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TO: NAATS' Members May 11, 2005
FROM: Arthur L. Fox, Esq.
RE: Lockheed Martin's mandatory Arbitration Agreement

I understand that every FAA Flight Service employee has recently received in the mail an offer of employment from Lockheed Martin, together with an arbitration agreement (AA) they've been told they must sign. NAATS has asked me to furnish you with this analysis of the AA.

While the AA supposedly gives you an opportunity to review its provisions with your attorney before signing it, that is an empty gesture since LM does not indicate its willingness to negotiate any modifications to its "take-it-or-leave-it" agreement which states unequivocally that everyone "MUST SIGN *THIS* AGREEMENT as a condition of employment." In the eyes of the law, this is known as a "contract of adhesion" which some courts will not enforce; however, while the tide is shifting, most courts still honor and enforce such contracts; it all depends upon the jurisdiction, or state, in which a case is filed.

Thus, while you have no choice but to sign this particular AA if you wish to continue your career in Flight Service, there is nothing that says you cannot hand-write above your signature, next the word: "AGREED," two simple words, "***under protest***." It's possible that those two words could, some day, give a court reason to refuse to honor the AA. Lockheed will not be happy to see those words, but since you are nonetheless executing its AA, the company cannot use them as a basis for rescinding its offer of employment.

While the AA is couched in language that supposedly gives either party (employee or LM) the right to invoke its terms, as a practical matter it forfeits your right to litigate most all forms of employment dispute against LM in a court of law, and confers upon LM the right to "divert [your] case to arbitration from [a] court." Further, as a practical matter, arbitrators tend to be more "hospitable" to parties who are responsible for employing (and paying for) their services, than are courts which are supported by tax dollars. In this case, it is LM which has, effectively, arranged to use the services of the American Arbitration Association, and LM has agreed initially to pay for those services while giving individual arbitrators the discretion "to require the Employee to pay [an unspecified portion or] part of those fees and costs" which typically run $1,000 per diem, and upwards.

Inasmuch as you may already be somewhat familiar, at least in a general sense, with the arbitral process, I will not dwell upon the differences between the arbitral and judicial processes other

than to say that arbitrators cannot issue subpoenas or compel a "reluctant" witness to attend and testify at a hearing, or to give a deposition, or to produce requested evidentiary documents or other materials; nor can arbitrators even enforce their own decisions or awards. Generally speaking, the arbitral process is less formal, as well as more quick, and "dirty," compared to the judicial process. You would still be represented by your own lawyer, at your own expense, and, when successful, you could ask the arbitrator to require LM to reimburse you for your attorney fees which are likely to be less onerous than in a full-blown legal proceeding. On the other hand, there would be nothing to stop LM from asking arbitrators to require employees pursuing unsuccessful actions to reimburse LM for its attorney fees along with the costs of the arbitral proceeding.

On the plus side, this particular AA does require arbitrators to apply relevant judicial precedent rather than their own notions of what the "law", or outcome, should be; it also requires the arbitrator to render a written opinion applying "the prevailing substantive law"; and, importantly, it permits any disappointed party, in essence, to appeal the arbitrator's decision to a federal district court to review the "decision for conformance with applicable law." In this connection, I would raise several caution flags: (1) the arbitrator's factual findings are not reviewable; (2) courts are loathe to overturn arbitration decisions; and (3) there exists a possibility that federal judges will rule that they lack jurisdiction to hear such "appeals" in which case challenges would have to be submitted instead to state courts.

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By now, you undoubtedly have begun to understand the potential consequences of becoming an "at-will" employee of a private employer. For example, as LM's May 6th letter states, an "at-will" employee can be fired "for any reason at any time"; however, a central protection in a collective bargaining agreement is the right not to be terminated except for "just cause," a term that embraces a vast body of precedent. While the FAA and LM may hope to convert Flight Service to non-union, at-will status via the A-76 contracting-out process, by remaining (or becoming) a loyal NAATS' member, NAATS has every expectation of being able to persuade LM (a) to recognize it as your collective bargaining agent and (b) to sign a collective bargaining agreement that is virtually identical to the one between NAATS and the FAA. Indeed, LM would become obliged to negotiate with NAATS over a host of issues including, for example, the AA that is the subject of this memorandum – negotiations that could result in the AA being scrapped entirely.

In the meantime, as you know, NAATS is challenging the FAA's decision to award LM the Flight Service contract, a challenge that should be resolved, one way or another, by this summer. While the outcome could possibly put a wrench in LM's (and the FAA's) gears, all parties have no choice at this time but to continue the on-going transition toward LM's takeover of responsibility for Flight Service in October. Hence, you should proceed with the employment application process or any other plans you have initiated.

If you have any questions about this, or any other topic, please address them to your respective Directors or to NAATS headquarters, not to me.