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May 9, 2012

The Honorable Richard A. Lidinsky, Jr.
Chairman
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573

Dear Mr. Chairman Lidinsky:

It has come to my attention that the Federal Maritime Commission (FMC) may be an agency in crisis. Commission insiders allege that the politicization of the Commission's core functions and administrative decisions has contributed to a climate of fear and intimidation among agency managers and staff. As you know, the Office of Special Counsel has opened an investigation into these allegations.

The effect on the staff has been measurable. According to the Partnership for Public Service, which produces the respected federal employee satisfaction survey *The Best Places to Work in the Federal Government*, in 2011 the FMC suffered the largest drop in employee satisfaction of any agency in government.[1] The Committee observed a similar chilling effect on the staff when the Chairman of the Nuclear Regulatory Commission politicized the agency and bullied career staff. The Committee treats allegations of politicization of independent regulatory agencies very seriously because, if true, they can undermine the performance of an agency's mission. The purpose of this letter is to request documents and information to better understand the allegations concerning the Federal Maritime Commission.

The allegations center on your treatment of staff who objected to banning owner-operator truck drivers from providing services at the Port of Los Angeles (POLA). Prior to your being named Chairman in September 2009, the FMC was involved in litigation concerning the POLA Clean Truck Program (CTP), which was intended to reduce air pollution at the port.[2] The FMC opposed one provision of the CTP, unrelated to air pollution, which would have effectively banned independent owner-operator truck drivers, who provide the vast majority of port drayage services, from working at POLA.[3] Instead, under POLA's proposal, only trucking companies utilizing employee-drivers, who are subject to unionization, would be allowed to work at the

[1] THE BEST PLACES TO WORK IN THE FEDERAL GOVERNMENT (2011), http://bestplacestowork.org/BPTW/rankings/overall/small.
[2] Ronald D. White, *Agency Objects to Clean Truck Program*, L.A. TIMES, Oct. 30, 2008.
[3] *S. Calif. Port Truck Plan Supporters Warn Current Version Will Fail*, SHIPPERS' NEWSWIRE, July 5, 2007.

port. However, FMC economists Roy Pearson and Robert Blair testified in federal court that this provision would reduce competition and "unreasonably increase transportation costs," and was "not in any way critical to sustaining the CTP's environmental and public health benefits."[4]

Labor unions,[5] environmental groups,[6] and "green jobs" advocacy organizations decried FMC's opposition to the employee-driver mandate, as set forth by Pearson and Blair in their court testimony.[7] The Natural Resources Defense Council filed a Freedom of Information Act request for FMC documents in an attempt to prove that "external influences" may have precipitated the agency's "rabid attacks and scrutiny" of the employee-driver mandate.[8] According to information received by the Committee, the nonpartisan Office of the Secretary and the General Counsel's office – not the Chairman's Office – typically handle FOIA requests.

One of your first acts as Chairman was to insert yourself into the nonpartisan FOIA process by ordering that six boxes of Blair's work papers concerning CTP be sent to your office for review. You made this request despite the fact that these documents were the subject of ongoing litigation between the FMC and the Natural Resources Defense Council.

The Committee has learned that Blair and Pearson may have faced retaliation for testifying in opposition to the employee-driver mandate in federal court. According to information received by the Committee, in October 2009 you told Blair and Pearson's supervisor Austin Schmitt to "keep an eye on" them. You further advised their supervisor that Blair and Pearson did not reflect well on the agency, and that Blair, who had worked for a time at the World Shipping Council, an association representing ocean carriers, was a "spy for the carriers" inside the agency. Furthermore, you allegedly told Schmitt that you regretted not having sought permission from OPM to fire Blair and Pearson. In another instance, following a presentation Pearson gave to Commissioners and staff, you stated:

> I've had several complaints concerning [Pearsons's] 'performance' at meeting yesterday – which fell somewhere between a red brick poly in Liverpool or a too-clever-by-half over the hill vaudevillian who once read a book. He took way too much time on a very busy day, too obtuse charts and his never-ending arrogant sneer toward the bench. Who vetted his

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[4] Decl. of Dr. Roy J. Pearson in Supp. of Pl.'s Mot. for Prelim. Inj., at 5, 6-7, Fed. Mar. Comm'n v. City of Los Angeles, et al., No. 08-1895 (D.D.C. Nov. 17, 2008).

[5] Press Release, International Brotherhood of Teamsters, Environmental-Led Port Coalition Praises President Obama's Pick of Joseph Brennan to Lead FMC (June 9, 2009), http://www.teamster.org/content/environmental-led-port-coalition-praises-president-obamas-pick-joseph-brennan-lead-fmc.

[6] David Pettit, *A Truckload of Hyprocrisy*, NATURAL RESOURCES DEFENSE COUNCIL, Sept. 17, 2008, http://switchboard.nrdc.org/blogs/dpettit/a_truckload_of_hypocrisy.html.

[7] Press Release, Coalition for Clean & Safe Ports, National "Blue-Green" Coalition Applauds Key Obama Appointee's Inaugural Earth Day Award to LA Clean Truck Program (April 21, 2010), http://cleanandsafeports.org/resources-for-the-media/press-releases/national-blue-green-coalition-applauds-key-obama-appointees-inaugural-earth-day-award-to-la-clean-truck-program/.

[8] NRDC, "The Federal Maritime Commission Needs a Lesson in Transparency," May 19, 2009, *available at* http://switchboard.nrdc.org/blogs/amartinez/the_federal_maritime_commission.html.

> performance time? I will decide in the future what time he has. Take this up with his supervisor, RL.[9]

The Committee has learned that Schmitt may also have faced retaliation for defending Blair and Pearson. On September 20, 2010, Schmitt, in his capacity as Blair and Pearson's direct supervisor, gave them an adjectival performance rating of "Outstanding" and recommended they each receive an annual performance award of 3 percent of base salary, the minimum amount commensurate with an "Outstanding" rating under established FMC policy.[10] According to documents reviewed by the Committee, this would have equated to awards of roughly $3,800 to $4,200, respectively.[11]

In spite of these ratings, you informed Schmitt through the Managing Director that you wanted Blair and Pearson to receive no more than $200 each, despite the fact that both their direct supervisor and FMC Commissioner Rebecca Dye had lauded their work performance as "outstanding."[12] After Schmitt protested that this would violate agency policy, you agreed to a 2 percent award for Blair and Pearson. You refused to put your rationale for rejecting the reviewing supervisor's recommendation in writing, despite the fact that doing so is also required by established agency policy.[13]

According to documents obtained by the Committee, on the same day that Schmitt refused to arbitrarily lower his recommended performance award for Blair and Pearson without written explanation from your office, you informed Schmitt that his department would be subjected to a "management survey."[14] One of the staffers tasked to conduct this "management survey" later resigned, in part because he believed his task was to conduct a biased investigation designed to produce predetermined conclusions and damaging information about Schmitt and others.

In addition to adverse personnel decisions taken against them, the Committee has learned that agency management subjected Schmitt, Blair and Pearson, along with at least three other FMC employees, to covert surveillance of their computers and e-mails by means of software called Spector 360. According to the company's website, this software captures all the workstation activity of a monitored employee.[15] The Committee has learned that the Inspector General for the FMC expressed concern about whether the agency's use of this software violated federal privacy regulations and requested that agency management stop using it in January 2012.

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[9] E-mail from Richard A. Lidinsky, Chairman, Federal Maritime Commission, to Ronald Murphy, Managing Director, Federal Maritime Commission (July 14, 2011).
[10] FEDERAL MARITIME COMMISSION, RECOMMENDATION FOR PERFORMANCE OR INCENTIVE AWARD (Sept. 20, 2010).
[11] FEDERAL MARITIME COMMISSION, *supra* note 10.
[12] Memoranda from Rebecca Dye, Commissioner, Federal Maritime Commission to Austin Schmitt, Director, Bureau of Trade Analysis (Sept. 13, 2010) (on file with author).
[13] FEDERAL MARITIME COMMISSION, *supra* note 11, § (f)(7).
[14] Memorandum from Ronald D. Murphy, Managing Director, Federal Maritime Commission to Austin Schmitt, Director, Bureau of Trade Analysis (Sept. 22, 2010).
[15] SpectorSoft, Computer & Internet Monitoring Software, http://www.spector360.com/ (last visited May 8, 2012).

Despite this admonition, it appears agency management continued using Spector 360 against the advice of the Inspector General.

The Committee is also concerned about misuse of taxpayer funds. For example, according to information we have received, the FMC procured an official car and chauffer used mostly to drive you from FMC headquarters to Union Station, a distance of approximately three blocks.

To assist the Committee's investigation of this matter, please provide the following documents and information as soon as possible, but by no later than May 22, 2012, at noon:

1. All documents and communications, from July 1, 2009, to the present, between and among Richard A. Lidinsky, Ronald D. Murphy and the following organizations/individuals:

    a. Natural Resources Defense Council;
    b. International Brotherhood of Teamsters;
    c. International Longshoremen's Association;
    d. International Longshore and Warehouse Union;
    e. Coalition for Clean & Safe Ports;
    f. Change to Win;
    g. Office of the Honorable Antonio Villaraigosa, Mayor of Los Angeles;
    h. Office of Geraldine Knatz, Executive Director, Port of Los Angeles;
    i. Office of the Honorable Nancy Pelosi; and
    j. Executive Office of the President.

2. All documents and communications, from July 1, 2009, to the present, referring or relating to Austin Schmitt, Roy Pearson, Robert Blair, Edward Anthony, Spector 360 software, the *Survey of Bureau of Trade Analysis Programs* (Aug. 22, 2011), the Natural Resources Defense Council FOIA request, the Port of Los Angeles Clean Truck Program, and the Chairman's Inaugural Earth Day Award, between and among Richard A. Lidinsky, Ronald D. Murphy and the following individuals:

    a. Rebecca A. Fenneman;
    b. Adam R. Trzeciak;
    c. Laura Mayberry;
    d. Jerome Johnson;
    e. Michael H. Kilby;
    f. David Story; and
    g. Anthony Haywood.

3. A complete accounting of the agency's purchase and use of Spector 360 software, including the total amount of agency funds expended, the agency employees subjected to monitoring, the justification for monitoring them, whether the FMC Inspector General requested that the agency stop using Spector 360 to monitor certain employees, and whether the agency immediately complied with that directive.

4. A complete accounting of the agency's procurement of a vehicle for the purpose of transporting commissioners and agency employees, including:

    a. The year, make and model of the vehicle;
    b. The total amount spent on the vehicle, including any costs involved in securing garage space for the vehicle;
    c. The salary of any individual whose job description includes driving the vehicle; and
    d. All records describing the use of the vehicle including origins, destinations, frequency of use, and passengers.

5. A complete accounting of the agency's purchase of any decorative or commemorative items such as paintings, sculptures, works of art, furniture, or coins on behalf of the Office of the Chairman since September 11, 2009, including the total amount spent and the method of payment.

6. A complete accounting of the agency's 50th Anniversary Party, including total funds expended and a break-down of funds expended by category.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment to this letter provides additional information about responding to the Committee's request.

If you have any questions about these requests, please contact Brien Beattie or Jonathan Skladany of the Committee staff at (202) 225-5074. Thank you for your attention to this important matter.

Sincerely,

Darrell Issa
Chairman

Attachment

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

DARRELL E. ISSA, CALIFORNIA
CHAIRMAN

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

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Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.

8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.

12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.

16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.

18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157of the Rayburn House Office Building and the Minority Staff in Room 2471of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.