Candy Crowley repeated some of his remarks as if they were true. Now they're coming back to us with the other side's responses. I'd appreciate any input on these questions.

On #1, Boeing folks are still saying we're in fact making them close the SC plant because it was specifically built to assemble Dreamliners. What's the best way to explain this? They've done a good job of making it seem like it's a distinction without a difference.

On #2, they don't seem to think there's much difference between the NLRB issuing a complaint and ruling on a case. I can understand their confusion, but there is a big difference. Any thoughts about how to underscore that point?

From: Solomon, Lafe E.
Sent: Friday, April 29, 2011 3:31 PM
To: Cleeland, Nancy; Liebman, Wilma B.; Garza, Jose; Ahearn, Richard L.; Kearney, Barry J.; Farrell, Ellen; Sophir, Jayme
Subject: RE: CNN questions on correction

As to 1, we want them to keep using the main line and the surge line building planes in Seattle; they can build even more planes in SC. Everyone agree?

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[83] Letter from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to Cause of Action (Apr. 9, 2012), *available at* http://causeofaction.org/wp-content/uploads/2012/04/2012-4-9-NLRB-FOIA-production-letter-re-Appeal-LR-2012-0125.pdf.

[84] Letter from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to Darrell Issa, Chairman, Comm. on Oversight and Gov't Reform (Oct. 21, 2011), *available at* http://www.nlrb.gov/sites/default/files/documents/967/10-21.pdf

[85] Letter from David Berry, Inspector Gen., NLRB, to John Kline, Chairman, Comm. on Educ. & the Workforce, U.S. House of Representatives (Apr. 16, 2012) (on file with author).

[86] NAT'L LABOR RELATIONS BD., OFFICE OF INSPECTOR GEN., REPORT OF INVESTIGATION – OIG-I-473 (Nov. 19, 2012), *available at* http://edworkforce.house.gov/uploadedfiles/11-19-12_nlrb_ig_ex_parte.pdf [hereinafter BOEING REPORT].

[87] BOEING REPORT, *supra* note 86, ¶ 4, at 2.

When interviewed regarding his e-mail, Solomon claimed that "[h]is focus, at the time, was on providing assistance to the Director of Public Affairs, rather than communicating with the Chairman."[88] The report, however, ignores the fact that Solomon could have easily removed Liebman as a recipient, thereby avoiding any potential *ex parte* concerns.

The OIG's report also revealed communications by Ellen Farrell, the former Deputy Associate General Counsel within the Division of Advice, in which she replied to Solomon's comments in an e-mail sent to all recipients—including Liebman:[89]

From: Farrell, Ellen
Sent: Friday, April 29, 2011 3:49 PM
To: Solomon, Lafe E.; Cleeland, Nancy; Liebman, Wilma B.; Garza, Jose; Ahearn, Richard L.; Kearney, Barry J.; Sophir, Jayme
Subject: RE: CNN questions on correction

We agree with Lafe. We can also point out that the Co. has a backlog of orders of somewhere around 850 planes. So there is room for additional production. I would guess the response from Boeing would be that they can't get their supply chain to provide for assembly of more than 10 planes per month so, as a practical matter, they cannot increase their production capacity even if they have the physical space.

Does anyone find it significant that they have continued the construction in the face of the charge filed in March 2010 and an investigation and efforts to settle in which they were closely involved. They have known for over a year that there was a risk of a complaint issuing but chose to take that risk. We don't have a lot of information about how specialized the facility was a year ago and whether it could have been converted to some other use at that time. But this may be an argument that's too sophisiticated for a CNN soundbite.

As to #2, it seems the problem is not so much distinguishing between the NLRB (Board) and NLRB (GC) – but distinguishing between a ruling and a complaint. A complaint is an allegation; a ruling is a finding. And no finding has yet been made.

Like Solomon, Farrell also defended her e-mail message, stating that "[s]he did not intend for her e-mail . . . to be an ex parte communication" because she "believed that the statements that were in her e-mail response had already been made publicly by Boeing or in some other public discussion."[90]

In response to Farrell's e-mail, Jayme Sophir, the former Regional Advice Branch Chief in the Division of Advice, provided her input on how to characterize the requested remedy, again including Liebman as a recipient:[91]

From: Sophir, Jayme
Sent: Friday, April 29, 2011 4:01 PM
To: Farrell, Ellen; Solomon, Lafe E.; Cleeland, Nancy; Liebman, Wilma B.; Garza, Jose; Ahearn, Richard L.; Kearney, Barry J.
Subject: RE: CNN questions on correction

One further point on #1 – even if they built the SC plant specifically to produce Dreamliners. I don't think they've ever said that the plant couldnt be used to produce other kinds of airplanes. Its basically an assembly facility. And, in addressing the Union's argument that closing the surge line will necessarily impact employee jobs in Washington (even though there hasn't yet been any impact), they've told us that other kinds of planes could easily be produced in that facility instead Why would it be any different at the South Carolina facility?

<u>Sophir admitted that her e-mail addressed substantive issues that "arguably should not have been shared with Chairman Liebman</u>."[92] However, she explained that the

[88] *Id.* ¶ 5, at 2.
[89] *Id.* ¶ 7, at 3.
[90] *Id.* ¶ 8, at 3.
[91] *Id.* ¶ 9, at 4.
[92] *Id.* ¶ 10, at 4 (emphasis added).

communication was inadvertent because she "was not paying attention to the fact that Chairman Liebman was included on the e-mail thread."[93]

Finally, Richard Ahearn, the Region 19 Director, sent a response to Nancy Cleeland's media inquiry:[94]

From: Ahearn, Richard L.
Sent: Friday, April 29, 2011 3:55 PM
To: Cleeland, Nancy; Solomon, Lafe E.; Liebman, Wilma B.; Garza, Jose
Subject: RE: CNN questions on correction

#1 In the article you sent today Boeing expressed optimism that they could be producing (I believe) up to 14 Dreamliners per month. We are only contending that their decision to place the second line at a union facility was unlawful because that decision was motivated by a desire to retaliate. If they decided for non discriminatory reasons to place a third Dreamliner line outside of Puget Sound, we would have no issue with that. Moreover, they are now doing other work there which we are not seeking to stop and they can decide to locate additional work there, as long as for lawful reasons

Like other General Counsel members, Ahearn defended his actions by stating that he only intended to communicate with Cleeland—not the other individuals to whom his message was sent.[95] Ahearn claimed that he clicked "reply all" because he was in a rush to respond quickly since media deadlines were involved.[96]

The OIG report not only reveals that General Counsel members improperly included Liebman on e-mails addressing the Boeing complaint, but that Liebman herself actively participated in the discussion:[97]

From: Liebman, Wilma B.
Sent: Friday, April 29, 2011 6:24 PM
To: Farrell, Ellen; Solomon, Lafe E.; Cleeland, Nancy; Garza, Jose; Ahearn, Richard L.; Kearney, Barry J.; Sophir, Jayme
Subject: RE: CNN questions on correction

I am reluctant to get into this writing by committee. And probably I am too late, but I think Ellen misses the political point that is lurking here: the difference in re #2 is of course between issuance of a complaint and a ruling, but most certainly it is also about the complete independence of the General Counsel and the Board itself. If the reasons aren't apparent to each of you why that distinction is important, then come and talk to me.

Liebman claimed that her communication was intended to explain the difference between the General Counsel issuing a complaint and the Board making a ruling.[98] In fact, "[t]he notion of ex parte communication did not enter [Liebman's] mind and she was only focused on the issue involving the Board."[99] However, the report noted that "[a]t some point in the discussion, **[Cleeland] removed Chairman Liebman from the e-mail thread because someone expressed a concern about maintaining the separation between the Board and the General Counsel**."[100] Cleeland claimed that she could not recall who expressed these concerns,[101] although the report states that **Barry Kearney**, the Associate General Counsel in the Division of

[93] BOEING REPORT, *supra* note 86, ¶ 10, at 4.
[94] *Id.* ¶ 11, at 4.
[95] *Id.* ¶ 12, at 4.
[96] *Id.* ¶ 12, at 5.
[97] *Id.* ¶ 14, at 5.
[98] *Id.* ¶ 15, at 5-6.
[99] BOEING REPORT, *supra* note 86, ¶ 15, at 6.
[100] *Id.* ¶ 16, at 6 (emphasis added).
[101] *Id.* ¶ 16, at 6.

Advice**, felt that Liebman's response to Farrell was inappropriate because it was an "intrusion into a discussion about how [Solomon] was going to defend his complaint in the media**."[102]

The OIG concluded that the e-mail replies by Farrell, Ahearn and Sophir were *ex parte* communications because they were relevant to the merits of the Boeing matter. The report explained that because the e-mails discussed the "appropriateness of the remedy sought in light of what is described as a failure by Boeing to mitigate its possible losses," they inappropriately discussed the merits of the case.[103] Despite the OIG's determination that the e-mails constituted prohibited *ex parte* communications, it ultimately found that no misconduct occurred because the e-mails were "inadvertent" and sought to address media issues rather than persuade Board members.[104] Thus, the OIG accepted Farrell, Ahearn and Sophir's claims that they merely intended to communicate with Cleeland, even though their responses were also directed to Liebman. Similarly, the OIG concluded that Liebman's e-mail reply to Farrell's comments "[did] not evidence an attempt to influence [Solomon's] prosecution" of the Boeing matter," although the report failed to further analyze Liebman's communication.[105]

The OIG's focus on the members' mental state for purposes of determining an *ex parte* communication completely misconstrues the law. Under 29 C.F.R. § 102.126(a), "[n]o interested outside person shall . . . **make or knowingly cause to be made** any prohibited ex parte communication to Board agents."[106] Based on this language, there is no specific intent requirement contained in the regulation because it is enough that an individual simply "makes" the prohibited *ex parte* communication without also knowing that it is prohibited. Accordingly, the OIG should have ignored any claims of inadvertency after determining that the communications were *ex parte*. Instead, it made excuses for the prohibited communications and downplayed evidence of a widespread problem within the agency. As seen throughout the e-mail exchanges, agency members appeared comfortable engaging in improper communications. Even Liebman suggested that these types of communications occurred frequently as the report stated that Liebman previously expressed to Cleeland her concerns about the "inefficiencies of having a conversation with such a large group of people."[107]

Even assuming that it is appropriate to evaluate the mental state of individuals under 29 C.F.R. § 102.126(a), **Liebman's e-mail clearly indicates her desire to control the direction of the litigation**. She specifically states that, "Ellen misses the political point that is lurking here."[108] Therefore, Liebman's claims that she could not recall reading all the messages or that "the notion of ex parte communication did not enter her mind" are unpersuasive.[109] The language in her e-mail discussing the underlying political issue clearly militates against the OIG's conclusion that Liebman's reply was not an attempt to influence Solomon's prosecution of Boeing.

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[102] *Id.* ¶ 13, at 5 (emphasis added).
[103] *Id.* at 8.
[104] *Id.* at 9.
[105] BOEING REPORT, *supra* note 86, at 7.
[106] 29 C.F.R. § 102.126(a) (emphasis added).
[107] BOEING REPORT, *supra* note 86, ¶ 16, at 6.
[108] *Id.* ¶ 14, at 5.
[109] *Id.* ¶ 15, at 6.

In defending the actions of the General Counsel members, the OIG also cited the Memorandum of Understanding (MOU) between Liebman and Solomon regarding the conditions under which Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, would provide assistance to Solomon.[110] Pursuant to the MOU, Garza would be considered Solomon's representative for purposes of the Board rules prohibiting *ex parte* communications.[111] **As a result, Garza could not communicate, directly or indirectly, with the Chairman, Board members, or their legal assistants regarding any information he received from Solomon about the Boeing case**.[112] The OIG referenced the MOU as evidence that Liebman and Solomon took seriously the need to avoid *ex parte* communications.[113] **The OIG's reliance on the MOU, however, is seriously undermined by the fact that Garza was included in the e-mail sent by Liebman**.[114] Thus, the existence of the MOU was clearly not enough to prevent improper *ex parte* communications from occurring within the NLRB and accordingly should not have been a basis for the OIG's conclusion that Liebman and Solomon took seriously the wall of separation between the Board and General Counsel.

The OIG's acceptance that the e-mail messages were "inadvertent" is also unacceptable because it ignores the fact that the Deputy Associate General Counsel, Regional Advice Branch Chief and the Regional Director were all attorneys who should have been vigilant about ensuring separation between the Board and General Counsel. Therefore, they should have been constantly aware of who they were communicating with and the contents of that communication. If Kearney understood the inappropriateness of the above communications, then all members of the General Counsel—including Sophir, Ahearn and Farrell—should have also immediately recognized the ethical implications of discussing press strategy with the Board Chairman. Similarly, since Liebman's e-mail acknowledges the independence of the Board and General Counsel, she should have also removed herself from the conversation since she was clearly aware that her involvement in General Counsel matters was inappropriate.

In analyzing Solomon's e-mail communication, the OIG found that Solomon's e-mail did not constitute an improper *ex parte* communication because it was not relative to the merits of the proceeding, as is required under 29 C.F.R. § 102.126(a).[115] Unlike the e-mails from Ahearn, Sophir and Farrell which touched on the appropriateness of the remedy, the OIG concluded that Solomon's e-mail message merely restated the remedy sought. However, Solomon's statement does in fact seem to discuss "the appropriateness of the remedy sought" since he states that "[Boeing] can build even more planes in [South Carolina]," suggesting that the proposed remedy is fair to Boeing and will not interfere with its ability to build planes in that state. **Accordingly, the OIG should not have distinguished Solomon's email from those sent by Ahearn, Sophir and Farrell since Solomon's message also discusses the fairness of the requested remedy**.

Further, Solomon's communication does not fall within any of the enumerated permissible *ex parte* communications under 29 C.F.R. § 102.130. Subsection (c) states that

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[110] *Id.* at 9.
[111] *Id.* ¶ 18, at 7.
[112] *Id.* ¶ 18, at 7.
[113] BOEING REPORT, *supra* note 86, at 9.
[114] *Id.* ¶ 14, at 5.
[115] *Id.* at 8.

"oral or written communications which all the parties to the proceeding agree . . . may be made on an ex parte basis." Since Solomon's e-mail message ended with him asking whether everyone agreed with his interpretation of the remedy, his e-mail is not a statement which "all the parties to the proceeding agree" since not even the General Counsel was clear on the requested remedy. While the OIG found that Solomon's e-mail was merely a "restatement of the remedy," Solomon's indication that the Office of General Counsel was unclear as to the remedy suggests that his e-mail may have been more troublesome than the OIG report was willing to acknowledge.

B. The OIG's Delay in Responding to Evidence of *Ex Parte* Communications Suggests It Conducts Investigations in an Arbitrary and Capricious Manner

Upon receiving Cause of Action's November 22, 2011 letter, the OIG waited five months to initiate an investigation into *ex parte* communications and another seven months to issue a report. In contrast, the OIG quickly investigated Republican Board Members Terence Flynn and Brian Hayes, completing the investigations within five months—and without any apparent publicized request for investigation from a Congressional committee. The OIG's failure to act on Cause of Action's allegations, combined with the OIG's penchant for investigating Republican members, strongly suggests that the OIG conducts its investigations in an arbitrary and capricious manner.

1. The OIG's Failed to Respond and Act upon Evidence Contained in Cause of Action's November 2011 Letter

When the OIG issued its report to the Committee on November 19, 2012, conspicuously absent was any mention of Cause of Action's November 2011 letter. Instead, the report stated that "we received a request from the Committee on Education and the Workforce" which "included several redacted e-mail messages that have been provided to a [FOIA] requester."[116] The OIG failed to specifically acknowledge Cause of Action as that FOIA requester, presumably because it was aware that no action was taken in response to Cause of Action's FOIA request, as the OIG neither admitted nor denied the existence of information "referring or relating to Cause of Action's November 22, 2011 request for an NLRB OIG investigation" because "any such confirmation or denial would harm the interest protected by FOIA Exemptions 6, 7(C), and 7(D)."[117] **It appears as though the OIG wanted to avoid admitting that it received credible information regarding *ex parte* communications months before deciding to open an investigation**.

It is puzzling why the OIG ignored Cause of Action's November 2011 letter but initiated an investigation into possible *ex parte* communications only upon receiving a request from Chairman Kline—especially considering that the attached e-mails forming the basis of Kline's letter were obtained through Cause of Action's FOIA requests. Therefore, the only meaningful distinction between Kline's letter and Cause of Action's is the fact that a Congressional committee requested an investigation, rather than a private organization.

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[116] *Id.* at 1.

[117] Letter from Jennifer Matis, Counsel to the Inspector Gen., NLRB, to Cause of Action (Sept. 21, 2012) (on file with author).

According to the OIG website, the OIG initiates investigations based on information originating from many different sources, including anonymous tipsters.[118] Similarly, the OIG manual describes how every complaint is logged by the Staff Assistant and reviewed by the Counsel.[119] A case is then initiated "based upon factors deemed relevant, including the public's need to know."[120] According to this information, there is no requirement that evidence sufficient for prompting an investigation originate from any particular source. The seriousness of the complaint, rather than its source, seems to be the determining factor in whether the OIG acts on a complaint. **Therefore, the fact that a private entity rather than a Congressional committee supplied the relevant evidence should have no bearing on the OIG's decision to open an investigation**.

Considering that Cause of Action's November 2011 letter concerned the same allegations and substantially similar evidence as Chairman Kline's letter, there is no explanation for the OIG's failure to initiate an investigation upon receiving Cause of Action's letter. The only logical conclusion is that the OIG found Cause of Action's claims to be non-credible. For instance, the OIG states that upon receiving allegations of misconduct, it

> reviews the information and makes an initial determination of what action is required. If an allegation appears to be credible, the OIG will generally take one of three actions: (1) initiate an investigation; (2) initiate an audit or inspection; or (3) refer the allegation to management or another agency.[121]

The above information suggests that because the OIG neglected to act upon Cause of Action's letter, the OIG's initial determination of the letter likely concluded that Cause of Action's claims were without merit. Since Kline and Cause of Action's letter were substantially similar, it appears that the OIG initiates investigations in an arbitrary and capricious manner, choosing to respond only to certain requests, while ignoring others based on substantially similar claims and evidence.

In any event, the OIG manual states that "[i]nvestigations will be conducted in a timely . . . manner."[122] Over one year has passed since the OIG first received information regarding *ex parte* communications. Such a delay in investigation suggests that the OIG failed to appropriately respond to serious misconduct occurring within the agency.

2. The OIG Actively Pursues Investigations of Republican Members

In contrast to the OIG's delayed response to allegations of *ex parte* communications between Solomon and Liebman, the OIG has had a much more successful track record in investigating Republican Members. For instance, the two NLRB OIG investigative reports included in the last Semiannual Report both involved Republican members of the NLRB. Report

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[118] *See Office of Inspector General – Investigations*, NLRB, http://www.nlrb.gov/who-we-are/inspector-general/oig-investigations (last visited Nov. 20, 2012).
[119] NAT'L LABOR RELATIONS BD., OIG INVESTIGATIONS MANUAL 8 (2003).
[120] *Id.*
[121] *See Office of Inspector* General, *supra* note 118.
[122] *Id.* at 5.

OIG-I-467 relates to the OIG's investigation of Republican Board Member Brian C. Hayes[123] and Report OIG-I-468 relates to the OIG's investigation of former Republican Counsel and Board Member Terence Flynn.[124]

Deposition transcripts from March 15, 2012[125] related to the OIG's investigation into Terence Flynn create the impression that the OIG maintained "too closed a mind" in its investigations.[126] While proper investigative interviews are designed to develop facts, deposition testimony reflects the IG's active disagreement with Terence Flynn:

> [MR. FLYNN:] [M]y sense of this is that there is no predicate for this investigation, none. And that the kind of thing that we're talking about here is the kind of thing that would surface if you looked at any government official's e-mail. . . . By saying this, I don't mean to concede any even technical wrongdoing because I don't believe any occurred. But to the extent an argument could be made that any sort of de minimis forwarding of internal government material might have occurred, it is de minimis and not something that should be the subject of an investigation. You know investigative activity even by an IG or the Department of Justice or anybody else has a chilling effect on a person's activities and creates a lot of anxiety. And my suggestion is that there is, like I said, no predicate for this one. And that it should be closed down.
>
> MR. BERRY: Okay. Well, I respectfully disagree with you. And we will be issuing a report.[127]

Based on the IG's response, Mr. Flynn's counsel, former DOJ Inspector General Glenn Fine, asked the IG, "What's the predicate for looking at all of [Mr. Flynn's] e-mails was [sic] as opposed to looking at somebody else's emails . . . And has this been a fair and universal look at e-mails in the NLRB or is it just focusing on one or two individuals?"[128] Following this inquiry, the IG responded:

> MR. BERRY: This came up as a result of another investigation. So this is not that we just went and pulled his e-mail account and decided to look at him. It came up in the course of a different investigation. And, actually, it came up because of his – got initiated because of his communications with Peter Kirsanow.

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[123] *See* NAT'L LABOR RELATIONS BD., OFFICE OF INSPECTOR GEN., REPORT OF INVESTIGATION – OIG-I-467 (Jan. 23, 2012) [hereinafter HAYES REPORT], *available at* http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/document s/112/pdf/NLRBOIGReport.pdf.

[124] *See* NAT'L LABOR RELATIONS BD., OFFICE OF INSPECTOR GEN., REPORT OF INVESTIGATION – OIG-I-468 (Mar. 19, 2012), *available at* http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/letters/DOCFlynnTransmittal.PDF.

[125] Investigative Interview of Terence Flynn, *In re* Terence Flynn, Case No. OIG-I-468, (Mar. 15, 2012), *available at* http://democrats.edworkforce.house.gov/blog/exhibits-referenced-nlrb-inspector-general-and-provided-committee [hereinafter Flynn Deposition].

[126] *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988).

[127] Flynn Deposition, *supra* note 125, at 69.

[128] *Id.* at 69-70.

> MR. FINE: But have you done this with others as well or is this just simply focused on him? Because I think –
>
> MR. BERRY: Well, I'm not –
>
> MR. FINE: . . . [T]he kinds of things that we're seeing here are the kinds of things that I would venture to say happens quite frequently. And that if you're looking at one, are you going to also look at others as well.
>
> MR. BERRY: If I have evidence other people are engaging in this type of conduct, we would look at other individuals. But I'm not going to go look at everyone's e-mail account without some basis for doing so. We looked at Mr. Flynn's e-mail account because we had a basis for doing so. We don't routinely just go look at e-mail accounts.
>
> MR. FINE: Well, but if you see that it is happening on one or what you believe is happening in one instance, wouldn't you want to go look and see whether it is happening in others as well?
>
> MR. BERRY: **Well, I think you would have to have some basis to believe that it is happening with other individuals. We haven't**.[129]

If the NLRB OIG requires "some basis to believe" improper activity is occurring before initiating an investigation, Cause of Action's November 22, 2011 letter should have formed such a basis. Instead, the OIG either ignored Cause of Action's letter or determined that the allegations were not credible, indicating that the agency acted in an arbitrary and capricious manner. In fact, the OIG's investigation into Flynn and Hayes was initiated without any Congressional prompting. Similarly, the investigation was completed within five months, while it took one year for the OIG to investigate *ex parte* communications in the Boeing case, and which ultimately resulted in the OIG overlooking the misconduct.[130] It appears as though the OIG has a permissive attitude toward investigating Republican members but delays following up on evidence strongly suggesting that Democratic members may have also committed ethical violations. Furthermore, as Mr. Fine suggested, the OIG's investigation into Mr. Flynn should have alerted the OIG to the possibility that a broader problem existed within the agency. Instead, the OIG focused solely on one individual. Such a targeted approach indicates that the OIG was more concerned with prosecuting Republican members than with genuinely investigating ethics violations. Mr. Fine's extensive experience as a former Inspector General at the DOJ, with a

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[129] *Id.* at 70-71 (emphasis added).

[130] The investigation of Brian Hayes began in December 2011, and the investigation into Terence Flynn ended April 30, 2012. *See* NAT'L LABOR RELATIONS BD., OFFICE OF INSPECTOR GEN., SUPPLEMENTAL REPORT OF INVESTIGATION – OIG-I-468 (Apr. 30, 2012), *available at* http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/FlynnSupplementReport4-30-12.pdf; HAYES REPORT, *supra* note 123 (referencing interviews from December 2011).

reputation for being both "fair and aggressive," lends credence to his critique of the OIG's investigations.[131]

C. The NLRB's Attempt to Avoid Public Inquiry into Unethical Conduct Occurring Throughout the Boeing Litigation

The NLRB's interactions with Congressional committees as well as responses to Cause of Action's FOIA requests suggest that the NLRB not only delayed investigating potential pro-union bias and *ex parte* communications, but is actively trying to hinder public inquiry into the matter. For instance, after the NLRB filed a complaint against Boeing, a series of correspondence was prompted between various Congressional committees and members of the Office of General Counsel, based on the suspicion that the complaint was impermissibly influenced by political motivations.

On May 26, 2011, Darrell Issa, Chairman of the U.S. House Committee on Oversight and Government Reform, formally requested Solomon's testimony at a full Committee hearing on June 17, 2011 to explore the NLRB's decision to sue Boeing for alleged unfair labor practices. Congressman Issa, concerned that the suit against Boeing was "legally frivolous,"[132] instructed Solomon to prepare to "provide testimony about the NLRB's action against Boeing and how its actions could impact the thousands of Boeing employees at a non-union worksite in South Carolina."[133] As pointed out by the U.S. Senate Committee on Health, Education, Labor and Pensions, the extraordinary remedy proposed under the complaint would force Boeing to move the production line to Washington State, consequently eliminating thousands of newly created jobs in South Carolina and requiring Boeing to close its assembly facility in North Charleston.[134] Considering that the South Carolina facility was nearly complete (since Boeing announced its plan to build almost seventeen months before the complaint was filed) the proposed remedy appeared particularly draconian.[135] As a result, Congressman Issa informed Solomon that his testimony would be required.

Solomon responded to Congressman Issa in a letter dated June 3, 2011, stating that his presence at the hearing—two days before the trial—might threaten the parties' right to a fair trial.[136] Specifically, any premature disclosure of information relevant to the trial would

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[131] Scott Shane, *Glare of Publicity Finds an Inspector General*, N.Y. TIMES (Mar. 26, 2007), http://www.nytimes.com/2007/03/26/washington/26inspector.html?adxnnl=1&adxnnlx=1353423735-93P/q39cvMqj63GrK8jSyQ&_r=0.

[132] Letter from Darrell Issa, Chairman, Comm. on Oversight and Gov't Reform, to Lafe E. Solomon, Acting Gen. Counsel, NLRB (July 12, 2011).

[133] Letter from Darrell Issa, Chairman, Comm. on Oversight and Gov't Reform, U.S. House of Representatives, to Lafe E. Solomon, Acting Gen. Counsel, NLRB (May 26, 2011), *available at* http://www.nlrb.gov/sites/default/files /documents/967/may_26.pdf.

[134] Letter from Senate Comm. on Health, Educ., Labor, & Pensions, to Lafe E. Solomon, Acting Gen. Counsel, NLRB (May 3, 2011), *available at* http://www.nlrb.gov/sites/default/files/documents/967/may_3_2011_letter_from_senator_michael_b._enzi_and_others.pdf.

[135] Press Release, Boeing, Boeing to Fight NLRB Complaint Back by Union (Apr. 20, 2011), *available at* http://boeing.mediaroom.com/index.php?s=43&item=1714.

[136] Letter from Darrell Issa, Chairman, Comm. on Oversight and Gov't Reform, U.S. House of Representatives, to Lafe E. Solomon, Acting Gen. Counsel, NLRB (June 3, 2011), *available at* http://www.nlrb.gov/sites/default/files/ docume nts/967/june3.pdf.

constitute an impermissible interference with the litigation.[137] Solomon therefore refused to appear, offering only his written testimony or, in the alternative, the Associate General Counsel's testimony.[138] Congressman Issa maintained that the parties' rights would not be jeopardized because the hearing concerned the policy implications of the decision to sue Boeing, rather than Solomon's legal strategy.[139] Further, Solomon would not be the ultimate decision-maker in the case, thus avoiding the holding in *Pillsbury Co. v. Federal Trade Commission* which exempts decision-makers from Congressional interventions focusing on the decision-making process.[140] Under threat of subpoena, Solomon attended the hearing,[141] despite his later claim that he testified "out of respect for the oversight role of Congress."[142]

A series of correspondence also transpired between Solomon and Congressman Issa concerning the scope of production of documents. Solomon objected to Congressman Issa's May 12, 2011 Oversight request seeking "[a]ll documents and communications referring or relating to the Office of the General Counsel's investigation of Boeing, including but not limited to all communications between the Office of the General Counsel and the National Labor Relations Board."[143] Solomon argued that he should be permitted to produce documents as they became contemporaneously available to the parties, since some information was not yet available to Boeing.[144] Congressman Issa, citing Supreme Court precedent, "rejected [Solomon's] position that pending lawsuits are a basis to withhold information from a Congressional committee," suggesting that "the fact that you are only willing to turn over public court documents and remain unwilling to produce any more than that, and seem to be part of a coordinated effort to derail a Congressional investigation heightens speculation there is something you are trying to hide."[145] Solomon's continued refusal to cooperate ultimately resulted in the Committee issuing a subpoena on August 5, 2011, requiring Solomon to produce all documents requested.[146] Such lack of respect for Congress' constitutional power to

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[137] *Id.*

[138] Letter from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to Darrell Issa, Chairman, Comm. on Oversight and Gov't Reform, U.S. House of Representatives (June 10, 2011), *available at* http://www.nlrb.gov/sites/default/files/documents/516/responsetocommittee.pdf.

[139] Letter from Darrell Issa, Chairman, Comm. on Oversight and Gov't Reform, U.S. House of Representatives, to Lafe E. Solomon, Acting Gen. Counsel, NLRB (June 14, 2011), *available at* http://www.nlrb.gov/sites/default/files/documents/967/dei_to_solomon_6_14_11.pdf

[140] 354 F.2d 952, 964 (5th Cir. 1966).

[141] Letter from Darrell Issa, Chairman, Comm. on Oversight and Gov't Reform, U.S. House of Representatives, to Lafe E. Solomon, Acting Gen. Counsel, NLRB (June 7, 2011), *available at* http://www.nlrb.gov/sites/default/files/documents/967/solomon-nlrb_hearing_invite_reconsideration_6.7.11.pdf (threatening the use of compulsory process).

[142] Lafe Solomon, Acting Gen. Counsel, NLRB, Testimony Before the Committee on Oversight and Government Reform (June 17, 2011), *available at* http://ftpcontent.worldnow.com/wcsc/news_content/pdf/solomon_statement.pdf.

[143] Letter from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to Darrell Issa, Chairman, Comm. on Oversight and Gov't Reform, U.S. House of Representatives (July 26, 2011) (alteration in original), *available at* http://www.nlrb.gov/sites/default/files/documents/967/response_to_july_12_2011_issa_ letter.pdf.

[144] *Id.*

[145] Letter from Darrell Issa, Chairman, Comm. on Oversight and Gov't Reform, U.S. House of Representatives, to Lafe E. Solomon, Acting Gen. Counsel, NLRB (July 28, 2011), *available at* http://www.nlrb.gov/sites/default/files/documents/967/2011-07-28_dei_to_solomon_re_nlrb_complaint_against_boeing_2.pdf.

[146] NLRB, http://www.nlrb.gov/sites/default/files/documents/967/ogr_subpoena_-_solomon.pdf (last visited Nov. 20, 2012) (containing copy of subpoena).

investigate suggests Solomon's alleged concern for the rights of the parties was merely a cover to frustrate Congress' investigation into the Boeing matter.

In addition to avoiding Congressional inquiries, **the NLRB improperly denied Cause of Action's September 10, 2012 FOIA request in which we requested, *inter alia*, "[a]ll records, including e-mails, referring or relating to Cause of Action's November 22, 2011 request for an NLRB OIG investigation**."[147] On September 21, 2012, Counsel to the Inspector General, Jennifer Matis, responded to Cause of Action's FOIA request.[148] The letter neither admitted nor denied the existence of records referring or relating to Cause of Action's November 22, 2011 request for an NLRB OIG investigation because "any such confirmation or denial would harm the interest protected by FOIA Exemptions 6, 7(C), and 7(D)."[149] As stated in the March 19, 2009 Memorandum from Attorney General Eric Holder, the Department of Justice "will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."[150] **Thus, the OIG's generous use of FOIA exemptions seems contrary to the spirit of openness expressed in the Holder Memorandum.**

Cause of Action subsequently appealed the partial denial on November 2, 2012.[151] In response to our appeal, Chairman Pearce of the NRLB sent Cause of Action a letter on November 30, 2012 stating that, as advised by the IG, our September 10, 2012 FOIA request "should now be considered . . . in light of [the November 19, 2012 Report of Investigation].[152] Accordingly, Cause of Action's November 2, 2012 appeal was moot.

Exemptions 7(C) and 7(D) cover records or information compiled for law enforcement purposes as well as personal information contained within those documents. However, as argued in Cause of Action's FOIA appeal, neither Exemption was properly invoked since an investigation by the NLRB OIG cannot be considered a law enforcement action.[153] The D.C. Circuit has held that law enforcement purposes consist of an "investigation to consider an action equivalent to those which the Government brings against private parties" and not "customary surveillance of duties by government employees" [154] The NLRB OIG performs only internal investigations; it brings no actions against private parties. Any investigation, report, record or request for investigation generated by the NLRB OIG in no way resembles an action by the government against a private party. Thus, the NLRB's willingness to produce documents previously withheld based on Exemption 7(C) and (D) violates Cause of Action's rights under FOIA and demonstrates the agency's consistent attempts to stonewall inquiry into potentially unethical conduct.

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[147] FOIA Request from Cause of Action, to David P. Berry, Inspector Gen., NLRB (Sept. 10, 2012) (on file with author) (emphasis added).
[148] Letter from Jennifer Matis, Counsel to the Inspector Gen., to Cause of Action (Sept. 21, 2012) (on file with author).
[149] *Id.* at 2.
[150] Memorandum from Eric Holder, Attorney Gen., to Heads of Exec. Dept's and Agencies (Mar. 19, 2009).
[151] Letter from Cause of Action, to Mark Pearce, Chairman, NLRB (Nov 2. 2012).
[152] Letter from Mark Pearce, Chairman, NLRB, to Cause of Action (Nov. 30, 2012) (on file with author).
[153] Letter from Cause of Action, to Mark Pearce, Chairman, NLRB (Nov 2. 2012).
[154] *Id.*

IV. Conclusion

The NLRB OIG was established to prevent and detect fraud, abuse and mismanagement and to promote economy and efficiency in government.[155] However, in both the Wal-Mart and Boeing cases, evidence suggests that the NLRB OIG, rather than fairly and aggressively pursuing allegations of wrongdoing, practices political favoritism and protects certain members against prosecution. The OIG's failure to promptly investigate credible evidence of ethics violations within the agency also indicates that the NLRB lacks appropriate oversight, especially considering the agency's continual attempts to avoid public inquiry. As a consequence of this unethical conduct, businesses coming before the NLRB cannot be assured that their rights as litigants will be respect and that they will be treated fairly under the law.

[155] Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (Oct. 12, 1978), as amended at by Pub. L. No. 100-504, 102 Stat. 2515 (Oct. 18, 1988).

EXHIBIT

1

Memorandum

October 1, 2012

From: Gloria Joseph
Designated Agency Ethics Official (Retired)
National Labor Relations Board

Subj: Response to Inspector General's Report of Investigation – OIG-I-475
(Acting General Counsel Lafe Solomon/Title 18 Sec. 208(b) violation)

As the former Designated Agency Ethics Officer (DAEO)[1] involved in the 18 U.S.C. 208(b) waiver issue described in the National Labor Relations Board's Inspector General's memorandum of September 13, 2012 regarding the ethics violation by National Labor Relations Board (NLRB) Acting General Counsel Lafe Solomon, I offer the following comments on the memorandum.

In summary:

1. I agree with the legal conclusions of the Inspector General (IG) regarding the Title 18 ethics violation.
2. I do not agree that there were extenuating circumstances that lessen personal responsibility for the ethics violation.

Legal Conclusions

The Inspector General's conclusions regarding the violation of Title 18 are correct. The facts are simple and straightforward and the relevant statutory and regulatory provisions are quite clear. Reduced to its essence: Mr. Solomon: 1) owned stock in Wal-Mart valued at more than $15,000; 2) acted on a Wal-Mart case in a personal and substantial manner while holding said stock (directing subordinates to set up a meeting with Wal-Mart; directing settlement activity; holding up the issuance of the Advice memo while he considered the issues, etc.) and ; 3) participated in the matter before receiving a waiver allowing him to participate without running afoul of Title 18.

In neither the memorandum to the DAEO asking for the waiver nor in his later correspondence on this matter via counsel, cited by the Inspector General (IG), does Mr. Solomon present any relevant facts that would alter the IG's legal conclusions.

In fact, the IG's memorandum could have ended with the above conclusions because the facts establish that Title 18 was violated before Mr. Solomon even sought to engage the ethics office on the waiver issue. Hence any discussion of the adequacy

[1] I retired as from the NLRB on August 3, 2012. Shortly thereafter, the Deputy Associate General Counsel in Enforcement Litigation was designated as the new DAEO.

of the waiver request, the authority to issue a waiver, atmosphere, etc., are irrelevant because Mr. Solomon's premature action pre-empted any opportunity to make his actions legal. As stated in the Office of Government Ethics Memorandum DO-10-005 (April 22, 2010), "Guidance on Waivers under 18 U.S.C. § 208(b)" a waiver is not retroactive. It must be granted before an employee engages in a potentially prohibited activity and it must be based upon a full disclosure by the employee of all the relevant facts. Neither of those acts occurred in this matter.

Extenuating Circumstances/Personal Responsibility

While it is not necessary to address this issue for the purposes of deciding whether Mr. Solomon committed a violation of Title 18, this issue warrants comment as the IG's memo does not put sufficient emphasis on personal responsibility and seeks to share this responsibility with others. In the end, it is the individual employee who is responsible for behaving ethically. While there may be circumstances that warrant mitigating the remedy for an ethics violation, the circumstances cited by the IG do not fit the bill. Moreover, the cited "extenuating circumstances", even if accurately described, would not have made a difference to the outcome as Mr. Solomon had already acted in violation of the statute by the time he asked for the waiver.

If Mr. Solomon's motive was to avoid lengthy litigation, that objective could have been met by permitting his deputy to make decisions in the Wal-Mart case as his alter ego. Unlike Board Members who cannot delegate their voting authority on cases to their Chief Counsels, the General Counsel can and does delegate significant casehandling decision-making authority to subordinates including division heads and regional directors. In fact regional directors have authority to issue complaints in most cases without consultation with the General Counsel or headquarters divisions. As his alter ego, the Deputy General Counsel could have acted on his behalf.[2]

The conclusion that there was a "complete failure of the NLRB's ethics program with regard to the operations of the Office of the General Counsel" is inaccurate. An ethics program is only as strong as the willingness of employees to adhere to its standards. When the person at the highest level of the agency, who is fully aware of his ethical obligation, chooses to ignore that obligation, the fault lies with the person and not with the program. As the IG notes, Mr. Solomon was counseled by the ethics office annually about the need to avoid participating in matters in which he had a financial interest valued at more than $15,000. While, to be sure, the Deputy General Counsel also should have screened the case before it reached Mr. Solomon's desk, in the end adherence to ethical standards is the responsibility of the individual.

[2] The Deputy General Counsel, a long-tenured, experienced career manager, served for many years as the regional director in the agency's Manhattan office before being selected by Mr. Solomon to be the Deputy General Counsel. The Manhattan office handled very complicated, high-profile cases and litigation during her tenure there. The current Deputy General Counsel is therefore no stranger to making decisions in complicated and/or high profile cases.

A long line of past General Counsels used a screening mechanism as well as their own diligence to avoid such conflicts. And unlike most past General Counsels who came from the private sector and for whom many of the executive branch ethics rules initially may have appeared odd or overly technical, Mr. Solomon grew up in the agency with these rules. The particular rule in question was as applicable to him as a career manager as it was to him as a Presidential appointee. As career executives in the agency, both Mr. Solomon and the Deputy General Counsel have received annual ethics training for many years. And, as the IG notes, Mr. Solomon is responsible for certifying that he has not handled matters that would present a financial conflict. The Deputy General Counsel, as his designated certifier, is also responsible for certifying that Mr. Solomon has not handled matters that present a financial conflict of interest. Yet Mr. Solomon ignored the known restriction on his ability to participate in the Wal-Mart case and when Mr. Solomon told his deputy of the conflict, she raised no objection. Rules *were* in place to avoid a conflict. They were simply ignored by the occupants of the General Counsel's office. That is their failing, not the ethics program's.

The agency's ethics program has long been well-regarded and has been the recipient of the Office of Government Ethics "Outstanding Ethics Program Award". Among other things, its success is based on: 1) the ethics office making employees aware of their ethics responsibilities through training and other means of information dissemination; 2) employees seeking timely advice about those responsibilities; 3) ethics officials providing accurate and prompt advice to ethics inquiries; and 4) employees acting in accord with that advice. Here items 1 and 3 were done. Items 2 and 4 were not. That is not an ethics program failing. The most safely built car is not going to prevent an accident by a reckless driver.

The IG is correct in his conclusion that Mr. Solomon was obligated to provide a full set of facts for consideration by the DAEO in considering the waiver request. However, his citing of the DAEO's alleged failure to seek additional facts from Mr. Solomon as a mitigating circumstance is puzzling. From my perspective as the DAEO, Mr. Solomon was seeking a waiver in <u>order to be able to participate in the case</u>. Accordingly there was no reason to believe that he had <u>already acted on the case</u> since clearly by his request he was indicating that he knew he needed a waiver as a necessary pre-condition to participation. The questions that would ordinarily have been raised (e.g., the size of the stock holding, the percentage it represented of his financial holdings, whether the matter could be handled by a surrogate) were all facts that were either set forth in Mr. Solomon's memo or were facts that were already known to me based on my long tenure at the agency including stints as a manager in legal divisions and my knowledge of agency operations and current initiatives. Moreover, the IG fails to note that in my written response to Mr. Solomon's waiver request, I <u>specifically invited</u> Mr. Solomon to provide any additional facts for my consideration which he believed might alter my decision. Mr. Solomon never responded to that invitation.

Even if Mr. Solomon had provided additional facts, either on his own or upon being prompted, at that point the die had already been cast – Mr. Solomon had already acted in violation of Title 18. No amount of fact-gathering would have changed that essential fact and I still would have been obligated, per the OGE guidance, to refer the violation to the appropriate office (e.g., the agency's Inspector General).

Also based on an inaccurate interpretation of wholly unrelated incidents, the IG attempts to mitigate Mr. Solomon's conduct by wrongly concluding that a strained relationship or communications between the DAEO and Mr. Solomon played a role in the waiver decision or Mr. Solomon's request for a waiver. The notion that personal motives played a role in an ethics decision is simply wrong and not supported by the facts. In this regard, the IG fails to note that the DAEO's office interacted frequently with the Acting General Counsel on ethics matters including those where a conflict of interest determination had to be made by the DAEO. For example on many occasions both before and after the Wal-Mart request for a waiver, my office had to make decisions on whether to approve travel by Mr. Solomon that was to be reimbursed by third parties. This required first performing a conflict of interest analysis. Those many requests and the related travel vouchers were approved by me both before and after the Wal-Mart waiver incident. Clearly any alleged "dysfunctional" or "adversarial" atmosphere did not prevent my approving those requests. Further, any such alleged conditions did not stop Mr. Solomon from actually making the request for the waiver in Wal-Mart case in the first place.

As to the IG's comment that I did not use the appropriate analytical framework in considering the waiver request, had the IG interviewed me as part of his investigation as he interviewed others, he would have learned that that is exactly what I did. While the IG went beyond the four squares of Mr. Solomon's written request for a waiver to explore his motivation, intent, and understanding of the waiver process, and while he interviewed others involved in the matter, the IG did not attempt to interview me, resulting in an inaccurate conclusion about my reasoning and motivation in the handling of the waiver request.

The IG's conclusion that I was looking for a reason to say "no" to the waiver request is also not accurate. This is not a complicated matter and 208(b) waivers are rare. If I had been inclined to grant the waiver, I would have consulted both OGE and White House counsel. However, based on our experience with the White House on ethics matters and based on the fact that the current Administration has put in place even stricter ethics rules for its appointees, such as "the Obama pledge", I believe that the White House would have been even less likely than the agency's ethics office to approve a waiver in this instance. Further, even if the matter had been referred to White House counsel, the White House would have been faced with the same problem that the ethics office faced: the violation had already occurred.

In my two decades of serving as the agency's ethics officer, I have been impressed with the ethical sensitivity and integrity of the agency's workforce. The frequency

and types of inquiries that the ethics office receives make it clear that employees are very concerned about doing the right thing. While the Acting General Counsel's new interest in ethics training is welcome, any inference that this is a negative reflection on any other agency employee or the ethics office would be inappropriate. As the Office of Government Ethics stated in its "Letter to an Acting Inspector General dated March 30, 2006 (06 x 4)":

> …it is the personal responsibility of even high level officials to remember their ethical obligations or at least seek ethics advice, and OGE is particularly sensitive to any effort that may be perceived as shifting this personal responsibility from the individual concerned to the agency's ethics officials.

EXHIBIT

2

Affidavit

I, Gloria Joseph, hereby affirm that to the best of my knowledge all of the following statements are true and correct:

1. I served as the Designated Agency Ethics Official during Acting General Counsel Lafe Solomon's involvement in the National Labor Relations Board (NLRB) matter involving Wal-Mart until my retirement from the NLRB on August 3, 2012.

2. The NLRB ethics program has long been well-regarded and has received the Office of Government Ethics "Outstanding Ethics Program Award." Furthermore, it has been my consistent experience as the agency's ethics officer during the past two decades that the NLRB's ethical oversight program is strong.

3. Throughout Lafe Solomon's involvement in the Wal-Mart matter, Solomon was fully aware of his ethical obligations, but nevertheless failed to request a waiver before participating personally and substantially in the Wal-Mart case.

4. I agree with the Inspector General's (IG) legal conclusions in the investigative report dated September 13, 2012 about Acting General Counsel Lafe Solomon's violation of 18 U.S.C. § 208. However, the IG improperly used mitigating, extenuating, and aggravating circumstances in characterizing that violation, and therefore failed to place sufficient emphasis on Lafe Solomon's personal responsibility.

5. The Inspector General's conclusion that my actions in this matter were influenced by a strained relationship between Mr. Solomon and myself is incorrect. In fact, during the entire period when I served as the Designated Agency Ethics Official at the NLRB, I endeavored to maintain a professional relationship with Solomon.

6. The IG's report wrongly concluded that I relied on my own personal views in reviewing Solomon's waiver request, rather than consulting the relevant analytical framework.

7. These affirmations are described in greater detail in my October 1, 2012 Memorandum provided to Cause of Action.

GLORIA JOSEPH

Subscribed and sworn to before me this 29 day of NOV. 2012

[SEAL]

NOTARY PUBLIC

Name: Mary Akbar

My commission expires: 08/31/14

MARY AKBAR
NOTARY PUBLIC
REG # 7026846
COMMISSION EXPIRES 8/31/2014
COMMONWEALTH OF VIRGINIA