

1 MR. BERRY: 11.

2 MR. COBURN: 11, thanks.

3 **(Investigative Exhibit 11 marked for identification.)**

4 THE WITNESS: Okay.

5 Q. BY MR. BERRY: Now, on November 18, 2011, was the D.H.  
6 Horton case issued?

7 A. I don't, I don't recall one way or the other, but this  
8 e-mail would suggest that it had not.

9 Q. Okay. Well, D.H. Horton is a rather significant case,  
10 isn't it? Sorry.

11 A. D.H. Horton was certainly a novel case in that it was a  
12 case that issued with only two members participating.

13 Q. Okay. And when did it issue?

14 A. I'm not sure.

15 Q. So you're saying you, on November 18th, you did not know  
16 whether or not the case was issued or you do not know now  
17 whether or not the case was issued?

18 A. I do not recall the date that D.H. Horton issued.

19 Q. Okay. Do you recall sending this e-mail to Mr. Lopatka?

20 A. I remember having an exchange with Mr. Lopatka regarding  
21 a law review article that he was working on that addressed  
22 among other things the issue presented in D.H. Horton.

23 Q. Now, it would seem if the case or the decision had been  
24 issued, the discussion would have been different. I mean  
25 clearly it says while the majority, and Brian is recused --

1 and Brian is Member Hayes; is that correct?

2 A. That would be right.

3 Q. Is recused and while the majority wants to press  
4 forward, [REDACTED]. So this would seem  
5 to indicate this is pre-issuance e-mail.

6 A. It would appear to be.

7 Q. As a Chief Counsel, do you know what the rules are  
8 regarding discussing pending matters or pending cases on the  
9 Board?

10 MR. COBURN: Again, I'm going to object. I think you're  
11 asking him for a legal conclusion.

12 MR. BERRY: Well, he's a Chief Counsel.

13 MR. COBURN: He was a Chief Counsel, you're right about  
14 that. Nonetheless --

15 MR. BERRY: Well, now he's --

16 MR. COBURN: You're asking him to kind of render an  
17 opinion about the propriety or impropriety of his conduct.

18 MR. BERRY: Not really. I asked him to -- well, I think  
19 that's appropriate. We can ask him whether or not he thought  
20 his conduct was appropriate.

21 MR. COBURN: I don't mean to stop you, nor am I  
22 suggesting he shouldn't answer the question. I'm just noting  
23 an objection.

24 MR. BERRY: Okay. Well, I'm not sure who your  
25 objections are going to go to, but okay.

1 MR. COBURN: That's okay. I know there's no judge here.

2 THE WITNESS: Was there a question?

3 Q. BY MR. BERRY: Yes, there is a question. Do you know  
4 the rules involving giving information about pending cases  
5 before the rules?

6 A. I don't know what rules you're referring to.

7 Q. What is your understanding of the rules about issuing or  
8 providing information about pre-decisional cases?

9 A. I don't know what rules you're referring to.

10 MR. COBURN: If you could show him a rule, you know,  
11 then he might be able to discuss it.

12 Q. BY MR. BERRY: How long were you a Chief Counsel?

13 A. I believe I said I have been Chief Counsel from December  
14 2003 until my appointment in January of this year. And  
15 Mr. Lopatka was also a Chief Counsel.

16 Q. Right. As in your role as Chief Counsel, how many  
17 attorneys did you manage, on average?

18 A. It varied significantly depending whether I was managing  
19 one staff or two.

20 Q. If it was two staffs?

21 A. 12 per staff maybe, 24.

22 Q. Would it have been appropriate for one of those staff  
23 members to release information about a case that was pending  
24 before Member Schaumber?

25 MR. COBURN: I think that would be the same objection.

1 Just noting it for --

2 MR. BERRY: That's fine.

3 MR. COBURN: Just noting it for the record.

4 THE WITNESS: Could you repeat the question, please?

5 Q. BY MR. BERRY: Would you have found it appropriate for a  
6 subordinate staff member to give out pre-decisional  
7 information on a case that was pending before  
8 Member Schaumber?

9 A. To give out to who?

10 Q. To anyone outside the Agency?

11 A. What information?

12 Q. Well, perhaps, one member is recused, that the majority  
13 is going to go forward.

14 A. The recusal is a -- the fact of recusal is a matter of  
15 public record. Member Hayes' recusal was, the list was  
16 submitted and he had notified the Agency of the cases in  
17 which he was recused. That happened long before this e-mail.

18 Q. Actually, no.

19 A. No? Then I'm mistaken.

20 Q. Yes. Member Hayes was recused on the D.H. Horton case  
21 because [REDACTED]

22 [REDACTED] The recusal happened not because of [REDACTED]

23 [REDACTED], but because of [REDACTED]

24 A. I wasn't aware of that.

25 Q. Without knowing --

1 MR. FINE: But when was it public?

2 MR. BERRY: I don't believe the recusal was ever made  
3 public till the decision was issued. It wouldn't have been  
4 on a list.

5 Q. BY MR. BERRY: I believe the list you're talking about  
6 is where you're recused because of certain financial  
7 interests that you hold outside of your public appointment.

8 A. Right.

9 MR. COBURN: Just to the extent it is helpful to you, I  
10 just want to -- I don't think he's going to be in a position  
11 to opine on kind of the propriety or impropriety of conduct  
12 that he undertook. I mean my understanding is he's here  
13 basically to testify about the facts. I mean he could tell  
14 you if he sent any mail or didn't send it, or what he was  
15 thinking, or that sort of thing. But in terms of asking him  
16 do you think this was right or do you think this was wrong, I  
17 just don't think he's going to be in a position to answer  
18 those questions.

19 MR. BERRY: Okay. Can I have that back, please?

20 Q. BY MR. BERRY: Okay. You said earlier that you know who  
21 John Ferguson is?

22 A. Yes.

23 Q. Does Mr. Ferguson provide legal advice to the Board from  
24 time to time in his capacity as the division director for the  
25 Division of Enforcement Litigation?

1 A. He does.

2 Q. And you were aware of that in November 2011?

3 A. Yes.

4 Q. If Mr. Ferguson provided legal advice to the Board, is  
5 that something that would be public information?

6 A. It depends on the advice.

7 Q. And what is your understanding of when his advice would  
8 be public?

9 A. It would depend on how the advice is delivered, whether  
10 it's protected by some privilege from disclosure, a variety  
11 of other factors.

12 Q. As the Chief Counsel, do you know if you were authorized  
13 to release Mr. Ferguson's legal advice?

14 A. Again, I think it would depend on what it was, and when,  
15 and to who.

16 Q. Okay. I'm showing you what we're calling Investigative  
17 Exhibit 12.

18 **(Investigative Exhibit 12 marked for identification.)**

19 MS. JANDRAIN: Dave, can I trouble you for a copy?

20 MR. BERRY: Not right now.

21 MS. JANDRAIN: Okay.

22 MR. BERRY: It's not like I have a stack of them.

23 **(Pause.)**

24 Q. BY MR. BERRY: Do you recognize that e-mail?

25 A. I don't recall it. But it appears to be from me to Ken

1 again in relation to the article that he was working on.

2 Q. Do you believe he had the authority to release  
3 Mr. Ferguson's legal advice to the Board in that situation to  
4 Mr. Lopatka?

5 MR. COBURN: Like I said, I just don't think he's going  
6 to be in a position to offer you an opinion about that.

7 MR. BERRY: I'm not asking for his opinion. I'm asking  
8 him if he believed at the time he had authority to release  
9 that to Mr. Lopatka. That's a different question than what  
10 his opinion is.

11 MR. COBURN: So you're asking him whether he thought at  
12 the time it was appropriate for him to write the e-mail that  
13 he wrote?

14 MR. BERRY: Correct.

15 THE WITNESS: Yeah, at the time, I didn't see anything  
16 wrong with having this conversation with Member Lopatka or  
17 Chief Counsel Lopatka, former Chief Counsel Lopatka.

18 MR. BERRY: Thank you. I'm showing you what we are  
19 calling Investigative Exhibit 13, which is an e-mail dated  
20 Friday, June 17, 2011, at 3:36 p.m.

21 **(Investigative Exhibit 13 marked for identification.)**

22 Q. BY MR. BERRY: Who is that e-mail to?

23 A. It appears to be to Tom Gies, a former colleague of mine  
24 at Crowell & Moring.

25 Q. Okay. And why did you send this to Mr. Gies?

1 A. To notify him that the publication date for the proposed  
2 R-rules was 6/22/2011.

3 Q. And why did you send that to him?

4 A. So that he could look at the Federal Register and read  
5 the proposed rule.

6 Q. This appears to be advance notice of the publication  
7 date. Was this e-mail that you forwarded to him public  
8 knowledge?

9 A. That the Board has sent the rule to the GPO for  
10 publication would have been a matter of public knowledge, I  
11 believe.

12 Q. Why do you believe that?

13 A. Because they had sent it from the Board to the GPO for  
14 publication.

15 Q. Right. And why do you believe that would be public  
16 knowledge?

17 A. I don't know why it wouldn't be a matter of record.

18 Q. At the time you sent this e-mail?

19 A. Yes.

20 Q. Okay. Does your private law firm, the law firm that you  
21 practiced at before coming to the Agency, does it practice  
22 before the NLRB?

23 MR. COBURN: Which one?

24 MR. BERRY: Crowell Moring, I think is how you pronounce  
25 it. Crowell? Is it Crowell Moring?

1 MR. COBURN: It's Crowell & Moring.

2 MR. BERRY: Crowell & Moring.

3 THE WITNESS: They do have practice before the Agency.

4 MR. BERRY: Okay. I'm showing what -- sorry. I'm  
5 showing you what we've marked as Investigative Exhibit 15.  
6 And it's an e-mail dated Wednesday, August 17, 2011, 9:30  
7 a.m.

8 **(Investigative Exhibit 15 marked for identification.)**

9 THE WITNESS: Okay.

10 Q. BY MR. BERRY: Can you tell me who is Glenn Grant?

11 A. Glenn Grant is a former colleague of mine at Crowell &  
12 Moring.

13 Q. Does he practice before the Agency?

14 A. I believe he does.

15 Q. Who is Kris Meade?

16 A. Also a former colleague of mine.

17 Q. And does he practice before the Agency?

18 A. I believe he does.

19 Q. Okay. Have you had an opportunity to read the text of  
20 that e-mail?

21 A. Yes.

22 Q. Can you tell me the last sentence of your text? I  
23 believe there is a small text on that exhibit that starts  
24 with NLRB. I'm talking about the last sentence before that  
25 which starts unfortunately. Do you see that?

1 MR. COBURN: You're talking about the part that he  
2 wrote?

3 MR. BERRY: Well, yeah, I believe he wrote that part.

4 Q. BY MR. BERRY: Have you had an opportunity to read that?

5 A. I have.

6 Q. Okay. Now, it says unfortunately these guys. Can you  
7 explain to me who these guys are?

8 A. (Reviews document.) I assume I'm referring to the folks  
9 who would be responding to the FOIA request.

10 Q. And who would that be?

11 A. I don't know.

12 Q. Well, you have no idea who would destroy anything  
13 embarrassing?

14 A. I don't know who would do that.

15 Q. Then why did you put that in the e-mail?

16 A. Because I was joking with my colleagues.

17 Q. You mean former colleagues, correct?

18 A. I still consider them colleagues, actually.

19 **(Investigative Exhibit 17 marked for identification.)**

20 Q. BY MR. BERRY: Okay. I'm showing you what we marked or  
21 are calling Investigative Exhibit 17, which is an e-mail.  
22 The first e-mail in that chain is dated Friday, September 16,  
23 2011, at 1:15 p.m.

24 A. Okay.

25 Q. Glenn Grant, is that -- the e-mail is to Glenn Grant.

1 Is that the same individual as you discussed earlier?

2 A. Yes.

3 Q. And the paragraph -- just hold onto that one for a  
4 second, if you could. Now, did you provide that information  
5 on your own?

6 A. What?

7 Q. Or did you seek the assistance of other individuals?

8 A. What information?

9 Q. The information in your responses to Mr. Grant about the  
10 possibility of finding a violation. I believe they are  
11 talking about, if you go back and look at the bottom, it  
12 starts out with the --

13 A. In this case, Mr. Grant asked me if I was aware of any  
14 cases that dealt with an issue involving a Board principle  
15 called *Majestic Weaving*, which was in a publicly issued case  
16 by the Board, the Board took a position on *Majestic Weaving*.  
17 He asked me do I know are there any other cases dealing with  
18 that issue. And I told him [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Q. Right. And then further up in that e-mail chain, you  
22 also said, by the way, that paragraph, notwithstanding the  
23 case-by-case disclaimers, I would be surprised to see a  
24 complaint issued on anything short of a complete CBA, which  
25 is a collective bargaining agreement, in recognition prior to

1 the proof of majority under this Board.

2 A. I was offering an opinion based upon the decision in  
3 Dana.

4 Q. Now, was that your opinion?

5 A. That was my opinion.

6 Q. Okay. Now, did you form that opinion on your own?

7 A. I formed that opinion on the basis of the decision in  
8 Dana, the majority.

9 Q. No, but I mean your own, that's your own opinion?  
10 That's what I mean.

11 A. That's my own opinion.

12 Q. Okay. Go ahead and let me take that back. I'm going to  
13 show you what we're calling Investigative Exhibit 18. Take a  
14 look at that.

15 **(Investigative Exhibit 18 marked for identification.)**

16 MR. COBURN: And this is an e-mail dated Friday --

17 MR. BERRY: I'm sorry, yeah.

18 MR. COBURN: No, that's okay.

19 MR. BERRY: Friday, September 16, 2011, at 12:12 p.m.

20 Q. BY MR. BERRY: I'd actually like to, just for the  
21 purposes of the first question, draw your attention to the  
22 earlier e-mail on that chain dated the same date at 10:50  
23 a.m. Who is James [Name] ?

24 A. Jim [Name] is a Chief Counsel to Member Hayes.

25 Q. And David [Name] ?

- 1 A. Deputy Chief Counsel.
- 2 Q. To?
- 3 A. To Member Hayes.
- 4 Q. Okay. And Robert [Name] ?
- 5 A. Deputy Chief Counsel on the former Schaumber staff, now
- 6 my staff.
- 7 Q. Okay. But at this time, were you his supervisor or
- 8 manager?
- 9 A. Whose?
- 10 Q. Robert [Name] ?
- 11 A. Yes.
- 12 Q. You're asking a question in that e-mail, correct?
- 13 A. Yes.
- 14 Q. That seems to be very similar to the question that was
- 15 asked by your former colleague that you were responding to in
- 16 the last exhibit.
- 17 A. Yeah.
- 18 MR. FINE: Can we see the last exhibit, please? We
- 19 handed it back.
- 20 MR. BERRY: Sure. Hold on.
- 21 THE WITNESS: Okay.
- 22 Q. BY MR. BERRY: Now, Mr. [Name] responded back to you at
- 23 12:12, if you take a look at his response.
- 24 A. Yeah.
- 25 Q. And if I could focus your attention back on the earlier

1 exhibit, 17.

2 A. Yeah.

3 Q. In particular to the section, I guess it's the third  
4 e-mail in that chain down, dated at 1:36. It seems to be  
5 almost a word for word opinion that you are providing there  
6 that's similar to Mr. [Name] 's opinion.

7 A. That's certainly not surprising since [REDACTED]  
8 [REDACTED] So, yes, I  
9 mean it appears that, that my colleague asked me was I aware  
10 of any cases pending. [REDACTED] I guess I asked Jim  
11 and Bob and Dave if they had seen any cases pending. And  
12 they said [REDACTED] So I told them -- I told my friend that [REDACTED]

13 [REDACTED]  
14 I get calls from this, by the way, Dave, I get calls  
15 like this from people all the time. People will call me and  
16 say are you aware of a case that raises this issue? Have you  
17 seen any cases that deal with this kind of matter? Can I run  
18 something by you? Will you take a look at this for me? It  
19 is part of my job is to respond to a request from  
20 practitioners in the field.

21 Q. Part of your job to give your legal opinion?

22 A. I wasn't giving a legal opinion.

23 **(Investigative Exhibit 19 marked for identification.)**

24 Q. BY MR. BERRY: I'm going to give you what we're calling  
25 Investigative Exhibit 19, which is dated Friday, October 28,

1 2011, at 11:51 a.m.

2 A. Okay.

3 Q. Okay. Now, I don't really care about the first sentence  
4 of your reply. You'll probably agree with me that's just  
5 procedural information people might routinely ask of people  
6 who work at the Board. But I'd like to focus your attention  
7 on the next sentence.

8 A. Sure.

9 Q. Have you had a chance to read that?

10 A. I have.

11 Q. Now, in that case that's talking about a dissent of  
12 Member ██████, correct?

13 A. No, it's not, actually. That was me offering my opinion  
14 as to what ██████ would do. And, in fact, he did not do that.  
15 He did not dissent. That was my opinion, but it did not  
16 happen.

17 Q. Did you --

18 A. And the delegation was made.

19 Q. Do you normally give your opinion on what a Board Member  
20 may do in the future as their Chief Counsel?

21 MR. COBURN: Well, I'm just going to object to the  
22 question about normally. I mean I just don't think that  
23 question is susceptible of an answer, you know. Every one of  
24 these situations is unique.

25 MR. BERRY: I don't think it is unique to give an

1 opinion on what a Board Member might do in a particular  
2 matter if they have not yet voted, a Board Member has not yet  
3 voted and that vote has not been made public because it has  
4 not yet occurred.

5 Q. BY MR. BERRY: Would what a Board Member might do be  
6 appropriate to put out to someone who might be practicing  
7 before the Board?

8 MR. COBURN: Again, I just don't think he's in a  
9 position to tell you what's appropriate or inappropriate.

10 MR. BERRY: Well, he can decline to answer the question  
11 if he wants, but he should so state his basis.

12 MR. COBURN: I'm not, I'm not -- just to make sure that  
13 my objection is clear, I'm not advising him not to answer, or  
14 asking him not to answer, or certainly instructing him not to  
15 answer. What I am saying is just that my understanding of  
16 the purpose of this voluntary IG interview is to explore the  
17 facts. You're asking him whether or not what he thought he  
18 did, whether he thought that his conduct was appropriate or  
19 inappropriate is beyond that ambit. And so that's the nature  
20 of my objection to it. I just don't think he's in a position  
21 to express an opinion about the propriety or impropriety of  
22 his own conduct in this context or any of the others.

23 MR. BERRY: Okay. Well, I don't agree. I do think it's  
24 appropriate to ask this subject or any subject whether or not  
25 they believe their conduct was appropriate in particular

1 situations.

2 MR. COBURN: Well, I guess we just have a respectful  
3 disagreement on that point.

4 MR. BERRY: That's fine.

5 THE WITNESS: Would you repeat the question?

6 Q. BY MR. BERRY: If you believe it was appropriate to  
7 discuss a position of a Board Member before that position was  
8 made publicly known.

9 A. I wasn't discussing a position of a Board Member. As I  
10 told you, I was speculating as to what might happen. And it  
11 did not, in fact, happen. Member [REDACTED] did not dissent.

12 Q. Is your e-mail written as if it were your opinion, if  
13 you could take a look at it again?

14 MR. COBURN: It speaks for itself.

15 Q. BY MR. BERRY: Is it written as if it is your opinion?

16 A. I believe it speaks for itself.

17 Q. So you are refusing to answer that question?

18 A. Not at all. I just did.

19 Q. Okay. Now, you obviously know Peter Schaumber, correct?

20 A. Yes.

21 Q. How long have you known Mr. Schaumber?

22 A. Since December 2003.

23 Q. Is that when you became his Chief Counsel?

24 A. Yes.

25 Q. How did he select you as the Chief Counsel?

1 A. We met and discussed the position.

2 Q. Did you have any relationship with him prior to that? I  
3 don't mean that in a negative way. I'm just saying did you  
4 have any --

5 A. No.

6 Q. -- prior business relationship or acquaintance or  
7 anything?

8 A. No.

9 Q. Okay. Was there any type of notice that he was seeking  
10 a Chief Counsel?

11 A. I don't believe there was any official notice.

12 Q. Okay. Maybe that's not a good phrase. How did you come  
13 to know or how did you come to apply for the job?

14 A. I was contacted by attorneys that Member Schaumber, I  
15 guess, had spoken to and asked if I would talk to Peter about  
16 the job.

17 Q. When did Mr. Schaumber's term end?

18 A. August of 2010.

19 Q. Do you recall having conversations with Mr. Schaumber  
20 about what he was going to do after his term ended?

21 A. I do.

22 Q. And can you just sort of briefly describe what kind of  
23 conversations or the exchange between you and him regarding  
24 what his future plans were or what your -- let me rephrase  
25 that. Can you please describe what your understanding was of

1 what he was going to do after his term ended?

2 A. He wasn't sure what he was going to do after his term  
3 ended. I know he was speaking to various law firms and was  
4 entertaining various possibilities.

5 Q. Do you know what he ended up doing after his term ended?

6 A. Specifically when?

7 Q. From when it ended to currently.

8 A. I don't believe that he had any -- I don't believe that  
9 he finalized any agreement with any law firm. And I think  
10 that he is -- Member Schaumber is independently wealthy and  
11 as far as I know doesn't have to work. But I believe he's  
12 involved in sort of policy analyst type things and does some  
13 lobbying.

14 Q. Do you know who his clients are?

15 A. I have no idea.

16 Q. Has he ever discussed who his clients are with you?

17 A. To my knowledge, he has never disclosed who his clients  
18 are. I do know that he's not involved in representing anyone  
19 before the Board. I don't believe he is engaged in the  
20 practice of law.

21 Q. Okay. I'm going to show you what we've marked as  
22 Investigative Exhibit 21.

23 **(Investigative Exhibit 21 marked for identification.)**

24 MR. COBURN: This doesn't seem to bear a date on the  
25 front of it.

1 MR. BERRY: It doesn't, I'm sorry. This is a document  
2 which begins, My background and experience uniquely  
3 positioned me to take advantage of significant new  
4 opportunities.

5 MR. COBURN: Thanks very much.

6 THE WITNESS: Okay.

7 MR. COBURN: Dave, not to derail this in any way in  
8 terms of your next question, but would it be an imposition  
9 for me to ask for a time estimate just in terms of some other  
10 things set for this afternoon?

11 MR. BERRY: I don't know, maybe an hour. I think we're  
12 about halfway done.

13 Q. BY MR. BERRY: Do you recall seeing that document  
14 before?

15 A. I don't really remember seeing this document before, but  
16 I don't really remember it, but I'm perhaps seeking  
17 enlightenment.

18 Q. Okay. I'd be happy to do that. We recovered this  
19 document from your government computer, from the hard drive.  
20 And the things that are underlined are your edits.

21 MR. COBURN: Well, that's you testifying, I have to say.

22 MR. BERRY: Well, I'm just -- actually what we want to  
23 talk about, but based upon the information we have, these  
24 were edits that were made of the document when it was on your  
25 computer versus somebody else's computer. I mean it's not