

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Lockheed Martin Services, Inc.

Employer,

And

International Association of Machinists and Aerospace
Workers,

Petitioner.

Case No. 5-RC-16189

**EMPLOYER'S BRIEF IN OPPOSITION TO PETITIONER'S
OBJECTIONS TO ELECTION**

STATEMENT OF THE CASE

This case comes before Region 5 of the National Labor Relations Board on an objection of the International Association of Machinists (IAM) to an election conducted by mail ballot in the above captioned matter. In its Supplemental Decision and Notice of Hearing dated May 5, 2008, the Region dismissed all of the IAM's Objections, except Objection 3(a), which reads:

(a) During the period between the distribution of ballots to eligible voters the Employer electronically delivered several "communiqués" (a form of communication which the Employer requires employees to read and to acknowledge receipt of) to eligible voters in which the Employer included anti-union propaganda. These communiqués violated the Board's rules against captive audience meetings during the voting period.

At the hearing, the parties stipulated Joint Exhibit 2 dated February 28, 2008 which was the focus of the Objection. Ballots were mailed on February 27, 2008, the day before. Joint Exhibit 2 contained basic voting instructions (which were technically incorrect, but were quickly corrected by email). Joint Exhibit 2 also outlined the reasons why the Respondent, Lockheed Martin Services, Inc. (LMS), considered unionization unnecessary. The incorrect instructions are not a consideration in this matter. The only issue before the Region is the fact that the communication was delivered in the fashion it was, containing a partisan position on the election.

The issue before the Region is whether the email communication sent on February violates the Board's long established rule against mandatory meetings on company property during the period proscribed by *Peerless Plywood* and its progeny. There is no contention and no evidence that a "mass meeting" in the traditional sense ever took place. Instead, the IAM is attempting to cobble together an argument that the distribution of an email to bargaining unit members is the equivalent of a proscribed "mass meeting". The argument is both novel and meritless.

STATEMENT OF FACTS

In October 2005, Lockheed Martin Corporation took over operation of the Automated Flight Service Station Program (hereafter, AFSS) and its facilities from the Federal Aviation Administration (hereafter, FAA) (Tr. 9).¹ After completing the first phase of a transition program that resulted in the closure or consolidation of

¹ References to the transcript will be designated as Tr. followed by the appropriate page number. Exhibits will be referenced Joint Ex., Pet. Ex. (Petitioner's Exhibit) and Er. Ex. (Employer's Exhibit) followed by the appropriate Exhibit number.

approximately 40 facilities that had been previously scheduled by the FAA, three hub facilities and 15 flight service station facilities remained. The hubs were located at Prescott, Arizona, Fort Worth, Texas and Ashburn, Virginia (Tr. 76).

The second phase of the AFSS Program introduced a completely new weather briefing system, including all of the associated consoles, computers and software to train approximately 1,000 Flight Service Specialists (hereafter, Specialists or Briefers). That was a huge and difficult undertaking. There were equipment failures, software anomalies and system outages. Briefers were frustrated and uncertain as the new system came on-line, but they could see that there was steady, although slow, improvement.

From October 2005 (Tr. 9) through January 2008 (Tr. 76), the AFSS Program Manager was Dan Courain. He brought the Program through Phase One and launched Phase 2 before being assigned to a new position. In January 2008, a new manager, Ron Petro, succeeded Mr. Courain (Tr. 76). He immediately set about learning more about the status of the Program and the Briefers. While visiting the hubs and flight service stations, Mr. Petro heard directly from many Specialists that they wanted to know more about the system changes, planned improvements, equipment failures and fixes (Tr. 76-77). The Specialists were able to do their jobs on a day to day basis. What they wanted was the background behind the new system, which Petro called the "behind the scenes" story (Tr. 138). Petro decided the need could be met with an informal newsletter that would be made available to any Specialist who wanted it. The newsletter would center on "behind the scenes" information, not daily operational matters. It would be general information about the AFSS program and, like a free

newspaper, it could be passed by, picked up, scanned, read to the extent the reader desired or discarded without a glance. It would be information free for the taking by anyone interested (Tr. 76-78)

Petro hired a communications specialist, Nancy Causey (Tr. 77). She was tasked with developing stories that fit the communication model and producing a newsletter or communiqué every one or two weeks. She consulted a number of people for story ideas, including other managers, engineers and Specialists who were working on technology updates and system improvements (Tr. 135-136). On January 16, 2008, the first issue of the newsletter was circulated by email as an attachment. The subject line on the email was "Communiqué From Ron Petro." Every release since January 16, 2008, has borne the same subject line and has been issued as an attachment to an email (Tr. 85, 132). Employees know what it is just by reading the subject line. They can delete the message without reading it if they want (Khanoyan Tr. 25-26, 47; Petro Tr. 84-85; Post Tr. 113; Causey Tr. 132-133). Employees can also scan, skip around or read just parts of the Communiqué (Khanoyan Tr. 46; Petro Tr. 81; Post Tr. 113; Causey Tr. 132-133; Velasquez Tr. 158). There is no way for management to determine whether an email is deleted without being read (Petro Tr. 91, 104; Post Tr. 114; Causey Tr. 133).

Petitioners' witnesses lacked any credible evidence that it was mandatory to read Ron Petro's Communiqué. To the contrary, both Khanoyan (Tr. 46) and Brandes (Tr. 72-73) acknowledged that in his initial Communiqué, Petro instructed the Specialists that it was not mandatory, specifically stating:

This weekly report will provide you a status update of all things AFSS-FS21 software drops and behind-the-scene events that affect changes and other topics. It is not intended to be training or a mandatory reading item or to replace the 21st Century briefng [sic] and I hope to keep it short.

(Tr. 46, 50, Joint Ex. 1); (emphasis supplied).

In fact, Khanoyan admitted that he read the Communiqué out of “intellectual curiosity” and that it did not give him information on how to run his job (Tr. 47). Moreover, Khanoyan, who had been a Flight Service Specialist when the FAA ran the service and while Lockheed Martin ran it with Dan Courain, admitted that the Specialists always had sufficient information about how to perform the job under the FAA and under Lockheed Martin before the Communiqué was initiated by Ron Petro (Tr. 48).

Repeated leading questions got agreement from Petitioner’s witnesses that the Communiqué contained information which was “useful” (Brandes Tr. 70), “operationally significant” (Khanoyan Tr. 28; Brandes 70), “important” ((Khanoyan Tr. 28, Brandes Tr. 70), “helpful” (Khanoyan Tr. 55); and “significant” (Khanoyan Tr. 55). While those may be interesting adjectives, they all fall far short of “mandatory.”

Outlook

The software used to distribute AFSS email is Microsoft Outlook. It is a widely used commercial product. This is important to note because of the features built into Outlook. At the hearing on May 13, there was uncontroverted testimony that employees have the ability with any piece of email they receive to view the subject line without opening the email (Tr. 37, 113). This allows the reader to decide whether to open the

email, delete it without opening it or to open it and scan it, scrolling through the contents as desired, and ultimately to delete it or save it (Tr. 81). Uncontroverted testimony at the hearing established that all Briefers do not read their email and that a number of employees do not receive any email because their Outlook in-box is full and will not accept new email (Causey Tr. 129-134, Er. Ex. 4, 5, 6).

These email handling options, i.e., opening, scanning and scrolling, reading or deleting without reading also apply to email attachments, the form in which Petro's Communiqué was distributed. As noted, the Communiqué can be opened, skimmed, scrolled, kept or deleted, all at the discretion of the employee and no one in management knows what the employee does with their copy of the newsletter. Petro's Communiqué, is clearly labeled in the subject line of the email (Tr. 37) and at the top of page one of the attachment itself (Joint Ex. 2). An employee who opens and views the attachment does so because he or she has made that choice. That is what was intended by Petro when he launched the Communiqué in January and that is how the distribution was carried out.

There is a means of communicating job-critical "mandatory" information that cannot be simply ignored by the Briefers. In response to a question on direct examination, witness Ron Petro explained that, "There's a broadcast capability on the system, that we can actually send a broadcast message that will come up, and it's not via e-mail, it is a broadcast that will actually come up..." (Tr. 84). The Hearing Officer asked, "So the instant message is something they can't turn off..."? Petro replied, "That is correct, they cannot turn that message off" (Tr. 84). In contrast, the Communiqué was sent by email. It could be turned off, deleted, scanned, saved or

ignored. That is one of the major differences between a "mandatory read" item and the informal Communiqué newsletters.

Three Briefers (David Khanoyan (Ashburn); Judith Brandes (Princeton); and Frances Velazquez (Ashburn)) offered testimony at the Hearing about how they use Outlook. Each agreed that email can be deleted without opening it or reading it, but their subjective decisions on how to handle email differed. Khanoyan said that he felt that he had to open and peruse all email in case it contained something that might be of importance. He did not want to trust the subject line and thus chose to ignore it. He acknowledged that he could scan email if he wanted and that he could also delete it without reading it if he wanted to do that (Tr. 47). He chose to open and peruse everything. Critical information, he said, is displayed on the Jumbotron (Tr. 16).

Judith Brandes usually reads emails before starting work, but does not like extraneous noises while she is working, so she shuts down Outlook and opens it later in her shift when she is not busy (Tr. 74). She knows when a Communiqué is sent out because she checks the "From" line to see that it is from Nancy Causey and is addressed to a large group of people. Causey vaguely recalled reading the January 16 Communiqué but could not remember if it was ever in the read and initial folder (Tr. 69). She did remember reading the February 28 Communiqué because of the election instructions, but did not recall it being in the read and initial folder (Tr. 170). Brandes testified that at Princeton, MBI items are displayed on a clipboard at the front of the briefing room (Tr. 64). There was no testimony that Communiqués were ever displayed on the clipboard with the mandatory briefing items.

Frances Velazquez does not look at her email at the beginning of her shift (Tr. 157). She waits until later, if she opens Outlook at all. She testified that she does not open it everyday and that when she does open her email account, she does not read all the mail (Tr. 158). She related that when she came to Ashburn, the Briefer who was responsible for training her told her that the Communiqués were not required reading (Tr. 158). He said that he read them but that she did not have to if she did not want to read them. Velazquez said that she reads the Communiqué sometimes, but that just as often she does not read it. She explained that it does not contain any information she needs to do her job (Tr. 158-159).

Computerized Operational Information System: FS21

Flight Service Specialists provide weather briefings to pilots. This may include pre-flight briefings, reports of significant weather events, filing, activating and closing flight plans, briefing pilots on any current Notices to Airmen (NOTAMS) that may have an effect on their departure, en route flight or destination and, finally, they initiate search and rescue efforts for overdue flights. The work is information intensive and the information must be current up to the minute for safety and completeness (Tr. 10-11).

Briefers receive much of the information they need to perform their jobs from an elaborate and sophisticated proprietary computer system, FS21 (Tr. 90). This is the system that has been developed by Lockheed Martin to replace an antiquated system used by the FAA for many years. FS21 has not been without its problems, but through a sustained and cooperative effort, system engineers and Briefers working together

have been reducing the operational anomalies. Their progress is one of the periodic reports that are chronicled in Petro's newsletter, the Communiqué (Tr. 78).

The design of the FS21 System places each Briefer in his or her own work station. It is approximately eight feet wide and is isolated from the next Briefer's station by privacy screens on each side of the work station (Tr. 108-109). See Er. Ex. 2. Individual Briefers are separated by at least eight feet of space (Tr. 100, 107). These work stations are the same at all locations. The layout at Princeton, Minnesota is three rows of five work stations with a supervisor's desk area at the front of the room. Union witness Brandes said it had a "mission control" flavor (Tr. 62, 63). The Ashburn hub is circular and is divided into four quadrants of 25 work stations each. Three quadrants are dedicated to daily briefing operations and one quadrant is available for training or as a back up. The Ashburn hub has 28,000 square feet of floor space and can accommodate up to 75 active briefing positions at any one time (Tr. 108). Union witness Khanoyan offered his opinion that Briefers at Ashburn were so close they practically rubbed elbows and that the Ashburn hub was approximately 50 feet across from side to side. His testimony is seriously at odds with the actual work station layout and the physical dimensions of the Ashburn hub (Er. Ex. 2). Briefers are situated approximately eight feet apart (Tr. 107).

Briefers at both locations work in an environment where they can talk one-on-one with the pilot who is requesting a briefing. This process starts with a call from a pilot either by telephone or by radio (Tr. 82). The Briefer answers the call. To do this, they wear a headset with a boom microphone (Tr. 114). That allows the Briefer to answer

the pilot's call and to retrieve the information from the FS21 System that will be needed by that particular pilot.

Four computer screens, arranged in a "U" shape in front of each Briefer (not unlike a wrap-around truck windshield) form the contours of each individual work station (Tr. 108, 109; Er. Ex. 2). Three of the screens display the current weather data, airport data, en route conditions and destination airport data in both graphic and text form. This is the type of information that a Briefer needs to safely and accurately advise the pilot about the particular conditions that may affect the flight. It can be easily seen that each briefing is unique to that pilot and that time. It is localized for use by the pilot and the Briefer for the point of origin, route of flight and destination. The operational information needed to brief each pilot changes with each call answered by a Specialist. This type of information is not stored in a binder. It is created, displayed, revised and stored in electronic format in the FS21 System and is instantaneously available to every Briefer at his or her work station.

While the testimony is admittedly confusing, the FS21 workstation computers contain many Outlook "folders" (computer language for data storage buckets) (Khanoyan Tr. 25-26; Morgan Tr. 147-153; Pet. Ex. 1; Brandes Tr. 66-68). Khanoyan listed several "folders" containing vital "must have" information like graphics, charts, frequency selection, Air Defense International Zone, Washington ADIZ, the no-fly zone around Washington, D.C. and the like (Tr. 25-26). Brandes' testimony is similar (Tr. 66-67). It is noteworthy that this kind of mandatory, "must have" folder information could not be deleted by Specialists like the Communiqué could (Tr. 148).

Pre-Shift Mandatory Briefings

Flight Service Stations must be staffed 24 hours per day, seven days per week (Tr. 82).² There are no holidays or days when the station closes. Specialists must always be available to answer calls from pilots and to provide them with the most current information. The Flight Service Program has developed a system over the years to ensure that Specialists get the current information they need to do their jobs.

Prior to the start of each shift, and before going to their work individual workstations, the Specialists for the on-coming shift assemble for a group meeting with their shift supervisor. This is a uniform and necessary practice at each of the FSS facilities. The type of information includes an oral briefing on job critical information: Temporary Flight Restrictions or TFRs, Presidential TFRs, whether a software "drop" took place or did not take place, whether there are any problems with the FS21 System that day and whether there are any problems with the NOTAM system that day (Tr. 78). This type of information is time sensitive – it is briefed verbally to the Specialists before they go on duty because they need it to give a complete and safe briefing (Tr. 90-91). It is so time-sensitive that it is also displayed at the front of the briefing room on a white board at the smaller stations like Princeton, Minnesota, or at the center of the briefing room at Ashburn, Virginia on four electronic bulletin boards, each of which is larger than the individual work stations (Er. Ex. 2). One of these four identical boards is visible from anywhere in the briefing room. Briefers refer to the boards as the Jumbotron (Tr. 110). See Er. Ex. 2. It is easy to see that much of the information that is communicated in a verbal briefing at the start of a shift could be obsolete by the end of the shift (Tr. 95).

² One facility, San Diego, operates 16 hours per day (Tr. 82).

Read & Initial Binders: Optional Information and Mandatory Read Items

Both parties introduced evidence at the hearing on May 13 about what were called "Read and Initial" or R&I Binders. Company witnesses Petro, Post and Morgan explained the common characteristics of the R&I Binder system (Tr. 83, 111). Company witness Velazquez, a Specialist, testified about the way that she was taught to use the R&I Binders and about her routine for using them.

The R&I Binder at Ashburn and Princeton is divided into four sections (Tr. 117). As explained by witnesses Ron Petro, Richard Post, Francis Velazquez and David Khanoyan, the sections are labeled MBI (Mandatory Briefing Item); OSI (Operationally Significant Items); PBI (Personal Benefit Information) and FYI. At Princeton, there is one R&I binder that is shared by all Specialists. At Ashburn, there are nine sets of binders, and each set is shared by all members of a team (Tr. 116).

Documents in the MBI section would have been the subject of a verbal briefing at some point by a supervisor. The individual pages are marked with a "Must Be Verbally Briefed" stamp and each Specialist is required to read the MBI, sign and date it (Tr. 111). Witness Nancy Causey explained that the MBI information is removed from the binder periodically. The training supervisor reviews the signatures in the MBI section of the binder and if any are missing, he finds the Briefer, asks if they read the MBI material and upon their acknowledgement that they have, he has them sign off. The completed MBI certification is then entered into the training record of each individual Specialist (Tr. 112). The Communiqués did not appear in the MBI section of the binder at either Princeton or Ashburn (Tr. 104).

The next section of the Binder is called the OSI section (Tr. 111). Briefers are required to initial the cover page of OSI articles and, again, the training manager confirms that each Briefer has signed and dated the OSI cover sheet.

The PBI section of the Binder contains information that would be of personal interest to the Specialists, like changes in fringe benefits, etc. Although there is a signature cover sheet for these materials, the Briefers are not required to either read the materials or initial the cover sheet. These materials are also removed from the Binder periodically (Tr. 112, 113).

R&I Binders were used by the FAA before the Program was transitioned to Lockheed Martin. Even then, the R&I Binders had an FYI section for general information (Tr. 113). The final section of the binder is the FYI section (Tr. 147). It contains information of general interest. Like the PBI section, the FYI section does not contain any required reading. The Communiqué – including the January 16 issue in which Petro explained it was not mandatory reading – was kept in the FYI section at Ashburn (Tr. 112).

Richard Post explained that it was “ingrained with FAA from the day you came in until the day you quit being FAA. It’s common knowledge that FYI is not to be initialed. At the request of several Briefers, however, a cover sheet for initials only was added to Communiqué in the Ashburn R&I Binder. The FYI section cover sheet was requested by the Specialists to help them to remember whether they had looked at the materials (Tr. 117). It is significant that neither Khanoyan nor Brandes said they were required to read or sign the materials in the PBI section or the FYI section.

Union witness Judith Brandes, a Briefer at Princeton, MN, testified at first that she vaguely remembered the Communiqué of January 16 in which Petro explained that the newsletter was not mandatory reading. She then testified she did not remember it. She said she remembered the Communiqué of February 28 but she was not certain whether it was in the R&I binder (Tr. 69, 70). Her lapse of memory was an indication of the true circumstances. Company witness Joe Morgan was able to fill the gap in Brandes' testimony. Morgan, the station manager at Princeton, said he placed the January 16 Communiqué in the FYI section of the R&I binder at Princeton. Several Specialists read it and questioned him: if it was not mandatory reading, why was it in the Binder at all? Morgan took the Communiqué out of the Binder and did not put any others in at any time thereafter (Tr. 146). The February 28 Communiqué did not appear in the R&I Binder at Princeton at any time. Brandes was not able to remember whether the February 28 Communiqué was in the Binder because it was not there.

There was no obligation to read the PBI or FYI materials or to initial the cover sheets. There was no follow up by any member of management if an employee chose not to look at the materials or if the employee did not initial the cover sheet. In her testimony, Francis Velazquez said she does not always read the Communiqués because they are Ron's opinion, or they contain information she does not need to do her job. It is critically important to realize that this sworn testimony was given in the presence of her ultimate "boss", Ron Petro, the author of the document. Velazquez said she has done her job satisfactorily, has never been told otherwise and does not read every Communiqué. Velazquez said she looks at the binder approximately once per week and that is enough (Tr. 158-159, 162). She confirmed on the witness stand that

the January 16 Communiqué was in the FYI section and that there were no Communiqués in the MBI, OSI & PBI sections of the binder (Tr. 166).

When he was on the witness stand, David Khanoyan offered little fact but much opinion and generous amounts of gratuitous and irrelevant commentary. His time was spent talking about his subjective perception of conditions at the Ashburn facility. Khanoyan slipped effortlessly between fact and subjective opinion, never signaling that a change had taken place. At the close of his testimony, he could not help but comment on the pleasure of his own performance, noting "It's been fun" (Tr. 59).

Khanoyan stated he believed the Communiqué was mandatory reading. He said that he attended a pre-duty briefing every day and that he felt that he had to read the R&I binder every day because he felt he could not do his job, i.e., brief pilots, if he had not checked the R&I Binder. He argued that if the Communiqué was in the Binder, he regarded it as mandatory reading. In other words, it was his subjective belief, one that was not supported by the facts. When shown the language of January 16 Communiqué ("It's not intended to be training or a mandatory reading item..."), he continued to argue that he regarded it as mandatory notwithstanding clear instructions to the contrary.³ Finally, Khanoyan said that when it came to doing his job he suffered from tunnel vision and that he did not know whether other Briefers viewed the Communiqué in the same way he did or for the same reasons (Tr. 35). When pressed further, Khanoyan admitted that he read the Communiqué out of a sense of "intellectual curiosity" and that it did not give him the type of information that he needed to do his job

³ There is another contradiction in Khanoyan's testimony. He was with the FAA and, in his testimony, he said he did a good job with the FAA and that he did not have Petro's Communiqué. Khanoyan was able to do his job – briefing pilots – long before Petro's newsletter ever existed!

on a day-to-day basis (Tr. 48, 60). Once again demonstrating the flippant attitude with which he approached his testimony, he coyly said, "I have a need-to-know card and it has not expired" (Tr. 24).

LEGAL AUTHORITIES

As indicated in the Supplemental Decision and Notice of Hearing (and as was stipulated by the parties), the only issue pending in the hearing was an objection as to whether the issuance of an email from Ron Petro on February 28, 2006 was the equivalent of a forced mass meeting in violation of the so-called *Peerless Plywood* rule. This novel, albeit far fetched theory, must fail on its face and in light of numerous Board precedents. To begin with, an email is a "one-on-one" communication, even if it is sent to multiple individuals at the same time. As the evidence showed, the reading of the emails did not take place en masse, but, as is common, was done when convenient to the reader.

In *Peerless Plywood*, 107 N.L.R.B. 427 (1953), the Board considered a representation case in which the employer gave an anti-union speech to mass groups of employees on company time within 24 hours of the election. (In a mail ballot situation, the Board has considered the *Peerless* period to be from the time the ballots are mailed until the date the ballots are counted – generally a period of weeks rather than a 24-hour period.) In *Peerless*, the Board set the election aside because of the "last-minute character" of the speech – "on the eve of the election"- and the fact that it was given on company time to a massed assembly of employees. The Board made it clear that it was "last-minute" speeches on company time that caused concern because they tend to

create a "mass psychology which override arguments made through other campaign media and gives an unfair advantage to the party, whether the employer or union, who in this manner obtains the last, most telling word." *Id. Peerless* made it clear, however, that "circulation of campaign literature" and other legitimate campaign "propaganda or media" would be allowed. *Id.* at 430. Email was not a known form of communication in 1953, but, in the present context it is, at most, the modern day equivalent of "circulation of campaign literature" like a letter, a poster on a bulletin board or handbill in electronic format.

In a companion case decided at the same time as *Peerless*, *Livingston Shirt Corporation*, 107 N.L.R.B. 400, 408 (1953), the Board expounded on the freedom to communicate during the *Peerless* period, saying:

... even during the 24-hour period, the employer and the union still have the lawful right to use all lawful means of persuasion, including speech, subject only to the *one qualification that they cannot assemble employees on company premises during work hours for the purpose of addressing them en masse.*

(Emphasis supplied).

Since *Peerless* and *Livingston*, the Board has clarified what is or is not permissible conduct and communication during the *Peerless* period. The conclusion is inescapable that the only real target of *Peerless* is the mass psychology that a "mass meeting" in one form or another during working time on company property too close to the time of a vote can create. As the following cases demonstrate, far more emotional and inclusive forms of communication during the *Peerless* period have been countenanced by the Board.

While there is a prohibition against mass meetings, individual communication of anti-union messages by a high ranking member of management are permissible during the *Peerless* period. In *Associated Milk Producers, Inc.*, 237 N.L.R.B. 879 (1978), the plant manager spoke with every eligible voter for several minutes each, the morning of the election. Although he generally spoke to employees individually, on two occasions he spoke to employees together at their work stations. He spoke to two employees together once and to three lab employees together because they were so close that he would be overheard if he tried to speak to them separately. *Id.* at 879 n. 4. He told employees that the election was to be held that morning, that he felt they did not need a union, and that he hoped they would vote "no." The Board held that this conduct did not amount to a proscribed last-minute speech to a massed assembly of employees, noting that non-coercive anti-union statements "made by management representatives to individual employees at their work stations" (and to the two and three together on other occasions) within 24 hours of an election are permissible. Specifically, the Board said:

Clearly, [plant manager] Vail's brief comments advocating nothing more than a vote against the Union did not constitute a formal speech and made, as they were, to the employees individually, as well as informally, such remarks were unlikely to create the mass psychology referred to in *Peerless Plywood* or give "an unfair advantage to the party" making them. Nor are such statements elevated to the status of a speech to a massed employee assembly merely because they were repeated by Vail to every employee one after another at each one's workplace. That each employee during work hours was spoken to about the same subject with a similar refrain does not negate the fact that Vail spoke to each of them personally, informally, and separately, as individuals. Thus, we conclude that the repetitious nature, reach, location, and timing of these individual conversations did not singly or in combination transform Vail's comments into a speech as if made to all the employees collectively.

We therefore find that Vail's speaking to the employees individually did not constitute objectionable conduct.

237 N.L.R.B. at 880.

The Board reached a similar conclusion in *Electro-Wire Products, Inc.* 242 N.L.R.B. 960 (1979), where the company's president spoke individually with each employee at his/her work station on first shift the morning of the election, on company time. In doing so, he talked with approximately half the eligible voters. He continued his efforts until just prior to voting time, and in these conversations, each lasting a few minutes, he urged each employee to vote and to vote "no." The Board dismissed the objection, observing that the "repetitious nature, reach, location and timing of these individual conversations did not amount to a speech made to all the employees collectively." 242 N.L.R.B. at 960.

In *Flex Products, Inc.*, 280 N.L.R.B. 1117 (1986), the president of the company called 120 of 164 unit employees into the plant manager's office for individual meetings, within 24 hours of the election. In these meetings, each of which lasted approximately five minutes, he asked the employees if they had questions about his 25th hour speech the day before, or questions about the union, and then urged them to vote "no." In addition to other determinations, the Board found no *Peerless Plywood* violation.

In *C.E. Glass Co.*, 189 N.L.R.B. 496 (1971) the vice president of the company delivered a 25th hour speech before the election and then distributed a copy of the text of the speech to each employee the morning of the vote. The speech was not brief, and contained a rather firm message regarding employee loyalty, the union vote, plans for possible expansion and job security. The Board found no problem with the delivery of

the entire lengthy written text of the speech to employees during the *Peerless* period. Similarly, in *Andel Jewelry Corp.*, 326 N.L.R.B. 507 (1998), the employer distributed a campaign leaflet to each employee in the plant the day before the election, and in the process answered employee questions about the content of the leaflet. The Board found that even coupling the delivery of written anti-union materials to employees at their work stations with commentary by the delivering manager during the *Peerless* period was permissible.

It is difficult to conceive that the Board would consider an email to be read by each employee at his or her individual work station, at a time of their own choosing (assuming that they chose to read it at all) even close to the emotional equivalent of the individual discussions which it has routinely approved. These decisions are consistent proof that it is not the "message" or the "deliverer" which is the critical issue in the *Peerless* period – it is the gathering of employees in mass meetings to impose a "mass psychology" effect to which the other party does not have an opportunity to respond effectively.

In *Bro-Tech Corp.*, 330 N.L.R.B. 37 (1999) the union parked a sound truck across the street from the plant on the day of the election and played pro-union songs and lyrics to a captive work force for a period of about 9 and 1/2 hours. The employees were stuck at their work stations for most of the day. Since the music was piped into the plant by the union's sound truck, they were forced to listen to the pro-union message in the songs for nearly an entire shift. Under Board rules, no speeches are to be given on company time to massed assemblies of employees by either side within 24 hours of an election. Here, the election was set aside because the sound truck activity,

on these facts, was tantamount to a speech to a captive audience of employees on company time, within twenty-four hours of the election.

The improper aspect of the union's sound truck tactic was not the message itself. It was not specifically the method of delivery. It was the de facto forced meeting environment in which the message was delivered to employees assembled en masse during work time. All employees were forced to hear the same thing – at the same time – whether they wanted to hear the message or not. In effect, there was “no escape” from the message and it was the equivalent of a forced meeting with all of its psychological impact.

The controlling Board precedent is *Virginia Concrete Corp.*, 338 N.L.R.B. 1182 (2003). That case involved the use of email messages in an even more compelling circumstance than the matter at hand. In that case, truck drivers were scheduled to vote in a decertification election. On election day, within 24 hours before the vote, the Company sent an electronic message to each driver, via their on-board text messaging equipment (mobile data unit), asking them to vote “no.” The on-board mobile data unit, mounted on the truck dash board, had a screen on which text messages were displayed. The ALJ found that the messages could not be ignored because of a “beeper” which went off continuously when the message came onto the screen until the driver turned it off. As such, drivers were compelled to pay attention to the screens.

The Administrative Law Judge (ALJ) concluded that even though the drivers were free to delete or scroll past the union-related message on their data unit, this “uninvited” message constituted objectionable conduct. The Board disagreed, noting

that while *Peerless Plywood* prohibited captive audience speeches to “massed assemblies of employees,” it did not forbid circulating campaign literature or “any other legitimate campaign propaganda.” 107 N.L.R.B. 430. It did not prohibit the use of campaign posters or other literature. *Pearson Education, Inc.*, 336 N.L.R.B. 979, 979 (2001). Dismissing the objection relating to this conduct, the Board said:

Considering the particular characteristics of the Employer’s message, we find 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. Therefore, we overrule Objection 4.

338 N.L.R.B. at 1187.

The Board further noted in *Virginia Concrete* that the electronic message under consideration was not delivered to “massed assemblies of employees,” as in *Peerless*, or even to employees “working with or near each other” citing *U. S. Gypsum*. However, this reference to *U S Gypsum* was gratuitous, at best, inasmuch as that case involved facts totally different from those in *Virginia Concrete* (and different from the facts in the matter at hand).

In *US Gypsum*, the union was faulted for continuously broadcasting a pro-union message to prospective voters by sound truck, for more than seven hours the day before the vote. The broadcast was loud enough to be heard by a substantial number of employees who were forced to listen to the day-long message because they were held

captive by their job assignments. In view of its facts, *US Gypsum* is clearly inapposite and does not apply. At Lockheed Martin's workplaces involved, the employees worked in 8 foot wide cubicles separated by a divider and there was no audible broadcast of the message. The "in close proximity" really has no meaning unless there is an audible broadcast and those "in close proximity" are forced to listen to the same message at the same time.

In *Virginia Concrete* and in the matter at hand, there was no speech, no sound truck, no massed assembly of employees and no message the employees were forced to listen to or, for that matter, read in unison. Moreover, as the evidence showed, employees were free to read, not read, delete, scroll through or scan the electronic message, making it an entirely voluntary exercise if an employee chose to read the message. The Communiqué of February 28 was forced on no one. In fact, as was pointed out above, manager Ron Petro instructed the Service Specialist in the first issue of the Communiqué that it was neither training material nor "mandatory" reading.

CONCLUSION

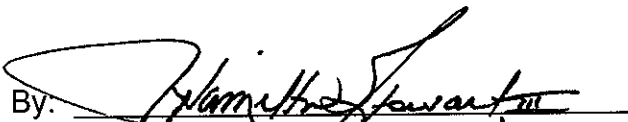
Much of the record evidence is "interesting," "useful," "helpful," and "important" to give context, but it is not "mandatory" to reach the only realistic conclusion. The issue is much simpler. In its first issue, Petro clearly stated that the Communiqué was not mandatory reading. That instruction never changed and no witness proved to the contrary. Management had no way of determining who had read the Communiqué (except for those who never got it because their email mailboxes were full). The Communiqués were not read en masse. The Communiqués could be scanned, scrolled

through, deleted or read at the discretion of the Briefers. There was never any gathering of Specialists to read the Communiqués. The Petitioners' theory that the email was the substantial equivalent of a mass meeting is simply without substance. *Virginia Concrete* is the controlling case law. Emails, like letters, campaign posters, or handouts do not violate the *Peerless Plywood* guidelines. The objection should be dismissed and the results of the election in NLRB Case No. 5-RC-16189 certified.

Dated this 28th day of May, 2008.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Lockheed Martin Services, Inc.

Employer,

And

International Association of Machinists and Aerospace
Workers,

Petitioner.

Case No. 5-RC-16189

CERTIFICATE OF SERVICE


It is hereby certified that the foregoing Employer's Brief in Opposition to Petitioner's Objections to Election was served on the following named individuals by faxing the Brief to (410) 962-2198 and also putting same in the United States mail with proper postage affixed there:

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It is further certified that the foregoing Brief was served on the following named individuals by sending the Brief by email and also putting same in the United States mail with proper postage affixed thereto:

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Dated this 28th day of May, 2008.


J. Hamilton Stewart, III