U.S. House of Representatives

Committee on Oversight and Government Reform

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President Obama's Pro-Union Board: The NLRB's Metamorphosis from Independent Regulator to Dysfunctional Union Advocate

STAFF REPORT
U.S. HOUSE OF REPRESENTATIVES
112TH CONGRESS
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
DECEMBER 13, 2012

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EXECUTIVE SUMMARY

Congress intended the National Labor Relations Board (NLRB) to be a neutral arbiter of labor disputes, and fairness of the agency to workers, unions, and job creators is imperative to its successful operation. Unfortunately, under the Obama Administration, the NLRB appears to be sacrificing fairness to job creators in order to promote pro-union policies. To make matters worse, its leadership disregarded ethics and internal rules along the way.

The Committee staff report documents a pattern of behavior at the NLRB that undermines its integrity and creates an impression that the NLRB has morphed into a rogue agency plagued by systemic problems. Its two major substantive rulemakings have been overturned by the courts, one for statutory overreach and the other for disregarding procedural requirements. These rules are also viewed by job creators as unnecessary and one-sided in favor of unionization. Some of the NLRB's recent cases have also been heavily criticized as an expansion of the National Labor Relations Act (NLRA) and a reinterpretation of decades-old labor law. Moreover, NLRB documents obtained by the Committee show a strong pro-union bias among NLRB political appointees and agency bureaucrats during their pursuit of a case against The Boeing Company (Boeing) for alleged unfair labor practices. NLRB staff also appeared to enjoy the thrill of gamesmanship in bringing a complaint against a major employer. This bias creates uncertainty in labor relations because job creators fear what actions the NLRB will take next—whether it is a company finding itself subject to a complaint for making a business decision or having to adjust its operations because of new government red tape.

To add to the uncertainty, President Obama's unprecedented "recess" appointments to the NLRB earlier this year also cause angst for job creators. The appointments are widely viewed as unconstitutional because the U.S. Senate was not in recess when they were made. As a result, multiple legal challenges have been filed and are pending. If the courts agree that the appointments are unconstitutional, actions taken by the NLRB during the intervening period are subject to being overturned. However, despite this risk and bipartisan skepticism that the appointments are constitutional, the NLRB seems unfazed by the questionable status of its actions. The NLRB Chairman has indicated that the Board plans to move forward with rulemakings and decisions, notwithstanding the legal challenges.

To further tarnish the NLRB's reputation, NLRB leadership broke internal rules, ethics rules, and refused to fully cooperate with a congressional investigation for many months. The Office of General Counsel and members of the NLRB are required to operate separately for purposes of prosecuting unfair labor practices because the Board may eventually hear a case brought by the general counsel. The NLRB's *ex parte* rules also restrict communications between the two offices. However, documents obtained by the Committee show that then-NLRB Chairman Wilma Liebman and Acting General Counsel Lafe Solomon communicated frequently about the case against Boeing, and the staff of the two offices were in touch about the case as well. NLRB documents also reveal that the Office of General Counsel staff had a flippant and disrespectful attitude towards congressional oversight and tried to slow down the oversight process.

The NLRB's Office of Inspector General (OIG) also found misconduct at the NLRB. The OIG found that Mr. Solomon inappropriately participated in a matter before the NLRB involving Wal-Mart when he had a financial interest in the company. In addition, the OIG noted that the ethics program within the Office of General Counsel was a complete failure. Also, former NLRB "recess" appointee Terence F. Flynn resigned amid allegations by the OIG that he violated ethics rules by disclosing confidential Board information.

In total, the actions discussed in the staff report arguably compromise the perceived fairness of the NLRB that Congress deemed necessary for its successful operation. While the report is not intended to be an exhaustive compendium of all NLRB actions viewed as controversial, it is a sampling of the most widely-known, problematic behavior.

FINDINGS

Pro-Union Bias at the NLRB

- The NLRB, under the current Administration, appears to have turned into a voice for unions instead of a neutral arbiter of labor disputes. One NLRB supervisory attorney encouraged a list-serve of her colleagues to prepare for a work-training event by reading a pro-union book described as "daring" and "sure to be controversial" in labor relations. The attorney emphasized to her colleagues that the book "proposes arguments that *Unions* can use, particularly in the Courts, to make the [NLRA] more effective." [emphasis added]. Another NLRB attorney complained that it was "[n]ot good for labor relations. . . ." when workers voted out the union at a South Carolina Boeing plant.

- NLRB political appointees and agency bureaucrats demonstrated an extreme lack of impartiality as they pursued the case against Boeing.

    - The NLRB's Associate General Counsel, Barry Kearney, praised an International Association of Machinists and Aerospace Workers (IAM) press release related to the Boeing case, stating, "[h]ooray for the red, white, and blue."

    - Upon receiving Boeing's Answer to the complaint, one NLRB attorney forwarded it to other NLRB attorneys and declared "[l]et the games begin" to which one attorney responded "finally…"

    - The NLRB's head of public affairs, Nancy Cleeland, wrote to NLRB Acting General Counsel Lafe Solomon worried that she "made the Machinists [union] mad" and wanted to discuss it.

    - Mr. Solomon forwarded an email to then-NLRB Chairman Wilma Liebman and Ms. Cleeland expressing praise from a union attorney who "spoke about how impressed everyone is with all [Mr. Solomon] ha[s] been attempting to do and accomplishing." This email was accompanied by a blog posting entitled, "Labor Board Grows a Set," by the former head of ACORN, Wade Rathke.

- NLRB bureaucrats lamented about developments that did not benefit the IAM concerning the complaint against Boeing. One NLRB attorney worried that "what [they] were doing was fairly meaningless after the 10(j) [injunction remedy] got dropped" from the complaint, which could have required Boeing to stop operations at the South Carolina plant while the case was pending. However, she was reassured by her colleague that the aftermath of filing the complaint was "like being on a roller coaster," stating, "I feel like I'm having an out-of-body experience. Could this really matter? I hope so."

- The NLRB Acting General Counsel may have brought the complaint against Boeing to induce a settlement. A couple of months before the complaint was filed, IAM's attorney called a NLRB attorney to say that his client wanted to know "what's going on." The attorney responded "[t]ell him Lafe [Solomon] is thinking about it. I had an

unsatisfactory conversation with [Boeing's attorney]." Then, when NLRB attorneys learned that Boeing's motion to dismiss was denied, they proclaimed, "[b]ingo!" and "[h]ooray! Let the talks begin."

- Jubilance and excitement rang through the NLRB upon the announcement of a new collective bargaining agreement between Boeing and the IAM. The NLRB Seattle area regional director overseeing the litigation against Boeing sent an email to other NLRB regional directors with the subject line, "Boeing, Machinists reach sweeping agreement" and the notation "YEA!!" with an article describing the agreement. Responses included, "[g]reat news, my man!," "[t]his is fantastic news," and "a double/triple YEA! YEA! YEA! Congrats." The Seattle regional director also called the agreement between Boeing and IAM "pretty wonderful …on lots of levels," "a huge event for the [NLRB], this [Seattle] area and *the labor movement*" [emphasis added], and he looked forward to "bask[ing] in the glow of a resolved Boeing matter . . . ."

- The NLRB's notice posting rule demonstrates a pro-union bias. While the NLRB justified the rule on the basis that it "believes that many employees protected by the NLRA are unaware of their rights under the statute" and the notice will "better enable the exercise of [those] rights . . . .", 67 percent of workers are unaware of their right under the NLRA to withhold mandatory union fees for political purposes. Yet, the NLRB appears unconcerned with workers' rights to object to union political spending since that statutory right is not included in what must be posted.

- Demonstrating a cozy relationship between unions and the NLRB, one of the two NLRB members who voted to hastily issue the "quickie election" rule without a proper quorum was Craig Becker, a former union associate general counsel, who then returned to the nation's largest federation of unions, the AFL-CIO, a mere five months after voting to issue the rule.

NLRB Officials Broke the Rules

- NLRB political appointees and agency bureaucrats appear to have violated the NLRB's separation principle between the Office of General Counsel and the Board as well as *ex parte* rules as they pursued the case against Boeing. Acting General Counsel Lafe Solomon and then-Chairman Wilma Liebman exchanged, or were both party to, more than 20 emails related to the Boeing matter. In one exchange, Mr. Solomon forwarded a HR Policy Association letter related to the merits of the Boeing case to then-Chairman Liebman and later said "I'm going to come see you in a bit . . . ." to which she responded, "[c]ome any time." Mr. Solomon, then-Chairman Liebman, and the head of the Office of Public Affairs were also part of an extensive email exchange with Office of General Counsel representatives that coordinated a response to questions from CNN's television program *State of the Union* about the case. The NLRB OIG found that some of the latter emails by Office of General Counsel staff violated *ex parte* rules, and the agency's "public affairs activities could benefit from more clearly defined policies and procedures" to prevent such violations.

- In a violation of the spirit of the separation principle, then-Chairman Liebman expressed interest in, and apparently obtained a copy of, a letter from Boeing Executive Vice President & General Counsel J. Michael Luttig to Mr. Solomon that detailed Boeing's rebuttal to facts in the complaint as well as public statements made by the NLRB. Responding to an internal email from the NLRB's new media specialist that referenced the letter, then-Chairman Liebman asked, "what letter from Boeing?" In reply, the NLRB staffer stated, "[t]he letter from Boeing is to Lafe [Solomon], and uses the language of the complaint and our public statements to try to make their case. Nancy [Cleeland] is bringing you a copy."

- Undermining the separation principle, not only did Mr. Solomon and other general counsel representatives communicate with then-Chairman Liebman about the Boeing case, then-Chairman Liebman's Chief of Staff and Chief Counsel were also party to emails with the Office of General Counsel about the case.

- Further tarnishing the NLRB's reputation, the NLRB OIG found misconduct at the NLRB. Mr. Solomon is the subject of allegations by the OIG that he improperly participated in a matter where he had a financial interest, and President Obama's "recess" appointee, Terence F. Flynn, resigned his position in wake of allegations by the OIG that he had improperly released confidential and privileged Board information to outside parties.

NLRB Officials Thwarted Congressional Oversight

- NLRB political appointees and agency bureaucrats delayed producing documents to the Committee during the Committee's oversight of the complaint against Boeing. Communications between two NLRB attorneys indicated that they thought the Committee's investigation was "going a lot faster than [the NLRB's counsel for congressional and intergovernmental affairs] projected" and queried—an astonishing two months after the Committee made its first inquiry—"have we sent them anything yet?" Upon news reports about a possible congressional subpoena for the NLRB's documents, one NLRB attorney told another NLRB attorney "we will politely decline."

- NLRB political appointees and agency bureaucrats had a flippant attitude about their accountability to Congress. The NLRB Acting Deputy General Counsel demonstrated a lack of respect for congressional oversight when she sent an email to Mr. Solomon after he testified before the Committee stating, "the Republicans were not as vicious as [NLRB staff] thought, although [she] felt like kicking some of them from time to time…" and that "[NLRB staff] are proud of [Lafe Solomon] for standing up to those bullies!" In addition, the Associate General Counsel's reaction to the threat of a subpoena for documents was to forward it to his colleagues and say the "[p]rice of poker just went up."

NLRB Actions Promote Uncertainty

- The NLRB Acting General Counsel's complaint against Boeing for alleged unfair labor practices threatened up to 3,800 jobs in South Carolina and also created uncertainty and instability among other businesses.

- The NLRB's decision to overturn decades of labor law through the sanction of micro-unions in *Specialty Healthcare and Rehabilitation Center of Mobile* threatens to foster workplace instability and increase labor uncertainty.

- The NLRB's rulemakings exceed legislative authority. Two rules—the notice posting rule and the "quickie election" rule—have been struck down by the courts. It was found that the NLRB did not have the statutory authority to issue the notice posting rule and statutory quorum requirements were ignored when the quickie election rule was issued.

- Despite the pending legal challenges to the constitutionality of President Obama's "recess" appointments to the NLRB and the uncertainty the appointments create for job creators, NLRB Chairman Mark Pearce seems unfazed by the controversy. He recently indicated that the NLRB plans to "keep [its] eye on the prize" and "presume[s] the constitutionality of the president's appointments, and [goes] forward based on that understanding."

I. Introduction

The National Labor Relations Act (NLRA) was enacted in 1935 to ensure that the free flow of commerce was not impaired by disagreements between unions and management in the private sector.[1] More specifically, the United States Supreme Court opined that the primary objective of Congress in enacting the NLRA was "to achieve *stability* of labor relations."[2] [emphasis added]. The NLRA also instituted an independent agency, the National Labor Relations Board (NLRB), to administer the statute. The NLRB primarily consists of two separate entities—a five member Board that acts as a quasi-judicial body to decide cases and an Office of General Counsel that, among other things, investigates and prosecutes such cases.[3] The two bodies are to operate independently at certain times because members of Congress recognized early on "that a man cannot act as an advocate of one side of a controversy and at the same time inspire public confidence in his impartiality to decide that very case."[4]

On the whole, the NLRB's primary duties are to conduct elections of union certification or decertification, to investigate charges of unfair labor practices, to facilitate settlements, to decide cases, and to enforce orders.[5] For the majority of its existence, the NLRB has, in its own words, "rarely" engaged in substantive rulemaking.[6] However, recently the NLRB has changed course and is conducting substantive rulemaking more frequently. In carrying out these duties, the NLRB is supposed to conduct itself impartially. To do otherwise is contrary to NLRB's mission and would corrupt the process. Indeed, in considering amendments to the NLRA in 1949, members of Congress recognized that "unless both labor and industry are satisfied with the fairness of the [NLRB] its successful operation will be impaired."[7]

Unfortunately, under President Obama's Administration, the NLRB is viewed as anything but fair. Rather, as this staff report documents, many of its recent actions are an overreach of its authority, promote uncertainty for job creators, and demonstrate a blatant unwillingness to follow the rules. Moreover, it appears the NLRB has turned into a voice for unions instead of a neutral arbiter of labor disputes. In a snapshot that shows such worries have merit, one NLRB supervisory attorney encouraged a list-serve of her colleagues to prepare for a work-training event by reading a pro-union book[8] described as "daring" and "sure to be controversial" in labor relations.[9] The attorney emphasized to her colleagues that the book "proposes arguments that *Unions* can use, particularly in the Courts, to make the [NLRA] more

[1] *See* National Labor Relations Act, 29 U.S.C. § 151, *available at* http://www.nlrb.gov/national-labor-relations-act.
[2] *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355 (1949).
[3] National Labor Relations Board, Who We Are, *available at* http://www.nlrb.gov/who-we-are.
[4] H.R. Rep. No. 317, Part 2 (1949).
[5] National Labor Relations Board, What We Do, *available at* http://www.nlrb.gov/what-we-do.
[6] *See* National Labor Relations Board, Information Quality Guidelines, Effective Date Oct. 1, 2002.
[7] H.R. Rep. No. 317, Part 2 (1949).
[8] Ellen Dannin, Taking Back the Workers' Law — How to Fight the Assault on Labor Rights, Cornell University Press (2006).
[9] Cornell University Press, *available at* http://www.cornellpress.cornell.edu/book/?GCOI=80140100186100.

effective."[10] [emphasis added]. Such actions raise grave concerns that the NLRB no longer possesses the fairness and neutrality that Congress deemed necessary for its successful operation.

II. The NLRB's Litigation Overreach

The NLRB Acting General Counsel and the Board are using their adjudicatory functions to wreak havoc on job creators. In two separate and heavily criticized actions, the NLRB has attempted to effectively shut down the operations of a major employer in a right-to-work state and has enabled small segments of employees to unionize. As Senator Lindsey Graham (R-SC) stated, through these actions "the NLRB is becoming the Grim Reaper of job creation."[11]

a. The Acting General Counsel's Shocking Complaint Against Boeing

In an action that received widespread and bipartisan outrage,[12] on April 20, 2011, NLRB Acting General Counsel Lafe Solomon issued a complaint against The Boeing Company (Boeing) for alleged unfair labor practices under the NLRA.[13] The complaint was the result of a charge in 2010 by the International Association of Machinists and Aerospace Workers District Lodge No. 751 (IAM) that Boeing was engaged in these practices.[14] It alleged, among other things, that Boeing retaliated against its employees in violation of the NLRA when it "transferr[ed]" a second 787 Dreamliner production line from a union work site in Puget Sound, Washington, to a non-union work site in North Charleston, South Carolina.[15] In bringing the complaint, the NLRB attempted to force Boeing to operate the second Dreamliner production line in Washington State, effectively shutting down the South Carolina line.

i. South Carolina Jobs Put at Risk

The complaint was viewed as particularly egregious because Boeing contended that no existing work was transferred to South Carolina, nor did a single union member in Washington lose his or her job or was otherwise adversely affected by Boeing's decision.[16] During

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[10] Email from Leah Jaffe, NLRB to ML-R02-Professionals(R); ML-R02-Supervisors(R) (May 16, 2011). [NLRB-00007290]

[11] Kevin Bogardus, *Sen. Graham Slams NLRB as the 'Grim Reaper of Job Creation,'* The Hill, June 13, 2012, *available at* http://thehill.com/blogs/on-the-money/1007-other/232603-graham-nlrb-the-grim-reaper-of-job-creation.

[12] *See Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise: Hearing Before the H. Comm. on Oversight and Government Reform*, 112th Cong. (2011); Op-Ed, Philip Miscimarra, *The NLRB's Invisible Hand*, The Daily Caller (July 19, 2011); Amicus Curiae Brief of Sixteen State Attorneys General in Support of Respondent The Boeing Company, In Case 19-CA- Case 19-CA-32431; Philip Klein, *Former NLRB Chairman Says Board's Complaint Against Boeing is Unprecedented*, The Examiner (April 21, 2011); Keith Laing, *Former NLRB Chairman Under Bill Clinton Says Boeing Lawsuit 'Unprecedented'*, The Hill (May 18, 2011); John McDermott, *3 Boeing Works Want Suit Role: Trio Files Request to Intervene in Case Brought by NLRB*, The Post and Courier (June 3, 2011).

[13] *Boeing and International Association of Machinists and Aerospace Workers District Lodge 751*, affiliated with *International Association of Machinists and Aerospace Workers*, before the National Labor Relations Board, Region 19, United States of America, Case No. 19-CA-32431.

[14] *Id.*

[15] *Id.*

[16] Letter from Michael Luttig, Executive Vice President & General Counsel, Boeing, to Lafe Solomon, Acting General Counsel, National Labor Relations Board (May 3, 2011).

questioning by Representative Trey Gowdy (R-SC) at the Committee's South Carolina field hearing, Mr. Solomon even conceded that no workers in Washington had lost their job or benefits as a result of the second Dreamliner production line.[17] Instead, the line was a brand new facility that was the result of a business decision driven by "historic customer demand for the 787."[18] Boeing decided to invest more than $1 billion in the facility,[19] more than 1,000 employees were hired,[20] and the facility is expected to have a payroll of 3,800 "above average" paying jobs when hiring is complete.[21] Not only did Boeing create jobs in South Carolina, but it also added 2,000 more union jobs in Washington State as the South Carolina production line was built.[22] The complaint against Boeing undoubtedly put the heavily coveted South Carolina jobs in jeopardy. Indeed, the Committee heard testimony from a South Carolina Boeing worker, Cynthia Ramaker, who stated:

> Thousands of people will be unemployed if the NLRB complaint is successful. Losing my job will be catastrophic to myself and the workers at the North Charleston Boeing facility. We are homeowners. We have families that will be affected. . . . Boeing is one of the best employers in the area, and I would like to continue working for them. But if the 787 program is moved to Washington, I will not accept a relocation offer. I have chosen to exercise my rights as a citizen of the United States to live and work in South Carolina.[23]

The criticism about the absurdity of the complaint came from across the political spectrum. *The Economist* deemed NLRB's action as a "loony-left complaint," and said the "agency's recent militancy [was] shocking."[24] Representative James Clyburn (D-SC), the third highest ranking Democrat in the U.S. House of Representatives, defended Boeing, stating:

> Boeing's decision to invest tens of millions of dollars to build the new 787 facility in North Charleston was based on economics and quality of life issues. . . . South Carolina worked hard to bring the assembly line to the state through a competitive incentives package. And South Carolina's highly qualified workforce doubtlessly played a significant role. If upheld, the NLRB's decision, which I believe is

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[17] *Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise: Hearing Before the H. Comm. on Oversight and Government Reform*, 112th Cong. (2011) (question and answer between Rep. Trey Gowdy and Acting General Counsel Lafe Solomon).

[18] Letter from Michael Luttig, Executive Vice President & General Counsel, Boeing, to Lafe Solomon, Acting General Counsel, National Labor Relations Board (May 3, 2011).

[19] Opinion Editorial, Jim McNerney, Boeing Chairman, President & CEO, *Boeing is Pro-Growth, Not Anti-Union*, Wall Street J., May 11, 2011 *available at* http://online.wsj.com/article/SB10001424052748703730804576315141682547796.html.

[20] Eric Pryne, *Boeing to Fight NLRB Complaint on 787 South Carolina Plant*, The Seattle Times (Apr. 20, 2011), *available at* http://seattletimes.nwsource.com/html/businesstechnology/2014824566_charleston21.html.

[21] Brendan Kearney, *Boeing applicants flood website; deadline extended through Saturday evening*, The Post and Courier, Aug. 13, 2011, *available at* http://www.postandcourier.com/article/20110813/PC04/308139965.

[22] Opinion Editorial, Jim McNerney, Boeing Chairman, President & CEO, *Boeing is Pro-Growth, Not Anti-Union*, Wall Street J., May 11, 2011 *available at* http://online.wsj.com/article/SB10001424052748703730804576315141682547796.html.

[23] *Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise: Hearing Before the H. Comm. on Oversight and Government Reform*, 112th Cong. (2011) (testimony of Cynthia Ramaker).

[24] Editorial, *Don't Bully Boeing, Barack*, The Economist (May 19, 2011), *available at* http://www.economist.com/node/18712206.

> without merit and will not survive a court challenge, would jeopardize thousands of jobs in our community. This would be an unacceptable outcome.[25]

Sixteen attorneys general, including attorneys general from two non-right-to-work states, filed an amicus brief in support of Boeing, arguing that the Board should "repudiate the general counsel's misinterpretation of the [NLRA] as soon as possible."[26] The *Wall Street Journal* argued that the complaint showed the current NLRB is the "most politicized in memory" and was engaging in "an unprecedented attack on the free movement of business and capital in America."[27]

Not only did the NLRB's unprecedented action threaten to harm Boeing and its workers, it also created uncertainty and instability among other businesses. In a July 2011 survey conducted by the National Association of Manufacturers, 69 percent of 1,000 job creators said the case would negatively affect job growth.[28] 60 percent said the NLRB's case already has or may hurt hiring, and 49 percent said their capital expenditure plans have been or could be affected by the complaint against Boeing.[29]

ii. Union Bias Exemplified as the Case Against Boeing was Pursued

The Committee conducted extensive oversight of the NLRB Acting General Counsel's complaint against Boeing, and in the course of its oversight, the Committee learned that NLRB political appointees and agency bureaucrats demonstrated an extreme lack of impartiality as they pursued the case. Documents produced to the Committee included a strongly-worded IAM press release that criticized Boeing for writing a letter to Mr. Solomon challenging the facts in the complaint.[30] The NLRB's Associate General Counsel, Barry Kearney, praised the IAM's press release, stating, "[h]ooray for the red, white, and blue."[31] The NLRB Director of Public Affairs, Nancy Cleeland, reacted to the press release by forwarding it to the NLRB Special Counsel for Congressional and Intergovernmental Affairs, Jose Garza, with the comment "[n]ice"[32] to which Mr. Garza, responded, "[v]ery nice."[33] Another email chastised *The Wall Street Journal* for their reporting on the complaint, saying "don't look at yesterday's WSJ; you'll puke."[34] Upon receiving Boeing's Answer to the complaint, Mr. Kearney forwarded it to other NLRB attorneys

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[25] John McDermott, *3 Boeing workers want suit role: Trio files request to intervene in case brought by NLRB*, June 3, 2011, *available at* http://www.postandcourier.com/news/2011/jun/03/3-boeing-workers-want-suit-role.
[26] *Boeing and International Association of Machinists and Aerospace Workers District Lodge 751*, affiliated with *International Association of Machinists and Aerospace Workers*, before the National Labor Relations Board, Region 19, United States of America, Amicus Curiae Brief of Sixteen State Attorneys General In Support of Respondent The Boeing Company, Case No. 19-CA-32431 (June 9, 2011).
[27] Editorial, *Another Labor Board Power Play*, Wall Street J. (May 23, 2011), *available at* http://online.wsj.com/article/SB10001424052748704816604576335191478940656.html.
[28] Editorial, *The NLRB Fear Factor*, Wall Street J. (Aug. 13, 2011), *available at* http://online.wsj.com/article/SB10001424053111904007304576498343574868286.html.
[29] *Id.*
[30] Machinists Union Press Release, Boeing Uses Clout to Block Federal Law Enforcement Action, May 4, 2011. [NLRB-00006656-6657]
[31] Email from Barry Kearney, NLRB, to Ellen Ferrell et al., NLRB (May 5, 2011). [NLRB-00006654]
[32] Email from Nancy Cleeland, NLRB, to Jose Garza, NLRB (May 4, 2011). [NLRB-00006627]
[33] Email from Jose Garza, NLRB, to Nancy Cleeland, NLRB (May 4, 2011). [NLRB-00006627]
[34] Email from Miriam Szapiro, NLRB, to private (May 5, 2011). [NLRB-00006670]

and declared "[l]et the games begin"[35] to which one attorney responded "finally…."[36] Ms. Cleeland wrote to Mr. Solomon worried that she "made the Machinists [union] mad" and wanted to discuss it.[37] Ms. Cleeland also appeared to mock Representative Adam Smith (D-WA) for being "cautious" because he issued a press release about the complaint that called for "a fair legal process" and didn't prejudge the facts.[38] Moreover, Mr. Solomon felt compelled to forward an email to then-NLRB Chairman Wilma Liebman and Ms. Cleeland expressing praise from a union attorney who "spoke about how impressed everyone is with all [Mr. Solomon] ha[s] been attempting to do and accomplishing."[39] This email was accompanied by a blog posting entitled, "Labor Board Grows a Set," by the former head of ACORN, Wade Rathke,[40] to which Ms. Cleeland responded, "[f]riends like these…."[41] Such communications shows an overt pro-union bias out of an independent federal agency that should conduct itself in a balanced and non-partisan manner.

Pro-union bias at the NLRB extended throughout the staff who lamented about developments that did not benefit the IAM. A Deputy Assistant General Counsel expressed concern that the IAM lost a union decertification election at a Boeing location in South Carolina approximately a year before the complaint was filed, opining it was "[n]ot good for labor relations. . . ."[42] Another NLRB attorney worried that "what [they] were doing was fairly meaningless after the 10(j) [injunction remedy] got dropped" from the complaint, which could have required Boeing to stop operations at the South Carolina plant while the case was pending.[43] However, she was reassured by her colleague that the aftermath of filing the complaint was "like being on a roller coaster," stating, "I feel like I'm having an out-of-body experience. Could this really matter? I hope so."[44] To believe that an action that could jeopardize 3,800 South Carolina jobs is "meaningless" and ponder whether it could "really matter" further illustrates that the NLRB is an out-of-touch agency that does not grasp the practical effects of its actions.

iii. Cheers Erupted at the NLRB as the IAM and Boeing Announced a New Collective Bargaining Agreement

On November 30, 2011, Boeing and the IAM announced they had reached a new 4-year collective bargaining agreement to build the 737MAX airplane in Renton, Washington.[45] Shortly thereafter, Boeing workers in Washington State ratified the agreement, the IAM withdrew their unfair labor practice charge against Boeing, and Mr. Solomon announced that his

[35] Email from Barry Kearney, NLRB, to Ellen Farrell et al., NLRB (May 4, 2011). [NLRB-FOIA-00000444]
[36] Email from Miriam Szapiro, NLRB, to Debra Willen, NLRB (May 4, 2011). [NLRB-FOIA-00000444]
[37] Email from Nancy Cleeland, NLRB, to Lafe Solomon, NLRB (May 17, 2011). [NLRB-00009033]
[38] Email from Nancy Cleeland, NLRB, to Richard Ahearn et al., NLRB (Apr. 26, 2011) [NLRB-00007580]
[39] Email from Lafe Solomon, NLRB, to Wilma Liebman, NLRB and Nancy Cleeland, NLRB (Apr. 27, 2011). [NLRB-00010207]
[40] *See* Wade Rathke: Chief Organizer Blog, *available at* http://chieforganizer.org/.
[41] Email from Nancy Cleeland, NLRB, to Lafe Solomon, NLRB (Apr. 27, 2011). [NLRB-00010207]
[42] Email from Joseph Baniszewski, NLRB, to Richard Ahearn, NLRB (Apr. 11, 2010). [NLRB-FOIA-00000049]
[43] Email from Debra Willen, NLRB, to Miriam Szapiro, NLRB (May 4, 2011). [NLRB-00006666]
[44] Email from Miriam Szapiro, NLRB, to Debra Willen, NLRB (May 4, 2011). [NLRB-00006666]
[45] Dean Radford, *Boeing to build the 737 MAX in Renton*, Renton Reporter, Nov. 30, 2011, *available at* http://www.rentonreporter.com/news/134769908.html#.

office was withdrawing their complaint and the case was "closed."[46] While Boeing did not view the new collective bargaining agreement as a settlement of the case, critics of the complaint were skeptical that Boeing was not bullied into the new agreement. *The Wall Street Journal* called the withdrawal of the complaint a "sham,"[47] and *The Economist* opined that the "bureaucratic bruisers" decision to drop the complaint "reflects a victory not for common sense, but for strong-arm tactics," declaring that "[w]ith the deal done, the union no longer needed the [NLRB] to hold a helpful gun to Boeing's head."[48] Some internal NLRB documents exist to substantiate this theory. A couple of months before the complaint was filed, IAM's attorney called a NLRB attorney to say that his client wanted to know "what's going on."[49] Mr. Kearney responded "[t]ell him Lafe [Solomon] is thinking about it. I had an unsatisfactory conversation with [Boeing's attorney]."[50] While it is unclear what Mr. Solomon was "thinking about," it is possible that it concerned bringing a complaint to induce a settlement. Indeed, when NLRB attorneys working on the case learned that Boeing's motion to dismiss was denied, they proclaimed, "[b]ingo!"[51] and "[h]ooray! Let the talks begin."[52]

Jubilance and excitement rang through the NLRB upon announcement of the new collective bargaining agreement. Richard Ahearn, the NLRB Seattle area regional director overseeing the litigation, sent an email to other NLRB regional directors with the subject line, "Boeing, Machinists reach sweeping agreement" and the notation "YEA!!" with an article describing the agreement.[53] Responses to Mr. Ahearn included, "[g]reat news, my man!,"[54] "[t]his is fantastic news,"[55] and "a double/triple YEA! YEA! YEA! Congrats."[56] Mr. Ahearn also called the agreement between Boeing and IAM "pretty wonderful …on lots of levels,"[57] "a huge event for the [NLRB], this [Seattle] area and *the labor movement*"[58] [emphasis added], and he looked forward to "bask[ing] in the glow of a resolved Boeing matter . . . ."[59] Amid the celebratory mood, it also appeared that Mr. Ahearn had grown tired of the controversial Boeing litigation. He described the agreement as a "HUGE relief…."[60] and he "fel[t] like a huge albatross ha[d] been lifted from [him] and the region."[61] Boeing, and its South Carolina workers—those actually affected by the NLRB's ill-conceived and unnecessary litigation—undoubtedly agreed with Mr. Ahearn's sentiment.

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[46] Press Release, *NLRB Acting General Counsel announces close of Boeing case*, National Labor Relations Board, Dec. 9, 2011.
[47] Editorial, *The NLRB's Boeing Sham*, The Wall Street J. (Dec. 12, 2011), *available at* http://online.wsj.com/article/SB10001424052970203833104577070572768248242.html.
[48] Editorial, *Boeing bullied*, The Economist (Dec. 17, 2011), *available at* http://www.economist.com/node/21541851?frsc=dg%7Ca.
[49] Email from Debra Willen, NLRB, to Barry Kearney, NLRB (Feb. 7, 2011). [NLRB-00014625]
[50] Email from Barry Kearney, NLRB, to Debra Willen, NLRB (Feb. 7, 2011). [NLRB-00014625]
[51] Email from Richard Ahearn, NLRB, to Lafe Solomon, et al., NLRB (June 30, 2011). [NLRB-00014732]
[52] Email from Jennifer Abruzzo, NLRB, to Richard Ahearn, et al., NLRB (June 30, 2011). [NLRB-00014732]
[53] Email from Richard Ahearn, NLRB, to ML-Regional Directors, NLRB (Nov. 30, 2011). [NLRB-00012708]
[54] Email from Rik Lineback, NLRB, to Richard Ahearn, NLRB (Nov. 30, 2011). [NLRB-00012708]
[55] Email from Martha Kinard, NLRB, to Richard Ahearn, NLRB (Nov. 30, 2011). [NLRB-00012659]
[56] Email from Wanda Jones, NLRB, to Richard Ahearn et al., NLRB (Nov. 30, 2011). [NLRB-00012672]
[57] Email from Richard Ahearn, NLRB, to Martha Kinard, NLRB (Nov. 30, 2011). [NLRB-00012685]
[58] Email from Richard Ahearn, NLRB, to Rik Lineback et al., NLRB (Nov. 30, 2011). [NLRB-00012708]
[59] Email from Richard Ahearn, NLRB, to Charles Posner et al., NLRB (Nov. 30, 2011). [NLRB-00012691]
[60] Email from Richard Ahearn, NLRB, to Mark Hutcheson, Davis Wright Tremaine LLP (Nov. 30, 2011) [NLRB-00012591]
[61] Email from Richard Ahearn, NLRB, to Stephen Glasser, NLRB (Dec. 1, 2011). [NLRB-00012743]

b. Decades of Precedent Overturned in *Specialty Healthcare* Decision

In another controversial action, on August 26, 2011, the NLRB issued a decision in *Specialty Healthcare and Rehabilitation Center of Mobile*.[62] This decision, in overturning decades of labor law precedent, threatens to foster workplace instability and increase labor uncertainty.

The NLRA authorized the NLRB to determine the appropriate employee unit for collective bargaining with an employer.[63] In 1989, the NLRB promulgated a rule defining the scope of bargaining units in acute healthcare facilities, such as short-term care hospitals.[64] This rule expressly did not apply to non-acute healthcare facilities, such as nursing homes.[65] After the Supreme Court upheld the rule,[66] the NLRB issued a decision in *Park Manor Care Center* to address the scope of a bargaining unit in the context of a non-acute healthcare facility.[67] The Board in *Park Manor* decided to apply a "broader approach" using not only the traditional "community of interests" factors but also "background information gathered during rulemaking and prior precedent."[68] Thus, when applying the *Park Manor* standard, the NLRB looked at whether the interests of the employees to be included in the unit were "sufficiently distinct from those of other employees" who were to be excluded from the unit.[69]

By its terms, the *Park Manor* standard made smaller bargaining units such as "micro-unions" impermissible under the NLRA. However, in *Specialty Healthcare*, the NLRB unilaterally changed course and overturned this twenty-year-old precedent – without even being asked to do so by the litigants in the case.[70] The new rule created by the Board turned the existing standard on its head by shifting the burden to the employer. Now, in order to avoid the formation of a micro-union, an employer must show that employees excluded from the petitioned-for bargaining unit "share an overwhelming community of interest" with the employees included in the petitioned-for bargaining unit.[71]

The NLRB's new rule threatens to upset the delicate balance between the interests of employers and unions as practiced for 20 years. The Retail Leaders Industry Association (RILA) – a trade group representing top domestic and international retailers[72] – explained that the decision will allow "unions to gerrymander a workplace to establish micro-unions, creating unnecessary divisions in the workplace, undermining staffing flexibility and impeding retailers'

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[62] *See Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. (2011).
[63] National Labor Relations Act, 29 U.S.C. § 159(b).
[64] Collective Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,336 (Apr. 21, 1989); *see* 29 C.F.R. § 103.30.
[65] *See* 29 C.F.R. § 103.30(f)(2).
[66] *See American Hospital Ass'n v. NLRB*, 499 U.S. 606 (1991).
[67] *Park Manor Care Center, Inc.*, 305 NLRB 872 (1991).
[68] *Id.* at 875.
[69] *See* Barnes & Thornburg LLP, NLRB Facilitates Union Organization of Smaller Bargaining Units (Sept. 2011).
[70] *See Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 slip op. at 15-16 (Hayes, dissenting).
[71] *See id.* at 1 (majority opinion).
[72] *See* Retail Industry Leaders Ass'n, About Us, http://www.rila.org/about/Pages/default.aspx.

ability to meet the expectations of their customers."[73] RILA further predicted that the decision will harm American workers by reducing career development opportunities as a result of limited cross-training.[74]

Although some argue that the *Specialty Healthcare* decision is limited to the healthcare industry,[75] the NLRB is already certifying micro-unions in other industries. For example, relying on *Specialty Healthcare*, the Regional Director of the NLRB's Region 2 certified as a micro-union all women's shoes associates in the Bergdorf Goodman department store in New York City.[76] The NLRB also recently relied on *Specialty Healthcare* to allow a bargaining unit comprised of 31 rental sales agents at a rental car facility at the Denver International Airport.[77] Because of the proliferation of smaller bargaining units, industry trade groups worry that the *Specialty Healthcare* decision could adversely affect both employers and employees: "Micro-unions would be devastating to [their] member companies and their employees, by limiting customer service and denying today's workforce the upward mobility enjoyed by their predecessors."[78]

III. The NLRB's Regulatory Overreach

At a time when the Administration claims that it is streamlining rules, the substantive rulemaking at the NLRB is increasing with frequency. Indeed, during the NLRB's first 75 years, it only finalized one major substantive rule; the rulemaking process for the substantive rule moved cautiously and took almost two years to complete.[79] Two other substantive rules were proposed, but were eventually withdrawn.[80] However, under the Obama Administration, the NLRB has finalized two, very significant substantive rules—the notice posting rule and the "quickie election" rule—in a much shorter time period. These rules, criticized as an overreach of the NLRB's authority, have been struck down by courts, but the NLRB has indicated it intends to try to advance the rules despite the court decisions. Many view these rules as an effort to boost the declining population of private-sector labor unions.

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[73] Letter from Bill Hughes, Retail Industry Leaders Ass'n, to Darrell Issa & Elijah Cummings, H. Comm. on Oversight & Gov't Reform, 1 (June 6, 2012).
[74] *Id.*
[75] *See* Kevin Bogardus, *Sen. Graham Slams NLRB as the 'Grim Reaper of Job Creation,'* The Hill, June 13, 2012.
[76] *See* Decisions and Direction of Election, *Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*, NLRB Case No. 02-RC-079654 (May 4, 2012).
[77] *See DTG Operations, Inc.*, 357 NLRB No. 175, slip op. (Dec. 30, 2011).
[78] Letter from the Food Marketing Institute, the Internat'l Council of Shopping Centers, the Internat'l Franchise Ass'n, the Nat'l Ass'n of Wholesaler-Distributors, the Nat'l Restaurant Ass'n, the Nat'l Retail Fed., the Retail Industry Leaders Ass'n, & the U.S. Chamber of Commerce to Daniel K. Inouye, Thad Cochran, Tom Harkin, and Richard C. Shelby, S. Comm. on Appropriations (June 12, 2012).
[79] *See* Mel Haas et al., *The "Obama" National Labor Relations Board: The Potential Use of Rulemaking to Enhance Union Organizing* (August 2010), *available at* http://www.uschamber.com/sites/default/files/reports/1008_obamanlrb.pdf.
[80] *See id.*

a. The Notice Posting Rule Exceeds Legislative Authority

In more than 75 years, the NLRB has never mandated that employers post a general notice of employee rights in the workplace.[81] However, on August 30, 2011, the NLRB reversed course and issued a final rule that requires employers subject to the NLRA to post a notice of select employee rights under the statute.[82] In particular, the notice emphasizes employees' right to unionize and collectively bargain, but it does not include workers' rights to object to the use of their union dues and fees for political purposes.[83] The Board justified the rule on the basis that it "believes that many employees protected by the NLRA are unaware of their rights under the statute" and the notice will "better enable the exercise of [those] rights . . . ."[84] While there is disagreement about the extent of employee awareness of the rights to unionize and collectively bargain,[85] it is known that 67 percent of workers are unaware of their right under the NLRA to withhold mandatory union fees for political purposes.[86] Yet, in a demonstration of union bias, the NLRB appears unconcerned with workers' rights to object to union political spending since that statutory right is not included in what must be posted.

Notwithstanding the contents of the notice, a broad array of industries, spearheaded by the U.S. Chamber of Commerce and the National Association of Manufacturers, disputed the NLRB's statutory authority to issue the rule and filed suit. On March 2, 2012, the U.S. District Court for the District of Columbia found that the NLRB had the authority to issue the rule; however, the court invalidated most of the enforcement mechanisms as improper under the NLRA.[87] On April 13, 2012, the U.S. District Court for the District of South Carolina reached the opposite conclusion—finding that under the "plain language and structure of the [NLRA]" the NLRB "lack[ed] authority . . . to promulgate the rule."[88] Subsequent to this ruling, the U.S. Court of Appeals for the District of Columbia Circuit directed the NLRB to delay implementation of the rule pending the outcome of appeals.[89] The NLRB continues to believe "that requiring employers to post this notice is *well within* [its] authority" and intends to fight business representatives throughout the appeals process.[90] [emphasis added]. With at least one federal court in disagreement, and appeals pending, such a strong assertion of authority is dubious and premature.

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[81] *See Chamber of Commerce of the United States and South Carolina Chamber of Commerce v. National Labor Relations Board*, Order, No. 2: 11-cv-02516-DCN (S.C. Dist. Ct. Apr. 13, 2012).
[82] Notification of Employee Rights Under the National Labor Relations Act, Final Rule, 76 Fed. Reg. 54006 (Aug. 30, 2011).
[83] *See* National Labor Relations Board, Employee Rights Under the National Labor Relations Act, Sept. 2011, *available at* http://www.nlrb.gov/poster.
[84] Notification of Employee Rights Under the National Labor Relations Act, Final Rule, 76 Fed. Reg. 54006 (Aug. 30, 2011).
[85] *See id.*
[86] UnionFacts.com, Use of Dues for Politics *available at* http://www.unionfacts.com/article/political-money/.
[87] *National Association of Manufacturers v. National Labor Relations Board*, Memorandum Opinion, No. 11-1629 (ABJ) (D.C. Dist. Ct. Mar. 2, 2012).
[88] *Chamber of Commerce of the United States and South Carolina Chamber of Commerce v. National Labor Relations Board*, Order, No. 2: 11-cv-02516-DCN (S.C. Dist. Ct. Apr. 13, 2012).
[89] *See National Association of Manufacturers, et al. v. National Labor Relations Board*, Order, No. 12-5068 (D.C. Cir. Ct. Apr. 17, 2012).
[90] Office of Public Affairs, National Labor Relations Board, NLRB Chairman Mark Gaston Pearce on recent decisions regarding employee rights posting, Apr. 17, 2012, *available at* http://www.nlrb.gov/news/nlrb-chairman-mark-gaston-pearce-recent-decisions-regarding-employee-rights-posting.

Many view the notice posting rule as a ploy by the NLRB to achieve private-sector unionization by regulation and are concerned about the cost and practical implications if it is allowed to move forward. According to the NLRB's own estimates, six million employers could be affected by the rule, imposing a compliance burden of $386.4 million.[91] The Western Growers Association believes the rule "will make it easier for traditional union organizing efforts resulting in increased costs to businesses and job losses . . . for farming operations."[92] The Brick Industry Association believes the rule "could set a disturbing precedent and chill job creation[,]"[93] and the National Federation of Independent Business (NFIB) argues that "since the NLRB can only investigate matters brought to its attention by employees, the [rule] serves as a mechanism for the Board to increase its caseload and influence over small businesses."[94] At a broader level, some fear "there is a danger that [the] politically-motivated Board will continue to issue decisions and propose rules that run counter to an effective employer-employee relationship."[95] The Non-Ferrous Founders' Society hopes that Congress will step in to return the NLRB to an "unbiased and non-evangelistic judge" of labor-management disputes.[96]

b. The "Quickie Election" Rule Illustrates a Disregard for Quorum Requirements

In a major change to how workers unionize, on December 22, 2011, the NLRB issued a final rule that alters the procedures for union organizing elections.[97] The rule, commonly known as the "quickie election" rule, could allow an organizing election to occur in as little as 15 to 20 days[98] after filing a petition, versus the current median of 38 days[99] and the NLRB's own target, at least at one time, of 42 days.[100] The rule also postpones certain pre-election challenges until

[91] National Labor Relations Board, Notification of Employee Rights Under the National Labor Relations Act, Final Rule, 76 Fed. Reg. 54006 (Aug. 30, 2011).
[92] Letter from Tom Nassif, Western Growers to to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight and Gov't. Reform, June 1, 2012 (on file with author).
[93] Letter from J. Gregg Borchelt, President and CEO, Brick Industry Association to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight and Gov't. Reform, May 25, 2012 (on file with author).
[94] Letter from Susan Eckerly, Senior Vice President, Public Policy, National Federation of Independent Businesses to Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform, May 31, 2012 (on file with author).
[95] Letter from Robert E. McKenna, President and CEO, Motor & Equipment Manufacturers Association to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight and Gov't. Reform, June 1, 2012 (on file with author).
[96] Letter from James L. Mallory, Executive Director, Non-Ferrous Founders' Society to Chairman Darrell Issa, H. Comm. on Oversight & Gov't Reform, June 1, 2012 (on file with author).
[97] National Labor Relations Board, Representation—Case Procedures, Final Rule, 76 Fed. Reg. 80138 (Dec. 22, 2011).
[98] Letter from Jay Timmons, President and CEO, National Association of Manufacturers to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't Reform, June 4, 2012 (on file with author).
[99] National Labor Relations Board, Representation—Case Procedures, Final Rule, 76 Fed. Reg. 80138 (Dec. 22, 2011).
[100] National Labor Relations Board Office of the General Counsel, Memorandum GC 04-02, Apr. 22, 2004; *NLRB Representation Elections and Initial Collective Bargaining Agreements: Safeguarding Workers' Rights: Hearing Before the Subcomm. on Labor, Health and Human Services, Education, and Related Agencies of the S. Comm. Appropriations*, 110th Cong. (2008) (testimony of Peter C. Schaumber, Chairman, National Labor Relations Board).

after the union election occurs.[101] The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace challenged the rule on multiple procedural and substantive grounds. On May 14, 2012, the U.S. District Court for the District of Columbia invalidated the rule on the basis that the NLRB lacked the quorum required under the NLRA when it issued the rule. The court quipped that, "[a]ccording to Woody Allen, eighty percent of life is just showing up. When it comes to satisfying a quorum requirement, though, showing up is even more important than that. Indeed, it is the only thing that matters . . . ."[102] The court chose not to rule on the additional challenges and indicated that its ruling "need not necessarily spell the end of the final rule for all time."[103]

On June 11, 2012, the NLRB invented a new theory on how to justify its procedural shenanigans and asked the court to reconsider its earlier ruling.[104] However, the judge denied the request, stating that while the NLRB expanded and improved its argument, the Court "already rejected its core . . . ."[105] Moreover, the Board did not "adequately explai[n] why it could not have presented this [new] evidence at [an earlier] stage . . . ." and "prior to the entry of judgment."[106] Nevertheless, the judge concluded that his original ruling would likely not have changed.[107] Refusing to relent in its effort to aid unionization, the NLRB has indicated it plans to appeal the ruling to a higher court.[108]

Many argue that the quickie election rule greatly limits an employer's ability to lawfully educate employees and "tilt[s] the playing field in favor of organized labor" at the expense of free speech and due process rights.[109] The American Frozen Food Institute and the Interlocking Concrete Pavement Association stress that the current labor environment is fair and balanced, which provides an adequate opportunity for unions and employers to discuss their views for or against unionization in the workplace. In contrast, employers believe the new rule is an attempt by "union sympathizers," who failed to achieve "card check," to undermine the will of Congress by allowing unions to be certified before employers have a chance to communicate with employees "creat[ing] opportunities for mischief and misconduct . . . ."[110] The Brick Industry Association attests that the rule "restrict[s] employees full access to important facts and

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[101] National Labor Relations Board, Representation—Case Procedures, Final Rule, 76 Fed. Reg. 80138 (Dec. 22, 2011).
[102] U.S. *Chamber of Commerce and Coalition for a Democratic Workplace v. National Labor Relations Board*, Memorandum Opinion, No. 11-2262 (JEB) (D.C. Dist. Ct. May 14, 2012).
[103] *Id.*
[104] Melanie Trottman, *NLRB Appeals Union-Organizing Ruling*, The Wall Street Journal, June 11, 2012.
[105] *U.S. Chamber of Commerce and Coalition for a Democratic Workplace v. National Labor Relations Board*, Memorandum Opinion, No. 11-2262 (JEB) (D.C. Dist. Ct. July 27, 2012).
[106] *Id.*
[107] *Id.*
[108] Melanie Trottman, *Judge Declines to Reconsider Union-Organizing Rule*, The Wall Street Journal Blog (July 31, 2012), *available at* http://blogs.wsj.com/washwire/2012/07/31/judge-declines-to-reconsider-union-organizing-rule/.
[109] Letter from Thomas J. Donohue, President and CEO, U.S. Chamber of Commerce to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't. Reform, June 1, 2012 (on file with author).
[110] Letter from Charles A. McGrath, Executive Director, Interlocking Concrete Pavement Institute to Chairman Darrell Issa, H. Comm. on Oversight & Gov't Reform, May 29, 2012 (on file with author); Letter from Kraig R. Naaz, President and CEO, American Frozen Food Institute to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't. Reform, June 1, 2012 (on file with author).

employers' free speech and due process rights during union representation elections."[111] Indeed, "[b]y rushing the timeframe . . . employees will be forced to make a decision without relevant details, and employers will be unable to offer balanced information on collective bargaining."[112]

Small businesses, in particular, will be hit hard by costly legal fees and the rule could have a negative effect on the economy. The National Association of Manufacturers emphasizes that "smaller-sized manufacturers who lack the legal expertise to navigate complex and detailed labor laws" could see a significant increase in violations for unknowing employers.[113] The NFIB had similar concerns, stating "[t]his shortened timeframe would hit small businesses particularly hard, since small employers usually lack labor-relations expertise and in-house legal departments."[114] The American Bakers Association believes that the rule "will continue to deter economic growth," and it is just another example of the NLRB's "willingness . . . to circumvent regular order to advance a specific agenda."[115] Indeed, the Brick Industry Association believes that "[s]uch extreme and unnecessary changes to long-standing election procedures disrupt business and jeopardize job creation as the brick industry struggles to rebound."[116]

One of the two NLRB members who voted to hastily issue the rule without a quorum was Craig Becker—the widely known "lightning rod" nominee to the NLRB who was recess appointed by President Obama in 2010 after he did not receive Senate confirmation.[117] Mr. Becker's term was about to expire when he voted to approve the final rule in December 2011.[118] In May 2012, a mere five months later, the AFL-CIO announced that Mr. Becker would be returning to the organization as a co-general counsel.[119] Prior to serving on the NLRB, Mr. Becker was an associate general counsel at both the AFL-CIO, which is the largest federation of unions in the U.S.,[120] and the Service Employees International Union, which is one of the largest

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[111] Letter from J. Gregg Borchelt, President and CEO, Brick Industry Association to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight and Gov't. Reform, May 25, 2012 (on file with author).
[112] *Id.*
[113] Letter from Jay Timmons, President & CEO, National Association Manufacturers, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform and Jim Jordan, Chairman, Subcom. on Reg. Affairs, Stimulus Oversight & Gov't Spending, June 4, 2012 (on file with the author).
[114] Letter from Susan Eckerly, Senior Vice President, Public Policy, National Federation of Independent Businesses to the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov't Reform, May 31, 2012 (on file with author).
[115] Letter from Robb MacKie, President and CEO, American Bakers Association to Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform, June 1, 2012 (on file with author).
[116] Letter from J. Gregg Borchelt, President and CEO, Brick Industry Association to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight and Gov't. Reform, May 25, 2012 (on file with author).
[117] Steven Greenhouse, *Former N.L.R.B. Member Takes Post in a Big Union*, The New York Times, May 22, 2012, *available at* http://www.nytimes.com/2012/05/23/business/craig-becker-appointed-to-afl-cio-role.html.
[118] *See* U.S. *Chamber of Commerce and Coalition for a Democratic Workplace v. National Labor Relations Board*, Memorandum Opinion, No. 11-2262 (JEB) (D.C. Dist. Ct. May 14, 2012).
[119] Steven Greenhouse, *Former N.L.R.B. Member Takes Post in a Big Union*, The New York Times, May 22, 2012, *available at* http://www.nytimes.com/2012/05/23/business/craig-becker-appointed-to-afl-cio-role.html.
[120] Times Topics, American Federation of Labor-Congress of Industrial Organizations, The New York Times, Apr. 14, 2009 *available at* http://topics.nytimes.com/top/reference/timestopics/organizations/a/american_federation_of_laborcongress_of_industrial_organizations/index.html.

international unions in North America.[121,122] Such close ties to these extremely influential union groups creates the appearance that Mr. Becker was promoting a specific agenda to benefit his past and present employers rather than looking out for the best interest of American workers.

IV. President Obama's Unconstitutional "Recess" Appointments to the NLRB Promote Uncertainty

In a heavily criticized action, on January 4, 2012, President Obama "recess" appointed three new members to the NLRB—Richard Griffin, Jr., Sharon Block, and Terence F. Flynn.[123] The appointments were met with bipartisan criticism because the U.S. Senate was not in recess when they were made; therefore, the exercise of the Recess Appointments Clause of the U.S. Constitution was improper. The Department of Justice (DOJ) acknowledged that "substantial arguments" exist to dispute the constitutionality of the appointments, the appointments create a "litigation risk," and that DOJ "cannot predict with certainty how courts will react to challenges [to the] appointments . . . ."[124] Yet, the head of the NLRB, Chairman Mark Pearce, seems unfazed by the controversy surrounding the appointments and indicated the NLRB plans to "keep [its] eye on the prize" by continuing to issue controversial rules.[125]

a. U.S. Supreme Court Precedent Underscores the Uncertainty Created by the "Recess" Appointments

As discussed earlier in the report, the purpose of the NLRA and the NLRB is to promote stability. However, President Obama chose to frustrate Congress' intended structure and purpose of the NLRB when he usurped the Senate's "advice and consent" power and appointed the NLRB members. According to a former NLRB Democratic board member, Dennis Devaney, there will be a "cloud" over future NLRB actions because "anything they do is going to be subject to being undone, because they didn't have the authority to act."[126]

The concern that NLRB decisions could be "undone" in the future is supported by substantial evidence. Indeed, on June 17, 2010, in *New Process Steel, L.P. v. NLRB*, the U.S. Supreme Court ruled that the NLRB acted without authority during a 27-month period when it operated with just two members.[127] During that period, the NLRB unlawfully decided almost 600 cases concerning union representation and allegations of various unfair labor practices by unions and employers.[128] After the Supreme Court's decision, the NLRB issued a press release

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[121] SEIU.org, Fast Facts, *available at* http://www.seiu.org/a/ourunion/fast-facts.php.
[122] Steven Greenhouse, *Former N.L.R.B. Member Takes Post in a Big Union*, The New York Times, May 22, 2012, *available at* http://www.nytimes.com/2012/05/23/business/craig-becker-appointed-to-afl-cio-role.html.
[123] The White House, Office of the Press Secretary, *President Obama Announces Recess Appointments to Key Administration Posts*, (Jan. 4, 2012), http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts.
[124] Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, (Jan. 6, 2012), *available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.
[125] *See* Michael Tremoglie, *NLRB Chief says he wants easier organizing rules*, LegalNewsline, Jan. 26, 2012 *available at* http://www.legalnewsline.com/news/235015-nlrb-chief-says-he-wants-easier-organizing-rules.
[126] Tim Devaney, *Business groups fear revitalized NLRB*, The Washington Times (Jan. 5, 2012) *available at* http://www.washingtontimes.com/news/2012/jan/5/business-groups-fear-revitalized-nlrb/.
[127] *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).
[128] *Id.*

indicating that *New Process Steel* and the 96 other pending cases challenging the two-member Board decisions (six that were currently before the Supreme Court and 90 pending in the federal courts of appeal) were expected to be remanded for consideration by the current Board.[129] As for the roughly 500 other cases that did not have a challenge pending, the NLRB said it remained "unclear" how many of those decisions issued without authority "can or will be contested and how many may now be moot."[130]

The precedent set in *New Process Steel* creates a real possibility that if the "recess" appointments are determined to be unconstitutional, the decisions issued by the NLRB during the intervening period could also be rendered invalid because the NLRB lacked the needed quorum. Such an outcome would impact the NLRB's future caseload: it would likely have to reconsider numerous cases as it did after *New Process Steel*. In turn, this would increase NLRB's caseload and would result in workers, employers and unions having to wait even longer for rulings on pending and future cases. The Committee wrote to the NLRB earlier this year expressing concern about the possible waste of taxpayer resources due to the potential for NLRB decisions to be invalidated if a court finds the appointments unconstitutional.[131] As a result, the Committee learned that after *New Process Steel* the Board had to reprocess and re-decide 106 cases, and the General Counsel had to resubmit at least 30 appellate briefs and present oral argument on 14 occasions, half of which was for a second time.[132] Such duplication represents a significant waste of taxpayer dollars and creates uncertainty for those regulated by the NLRB who must re-litigate their cases. The President's recent appointments create the same risk that NLRB decisions will be upended and additional taxpayer resources will be wasted.

To make matters worse, the number of decisions in jeopardy could be even higher than after *New Process Steel* because of the differing philosophies of the current Board members. When the Board was operating with just two members those members agreed not to decide any controversial cases "[a]nd they did so in a collegial fashion despite the fact that Member Schaumber was of the Republican Party and Ms. Liebman was a Member of the Democratic Party."[133] However, it is clear that the current Board is not planning to operate as cautiously as its predecessors. Instead, it plans to move full-steam ahead without regard for future consequences to taxpayers or the employers and workers who are left in limbo during this period of uncertainty. Indeed, Chairman Pearce declared, "[w]e presume the constitutionality of the president's appointments, and we go forward based on that understanding."[134] Ironically, while the NLRB's claimed goal is to "eliminate a lot of waste of time, energy and money for the

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[129] NLRB Press Release, NLRB outlines plans for considering 2-member cases in wake of Supreme Court ruling (July 1, 2010).
[130] *Id.*
[131] Letter from Chairman Issa, House Committee on Oversight and Government Reform to Acting General Counsel Lafe Solomon, National Labor Relations Board and Chairman Mark Pearce, National Labor Relations Board (Jan. 30, 2012).
[132] Letter from Acting General Counsel Lafe Solomon, NLRB to Chairman Darrell Issa, House Committee on Oversight and Government Reform, Feb. 13, 2012; Letter from Solicitor William B. Cowen, NLRB to Chairman Darrell Issa, House Committee on Oversight and Government Reform, Feb. 13, 2012.
[133] *Uncharted Territory: What are the Consequences of President Obama's Unprecedented 'Recess' Appointments?":Hearing before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012) (testimony of Mark A. Carter).
[134] Michael Tremoglie, *NLRB Chief says he wants easier organizing rules*, LegalNewsline, Jan. 26, 2012 *available at* http://www.legalnewsline.com/news/235015-nlrb-chief-says-he-wants-easier-organizing-rules.

taxpayers,"[135] if its actions are subsequently undone it will have failed miserably to achieve that goal.

b. Job Creators Challenge the "Recess" Appointments

A cloud of uncertainty is already apparent in the legal challenges that have been filed. On January 13, 2012, the NFIB filed a motion to amend its existing lawsuit challenging the NLRB's notice posting rule to argue that the NLRB did not possess the authority to enforce the rule due to the unconstitutional appointments.[136] Unfortunately, the court denied the motion because it did not believe the current lawsuit was the appropriate vehicle to challenge the appointments.[137] On March 15, 2012, the U.S Chamber of Commerce and the Coalition for a Democratic Workplace filed a motion to intervene in *Noel Canning v. National Labor Relations Board*,[138] also to contest the validity of the NLRB's authority in light of the appointments. In bringing the challenge, Thomas J. Donohue, president and CEO of the U.S. Chamber, stated:

> Allowing the Board to act when it may not have a quorum adds even more uncertainty to our economic climate. That is why we are looking to join a small business lawsuit to challenge these appointments—we want the authority of the Board clarified. Employers and employees need to know what it means when the NLRB orders an employer to bargain with a union, to modify its compensation and benefit plans, or to cease contracting work—to offer just a few examples. Is the order legally rendered, or will it be invalidated in the future? Without this kind of certainty, we cannot foster an environment that will lead to economic growth and job creation.[139]

The U.S. Chamber's motion to intervene was granted.[140] In addition, 42 U.S. Senators filed an amicus brief in the case to challenge the constitutionality of the appointments.[141] On December 5, 2012, during oral arguments, two federal judges expressed doubt that the President acted within his authority when he made the appointments.[142] Judge Thomas Griffith stated, "[o]nce you remove yourself from the principles set forth in the Constitution . . . you are adrift."[143] Finally, on July 30, 2012, four workers filed a brief with the U.S. Court of Appeals for the Seventh Circuit appealing recent NLRB decisions and challenging

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[135] *Id.*
[136] *See* NFIB Press Release, NFIB Challenges "Recess" Appointments to National Labor Relations Board Adds New Claims to "Poster Rule" Lawsuit (January 13, 2012).
[137] Alexandra Alper, *Challenge to Obama recess appointments denied*, Reuters (March 2, 2012), *available at* http://www.reuters.com/article/2012/03/02/us-usa-court-appointments-idUSTRE8211JO20120302.
[138] *Noel Canning v. National Labor Relations Board*, Motion for Leave to Intervene, No. 12-1115 (D.C. Cir. Ct. Mar. 15, 2012).
[139] U.S. Chamber of Commerce Press Release, U.S. Chamber Joins Challenge to NLRB Appointments (March 15, 2012).
[140] *See* National Chamber Litigation Center, *Noel Canning v. National Labor Relations Board, available at* http://www.chamberlitigation.com/noel-canning-v-national-labor-relations-board.
[141] Press Release, Senate Republicans File Amicus Brief in Suit Over Unconstitutional Recess Appointments, U.S. Senate Committee on Health, Education, Labor, and Pensions (Sept. 26, 2012), *available at* http://www.help.senate.gov/newsroom/press/release/?id=38be36f9-e5c1-47e0-8a07-6039f992ce7d.
[142] Stephen Dinan, *Court puts doubt on Obama's appointments in recess*, The Washington Times (Dec. 5, 2012), *available at* http://www.washingtontimes.com/news/2012/dec/5/court-questions-obama-recess-appointments/.
[143] *Id.*

the NLRB's authority to hear the cases, arguing the unconstitutional appointments leave the Board without a legitimate quorum.[144] The case is also currently pending. Such instability brought about by the appointments, and the corresponding challenges to President Obama's unprecedented actions, injects uncertainty into labor relations for those subject to the NLRB's jurisdiction — workers, unions, and employers alike.

V. NLRB Officials Broke the Rules

The actions of NLRB leadership contribute to its perceived reputation as a rogue and unaccountable agency. Multiple NLRB political appointees and agency bureaucrats, including the Acting General Counsel and a former Board member, appear to have inappropriately communicated with each other as the Acting General Counsel pursued the case against Boeing, and some of these same actors stonewalled a congressional investigation for months. Also, the NLRB Office of Inspector General (OIG) found that the Acting General Counsel inappropriately participated in a matter involving Wal-Mart when he had a financial interest in the company, and a former Board member resigned due to allegations by the OIG that he inappropriately communicated with outside parties. These activities seriously undermine the integrity and fairness of the agency.

a. The Separation Principle between the Board and the General Counsel as well as *Ex Parte* Rules Appear to Have Been Violated

For purposes of prosecuting unfair labor practices, the Office of General Counsel and members of the NLRB are required to operate separately because the Board may eventually hear a case brought by the general counsel.[145] Moreover, the NLRB's *ex parte* rules prohibit communications relevant to the merits of an unfair labor practice proceeding between the general counsel or his representatives and members of the NLRB and their legal assistants "from the time the complaint . . . is issued, or the time the communicator has knowledge that a complaint will be issued, whichever occurs first."[146] In a display of a willingness to break the NLRB's own rules, individuals within the NLRB appear to have made inappropriate internal communications as they pursued the case against Boeing.

In October 2011, as a part of the Committee's investigation into the Acting General Counsel's complaint against Boeing, the Committee wrote to the NLRB expressing concern that the two entities were not maintaining this independence with respect to the Boeing case.[147] Documents produced to the Committee revealed that Acting General Counsel Lafe Solomon and then-NLRB Chairman Wilma Liebman had communicated about the complaint against Boeing. On April 20, 2011, the same day the complaint was filed, Mr. Solomon sent an IAM press

[144] National Right to Work Foundation Press Release, Workers Challenge Obama NLRB "Recess Appointments" in Federal Appeals Court (July 30, 2012).
[145] *See* Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (Oct. 21, 2011); *see also NLRB. v. United Food and Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112 (1987).
[146] 29 C.F.R. 102.126; 29 C.F.R. 102.127; 29 C.F.R. 102.128; 29 C.F.R. 102.129.
[147] Letter from Chairman Darrell Issa, Oversight and Government Reform Committee to Lafe Solomon, Acting General Counsel, National Labor Relations Board (Oct. 17, 2011).

release hailing the complaint to then-Chairman Liebman.[148] Then, on May 5, 2011, then-Chairman Liebman sent Mr. Solomon and Ms. Cleeland an email that included an article from *The New Republic* praising the complaint.[149]

NLRB leadership misled the Committee about communications between the Office of General Counsel and the Board concerning the complaint against Boeing. Indeed, on three different occasions NLRB officials, including Mr. Solomon, represented to the Committee that "there [were] no documents constituting or recording communications between the Office of General Counsel and the National Labor Relations Board related to the Boeing matter."[150] When the Committee confronted the NLRB about the above documents and false representations, it brushed them off as mere email exchanges that included "*one* news article and *a* press release."[151] [emphasis added]. Mr. Solomon went on to explain that:

> The NLRB takes seriously the separation between the Office of General Counsel and the Board because the General Counsel may eventually present a case on appeal to the Board. However, email exchanges about news articles and press releases after the issuance of the complaint do not implicate the separation principle because they obviously could have no impact on the investigation or the decision to issue a complaint against Boeing or on the prosecution of this case.[152]

However, additional documents produced to the Committee contradict the NLRB's assertion and shows the lack of seriousness that the NLRB gives to the separation principle as well as its *ex parte* rules. For instance, Mr. Solomon and then-Chairman Liebman exchanged, or were both party to, more than 20 emails related to the Boeing matter. Contrary to Mr. Solomon's assertion, a number of these emails encompass more than "news articles" and "press releases." Indeed, on April 22, 2011, two days after the complaint was filed, Mr. Solomon forwarded a HR Policy Association letter[153] related to the merits of the Boeing case to then-Chairman Liebman and later said "I'm going to come see you in a bit . . . ."[154] Then-Chairman Liebman responded, "[c]ome any time."[155] Later, on April 28, 2011, and April 29, 2011, Mr. Solomon, then-Chairman Liebman, and the head of the Office of Public Affairs were part of an extensive email exchange with Office of General Counsel representatives that coordinated a response to questions from CNN's television program *State of the Union* about the case.[156] The NLRB OIG

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[148] Email from Lafe Solomon, NLRB, to Wilma Liebman, NLRB (Apr. 20, 2011). [NLRB-FOIA-00000314]
[149] Email from Wilma Liebman, NLRB, to Lafe Solomon and Nancy Cleeland, NLRB (May 5, 2011). [NLRB-00006641]
[150] *See* Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (July 26, 2011); NLRB Briefing with Committee Staff (June 8, 2011); Letter from Celeste Mattina, Acting Deputy General Counsel to Chairman Darrell Issa, House Oversight and Government Reform Committee (May 27, 2011).
[151] Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (Oct. 21, 2011).
[152] *Id.*
[153] Letter from Daniel Yager, HR Policy Association, to Senator Tom Harkin, et al. (April 22, 2011). [NLRB-00010558-10559]
[154] Email from Lafe Solomon, NLRB, to Wilma Liebman, NLRB (Apr. 22, 2011). [NLRB-00010568]
[155] Email from Wilma Liebman, NLRB, to Lafe Solomon, NLRB (Apr. 22, 2011). [NLRB-00010569]
[156] Multiple emails between Lafe Solomon, Nancy Cleeland, Wilman Liebman, Jose Garza, Richard Ahearn, Barry Kearney, Ellen Farrell, and Jayme Sophir, NLRB (Apr. 29, 2011) [NLRB-00008994-9002; NLRB-

found that some of the latter emails by Office of General Counsel staff violated *ex parte* rules,[157] and the agency's "public affairs activities could benefit from more clearly defined policies and procedures" to prevent such violations.[158] The other 20 plus emails and subsequent in-person communication about the case between Mr. Solomon and then-Chairman Liebman, which are not specifically addressed in the OIG report, may directly violate the *ex parte* rules as well. At the least, they create the appearance that NLRB officials carelessly disregarded the separation principle as they pursued the case against Boeing.

Further, then-Chairman Liebman expressed interest in, and apparently obtained a copy of, a May 3, 2011, letter from Boeing Executive Vice President & General Counsel J. Michael Luttig to Mr. Solomon that detailed Boeing's rebuttal to facts in the complaint as well as public statements made by the NLRB.[159] Responding to an internal email from the NLRB's new media specialist that referenced the letter, then-Chairman Liebman asked, "what letter from Boeing?"[160] In reply, the NLRB new media strategist stated, "[t]he letter from Boeing is to Lafe [Solomon], and uses the language of the complaint and our public statements to try to make their case. Nancy [Cleeland] is bringing you a copy."[161] As Mr. Solomon stated, the separation principle exists to ensure that the Board is not intertwined in the prosecution of the case "because the General Counsel may eventually present a case on appeal to the Board."[162] With the matter still at the complaint stage – with the potential that the Board could eventually hear the matter – then-Chairman Liebman's possession of Boeing's letter to Mr. Solomon seems to represent a startling violation of the spirit of the separation principle. Moreover, then-Chairman Liebman's interaction with Ms. Cleeland directly contradicts a statement Ms. Liebman recently made to the OIG that she did not discuss the complaint with Ms. Cleeland.[163]

Not only did Mr. Solomon and other general counsel representatives communicate with then-Chairman Liebman about the Boeing proceeding, then-Chairman Liebman's Chief of Staff, Robert Schiff,[164] and Chief Counsel, John Colwell,[165] were also party to emails with the Office of General Counsel about the case. On April 20, 2011, following a request from Mr. Schiff,[166] Mr. Solomon sent an email to Mr. Schiff that included information about settlement options that

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00009040,9043,9049, 9083, 9088, 9117; Multiple emails between Nancy Cleeland, Wilma Liebman, Lafe Solomon, Jose Garza, and Robert Schiff, NLRB (Apr. 28, 2011). [NLRB-00010289-10292; NLRB-00010612]

[157] Memorandum, Report of Investigation-OIG-I-473 (Nov. 19, 2012).

[158] Memorandum from David P. Berry, NLRB Inspector General to Mark Gaston Pearce, NLRB Chairman and Lafe Solomon, NLRB Acting General Counsel (Nov. 19, 2012).

[159] Letter from J. Michael Luttig, Executive Vice President & General Counsel, Boeing, to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (May 3, 2011).

[160] Email from Wilma Liebman, NLRB, to Anthony Wagner, NLRB (May 3, 2011). [NLRB-00007252]

[161] Email from Anthony Wagner, NLRB to Wilma Liebman, NLRB (May 3, 2011). [NLRB-00007253]

[162] *See* Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (Oct. 21, 2011).

[163] Memorandum, Report of Investigation-OIG-I-473, Results of Interview—Wilma Liebman, Investigation Exhibit 8 (on file with author).

[164] Press Release, Robert Schiff Named Chief of Staff to Chairman Liebman, Feb. 01, 2011.

[165] *See* Seth Borden, Newly Appointed NLRB Board Members Sworn In, Select Staff, Amid Continuing Controversy, Labor Relations Today, Jan. 14, 2012, *available at* http://www.laborrelationstoday.com/2012/01/articles/nlrb-administration/newly-appointed-nlrb-members-sworn-in-select-staff-amid-continuing-controversy/.

[166] Email from Robert Schiff, NLRB, to Lafe Solomon, NLRB (Apr. 19, 2011). [NLRB-00011266]

had been discussed between Boeing and IAM.[167] Mr. Solomon also kept Mr. Schiff apprised of Freedom of Information Act requests from the non-partisan government watchdog Judicial Watch related to the Boeing case.[168] Finally, Mr. Solomon, Mr. Schiff, Mr. Colwell, and then-Chairman Liebman were regularly on the same emails to keep them apprised of, among other things, "social media trends"[169] and congressional defenses[170] of the complaint.

Social media trends were circulated by the Office of Public Affairs which bolsters the need for that office to heed to the OIG's recommendation that it develop clearly defined policies and procedures when initiating concurrent communications with the Board and Office of General Counsel. Congressional defenses of the complaint were circulated by Mr. Garza. Mr. Garza signed a memorandum of understanding with then-Chairman Liebman and Mr. Solomon that generally precluded him from communicating with the Board about the Boeing matter "to avoid even the appearance of impropriety";[171] however, his actions appear to further such impropriety. In sum, such documents reveal that the Office of General Counsel and members and staff of the Board appear to be heavily intertwined and coordinated on matters where Congress intended they remain independent.[172]

b. NLRB Leadership Refused to Fully Cooperate with Congress for Months

Pursuant to the Committee's constitutional obligation to conduct oversight, the Committee launched an investigation of the NLRB Acting General Counsel's complaint against Boeing in May 2011.[173] Over the course of the investigation, the Committee's attempts to obtain documents from the NLRB were repeatedly resisted, congressional testimony from Mr. Solomon was only agreed to under the threat of a subpoena, and the Committee was forced to issue a subpoena for documents. Only upon the dismissal of the case did NLRB officials produce previously withheld documents.

While NLRB political appointees and agency bureaucrats eventually ceased their obstruction of the Committee's investigation, it does not negate the fact that they resisted oversight for many months. Indeed, when the Committee asked Mr. Solomon to testify at its hearing on June 17, 2011, in North Charleston, South Carolina, he initially declined.[174] He cited concerns for the litigants, but also implied that he would be in Seattle overseeing the litigation

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[167] Email from Lafe Solomon, NLRB, to Robert Schiff, NLRB, and Jose Garza, NLRB (Apr. 20, 2011). [NLRB-00007644-7647]
[168] Email from Lafe Solomon, NLRB to Robert Schiff et al., NLRB (May 3, 2011). [NLRB-00006385]
[169] *See, e.g.*, Emails from Anthony Wagner, NLRB, to Wilma Liebman, Lafe Solomon, Nancy Cleeland, Robert Schiff, John Colwell, and Jose Garza, NLRB (May 3, 2011, May 24, 2011, May 25, 2011, June 1, 2011, June 21, 2011). [NLRB-00007252; NLRB-00011083-11085; NLRB-00009162]
[170] Emails from Jose Garza, NLRB to Lafe Solomon, Wilma Liebman, Nancy Cleeland, Robert Schiff, John Colwell, Jennifer Abruzzo, and Celeste Mattina, NLRB (May 10, 2011, May 11, 2011). [NLRB-00011077; NLRB-00006965-6966]
[171] Memorandum, Report of Investigation-OIG-I-473, Memorandum of Understanding, Investigation Exhibit 10 (on file with author).
[172] *See NLRB. v. United Food and Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112 (1987).
[173] Letter from Chairman Darrell Issa, House Oversight and Government Reform Committee to Lafe Solomon, Acting General Counsel, National Labor Relations Board (May 12, 2011).
[174] Letter from NLRB Acting General Counsel Lafe Solomon, NLRB to Oversight and Government Reform Committee Chairman Darrell Issa, (June 3, 2011).

against Boeing.[175] That impression was false. Ms. Cleeland informed a reporter that Mr. Solomon would not be in Seattle, but nonetheless would also not be testifying at the Committee's hearing.[176] However, after the Committee informed Mr. Solomon that a subpoena would be issued to compel his testimony if necessary, he agreed. Others inside the agency were not thrilled with his decision to testify. Mr. Garza sent an email to Mr. Solomon as well as the NLRB Acting Deputy General Counsel, Celeste Mattina, and others informing them that the Chairman of the Senate Health, Education, Labor and Pensions Committee, Tom Harkin, did an interview "hammer[ing] on the inappropriateness of the South Carolina hearing,"[177] to which Ms. Mattina responded, [f]inally!!"[178] Shortly after Mr. Solomon's testimony, Ms. Mattina demonstrated her lack of respect for congressional oversight when she sent an email to Mr. Solomon stating, "the Republicans were not as vicious as [NLRB staff] thought, although [she] felt like kicking some of them from time to time…" and that "[NLRB staff] are proud of [Lafe Solomon] for standing up to those bullies!"[179]

NLRB political appointees and agency bureaucrats delayed producing documents to the Committee. Communications between two NLRB attorneys indicated that they thought the Committee's investigation was "going a lot faster than Jose [Garza] projected" and queried—an astonishing two months after the Committee made its first inquiry—"have we sent them anything yet?"[180] Further, upon news reports about a possible congressional subpoena for the NLRB's documents, Mr. Ahearn told a NLRB trial attorney that after a conversation with Ms. Mattina "we will politely decline."[181] Mr. Kearney's reaction to the threat of a subpoena for documents was to forward it to his colleagues and say the "[p]rice of poker just went up."[182] These documents highlight the flippant attitude of bureaucratic officials who appear to believe congressional oversight is akin to a game and easily dismiss the NLRB's accountability to Congress.

In the course of the Committee's oversight, some NLRB documents were produced to the Committee; however, many were duplicative and consisted of, among other things, news articles, trial documents "available to all parties" and emails circulating these documents between attorneys, which was woefully incomplete and unacceptable. Moreover, it appeared these productions were merely a diversion to slow down the Committee's investigative process. Therefore, on August 5, 2011, the Committee subpoenaed the documents. Even then, Mr. Solomon broke the law and refused to fully comply with the subpoena stating that "the majority

[175] *See* Letter from NLRB Acting General Counsel Lafe Solomon, NLRB to Oversight and Government Reform Committee Chairman Darrell Issa, (June 3, 2011) stating, "Your inquiry concerns an open case that is scheduled to be tried before an administrative law judge in Seattle, Washington beginning June 14, 2011. That trial will almost certainly be in progress when your Committee gathers in South Carolina only three days later. As Acting General Counsel of the National Labor Relations Board, I am ultimately responsible for overseeing the litigation in Seattle and for making all strategic decisions related to the prosecution of this case."
[176] Email from Nancy Cleeland, NLRB, to Sam Hananel, AP (June 7, 2011). [NLRB-00011108]
[177] Email from Jose Garza, NLRB, to Lafe Solomon, NLRB and Celeste Mattina, et al., NLRB (June 16, 2011). [NLRB 00010903]
[178] Email from Celeste Mattina, NLRB to Jose Garza, et al., NLRB (June 16, 2011). [NLRB-00010903]
[179] Email from Celeste Mattina, NLRB to Lafe Solomon, NLRB (June 17, 2011). [NLRB-00010904]
[180] Email from Mara-Louise Anzalone, NLRB to Anne Pomerantz, NLRB (July 12, 2011). [NLRB-FOIA-00000141]
[181] Email from Richard L. Ahearn, NLRB to Peter G. Finch, NLRB (July 12, 2011). [NLRB-FOIA-00000134]
[182] Email from Barry Kearney, NLRB, to Ellen Farrell, NLRB and Jayme Sophir, NLRB (July 13, 2011). [NLRB-00011162]

of documents that will be captured by [the subpoena] will likely contain material that cannot be disclosed consistent with preserving the integrity of the Agency's ongoing law enforcement proceeding and ensuring fundamental fairness to the parties to that proceeding."[183] However, after staff negotiations, and evidence that damaging documents were being withheld from the Committee,[184] Mr. Solomon began to produce additional responsive documents on a bimonthly basis albeit with redactions he believed to be deliberative. After the case was dismissed, Mr. Solomon finally agreed to produce documents contained in the NLRB's Boeing case file, notwithstanding prior calculated attempts to stonewall Congress and a congressional investigation.

c. Acting General Counsel Lafe Solomon Accused of Ethical and Criminal Misconduct; Office of General Counsel Ethics Program a Failure

As more evidence that Mr. Solomon fails to abide by the rules, on September 13, 2012, the NLRB Office of the Inspector General (OIG) issued a report that alleged Mr. Solomon committed ethical and criminal violations when he participated in a matter before the NLRB in which he had a financial interest.[185] Under federal law and ethics regulations, federal employees may not participate personally and substantially in a matter in which, to their knowledge, a financial interest exists, if that matter will have a direct and predictable effect on that interest.[186] The OIG found that Mr. Solomon participated personally and substantially in a matter before the NLRB involving Wal-Mart and their social media policy, that Mr. Solomon owned more than $15,000 worth of Wal-Mart stock at the time of his participation, and that the matter would have a direct and predictable effect on his financial interest.[187] In addition, the OIG found the ethics program within the Office of General Counsel was a complete failure.

Mr. Solomon, in his capacity as NLRB's Acting General Counsel, reviewed a memorandum prepared by the NLRB's Division of Advice that addressed whether Wal-Mart's social media policy violated the NLRA.[188] The memo found that Wal-Mart's social media policy was unlawful and recommended the appropriate NLRB regional office issue a complaint against the company. When the memo was presented to Mr. Solomon for review, Mr. Solomon indicated that he did not necessarily disagree with the finding, but wanted additional questions to be researched in order to prepare for negative reactions should a complaint be filed.[189] Two days later, Mr. Solomon mentioned to his staff that he owned Wal-Mart stock and needed to check with the ethics official to determine whether he could obtain a waiver to participate in the case.[190] Yet, later that day, Mr. Solomon conducted a meeting to further discuss the case and

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[183] Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (Aug. 12, 2011).
[184] *See* Letter from Chairman Darrell Issa, Oversight and Government Reform Committee to Lafe Solomon, Acting General Counsel, National Labor Relations Board (Oct. 17, 2011).
[185] Memorandum from David P. Berry, Inspector General, National Labor Relations Board, Report of Investigation – OIG-I-475 (September 13, 2012).
[186] 18 U.S.C. 208(a); 5 C.F.R. 2635.402.
[187] Memorandum from David P. Berry, Inspector General, National Labor Relations Board, Report of Investigation – OIG-I-475 (September 13, 2012).
[188] *Id.* at 2-3.
[189] *Id.* at 2.
[190] *Id.* at 3.

directed his staff to settle it by contacting Wal-Mart's counsel and asking Wal-Mart to amend its social media policy.[191] A week later he applied for an ethics waiver, and it was denied.[192] Soon after that, Mr. Solomon sold his Wal-Mart stock and then continued to participate in the case, which ultimately resulted in Wal-Mart amending its social media policy.

The OIG found that Mr. Solomon's participation in the case was improper because, among other things, his actions resulted in a determination of how to "effect a change in policy that affects each of Wal-Mart's employees and was, by its very nature, intended to be determinative of the outcome."[193] Moreover, the OIG also found a "complete failure of the NLRB's ethics program with regard to the operations of the Office of the General Counsel and that the environment at the NLRB in which this violation occurred was dysfunctional and adversarial."[194] The OIG characterized the multiple failures of NLRB employees to prevent Mr. Solomon's conduct as evidence that the Office of General Counsel's ethics program is currently in disarray.[195] While Mr. Solomon disputes that he violated the law and the NLRB believes that corrective action has been taken to improve the NLRB's ethics program, Mr. Solomon concedes that "the best course of action would have been for him to have had no involvement in the Wal-Mart matter whatsoever . . . until he had sold the Wal-Mart stock."[196]

d. "Recess" Appointee Terence F. Flynn Resigned Amid Allegations of Ethical Violations

On May 26, 2012, less than five months after his appointment by President Obama, NLRB Member Flynn resigned his position in wake of allegations that he had improperly released confidential and privileged Board information to outside parties.[197] The alleged leaks occurred in 2010 and 2011 – prior to Mr. Flynn's appointment to the Board, but while he served as chief counsel to Board Member Brian Hayes.[198]

An investigation by the NLRB OIG documented instances in which Mr. Flynn "violated the Standards of Ethical Conduct for Employees of the Executive Branch" by disclosing sensitive Board information and material to two former Board members.[199] According to the OIG findings, Mr. Flynn utilized the NLRB librarian on one occasion to perform legal research for Peter Kirsanow, a former Board member who represented a trade group in an action against the NLRB.[200] The OIG investigation further found that on several occasions Mr. Flynn sent former Member Peter Schaumber updates on Board rulemaking timelines, details on internal

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[191] *Id.* at 3-4.
[192] *Id.* at 6-7.
[193] *Id.* at 10.
[194] *Id.* at 11.
[195] *Id.* at 12.
[196] Letter from William W. Taylor, III, Counsel for Lafe Solomon, to David Berry, Inspector General, National Labor Relations Board, September 14, 2012.
[197] *See* Steven Greenhouse, *Labor Board Member Resigns Over Leak to G.O.P. Allies*, N.Y. Times, May 27, 2012.
[198] *See id.*
[199] Memorandum from David P. Berry, Inspector General, Report of Investigation – OIG-I-468 (Mar. 19, 2012); Memorandum to the Board from David P. Berry, Inspector General, Supplemental Report of Investigation – OIG-I-468 (Apr. 30, 2012).
[200] Memorandum from David P. Berry, Inspector General, Report of Investigation – OIG-I-468, at 2-3 (Mar. 19, 2012).

deliberations, and confidential legal advice and analyses on pending Board actions.[201] The OIG investigation also found that Mr. Flynn had assisted former Member Schaumber in drafting an opinion article that was highly critical of a Board decision.[202]

Mr. Flynn's actions, and his corresponding resignation, reflect poorly on the NLRB and its image as a principled and independent regulator. His actions also further illustrate the problems with President Obama's "recess" appointments. Mr. Flynn was informed that he was the subject of an OIG investigation on December 5, 2011—a month before he was appointed,[203] which also raises questions about the rigor of the White House's internal vetting process for appointments. Nevertheless, if Mr. Flynn had been subject to a Senate confirmation hearing and a thorough vetting process, it is entirely possible that such findings would have been exposed at that time and the NLRB could have avoided further tarnish to its waning reputation.

VI. Conclusion

The NLRB was intended to be a fair and unbiased agency that balances the interests of employers and unions. However, as this staff report discussed, the problems and bias at the NLRB run rampant. Courts have invalidated its rules, it is reinterpreting labor law with a slant towards unionization, and its leaders apparently believe the rules do not apply to them. The uncertainty stemming from these actions only adds to the decay of economic recovery and hurts job growth. Such a systematic pattern of behavior is the reason the NLRB is becoming known as a rogue agency and is no longer viewed as fair and impartial by job creators.

[201] Memorandum from David P. Berry, Inspector General, Report of Investigation – OIG-I-468, at 6-8 (Mar. 19, 2012); Memorandum to the Board from David P. Berry, Inspector General, Supplemental Report of Investigation – OIG-I-468 (Apr. 30, 2012).
[202] Memorandum to the Board from David P. Berry, Inspector General, Supplemental Report of Investigation – OIG-I-468, at 6-7 (Apr. 30, 2012).
[203] Memorandum from David P. Berry, Inspector General, Report of Investigation – OIG-I-468, at 13 (Mar. 19, 2012).

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The Committee on Oversight and Government Reform is the main investigative committee in the U.S. House of Representatives. It has authority to investigate the subjects within the Committee's legislative jurisdiction as well as "any matter" within the jurisdiction of the other standing House Committees. The Committee's mandate is to investigate and expose waste, fraud and abuse.

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