

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General




Memorandum

November 19, 2012

To: Mark Gaston Pearce
Chairman

Lafe Solomon
Acting General Counsel

From: David P. Berry 
Inspector General

Subject: Report of Investigation – OIG-I-473

On April 13, 2012, we received a request from the Committee on Education and the Workforce to investigate whether the Acting General Counsel or his staff made prohibited ex parte communications regarding the Boeing case, 19-CA-032431. The request by the Committee included several redacted e-mail messages that had been provided to a Freedom of Information Act requester. Our investigative efforts included a review of those e-mail messages as well as other e-mail messages that have been provided through the Freedom of Information Act and in response to Congressional oversight requests. This report summarizes our findings with regard to that investigative activity.

Although we concluded that NLRB personnel did not engage in misconduct, we believe that the Agency's public affairs activities could benefit from more clearly defined policies and procedures. This recommendation is based on our general observations during the investigation and is not a statement that we believe that the Director, Office of Public Affairs, is responsible for our findings.

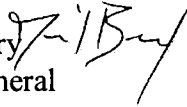
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From: David P. Berry 
Inspector General

Subject: Report of Investigation – OIG-I-473

This memorandum addresses an investigation conducted by the Office of the Inspector General (OIG) involving an allegation that ex parte communications were made by the Office of the General Counsel to Chairman Wilma Liebman in the unfair labor practice case involving The Boeing Company (Boeing), 19-CA-032431. As a result of our investigative efforts, we found that certain statements in e-mail messages from personnel in the Division of Advice and Region 19 infringed upon the statutory prohibition regarding ex parte communications to Board Members. We also found that these individuals did not engage in misconduct because the communications were inadvertent.

SCOPE

On April 13, 2012, we received a request from the Committee on Education and the Workforce to investigate whether the Acting General Counsel or his staff made prohibited ex parte communications regarding the Boeing case, 19-CA-032431. The request by the Committee included several redacted e-mail messages that had been provided to a Freedom of Information Act requester. Our investigative efforts included a review of those e-mail messages as well as other e-mail messages that have been provided through the Freedom of Information Act and in response to Congressional oversight requests. This report summarizes our findings with regard to that investigative activity.

FACTS

1. On April 20, 2011, Richard Ahearn, Director, Region 19, issued a complaint against Boeing in case 19-CA-032431. (IE 1)
2. According to Nancy Cleeland, Director of Public Affairs, on April 27, 2011, she notified Wilma Liebman, then Chairman, and Lafe Solomon, Acting General Counsel, that during the “State of the Union,” a CNN television show, the host of the show repeated misstatements of facts that had been made by Senator Graham regarding the Boeing case. (IE 2)

3. On April 29, 2011, the Director of Public Affairs sent the below e-mail message to solicit guidance on how to get certain points across to the media:

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?

[Portion of e-mail message redacted as not related to possible ex parte communication.]

4. Several minutes after the Director of Public Affairs sent the e-mail message, the Acting General Counsel replied with the below message and added certain Division of Advice personnel as recipients:

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?

5. When interviewed by the OIG, the Acting General Counsel stated the following: (IE 3)

a. It was his understanding that the Director of Public Affairs had an exchange of e-mail messages with CNN's producers, and the Director of Public Affairs was seeking guidance on how to deal with two issues relating to misstatements made by the show's host and a Senator who had appeared on the show;

b. He described the issues as involving the remedy they were seeking and the differences between issuing a complaint and a decision;

c. When he replied to the Director of Public Affairs, he was repeating what was stated in the complaint using everyday language rather than "legalese;"

d. His focus, at the time, was on providing assistance to the Director of Public Affairs, rather than communicating with the Chairman; and

e. He does not consider restating what is in an unfair labor practice complaint to be ex parte communication.

6. Paragraph 13 of the complaint states as follows: (IE 1)

(a) As part of the remedy for the unfair labor practices alleged above in paragraphs 7 and 8, the Acting General Counsel seeks an Order requiring Respondent to have the Unit operate its second line of 787 Dreamliner aircraft assembly production in the State of Washington, utilizing supply lines maintained by the Unit in the Seattle, Washington, and Portland, Oregon, area facilities.

(b) Other than as set forth in paragraph 13(a) above, the relief requested by the Acting General Counsel does not seek to prohibit Respondent from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility.

7. Ellen Farrell, the former Deputy Associate General Counsel, Division of Advice, replied to the Acting General Counsel's comments in an e-mail message that was sent to all recipients, including Chairman Liebman:

From: Farrell, Elen
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.; Sopher, 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 sophisticated 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.

8. When asked about her e-mail message, the former Deputy Associate General Counsel stated the following: (IE 4)

a. She did not intend for her e-mail message to be an ex parte communication, but rather intended it to assist in responding to the press;

b. 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; and

c. She acknowledged that her comments could be considered “relevant to the merits of the proceedings (29 CFR 102.126(a))’ in the sense that they concerned the remedy to the unfair labor practice” and that they were made in the timeframe set out in the regulations.

9. Jayme Sophir, then the Regional Advice Branch Chief in the Division of Advice, responded to the comments of the Deputy Associate General Counsel in the following e-mail message:

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 couldn't be used to produce other kinds of airplanes. It's 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?

10. When asked about the e-mail message, the Branch Chief stated the following: (IE 5)

a. She acknowledged that in responding to the e-mail message that she addressed some substantive issues regarding the alleged violations that arguably should not have been shared with Chairman Liebman;

b. She believed the statements were shared with Chairman Liebman inadvertently in that she was not paying attention to the fact that Chairman Liebman was included on the e-mail thread; and

c. After the complaint issued, the Director of Public Affairs sent several similar e-mail messages seeking input on how to respond to the press, and it was unusual for the Director of Public Affairs to include the Chairman on such messages.

11. The then Region 19 Director also sent a response to the Director of Public Affairs that included Chairman Liebman as an addressee:

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.

[Portion of e-mail message redacted as not related to possible ex parte communication.]

12. When asked about the e-mail message, the former Regional Director stated that: (IE 6)

a. Although he used “reply all” to respond to the request for input on how to respond to CNN, his primary intent was to communicate with the Director of Public Affairs, not the other individuals to whom his message was sent;

b. He was focused on responding quickly, because he understood that there were media deadlines; and

c. He views the first part of his message as a restatement of the language in the complaint itself and not an attempt to address the evidence in the case, and the second part of his message discussed procedural issues.

13. Barry Kearney, Associate General Counsel, Division of Advice, provided the following information: (IE 7)

a. After the complaint issued in April 2011, there was a discussion in the media concerning the complaint and the defenses raised to it;

b. He viewed the responses by the Director of Public Affairs to that discussion to be on behalf of the Acting General Counsel;

c. With regard to the e-mail message sent by the Director of Public Affairs, he did look at the messages in the thread, but did not focus on who was listed as addressees until the Chairman responded to a response by his Deputy;

d. He was upset by Chairman Liebman's response to his Deputy because he felt that it was an intrusion into a discussion about how the Acting General Counsel was going to defend his complaint in the media;

e. He believed that Chairman Liebman should not have been on the e-mail thread because it is not appropriate to discuss a complaint or defenses to it in front of a Board Member; and

f. If it had been an in-person discussion, he would have objected to Chairman Liebman's presence.

14. Chairman Wilma Liebman sent the below e-mail message in response to the e-mail reply by the Deputy Associate General Counsel:

From: Liebman, Wilma B.
Sent: Friday, April 29, 2011 8:24 PM
To: Farrell, Ellen; Solomon, Lafe E.; Cleeland, Nancy; Garza, Jose; Ahearn, Richard L.; Kearney, Barry J.; Saphir, 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.

15. Former Chairman Liebman provided the following information: (IE 8)

a. From her view, the issue was a matter of simply setting the record straight with regard to the difference between the General Counsel issuing a complaint and the Board making a ruling;

- b. She wanted to make it clear that there had been no ruling by the Board and that the complaint was issued by an independent prosecutor and not the Board;
- c. The notion of ex parte communication did not enter her mind and she was only focused on the issue involving the Board;
- d. She had no discussion regarding the complaint with the Director of Public Affairs; and
- e. She could not recall reading all the messages.

16. When interviewed, Nancy Cleeland, Director of Public Affairs, provided the following information: (IE 2)

- a. She is the primary media relations person at the NLRB;
- b. Although she reports directly to the Chairman, she also works with the Office of the General Counsel;
- c. She sent the e-mail message regarding the issues with CNN's "State of the Union" show because she was seeking input on how to formulate a response to a CNN producer on the issues raised by the CNN show;
- d. Her intent was not to solicit new information, but she wanted to come up with another way to explain the two points involving the remedy and the difference between a complaint and a decision because she felt that the prior statements were "not getting through;"
- e. At some point in the discussion, she removed Chairman Liebman from the e-mail thread because someone expressed a concern about maintaining the separation between the Board and the General Counsel;
- f. She could not recall who expressed concerns, except that it was not Chairman Liebman;
- g. After she had removed Chairman Liebman from the list, Chairman Liebman responded to an earlier message, stating that she was "reluctant to get into this writing by committee;"
- h. In the past, Chairman Liebman had expressed similar concerns to her about the inefficiencies of having a conversation with such a large group of people; and
- i. At the time that she initiated her e-mail messages, she did not know what ex parte communications entailed or that there were any prohibitions on including both the Acting General Counsel and Chairman on the same e-mail chain.

17. Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, provided the following information: (IE 9 & 10)

a. He reports to and provides counsel to both the Chairman and Acting General Counsel (AGC) regarding Congressional inquiries;

b. He does not represent or assist either the Board or the General Counsel with regard to unfair labor practice case-handling matters; and

c. He was provided with a copy of a Memorandum of Understanding (MOU) between Chairman Liebman and Acting General Counsel Solomon regarding the conditions under which he was to provide assistance to the Acting General Counsel in the Boeing case.

18. The following provisions were included in the MOU: (IE 10)

a. In providing such assistance to the AGC, Mr. Garza will be considered a “representative” of the AGC for the purposes of the Board’s rules prohibiting ex parte communications (Subpart P of the Board’s Rules and Regulations), and he will abide by those rules and this Memorandum of Understanding;

b. In providing such assistance to the AGC, Mr. Garza will report exclusively to the AGC and will not be subject to the direction or control of the Chairman; and

c. Mr. Garza will not communicate, directly or indirectly, with the Chairman, the Members of the Board, or their legal assistants regarding the substance of any information he may receive from the AGC or his representatives regarding the investigation and prosecution of the unfair labor practice case against The Boeing Company.

19. The Boeing unfair labor practice complaint was withdrawn on December 9, 2011. (IE 11)

ANALYSIS

We determined that, of the e-mail messages discussed above, the messages from Ellen Farrell, former Deputy Associate General Counsel, Division of Advice, Jayme Sophir, then Regional Advice Branch Chief, Division of Advice, and Richard Ahearn, former Regional Director, infringed upon the statutory prohibition on ex parte communication. We also find that the communications were inadvertent in the sense that they were not made with the intent to influence the Board. We also find that Chairman Liebman’s e-mail reply to the comments of the former Deputy Associate General Counsel does not evidence an attempt to influence the Acting General Counsel’s prosecution of the unfair labor practice complaint in the Boeing matter. Finally, we reach no conclusion with regard to whether an ex parte communication can also be privileged communication.

Section 4 of the Government in the Sunshine Act, P.L. 94-409, 5 U.S.C. 557(d), established a statutory prohibition on “ex parte communication relative to the merits of a pending proceeding between an agency decision making official and an interested person outside the

agency.” See H.R.Rep.No. 880, Pt. I, 94th Cong., 2d Sess. (1976), U.S.Code. & Admin.News 1976, p. 2201. The phrase “relative to the merits” was intended to be construed broadly and to include more than “facts and circumstances” that had been previously used in the Administrative Procedure Act. Id at 2202. The Board implemented this statutory prohibition through the following regulations:

No interested person outside this agency shall, in an on-the-record proceeding of the types defined in §102.128, make or knowingly cause to be made any prohibited ex parte communication to Board agents of the categories designated in that section relevant to the merits of the proceeding. 5 CFR §102.126(a).

The term *person outside this agency*, to whom the prohibitions apply, shall include . . . the general counsel or his representative when prosecuting an unfair labor practice proceeding before the Board pursuant to section 10(b) of the Act. 5 CFR § 102.127(a)

The term *ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given . . . 5 CFR §102.127(b)

[The prohibition on ex parte communications is applicable to] [i]n 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 . . . is issued . . . 5 CFR §102.128(e)

We agree with the characterizations by the Acting General Counsel that his message contains only a restatement of the remedy that is sought in the complaint. We determined that a restatement of the remedy sought in a complaint is not *relative to the merits* within the meaning of a prohibited ex parte communication. The complaint itself is a public document that is not a matter in dispute and restating the remedy sought is not, in and of itself, relevant to whether the remedy is appropriately warranted by the facts or law. This is particularly true when the communication is made in the context of a discussion of how to respond to what are perceived to be misstatements by the media regarding the remedy that a General Counsel is seeking. This type of exchange between the prosecuting and adjudicating arms of an agency of basic information that is contained in the document initiating the proceedings, particularly when engaged in overlapping functions such as media relations, would not normally threaten the fairness of a proceeding so as to rise to the level of a due process violation. See Professional Air Traffic Controllers Organization v. FLRA, 685 F.2d 547, 566-67 (D.C. Cir. 1982). As such, we find that the e-mail message sent in reply by the Acting General Counsel was not ex parte communication.

In our view, the e-mail replies by the Deputy Associate General Counsel, Regional Advice Branch Chief, and the Regional Director are relevant to the merits of the pending Boeing matter. The statements of the Deputy Associate General Counsel not only provide factual information about the appropriateness of the remedy being sought, they provide a prosecutorial view of a potential response by Boeing. The reply of the Regional Advice Branch Chief only adds support to those arguments. As those matters are directly related to appropriateness of the remedy sought in light of what is described as a failure by Boeing to mitigate its possible losses, they would seem clearly relevant to the merits of the proceeding. In fact, Boeing later filed a motion with the Administrative Law Judge seeking, in part, to strike the remedy, arguing that the remedy was unduly burdensome. With regard to the e-mail reply by the Regional Director, in addition to restating the remedy sought

in the complaint, his communication also included factual information that was relevant to the merits of the appropriateness of the remedy. Whether this same information was available from other sources, such as media, does not relieve a communication of its status as being ex parte. *Cf. Railey v. Webb*, 540 F.3d 393, 411 (6th Cir. 2008) (citing *Johnson v. Carroll*, 369 F.3d 253, 254 (3d Cir. 2004)).

We do also find, however, that the ex parte communications by the Deputy Associate General Counsel, Regional Advice Branch Chief, and Regional Director were inadvertent in the sense that the purpose of the statements was to address the media issues rather than persuade a Board Member. In reaching that finding, we believe that the statements of Acting General Counsel and his staff that they were focused on responding to the media rather than communicating facts to a Board Member to be credible. We also considered the fact that the e-mail was initiated by the Office of Public Affairs in response to its concern with perceived misstatements in the media rather than by an office associated with prosecution of the Boeing case. We also believe that the MOU between Chairman Liebman and Acting General Counsel Solomon concerning the Special Counsel for Congressional and Intergovernmental Affairs demonstrates their concern that the Board not receive ex parte communications. Given that the ex parte communication was inadvertent, we also found no basis to conclude that these individuals engaged in misconduct.