UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FIVE

LOCKHEED MARTIN SERVICES, INC., Employer	:	
and	:	Case 5-RC-16189
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, Petitioner	: :	

BRIEF OF PETITIONER, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ON ITS ELECTION OBJECTION

INTRODUCTION

The sole issue for determination at this time is an objection raised by Petitioner, International Association of Machinists and Aerospace Workers ("IAM"), asserting that the Employer, Lockheed Martin Services, Inc. ("Employer"), unlawfully broadcast election propaganda, interspersed with operations-related information, in an electronic communication to bargaining-unit members during the "quiet period" of a mail-ballot election.

STATEMENT OF FACTS

As the official record reflects, the election in this matter was held in a nationwide bargaining unit consisting of over 1,000 Flight Service Specialists ("FSS"), and was conducted by mail ballot, with the ballot packages being sent out from the Region Five

offices on Wednesday, February 27, 2008, and the completed ballots were opened and counted on Monday, March 24, 2008.

David Khanoyan is an experienced FSS, having worked in aviation for the Employer, its predecessor (the Federal Aviation Administration) and the military since 1970 (Tr.9:1-19). He described the varied FSS duties (Tr.9:20-18:4), which include flight data NOTAMS ("Notice to Airmen") (Tr.10:8-12), Preflight Briefing (Tr.10:12-19), and In-Flight positions, which include manning radio frequencies and provide weather updates, etc. (Tr.11:16-13:3). Mr. Khanoyan works at the Washington hub location, located in Virginia, where all of the FSS personnel work in a large operations room remiscent of NASA "mission control" in Houston. (Tr.14:1-15:4.)

Each day the FSS personnel coming on duty at the Washington hub receive a pre-duty briefing from the operations supervisor on duty. (Tr.16:1-18:4.) Mr. Khanoyan testified that, in addition to the live, verbal briefing from the supervisor, it is also ever FSS's job to review a binder for that individual's team. (Tr.18:2-4.) The binder includes, *inter alia*, "Read and Initial" items, as well as "Mandatory Briefing Items," both of which are required to be read by all FSS personnel. (Tr.18:9-19.)

After the briefing, the FSS log-on to their indivual work stations, which include several computer screens, at which they can view e-mails sent to them by the Employer on the Employer's private Outlook e-mail system. (Tr.20:23-21:15.) Outside (i.e., non-employment-related) e-mails are not accessible on this system, *id.*, which is used by the Employer to convey important operational information for the FSS personnel, such as information relating to "work arounds" (instructions for circumventing temporary software problems) and other "glitches" in the FSS system. (Tr.21:16-24:4.) Mr.

Khanoyan testified that the e-mails contain information necessary to the performance of his job, and that he was not aware of any means to differentiate "important" e-mails from those that might safely be ignored or deleted without reading. (Tr.24:5-25:8.)

Mr. Khanoyan is familiar with the "communiqué" issued by Mr. Petro over the FSS Outlook system on February 28, 2008 (Joint Exhibit 2), and he recalls that it appeared, in hard-copy format, in his team's binder. (Tr.29:12-30-4.) In addition to the Employer's anti-union message, the February 28th "communiqué," (like other "communieques" from Mr. Petro) contained operationally significant information that Mr. Khanoyan found pertinent to the performance of his FSS duties, such as announcments of upcoming software upgrades. (Tr.30:12-33:24.)

Judith Brandes is another experienced FSS who works at the Employer's facility in Princeton, Minnesota. (Tr.60:23-24:61:7.) She works in an operations room similar to (but smaller than) the room at the Washington hub, and has the same sort of work station, and access to the Employer's FSS Outlook e-mail system, and that she is required, as part of her job, to review e-mails received on this system. (Tr.62:12-63:8; 64:18-65:25) While live, verbal pre-duty briefings are not the norm at Princeton, Mr. Brandes testified that they have "Read and Initial" Binders at Princeton and that she is required, as part of her job, to review the contents of this binder. (Tr.63:22-64:17) Ms. Brandes identified a memorandum from her facility's operations manager (Union Exhibit 1), which notes that "familiarization with FS21 Outlook Folders" is a mandatory part of FSS pre-duty briefing, and which she understood to mean that she is required, as part of her job, to read all e-mails received on the FSS Outlook system. (Tr.67:24-68:1.)

On January 16, 2008, Ronald Petro, the program manager for the Employer's Flight Service program (Tr.76:2-5), sent, by electronic transmission over the FSS e-mail system, the first of his "communiqués" (Joint Exhibit 1). Buried in this four-page-long document in the middle of the 9th paragraph is a statement that the "communiqués" "are not intended to be training or a mandatory reading item." It is undisputed, however, that this, and all other of Mr. Petro's "communiqués" were sent to all FSS personnel nationwide over the FSS Outlook system, meaning that the "communiques" were received by the FSS personnel while on duty at their workstations in the various operations rooms around the country.

It is undisputed that Joint Exhibit 2 – the "communiqué" issued on February 28, 2008 – contained anti-union propaganda from the Employer, as well as an "AFSS Engineering Weekly Report," as well as other operationally significant material. While Mr. Petro testified that he did not require any FSS personnel to read his communiqués, he did acknowledge that he is the top manager of the FSS program, and that he always reads e-mails that are directed to him by his direct superior.

The Employer also presented the testimony of Richard Post, a management official, who testified that the FSS binders at Washington are divided into various sections, including an "FYI" section that is not considered mandatory reading. (Tr.110:22-113:6.) At the hearing, one of the team binders from the Washington hub was produced (but not introduced into evidence) by the Employer. (Tr.166:21-170:21.) The binder, which is labeled "R&I, MBI," contains a number of tabs, including "MBI and "FYI," and contains a number of the communiqués, not all of which appear in the "FYI" section. *Id.*

Finally, the Employer produced the testimony of FSS Frances Velasquez, a new staff member still in training who is only authorized, at present, to perform the "NOTAMS" component of the FSS position. (Tr.154-171.) While Ms. Velasquez testified that she did not consider the communiqués to be important and routinely did not read them, she also testified that she also routinely "skims" and fails to read such mandatory items as the "Read and Initial" items. *Id.*

ARGUMENT

The Board first announced its current "captive audience" rule in *Peerless Plywood Co.*, 107 NLRB 427, 428 (1953), in a case where the employer, "less than 24 hours before the election . . . assembled the employees on its property in order to have them listen to a prepared speech about the election delivered by the secretary-treasurer o the Employer." Having recently rejected its former "Bonwit Teller" doctrine[1] (whereby an employer was prohibited from holding a "captive audience" speech while rejecting the union's request for equal access), the Board in *Peerless Plywood* announced a new rule whereby "employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. Violation of this rule will cause the election to be set aside whenever valid objections are filed." *Id.*, 107 NLRB 429. Explaining its rationale, the Board stated that "[i]t is our considered view, based on experience with conducting representation elections, that last-minute speeches by either employers or unions delivered to massed assemblies of employees on company time have an

[1] The doctrine was first enunciated in *Bonwit Teller, Inc.*, 96 NLRB 608 (1951), and was rejected in *Livingston Shirt Co.*, 107 NLRB 400 (1953).

unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect." *Id.* The Board further explained that the rule "is closely akin to, and no more than an extension of, our long-standing rule prohibiting electioneering by either party at or near the polling place. We have previously prescribed space limitations, now we prescribe time limitations as well." *Id.,* at 430. Elaborating upon the ramifications of its new rule, the Board noted that it

> will not interfere with the rights of unions or employers to circulate campaign literature on or off the premises at any time prior to an election, nor will it prohibit the use of any other legitimate campaign propaganda or media. . . . Moreover, the rule does not prohibit employers or unions from making campaign speeches on or off company premises during the 24-hour period if employee attendance is voluntary and on the employees' own time.

Id.

In *Oregon Washington Telephone Co.*, 123 NLRB 339, 341 (1959), the Board applied the *Peerless Plywood* rule to mail-ballot elections, declaring that "[e]mployers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within the period set forth in the notice, i.e., from the time and date on which the "mail in" ballots are scheduled to be dispatched by the Regional Office until the terminal time and date prescribed for their return."

In *United States Gypsum*, 115 NLRB 734 (1956) , the Board extended the *Peerless Plywood* "captive audience" rule beyond the context of mandatory meetings called for the purpose of disseminating propaganda. In that case, the union, on the day before the election, "stationed a sound truck on the street opposite the center of the Employer's plant and broadcast campaign speeches and other material. There were approximately 325 of the 424 eligible voters working in the plant during the period of the

broadcasts. Approximately 50, and possibly more, employees heard or were in a position to hear the sound trucks while working at their usual stations. Approximately 215 employees stationed in other areas could not have heard the sound truck." *Id.* at 735. In extending the *Peerless Plywood* rule to this situation, the Board acknowledged that

> In the usual *Peerless Plywood* situation a speech is made to a group or massed assembly of employees gathered together for the purpose of hearing the speech by a speaker who addresses them face to face. It is true that in this case the speaker did not address the employees face to face. However, the critical factor in this regard is not the location of the speaker but whether the employees are exposed to his remarks. n4 Thus, here the speeches could be clearly heard during working hours at locations in the plant where a number of employees were stationed. Furthermore, although the employees were not a massed assembly in the sense that they were gathered for the purpose of hearing the speeches, the employees who heard or could have heard the speeches were not isolated, but were working with or near each other, and the Petitioner in a planned and systematic fashion directed its campaign speeches at the employees during the entire day before the election. Accordingly, as the considerations operative in establishing the *Peerless Plywood* rule are here present in substance, albeit not in form, we are persuaded to reach the same result here.

Id. See also Bro-Tech Corp., 330 NLRB 37 (1999).

Finally, in *Virginia Concrete Corp.,* 338 NLRB 1182 (2003), the Board considered the *Peerless Plywood* rule in the context of electronic communications. In that case, involving a unit of truck drivers, the employer "within 24 hours before the election, . . . sent a brief, electronic "Vote No" message that appeared on small text messaging screens in the unit employees' trucks." *Id.* Sustaining an objection filed by the union, the ALJ "Found that the Employer's message violated *Peerless Plywood* because the message was uninvited. He found that although drives could delete the message or scroll past it, in doing so they would see it, and therefore the Employer would

succeed in communicating its message. Therefore, the judge found that the drivers became a captive audience under *Peerless.*" *Id.* at 1187.

The Board reversed, explaining that the *Peerless* rule was not intended to prohibit normal campaign literature or propaganda. Considering "the particular characteristics of the Employer's message," the Board found that

> it is more analogous to campaign literature than to a campaign speech or sound truck broadcast. The message was not audible. Although it was uninvited, the drivers could delete or scroll past it if they chose; they did not have to leave it on the screen indefinitely. We do not find it persuasive that employees would necessarily be exposed to the message in the process of deleting or scrolling past it. The same can be said of campaign posters, to which *Peerless* does not apply. Moreover, the Employer sent its message to employees in their trucks. The message was not delivered to "massed assemblies of employees," as in *Peerless*, or even to employees "working with or near each other," as in *United States Gypsum.*

Id.

Applying the factors considered by the Board in Virginia Concrete, it is clear that the Petro "communiqué" constituted an unlawful communication. While the message was not "audible," this factor, standing alone, is obviously not determinative. Significantly, and in contrast to the situation in *Virginia Concrete*, the "communiqué" was undisputably sent to a "massed assembly of employees" (i.e., the Flight Service Specialists, at their workstations), and that these employees were also "working with or near each other" as in *United States Gypsum* and the other sound-truck cases.

The final *Virginia Concrete* factor – essentially whether the message could be avoided by the Flight Service Specialists – is really the only factually contested matter. The Employer argues that Mr. Petro's "communiqués" are not mandatory reads, and produced the testimony of several witnesses, including Mr. Petro and Ms. Velasquez, in support of its position. The Employer's testimony, however, flies in the face of the fact

that the communiqués are issued over the FSS Outlook system, which otherwise contains operationally significant material. In fact, despite the Employer's attempted disavowals, it is clear that the 'communiques" themselves contain operationally significant material, and that FSS who deleted or skipped over them without reading are at risk of not obtaining important information. It is also undisputed that the "communiqués" are delivered to *all* members of the bargaining unit at their workstations. As such, they are akin to the unavoidable sound-truck broadcast of *United States Gypsum* than they are to the two-word "vote no" message sent remotely to truck drivers in *Virginia Concrete.* While the Employer presented witnesses who asserted that the communiqués are not operationally significant and may safely be skipped, this testimony is belied by the fact that the communiqués are issued over the FSS Outlook system, are often placed in mandatory-read sections of the R&I binders, and contain operationally significant material. Ms. Velasquez's testimony, in particular, is also of questionable probative value, since she also admitted that she doesn't bother to read undisputably mandatory reading items.

CONCLUSION

The Employer violated the Board's long-standing and clear *Peerless Plywood* rule when it issued the February 28th "communiqué" containing anti-union propaganda. The IAM's objection to the election should be sustained and a new election ordered forthwith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The aforesigned hereby certifies that the above brief has been served this date, via electronic transmission, upon:

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