

OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, NW
Washington, DC 20001
(202) 624-8778
1-800-828-6496
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Michael H. Holland
Election Officer

November 2, 1991

Chicago Office:
% Cornfield and Feldman
343 South Dearborn Street
Chicago, IL 60604
(312) 922-2800

VIA FACSIMILE WHERE NOTED AND U.S. EXPRESS

Ron Carey
c/o Susan Davis, Esquire
Cohen, Weiss & Simon
330 West 42nd Street
New York, NY 10036-6901
(Fax: 212-695-5436)

UPS
17940 Inglewood Drive
Middleburg Heights, OH 44130

C. Sam Theodus
c/o IBT Local Union 407
3150 Chester Avenue
Cleveland, OH 44114
(Fax: 216-391-7353)

Re: Election Office Case No. P-1026-LU407-CLE

Gentlemen:

A protest was filed on behalf of the Committee to Elect Ron Carey pursuant to the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*"). The protest claims that Ron Carey and Sam Theodus, nominated candidates for General President and Vice President, respectively, and several of their supporters were prevented by United Parcel Service ("UPS") from campaigning in the parking lot of its facility in Middleburg Heights, Ohio. A violation of Article VIII, § 10(d) of the *Rules* is claimed. To remedy such violation, the protest seeks a mailing on behalf of the Ron Carey Slate to all IBT members employed at the facility at the expense of UPS.

Article VIII, § 10(d) of the *Rules* provides that no restrictions shall be placed on members' pre-existing rights to engage in campaign activities on employer premises. For IBT members not employed by a particular employer, where the location of the employer's facility prevents face-to face contact with the IBT members who work there, pre-existing rights consist of the right to campaign in non-work areas outside of the plant, terminal or other facility in locations generally open to the public such as parking lots. See Advisory Regarding Political Rights, issued December 28, 1990. Further, UPS agreed in December of 1990 to permit IBT members not employed by it or at the particular UPS facility to campaign on the premises of all UPS facilities in non-work areas outside of the terminal and open to the public such as unenclosed, unrestricted parking lots.

Ron Carey
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This protest was investigated by Regional Coordinator Joyce Goldstein. Neither Mr. Carey nor Mr. Theodus are employed at the Middleburg Heights UPS facility. On October 29, 1991, they arrived at the facility and attempted to engage in campaign activities in the parking lot at the facility, specifically in an area adjacent to—but in front of—the security trailer by which employees must pass prior to entering the facility building. They remained about ten or fifteen minutes when they were told to leave by security personnel. It was suggested that they attempt to campaign in a grassy area between the street on which the facility is located and the start of the parking lot. Richard Nawrocki, Jr., a District Loss Prevention supervisory employee, acknowledged to the Regional Coordinator that campaigning in this area would be dangerous.

The Regional Coordinator personally visited the facility. The Middleburg Heights UPS facility is located in an industrial park. The parking lot for that facility is open and unenclosed. Although there is a fence between the parking lot and the facility proper, the parking lot itself is unfenced. There are two entrances to the parking lot; both are used by UPS customers and employees. While a few parking slots close to the facility building are marked for customer parking, customers are not prevented from parking elsewhere in the lot. Further, there is no barrier of any type separating the "customer" parking slots from the remaining parking areas of the lot.

There are two entrances to the facility from the parking lot; the entrances are adjacent to each other. One entrance is for customer use. The second is for employees. Prior to the employee entrance, and in the parking lot itself, there is a small security building or trailer. Messrs. Carey, Theodus and their supporters were standing in front of this security kiosk or trailer—in an area of the parking lot which would require members to pass them prior to the time such members reached the security trailer—when they were asked to leave.

The parking lot at the Middleburg Heights UPS facility is a classic unenclosed, unrestricted parking lot. UPS has previously agreed, consistent with the Election Officer's position, to permit all IBT members—whether or not employed by it—to engage in campaign activities on such types of parking lots. Accordingly, UPS' actions on October 29, 1991 violated its own agreement.

Further, even absent such agreement, the Election Officer would require UPS to permit IBT members not employed by it access to the parking lot at the Middleburg Heights facility for campaign purposes. There is no other area at or near the facility, other than UPS' property, where IBT members not employed at that facility can contact IBT members so employed. UPS concedes as much; UPS concedes that the public grassy area between the roadway and the parking lot is unsafe.

Outside of worksite contact, there are no alternate means available for IBT members not employed at the Middleburg Heights facility to communicate about the 1991 International Union officer election with IBT members employed at that facility. The ballots for the 1991 International Union election will be mailed on or about November 9, 1991. There is thus insufficient time for home visits or other types of face-to-face contact away from the work site. Face-to-face contact is the preferred method of communication. See Maritime Union v. NLRB, 867 F. 2d 767 (2nd Cir., 1989).

UPS has demonstrated no interest in maintaining security or its private property rights with respect to this parking lot. The lot is open; anyone can gain access. No security or other employee checks the identity of persons entering the lot. The Regional Coordinator, for instance, drove into and parked in the lot without being impeded or questioned. Accordingly, even if UPS had not previously agreed to allow campaigning in parking lots such as the parking lot at the Middleburg Heights facility, the Election Officer would order that IBT members be given access to that parking lot for campaign purposes.

The remedy sought by the protest for UPS' conduct in preventing Messrs. Carey, Theodus and their supporters from campaigning in the parking lot is, however, not warranted. The Election Officer investigation has determined that UPS, however improperly, has treated all International Union officer candidates and all IBT members alike. UPS has ejected other candidates for International Union office from its parking lot in Middleburg Heights.

Further, Mr. Theodus lives in Cleveland, Ohio; Middleburg Heights is a suburb of Cleveland. Thus, even given the short period until the 1991 International Union officer election ballots are mailed, Mr. Theodus will have an opportunity to return to this site. Further, his supporters, as well as Mr. Carey's supporters and the supporters of other International Union officer candidates, will be permitted by the terms of this decision to have access to the parking lot at the Middleburg Heights facility for campaign purposes.¹

In accordance with the foregoing, UPS is ordered to cease and desist from denying access to its parking lot at its Middleburg Heights facility for campaigning purposes to IBT members, whether or not such IBT members are employed by it or employed at that facility.

¹ It should also be noted that the decision of the Election Officer has been rendered but four days after the protest was filed and is being distributed by facsimile transmission.

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If any interested party is not satisfied with this determination, they may request a hearing before the Independent Administrator within twenty-four (24) hours of their receipt of this letter. 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. Requests for a hearing shall be made in writing, and shall be served on Independent Administrator Frederick B. Lacey at LeBoeuf, Lamb, Leiby & MacRae, One Gateway Center, Newark, New Jersey 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.

Very truly yours,



Michael H. Holland

MHH/ca

cc: Frederick B. Lacey, Independent Administrator

Joyce Goldstein, Regional Coordinator

Ron Carey
c/o Eddie Burke
26 Bradford Street
Main Front Door
Charleston, WV 25301
(Fax: 304-925-0273)

R. V. Durham
c/o Hugh J. Beins, Esquire
Beins, Axelrod, Osborne
& Mooney
2033 K St., NW
Suite 300
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(Fax: 202-835-3821)

Ron Carey
November 2, 1991
Page 5

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Election Officer

November 2, 1991

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VIA FACSIMILE WHERE NOTED AND UPS OVERNIGHT
ON NOVEMBER 4, 1991

Ron Carey
c/o Susan Davis, Esquire
Cohen, Weiss & Simon
330 West 42nd Street
New York, NY 10036-6901
(Fax: 212-695-5436)

UPS
17940 Inglewood Drive
Middleburg Heights, OH 44130


C. Sam Theodus
c/o IBT Local Union 407
3150 Chester Avenue
Cleveland, OH 44114
(Fax: 216-391-7353)

Re: Election Office Case No. P-1026-LU407-CLE
(Addendum)

Gentlemen:

On this date, the Election Officer issued his decision in the above matter. For the reasons articulated in that decision--the date of the ballot mailing for the 1991 IBT International Union Election--the Election Officer has determined that an appeal of his decision shall not stay the access required by that decision. *Rules, Article XI, § 2(z).*

Very truly yours,


Michael H. Holland

cc: Frederick B. Lacey, Independent Administrator
Joyce Goldstein, Regional Coordinator

Ron Carey
November 2, 1991
Page 2

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c/o Eddie Burke
26 Bradford Street
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2833 Cottman Avenue
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(Fax: 215-333-4146)

IN RE:	:	91 - Elec. App. - 225 (SA)
COMMITTEE TO ELECT RON CAREY	:	:
and	:	DECISION OF THE
UNITED PARCEL SERVICE	:	INDEPENDENT ADMINISTRATOR
and	:	:
IBT LOCAL UNION NO. 407	:	:

This matter arises as an appeal from the Election Officer's decision in Case No. P-1026-LU407-CLE. A hearing was held before me at which the following persons were heard: John J. Sullivan and Barbara Hillman for the Election Officer; Joyce Goldstein, a Regional Coordinator; Bernard Goldfarb for United Parcel Service ("UPS"); and Susan Davis for the Committee to Elect Ron Carey. The Election Officer provided a written Summary in accordance with Article XI, Section 1.a.(7) of the Rules For The IBT International Union Delegate And Officer Election (the "Election Rules"). In addition, UPS submitted written arguments and an extensive set of exhibits.

This is another campaign access case in which a non-employee IBT member seeks access to an employer's parking lot for campaign purposes. In this case, Ron Carey, a candidate for IBT General President, and C. Sam Theodus, a candidate for IBT Vice President, were stopped by UPS from campaigning in the parking lot of its

facility in Middleburg Heights, Ohio on October 29, 1991. UPS contends that it has consistently maintained a policy forbidding non-employees to solicit support or distribute campaign literature on UPS property including its parking lot.¹

Access cases are evaluated under Article VIII, Section 10.d. of the Election Rules which provides that an employer may not restrict an IBT member's pre-existing rights to engage in campaign activities on the employer's property. As previously stated by the Election Officer in In Re: Frechin, Election Office Case No. P-852-LU174-PNW, aff'd, 91 - Elec. App. - 195 (SA) (October 4, 1991):

Pre-existing rights can be established by federal substantive law or by the past practice of a particular employer. The National Labor Relations Act, 29 U.S.C. §158(a)(1), protects the right of union members 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.2d 876 (2d Cir. 1987); NLRB v. Methodist Hospital of Gary, Inc., 732 F.2d 43 (7th Cir. 1984); ABF Freight Systems v. NLRB, 673 F.2d 229 (8th Cir. 1982). And the pre-existing rights provided by federal substantive law include the right to reasonable access to their fellow union members working for another employer. National Maritime Union v. NLRB, 867 F.2d 767 (2d Cir. 1989). Accordingly, the Election Rules incorporate these pre-existing rights.

In an Advisory Regarding Political Rights issued on December 28, 1990, the Election Officer affirmed, inter

¹ UPS reserves its jurisdictional challenges to the authority of the Election Officer and the Independent Administrator over employers who were not signatories to the Consent Order. However, it is now well settled that the Court-appointed Officers have jurisdiction over non-consenting employers to enforce the Election Rules. See In Re: McGinnis, 91 - Elec. App. - 43 (January 23, 1991), aff'd, United States v. IBT, 88 Civ. 4486 (DNE), slip op., at pp. 2-7 (S.D.N.Y. April 3, 1991), aff'd, United States v. IBT, No. 91-6096 (2d Cir. October 29, 1991).

alia, that federal labor law gives IBT members who are not employees a right to campaign among their fellow IBT members. However, the Advisory also clarifies that this right is more limited than the right to campaign at one's own place of work.

Reasonable access may be available to non-employees on public property in the vicinity of the work site, and plainly, an employer cannot interfere with protected activity, including campaign activity, on such property. Lechmere v. NLRB, 914 F.2d 313 (1st Cir. 1990), cert. granted, 111 S.Ct. 1305 (1991). However, "reasonable" access implies that the alternative means not on the employer's property is not unduly costly, burdensome or unsafe, and generally permits face-to-face contact. E.g., National Maritime Union, 867 F.2d 767 (2d Cir. 1989). Accordingly, if IBT members are not able to safely or effectively communicate with their fellow members from public property, limited intrusion by IBT members onto the employer's private property may be required. Jean Country, 291 NLRB No. 4 (1988).

The Second Circuit Court of Appeals has recently endorsed such an approach, noting that Article VIII, Section 10.d. of the Election Rules may be applied to "invoke both past practice or agreement among employers and the IBT . . . and any substantive rights of union members to engage in conduct as established by applicable law." United States v. IBT, No. 91-6096, slip op., at p. 21 (2d Cir. October 29, 1991).

In the instant matter, the Election Officer found that non-employee IBT members had acquired the right to campaign in the parking lot of the Middleburg Heights facility by virtue of an arrangement entered into between UPS and the Election Officer in January, 1991. By internal memorandum dated January 11, 1991, UPS directed its regional and district managers to post a notice from the Election Officer affirming the campaign rights of IBT members

employed by UPS. That notice, which was posted for a thirty-day period at all UPS facilities throughout the United States and Canada, stated the rights of non-employees as follows:

Your fellow members of the IBT, who work at other facilities or who are employed by other employers, have the right to engage in campaign activities on UPS premises which are in non-work areas outside of terminal facilities and are open to the public, e.g., in unenclosed, unrestricted parking lots or outside of the gates of UPS facilities on ground open to the public.

Based on this, the Election Officer concluded that there was a past practice or policy which entitled IBT members to engage in campaign activity at the parking lot in question. As stated in the Election Officer's Summary:

That Notice expressly reflects UPS' agreement with the right of members of the IBT who are not employed by UPS -- i.e., members like Messrs. Carey and Theodus -- to engage in campaign activities "in unenclosed, unrestricted parking lots."

UPS, however, asserts that the parking lot in question is neither "unenclosed" nor "unrestricted" within the meaning of the above cited Notice and thus, it is under no obligation to permit non-employees to use the lot for campaign purposes.

In investigating the protest, a representative from the Election Office visited the job site. In addition, UPS furnished a map of the facility as part of its written submissions at the hearing before me. The lot is fenced on three sides but unfenced on the side that abuts Englewood Drive, the public access road. There, a grassy knoll or "berm" broken by two driveways separates the lot from the public roadway. The lot itself is marked as

"employee," "visitor" and "customer" but there are no actual barriers between the areas thus designated. At the rear of the lot, along the side which is farthest from and roughly parallel to Englewood Drive, there is a manned guard house and security gate through which employees walk on their way from the parking lot into the facility. Adjacent to this and about six feet away is the customer and visitor entrance.

The Election Officer's conclusion that the lot in question is unenclosed and unrestricted is based largely on the fact that anyone may enter the lot from the unfenced side along the public road and that UPS has positioned its security checkpoint between the lot and the interior of the facility rather than between the lot and the public roadway. This is a reasoned view of the situation by a neutral factfinder whose findings are entitled to deference.

In opposition, UPS argues that it has never permitted campaigning in the lot and that its Pinkerton guards routinely police the lot to eject trespassers. In support of its contentions, UPS submitted copies of "incident reports" detailing its efforts in this regard. Notwithstanding all of this, it is clear that UPS' policy regarding campaign rights changed when it directed the implementation of the Election Officer's Notice quoted above.

Moreover, it is clear from the incident reports that in the past UPS permitted non-employees access to the parking lot in

question under certain circumstances. For example, on October 30, 1990, guards encountered an individual attempting to repossess a vehicle registered with a UPS employee who worked at the facility. Rather than eject him as a trespasser, the guards sought to insure that he had complied with local police requirements and let him use the phone to check in with the Middleburg police. This further supports the conclusion that the lot is unrestricted.

In sum, the arguments presented by UPS do not compel a reversal of the findings of the Election Officer.

At the hearing before me, the Election Officer also stated that even under the balancing test articulated in Jean Country, 291 NLRB No. 4 (1988), 1988 LEXIS 568 (1988), non-employee IBT members are due a limited right of access to the parking lot in question.²

When Messrs. Carey and Theodus were ejected from the parking lot, they were standing near the guard house campaigning with IBT members who were entering the facility. UPS management suggested that they stand on the grassy knoll next to the driveway entrances. Based on an interview with the Election Officer's Regional Coordinator, on the one hand, and Richard Nawrocki, the District Loss Prevention Supervisor for UPS, on the other, the grassy knoll was found to be unsafe. At shift changes, 300 cars attempt to leave the facility through the two driveways and Mr. Nawrocki

² Jean Country mandates that when determining the extent to which a non-employee may access an employer's premises to campaign, one must weigh the employee's right to access against the strength of the employer's property interest and the availability of a reasonable alternative means of communication.

initially acknowledged that the heavy traffic would make the area unsafe for campaigning. Mr. Nawrocki subsequently furnished an affidavit indicating that what he originally meant was that standing in the driveways at shift changes would be unsafe but that standing on the grassy knoll would not be.


This later affidavit does not entirely dispel the idea that campaigning in the grassy knoll area generally would create congestion and traffic hazards which would place the safety of both drivers and campaigners at risk. Moreover, this arrangement does not afford the face-to-face contact favored by the Election Rules and by applicable law. See, e.g., National Maritime Union v. NLRB, 867 F.2d 767 (2d Cir. 1989). In addition, since the driveways are used by both customers and employees, this arrangement is more likely to interfere with customers than is an arrangement that would permit face-to-face campaigning at the guardhouse where customers and employees separately enter the facility. In short, there are no viable on-site alternatives to standing in front of the guardhouse.

It is also evident that home visits, telephone solicitations, and mailings are not reasonable alternatives under these circumstances. Given that balloting for the election has already begun, home visits to over 300 employees before their ballots are cast would be an impossibility. Telephone solicitations and mailings are also costly and do not permit face-to-face contact.

These alternatives are costly, not equivalent to the rights sought, and unduly burdensome.

As noted, even under a Jean County analysis, the same result is reached. Under any analysis, however, it is clear that non-employee IBT members have a right to campaign in the Middleburg facility parking lot in front of the guard house. This determination fully respects UPS' evident desire to police the lot and, if anything, provides UPS with more control over possible untoward behavior than the suggested alternative.

For the foregoing reasons, the Election Officer's decision is affirmed in all respects.



Frederick B. Lacey
Independent Administrator
By: Stuart Alderoty, Designee

Dated: November 14, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

Plaintiff, :

-v- :

INTERNATIONAL BROTHERHOOD OF :

TEAMSTERS, CHAUFFEURS, :

WAREHOUSEMEN AND HELPERS OF :

AMERICA, AFL-CIO, et al., :

Defendants. :

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ORDER

88 CIV. 4486 (DNE)

EDELSTEIN, District Judge:

WHEREAS United Parcel Service ("UPS"), an employer of members of the International Brotherhood of Teamsters ("IBT"), has appealed six decisions of the Independent Administrator concerning protests filed under the Election Rules for the IBT International Union Delegate and Officer Election (the "Election Rules"); and

WHEREAS the Government argues that these appeals are moot; and

WHEREAS these six decisions affirmed decisions of the Election Officer finding that UPS had violated the Election Rules; and

WHEREAS all six decisions involved the rights of IBT members to campaign in connection with the recently completed International Union Officer Election; and

WHEREAS the remedies imposed were limited to the campaign period for International Union Officer Election, which ended on December 10, 1991 -- the date by which mail ballots had to be received by the Election Officer in order to be counted, see International Union Officer Election Plan, Art. II; and

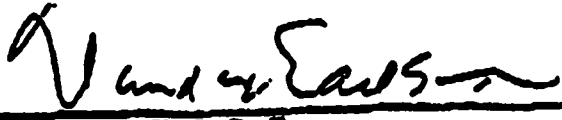
WHEREAS UPS could have timely appealed before the close of the campaign period, see Election Rules, Art. XI, §1(a)(8), but did not do so; and

WHEREAS these appeals, which challenge the imposition of remedies no longer in effect, are moot;

IT IS HEREBY ORDERED that UPS's appeals are dismissed as moot.

SO ORDERED.

**Dated: December 20, 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- :

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

Defendants. :

ORDER

88 CIV. 4486 (DNE)

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EDELSTEIN, District Judge:

United Parcel Service, Inc. ("UPS") has moved this Court pursuant to Local Civil Rule 3(j) for reargument of this Court's December 20, 1991 order, which dismissed as moot UPS's appeal from six decisions of the Independent Administrator. These decisions concerned the campaign rights of members of the International Brotherhood of Teamsters (the "IBT") in connection with the recently concluded International Union officer election.

Local Civil Rule 3(j) provides that a motion for reargument shall set forth concisely the "matters or controlling decisions which counsel believes the court has overlooked." This Court enunciated the standard governing motions to reargue as follows:

The strong interests in finality and the procedural directions of Local General Rule 9(m) [Rule 3(j)'s predecessor] lead this court to conclude that the only proper ground for a motion for reargument is that the court has overlooked "matters or controlling decisions" which, had they been considered, might reasonably have altered the result reached by the court.

412, 414 (S.D.N.Y. 1978). This has been adopted as the governing standard. See Morser v. AT&T Information Systems, 715 F. Supp. 516, 517 (S.D.N.Y. 1989); Adams v. United States, 686 F. Supp. 417, 418 (S.D.N.Y. 1988); Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n, Inc., 624 F. Supp. 856, 857 (S.D.N.Y. 1985). This stringent standard is necessary to "dissuade repetitive arguments on issues that have already been considered fully by the court." Caleb & Co. v. E.I. DuPont de Nemours & Co., 624 F. Supp. 747, 748 (S.D.N.Y. 1985). A party moving under Rule 3(j) may not submit new facts, issues or arguments. See Travellers Ins. Co. v. Buffalo Reins. Co., 739 F. Supp. 209, 211 (S.D.N.Y. 1990).

All of the matters and controlling decisions proffered by UPS in this motion were considered by this Court in issuing its December 20, 1991 order. There is no actual controversy at this stage of appellate review. See Roe v. Wade, 410 U.S. 113, 125 (1973). UPS's appeals are therefore moot.

UPS has only itself to blame for not obtaining prompt judicial review of the Independent Administrator's decisions, the last of which was issued on November 14, 1991. If UPS had promptly appealed any of the Independent Administrator's decisions, it would have received a decision well before the close of the election campaign on December 10, 1991. However, UPS delayed until November 24, 1991 before filing an appeal, which this Court rejected as fatally vague on December 2, 1991. UPS did not file a proper appeal until December 6, 1991, four days before the close of the election campaign.

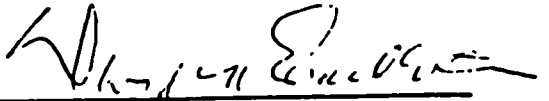
UPS next argues that the issues presented in the appeals are capable of repetition, yet evading review. UPS's argument that the issues presented in its appeals will recur is purely speculative. Even if the 1996 election is governed by the Election Officer, the election may be governed by a completely different set of rules. Further, even if the 1996 Election is governed by the Election Officer and the same rules apply, there is no reason that UPS would be unable to obtain judicial review at that time. See DeFunis v. Odegaard, 416 U.S. 312, 318-319 (1974) ("just because this particular case did not reach the Court until the eve of the petitioner's graduation from law school, it hardly follows that the issue he raises will further evade review"). Thus, while the issues decided against UPS in 1991 might be capable of repetition in 1996, there is no reason that the issues they present will evade review.

Finally, UPS argues that if this Court determines that UPS's appeals are moot, it should vacate the Independent Administrator's decisions as moot, rather than dismiss UPS's appeals as moot. While vacatur might have been appropriate had UPS diligently prosecuted its appeal, it did not do so. Instead, UPS "slept on its rights" and rendered its appeal moot by its own inaction. See United States v. Munsingwear, 340 U.S. 36, 41 (1950).

Accordingly, UPS's motion to reargue is denied in all respects.

SO ORDERED

DATED: *July 23*, 1992
New York, New York



U.S.D.J.