Lockheed Martin Skunk Works, a Division of Lockheed Martin Corporation *and* John Morehead, Petitioner and Engineers and Scientists Guild, Lockheed Section. Case 31–RD–1396

July 24, 2000

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held December 17, 1998, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 407 for and 446 against the Union, with 4 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings[1] and recommendations only to the extent consistent with this Decision and Certification of Results.

Facts

On October 6, 1998,[2] the Petitioner, John Morehead, a unit employee, filed a petition seeking to decertify the Union. During the course of the subsequent election campaign, the Petitioner and employees Ken Klar, Richard Lidh, and Roger Steele sent six mass e-mails supporting decertification to virtually the entire unit of approximately 1100 employees. In addition, two e-mails were sent by decertification "leaders"[3] to smaller portions of the bargaining unit (ranging from 50 to 350 employees)[4] and "thousands" of e-mail messages were exchanged between individual pro and antidecertification employees.[5]

The Union protested the Petitioner's use of e-mail on several occasions during the election campaign and requested the Employer to put a stop to it. Although on one occasion the Employer's vice president told the Union that the Employer would "look into it," and on another occasion a human resources manager told the Union that the Employer would "take care of it; it'll stop," the Employer did not direct the Petitioner to stop using its e-mail system in connection with the decertification campaign.

The Employer maintains a policy concerning solicitation and concerning distribution of literature. The policy prohibits solicitation during "working time," and prohibits the distribution of "leaflets, pamphlets, circulars, chain letters, or other printed material" in working areas or during the working time of the person distributing or receiving the literature. This policy states, in pertinent part:

> **Solicitation** No employee shall solicit or promote subscriptions, pledges, memberships or other types of support for any drives, campaigns, causes or organizations on Company property during the assigned working times of either the employee(s) engaging in such activity or the employee(s) at whom such activity is directed unless authorized by management.
>
> **Distribution of Literature** Distribution or circulation of leaflets, pamphlets, circulars, chain letters, or other printed materials is likewise not permitted during the assigned working times of either the employee(s) at whom such activity is directed or in work areas. All literature to be distributed in accordance with this rule, except that dealing with protected, concerted activities, such as union matters, collective bargaining, or labor relations, must be submitted to the Human Resources department for prior approval. No prior approval need be obtained for distribution of literature dealing with protected, concerted employee activities in non-work areas during the non-working times of both the employee(s) engaging in such activity and the employee(s) at whom such activity is directed.

The Employer also maintains a policy (corporate policy statement 007) stating that its "property, materials, equipment, facilities, information, and resources" are to be used for the Employer's business, but permits "occasional personal use" during nonworktime if it is of reasonable duration and frequency, does not interfere with the employee's performance, and is not "in support of a personal business." Personal use of e-mail, in compliance with these guidelines, is specifically authorized.[6]

---

[1] The Employer and the Petitioner have excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.,* 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

The Petitioner also asserts that the hearing officer's findings and conclusions are the product of bias in favor of the Union. We have carefully examined the record and find no merit to this allegation.

[2] All dates hereafter are in 1998.

[3] See fn. 8, infra.

[4] Klar sent an additional e-mail concerning the decertification petition to more than 15 employees on October 1, prior to the critical period.

[5] Some of the e-mails, including some of the mass e-mails, were sent by employees from their computers at work; others were sent by employees from their home computers.

[6] This policy states, in pertinent part:

> 2.1 Lockheed Martin property, materials, equipment, facilities, information, and resources, hereinafter collectively referred to as "assets," are intended to be used for the conduct of the Corporation's business. It is recognized, however, that occasional personal use of such assets by employees may occur without adversely affecting the interests of the Corporation. . . .
>
> 2.3 It is not possible to define certain terms . . . such as . . . *occasional* by means of a specific number. It is believed, however, that a common sense determination should dictate what one should do

During the election campaign period, the Union sent three interoffice mailings regarding the election using the Employer's interoffice mail system (referred to by the parties as "pony mail"). The Union also posted its campaign materials on bulletin boards assigned to the Union throughout the Employer's facility, and union officials and supporters placed campaign literature on individual employees' desks. Prior to December 11, the Union did not send any mass e-mails concerning the election campaign using the Employer's e-mail system. The Union's president testified that he did not learn how to use e-mail until after the campaign had commenced and that he viewed interoffice mail and direct solicitation as effective methods of communication.[7]

On December 10 the Union by letter requested permission to use the Employer's e-mail system to send no more than three e-mails related to the election. The Union stated that its request was made "in order to remedy the discriminatory manner in which [the e-mail system] has been used to date." The next day, the Employer granted the Union's request, as a "one-time-only authorization," and granted the same accommodation to the Petitioner. The Union sent one mass e-mail pursuant to this authorization. Although not mentioned by the hearing officer, the record reflects that in December, during the decertification campaign, the Employer, at the Union's request, sent a mass e-mail to all unit employees reminding them of the Union's scheduled contract ratification vote.

The record also reflects that, prior to the election, the Employer disciplined employees who used its e-mail system for certain nonwork-related purposes including: running a travel-related business; for communications related to an employee's external pornographic web site; and sending "inappropriate material" to coworkers such as off-color jokes and ethnic comments. In each case, the Employer acted after receiving complaints about the manner in which its e-mail system was being used. In early December, the Employer also requested that employees stop using its e-mail system to send holiday-related e-mails which included large image, video, and/or audio file attachments, because these messages were placing a significant burden on its e-mail servers and delaying e-mail transmissions. However, no employees were disciplined in connection with this episode.

The record reflects widespread use of the Employer's e-mail system by employees to plan social activities, trade jokes, and send personal messages to family members, friends, and other nonemployees. Consistent with its policy 007, the Employer has not disciplined employees for using its e-mail system to send or receive nonwork-related messages of this type.

The campaign-related messages sent by the Petitioner and his supporters and discussed above included a salary survey sent by Klar by e-mail in November to approximately 350 unit employees and a December 12 e-mail sent to virtually the entire unit entitled "Salary Trends" which disclosed the results of the survey and argued that unit employees were underpaid relative to engineers at other companies. After learning of the salary survey, the Employer cautioned Klar against using the e-mail system for this purpose.

The Hearing Officer's Report

The hearing officer found that the mass e-mails sent by the Petitioner and his supporters violated the Employer's solicitation and distribution of literature policy and the policy regarding the personal use of company assets.[8] In addition, the hearing officer found that, although the Employer was aware of the Petitioner's use of mass e-mail messages in the election campaign, and the Union's objections thereto, the Employer made no attempt to clarify its policies or to investigate potential abuses.

The hearing officer found that the Union could reasonably have believed that the Employer's rules prohibited campaigning by e-mail. Accordingly, the hearing officer found that the Employer was responsible for the Union's failure to use e-mail in connection with the campaign prior to the Employer's December 11 letter allowing it to send three e-mails. The hearing officer discounted evidence that the Union could have used, but chose not to use, the Employer's e-mail system in connection with the election campaign, including its failure to take full advantage of the Employer's December 11 offer, on the grounds that "the issue must be decided on objective, not subjective grounds."[9] In essence, the hear-

in a particular circumstance. The final determination of appropriate use is reserved to local management.

3.1 Occasional personal use of Lockheed Martin assets is permitted subject to the following. . . .

3.1.1 The activity must take place during non-work time, be of reasonable duration and frequency, and must not interfere with or adversely affect the employee's performance or other organization requirements.

3.1.3 The activity must not be in support of a personal business . . . nor for any illegal purpose or purpose which would cause embarrassment to Lockheed Martin or otherwise be adverse to its interests. . . .

3.3 Personal use of electronic mail systems . . . is permitted provided that such use is consistent with the[se] guidelines.

[7] The Union's officers, including its president, are bargaining unit employees.

[8] The Employer also maintains a policy regarding political activity in the workplace. The hearing officer found that the Petitioner's use of e-mail did not violate this policy and there are no exceptions to this finding.

The hearing officer also found that the Petitioner, Morehead, and employees Klar, Lidh, and Steele were the "leaders" of the decertification campaign and, without further discussion, found that the actions of Klar, Lidh, and Steele were attributable to the Petitioner. We view this finding as an implicit determination that Klar, Lidh, and Steele were agents of the Petitioner and, in the absence of any exceptions, we adopt it.

[9] The hearing officer cited *Gray Drug Stores,* 197 NLRB 924 (1972) (employer engaged in objectionable conduct by failing to timely submit

ing officer found that, by failing to dispel the Union's fear that its supporters would be disciplined if they engaged in the same conduct that the Petitioner's supporters were engaging in, with impunity, the Employer engaged in disparate discriminatory nonenforcement of its (otherwise valid) rules, which gave the Petitioner an advantage in the campaign, and thereby engaged in objectionable conduct.[10]

Although not the subject of any timely objection, the hearing officer found that the Employer gave the Petitioner an additional advantage by providing Lidh with an employee seniority list prior to the date the petition was filed. The Petitioner, Klar, Lidh, and Steele, used this list, which was also provided to the Union, to compile the e-mail addresses of unit employees.

Analysis

"Representation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.,* 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)), cited in *Antioch Rock & Ready Mix,* 327 NLRB 1091 (1999). "There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.,* supra at 328. Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.'" *Kux Mfg. Co. v. NLRB,* 890 F.2d 804, 808 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB,* 490 F.2d 117, 120 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974). See also *Chicago Metallic Corp.,* 273 NLRB 1677, 1704 fn. 163 (1985), quoting *Valley Rock Products v. NLRB,* 590 F.2d 300, 302 (9th Cir. 1979). The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit. *Avante at Boca Raton, Inc.,* 323 NLRB 555, 560 (1997). A party's conduct cannot be the basis for setting aside the election unless it reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place,* 268 NLRB 868 (1984). And the objecting party must establish dissemination of statements allegedly interfering with preelection conditions; dissemination will not be presumed. *Kokomo Tube Co.,* 280 NLRB 357, 358 fn. 9 (1986).

Applying these standards, we find that the Union has not established that this election must be set aside. There is no contention in this case, nor any finding, that the Employer's rules are objectionable on their face. Rather, the hearing officer found, in effect, that the Employer gave the Petitioner an advantage by allowing it to use the e-mail system, in violation of the Employer's rules, while the Union, believing itself to be constrained by those rules, did not use the e-mail system. For the purpose of this decision only, we shall assume, without deciding, that the Employer's rules could reasonably be read to prohibit mass e-mails of the type sent by the Petitioner. However, as noted above, the Employer's alleged failure to enforce those rules against the Petitioner cannot be the basis for setting aside the election unless it reasonably tended to interfere with the employees' free and uncoerced choice in the election. As shown below, it did not.[11]

Contrary to the hearing officer, under all the circumstances of this case, we cannot agree that the Union was placed at a disadvantage relative to the Petitioner based solely on the Petitioner's greater use of the e-mail system in the election. Initially, we stress that any disparity in the use of the e-mail system is at least to some degree the result of the Union's choice to send only one e-mail pursuant to the Employer's December 11 authorization, which explicitly granted permission to the Union to send three.[12] The Employer's authorization, moreover, represented approval in full of the Union's only request.[13] We cannot fault the Employer for the Union's subsequent failure to take full advantage of the opportunity to use the e-mail system presented to it.

list of the names and addresses of unit employees regardless of whether union already had information).

[10] The hearing officer cited to *Northeastern University,* 235 NLRB 858 (1978), enfd. in pert. part 601 F.2d 1208 (1st Cir. 1979), and *Columbia University,* 225 NLRB 185 (1976) (discriminatory denial of prounion employees' request to hold meetings at the employer's facilities while allowing antiunion employees to hold meetings violated Sec. 8(a)(1)).

[11] In light of our disposition of this case, we do not pass on the Employer's and the Petitioner's exceptions to the hearing officer's finding that the Petitioner's use of the Employer's e-mail system violated the Employer's rules.

[12] The hearing officer discounted the significance of this evidence on the grounds that it was "subjective." We do not agree. The question presented is whether the Employer's alleged failure to enforce its rules against the Petitioner gave the Petitioner an advantage in the election. Evidence concerning the Union's communications with the voting unit, including its e-mail communications, is plainly relevant to this inquiry.

Regarding the hearing officer's reliance on *Gray Drug Stores,* see fn. 9, supra, we note that the Board requires an employer to provide a list containing the full names and addresses of all eligible voters prior to Board-conducted elections. *Excelsior Underwear,* 156 NLRB 1236 (1966); see also *North Macon Health Care Facility,* 315 NLRB 359 (1994). In cases involving noncompliance with this requirement, the Board has held that it will "presume . . . that the Employer's failure to provide a substantially complete eligibility list had a prejudicial effect upon the election . . ." without an inquiry into whether the union was able to contact employees without the list. *Sonfarrel, Inc.,* 188 NLRB 969, 970 (1971). Contrary to the hearing officer, these principles have no application in the circumstances of this case. There is no per se rule that an employer must allow the parties to an election to use its e-mail system comparable to the *Excelsior* list requirement discussed above, and there is, accordingly, no basis for presuming that an employer's failure to provide such access constitutes objectionable conduct.

[13] Accordingly, this case is distinguishable from *Northeastern University* and *Columbia University,* supra. In those cases, the employer discriminatorily denied permission to use its facilities to employees for the purpose of engaging in protected activities. Here, by contrast, the Employer did not deny any party access to anything. To the contrary, when the Union requested access to the e-mail system the Employer immediately and in full granted the Union's request.

Likewise, it appears from the record that the Union's failure to use the e-mail system prior to December 10 was based on its preference for traditional methods of communication. There is no evidence that the Union wished to communicate with unit employees regarding the election by e-mail during this period of time. While the Union complained about the Petitioner's use of the e-mail system, the Union never requested that the Employer "clarify" its policies regarding the permissible use of e-mail in the campaign. Under these circumstances, there is no basis for finding that the Employer's failure to sua sponte clarify its rules constituted objectionable conduct.

Our dissenting colleague nevertheless asserts that the Employer "encouraged and took advantage of" an "imbalance in communications, effectively precluding employees from fully hearing from both sides, the Union and the decertification petitioner." We respectfully disagree. As discussed above, the Union mounted a vigorous campaign, which included the widespread distribution of its election materials via the Employer's interoffice-mail, the posting of literature on the Employer's bulletin boards, and the distribution of literature in the workplace itself by union officials. It is undisputed that the Employer facilitated and cooperated with these efforts. Thus, the record evidence in this case simply does not support the dissent's contention that there was an imbalance in communications, much less that any unit employee was "precluded" from "fully" hearing the Union's message.[14] There is also no evidence that the Employer somehow "took advantage of" the Union's use of traditional means of communication instead of e-mail.

There is also no evidence that the Employer's alleged nonenforcement of its rules regarding the use of its e-mail system was disseminated to eligible voters prior to the election. Rather, from the perspective of the unit employees, the Union freely disseminated its message through interoffice mail, direct solicitation, and, after December 11, *through the Employer's e-mail system,* without any protest or repercussions from the Employer. There is no evidence that unit employees generally were aware that the Union had complained to the Employer concerning the Petitioner's use of the e-mail system, that the Employer had offered to "put a stop to it," or that the Union had requested permission to use the e-mail system and the Employer, by its December 11 letter, had granted the Union's request on a "one-time-only" basis. Moreover, the Employer's failure to take any action against the Petitioner was consistent with its general practice of allowing its employees wide latitude in using its e-mail system for "non-business" purposes before, as well as during, the decertification campaign.[15] Thus, there is no reason to believe that employees reasonably perceived, from the Employer's handling of the Petitioner's use of the e-mail system, that the Employer discriminated against the Union, much less that employees were coerced thereby in their choice regarding their bargaining representative.

Under all of the circumstances, we find that the Employer did not engage in conduct having a reasonable tendency to interfere with employee free choice.[16] Accordingly, we shall overrule the Union's objection.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Engineers and Scientists Guild, Lockheed Section and that it is not the exclusive collective-bargaining representative of these bargaining unit employees.

MEMBER LIEBMAN, dissenting.

This case involves employee use of e-mail, an evolving and powerful means of workplace communication. At issue are not the difficult questions of whether, or to what extent, employers can regulate workplace use of e-mail by employees in election campaigns. The Board has yet to tackle those issues. Rather, this case involves a basic question of fairness. The Employer tacitly allowed the decertification petitioner to send repeated mass e-mailings to coworkers. At the same time, it ignored complaints about these e-mailings by the union representative (himself a unit employee), who believed that company rules prohibited use of e-mail for mass mailings of this sort. By its responses, or failure to respond, to the Union's pleas, the Employer actually reinforced the Union's hesitancy. It effectively denied the Union equal access to this powerful modern means of communicating with the work force and thereby impaired the employees' Section 7 right to make a fully informed choice in this election. This election took place in a large unit and was decided by a very small margin. It should be set aside.

Like my colleagues, I find it unnecessary to decide whether the Petitioner's repeated use of the Employer's

[14] To the extent that our dissenting colleague argues that the distribution of campaign materials by e-mail is inherently more effective than distribution by more traditional means, there is also no record support for this proposition.

[15] This past practice, which is undisputed, includes the Employer's sending a mass e-mail during the election campaign, at the Union's request, reminding unit employees of the Union's contract ratification vote. In light of our disposition of this case, we find it unnecessary to pass on the Employer's contention that, under these circumstances, it was precluded from denying the use of its e-mail system to the Petitioner. See *E. I. du Pont & Co.,* 311 NLRB 893, 919 (1993) (employer unlawfully prohibited e-mail messages for or about union, where personal messages and messages by employer-dominated labor organizations were allowed).

[16] We reject, as completely unfounded, the hearing officer's finding that the Employer afforded the Petitioner with "an additional advantage" by providing the Petitioner with a copy of the seniority list. Even assuming that this issue is properly before us (the Employer's provision of this list to the Petitioner was not the subject of any timely objection), we do not agree that the Petitioner derived any advantage from possessing this list when the evidence is clear that the Union at all times had access to it as well.

e-mail system to campaign against the Union actually violated work rules on solicitation, distribution, and e-mail usage. More importantly, as my colleagues concede, at least for the purpose of this decision, the Employer's rules could *reasonably be read* to prohibit mass e-mails like those sent by the Petitioner. Clearly, that is how the Union understood these rules. But, when the Union repeatedly protested what it reasonably believed were the Petitioner's substantial ongoing violations of these rules, the Employer simply gave the Union the brushoff. Obviously, the Petitioner and Union held very different views of what the Company's e-mail policies permitted. But, by failing to clarify its policies, the Employer encouraged and took advantage of the imbalance in communications, effectively precluding employees from fully hearing from both sides, the Union and the decertification petitioner. In my view, this conduct impaired employee free and fully informed choice and defeated the fairness of the election itself.[1]

The facts are not in dispute. On October 20, 1998,[2] early in the critical period, and 2 full months before the election, the Union filed an unfair labor practice charge against the Employer. It alleged that the Employer was unlawfully assisting the Petitioner's decertification campaign by allowing the Petitioner to use the Employer's e-mail system in violation of the Employer's rules. The next day, the Union wrote to the Employer "formally requesting that Lockheed Martin Skunk Works immediately enforce its internet/e-mail policy to halt employees' personal and ongoing use of the company internet/e-mail in support of the decertification petition." The Union asserted in this letter that "such conduct is both illegal and in violation of written company policy." The Employer never responded. Indeed, even after the Union withdrew the unfair labor practice charge 3 days later, so as not to interfere with ongoing bargaining, the Employer still made no attempt to clarify its e-mail policies for the obviously apprehensive union.

Around this same time in October, Union President Dale Herron spoke to Employer Human Relations Manager Haydu. He objected to the Petitioner's continued use of the Employer's e-mail system in its decertification campaign. Haydu acknowledged that it was "still going on," but told Herron "don't worry about it, we'll take care of it; it'll stop." But again, and contrary to these assurances, the Employer made no attempt to curtail the Petitioner's use of the Employer's e-mail system. Nor did it make any attempt to clarify its e-mail policies for the Union.

In November, Union Consultant Ammond telephoned Employer Vice President Robert MacPherson to complain about the Petitioner's continued use of the Employer's e-mail system in the decertification campaign. MacPherson told Ammond that he would "look into it." But MacPherson's only response was to scan his own mail and ask his own staff if anything was "out of the ordinary." When MacPherson got no response from his staff, he simply dropped the matter entirely. He neither investigated possible violations of the Employer's e-mail policies by the Petitioner, nor clarified those policies for the Union.

My colleagues and I essentially agree that the Employer's rules reasonably could be understood to prohibit mass e-mails like those sent by the Petitioner, and indeed, the Union reasonably understood the rules that way. Consistent with that understanding, the Union repeatedly complained to the Employer about the Petitioner's use of the e-mail system to communicate his views in the campaign. The Employer reinforced the Union's understanding by telling the Union that it would put a stop to the Petitioner's campaign e-mails. But, it never did. Nor, just as critically, did the Employer ever clarify its e-mail policies for the Union. Instead, the Employer just left the Union believing that it could not use the Employer's e-mail system to communicate with the work force in support of its campaign.

Nonetheless, my colleagues dispute that the Union ever *expressly asked* the Employer to clarify its e-mail policies for this election campaign. Surely, this quibbling elevates form over substance. As they acknowledge, the Union repeatedly protested the Petitioner's extensive use of e-mail during the campaign and asked the Employer to put a stop to it. Obviously, the Union believed the Employer's policies prohibited such use. And, just as obviously, faced with such complaints, the Employer could have told the Union that the Petitioner's use of e-mail did not violate its policies. But, it never did so. That, of course, would have left the Union free to use e-mail for its campaign communications. Instead, the Employer ignored the Union, turning this opportunity to its advantage. By assuring the Union that it would "put a stop to" the Petitioner's use of the e-mail system, it actually *reinforced* the Union's belief that e-mail was prohibited for campaign purposes. And, by its subsequent inaction, the Employer effectively denied the Union access to this means of communication for nearly the entire campaign, while allowing the Petitioner and his supporters to e-mail repeatedly and effectively.

Contrary to my colleagues' assertion, I am not relying on any general "duty" on the part of the Employer to sua sponte clarify its e-mail policies for the Union's benefit. Rather, I am holding the Employer to a standard of fairness and a duty to treat the decertification petitioner and the Union evenhandedly, giving advantage to neither, whether directly or indirectly, as here. The facts cried out for a clarification by the Employer of its policies. Yet, none was forthcoming. By its inaction, the Employer perpetuated an imbalance that impaired its em-

[1] See *NLRB v. Golden Age Beverage Co.,* 415 F.2d 26, 29 (5th Cir. 1969) (Board is responsible for determining whether an election "was fairly or unfairly conducted").

[2] All dates are in 1998.

ployees' "Section 7 right to make a 'fully-informed' choice in an election." *Thiele Industries,* 325 NLRB 1122 (1998) ("purpose of *Excelsior* rule is to protect that right").

My colleagues also dispute that there was ultimately any interference with the election. They say that (1) the Employer eventually gave the Union express permission to use the e-mail system, about a week before the election; (2) the Union made substantial use of the Employer's intracompany mail system, referred to as "pony mail," as well as bulletin boards and direct distribution of campaign literature in communicating its campaign messages to the employees; and (3) the Employer's nonenforcement of its e-mail policies was not disseminated to the employees prior to the election, i.e., the employees were not generally aware that the Union had repeatedly but unsuccessfully complained to the Employer about the Petitioner's use of the Employer's e-mail system.

These are red herrings. Failing to get the Employer to stop the Petitioner, the Union finally sought permission to use the e-mail system, and the Employer granted it. But this did not occur until the last week of the campaign. The Petitioner, on the other hand, was free to and did make widespread use of e-mails throughout the campaign. Nor did the Union's use of the Employer's "pony mail," bulletin boards, and personal distribution compensate for or right the imbalance. Today, these forms of communicating are just not the same as e-mail. It is by now beyond dispute that e-mail is a most effective means of communication. It is a particularly powerful organizing tool. Fast and easy to send, e-mail messages are immediately accessible to their audience and have a more direct impact than messages sent by other means. But, equal access to this form of communication was effectively denied the Union. By its action, or inaction, the Employer allowed one party to this election, but not the other, to make widespread use of this modern and highly potent method of communication and thereby impaired employees' right to hear both points of view in this decertification campaign.

Finally, dissemination of the Employer's objectionable conduct to the employees is irrelevant. The issue is not whether the employees would *perceive* the Union as being weak and ineffectual in failing to get the Employer to stop the Petitioner from using the Employer's e-mail system. The issue, rather, is whether the Union was reasonably disadvantaged in its efforts to communicate its campaign messages to the unit employees by the Employer's repeated failure to clarify its policy on the use of its e-mail system for campaign purposes, and whether the rights of unit employees were impaired as a result.

For all of the reasons discussed above, I find that the Union was so disadvantaged, and that the Section 7 right of employees to make a fully informed choice in this election has been so impaired as to affect the results of the election. As a matter of fundamental fairness, I therefore would set aside the election.