

MEMORANDUM

November 16, 2010

To: Senator Rockefeller, Chairman of the Committee on Commerce, Science & Transportation

From: Majority Staff, Office of Oversight & Investigations, Senate Committee on Commerce, Science & Transportation

Re: Recent Allegations against Thomas C. Carper, Chairman of Amtrak, and Eleanor Acheson, General Counsel of Amtrak

On September 23, 2010, Senator Charles Grassley, Representative Darrell Issa, and Representative John Mica sent a letter to Secretary LaHood, alleging that Thomas C. Carper, Chairman of Amtrak's Board of Directors, and Eleanor Acheson, General Counsel of Amtrak, "unlawfully interfered with the independence of the OIG [Office of Inspector General]" and removed Fred Weiderhold, the former Amtrak Inspector General, "from his post as IG in violation of the provisions of the Inspector General Act."¹ They based these allegations on a report drafted jointly by the offices of Senator Grassley and Representative Issa and asserted that "the findings of the...investigation are sufficient to warrant the removal of Chairman Carper and GC Acheson."²

As Amtrak falls within the jurisdiction of the Senate Committee on Commerce, Science & Transportation, you asked that we examine these allegations and the record upon which the report and letter are based. A review of the record reveals significant omissions in the staff report and the letter to Secretary LaHood. The report and letter presented Mr. Weiderhold as an effective Inspector General who was removed from his position for objecting to Amtrak management's interference with his investigations. Documents we located in the record presented a more complex picture.

Several key pieces of information in the record were not included or properly addressed in the report or the letter to Secretary LaHood. Documents we reviewed in the record showed that:

¹ Letter from Sen. Charles Grassley, Rep. Darrel Issa, and Rep. John Mica to Secretary LaHood (Sep. 23, 2010).

² *Id.*

- a succession of Amtrak managers and directors, some of whose tenure at Amtrak dates back to the 1990s, complained that Mr. Weiderhold inappropriately involved himself in managerial decisions and created a “climate of fear” at Amtrak;
- Amtrak management believed Mr. Weiderhold’s office failed to protect sensitive Amtrak information from inappropriate public release;
- Amtrak management had complained that Mr. Weiderhold did not meet his obligation to inform the Amtrak Chairman of alleged criminal conduct within Amtrak; and
- under Mr. Weiderhold’s leadership, the Amtrak Office of Inspector General fell below the federal government’s basic quality standards for Inspectors General.

Although Senator Grassley and Representative Issa rightly focused on the importance of an independent Office of Inspector General at Amtrak, we believe they should have included this information in their presentation of the facts surrounding the departure of Mr. Weiderhold from Amtrak. This additional information weakens their contention that Amtrak officials tried to thwart the OIG’s attempts at conducting oversight of Amtrak. It is our view that the Grassley-Issa investigation relied too heavily on Mr. Weiderhold’s version of what transpired and, consequently, the report presented incomplete accounts of the OIG’s relationship with Amtrak and Mr. Weiderhold’s tenure as Amtrak IG.

I. Background

On September 13, 2010, the offices of Senator Grassley, Ranking Member of the Senate Finance Committee, and Representative Issa, Ranking Member of the House Oversight Committee, released a staff report on “The Removal of the Inspector General for the National Railroad Passenger Corporation (Amtrak)” (Grassley-Issa Report).³ The report was the culmination of a fifteen-month investigation into the matter. According to the report, the minority staff “conducted more than 13 witness interviews and reviewed more than 6,400 pages of documents.”⁴ The twenty-two page report presented numerous findings about Amtrak management’s alleged violations of the law and interference with Mr. Weiderhold’s legitimate attempts to conduct oversight of Amtrak.⁵

³ Minority Staff Report, Senate Committee on Finance and House Committee on Oversight and Government Reform, *The Removal of the Inspector General for the National Railroad Passenger Corporation (Amtrak)*, (Sep. 13, 2010).

⁴ *Id.*

⁵ In the letter to Secretary LaHood, Sen. Grassley, Rep. Mica, and Rep. Issa asserted that, “[t]he Democratic staff (Majority) from the House Committee on Oversight... participated in the investigation of the removal of Mr. Weiderhold and has expressed no objection to the report’s findings.” Our own inquiry showed that, while Democratic staff was involved at the outset of the investigation, they were not involved throughout the entire investigation because they believed there were higher priorities. The assertion that they “expressed no objection to the report’s findings” is true only because Rep. Issa’s staff never provided them with a draft version. They were never given the opportunity to object to the report. Moreover, Democratic staff has informed us that they disagree with the findings of the Grassley-Issa Report.

This memorandum does not attempt to confirm or refute each of the assertions and findings in the Grassley-Issa Report or the letter to LaHood, as a number of previously drafted reports and memoranda do that.⁶ Nor does it attempt to justify or defend any action taken by Amtrak management in their handling of Mr. Weiderhold. Rather, this memorandum provides information in the record that was not addressed in the Grassley-Issa Report. Given that Senator Grassley, Representative Issa, and Representative Mica stated that “the findings of the Joint Committee’s investigation are sufficient to warrant the removal of Chairman Carper and GC Acheson,” we believe it is important to provide information that was located in the record and not included in the report or the letter to Secretary LaHood.

II. The Role of Inspectors General

Inspectors General play an important role in protecting taxpayers against waste, fraud, and abuse. Their offices conduct and supervise audits and investigations, provide policy recommendations to increase the effectiveness of agency programs and operations, and coordinate activities designed to prevent and detect fraud and abuse in agency programs and operations.⁷ The Offices of Inspectors General were created to keep their agency heads and Congress “fully and currently informed about problems relating to the administration” of agency programs and operations.⁸

For OIGs to achieve the goals that Congress has set out for them, the OIGs and the agencies they oversee must conduct their work with integrity and maintain a productive, working relationship. Agencies must not interfere with OIG audits and investigations or internal OIG decision making, so that OIGs can maintain their independence and effectiveness. At the same time, Inspectors General should not interfere with agency decision making and should protect the confidentiality of agency information they obtain through investigations and audits. The “Quality Standards for Federal Offices of Inspector General” require that OIGs maintain confidentiality by “respecting the value and ownership of privileged, confidential, or classified information received and protecting that information.”⁹

This Committee has seen firsthand the important role played by Inspectors General. In August 2009, the Committee held a hearing and issued a report on “Waste, Fraud and Abuse in the Small Business Innovation Research (SBIR) Program,” which heavily relied upon the efforts of the OIGs of NSF and NASA. Without their work, the Committee could not have learned that the SBIR program was susceptible to fraud.

⁶ See, e.g., Memorandum from Eleanor D. Acheson, Amtrak Vice President, General Counsel and Corporate Secretary, to Donna McLean, Amtrak Chairman, on “OIG Policies and Conduct” (Jan. 23, 2009); Wilkie Farr & Gallagher LLP, *Report on Matters Impairing the Effectiveness and Independence of the Office of Inspector General of the National Railroad Passenger Corporation (Amtrak)* (June 18, 2009); Amtrak, *Amtrak Management’s Response to the June 18, 2009 Report Regarding Amtrak’s Office of Inspector General* (July 22, 2009).

⁷ 5 U.S.C. App. 3

⁸ *Id.*

⁹ President’s Council on Integrity and Efficiency, Executive Council on Integrity and Efficiency, *Quality Standards for Federal Offices of Inspector General* (Oct. 2003).

III. Omissions in the Grassley-Issa Report

The Grassley-Issa Report asserted that Mr. Weiderhold's legitimate investigations into fraud, waste, and abuse at Amtrak led to a deterioration of the relationship between the Office of Inspector General and Amtrak management. Documents we have found in the record suggested a more complicated situation. They showed that a succession of directors and managers at Amtrak believed Mr. Weiderhold was not acting properly in his role as IG. This tension increased after Amtrak's attorney-client privileged information appeared in an article in *The Legal Times* in 2006 and Mr. Weiderhold refused to share information relating to alleged misconduct in the legal department with Amtrak's then Chairman, David Laney.

The Grassley-Issa Report did not address the dispute over withheld information and failed to address the breach of attorney-client privilege adequately. Instead, it characterized the breach entirely using Mr. Weiderhold's version of what transpired, even though contradictory evidence was available in the record.¹⁰ The report also failed to acknowledge that Mr. Weiderhold had a strained relationship with a number of former Amtrak chairmen and presidents and that an independent audit found deficiencies in the practices of the OIG during his tenure.

A. Longstanding Tension Between Amtrak and the Office of Inspector General

A number of documents in the record showed significant, longstanding tension between Mr. Weiderhold and a succession of directors and managers at Amtrak. These documents call into question the finding that Mr. Weiderhold was an effective IG and the allegation that Amtrak management was needlessly interfering with the OIG. These documents were not included or addressed in the Grassley-Issa Report.

A trio of memoranda between David Laney, a former Chairman of Amtrak's Board of Directors, and Mr. Weiderhold and Hamilton Peterson, who also worked in the OIG, revealed a significant dispute over Mr. Weiderhold's refusal to share information with Mr. Laney. In December 2006, Representatives Young and Mica had written a letter to the Department of Justice, requesting that it "review the interactions between and behavior of Amtrak's Law Department and its outside legal counsel for what may constitute unlawful conduct."¹¹ In that letter, which was released to the public, Representatives Young and Mica referenced two reports about Amtrak's Legal Department that had been provided to Amtrak, but also referenced allegations that were not included within the reports. Shortly thereafter, Mr. Laney sent a memorandum to Mr. Weiderhold and Mr. Peterson regarding the allegations in the Young-Mica letter. Mr. Laney stated:

¹⁰ The Grassley-Issa Report asserted that "Chairman of the Amtrak Board David Laney, falsely and without any evidence, accused Weiderhold of leaking information regarding the joint OIG findings to the press." The only evidence offered in the report to support this assertion was a Committee staff interview of Mr. Weiderhold. Other assertions in the report also rely solely on a Committee staff interview with Mr. Weiderhold.

¹¹ Letter from Rep. Don Young and Rep. John L. Mica to Attorney General Alberto R. Gonzales (Dec. 4, 2006).

As you know, the Board and I take very seriously our obligations to oversee Amtrak's affairs and will not tolerate illegal or other inappropriate behavior by any Amtrak personnel. Accordingly, I must ask that you promptly provide me with succinct, detailed summaries of your current findings or conclusions regarding each of the matters...together with information your office has obtained that supports such allegations of illegal or inappropriate behavior.¹²

A few days later, Mr. Peterson and Mr. Weiderhold denied Mr. Laney's request via a memorandum. They stated, "[t]he matters for which you request information relating to the referral by Chairmen Young and Mica to the United States Department of Justice are very sensitive given our responsibilities under the Inspector General Act," and noted, "it is policy consistent with the IG Act not to reveal information concerning pending investigations."¹³ In January 2007, Mr. Laney responded:

[T]he December 4, 2006 letter to Attorney General Gonzales refers to the possibility of members of the Legal Department receiving gifts and gratuities from law firms, backdating documents and being untruthful with investigators. The reports referenced in your memo, however, make no mention of such activities. In fact, your decision not to share information with me about improper conduct you claim to have uncovered or experienced in your investigation is in direct and deliberate conflict with your obligation under the Act to report such instances to me "without delay." (5 U.S.C. App., § 6(b)). If you are aware of any evidence that members of the Legal Department or outside attorneys have been engaged in questionable or improper conduct, I need a full briefing in order to evaluate such conduct, and if appropriate, to work with the Board in acting to prevent its continuation or recurrence and in taking any disciplinary action that may be warranted.¹⁴

Additional documents in the record showed other Amtrak executives' concern about Mr. Weiderhold's behavior. On October 3, 2008, Alex Kummant, then Amtrak's President and Chief Executive Officer, wrote a letter to Donna McLean, Amtrak's Chairman following Mr. Laney's tenure, questioning her proposal to alter the document that controlled interactions between Amtrak and the OIG.¹⁵ In that letter, he warned Ms. McLean about the OIG's involvement in areas outside its function. He stated:

I am concerned that the parameters of the mission and function of the IG and OIG and the reasons for those parameters have gotten lost at Amtrak. To the extent any IG/OIG becomes involved on the front end with management decisions or the operations of an

¹² Memorandum from David M. Laney to Fred E. Weiderhold and Hamilton Peterson (Dec. 20, 2006) (Amtrak 5082-5083).

¹³ Memorandum from Hamilton Peterson through Fred E. Weiderhold to David M. Laney (Dec. 28, 2006) (Amtrak 5084-5085).

¹⁴ Letter from David M. Laney to Fred Weiderhold and Hamilton Peterson (Jan. 3, 2007) (Amtrak 3248-3250).

¹⁵ Letter from Alex Kummant to Donna McLean (Oct. 3, 2008) (Amtrak 3085-3087).

agency or federal entity, that IG/OIG loses the essential independence and resulting objectivity that are the fundamental precepts of the IG function, and the ability of the IG/OIG to conduct arms length, independent and objective investigations and audits is compromised, eroded or lost completely. That kind of inappropriate involvement is not the intent of Congress, and it is clear to me that the situation of the Amtrak IG/OIG is well down that path.¹⁶

He went on to note that “Amtrak management would like the opportunity to let you as ‘head of entity’ and supervisor of Amtrak’s IG/OIG...know about a number of actions by and experiences with the IG/OIG,” adding, “[t]o do so would set you on a different course than the one you propose.”¹⁷

Mr. Kummant’s sentiment was further reinforced on June 9, 2009, when four former chairmen and presidents of Amtrak wrote a letter to Chairman Carper and the Amtrak Board of Directors in support of their “actions to retire the current IG and replace him with a strong and professional IG.”¹⁸ These four former Amtrak officials—Thomas Downs, former Chairman and CEO from 1993 to 1998, John Robert Smith, former Chairman and Board Member from 1997 to 2002, David Gunn, former President from 2002 to 2005, and David Laney, former Chairman from 2003 to 2007—were appointed to the board or their positions by both Republican and Democratic presidents. In the letter to Chairman Carper, they were very critical of Mr. Weiderhold’s tenure as Amtrak’s Inspector General. They stated:

The current IG has been in that role for 17 years, longer than any other IG in the federal government, and has turned it into a personal fiefdom. The current IG has undermined management cohesiveness, teamwork, creativity, morale, and planning efforts. He has even interfered with Board and management oversight of the operations of the corporation. He has created a climate of fear that costs the corporation the services of the good people who leave, and the services of those who never come to Amtrak because of him.¹⁹

Amtrak has informed the Committee that it provided each of these letters and memoranda during the investigation. They are part of the record that was available, but they were not included in the Grassley-Issa Report.

B. Reported Breach of the Attorney-Client Privilege

A memorandum in the record showed that Amtrak was concerned about the OIG’s involvement in a breach of its attorney-client privilege. In 2005 and 2006, the Amtrak OIG and the OIG for the Department of Transportation conducted an investigation into the billing

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Letter from Tom Downs, John Robert Smith, David Gunn, and David Laney to Tom Carper and Members of the Amtrak Board of Directors (June 9, 2009) (Amtrak 3416).

¹⁹ *Id.*

practices of outside law firms Amtrak had hired. After the conclusion of the investigation, information that Amtrak viewed as protected by the attorney-client privilege appeared in an article in *The Legal Times*. Alicia Serfaty, Amtrak's General Counsel at the time, believed the information "could only have come from the OIG interviews" from the investigation.²⁰

On November 6, 2006, Ms. Serfaty sent a memorandum regarding "Breach of Legal Privilege by OIG and Transportation & Infrastructure Committee" to the Board of Directors of Amtrak. In the memorandum, she stated:

We do not know who may have released this information, but the information could only have come from the OIG interviews. Clearly, someone has breached their obligation to keep this information confidential and Amtrak has been harmed. There is information contained in these documents involving current litigation that could provide significant advantage to the other party by revealing our legal strategies.²¹

Amtrak's justifiable insistence on protecting its attorney-client privilege was not new to Mr. Weiderhold or the OIG. In 1999, Sarah Duggin, the General Counsel at the time, sent Mr. Weiderhold a memorandum regarding "Attorney-Client Privilege Issues."²² In that memorandum, Ms. Duggin agreed to provide documents to the OIG, so long as it "will protect the confidentiality of the information provided and ensure that no privileged or protected information will be disclosed to a third party absent specific written approval of Amtrak."²³ She stated, "If OIG deems it necessary...to make disclosures to a third party that may include privileged or protected information, OIG will first consult with the General Counsel about how to protect the privilege."²⁴ The documents and information that Amtrak provided to the OIG during the investigation of 2006 were apparently provided pursuant to this memorandum.

On November 13, 2006, Ms. Serfaty sent a copy of the 1999 Memorandum and the November 6, 2006, Memorandum to Mr. Weiderhold. In a cover memorandum, she stated, "I think you will agree that the issues raised in this memorandum are serious and should be addressed as soon as possible."²⁵ Neither this memorandum, nor Ms. Serfaty's memorandum to the Board about the breach of attorney-client privilege were addressed or included in the Grassley-Issa Report. These memoranda are relevant because they immediately precede, and explain, the efforts by Amtrak officials to protect Amtrak's attorney-client privilege. These efforts were presented as "Law Department Interference" with the OIG in the Grassley-Issa Report.

²⁰ Memorandum from Alicia Serfaty to Amtrak Board of Directors (Nov. 6, 2006) (Amtrak 0196-0197).

²¹ *Id.*

²² Memorandum from Sarah H. Duggin to Fred Weiderhold (May 4, 1999) (Amtrak 0222-0223).

²³ *Id.*

²⁴ *Id.*

²⁵ Memorandum from Alicia Serfaty to Fred Weiderhold (Nov. 13, 2006) (Amtrak 0195).

C. Deficiencies in the OIG

Following Mr. Weiderhold's departure from the Amtrak OIG, significant deficiencies in the practices and procedures of the OIG surfaced, which called into question Mr. Weiderhold's effectiveness as the Amtrak IG. These deficiencies were not included or addressed in the Grassley-Issa Report.

Most significantly, Lorraine Green, the Interim Amtrak IG who replaced Mr. Weiderhold in June 2009, learned that Special Agents in the OIG Office of Investigations did not "have the appropriate authorization from the Department of Justice (DOJ) to carry firearms, make arrests, or execute warrants for arrest, search and seizure."²⁶ In a September 24, 2009, letter to the Amtrak Board of Directors, she stated that "[t]his could significantly impair our investigative work if not corrected immediately," and explained that "all OIG-issued weapons have been collected & secured until the law enforcement issue can be clarified with the Department of Justice."²⁷

An outside review of the Amtrak OIG conducted in the summer of 2010 by the National Academy of Public Administration (NAPA) reported similar quality problems among Mr. Weiderhold's investigative staff. The report observed:

The majority of Investigators do not currently meet the federal standards that would permit them to carry firearms, and many may not even be eligible to attend required training standards due to physical or other limitations. Investigators have not consistently followed investigative standards; numerous interviewees cited examples in which Investigators conducted interviews without appropriate notice to Amtrak employees, or did not document their requests for information from employees.²⁸

In addition, a peer review conducted by the Inspector General for the Legal Services Corporation in September 2009 found that a sampling of Amtrak OIG audits did not meet the federal government's basic Government Accountability Office "Yellow Book" quality standards. The peer review found that Amtrak OIG "limited scope audits" did not properly support or explain their findings and lacked other basic elements of reliable audits.²⁹ The result of this September 2009 peer review was an underwhelming rating of "pass with deficiencies." One of the early actions of the current Amtrak Inspector General, Ted Alves, a veteran of the well-respected Department of Transportation OIG, was to prohibit the initiation of any new Amtrak OIG "limited scope audits."

²⁶ Memorandum from Lorraine Green to Thomas Carper (Sep. 24, 2009). (Amtrak 4968).

²⁷ *Id.*

²⁸ National Academy of Public Administration, *The Amtrak Office of Inspector General: An Organizational Assessment* (Aug. 2010).

²⁹ Legal Services Corporation Office of Inspector General, *System Review Report* (Sep. 30, 2009)

The NAPA review similarly found that, “Audits have not been conducted in accordance with Yellow Book standards or in a timely manner, with established deadlines and quality control for fact checking and independent referencing.” In order to raise the quality of auditing work within the Amtrak OIG, Mr. Alves, the current Amtrak IG, required all employees to take an “Audit 101” class and provided information to employees “about what a ‘big picture’ investigation would resemble and what skill sets it would require.”³⁰

Additionally, in his first Semiannual Report to Congress as Amtrak Inspector General, Mr. Alves provided a succinct assessment of the deficiencies in the OIG that contributed to the conflict between Amtrak and its OIG. He stated:

[T]he Amtrak OIG was heavily involved in management functions, including participating extensively in management decision making, serving as a first level of management controls, and helping to implement OIG recommendations for management. The OIG’s focus on internal review functions and its heavy involvement in management functions were also inconsistent with the spirit, and perhaps the letter of the IG Act.

Moreover, this involvement likely led over time to mutual confusion, conflict and resentment about the respective roles of management and the OIG that contributed to the breakdown of relationships. While these factors do not justify management’s actions to deal with the OIG, hopefully, they provide an additional perspective about the underlying issues.³¹

This “additional perspective” was not provided in the Grassley-Issa Report. Nor were the aforementioned deficiencies in the OIG.

IV. Conclusion

We have not attempted to determine who was to blame for the deterioration of the relationship between Mr. Weiderhold and Amtrak, or to justify the actions Amtrak management took with respect to Mr. Weiderhold and the Amtrak OIG. At this point, enough time and energy has been spent evaluating Mr. Weiderhold’s tenure as Inspector General of Amtrak. At least five reports and memoranda on this subject, totaling over a hundred pages and representing countless hours of work, have been drafted on the issue. These reports and memoranda came to very different conclusions on who was to blame for the troubled relationship between Amtrak and its OIG.

Our review of the record showed that both Mr. Carper and Ms. Acheson were dealing with a very difficult situation, not of their making, that preceded their tenure at Amtrak. Before Mr. Carper and Ms. Acheson, a succession of Amtrak officials faced a similarly toxic

³⁰National Academy of Public Administration, *The Amtrak Office of Inspector General: An Organizational Assessment* (Aug. 2010).

³¹Office of Inspector General for the National Railroad Passenger Corporation, *Semiannual Report to Congress* (Oct. 1, 2009-March 31, 2010)(Report #41).

relationship with the Amtrak OIG. Because the Grassley-Issa Report does not provide a full picture of the causes of the long-standing tension between Amtrak management and the OIG, we do not believe the report's findings warrant the removal of these two officials.

Amtrak now has a new Inspector General, Ted Alves, who has been working diligently with Mr. Carper to restore trust between the OIG and Amtrak. An additional investigation or the removal of Mr. Carper or Ms. Acheson from their positions will do nothing to help Amtrak or further develop an effective, independent OIG.