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710/CHI

Michael H Holland  
Election Officer

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January 3, 1991

**VIA UPS OVERNIGHT**

Robert McGinnis  
6319 South Lavergne  
Chicago, Illinois 60638

Patrick N. Clement  
4688 South 112th Street  
Greenfield, Wisconsin 53228

William D. Joyce  
Secretary-Treasurer  
IBT Local Union 710  
4217 South Halsted  
Chicago, Illinois 60609

Re: Election Office Case No. P-02-LU710-CHI  
P-023-LU710-CHI

Gentlemen:

The above pre-election protests were filed pursuant to the Rules for the IBT International Union Delegate and Officer Election, revised August 1, 1990 ("Rules"). Both protests concern the right of the protestors to engage in campaign activities with respect to the 1991 IBT International Union Convention delegate and International Union Officer election on the property of Yellow Freight Systems, Inc. at its Chicago Ridge, Illinois terminal.

Neither Mr. McGinnis or Mr. Clement are employees of Yellow Freight. Both however are members of IBT Local Union 710 which represents employees of Yellow Freight. It is undisputed that both were attempting to engage in campaign activities related to the International Union Delegate and Officer Elections and were told by Yellow Freight's supervisory and/or security personnel that they could not engage in such activities on company property. Police officers were called to the scene who similarly instructed Messrs. McGinnis and Clement that they had to remain on public property when conducting their campaign activities.

Yellow Freight prohibits all distribution and solicitation by persons not employed by it on its property. Yellow Freight rules states as follows:

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"There shall be no distribution of literature or solicitation by non-employees in working or non-working areas during working or non-working times. In other words, non-employees are not allowed on company property for the purpose of distributing literature or soliciting."

It is the Election Officer's position that such broad, non-solicitation, non-distribution rules is inappropriate. Such rule does not comport with substantive Federal law dealing with non-employee access to employer premises. Therefore, the rule is violative of Article VIII, §10(d) of the Rules prohibiting the placement of restrictions upon IBT members pre-existing rights to solicit support, distribute leaflets or literature, and engage in similar activities on employer premises.

Union members have a right protected by the National Labor Relations Act to engage in communications, solicitations and the like with respect to intra-Union affairs including intra-Union elections. District Lodge 91, International Association of Machinist v. NLRB, 814 F. 2nd 876 (2nd Cir. 1987); NLRB v. Methodist Hospital of Gary, Inc., 732 F. 2nd 43 (7th Cir. 1984); ABF Freight System v. NLRB, 673 F. 2nd 229 (8th Cir. 1982).

Right to engage in such communications includes right to access of non-employees. Where denial of all access to the property of an employer would prevent effective communications with such employer's employees by non-employees, the employer's private property rights must accommodate the right to engage in such communication type activities. Jean Country, 291 NLRB No. 4 (1988). Since the substantive Federal right to engage in communication and solicitation includes the rights to engage in such communication and solicitations with respect to trade union election activities, the Employer's rights to private property must accommodate the right to engage in such campaign activities.

Property that is purely public cannot be controlled by the employer, who cannot interfere with protected activity including campaigning activities on such property. Lechmere v. NLRB, 914 F. 2nd 313 (1st. Cir. 1990). An employer's private property rights with respect to property which is technically private, but open to the public, such as shopping malls, access roads, and parking lots is normally insufficient to overrule the right of access by non-employees. Similarly, where the employer has traditionally permitted non-employees to engage in solicitation other than Union solicitation on its property, the employer by practice has

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demonstrated that its private property interest is insufficient to override access rights for Union, intra-Union election purposes. Even where the employer has restricted its property to access by its employees only, such rights cannot outweigh the right of non-employees to have access to the property if no effective alternate means of communications exist. Lechmere v. NLRB, supra.; Jean Country, supra.; Trident Seafoods Corp. 293 NLRB 125 (1989). The alternate means must be reasonable, not overly costly or time-consuming and must generally permit face-to-face communications. National Maritime Union v. NLRB, 867 Fed. 2nd, 767 2nd Cir. (1989).

Thus, in the instant case, Yellow Freights' property interest must yield to a limited right of access by IBT members, not employed by Yellow Freight, if denying such access would prevent effective communications between IBT members not employed by Yellow Freight and those so employed.

The Election Officer's investigation determines that the Chicago Ridge, Illinois facility is located on the corner of Harlem Avenue and 103rd Street, Chicago Ridge, Illinois. Both streets are main and busy thoroughfares. The facility contains three (3) parking areas. Drivers park in a parking lot located on 103rd Street, but across that street from the main terminal facilities. There is a parking lot for visitors and dockmen located adjacent to Harlem Avenue. Office staff parking is located adjacent to 103rd Street.

Persons who park in the driver parking lots utilize an entrance or gate located along side the staff parking area for entry into the staff parking area and subsequent entry, see below, to the terminal facilities. Unfortunately, there is no public sidewalk located on 103rd Street at that entrance nor is there a public sidewalk on the other side of 103rd Street adjacent to the drivers' parking lot.

The visitor and dockmen parking area, as well as the office staff parking area, are enclosed by a chain-link fence. This fence has a gate which provides access to an open area located between such parking lots and the terminal building itself. That gate is also the gate utilized by all persons who park in the driver parking lot for entry to the terminal facilities.

The only public areas for campaign purposes constitute a public sidewalk located along Harlem Avenue. Campaigning in such location would give access, however, to only cars entering the visitor and dockmen parking area. There is no public sidewalk located along 103rd Street which provides access to the pedestrian

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entrance for persons using the driver parking lot or the car entry for persons utilizing the staff parking area.

Campaigning along the public sidewalk would limit access only to those cars entering the visitor and dockmen parking lot. There would be no access to the Yellow Freight drivers or members of the office staff. Drivers constitute the largest group of IBT members employed by Yellow Freight.

There is an open area between the two parking lots bounded by Harlem Avenue and 103rd Street, i.e., the visitor and dockmen and office staff lots, and the actual terminal building itself. The gate from the office staff parking lot, utilized by employees to gain access to the terminal building exits into this open area. Yellow Freight has permitted some solicitation in this area during the Christmas season by United Way.

The Chicago Ridge, Illinois Yellow Freight facility prevents meaningful access to non-employees without access to Yellow Freight's property. Appropriate access, limiting intrusion on Yellow Freight's private property rights to the greatest extent possible, requires that non-employees be given access to the driver's parking lot located across the street from the terminal facilities on 103rd Street. Campaigning in such parking lot would provide access to the IBT drivers employed by Yellow Freight; the dockmen could be accessed by campaigning on the public sidewalk located along Harlem Avenue and adjacent to the driveway which leads into the dockmen's parking area from Harlem Avenue. Alternately, access could be provided by permitting campaigning in the open area located between the parking lots and the actual terminal building. The Election Officer views the second form of access to be somewhat more intrusive on Yellow Freight's private property rights than merely permitting access to the driver parking lot.

The Election Officer has determined that meaningful access to IBT members at Yellow Freight cannot be provided without some limited intrusion upon Yellow Freight's private property rights. Such access is required by pre-existing subject Federal law and it is, therefore, a right granted to all IBT members under Article VIII, §10(d) of the Rules. Yellow Freight, by interfering with access rights of IBT members, thus violated the election Rules. Therefore, the Election Officer directs that Yellow Freight shall permit IBT members, including those not employed by it, to have access to the driver parking lot. Alternately, Yellow Freight, as its option, may grant access, in lieu of access to the parking lot, to the open area outside its terminal building. Yellow Freight

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shall notify the Election Officer within five (5) days of this decision as to whether it will grant access to the driver parking lot or to the open area outside the terminal building. To afford all Local 710 members knowledge of the limited right of access each has for campaigning purposes to the Chicago Ridge, Illinois Yellow Freight facility, the Election Officer will prepare a notice indicating the type of access permitted, which notice shall be sent to Local 710 for posting by it on all Local Union bulletin boards.

The above protest also alleges that IBT members, other than the protestors and other than employees of Yellow Freight, have been discriminatory granted access while Yellow Freight has denied protestors such access. The Election Officer's investigation has not uncovered sufficient evidence to substantiate this allegation. Therefore, this portion of the protest is DENIED.

If any person is not satisfied with this determination, he may request a hearing before the Administrator within twenty-four (24) hours of his receipt of this letter. Such request shall be made in writing and shall be served on Administrator Frederick B. Lacey at LeBoeuf, Lamb, Leiby & MacRae, One Gateway Center, Newark, N.J. 07102-5311, Facsimile (201) 622-6693. Copies of the request for hearing must be served on the parties listed above as well as upon the Election Officer, IBT, 25 Louisiana Avenue, N.W., Washington, D.C. 20001, Facsimile (202) 624-8792. A copy of the protest must accompany the request for a hearing. The parties are reminded that absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Officer in any such appeal.

Very truly yours,



Michael H. Holland

MHH/BJH/sst

cc: Mr. Frederick B. Lacey

Julie Hamos  
Yellow Freight Systems, Inc.  
Chicago Ridge, Illinois

Daniel Hornbeck, Esq.  
Yellow Freight Systems, Inc.  
P.O. Box 7563  
10990 Roe Avenue  
Overland Park, Kansas 66207

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IN RE:

ROBERT MCGINNIS and PATRICK CLEMENT,

Complainants,

and

IBT LOCAL UNION 710, YELLOW FREIGHT SYSTEMS, INC.,

Respondents.

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MIKE HEWER,

Complainant,

and

IBT LOCAL UNION 299, YELLOW FREIGHTS SYSTEMS, INC.,

Respondents.

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DECISION OF THE INDEPENDENT ADMINISTRATOR

This matter is before me on two separate appeals. The first appeal is from a decision of the Election Officer in Case Nos. P-021-LU710-CHI and P-023-LU710-CHI. The second appeal is from another decision of the Election Officer in Case No. P-165-LU299-MGN. These appeals were consolidated for purposes of the hearing conducted before me. Given the important issues raised in this appeal, I requested post-hearing submissions. Appearing in person or by teleconference were the following persons: Michael H.

Holland, John Sullivan and Barbara Hillman, on behalf of the Election Officer; Julie Hamos and James DeHaan, Regional Coordinators; Larry Hall and Patrick Kocian, attorney's for Yellow Freight Systems, Inc.; complainants Robert McGinnis and Patrick Clement, and Paul Levy, their attorney; Michael Hower and Susan Jennik, his attorney; Complainant Edward Vecchio, Secretary-Treasurer of IBT Local Union 299; Frank Genty and Robert Jones, employees of Yellow Freight.

These appeals involve the employer Yellow Freight Systems, Inc. ("Yellow Freight"). The protest filed by Robert McGinnis and Patrick Clement concerns an incident which occurred at the Yellow Freight terminal located in Chicago Ridge, Illinois. The protest filed by Mike Hower concerns an incident which occurred at the Yellow Freight facility located at 7701 West Jefferson, Detroit, Michigan.

Each protest centers around an alleged Yellow Freight violation of the rights of non-employee IBT members to engage in campaign activities on Yellow Freight's property. Specifically, the complainants have alleged that Yellow Freight, acting alone or at the request of the respective Local Union, violated Article VIII, § 10 of the Rules for the IBT International Union Delegate and Officer Election, revised August 1, 1990 ("Election Rules"), by refusing to allow them limited access to Yellow Freight's property for the sole purpose of campaigning among their fellow union members.



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Yellow Freight's policy prohibits any non-employee from engaging in any campaign activities on company property. Its written rule, applicable to all of its facilities, including Chicago Ridge and Detroit, provides:

There shall be no distribution of literature or solicitation by non-employees in working or non-working areas during working or non-working times. In other words, non-employees are not allowed on company property for the purpose of distributing literature or soliciting.

The Election Officer determined that Yellow Freight's "no solicitation" policy, as enforced at its Chicago Ridge terminal, violated the Election Rules and the March 14, 1989, Consent Order by denying complainants McGinnis and Clement limited access to Yellow Freight's property for campaign purposes. The Election Officer found that the complainants did not have a reasonable alternative means off of the company property for communicating with IBT members employed at this facility. In contrast, the Election Officer held that at the Detroit facility Yellow Freight had not violated the Election Rules or the Consent Order when it prohibited the complainant, Hower, from engaging in campaign activity on its property because he had a reasonable alternative means of communicating with his fellow IBT members off the company's property.

Yellow Freight has appealed the Election Officer's decision in both cases. Yellow Freight argues that the Election Officer and the Independent Administrator lack jurisdiction over it because, as an employer, it was not a party to the underlying civil RICO litigation or the Consent Order. In addition, Yellow Freight

raises a preemption argument, contending that the National Labor Relations Board ("NLRB") has exclusive jurisdiction over the claims alleged in these protests. It also challenges the merits of the Election Officer's determination as to the Chicago Ridge complainants.

I will address Yellow Freight's jurisdictional challenges first, before turning to a discussion of the Election Officer's application of the Election Rules to Yellow Freight.

### I. Jurisdiction

Yellow Freight's jurisdictional challenges, if successful, would strike at the heart of the effective enforcement of the Election Rules. If the Court-appointed officers do not have the power to prevent employers from frustrating an IBT member's exercise of the right to campaign for delegate or officer candidates, the Election Rules will have little meaning.

In approving and implementing the Consent Order and the Election Rules, United States District Court Judge David N. Edelstein established a comprehensive remedy designed to rid the IBT of the "hideous influence of organized crime." United States v. International Brotherhood of Teamsters, 728 F.Supp 1032, 1036 (S.D.N.Y. 1990). The key to the success of this endeavor lies with the "proposed framework for the first fully democratic, secret ballot elections in the history of [the] union." United States v. International Brotherhood of Teamsters, 88 Civ. 4486 (DNE), slip op. at 2 (S.D.N.Y. July 10, 1990). Judge Edelstein has

characterized an "honest, fair, and free" election process as the "linchpin" of the efforts to cleanse the union of corrupt influences. Id. at 3. According to the Court, "[n]o question is more central to the ultimate success of this Consent Decree." Id. at 2.

These lofty goals could not be achieved if third parties were free to effectively disenfranchise the IBT membership. Thus, the Election Officer properly determined, in the exercise of the very expertise concerning intraunion affairs that led to his court appointment, that the right to bring campaign messages to employees at their workplaces is fundamental to the ability of any candidates to successfully campaign for union office, particularly candidates who seek to unseat long-term incumbents who enjoy the advantages that go with incumbency. Indeed, this right is especially important where, as here, we are dealing with a union where, at certain levels, as Judge Edelstein has stated, there exists the "hideous influence of organized crime." It also must be recognized that some employers may have developed comfortable relationships with Local incumbent union leadership that they might wish to preserve in office; and, to the extent this condition exists, there may be an inclination to hinder or impair the candidacy of those who offer the prospect of being more aggressive or combative in representing the employees.

Yellow Freight, and other similarly situated employers, have the power, if not restrained, to subvert the electoral process and thereby eviscerate the most critical provisions of the Consent

Order by preventing IBT members from exercising their right to campaign for delegate or officer candidates. The Consent Order provides for the first secret ballot, one-person-one vote rank and file election ever conducted in the IBT. However, unless IBT members obtain true access to their fellow members for purposes of campaigning, the election process contemplated in the Consent Order will not be achieved. Since incumbent union officers have far greater name recognition than members of the rank and file, and often will have virtually unlimited access to IBT members at the members' job sites because of their status as union representatives, candidates who are not in office must often have access to work sites for campaign purposes if the playing field of the election process is not to be tilted toward the incumbent.

The Election Rules promulgated by the Election Officer and approved by order of Judge Edelstein recognize the necessity of equal access to work sites for campaigning IBT members and provide for jurisdiction over employers in order to enforce this rule. Article VIII, § 10(d) of the Election Rules states that "no restrictions shall be placed upon candidates' or members' pre-existing rights to solicit support, distribute leaflets or literature . . . or engage in similar activities on employer or Union premises." In addition, in Article XI, § 2, the Election Rules provide that the Election Officer may take "whatever remedial action is appropriate" including "requiring or limiting access" to such premises. Enforcement of these rules requires jurisdiction over employers such as Yellow Freight.

The Election Rules, as so ordered by Judge Edelstein, refer to a member's "pre-existing rights to solicit support . . . on employer . . . premises." It is thus appropriate to examine the meaning of "pre-existing rights." In general, the "pre-existing rights" to engage in campaign activity include any past practice or agreement among employers and the IBT, or its members, which allows for such campaign activity and any substantive rights of union members to engage in such conduct as established by applicable law.

The specific issue in the present protests is whether the complainants, non-employee IBT members, have any "pre-existing right" to engage in campaign activity on Yellow Freight's property. In his investigation, the Election Officer did not find any past practice or agreement authorizing access by non-employee IBT members to the Yellow Freight facilities in either Chicago Ridge or Detroit. In fact, Yellow Freight has a strict "no solicitation" policy prohibiting all non-employees from engaging in campaign activities on any company property.

Non-employee IBT members, however, do have a limited right to engage in campaign activity on an employer's premises as guaranteed by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), and decisions by the National Labor Relations Board ("NLRB") and federal courts interpreting this Act. Union members have the right, protected by the NLRA, to engage in communications, solicitations and the like with respect to intra-union affairs, including intra-union elections. District Lodge 91 International Association of Machinists v. NLRB, 814 F.2d 876 (2d Cir. 1987);

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NLRB v. Methodist Hospital of Gary, Inc., 733 F.2d 43 (7th Cir. 1984); ABF Freight System, Inc. v. NLRB, 673 F.2d 228 (8th Cir. 1982). Moreover, as the United States Supreme Court recognized in NLRB v. Magnavox Co., 415 U.S. 322 (1974), the right of employees to engage in activity critical of an incumbent union may be as important as the right of non-employee union members to organize the employees of a non-union employer. When the exercise of such rights conflicts with the property interests of employers, the NLRB has held and the federal courts have affirmed that the right of access by non-employees to an employer's premises depends upon the balancing of the strength of the union member's right to engage in the conduct in question, the strength of the employer's property right and the availability of a reasonable alternative means of communication. Jean Country, 291 NLRB No. 4 (1988); Lechmere v. NLRB, 914 F.2d 313 (1st Cir. 1990); Laborers Local Union 204 v. NLRB, 904 F.2d 715 (D.C. Cir. 1990).

Therefore, I find that non-employee IBT members do have a right, in accordance with "pre-existing law," to engage in campaign activities on an employer's premises subject to the foregoing balancing test. I will discuss this balancing test in greater detail later, when applying it to the present protests.

Judge Edelstein, pursuant to his authority under the Consent Order and the broad powers Congress gave the district courts to fashion remedial measures under the civil RICO statute, 18 U.S.C. § 1964(a), has approved the Election Rules (as amended), which include the pre-existing right of a non-employee union member to

engage in campaign activities on an employer's premises subject to the foregoing balancing test. I find that in order to effectuate the Election Rules "so ordered" by Judge Edelstein and to fulfill the purpose and goals of the Consent Order, the Election Officer and the Independent Administrator have the authority to enforce, in accordance with "pre-existing" law, a member's right to engage in campaign activity on employer premises.

Parenthetically, I note that this is not the first time that the United States District Court and its Court-appointed officers have found it necessary to assert jurisdiction over non-parties to the Consent Order. In his "All Writs Decision," Judge Edelstein recognized that interference by third parties could completely undermine the Consent Order and employed the All Writs Act, 28 U.S.C. § 1651, to assert jurisdiction over unrelated persons and entities. United States v. International Brotherhood of Teamsters, 728 F.Supp 1032 (S.D.N.Y. 1990), aff'd 907 F.2d 277 (2d Cir. 1990). Moreover, other federal courts in various factual situations have also found it necessary to assert jurisdiction over non-parties in order to effectively implement a consent order. See e.g., United States v. Hall, 472 F.2d 261 (5th Cir. 1973) (a school desegregation case in which non-parties to the litigation threatened to disrupt the court's remedial order); Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988), cert denied, 109 S.Ct. 1527 (1989) (a discrimination in housing suit in which non-party landowners threatened to destroy a consent decree by filing suit in state court).

The implementation of the Consent Order, and its mandate for fair, honest and open elections, is vulnerable to frustration or disruption by employers like Yellow Freight. If the Consent Order is to have meaning, the Court-appointed officers must have the power to exercise jurisdiction over Yellow Freight and I conclude that we do.<sup>1</sup>

## II. Preemption

Yellow Freight also argues that the claims which are presented here as violations of the provisions of the Election Rules are actually unfair labor practices covered by the NLRA, and, therefore, they fall under the exclusive jurisdiction of the NLRB. The issue presented here is whether the United States District Court, the Election Officer and the Independent Administrator have the authority to rule upon and enforce the Election Rules which have been approved by Judge Edelstein pursuant to the Consent Order and pursuant to the broad remedial powers the district courts have in civil RICO actions, see 18 U.S.C. § 1964(a), even though the prohibited activity may also be an unfair labor practice under the NLRA. The simple answer to this inquiry is "yes."

The United States Supreme Court has held that the NLRA preempts state law claims that regulate conduct that is arguably protected or prohibited by the unfair labor practice provisions of

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<sup>1</sup> During the hearing, I asked Yellow Freight's representative if it would entertain my suggestion that, on a voluntary basis, it would open its premises to the above-described campaign activity (as other employers have been doing). My suggestion was rejected.



the NLRA. San Diego Building Trades Council v. Garmen, 359 U.S. 236 (1959). Under this decision, such claims must be presented to the NLRB rather than to a court of law. However, preemption does not automatically apply when the NLRA runs counter to the provisions or remedies of another federal statute rather than a contrary state law. The United States Supreme Court has held on several occasions that federal claims may be litigated in federal court, notwithstanding the fact that the prohibited or permitted activity may also be an unfair labor practice under the NLRA. See e.g., Smith v. Evening News Association, 371 U.S. 195 (1962); International Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233 (1971); Breininger v. Sheet Metal Workers Local 6, 110 S.Ct. 424 (1989).

I find that the Congressional determination to provide for federal jurisdiction was no more specific in those cases in which a federal statute was held to override NLRB preemption, than it is here, where Congress has given the federal courts jurisdiction to enforce civil RICO claims. See 18 U.S.C. § 1964(a).

The comprehensive remedy embodied in the Consent Order and the Election Rules was approved by Judge Edelstein pursuant to the United States District Court's broad remedial powers in RICO actions. 18 U.S.C. § 1964(a). Even if the conduct complained of here amounted to an unfair labor practice under the NLRA, it is first and foremost a violation of the Election Rules, and is, therefore, subject to the Consent Order's enforcement provisions. By enforcing the Election Rules in this case, the Election Officer

and the Independent Administrator, as Court-appointed officers, are merely carrying out the United States District Court's power to enforce its own Consent Order.

Because the protection of a union member's right to engage in campaign activity at the work place is crucial to both the effective implementation of the Election Rules and to the enforcement of the Consent Order, I find that Congress' grant of federal jurisdiction for the enforcement of this civil RICO Consent Order overrides any concurrent NLRB jurisdiction. Therefore, I find that the Election Officer and the Independent Administrator have the authority to decide and enforce the Election Rules in this case.

### III. Findings of Fact and Conclusions of Law

Having considered the jurisdictional issues raised by Yellow Freight, I now turn to the underlying merits of these protests. As discussed earlier, the factual issue presented here concerning the scope of a Union member's right to engage in campaign activities on an employer's premises is not a novel one, but rather is a conflict that the courts have grappled with for decades in varying factual situations. On the one hand, the courts have upheld the legal right of union members to engage in communications and solicitations with respect to intra-union affairs, including intra-union elections. In fact, within the context of the election provisions of the Consent Order, as incorporated in the Election Rules, and as I have already noted, see p. 8, supra, the right of

IBT members to engage in campaign activities that may be critical of the incumbent union officers is as important, if not more important, than the right to organize an employer's employees. On the other hand, the courts have recognized that the exercise of such rights may impact upon the property interests of employers. In resolving this conflict, it is necessary to strike an equitable balance between the competing rights of the union members and the employer "with as little destruction of one as is consistent with the maintenance of the other." NLRB v. Babcock and Wilcox Co., 351 U.S. 105, 112 (1956).

In the present case, the Election Officer properly determined that the appropriate analysis for resolving the conflict between the complainants' right to campaign against incumbents and Yellow Freight's property interests is a balancing test in which the strength of the IBT member's right to engage in campaign activity, the strength of the employer's property right and the availability of a reasonable alternative means of communication are weighed against one another. See Jean Country, 291 NLRB No. 4 (1988). I agree that this balancing test is the proper analysis to apply to the present protests and any other similar conflicts that may arise between campaigning union members and employers.

With respect to the complainants, Patrick Clement and Robert McGinnis, both are announced candidates for delegates to the 1991 IBT International Convention. At the time in question, both candidates were engaging in campaign activity in an unfenced Yellow Freight parking lot reserved for visitors and loading dock

employees. There are two other Yellow Freight parking lots nearby that are enclosed by a security fence. The candidates were campaigning at a pedestrian gate on Yellow Freight property through which most Yellow Freight employees pass. The candidates were instructed by the Chicago Ridge police to leave this parking lot and go to an area on the public sidewalk approximately 50 feet from the driveway entrance to the parking lot and farther away from the pedestrian gate.

With respect to the complainant Michael Hower, at the time in question, the complainant was attempting to engage in campaign activity at the employee walk-through gate located on Yellow Freight property. The parking lot at the Detroit facility is surrounded by a security fence which forces Yellow Freight employees to enter and exit through the main gate. On either side of this gate is a sidewalk which is located on public property. Yellow Freight security personnel instructed the complainant to leave Yellow Freight's property and restrict his campaign activities to public property.

In applying the balancing test to the competing interests of the complainants' right of access to Yellow Freight's property for campaign purposes and Yellow Freight's property interest in its Chicago Ridge facility, the Election Officer found that Yellow Freight had violated the complainants' rights. I find that there

is ample evidence to sustain the Election Officer's decision with regards to Yellow Freight's Chicago Ridge facility.<sup>2</sup>

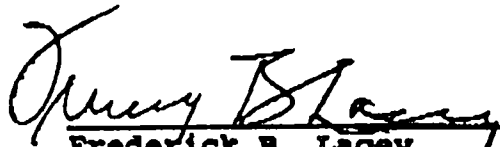
The ability of IBT members to engage in campaign communications with their fellow IBT members at the employer's premises is a strong interest that is vital to the effective implementation of the Election Rules and to the success of the Consent Order. Yellow Freight's property interests in its Chicago Ridge facility varied among its different parking lots. Two of its parking lots are enclosed by a security fence evidencing a strong property interest. The parking lot on which the complainants were conducting their campaign activities, however, was not fenced. Moreover, the complainants did not have a reasonable alternative means of communication off company property with IBT members at this facility. Therefore, in order to effectively communicate with IBT members employed at the Chicago Ridge facility, the complainants, non-employee IBT members, must be given a limited access to Yellow Freight's property for campaign purposes. In his remedy, the Election Officer gave Yellow Freight the option of permitting campaigning by non-employees at two different locations within the Chicago Ridge facility. I affirm this proposal.

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<sup>2</sup> Without determining what standard of evidence should be applied and where the burden of proof lies, I state here that, assuming the burden lies with the Election Officer (or protester) to establish the facts of the protest by a preponderance of the credible evidence, that burden has been sustained. As to the Detroit facility, the Election Officer properly determined that the protester had not established his claim.

In contrast, with regards to Yellow Freight's Detroit facility, the Election Officer determined that Yellow Freight's prohibition on solicitation by non-employees did not violate the complainant's rights under the Election Rules. I find that there is ample evidence to sustain the Election Officer's decision with regards to Yellow Freight's Detroit facility. While the complainant's interest in communicating with fellow IBT members is as strong here as at the Chicago Ridge facility, the complainant appears to have a reasonable alternative means of communicating with his fellow IBT members on the public sidewalk adjacent to the entrance to the fenced employee parking lot.

Accordingly, the decision of the Election Officer is affirmed in both cases.

  
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Frederick B. Lacey  
Independent Administrator

Dated: January 23, 1991.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

RECEIVED  
JUN 17 1991

UNITED STATES OF AMERICA,

Plaintiff,

-v-

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN AND HELPERS OF  
AMERICA, AFL-CIO, et al.,

Defendants.

MEMORANDUM & ORDER

88 CIV. 4486 (DNE)

M+H  
XBTJH  
JS

IN RE: PETITION FOR REVIEW OF  
DECISION 91-ELEC. APP.-43 OF  
THE INDEPENDENT ADMINISTRATOR

APPEARANCES:

OTTO G. OBERMAIER, United States Attorney for the  
Southern District of New York, (Edward T. Ferguson,  
III, Assistant United States Attorney, of counsel)  
for the Government;

FREDERICK B. LACEY, Independent Administrator of the  
International Brotherhood of Teamsters, (Stuart  
Alderoty, of counsel);

MICHAEL HOLLAND, Election Officer of the  
International Brotherhood of Teamsters, (Barbara  
Hillman, of counsel);

MATKOV, SALZMAN, MADOFF & GUNN, Chicago Illinois,  
(Larry G. Hall, Kirk D. Mesmer, of counsel) for  
Yellow Freight.

EDELSTEIN, District Judge:

This decision arises from the implementation of the rules for  
the IBT International Union Delegate and Officer Election  
promulgated by the Election Officer (the "election rules") and  
approved by this Court by Opinion & Order dated July 10, 1991, 742  
F. Supp. 94 (S.D.N.Y. 1990). These election rules provide a  
"framework for the first fully democratic, secret ballot election

in the history" of the IBT. Id. at 97.

Petitioner Yellow Freight Systems, Inc., ("Yellow Freight"), a trucking company that employs IBT members, appeals decision 91-Elec. App.-43 of the Independent Administrator, which consolidated and affirmed the Election Officer's decisions P-021-LU710-CHI, P-023-LU710-CHI, and P-165-LU299-MGN. Yellow Freight petitions this Court to issue injunctive and declaratory relief that would overturn the findings of the Independent Administrator and declare: (i) that the Court Officers had jurisdiction to enforce the election rules with respect to Yellow Freight; (ii) that the decisions of the Court Officers must be pre-empted by the National Labor Relations Board; and (iii) that the decision of the Independent Administrator was not supported by substantial evidence and should be overturned.

As previously ruled at the hearing held March 4, 1991, Yellow Freight's petition is denied in all respects. (Transcript, March 4, 1991 hearing, at 33-34). This memorandum supplements those earlier rulings made on this matter.

### I. Background and Procedural History

This dispute arose over the efforts of certain candidates running for office in IBT locals that sought access to Yellow Freight terminals in Chicago Ridge, Illinois, and 7701 West Jefferson Avenue, Detroit, Michigan. The incidents involved IBT candidates alleging that Yellow Freight had violated Article VIII, §10 of the election rules, by not permitting IBT candidates access



to Yellow Freight's property for the limited purpose of campaigning among the employees at each sight. Those candidates filed election protests to the Election Officer.

With respect to the Chicago Ridge terminal matter, election protests P-021-LU710-CHI, and P-023-LU710-CHI, the Election Officer determined that the complainants did not have any reasonable alternative means of communicating with the members at that facility off of company property. With respect to the Detroit, Michigan, protest, P-165-LU299-MGN, the Election Officer ruled that the complainant had an alternative reasonable means of communicating with the members off company property, and found that Yellow Freight did not violate the election rules or the Consent Decree.

Yellow Freight appealed both decisions to the Independent Administrator. In his decision 91-Elec. App.-43, the Independent Administrator (i) rejected Yellow Freight's argument that it was not bound by the determinations of the Election Officer or the Independent Administrator; (ii) rejected Yellow Freight's arguments that any determinations on the instant issues fall under the exclusive jurisdiction of the National Labor Relations Board; and (iii) concluded that the decisions of the Election Officer had sufficient basis in fact, and affirmed those decisions. This appeal followed.

## II. Discussion

In appealing the decision of the Independent Administrator,

Yellow Freight bears the burden of demonstrating that those findings were "arbitrary or capricious." Paragraph K.16 of the Consent Decree provides that this Court shall review actions of the Independent Administrator using the "same standard of review applicable to review of final federal agency action under the Administrative Procedures Act." Consent Decree at 25. This Court may only overturn the findings of the Independent Administrator when it finds that they are, on the basis of all the evidence, "arbitrary or capricious." This Court and the Court of Appeals have interpreted ¶K.16 to mean that decisions of the Independent Administrator "are entitled to great deference." 905 F.2d at 616 (2d Cir. 1990) aff'g March 13, 1990 Opinion and Order, 743 F. Supp. 155 (S.D.N.Y 1990).

Yellow Freight essentially repeats before this Court the same three arguments that were unsuccessful before the Independent Administrator. First, they argue that they cannot be "bound" by the election rules. Second, they argue that the hearings before the Election Officer and Independent Administrator is pre-empted by the National Labor Relations Act. Third, Yellow Freight argues that the substantive decision of the Independent Administrator regarding the Chicago Heights facility was arbitrary and capricious. All of these arguments are without merit.

Yellow Freight first argues that they cannot be affected by the election mechanism set up under the Consent Decree by the Supreme Court decision in Martin v. Wilks, \_\_\_ U.S. \_\_\_, 109 S.Ct. 2180, 2184 (1989), since by that decision non-parties to a Consent

Decree cannot be bound by its terms.

Yellow Freight's particular contention before this Court is that as an employer not in any way affiliated with the IBT, it cannot be bound by the Consent Decree. Yellow Freight's argument concerning the Martin case fundamentally mischaracterizes that decision, which is not applicable to this case. Martin v. Wilks concerns allowing those affected by a consent decree designed to remedy discriminatory hiring practices but who were not parties to the original suit to challenge actions made pursuant to that decree. The Second Circuit has specifically declined to apply Martin v. Wilks in the context of this ongoing case. United States v. International Brotherhood of Teamsters, 905 F.2d 610, 622 (2d Cir. 1990). In this circuit and others, courts have "decline[d] to extend Wilks beyond its facts." United States et al., v. Yonkers Board of Education, et al., 902 F.2d 213, 218 (2d Cir. 1990); see West Texas Transmission L.P. v. Enron Corp. 907 F.2d 1554, 1568 (5th Cir. 1990); E.E.O.C. v. Pan American World Airways, 897 F.2d 1499, 1506 (9th Cir. 1990).

Even assuming that Martin v. Wilks is applicable, Yellow Freight's argument also mistakes the fundamental posture that they now occupy. By being "bound" by the Consent Decree, Yellow Freight must seek redress for their claims before the Court Officers that the actions of the IBT candidates violated their rights to keep a secure freightyard. Yellow Freight was given a full and complete opportunity to argue their claims before the Election Officer, the Independent Administrator, and this Court, in addition to any right

of appeal they may have. By the application of this Consent Decree, Yellow Freight has not been denied any opportunity to litigate their claims. On the contrary, their claims are now being heard for the third time.

This Court has previously found jurisdiction over non-parties to the Consent Decree by the injunction entered under the All Writs Act, 28 U.S.C. §1651, 728 F. Supp. 1032 (S.D.N.Y. 1990), aff'd 907 F.2d 277 (2d Cir. 1990). In issuing that injunction, this Court ruled that all subordinate entities of the IBT must litigate their Consent Decree related claims in this Court as necessary "in aid of [this Court's] jurisdiction." Id. It is similarly necessary to apply that decision in this context, since employers such as Yellow Freight could frustrate the electoral provisions of the Consent Decree.

Why this is so is because the crux of this Consent Decree is for free, open and fair secret ballot elections. In order for those elections to be meaningful, the IBT rank and file must be given a fair choice of candidates. But the reality of such an election is that incumbents may often hold distinct advantages in name recognition, and access to members of a local. Employers may have developed comfortable relationships with incumbent IBT officers, and may not be anxious for new, and perhaps more assertive union representatives. As a result, jurisdiction over employers such as Yellow Freight may be necessary "in aid of this Court's jurisdiction."

As an additional matter, the grounds relied on by the

Independent Administrator were sufficient to find that Yellow Freight was subject to the jurisdiction of the Court Officers. First, the Independent Administrator reasoned that employers such as Yellow Freight "have the power, if not restrained, to subvert the electoral process..." were they to bar IBT members from exercising their right to campaign on employers' premises. Decision of the Independent Administrator at 4-7. Second, the Independent Administrator found that non-employee IBT members have a limited "pre-existing right" of access to non-employer premises as guaranteed by the National Labor Relations Act, ("NLRA") 29 U.S.C. §158(a)(1), and its subsequent interpretations. See, e.g., Lechmere v. National Labor Relations Board, 914 F.2d 313 (1st Cir. 1990). The Independent Administrator properly applied the balancing test weighing the availability of alternative means of reaching the membership with the employer's property rights. Id. at 320.

Accordingly, Yellow Freight's arguments that they are not subject to the jurisdiction of the Court Officers is without merit and must be rejected.

Second, Yellow Freight contends that the Court Officers are pre-empted from adjudicating these claims because the subject matter in question--whether IBT candidates should be given a limited right of access to Yellow Freight's property for the purpose of campaigning--is solely under the jurisdiction of the National Labor Relations Board, ("NLRB"). Yellow Freight is in essence arguing that the Court Officers adjudicated a charge that

Yellow Freight has violated the candidates Section 7 rights, 29 U.S.C. §157, guaranteed under Section 8, 29 U.S.C. §158(a)(1) of the NLRA, the exclusive jurisdiction over which is granted to the NLRB.

At the outset, Yellow Freight's preemption argument is without merit given this Court's All Writs Act decision of January 17, 1990, SUPRA, where this Court issued an injunction requiring that all Consent Decree related litigation must take place before this Court. Any NLRB proceeding would be enjoined under that order.

Next, as the Independent Administrator correctly noted, the Supreme Court has held that certain federal claims that might otherwise be unfair labor practices under the NLRA, may nonetheless be litigated in federal court under the Labor-Management Reporting and Disclosure Act ("LMRDA"). See, e.g., Breininger v. Sheet Metal Workers International Association Local Union 6, \_\_\_ U.S. \_\_\_, 110 S.Ct. 424, 429-31 (1989); Smith v. Evening News Association, 371 U.S. 195 (1962). The Consent Decree was entered pursuant to the Civil RICO statute, 18 U.S.C. §1964, and is the underlying legal basis for the election rules. RICO provides a sufficient basis to litigate Yellow Freight's claims before this Court, and not the NLRB.

Third, Yellow Freight challenges whether the facts supporting the Independent Administrator's decisions affirming the Election Officer are sufficient to support his findings. The record indicates that the Independent Administrator's decisions were neither arbitrary nor capricious.

In reaching his decision, the Independent Administrator applied the balancing test to determine the IBT candidates' pre-existing rights to campaign on employers' property. Lechmere v. National Labor Relations Board, SUPRA. The Independent Administrator reviewed the strength of the IBT members' right to engage in campaign activity, the strength of Yellow Freight's property right, and the availability of a reasonable alternative means of communicating with the IBT members employed at each site.

With respect to the Chicago Ridge, facility, the Independent Administrator found that (i) both IBT members were candidates for delegate, (ii) they were campaigning in a Yellow Freight-owned, unfenced parking lot, (iii) they had no alternative means to effectively communicate with the IBT members employed at that facility, and concluded (iv) that they must be given a limited right of access to Yellow Freight's property. With respect to the Detroit facility, the Independent Administrator found that the IBT candidate had a reasonable alternative means of communicating with IBT members employed at that site, and allowed no right of access to Yellow Freight's facility.

The Independent Administrator properly applied this balancing test in both instances, and his conclusions were neither arbitrary nor capricious. Accordingly, the substantive determinations of the Independent Administrator should be affirmed in all respects.

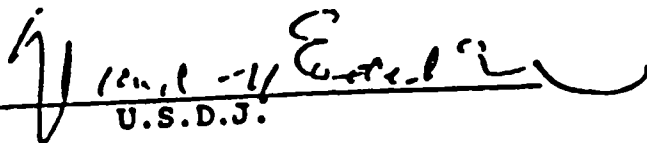
### III. Conclusion

For the reasons stated above, the determinations of the

Independent Administrator are affirmed in all respects. Yellow Freight's application for injunctive and declaratory relief is denied without separate analysis, since this memorandum has already considered and rejected the merits of that application.

So Ordered.

Dated: April 3, 1991  
New York, New York

  
U.S.D.J.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

Plaintiff, :

-v- :

ORDER

INTERNATIONAL BROTHERHOOD OF :

TEAMSTERS, CHAUFFEURS, :

WAREHOUSEMEN AND HELPERS OF :

AMERICA, AFL-CIO, et al., :

Defendants. :

-----X

IN RE: 91-ELEC. APP.-43 OF THE

INDEPENDENT ADMINISTRATOR

("Yellow Freight")

-----X

EDELSTEIN, District Judge:

In United States v. IBT, No. 91-6069, slip opinion, (Oct. 29, 1991 2d Cir.), the Second Circuit concluded that this Court: (1) was entitled to exercise jurisdiction over Yellow Freight pursuant to the All Writs Act, 28 U.S.C. §1651; and (2) was not pre-empted from that jurisdiction by the authority of the National Labor Relations Board (the "NLRB") to determine issues concerning unfair labor practices under the National Labor Relations Act (the "NLRA"). Further, given these conclusions, the Second Circuit refused to direct this Court to enjoin the Election Officer and the Independent Administrator from asserting jurisdiction or authority over Yellow Freight.

However, the Second Circuit also concluded that this Court, the Independent Administrator, and the Election Officer did not adequately consider the availability of alternate means by which the barred IBT campaigners might communicate with IBT employees of

Yellow Freight. Accordingly, the Second Circuit vacated and remanded for the limited purpose of assuring that alternate means are adequately considered as outlined in the Second Circuit's decision. Id. at 26.

The Second Circuit's decision explicitly stated that "the consideration of this issue on remand may take into account all pertinent matters, including time constraints imposed by the impending election schedule and cost factors." Id. at 25. Further, the Second Circuit stated that "we do not seek to pose undue difficulties for the district court and the court-appointed officers in dealing practically and flexibly with the significant burden of overseeing the ongoing IBT election." Id.

Accordingly, it is hereby ordered that the Government, the Independent Administrator, the Election Officer, and Yellow Freight are to implement the order of the Second Circuit with all due dispatch.

SO ORDERED.

Dated: October 29, 1991  
New York, New York



U.S.D.J.

UNITED STATES of America,  
Plaintiff-Appellee.

v

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, the Commission of La Cosa Nostra, Anthony Salerno, also known as Fat Tony, Matthew Ianniello, also known as Matty the Horse, Nunzio Provenzano, also known as Nunzi Pro, Anthony Corallo, also known as Tony Ducks, Salvatore Santoro, also known as Tom Mix, Christopher Furnari, Sr, also known as Christie Tick, Frank Manzo, Carmine Persico, also known as Junior, also known as The Snake, Gennaro Langelia, also known as Gerry Lang, Philip Rastelli, also known as Rusty, Nicholas Marangello, also known as Nicky Glasses, Joseph Massino, also known as Joey Messina, Anthony Ficarotta, also known as Figgy, Eugene Boffa, Sr, Francis Sheeran, Milton Rockman, also known as Maishe, John Tronolone, also known as Peanuts, Joseph John Aiuppa, also known as Joey O'Brien, also known as Joe Doves, also known as Joey Aiuppa, John Phillip Cerone, also known as Jackie the Lackie, also known as Jackie Cerone, Joseph Lombardo, also known as Joey the Clown, Angelo LaPietra, also known as The Nutcracker, Frank Ballistreri, also known as Mr B, Carl Angelo DeLuna, also known as Toughy, Carl Civella, also known as Corky, Anthony Thomas Civella, also known as Tony Ripe, General Executive Board, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Jackie Presser, General President, Weldon Mathis, General Secretary-Treasurer, Joseph Trerotola, also known as Joe T, First Vice President, Robert Holmes, Sr, Second Vice President, William J McCarthy, Third Vice President, Joseph W Morgan, Fourth Vice President, Edward M. Lawson, Fifth Vice President, Arnold Weinmeister, Sixth Vice President, John H.

Cleveland, Seventh Vice President, Maurice R. Schurr, Eighth Vice President, Donald Petera, Ninth Vice President, Walter J Shea, Tenth Vice President, Harold Friedman, Eleventh Vice President, Jack D Cox, Twelfth Vice President, Don L. West, Thirteenth Vice President, Michael J Riley, Fourteenth Vice President, Theodore Cozza, Fifteenth Vice President, Daniel Ligrotis, Sixteenth Vice President, and Salvatore Provenzano, also known as Sammy Pro, Former Vice President, Defendants,

Yellow Freight Systems, Inc., Appellant.

No. 1839, Docket 91-6096

United States Court of Appeals,  
Second Circuit.

Argued July 22, 1991

Decided Oct. 29, 1991

Employer sought relief from decision of independent administrator, appointed pursuant to consent decree entered in Government's action to rid union of organized crime influence, granting nonemployee union members access to employer's premises to campaign for union office. The United States District Court for the Southern District of New York, David N. Edelstein, J., affirmed independent administrator's decision, and employer appealed. The Court of Appeals, Mahoney, Circuit Judge, held that: (1) District Court could enforce consent decree against employer pursuant to All Writs Act, (2) dispute was not within exclusive jurisdiction of National Labor Relations Board (NLRB), and (3) inadequate consideration was given to availability of alternative means by which candidates could communicate with union employees.

Vacated and remanded.

Winter, Circuit Judge, filed dissenting opinion

1 Federal Civil Procedure ¶2397 6

District court had authority, pursuant to All Writs Act, to enforce consent decree,

Cite as 948 F.2d 98 (2nd Cir. 1991)

in Government's action to rid union organized crime influence, against non-employer, and to require that nonemployee candidates be granted limited access to employer premises to campaign for union office, in absence of any feasible alternative for campaigning 18 U.S.C.A. § 161-1968, 28 U.S.C.A. § 1651(a)

Labor Relations ¶510

National Labor Relations Board (NLRB) did not have exclusive jurisdiction over claims of nonemployee candidates for union office that their exclusion from employer's premises violated union election rules promulgated pursuant to consent decree entered in Government's litigation to rid union of organized crime influence, in this matter could be resolved by district court, on appeal from independent administrator, as provided in consent decree, particularly considering injunction prohibiting members and affiliates of union from instituting any legal proceeding relating to consent decree in any court or forum in any jurisdiction other than district court. National Labor Relations Act, §§ 7, 8(a)(1), as amended, 29 U.S.C.A. §§ 157, 158(a)(1)

Labor Relations ¶123

Inadequate consideration was given to availability of alternative means of communicating with employees away from job site before district court upheld decision of independent administrator, appointed pursuant to consent decree entered in Government's action to rid union of organized crime influence, granting nonemployee candidates access to employer's premises to campaign for union office, where specific attention was accorded only to alternatives immediately adjacent to premises. National Labor Relations Act, §§ 7, 8(a)(1), as amended, 29 U.S.C.A. §§ 157, 158(a)(1)

Jay G Swardenski, Chicago, Ill (Larry G Hall, Kirk D Messmer, Patrick W Kolan, Matkov, Salzman, Madoff & Gunn, Chicago, Ill, of counsel), for appellant.

James L. Cott, Asst. U.S. Atty, New York, New York City (Otto G Obermaier, U.S. Atty, S.D.N.Y., Edward T Fergus

son, III, Asst. U.S. Atty, S.D.N.Y., New York City, of counsel), for plaintiff appellee

Paul Alan Levy, Alan B Morrison, Public Citizen Litigation Group, Washington, D.C., for protestors Patrick N Clement and Robert McGinnis

Barbara J Hillman, Gilbert A Cornfield, Cornfield and Feldman, Chicago, Ill, for Election Officer Michael H Holland

Before WINTER, ALTIMARI, and MAHONEY, Circuit Judges

MAHONEY, Circuit Judge

Appellant Yellow Freight Systems, Inc ("Yellow Freight") appeals from an order of the United States District Court for the Southern District of New York, David N Edelstein, *Judge*, entered April 3, 1991. That order affirmed a determination of officers appointed pursuant to a certain consent decree (the "Consent Decree") relating to the affairs of defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the "IBT") that granted nonemployee members of the IBT access to premises of Yellow Freight to campaign for union office, and denied Yellow Freight's application for declaratory and injunctive relief from that determination. Yellow Freight seeks to enforce a "no solicitation" rule by barring nonemployee union members from campaigning for union office on its property. The district court upheld the appointed officers' determination denying effect to Yellow Freight's rule.

We conclude that the district court was entitled to exercise jurisdiction over Yellow Freight pursuant to the All Writs Act, 28 U.S.C. § 1651 (1988), and was not preempted from that jurisdiction by the authority of the National Labor Relations Board (the "NLRB") to determine issues concerning unfair labor practices under the National Labor Relations Act (the "NLRA"), 29 U.S.C. §§ 151-169 (1988). We also conclude, however, that the district court and its appointed officers did not adequately consider the availability of alternate means by which the barred IBT campaigners

might communicate with employees of Yellow Freight who are members of the IBT

We accordingly vacate and remand.

#### Background

This appeal arises from an ongoing effort of the United States government to rid the IBT of organized crime influence. To that end, the United States commenced this litigation in the United States District Court for the Southern District of New York on June 28, 1988 pursuant to the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. §§ 1961-1968 (1984 & Supp 1991), and the Consent Decree was entered on March 14, 1989.

The Consent Decree has generated considerable litigation in the Southern District and in this court. As we summarized its provisions in one of those prior cases.

Under the Consent Decree, three court officers are appointed to oversee certain aspects of the affairs of the IBT: an Election Officer, an Investigations Officer and an [Independent] Administrator. The Election Officer is to supervise the 1991 election of IBT officers. The Investigations Officer is granted authority to investigate corruption and prosecute disciplinary charges against any officer, member or employee of the IBT or any of its affiliates. The [Independent] Administrator oversees the implementation of the remedial provisions of the Consent Decree. For example, the [Independent] Administrator sits as an impartial decisionmaker in disciplinary cases brought by the Investigations Officer, conducts the disciplinary hearings and decides them. The [Independent] Administrator may also apply to the district court to facilitate implementation of the Consent Decree, and the other parties to the Decree may make such applications as well. Furthermore, the district court is vested with "exclusive jurisdiction" to decide any issues relating to the actions or authority of the [Independent] Administrator. And the IBT Constitution is amended to incorporate and conform with all of the terms of the Consent Decree.

*United States v IBT*, 905 F.2d 610, 613 (2d Cir 1990)

The fair and open conduct of the 1991 IBT election is a central purpose of the Consent Decree. The election encompasses three phases: (1) the rank-and-file secret ballot election of delegates to the 1991 IBT convention, (2) the election of trustees and nomination of national and regional officers at that convention, and (3) the subsequent rank-and-file secret ballot election of national and regional officers. The dispute at issue in this case arises from campaign activities occurring in the initial (delegate selection) phase of the 1991 election, but has significant implications for the third (election of national and regional officers) phase which is now in process.

Yellow Freight, many of whose employees are IBT members, has the following company policy:

There shall be no distribution of literature or solicitation by non-employees in working or non-working areas during working or non-working times. In other words, non-employees are not allowed on company property for the purpose of distributing literature or soliciting.

This appeal involves two incidents at Yellow Freight facilities challenging that policy. The first occurred in Chicago Ridge, Illinois. The second occurred in Detroit, Michigan. In October 1990, two IBT members who are not Yellow Freight employees, Patrick N. Clement and Robert McGinnis, entered an unfenced parking lot at the Chicago Ridge facility. They were candidates for delegate from IBT Local 710 to the 1991 IBT convention. Yellow Freight officials asked them to leave and summoned the police, who also asked the men to leave, which they eventually did. They moved to a public sidewalk nearby and continued campaigning. In December 1990, two IBT members who also are not Yellow Freight employees, Michael Hewer and James McTaggart, campaigned for union office at the employee walk through gate at the Detroit facility. They were required to leave Yellow Freight's premises by Yellow Freight security personnel.

McGinnis, Clement, and Hewer filed protests with the Election Officer, alleging that their exclusion by Yellow Freight violated IBT election rules promulgated pursuant to the Consent Decree (the "Election Rules") See *United States v IBT*, 931 F.2d 177, 184-90 (2d Cir 1991) (approving Election Rules with modification) Following separate investigations in Chicago Ridge and Detroit, the Election Officer issued two opinions. The first, dealing with the Clement/McGinnis protest, determined that Yellow Freight's policy violated the Election Rules by completely barring Clement and McGinnis from the Chicago Ridge facility, because campaigning on the nearest public sidewalk would provide no meaningful access to the IBT drivers employed by Yellow Freight. The Election Officer therefore required limited access for Clement and McGinnis to Yellow Freight's property either at a parking lot across the street from Yellow Freight's terminal facilities or at an open area outside the terminal building, at Yellow Freight's option. The Election Officer upheld Yellow Freight's exclusion of Hewer from the Detroit facility, however, finding that Hewer could campaign effectively from a public sidewalk and grassy area adjacent to that facility. In making both determinations, the Election Officer restricted his consideration of the availability of alternative means of communication with employees of Yellow Freight to those available at the Chicago Ridge and Detroit terminals.

Yellow Freight appealed the determination regarding Clement and McGinnis to the Independent Administrator, and Hewer appealed the determination adverse to him. The Administrator affirmed both rulings.<sup>1</sup> In doing so, he invoked Article VIII, section 10(d) of the Election Rules, which provides that "no restrictions shall be placed upon candidates' or members' pre-existing rights to solicit support, distribute leaflets or literature, or engage in similar activities on employer or Union premises," as well as Article XI, section 2, which includes among the remedies available to the Election Officer in resolving a protest. "requir

<sup>1</sup> Hewer has not appealed from this determination so the balance of the proceedings in this

ing or limiting access." The Administrator reasoned. "In general, the 'pre-existing rights' to engage in campaign activity include any past practice or agreement among employers and the IBT, or its members, which allows for such campaign activity, and any substantive rights of union members to engage in such conduct as established by applicable law."

The Administrator found such a right of access for union campaign activity under applicable federal labor law. He further affirmed the rulings of the Election Officer that adequate alternative means of communication were available to Hewer at the Detroit facility, but not to Clement and McGinnis at the Chicago terminal. In affirming the latter ruling, the Administrator considered almost exclusively alternative campaigning feasibilities at the Chicago Ridge terminal, except for the following conclusory statement. "the complainants did not have a reasonable alternative means of communication off company property with IBT members at this facility."

Yellow Freight made additional arguments to the Independent Administrator, and in a subsequent appeal to the district court, which parallel those pressed on this appeal. The district court affirmed the determination of the Administrator, and accordingly denied Yellow Freight's application for declaratory and injunctive relief directed against that determination.

This appeal followed.

#### Discussion

Yellow Freight tenders four arguments on appeal

- (1) the Consent Decree cannot validly be applied or enforced against Yellow Freight pursuant to either the All Writs Act or any other asserted authority, because Yellow Freight is not a party to the Consent Decree,
- (2) the Independent Administrator, the Election Officer, and the district court are denied jurisdiction over Yellow Freight by the NLRA, which vests ex

case including this appeal are addressed only to the Chicago Ridge controversy

clusive jurisdiction over the conduct at issue in the NLRB,

- (3) even assuming jurisdiction, the determination herein is not in accordance with law; and
- (4) Yellow Freight should be awarded injunctive relief against any further exercise of authority over it by the Independent Administrator or Election Officer

We address each in turn

**A. The Enforcement of the Consent Decree against Yellow Freight.**

[1] The district court premised its assertion of authority over Yellow Freight upon the All Writs Act, which provides in pertinent part:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law

28 U.S.C. § 1651(a) (1988)

As the Supreme Court has stated.

The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice

*United States v. New York Tel. Co.*, 434 U.S. 159, 174, 98 S.Ct. 364, 373, 54 L.Ed.2d 376 (1977) (citations omitted), *see also* *Yonkers Racing Corp v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 833 (1989), *Benjamin v. Malcolm*, 803 F.2d 46, 53 (2d Cir. 1986), *cert. denied*, 480 U.S. 910, 107 S.Ct. 1358, 94 L.Ed.2d 528 (1987), *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985)

Despite this authority, Yellow Freight contends that the Consent Decree cannot be enforced against it because Yellow Freight is not a party to the Consent De-

ree. Yellow Freight cites, in support of this view, our recent statement that:

It is true that, for purposes of interpretation, a consent decree is treated as a contract among the settling parties, *Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986), and that the terms of a consent decree cannot be enforced against those who are not parties to the settlement. *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989)

*IBT*, 931 F.2d at 185.

We proceeded immediately to acknowledge, however, that "there are several exceptions to this general rule," *id.*, and invoked one of those exceptions to impose upon IBT affiliates, not parties to the Consent Decree, the election rules promulgated pursuant to the Consent Decree. *See id.* at 187. We have previously subjected other nonparties to the Consent Decree, *see United States v. IBT*, 907 F.2d 277, 279-80 (2d Cir. 1990), *IBT*, 905 F.2d at 613 (2d Cir. 1990), in the former case invoking the All Writs Act to affirm an order restraining all members and affiliates of the IBT from "filing or taking any legal action that challenges, impedes, seeks review of or relief from, or seeks to prevent or delay any act of [the court-appointed officers] in any court or forum in any jurisdiction except [the Southern District of New York]." 907 F.2d at 279

Nor is it the case that *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989), upon which Yellow Freight heavily relies, bars the enforcement of the Consent Decree against Yellow Freight. In *Martin*, white firemen sued the City of Birmingham, Alabama, alleging that they were being denied promotions in favor of less qualified black firemen in violation of applicable federal law. 490 U.S. at 758, 109 S.Ct. at 2183. The promotions of the black firemen occurred in implementation of two previously entered consent decrees. *Id.* at 758-60, 109 S.Ct. at 2182-83. The Supreme Court ruled that, although the white firemen had not attempted to intervene in the litigation that led to the consent decrees, they were entitled to pursue their

Cite as 948 F.2d 98 (2nd Cir. 1991)

aims in the subsequent litigation *Id.* at 61, 109 S.Ct. at 2184

In other words, as we have stated, *Martin* "held that a failure to intervene does not bar a subsequent attempt to challenge actions taken pursuant to a consent decree." *IBT*, 931 F.2d at 184 n. 2, *see also independent Fed'n of Flight Attendants Zipes*, 491 U.S. 754, 109 S.Ct. 2732, 2736-7, 105 L.Ed.2d 639 (1989) (similarly construing *Martin*) Accordingly, *Martin* does not purport to bar any impact of a consent decree upon, or enforcement of a consent decree against, a nonparty to the decree. Rather, it is addressed to the issue whether such a nonparty is entitled to its own "day in court" to challenge any such impact or enforcement. *See Martin*, 490 U.S. at 762, 109 S.Ct. at 761-62.

Yellow Freight also argues that a consent decree, as distinguished from a judgment resulting from litigation pursued to completion, cannot be enforced against a nonparty.<sup>2</sup> In Yellow Freight's words, "the only process by which a non-party can be bound is its own agreement." This assertion is contradicted, *inter alia*, by our rulings in three prior cases enforcing the Consent Decree against nonparties, *see IBT*, 931 F.2d at 187, *IBT*, 907 F.2d at 279-80, *IBT*, 905 F.2d at 613,<sup>3</sup> as well as by *Yonkers Racing Corp.*, 858 F.2d at 858, *Benjamin*, 803 F.2d at 48, and *Baldwin-United*, 770 F.2d at 332.

Yellow Freight further contends that the All Writs Act may be invoked only in certain categories of cases, and that this litigation fits none of those categories. We do not agree with Yellow Freight's characterization of this body of law. In any event, Yellow Freight concedes that "the All Writs Act allows substantive injunctions against technical nonparties [in at

least some cases] to enforce a decree which adjudicates public rights." We believe that there is a strong public interest in the ongoing effort in this litigation to open the IBT to democratic processes and purge the union of organized crime influence.

Further, as a general rule

[I]f jurisdiction over the subject matter of and the parties to litigation is properly acquired, the All Writs Act authorizes a federal court to protect that jurisdiction even though nonparties may be subject to the terms of the injunction.

*IBT*, 907 F.2d at 281

The district court has subject matter jurisdiction of the underlying controversy pursuant to RICO. Yellow Freight does not contest personal jurisdiction, and in any event, "the All Writs Act requires no more than that the persons enjoined have the 'minimum contacts' that are constitutionally required under due process." *IBT*, 907 F.2d at 281 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)).

Since the jurisdictional requirements are satisfied, the remaining issues, in the language of the All Writs Act, are whether the district court's order was "necessary or appropriate" to the implementation of the Consent Decree, and whether it was imposed agreeably "to the usages and principles of law." 28 U.S.C. § 1651 (1988)

The district court articulated the need to provide access to Yellow Freight's Chicago Ridge terminal in the following terms

[T]he crux of this Consent Decree is free, open and fair secret ballot elections. In order for those elections to be meaningful, the IBT rank and file must be given a fair choice of candidates. But

opportunity to challenge the application of the decree to it.

2. Yellow Freight invokes in this connection a statement in *Local Number 93 Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529, 106 S.Ct. 3063, 3079, 92 L.Ed.2d 405 (1986) that "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." In view of *Martin*, which also involved consent decrees, this dictum must be understood to mean that a consent decree may not impose such obligations without affording the affected nonparty a meaningful

3. We do not mean to imply that these prior rulings, all of which relate to affiliates or members of the IBT automatically call for application of the Consent Decree to Yellow Freight. *See IBT*, 907 F.2d at 280 (extent of the Consent Decree's binding effect on nonparties "an issue best resolved in the context of concrete disputes adjudicated by the district court")



the reality of such an election is that incumbents may often hold distinct advantages in name recognition, and access to members of a local. Employers may have developed comfortable relationships with incumbent IBT officers, and may not be anxious for new, and perhaps more assertive union representatives. As a result, jurisdiction over employers such as Yellow Freight may be necessary "in aid of this Court's jurisdiction."

As an additional matter, the Independent Administrator reasoned that employers such as Yellow Freight "have the power, if not restrained, to subvert the electoral process" were they to bar IBT members from exercising their right to campaign on employers' premises. Second, the Independent Administrator found that non-employee IBT members have a limited "pre-existing right" of access to non-employer premises as guaranteed by the National Labor Relations Act, ("NLRA") 29 U.S.C. § 158(a)(1), and its subsequent interpretations.

*United States v IBT*, No 88 Civ 4486 (DNE), slip op at 6-7, 1991 WL 51065 (SDNY Apr 3, 1991)

We agree with this assessment of the need for limited access to employer premises where no feasible alternative for campaigning by candidates for union office is available. We therefore conclude that the order on appeal was "necessary or appropriate in aid of" the district court's jurisdiction over the underlying litigation in which the Consent Decree was entered, and turn to the issue whether it was "agreeable to the usages and principles of law."

We first consider whether the procedure made available to Yellow Freight to contest the asserted access was "agreeable to the usages and principles of law," bearing in mind the mandate of *Martin v Wilks* that Yellow Freight have its "day in court" on the issue. See 490 U.S. at 762, 109 S.Ct. at 2184. Yellow Freight contends that it was denied "due process," and thereby (*a fortiori*) traditional legal protections, because it

4. Throughout these proceedings, the appeal procedures made available by the Consent Decree to the parties thereto have been extended to Yellow Freight. Any failure thus to provide an

was subjected to a consent decree to which it was not a party. We have already rejected that claim, however, and therefore turn our attention to the particular procedures that have been applied herein in adjudicating Yellow Freight's claimed entitlement to bar Clement and McGinnis from the Chicago Ridge terminal.

Yellow Freight's position has been considered by both the Election Officer and the Independent Administrator, and reviewed, now, by two federal courts. The Election Officer, a former general counsel of the United Mine Workers, inspected both sites at issue, accepted submissions from the parties, wrote letter opinions that addressed the factual and legal contentions of the parties, and decided the controversy regarding the Detroit terminal in favor of Yellow Freight, although ruling against Yellow Freight regarding the Chicago Ridge terminal. The Independent Administrator, a former federal district judge, held a hearing at which testimony was presented, received prehearing legal submissions from the parties, and solicited posthearing submissions. He issued a detailed decision that carefully addressed the legal contentions of the parties, and made *de novo* findings of fact and conclusions of law.

Yellow Freight then availed itself of its right to appeal to the district court.<sup>4</sup> The district court held a hearing, incorporated the record developed by the IBT trustees at Yellow Freight's request, and issued a memorandum and order that again addressed the issues tendered by the parties. Now, of course, Yellow Freight has taken this appeal, in which the customary appellate procedures of federal circuit courts have been applied. Application may be made, by certiorari, for further review by the Supreme Court.

It is difficult to imagine additional or different procedures that would accord Yellow Freight a significantly enhanced opportunity to present its position concerning this controversy. Certainly, furthermore,

opportunity to Yellow Freight to litigate its claims would run afoul of *Martin*, 490 U.S. at 761-62, 109 S.Ct. at 2184-85.

These procedures are at least generally comparable to those provided by the NLRA for resolution by the NLRB and federal courts of unfair labor practice claims. See generally 29 U.S.C. § 160 (1988). We accordingly conclude that Yellow Freight has been accorded adequate procedural protections to satisfy the All Writs Act. Cf. *United States v IBT*, 941 F.2d 1292, 1297-98 (2d Cir 1991) (procedures utilized in disciplinary actions pursuant to Consent Decree satisfy due process).

Further, the provision of access to the Chicago Ridge terminal is certainly, as a substantive matter, "agreeable to the usages and principles of law" within the meaning of the All Writs Act. There is a thoroughly developed body of federal labor law regarding this issue. Indeed, Yellow Freight contends that the merits of the issue are definitively addressed by the NLRA and consigned thereby to the exclusive jurisdiction of the NLRB. We turn to that contention.

*NLRB Preemption.*

[2] Yellow Freight contends that the conduct at issue in this case is directly regulated by sections 7 and 8(a)(1) of the NLRA, 29 U.S.C. §§ 157 and 158(a)(1) (1988), and accordingly that the NLRB has exclusive jurisdiction with respect to it. In this connection, *San Diego Building Trades Council v Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), a case involving attempted state regulation of conduct constituting an NLRA unfair labor practice, stated that "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted." *Id.* at 245, 79 S.Ct. at 780.

This rule, however, is not uniformly applied even as to state regulation. See, e.g., *Sears Roebuck & Co v San Diego County Council of Carpenters*, 436 U.S. 180, 182 & 207-08, 98 S.Ct. 1745, 1749, 1762-63, 56 L.Ed.2d 209 (1978) (enforcement of state pass laws by state court allowed as to picketing which is arguably—but not defi-

nately—prohibited or protected by federal law"). Furthermore, where federal laws and policies other than the NLRA are implicated, the *Garmon* rule is frequently considered inapplicable. See, e.g., *Brenninger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 110 S.Ct. 424, 429-35, 107 L.Ed.2d 888 (1989) (district court had jurisdiction to hear fair representation claim although union's breach of duty of fair representation might violate § 8(b) of the NLRA), *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 237-39, 91 S.Ct. 609, 612-14, 28 L.Ed.2d 10 (1971) (district court had jurisdiction to hear claim that unlawful expulsion from union violated § 101(a)(5) of Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(5) (1988), although expulsion was arguably an unfair labor practice violative of §§ 8(b)(1)(A) and 8(b)(2) of NLRA), *American Postal Workers Union v United States Postal Service*, 766 F.2d 715, 720 (2d Cir 1985) (district court and NLRB have concurrent jurisdiction over suits to enforce labor contracts, "even if the conduct involved might entail an unfair labor practice"), *cert. denied*, 475 U.S. 1046, 106 S.Ct. 1262, 89 L.Ed.2d 572 (1986); *United States v Boffa*, 688 F.2d 919, 931 (3d Cir 1982) (in RICO prosecution alleging mail fraud predicates and substantive mail fraud violations, prohibition of defendants' conduct by § 8 of NLRA would not preclude "enforcement of a federal statute that independently proscribes that conduct"), *cert. denied*, 460 U.S. 1022, 103 S.Ct. 1272, 75 L.Ed.2d 494 (1983). Here, although the appointed officials are directly applying the NLRA rather than some separate body of law, considerations that we have previously recognized with respect to the Consent Decree argue compellingly for a ruling against exclusive NLRB jurisdiction.

We have affirmed an injunction prohibiting all members and affiliates of the IBT from initiating any legal proceeding relating to the Consent Decree "in any court or forum in any jurisdiction" (emphasis added) other than the district court from which this appeal was taken, *IBT*, 907 F.2d at 279, "as a necessary means of protecting the

district court's jurisdiction over implementation of the Consent Decree" *Id.* at 280. We did so to avoid inconsistent interpretations of, and judgments regarding, the Consent Decree, and also to avoid repetitive litigation that would distract the government and the court-appointed officers from implementation of the Consent Decree. *Id.* It would be completely disruptive to rule that despite this arrangement, the district court has no authority to address any matter arising under the Consent Decree that might arguably be deemed an unfair labor practice under the NLRA.<sup>5</sup>

As we have stated, "a district judge can legitimately assert comprehensive control over complex litigation," *IBT*, 907 F.2d at 281, and this rule is properly invoked in this case. *See id.*, *cf. Berger v Heckler*, 771 F.2d 1556, 1576 n. 32 (2d Cir 1985) ("[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it") (quoting *Brown v Neeb*, 644 F.2d 551, 558 n. 12 (6th Cir 1981)). We conclude that the NLRB does not have exclusive jurisdiction over the conduct at issue on this appeal, and that the district court and its appointed officers accordingly did not err in addressing it. Finally, by requiring strict adherence to the requirements of federal labor law in the enforcement of the Consent Decree, *see infra*, we preclude that "interference with national policy" that was the focal concern in *Garmon*. *See* 359 U.S. at 245, 79 S.Ct. at 779.

### C The Merits.

[3] Finally, Yellow Freight contends that the substantive determination made by the Election Officer as to the Chicago Ridge terminal, and affirmed by the Independent Administrator and the district court, is incorrect as a matter of law.<sup>6</sup> As

5. As Judge Winter's dissent suggests, the normally glacial pace of NLRB proceedings regarding unfair labor practice is ill suited to the regulation of ongoing IBT elections envisioned by the Consent Decree. Our jurisdictional ruling, however, is not premised upon this consideration.

6. We are unpersuaded by the argument of counsel for Clement and McGinnis that Yellow Freight has waived its right to contest the merits

indicated *supra*, the claims of Clement and McGinnis for access to Yellow Freight's property are premised upon the provision in Article VIII, section 10(d) of the Election Rules that safeguards "candidates' or members' pre-existing rights to [campaign] on employer or Union premises." The Independent Administrator properly construed this provision to invoke both "past practice or agreement among employers and the IBT, and any substantive rights of union members to engage in such conduct as established by applicable law." The pertinent issue on this appeal is the content of the "applicable law," since no preexisting practice or agreement has been asserted to be pertinent to this controversy. For the reasons that follow, we conclude that the determination on appeal did not adequately consider the availability of alternate means of communicating with Yellow Freight's Chicago Ridge employees at locations other than the worksite, and that the case must accordingly be remanded for reconsideration by the district court and the court-appointed officers.

The landmark case in this area is *NLRB v Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956), which ruled that:

[A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employee with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.

*Id.* at 112, 76 S.Ct. at 684.

Explaining the balance to be struck, the Court went on to say:

on appeal. The Election Officer the Independent Administrator, and the district court all addressed the merits, and Yellow Freight made clear that it contested those rulings. Yellow Freight placed its primary emphasis in the district court upon other arguments, however, in view of the court's expressed desires concerning the issues to be addressed at the hearing that resulted in the ruling on appeal.

This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization, the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

*Id.* (emphasis added)

*Babcock and Wilcox* involved efforts by as to organize the pertinent employees, rather than intraunion elections. See *id.* at 106, 76 S.Ct. at 679. The issue, however, was whether the employers had violated section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1988), by impeding their employees' section 7 "right to self-organization" 29 U.S.C. § 157 (1988). It has since been made clear that intraunion campaigning activities implicate employees' section 7 right "to form, join, or assist labor organizations," or to "refrain" therefrom, *id.*, and that unlawful interference with that right is also a section 8(a)(1) unfair labor practice. See *NLRB v. Magnavox Co.*, 415 U.S. 322, 324, 94 S.Ct. 1099, 1101, 39 L.Ed.2d 358 (1974), *District Lodge 91, Int'l Ass'n of Machinists v. NLRB*, 814 F.2d 876, 879 (2d Cir 1987).

*Babcock and Wilcox* ruled that "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property" 351 U.S. at 113,

The Election Officer's letter opinion regarding Chicago Ridge observed that Yellow Freight has permitted some solicitation during the Christmas season by United Way in one of the areas

76 S.Ct. at 685. On the other hand, the NLRA "does not require that the employer permit the use of its facilities for organization when other means are readily available." *Id.* at 114, 76 S.Ct. at 685. As the NLRB has summarized,

*Babcock* thus holds that where persons other than employees of an employer that owns or controls the property in question are concerned, "alternative means" must always be considered. A property owner who has closed his property to nonemployee communications, on a nondiscriminatory basis,<sup>7</sup> cannot be required to grant access where reasonable alternative means exist, but in the absence of such means the property right must yield to the extent necessary to permit the organizers to communicate with the employees.

*Jean Country*, 291 N.L.R.B. 11, 12 (1988) (emphasis partially added)

We have most recently considered this issue in *National Maritime Union v. NLRB*, 867 F.2d 767 (2d Cir 1989), where we affirmed an NLRB determination that an employer had not committed an unfair labor practice by barring union organizers from its boats because "the record [was] inadequate to establish that home visits were unreasonable," and the union "had the burden of proving that alternative means of communication were unreasonable" 867 F.2d at 775. We note that the Supreme Court will revisit this area in the coming term, having granted certiorari in *Lechmerc, Inc. v. NLRB*, 914 F.2d 313 (1st Cir 1990), cert. granted, — U.S. —, 111 S.Ct. 1305, 113 L.Ed.2d 240 (1991).

The problem with the determination on appeal here is that virtually no consideration was given to alternative ways of communicating with the Chicago Ridge employees of Yellow Freight away from the jobsite. Both the Election Officer and the Independent Administrator recognized in general terms the need to consider alternative means of communication, but specific

alternatively ordered to be made available to Clement and McGinnis, but the issue of discriminatory access was not otherwise pursued.

attention was accorded only to alternatives immediately adjacent to the Chicago Ridge jobsite. The district court affirmed on the basis of the determination by the Independent Administrator. In view of the applicable law, this is clearly inadequate, and we must therefore vacate and remand.

In doing so, we note that the consideration of this issue on remand may take into account all pertinent matters, including time constraints imposed by the impending election schedule and cost factors. See *National Maritime Union*, 867 F.2d at 774. We note also that home visits were considered a plausible alternative in *National Maritime Union* because the union organizers were provided by the employer with the names and addresses of the employees whom the organizers sought to approach. See *id.* at 769. In sum, we do not seek to pose undue difficulties for the district court and the court-appointed officers in dealing practically and flexibly with the significant burden of overseeing the ongoing IBT election, but we cannot ratify decisions made in that effort which do not comport with the requirements of applicable law.

We note, finally, that if Yellow Freight should on remand be validly compelled to provide access to its Chicago Ridge property in connection with the 1991 IBT election, such compelled access would not inhibit Yellow Freight's continued entitlement to enforce its "no solicitation" policy in the future, in the absence of judicial direction to the contrary. Yellow Freight would not in such circumstances have voluntarily abandoned its policy or willingly established any exception to it. Cf. *NLRB v Southern Md. Hosp. Ctr.*, 916 F.2d 982, 987 (4th Cir. 1990) ("[c]laims of disparate enforcement inherently require a finding that the employer treated similar conduct differently") (emphasis added), *Restaurant Corp. of Am. v NLRB*, 827 F.2d 799, 807 (D.C. Cir. 1987) (same), *id.* at 812 n. 3 (Bork, J., dissenting in part and concurring in part) (same). Accordingly, such a ruling would establish only that Yellow Freight may on occasion be required to provide access to its property in furtherance of the Consent Decree, despite its "no solicitation" policy. Yellow Freight would contin-

ue to be entitled to limit access to its property pursuant to the "no solicitation" policy, subject only to the general limits of federal labor law. See *Babcock & Wilcox*, 351 U.S. at 112, 76 S.Ct. at 684.

#### D. Injunctive Relief

Yellow Freight asks that we direct the district court to permanently enjoin the Election Officer and Administrator "not to assert authority or jurisdiction over Yellow Freight under color of the [Consent Decree] or Election Rules, not to process any protest or grievance against any act by Yellow Freight, and not to seek to require Yellow Freight to respond to any protest or grievance arising [thereunder]." As is obvious from the foregoing, we will not provide such relief, since we deem Yellow Freight amenable to the authority of the district court and the court-appointed officers as to the dispute on appeal, pursuant to the All Writs Act, and do not consider the authority of the district court and its officers to deal with that dispute to be preempted by the NLRB. Our ruling is limited to assuring that the correct legal standards are applied in the resolution of this controversy.

#### Conclusion

The order of the district court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion. Yellow Freight's application for injunctive relief is denied. The parties shall bear their own costs.

WINTER, Circuit Judge, dissenting.

I respectfully dissent.

I do not agree (i) that the Consent Decree between the IBT and the government purports to vest jurisdiction in the court-appointed Administrator and reviewing federal courts to adjudicate unfair labor practice charges brought by two IBT members against an employer under the National Labor Relations Act ("NLRA"), (ii) that, if the Decree so empowers the Administrator, it is valid, or (iii) that the adjudication in question is authorized by the All Writs Act.

## I

With regard to (i), the meaning of the Consent Decree, Article VIII, Section 10(d), provides that "No restrictions be placed on candidates' or members' pre-existing rights to solicit, support, distribute leaflets, literature or engage in general activity on employer or union premises." Given this language its ordinary meaning in the present context, there is no basis for arguing that Yellow Freight violated its rights. The words "pre-existing rights" refer no more than a reference to rights of access previously recognized by employers through contract or past practice or denied by enforcement orders of the National Labor Relations Board ("NLRB"). This is in accordance with the language used in the Consent Decree and limits the rights of access conferred by the Decree to rights denied by the IBT that the IBT may lawfully confer upon IBT members. However, under that reading, Yellow Freight does not violate the Consent Decree. Yellow Freight's no-solicitation rule was in effect when the Consent Decree was signed. Clement and McGinnis thus had no pre-existing right of access to Yellow Freight's premises.

## II

However, with regard to (ii), my colleagues read the language differently, based upon the Administrator's interpretation of the words "pre-existing rights" as including "all substantive rights of union members under established law." Under this reading, the Decree purports to strip jurisdiction in the Administrator to adjudicate nonemployees' claims of access to Yellow Freight's premises under the All Writs Act.

Putting aside the All Writs Act for the moment, it is a mystery to me where the IBT and the government found the authority to empower the Administrator to adjudicate unfair labor practice charges involving non-employees to the Decree. This issue is not addressed in my colleagues' opinion.

I do not mean to suggest that a bright line defines the "pre-existing rights" incorporated by the Consent Decree. Indeed I can imagine a

host of definitional problems arising from the provision. Such problems however are not a reason to give the Decree an expansive reading.

ion. In fact, Congress has designated exclusive procedures for the adjudication of unfair labor practice claims. I know of no theory under which the IBT and the government had the power, essentially legislative in nature, to override Congress's explicit direction that Clement and McGinnis file their unfair labor practice charges with the NLRB.

Not surprisingly, I also do not agree that the IBT and the government had the power to erase Yellow Freight's right to litigate the unfair labor practice charges before the NLRB. Nor do I agree that allowing the IBT and the government to accomplish this legislative act was not a denial of due process to Yellow Freight. Yellow Freight did have hearings on the unfair labor practice charges before the Administrator and the district court. However, Yellow Freight was not accorded due process when the Consent Decree deprived it of the right to litigate unfair labor practice charges before the NLRB rather than before the Administrator. Yellow Freight had neither notice nor a hearing in the RICO proceeding as to the potential loss of its rights under federal law. If the IBT and the government had the power to erase Yellow Freight's rights, then Yellow Freight should have been made a party defendant in the RICO action and allowed to litigate to final judgment the issue of whether the loss of such rights could be granted as relief.

## III

This brings me to (iii), namely, the All Writs Act issue. I agree with my colleagues that, in contrast to the Consent Decree, the All Writs Act may confer jurisdiction over third parties where necessary to implement otherwise valid provisions of the Decree. My colleagues reason that the proceedings against Yellow Freight are necessary to avoid inconsistent interpretations of that Decree. If the Consent Decree merely incorporates pertinent provisions of the NLRA, however, then the only

host of definitional problems arising from the provision. Such problems however are not a reason to give the Decree an expansive reading.

inconsistencies that might arise would be between the Administrator's interpretations of the NLRA and the NLRB's interpretations of the same statute. The apprehension that the Administrator may disagree with the NLRB as to the meaning of the NLRA, and the tacit but yet inexorable assumption that the Administrator's view should prevail, merely highlight the illegitimacy of vesting the Administrator with jurisdiction over unfair labor practices. It goes without saying that the All Writs Act does not authorize the displacement of Congress's legislative scheme for the adjudication of unfair labor practices.

However, my colleagues' discussion of the preemption issue implies that the Consent Decree created independent rights of access, i.e., not based on the NLRA, by IBT candidates to employers' property. Their discussion of the preemption issue relies exclusively on cases in which claims based on other bodies of law, e.g., common law trespass claims or "where federal laws and policies other than the NLRA are implicated," overlap unfair labor practice claims and are validly adjudicated by tribunals other than the NLRB. Those cases are neither analogous nor relevant to the instant matter unless the Consent Decree is viewed as creating a new body of law to be enforced by third parties against other third parties for purposes of the IBT election, another legislative act the IBT and the government had no power to accomplish. Moreover, in their discussion of the All Writs Act, they emphasize the "public interest" in democratizing the IBT and purging it of organized crime influence. Again, this implies that the Decree embodies legal commands beyond those found in present labor law. Whatever the implications of the opinion, however, the content of these new legal commands is not spelled out. Indeed, the Administrator's view of his powers was limited to enforcing "substantive rights under established law," (emphasis added), and my colleagues purport to apply only standards derived from the NLRA.

I know of no precedent for this expansive use of the All Writs Act. *United*

*States v. IBT*, 907 F.2d 277 (2d Cir. 1991) held that local unions, who were not parties to the Consent Decree but are constituent bodies of the IBT, had to litigate concerning the meaning of that Consent Decree in the Southern District of New York. This essentially housekeeping session dealt solely with inconsistencies concerning the meaning of the Consent Decree, not disagreements over the meaning of a federal statute, such as the NLRA. *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), cert. denied U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 1197 (1989), the City of Yonkers, pursuant to a consent decree entered in the Southern District, initiated condemnation proceedings in state court. Subsequently, the property owners brought actions in state court to invalidate the proposed condemnation. We affirmed an order directing the City to remove the state court actions. Our principal concern was again the effect of inconsistent judgments with respect to the meaning of a consent decree. A second concern was the fear that the City of Yonkers would not vigorously defend the condemnation proceedings. Finally, in *In re Iwin-United Corporation*, 770 F.2d 32 (2d Cir. 1985), we upheld an injunction prohibiting states from filing civil actions against parties who were defendants in a national district securities litigation. We did so in order to effectuate a settlement agreement in which the plaintiffs had waived state law claims and to ensure that they could not disrupt the agreement by bringing claims derivative of the settled claims. See *id.* at 336-37.

By contrast, the proceeding against *Low Freight* has nothing to do with the risk of inconsistent decisions concerning the meaning of the Consent Decree. Collusive actions by a party to the Decree or a need to avoid derivative, duplicative actions that would unravel a class action settlement.

#### IV

I believe that Clement and McClellan should have been required to file labor practice charges with the NLRB.

Cite as 948 F.2d 111 (2d Cir 1991)

the support of the Administrator, then could have specifically requested General Counsel to seek preliminary injunction under Section 10(j). 29 U.S.C. 50(j).

It may be that my colleagues are influenced by the fact that our court records state what might charitably be called a reasonable doubt as to the capacity of the NLRB to act with anything but, again speaking charitably, glacial speed in adjudicating unfair labor practices. See, e.g., NLRB v Oakes Machine Corp, 897 F.2d (2d Cir 1990), National Maritime Union of America, AFL-CIO v NLRB, 867 F.2d 767 (2d Cir 1989). Nevertheless, there is litigation pending in our court indicating that Section 10(j) actions for injunctions are not unknown. NLRB v Domsey Trading Corp, appeal docketed, No 91-6203 (2d Cir Aug 23, 1991). In any event, the performance of the NLRB is not for review by interpretation of consent decrees between unions and the government.

I thus regard my colleagues' decision as a profoundly troubling precedent. The reach of the decision is long but the theories on which it is based seem ill-defined and open-ended. It offers no limits to the power of parties to consent decrees to alter radically the substantive legal rights of non-parties by invoking the "public interest" and the All Writs Act. The best that can be said is that their opinion does so in the congenial factual setting of a corrupt and undemocratic union. I hope that all further references to this decision will be accompanied by the words, "That case is easily distinguishable, it involved the Teamsters."

CARIBBEAN TRADING AND FIDELITY CORPORATION, Petitioner-Appellee,

NIGERIAN NATIONAL PETROLEUM CORPORATION, Respondent-

Appellant.

No 1924, Docket 91-7445.

United States Court of Appeals, Second Circuit.

Argued July 23, 1991

Decided Oct. 30, 1991

Corporation brought petition to confirm and enforce arbitration proceeding pursuant to Convention on Recognition and Enforcement of Foreign Arbitral Awards. The United States District Court for the Southern District of New York, John F. Keenan, J., denied motion for reconsideration of order requiring Nigerian corporation to post security pending outcome of related litigation in Nigeria. Appeal was taken. The Court of Appeals, Winter, Circuit Judge, held that: (1) order requiring posting of security was not subject to appellate review, and (2) district court could require foreign state to invoke provision of Foreign Sovereign Immunity Act rendering foreign state's property immune from attachment in initial response to opposing party's request for order of attachment.

Petition denied.

Mahoney, Circuit Judge, filed opinion concurring in the judgment.

1. Federal Courts ¶574

Orders denying or requiring security are interlocutory and questions regarding their appealability turn on applicability of collateral order doctrine

2. Federal Courts ¶572

"Collateral order doctrine" allowing appeal applies if order conclusively determines disputed question, resolves important issue completely separate from merits





# United States Court of Appeals

FOR THE

SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 31st day of December, one thousand nine hundred and ninety-one.

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USA

PLAINTIFF-APPELLEE,

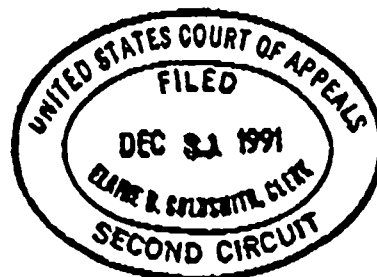
V.

IBT

DEFENDANTS

DOCKET NUMBER

91-6096



A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by APPELLANT YELLOW FREIGHT SYSTEMS INC.

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

*Elaine B. Goldsmith*  
ELAINE B. GOLDSMITH  
Clerk

*J. Gregory Cook*

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 1839 -- August Term, 1990

(Argued: July 22, 1991                      Decided: October 29, 1991)

Docket No. 91-6096

Amended: February 14, 1992

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- v -

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA, ANTHONY SALERNO, also known as Fat Tony; MATTHEW IANNIELLO, also known as Matty the Horse; NUNZIO PROVENZANO, also known as Nunzi Pro; ANTHONY CORALLO, also known as Tony Ducks; SALVATORE SANTORO, also known as Tom Mix; CHRISTOPHER FURNARI, SR., also known as Christie Tick, FRANK MANZO; CARMINE PERSICO, also known as Junior, also known as The Snake; GENNARO LANGELLA, also known as Gerry Lang, PHILIP RASTELLI, also known as Rusty; NICHOLAS MARANGELLO, also known as Nicky Glasses; JOSEPH MASSINO, also known as Joey Messina, ANTHONY FICAROTTA, also known as Figgy; EUGENE BOFFA, SR.,; FRANCIS SHEERAN, MILTON ROCKMAN, also known as Maishe; JOHN TRONOLONE, also known as Peanuts; JOSEPH JOHN AIUPPA, also known as Joey O'Brien, also known as Joe Doves, also known as Joey Aiuppa; JOHN PHILLIP CERONE, also known as Jackie the Lackie, also known as Jackie Cerone; JOSEPH LOMBARDO, ALSO KNOWN AS Joey the Clown; ANGELO LAPIETRA, also known as The Nutcracker; FRANK BALISTRIERI, also known as Mr. B; CARL ANGELO DELUNA, also known as Toughy; CARL CIVELLA, also known as Corky; ANTHONY THOMAS CIVELLA, also known as Tony Ripe; GENERAL EXECUTIVE BOARD, INTERNATIONAL BROTHERHOOD OF

1 PRESSER, General President; WELDON MATHIS, General Secretary-  
2 Treasurer; JOSEPH TREROTOLA, also known as Joe T, First Vice  
3 President; ROBERT HOLMES, SR., Second Vice President; WILLIAM J.  
4 MCCARTHY, Third Vice President; JOSEPH W. MORGAN, Fourth Vice  
5 President; EDWARD M. LAWSON, Fifth Vice President; ARNOLD  
6 WEINMEISTER, Sixth Vice President; JOHN H. CLEVELAND, Seventh Vice  
7 President; MAURICE R. SCHURR, Eight Vice President; DONALD PETERS,  
8 Ninth Vice President; WALTER J. SHEA, Tenth Vice President; HAROLD  
9 FRIEDMAN, Eleventh Vice President; JACK D. COX, Twelfth Vice  
10 President; DON L. WEST, Thirteenth Vice President; MICHAEL J. RILEY,  
11 Fourteenth Vice President, THEODORE COZZA, Fifteenth Vice President,  
12 DANIEL LIGUROTIS, Sixteenth Vice President; and SALVATORE  
13 PROVENZANO, also known as Sammy Pro, Former Vice President,

14 Defendants,

15 YELLOW FREIGHT SYSTEMS, INC.

16 Appellant.

17 -----\*-----

18 B e f o r e :

19 WINTER, ALTIMARI, and MAHONEY,

20 Circuit Judges.

21 -----\*-----

22 Appeal from an order of the United States District Court for  
23 the Southern District of New York, David N. Edelstein, Judge,  
24 entered April 3, 1991 that affirmed a determination of the  
25 Independent Administrator under a certain consent decree relating  
26 to the International Brotherhood of Teamsters, Chauffeurs,  
27 Warehousemen and Helpers of America, AFL-CIO, granting non-employee

1 union members access to premises of Yellow Freight Systems, Inc. to  
2 campaign for union office, and denied the application of Yellow  
3 Freight Systems, Inc. for declaratory and injunctive relief from  
4 that determination.

5 Vacated and remanded. Judge Winter dissents in a separate  
6 opinion.

7 -----\*-----

8 JAY G. SWARDENSKI, Chicago, Illinois  
9 (Larry G. Hall, Kirk D. Messmer,  
10 Patrick W. Kocian, Matkov,  
11 Salzman, Madoff & Gunn, Chicago,  
12 Illinois, of counsel), for  
13 Appellant.

14 JAMES L. COTT, Assistant United  
15 States Attorney for the Southern  
16 District of New York, New York,  
17 New York (Otto G. Obermaier,  
18 United States Attorney for the  
19 Southern District of New York,  
20 Edward T. Ferguson, III,  
21 Assistant United States Attorney  
22 for the Southern District of New  
23 York, New York, New York, of  
24 counsel), for Plaintiff-  
25 Appellee.

26 Paul Alan Levy, Alan B.  
27 Morrison, Public Citizen  
28 Litigation Group, Washington,  
29 D.C., for Protestors Patrick N.  
30 Clement and Robert McGinnis.

31 Barbara J. Hillman, Gilbert A.  
32 Cornfield, Cornfield and  
33 Feldman, Chicago, Illinois, for  
34 Election Officer Michael H.  
35 Holland.

36 -----\*-----  
37

1 MAHONEY, Circuit Judge:

2 Appellant Yellow Freight Systems, Inc. ("Yellow Freight")  
3 appeals from an order of the United States District Court for the  
4 Southern District of New York, David N. Edelstein, Judge, entered  
5 April 3, 1991. That order affirmed a determination of officers  
6 appointed pursuant to a certain consent decree (the "Consent  
7 Decree") relating to the affairs of defendant International  
8 Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of  
9 America, AFL-CIO (the "IBT") that granted nonemployee members of the  
10 IBT access to premises of Yellow Freight to campaign for union  
11 office, and denied Yellow Freight's application for declaratory and  
12 injunctive relief from that determination. Yellow Freight seeks to  
13 enforce a "no solicitation" rule by barring nonemployee union  
14 members from campaigning for union office on its property. The  
15 district court upheld the appointed officers' determination denying  
16 effect to Yellow Freight's rule.

17 We conclude that the district court was entitled to exercise  
18 jurisdiction over Yellow Freight pursuant to the All Writs Act, 28  
19 U.S.C. § 1651 (1988), and was not preempted from that jurisdiction  
20 by the authority of the National Labor Relations Board (the "NLRB")  
21 to determine issues concerning unfair labor practices under the  
22 National Labor Relations Act (the "NLRA"), 29 U.S.C. §§ 151-169  
23 (1988). We also conclude, however, that the district court and its

1 appointed officers did not adequately consider the availability of  
2 alternate means by which the barred IBT campaigners might  
3 communicate with employees of Yellow Freight who are members of the  
4 IBT.

5 We accordingly vacate and remand.

#### 6 Background

7 This appeal arises from an ongoing effort of the United States  
8 government to rid the IBT of organized crime influence. To that  
9 end, the United States commenced this litigation in the United  
10 States District Court for the Southern District of New York on June  
11 28, 1988 pursuant to the Racketeer Influenced and Corrupt  
12 Organizations Act of 1970 ("RICO"), 18 U.S.C. §§ 1961-1968 (1984  
13 & Supp. 1991), and the Consent Decree was entered on March 14, 1989.

14 The Consent Decree has generated considerable litigation in  
15 the Southern District and in this court. As we summarized its  
16 provisions in one of those prior cases:

17 Under the Consent Decree, three court officers  
18 are appointed to oversee certain aspects of  
19 the affairs of the IBT: an Election Officer,  
20 an Investigations Officer and an [Independent]  
21 Administrator. The Election Officer is to  
22 supervise the 1991 election of IBT officers.  
23 The Investigations Officer is granted  
24 authority to investigate corruption and  
25 prosecute disciplinary charges against any  
26 officer, member or employee of the IBT or any  
27 of its affiliates. The [Independent]  
28 Administrator oversees the implementation of  
29 the remedial provisions of the Consent Decree.  
30 For example, the [Independent] Administrator  
31 sits as an impartial decisionmaker in  
32 disciplinary cases brought by the  
33 Investigations Officer, conducts the

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disciplinary hearings and decides them. The [Independent] Administrator may also apply to the district court to facilitate implementation of the Consent Decree, and the other parties to the Decree may make such applications as well. Furthermore, the district court is vested with "exclusive jurisdiction" to decide any issues relating to the actions or authority of the [Independent] Administrator. And the IBT Constitution is amended to incorporate and conform with all of the terms of the Consent Decree.

United States v. IBT, 905 F.2d 610, 613 (2d Cir. 1990).

The fair and open conduct of the 1991 IBT election is a central purpose of the Consent Decree. The election encompasses three phases: (1) the rank-and-file secret ballot election of delegates to the 1991 IBT convention; (2) the election of trustees and nomination of national and regional officers at that convention, and (3) the subsequent rank-and-file secret ballot election of national and regional officers. The dispute at issue in this case arises from campaign activities occurring in the initial (delegate selection) phase of the 1991 election, but has significant implications for the third (election of national and regional officers) phase which is now in process.

Yellow Freight, many of whose employees are IBT members, has the following company policy:

There shall be no distribution of literature or solicitation by non-employees in working or non-working areas during working or non-working times. In other words, non-employees are not allowed on company property for the purpose of distributing literature or

1                   soliciting.

2                   This appeal involves two incidents at Yellow Freight  
3 facilities challenging that policy. The first occurred in Chicago  
4 Ridge, Illinois. The second occurred in Detroit, Michigan. In  
5 October 1990, two IBT members who are not Yellow Freight employees,  
6 Patrick N. Clement and Robert McGinnis, entered an unfenced parking  
7 lot at the Chicago Ridge facility. They were candidates for  
8 delegate from IBT Local 710 to the 1991 IBT convention. Yellow  
9 Freight officials asked them to leave and summoned the police, who  
10 also asked the men to leave, which they eventually did. They moved  
11 to a public sidewalk nearby and continued campaigning. In December  
12 1990, two IBT members who also are not Yellow Freight employees,  
13 Michael Hower and James McTaggart, campaigned for union office at  
14 the employee walk-through gate at the Detroit facility. They were  
15 required to leave Yellow Freight's premises by Yellow Freight  
16 security personnel.

17                   McGinnis, Clement, and Hower filed protests with the Election  
18 Officer, alleging that their exclusion by Yellow Freight violated  
19 IBT election rules promulgated pursuant to the Consent Decree (the  
20 "Election Rules"). See United States v. IBT, 931 F.2d 177, 184-90  
21 (2d Cir. 1991)(approving Election Rules with modification)  
22 Following separate investigations in Chicago Ridge and Detroit, the  
23 Election Officer issued two opinions. The first, dealing with the  
24 Clement/McGinnis protest, determined that Yellow Freight's policy



1 violated the Election Rules by completely barring Clement and  
2 McGinnis from the Chicago Ridge facility, because campaigning on the  
3 nearest public sidewalk would provide no meaningful access to the  
4 IBT drivers employed by Yellow Freight. The Election Officer  
5 therefore required limited access for Clement and McGinnis to Yellow  
6 Freight's property either at a parking lot across the street from  
7 Yellow Freight's terminal facilities or at an open area outside the  
8 terminal building, at Yellow Freight's option. The Election Officer  
9 upheld Yellow Freight's exclusion of Hewer from the Detroit  
10 facility, however, finding that Hewer could campaign effectively  
11 from a public sidewalk and grassy area adjacent to that facility.  
12 In making both determinations, the Election Officer restricted his  
13 consideration of the availability of alternative means of  
14 communication with employees of Yellow Freight to those available  
15 at the Chicago Ridge and Detroit terminals.

16 Yellow Freight appealed the determination regarding Clement  
17 and McGinnis to the Independent Administrator, and Hewer appealed  
18 the determination adverse to him. The Administrator affirmed both  
19 rulings.<sup>1</sup> In doing so, he invoked Article VIII, section 10(d) of  
20 the Election Rules, which provides that "no restrictions shall be  
21 placed upon candidates' or members' pre-existing rights to solicit  
22 support, distribute leaflets or literature, . . . or engage in  
23 similar activities on employer or Union premises," as well as  
24 Article XI, section 2, which includes among the remedies available

1 to the Election Officer in resolving a protest: "requiring or  
2 limiting access." The Administrator reasoned: "In general, the  
3 'pre-existing rights' to engage in campaign activity include any  
4 past practice or agreement among employers and the IBT, or its  
5 members, which allows for such campaign activity, and any  
6 substantive rights of union members to engage in such conduct as  
7 established by applicable law."

8 The Administrator found such a right of access for union  
9 campaign activity under applicable federal labor law. He further  
10 affirmed the rulings of the Election Officer that adequate  
11 alternative means of communication were available to Hower at the  
12 Detroit facility, but not to Clement and McGinnis at the Chicago  
13 terminal. In affirming the latter ruling, the Administrator  
14 considered almost exclusively alternative campaigning feasibilities  
15 at the Chicago Ridge terminal, except for the following conclusory  
16 statement: "the complainants did not have a reasonable alternative  
17 means of communication off company property with IBT members at this  
18 facility."

19 Yellow Freight made additional arguments to the Independent  
20 Administrator, and in a subsequent appeal to the district court,  
21 which parallel those pressed on this appeal. The district court  
22 affirmed the determination of the Administrator, and accordingly  
23 denied Yellow Freight's application for declaratory and injunctive  
24 relief directed against that determination.

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This appeal followed.

Discussion

Yellow Freight tenders four arguments on appeal:

- (1) the Consent Decree cannot validly be applied or enforced against Yellow Freight pursuant to either the All Writs Act or any other asserted authority, because Yellow Freight is not a party to the Consent Decree;
- (2) the Independent Administrator, the Election Officer, and the district court are denied jurisdiction over Yellow Freight by the NLRA, which vests exclusive jurisdiction over the conduct at issue in the NLRB;
- (3) even assuming jurisdiction, the determination herein is not in accordance with law; and
- (4) Yellow Freight should be awarded injunctive relief against any further exercise of authority over it by the Independent Administrator or Election Officer.

We address each in turn.

A. The Enforcement of the Consent Decree against Yellow Freight

The district court premised its assertion of authority over Yellow Freight upon the All Writs Act, which provides in pertinent part

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a) (1988).

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As the Supreme Court has stated:

The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.

United States v. New York Tel. Co., 434 U.S. 159, 174 (1977) (citations omitted); see also Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 863 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989); Benjamin v Malcolm, 803 F.2d 46, 53 (2d Cir. 1986), cert denied, 480 U.S. 910, (1987); In re Baldwin-United Corp., 770 F.2d 328, 338 (2d Cir. 1985).

Despite this authority, Yellow Freight contends that the Consent Decree cannot be enforced against it because Yellow Freight is not a party to the Consent Decree. Yellow Freight cites, in support of this view, our recent statement that:

It is true that, for purposes of interpretation, a consent decree is treated as a contract among the settling parties, Firefighters v City of Cleveland, 478 U.S. 501, 106 S. Ct. 3063, 92 L.Ed.2d 405 (1986), and that the terms of a consent decree cannot be enforced against those who are not parties to the settlement. Martin v. Wilks, 490 U.S. 755, 109 S. Ct. 2180, 104 L.Ed.2d 835 (1989).

IBT, 931 F.2d at 185.

We proceeded immediately to acknowledge, however, that "there are several exceptions to this general rule," id., and invoked one of those exceptions to impose upon IBT affiliates, not parties to

1 the Consent Decree, the election rules promulgated pursuant to the  
2 Consent Decree. See id. at 187. We have previously subjected other  
3 nonparties to the Consent Decree, see United States v. IBT, 907 F.2d  
4 277, 279-80 (2d Cir. 1990); IBT, 905 F.2d at 613 (2d Cir. 1990), in  
5 the former case invoking the All Writs Act to affirm an order  
6 restraining all members and affiliates of the IBT from "filing or  
7 taking any legal action that challenges, impedes, seeks review of  
8 or relief from, or seeks to prevent or delay any act of [the court-  
9 appointed officers] in any court or forum in any jurisdiction except  
10 [the Southern District of New York]." 907 F.2d at 279. This case,  
11 in any event, does not require us to determine whether the Consent  
12 Decree, of its own force, applies to Yellow Freight. Rather, the  
13 issue here is whether the All Writs Act authorized the district  
14 court and the officials acting pursuant to its authority to issue  
15 the order requiring Yellow Freight to permit campaigning on its  
16 property.

17 Nor is it the case that Martin v. Wilks, 490 U.S. 755 (1989),  
18 upon which Yellow Freight heavily relies, precludes the use of the  
19 All Writs Act against Yellow Freight. In Martin, white firemen sued  
20 the City of Birmingham, Alabama, alleging that they were being  
21 denied promotions in favor of less qualified black firemen in  
22 violation of applicable federal law. 490 U.S. at 758 The  
23 promotions of the black firemen occurred in implementation of two  
24 previously entered consent decrees. Id. at 758-60. The Supreme

1 Court ruled that, although the white firemen had not attempted to  
2 intervene in the litigation that led to the consent decrees, they  
3 were entitled to pursue their claims in the subsequent litigation.  
4 Id. at 761.

5 In other words, as we have stated, Martin "held that a failure  
6 to intervene does not bar a subsequent attempt to challenge actions  
7 taken pursuant to a consent decree." IBT, 931 F.2d at 184 n.2; see  
8 also Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct.  
9 2732, 2736-37 (1989) (similarly construing Martin). Accordingly,  
10 Martin does not purport to bar any impact of a consent decree upon  
11 a nonparty to the decree. Rather, it is addressed to the issue  
12 whether such a nonparty is entitled to its own "day in court" to  
13 challenge any such impact. See Martin, 490 U.S. at 762.

14 Yellow Freight also argues that a consent decree, as  
15 distinguished from a judgment resulting from litigation pursued to  
16 completion, cannot be enforced against a nonparty. Whatever the  
17 force of this argument, it is unavailing in this case because the  
18 district court has not purported to deem Yellow Freight bound by the  
19 Consent Decree. Instead, it has ruled that an order may issue under  
20 the All Writs Act to effectuate the Decree.

21 Yellow Freight further contends that the All Writs Act may be  
22 invoked only in certain categories of cases, and that this  
23 litigation fits none of those categories. We do not agree with  
24 Yellow Freight's characterization of this body of law. In any

1 event, Yellow Freight concedes that "the All Writs Act allows  
2 substantive injunctions against technical non-parties . . . [in at  
3 least some cases] to enforce a decree which adjudicates public  
4 rights." We believe that there is a strong public interest in the  
5 ongoing effort in this litigation to open the IBT to democratic  
6 processes and purge the union of organized crime influence.

7 Further, as a general rule:

8 [I]f jurisdiction over the subject matter of  
9 and the parties to litigation is properly  
10 acquired, the All Writs Act authorizes a  
11 federal court to protect that jurisdiction  
12 even though nonparties may be subject to the  
13 terms of the injunction.

14 IBT, 907 F 2d at 281.

15 The district court has subject matter jurisdiction of the  
16 underlying controversy pursuant to RICO. Yellow Freight does not  
17 contest personal jurisdiction, and in any event, "the All Writs Act  
18 requires no more than that the persons enjoined have the 'minimum  
19 contacts' that are constitutionally required under due process."  
20 IBT, 907 F.2d at 281 (quoting International Shoe Co. v. Washington,  
21 326 U S 310, 316, 66 S. Ct. 154, 158 (1945)).

22 Since the jurisdictional requirements are satisfied, the  
23 remaining issues, in the language of the All Writs Act, are whether  
24 the district court's order was "necessary or appropriate" to the  
25 implementation of the Consent Decree, and whether it was imposed  
26 agreeably "to the usages and principles of law." 28 U.S.C. § 1651  
27 (1988).

1           The district court articulated the need to provide access to  
2 Yellow Freight's Chicago Ridge terminal in the following terms:

3           [T]he crux of this Consent Decree is . . .  
4 free, open and fair secret ballot elections.  
5 In order for those elections to be meaningful,  
6 the IBT rank and file must be given a fair  
7 choice of candidates. But the reality of such  
8 an election is that incumbents may often hold  
9 distinct advantages in name recognition, and  
10 access to members of a local. Employers may  
11 have developed comfortable relationships with  
12 incumbent IBT officers, and may not be anxious  
13 for new, and perhaps more assertive union  
14 representatives. As a result, jurisdiction  
15 over employers such as Yellow Freight may be  
16 necessary "in aid of this Court's  
17 jurisdiction."

18           As an additional matter, . . . the  
19 Independent Administrator reasoned that  
20 employers such as Yellow Freight "have the  
21 power, if not restrained, to subvert the  
22 electoral process . . ." were they to bar IBT  
23 members from exercising their right to  
24 campaign on employers' premises . . . .  
25 Second, the Independent Administrator found  
26 that non-employee IBT members have a limited  
27 "pre-existing right" of access to non-employer  
28 premises as guaranteed by the National Labor  
29 Relations Act, ("NLRA") 29 U.S.C. § 158(a)(1),  
30 and its subsequent interpretations.

31 United States v. IBT, No. 88 Civ. 4486 (DNE), slip op. at 6-7  
32 (S.D.N.Y. Apr. 3, 1991).

33           We agree with this assessment of the need for limited access  
34 to employer premises where no feasible alternative for campaigning  
35 by candidates for union office is available. We therefore conclude  
36 that the order on appeal was "necessary or appropriate in aid of"  
37 the district court's jurisdiction over the underlying litigation in



1 which the Consent Decree was entered, and turn to the issue whether  
2 it was "agreeable to the usages and principles of law."

3 We first consider whether the procedure made available to  
4 Yellow Freight to contest the asserted access was "agreeable to the  
5 usages and principles of law," bearing in mind the mandate of Martin  
6 v Wilks that Yellow Freight have its "day in court" on the issue.  
7 See 490 U.S. at 762. Yellow Freight contends that it was denied  
8 "due process," and thereby (a fortiori) traditional legal  
9 protections, because it was subjected to a consent decree to which  
10 it was not a party. But, as we have pointed out, the district court  
11 did not rule that the Consent Decree, of its own force, bound Yellow  
12 Freight. It acted pursuant to the All Writs Act, and we therefore  
13 turn our attention to the particular procedures that have been  
14 applied herein in adjudicating Yellow Freight's claimed entitlement  
15 to bar Clement and McGinnis from the Chicago Ridge terminal.

16 Yellow Freight's position has been considered by both the  
17 Election Officer and the Independent Administrator, and reviewed,  
18 now, by two federal courts. The Election Officer, a former general  
19 counsel of the United Mine Workers, inspected both sites at issue,  
20 accepted submissions from the parties, wrote letter opinions that  
21 addressed the factual and legal contentions of the parties, and  
22 decided the controversy regarding the Detroit terminal in favor of  
23 Yellow Freight, although ruling against Yellow Freight regarding the  
24 Chicago Ridge terminal. The Independent Administrator, a former

1 federal district judge, held a hearing at which testimony was  
2 presented, received prehearing legal submissions from the parties,  
3 and solicited posthearing submissions. He issued a detailed  
4 decision that carefully addressed the legal contentions of the  
5 parties, and made de novo findings of fact and conclusions of law.

6 Yellow Freight then availed itself of its right to appeal to  
7 the district court.<sup>2</sup> The district court held a hearing,  
8 incorporated the record developed by the IBT trustees at Yellow  
9 Freight's request, and issued a memorandum and order that again  
10 addressed the issues tendered by the parties. Now, of course,  
11 Yellow Freight has taken this appeal, in which the customary  
12 appellate procedures of federal circuit courts have been applied.  
13 Application may be made, by certiorari, for further review by the  
14 Supreme Court.

15 It is difficult to imagine additional or different procedures  
16 that would accord Yellow Freight a significantly enhanced  
17 opportunity to present its position concerning this controversy.  
18 Certainly, furthermore, these procedures are at least generally  
19 comparable to those provided by the NLRA for resolution by the NLRB  
20 and federal courts of unfair labor practice claims. See generally  
21 29 U.S.C. § 160 (1988). We accordingly conclude that Yellow Freight  
22 has been accorded adequate procedural protections to satisfy the All  
23 Writs Act. Cf. United States v. IBT, No. 91-6052, slip op. 6769,  
24 6779-81 (2d Cir. Aug. 6, 1991) (procedures utilized in disciplinary

1 actions pursuant to Consent Decree satisfy due process).

2 Further, the provision of access to the Chicago Ridge terminal  
3 is certainly, as a substantive matter, "agreeable to the usages and  
4 principles of law" within the meaning of the All Writs Act. There  
5 is a thoroughly developed body of federal labor law regarding this  
6 issue. Indeed, Yellow Freight contends that the merits of the issue  
7 are definitively addressed by the NLRA and consigned thereby to the  
8 exclusive jurisdiction of the NLRB. We turn to that contention.

9 B. NLRB Preemption.

10 Yellow Freight contends that the conduct at issue in this case  
11 is directly regulated by sections 7 and 8(a)(1) of the NLRA, 29  
12 U.S.C. §§ 157 and 158(a)(1) (1988), and accordingly that the NLRB  
13 has exclusive jurisdiction with respect to it. In this connection,  
14 San Diego Building Trades Council v Garmon, 359 U.S. 236 (1959),  
15 a case involving attempted state regulation of conduct constituting  
16 an NLRA unfair labor practice, stated that "[w]hen an activity is  
17 arguably subject to § 7 or § 8 of the [NLRA], the States as well as  
18 the federal courts must defer to the exclusive competence of the  
19 [NLRB] if the danger of state interference with national policy is  
20 to be averted " Id at 245.

21 This rule, however, is not uniformly applied even as to state  
22 regulation. See, e.g., Sears Roebuck & Co. v San Diego County  
23 Council of Carpenters, 436 U.S. 180, 182 & 207-08 (1978)  
24 (enforcement of state trespass laws by state court allowed as to

1 "picketing which is arguably - but not definitely - prohibited or  
2 protected by federal law"). Furthermore, where federal laws and  
3 policies other than the NLRA are implicated, the Garmon rule is  
4 frequently considered inapplicable. See, e.g., Breininger v. Sheet  
5 Metal Workers Int'l Ass'n Local Union No. 6, 110 S. Ct. 424, 429-35  
6 (1989) (district court had jurisdiction to hear fair representation  
7 claim although union's breach of duty of fair representation might  
8 violate § 8(b) of the NLRA); International Bhd of Boilermakers v.  
9 Hardeman, 401 U.S. 233, 237-39, 91 S. Ct. 609, 612-14  
10 (1971) (district court had jurisdiction to hear claim that unlawful  
11 expulsion from union violated § 101(a)(5) of Labor-Management  
12 Reporting and Disclosure Act, 29 U.S.C. § 411(a)(5) (1988), although  
13 expulsion was arguably an unfair labor practice violative of §§  
14 8(b)(1)(A) and 8(b)(2) of NLRA); American Postal Workers Union v.  
15 United States Postal Service, 766 F.2d 715, 720 (2d Cir.  
16 1985) (district court and NLRB have concurrent jurisdiction over  
17 suits to enforce labor contracts, "even if the conduct involved  
18 might entail an unfair labor practice"), cert denied, 475 U.S. 1046  
19 (1986); United States v. Boffa, 688 F.2d 919, 931 (3d Cir. 1982) (in  
20 RICO prosecution alleging mail fraud predicates and substantive mail  
21 fraud violations, prohibition of defendants' conduct by § 8 of NLRA  
22 would not preclude "enforcement of a federal statute that  
23 independently proscribes that conduct"), cert. denied, 460 U.S. 1022  
24 (1983). Here, although the appointed officials are directly

1 applying the NLRA rather than some separate body of law,  
2 considerations that we have previously recognized with respect to  
3 the Consent Decree argue compellingly for a ruling against exclusive  
4 NLRB jurisdiction.

5 We have affirmed an injunction prohibiting all members and  
6 affiliates of the IBT from initiating any legal proceeding relating  
7 to the Consent Decree "in any court or forum in any jurisdiction"  
8 (emphasis added) other than the district court from which this  
9 appeal was taken, IBT, 907 F.2d at 279, "as a necessary means of  
10 protecting the district court's jurisdiction over implementation of  
11 the Consent Decree." Id. at 280. We did so to avoid inconsistent  
12 interpretations of, and judgments regarding, the Consent Decree, and  
13 also to avoid repetitive litigation that would distract the  
14 government and the court-appointed officers from implementation of  
15 the Consent Decree. Id. It would be completely disruptive to rule  
16 that despite this arrangement, the district court has no authority  
17 to address any matter arising under the Consent Decree that might  
18 arguably be deemed an unfair labor practice under the NLRA.<sup>3</sup>

19 As we have stated, "a district judge can legitimately assert  
20 comprehensive control over complex litigation," IBT, 907 F.2d at  
21 281, and this rule is properly invoked in this case. See id.; cf  
22 Berger v Heckler, 771 F.2d 1556, 1576 n.32 (2d Cir. 1985) ("'[f]ew  
23 persons are in a better position to understand the meaning of a  
24 consent decree than the district judge who oversaw and approved

1 it'") (quoting Brown v. Neeb, 644 F.2d 551, 558 n.12 (6th Cir  
2 1981)). We conclude that the NLRB does not have exclusive  
3 jurisdiction over the conduct at issue on this appeal, and that the  
4 district court and its appointed officers accordingly did not err  
5 in addressing it. Finally, by requiring strict adherence to the  
6 requirements of federal labor law in the enforcement of the Consent  
7 Decree, see infra, we preclude that "interference with national  
8 policy" that was the focal concern in Garmon. See 359 U.S. at 245.

9 C. The Merits.<sup>4</sup>

10 Finally, Yellow Freight contends that the substantive  
11 determination made by the Election Officer as to the Chicago Ridge  
12 terminal, and affirmed by the Independent Administrator and the  
13 district court, is incorrect as a matter of law.<sup>5</sup> As indicated  
14 supra, the claims of Clement and McGinnis for access to Yellow  
15 Freight's property are premised upon the provision in Article VIII,  
16 section 10(d) of the Election Rules that safeguards "candidates' or  
17 members' pre-existing rights to . . . [campaign] . . . on employer  
18 or Union premises." The Independent Administrator properly  
19 construed this provision to invoke both "past practice or agreement  
20 among employers and the IBT, . . . and any substantive rights of  
21 union members to engage in such conduct as established by applicable  
22 law." The pertinent issue on this appeal is the content of the  
23 "applicable law," since no preexisting practice or agreement has  
24 been asserted to be pertinent to this controversy. For the reasons

1 that follow, we conclude that the determination on appeal did not  
2 adequately consider the availability of alternate means of  
3 communicating with Yellow Freight's Chicago Ridge employees at  
4 locations other than the worksite, and that the case must  
5 accordingly be remanded for reconsideration by the district court  
6 and the court-appointed officers.

7 The landmark case in this area is NLRB v. Babcock & Wilcox  
8 Co., 351 U S. 105 (1956), which ruled that:

9 [A]n employer may validly post his property  
10 against nonemployee distribution of union  
11 literature if reasonable efforts by the union  
12 through other available channels of  
13 communication will enable it to reach the  
14 employee with its message and if the  
15 employer's notice or order does not  
16 discriminate against the union by allowing  
17 other distribution.

18 Id. at 112.

19 Explaining the balance to be struck, the Court went on to say:

20 This is not a problem of always open or  
21 always closed doors for union organization on  
22 company property. Organization rights are  
23 granted to workers by the same authority, the  
24 National Government, that preserves property  
25 rights. Accommodation between the two must  
26 be obtained with as little destruction of one  
27 as is consistent with the maintenance of the  
28 other. The employer may not affirmatively  
29 interfere with organization; the union may not  
30 always insist that the employer aid  
31 organization. But when the inaccessibility  
32 of employees makes ineffective the reasonable  
33 attempts by nonemployees to communicate with  
34 them through the usual channels, the right to  
35 exclude from property has been required to  
36 yield to the extent needed to permit  
37 communication of information on the right to

1                   organize.

2           Id. (emphasis added).

3                   Babcock and Wilcox involved efforts by unions to organize the  
4           pertinent employees, rather than intraunion elections. See id. at  
5           106. The issue, however, was whether the employers had violated  
6           section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1)(1988), by  
7           impeding their employees' section 7 "right to self-organization "  
8           29 U.S.C. § 157(1988). It has since been made clear that intraunion  
9           campaigning activities implicate employees' section 7 right "to  
10          form, join, or assist labor organizations," or to "refrain"  
11          therefrom, id., and that unlawful interference with that right is  
12          also a section 8(a)(1) unfair labor practice. See NLRB v Magnavox  
13          Co., 415 U.S. 322, 324 (1974); District Lodge 91, Int'l Ass'n of  
14          Machinists v. NLRB, 814 F.2d 876, 879 (2d Cir. 1987).

15                   Babcock and Wilcox ruled that "if the location of a plant and  
16          the living quarters of the employees place the employees beyond the  
17          reach of reasonable union efforts to communicate with them, the  
18          employer must allow the union to approach his employees on his  
19          property " 351 U.S. at 113. On the other hand, the NLRA "does not  
20          require that the employer permit the use of its facilities for  
21          organization when other means are readily available." Id. at 114.  
22          As the NLRB has summarized:

23                               Babcock thus holds that where persons other  
24                               than employees of an employer that owns or  
25                               controls the property in question are  
26                               concerned, "alternative means" must always be  
27                               considered: a property owner who has closed



1 his property to nonemployee communications,  
2 on a nondiscriminatory basis,<sup>6</sup> cannot be  
3 required to grant access where reasonable  
4 alternative means exist, but in the absence  
5 of such means the property right must yield  
6 to the extent necessary to permit the  
7 organizers to communicate with the employees.

8 Jean Country, 291 N.L.R.B. 11, 12 (1988) (emphasis partially added).

9 We have most recently considered this issue in National  
10 Maritime Union v. NLRB, 867 F.2d 767 (2d Cir. 1989), where we  
11 affirmed an NLRB determination that an employer had not committed  
12 an unfair labor practice by barring union organizers from its boats  
13 because "the record [was] inadequate to establish that home visits  
14 were unreasonable," and the union "had the burden of proving that  
15 alternative means of communication were unreasonable." 867 F.2d at  
16 775.

17 The problem with the determination on appeal here is that  
18 virtually no consideration was given to alternative ways of  
19 communicating with the Chicago Ridge employees of Yellow Freight  
20 away from the jobsite. Both the Election Officer and the  
21 Independent Administrator recognized in general terms the need to  
22 consider alternative means of communication, but specific attention  
23 was accorded only to alternatives immediately adjacent to the  
24 Chicago Ridge jobsite. The district court affirmed on the basis of  
25 the determination by the Independent Administrator. In view of the  
26 applicable law, this is clearly inadequate, and we must therefore  
27 vacate and remand.

1           In doing so, we note that the consideration of this issue on  
2 remand may take into account all pertinent matters, including time  
3 constraints imposed by the impending election schedule and cost  
4 factors. See National Maritime Union, 867 F.2d at 774. We note  
5 also that home visits were considered a plausible alternative in  
6 National Maritime Union because the union organizers were provided  
7 by the employer with the names and addresses of the employees whom  
8 the organizers sought to approach. See id. at 769. In sum, we do  
9 not seek to pose undue difficulties for the district court and the  
10 court-appointed officers in dealing practically and flexibly with  
11 the significant burden of overseeing the ongoing IBT election, but  
12 we cannot ratify decisions made in that effort which do not comport  
13 with the requirements of applicable law.

14           We note, finally, that if Yellow Freight should on remand be  
15 validly compelled to provide access to its Chicago Ridge property  
16 in connection with the 1991 IBT election, such compelled access  
17 would not inhibit Yellow Freight's continued entitlement to enforce  
18 its "no solicitation" policy in the future, in the absence of  
19 judicial direction to the contrary. Yellow Freight would not in  
20 such circumstances have voluntarily abandoned its policy or  
21 willingly established any exception to it. Cf. NLRB v. Southern Md.  
22 Hosp Ctr., 916 F.2d 932, 937 (4th Cir. 1990) ("[c]laims of  
23 disparate enforcement inherently require a finding that the employer  
24 treated similar conduct differently") (emphasis added); Restaurant

1 Corp. of Am. v. NLRB, 827 F.2d 799, 807 (D.C. Cir. 1987) (same); id.  
2 at 812 n.3 (Bork, J., dissenting in part and concurring in part)  
3 (same). Accordingly, such a ruling would establish only that Yellow  
4 Freight may on occasion be required to provide access to its  
5 property in furtherance of the Consent Decree, despite its "no  
6 solicitation" policy. Yellow Freight would continue to be entitled  
7 to limit access to its property pursuant to the "no solicitation"  
8 policy, subject only to the general limits of federal labor law.  
9 See Babcock & Wilcox, 351 U.S. at 112.

10 D. Injunctive Relief.

11 Yellow Freight asks that we direct the district court to  
12 permanently enjoin the Election Officer and Administrator "not to  
13 assert authority or jurisdiction over Yellow Freight under color of  
14 the [Consent Decree] or Election Rules, not to process any protest  
15 or grievance against any act by Yellow Freight, and not to seek to  
16 require Yellow Freight to respond . . . to . . . any protest or  
17 grievance arising [thereunder]." As is obvious from the foregoing,  
18 we will not provide such relief, since we deem Yellow Freight  
19 amenable to the authority of the district court and the court-  
20 appointed officers as to the dispute on appeal, pursuant to the All  
21 Writs Act, and do not consider the authority of the district court  
22 and its officers to deal with that dispute to be preempted by the  
23 NLRB Our ruling is limited to assuring that the correct legal  
24 standards are applied in the resolution of this controversy.

Conclusion

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The order of the district court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion. Yellow Freight's application for injunctive relief is denied. The parties shall bear their own costs.

## FOOTNOTES

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2           1. Hewer has not appealed from this determination, so the  
3 balance of the proceedings in this case, including this appeal, are  
4 addressed only to the Chicago Ridge controversy.

5           2. Throughout these proceedings, the appeal procedures made  
6 available by the Consent Decree to the parties thereto have been  
7 extended to Yellow Freight. Any failure thus to provide an  
8 opportunity to Yellow Freight to litigate its claims would run afoul  
9 of Martin, 490 U.S. at 761-62.

10           3. As Judge Winter's dissent suggests, the normally glacial  
11 pace of NLRB proceedings regarding unfair labor practice is ill  
12 suited to the regulation of ongoing IBT elections envisioned by the  
13 Consent Decree. Our jurisdictional ruling, however, is not premised  
14 upon this consideration.

15           4. Between the time when this opinion was originally issued  
16 on October 29, 1991 and its amendment on February 14, 1992, the  
17 Supreme Court decided Lechmere, Inc. v. NLRB, 60 U.S.L.W. 4415 (U.S.  
18 Jan. 27, 1992), significantly revising the law hereinafter addressed  
19 in section C of this Discussion. Because, on remand, this case has  
20 been dismissed as moot in view of the completion of the 1991  
21 election of IBT officers, we deem it unnecessary to amend section

1 C of this Discussion, but append this footnote simply to signal the  
2 Lechmere development of the law as of the amendment date of this  
3 opinion.

4 5. We are unpersuaded by the argument of counsel for Clement  
5 and McGinnis that Yellow Freight has waived its right to contest the  
6 merits on appeal. The Election Officer, the Independent  
7 Administrator, and the district court all addressed the merits, and  
8 Yellow Freight made clear that it contested those rulings. Yellow  
9 Freight placed its primary emphasis in the district court upon other  
10 arguments, however, in view of the court's expressed desires  
11 concerning the issues to be addressed at the hearing that resulted  
12 in the ruling on appeal.

13 6. The Election Officer's letter opinion regarding Chicago  
14 Ridge observed that Yellow Freight has permitted some solicitation  
15 during the Christmas season by United Way in one of the areas  
16 alternatively ordered to be made available to Clement and McGinnis,  
17 but the issue of discriminatory access was not otherwise pursued.

1 WINTER, Circuit Judge, dissenting:

2 I respectfully dissent.

3 I do not agree: (1) that the Consent Decree between the IBT  
4 and the government purports to vest jurisdiction in the court-  
5 appointed Administrator and reviewing federal courts to adjudicate  
6 unfair labor practice charges brought by two IBT members against an  
7 employer under the National Labor Relations Act ("NLRA");<sup>1</sup> (11)  
8 that, if the Decree so empowers the Administrator, it is valid; or  
9 (111) that the adjudication in question is authorized by the All  
10 Writs Act.

11 I

12 With regard to (1), the meaning of the Consent Decree, Article  
13 VIII, Section 10(d), provides that "No restrictions be placed upon  
14 candidates' or members' pre-existing rights to solicit, support,  
15 distribute leaflets or literature . . . or engage in general  
16 activities on employer or union premises." Giving this language  
17 its ordinary meaning in the present context, there is no basis for  
18 finding that Yellow Freight violated its terms. The words "pre-  
19 existing rights" seem no more than a reference to rights of access  
20 previously recognized by employers through contract or past  
21 practice or decreed by enforcement orders of the National Labor  
22 Relations Board ("NLRB"). This reading accords with the language  
23 used in the Consent Decree and limits the rights of access  
24 conferred by the Decree to rights enjoyed by the IBT that the IBT  
25 may lawfully confer upon IBT members.<sup>2</sup> However, under that  
26 reading, Yellow Freight did not violate the Consent Decree. Yellow

1 Freight's no-solicitation rule was in effect when the Consent  
2 Decree was signed. Clement and McGinnis thus had no pre-existing  
3 right of access to Yellow Freight's premises.

4 II

5 However, with regard to (11), my colleagues read the language  
6 differently, based upon the Administrator's interpretation of the  
7 words "pre-existing rights" as including "all substantive rights of  
8 union members . . . under established law." Under this reading,  
9 the Decree purports to vest jurisdiction in the Administrator to  
10 adjudicate non-employees' claims of access to Yellow Freight's  
11 premises under the NLRA

12 Putting aside the All Writs Act for the moment, it is a  
13 mystery to me where IBT and the government found the authority to  
14 empower the Administrator to adjudicate unfair labor practice  
15 charges involving non-parties to the Decree. This issue is not  
16 directly addressed in my colleagues' opinion. In fact, Congress  
17 has designated exclusive procedures for the adjudication of unfair  
18 labor practice claims I know of no theory under which the IBT and  
19 the government had the power, essentially legislative in nature, to  
20 override Congress's explicit direction that Clement and McGinnis  
21 file their unfair labor practice charges with the NLRB.

22 Not surprisingly, I also do not agree that the IBT and the  
23 government had the power to erase Yellow Freight's right to  
24 litigate the unfair labor practice charges before the NLRB. Nor do  
25 I agree that allowing the IBT and the government to accomplish this  
26 legislative act was not a denial of due process to Yellow Freight.



1 Yellow Freight did have hearings on the unfair labor practice  
2 charges before the Administrator and the district court. However,  
3 Yellow Freight was not accorded due process when the Consent Decree  
4 deprived it of the right to litigate unfair labor practice charges  
5 before the NLRB rather than before the Administrator. Yellow  
6 Freight had neither notice nor a hearing in the RICO proceeding as  
7 to the potential loss of its rights under federal law. If the IBT  
8 and the government had the power to erase Yellow Freight's rights,  
9 then Yellow Freight should have been made a party defendant in the  
10 RICO action and allowed to litigate to final judgment the issue of  
11 whether the loss of such rights could be granted as relief.

### 12 III

13 This brings me to (111), namely, the All Writs Act issue. I  
14 agree with my colleagues that, in contrast to the Consent Decree,  
15 the All Writs Act may confer jurisdiction over third parties where  
16 necessary to implement otherwise valid provisions of the Decree.  
17 My colleagues reason that the proceedings against Yellow Freight  
18 are necessary to avoid inconsistent interpretations of that Decree.  
19 If the Consent Decree merely incorporates pertinent provisions of  
20 the NLRA, however, then the only inconsistencies that might arise  
21 would be between the Administrator's interpretations of the NLRA  
22 and the NLRB's interpretations of the same statute. The  
23 apprehension that the Administrator may disagree with the NLRB as  
24 to the meaning of the NLRA, and the tacit but yet inexorable  
25 assumption that the Administrator's view should prevail, merely  
26 highlight the illegitimacy of viewing the Consent Decree as vesting

1 the Administrator with jurisdiction over unfair labor practices.  
2 It goes without saying that the All Writs Act does not authorize  
3 the displacement of Congress's legislative scheme for the  
4 adjudication of unfair labor practices.

5       However, my colleagues' discussion of the preemption issue  
6 implies that the Consent Decree created independent rights of  
7 access, i.e., not based on the NLRA, by IBT candidates to  
8 employers' property. Their discussion of the preemption issue  
9 relies exclusively on cases in which claims based on other bodies  
10 of law, e.g., common law trespass claims or "where federal laws and  
11 policies other than the NLRA are implicated," overlap unfair labor  
12 practice claims and are validly adjudicated by tribunals other than  
13 the NLRB. Those cases are neither analogous nor relevant to the  
14 instant matter unless the Consent Decree is viewed as creating a  
15 new body of law to be enforced by third parties against other third  
16 parties for purposes of the IBT election, another legislative act  
17 the IBT and the government had no power to accomplish. Moreover,  
18 in their discussion of the All Writs Act, they emphasize the  
19 "public interest" in democratizing the IBT and purging it of  
20 organized crime influence. Again, this implies that the Decree  
21 embodies legal commands beyond those found in present labor law.  
22 Whatever the implications of the opinion, however, the content of  
23 these new legal commands is not spelled out. Indeed, the  
24 Administrator's view of his powers was limited to enforcing  
25 "substantive rights . . . under established law," (emphasis added),  
26 and my colleagues purport to apply only standards derived from the

1 NLRA.

2 I know of no precedent for this expansive use of the All Writs  
3 Act. United States v. IBT, 907 F.2d 277 (2d Cir. 1990), held that  
4 local unions, who were not parties to the Consent Decree but are  
5 constituent bodies of the IBT, had to litigate issues concerning  
6 the meaning of that Consent Decree in the Southern District of New  
7 York. This essentially housekeeping decision dealt solely with  
8 inconsistencies concerning the meaning of the Consent Decree, not  
9 disagreements over the meaning of a federal statute, such as the  
10 NLRA In Yonkers Racing Corp v City of Yonkers, 858 F.2d 855 (2d  
11 Cir. 1988), cert denied, 489 U S 1077 (1989), the City of  
12 Yonkers, pursuant to a consent decree entered in the Southern  
13 District, initiated condemnation proceedings in state court.  
14 Subsequently, the property owners brought actions in state courts  
15 to invalidate the proposed condemnations. We affirmed an order  
16 directing the City to remove the state court actions. Our  
17 principal concern was again the effect of inconsistent judgments  
18 with respect to the meaning of a consent decree. A secondary  
19 concern was the fear that the City of Yonkers would not vigorously  
20 defend the invalidation proceedings. Finally, in In re Baldwin-  
21 United Corporation, 770 F.2d 328 (2d Cir. 1985), we upheld an  
22 injunction prohibiting states from filing civil actions against  
23 parties who were defendants in a multi-district securities  
24 litigation. We did so in order to effectuate a settlement  
25 agreement in which the plaintiffs had waived their state law claims  
26 and to ensure that states could not disrupt the agreement by

1 asserting claims derivative of the settled claims. See id. at 336-  
2 37.

3 By contrast, the proceeding against Yellow Freight has nothing  
4 to do with either the risk of inconsistent decisions concerning the  
5 meaning of the Consent Decree, collusive actions by a party to the  
6 Decree, or a need to avoid derivative, duplicative actions that  
7 would unravel a class action settlement.

#### 8 IV

9 I believe that Clement and McGinnis should have been required  
10 to file unfair labor practice charges with the NLRB. With the  
11 support of the Administrator, they then could have specifically  
12 requested the General Counsel to seek preliminary relief under  
13 Section 10(j). 29 U.S.C. § 160(j).

14 It may be that my colleagues are influenced by the fact that  
15 our court records create what might charitably be called a  
16 reasonable doubt as to the capacity of the NLRB to act with  
17 anything but, again speaking charitably, glacial speed in  
18 adjudicating unfair labor practices. See, e.g., NLRB v. Oakes  
19 Machine Corp., 897 F.2d 84 (2d Cir. 1990); National Maritime Union  
20 of America, AFL-CIO v. NLRB, 867 F.2d 767 (2d Cir. 1989).  
21 Nevertheless, there is litigation pending in our court indicating  
22 that Section 10(j) actions for injunctions are not unknown. NLRB  
23 v. Domsey Trading Corp., appeal docketed, No. 91-6203 (2d Cir.  
24 Aug 23, 1991). In any event, the sorry performance of the NLRB is  
25 not for us to correct by interpretation of consent decrees between  
26 unions and the government.

1 I thus regard my colleagues' decision as a profoundly  
2 troubling precedent. The reach of the decision is long but the  
3 theories on which it is based seem ill-defined and open-ended. It  
4 offers no limits to the power of parties to consent decrees to  
5 alter radically the substantive legal rights of non-parties by  
6 invoking the "public interest" and the All Writs Act. The best  
7 that can be said is that their opinion does so in the congenial  
8 factual setting of a corrupt and undemocratic union. I hope that  
9 all further references to this decision will be accompanied by the  
10 words, "That case is easily distinguishable; it involved the  
11 Teamsters "

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FOOTNOTES

1. Amendments to the majority opinion subsequent to receipt of the galleys from West Publishing Co. have stricken references to the consent decree as a source of authority for the majority's decision. In part, therefore, my dissent now appears to be responding to arguments not raised by my colleagues. I am not altering the substance of the dissent for two reasons. First, such an alteration cannot be accomplished before the publishing of this decision in the hardbound volume of the Federal Reporter, Second Series. Second, because I reject the view that the All Writs Act authorizes the actions of the district court, it is not inappropriate for me to address the question of whether the consent decree may justify those actions.

I will make one further observation. The basis for the view that the NLRA, as administered by the court officers and district court, governs the issues in the instant matter, is based upon the language of Article Eight, Section 10(d), of the consent decree. If the actions of the district court are actually justified by the All Writs Act, then there is no reason to hold that the NLRA governs the employees' rights to hand out leaflets. The right to engage in such distribution should be determined on the basis of what is necessary to bring about the fair election contemplated by the Decree, whether or not such a right exists under the NLRA.

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2. I do not mean to suggest that a bright line defines the "pre-existing rights" incorporated by the Consent Decree. Indeed, I can imagine a host of definitional problems arising from the provision. Such problems, however, are not a reason to give the Decree an expansive reading.