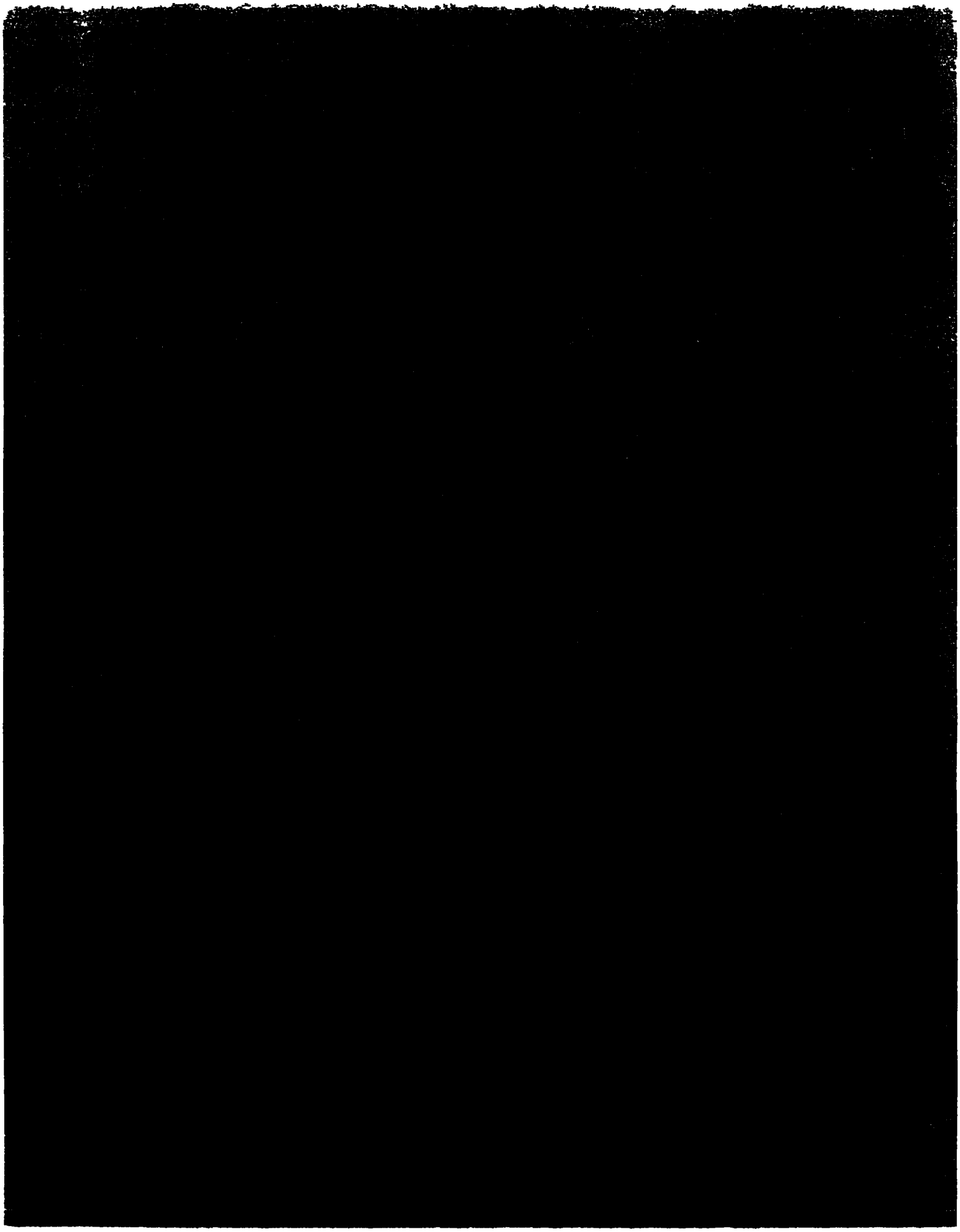

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Election Officer

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February 6 1991

VIA UPS OVERNIGHT

John Braxton
4712 Windsor Avenue
Philadelphia PA 19143

Richard Opalesky
Secretary Treasurer
IBT Local Union 623
1911 S 24th Street
Philadelphia PA 19145

Paul Sharp
UPS
1 Hog Island Road
Philadelphia PA 19153

Carmen Nepa
Division Manager
UPS
Philadelphia PA 19153

Re Election Office Case No P 210-LU623-PHL[1]

Gentlemen

On January 3 1991 Mr John Braxton protested that he had been discharged on December 29 1990 because of his campaign activities on behalf of and supporting the candidacy of Ron Carey for President of the IBT An issue is therefore raised as to

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[1] By letter dated February 3 1991 and transmitted to this office on February 4 1991 Mr Braxton filed a new protest involving the decision on this discharge by the Atlantic Area Parcel Grievance Committee That protest involves both UPS and the Union-side members of aforementioned committee This protest will be separately docketed investigated and decided by the Election Office

whether his discharge was violative of Article VIII, Section 10(a) of the Rules for the IBT International Union Delegate and Officer Election.

The facts developed in the course of the Election Officer's investigation are summarized below.

Mr. Braxton is a 12 year employee of United Parcel Service ("UPS"), having worked the last 10 years as a sorter. His discipline record is as follows:

(a) April 1, 1988. Two day suspension for verbal abuse of a supervisor.

(b) June 3, 1988 Three day suspension for improper loading of packages resulting in missed commitment, and warning that additional violations would lead to further discipline up to and including discharge.

(c) May 21, 1990 Written reprimand for sorting an open package on transverse belt, being instructed by supervisor as to proper procedure and then repeating the error ten minutes later, a warning that additional violations would lead to further discipline up to and including discharge.

(d) May 31 1990 One day suspension for sorting open packages on transverse belt and for verbal abuse of supervisor following corrective instructions; warning that repetition of offense would lead to further discipline up to and including discharge.

(e) June 1, 1990. One day suspension for failure to follow supervisor's instructions

(f) December 27, 1990 Terminated for verbal abuse of and loud argument with supervisor, who attempted to correct his work methods, and, following instructions to check under slide for any fallen mail packages, for failure to pick up two packages. (According to Mr. Braxton, the December 27 incident was a carryover from an incident on December 24 when his supervisor corrected him regarding proper procedures and a loud argument ensued No discipline was imposed related to the December 24 incident.)

Mr Braxton was an active and highly visible Carey supporter. UPS was aware of his campaign activities.

According to Mr Braxton, UPS indicated displeasure with his campaign activities on at least two occasions On November 14, 1990, while he was working, a supervisor approached him to discuss "Your boy, Ron Carey." The supervisor said that if Ron Carey were to be President and if the contract was written the way Carey wanted it, UPS would lose so much business that Braxton and the supervisor would both be out of jobs and UPS could go out of business Second, on December 7, 1990, while Mr. Braxton was passing out Carey literature in the parking lot, a supervisor scowled at him when he attempted to hand him some literature.

Mr Braxton has grieved his discharge. As of this date, no unfair labor practice or other claim protesting the discharge has been instituted. Mr. Braxton does not allege that his Union has failed to fairly and properly represent him in the grievance procedure.

The legal framework for deciding this case is set forth in the Decision of the Independent Administrator, In Re: Charles Coleman and Advance Transportation Co, 90-Elec App -18(SA). Adopting the Wright Line test of the NLRB governing "mixed motive" cases, the Independent Administrator applied a standard involving two steps. The first inquiry is whether the employee has made a prima facie showing sufficient to support an inference that protected conduct was a "motivating factor" in the employer's decision If this is established, the second inquiry is whether the employer has demonstrated that its decision would have been made even in the absence of the protested conduct

The application of the test in the Coleman decision makes it clear that the "inference" of a motivating factor can be drawn from less evidence than would be required to prove that there actually was such a motivating factor. Mr. Braxton has made a prima facie showing based on evidence of the statements and actions of UPS supervisors pertaining to his campaigning for Mr Carey

However, UPS has amply demonstrated that, based on the disciplinary record and work related incidents involving Mr Braxton, that UPS would have taken the discharge action regardless of Mr Braxton's protected activity.

For these reasons, the protest is denied. In accordance with Coleman, however, I emphasize that the merits of Mr. Braxton's grievance are not here addressed. It is particularly noted that this decision does not deal with the question of whether the discharge was for just cause. Nor has this decision addressed the merits of any other charge Mr Braxton may elect to initiate in connection with his discharge.

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/acm

cc Frederick B Lacey, Independent Administrator
Peter V Marks, Sr , Regional Coordinator

IN RE: JOHN BRAXTON Complainant, and UNITED PARCEL SERVICE, INC., Respondent.	91 - Elec. App. - 108 (SA) DECISION OF THE INDEPENDENT ADMINISTRATOR

This matter arises out of an appeal from a decision of the Election Officer in Case No. P-210-LU623-PHL. A hearing was held before me at which the Complainant John Braxton, and his attorney Susan Jennik appeared. At that hearing John Sullivan, on behalf of the Election Officer and Martin Wald, on behalf of United Parcel Service, Inc. ("UPS") were also heard via telephone conference. Following that hearing the matter was remanded for further factual findings by the Investigations Officer and for further submissions by the parties.[1]

In his protest Mr. Braxton alleged that he was terminated from his position as a part-time sorter for UPS because of his campaign activity on behalf of Ron Carey, an accredited candidate for General President of the IBT. UPS maintains that Mr. Braxton was

[1] Paul Levy, Esq. on behalf of the Public Citizen Litigation Group, also filed a memorandum on remand.

terminated for cause. Stated another way, UPS maintains that its decision to terminate Mr. Braxton was not influenced by his campaign activities.

The following Findings of Fact, as found in the Supplemental Election Officer Summary at pp. 3-4 are incorporated by reference:

> John Braxton is a member of Local Union No. 623 and was a candidate for delegate to the 1991 IBT International Convention.
>
> Until his termination on December 27, 1990, Braxton was employed as a part-time sorter by UPS at its Hog Island Road facility located in Philadelphia, PA. Mr. Braxton was employed by UPS for over 12 years and worked at other UPS facilities in the Philadelphia area.
>
> For a number of years Mr. Braxton has been an active and vocal critic of UPS and the IBT. His activities are well known both to his employer and his union. Mr. Braxton is also a prominent member of Teamsters for a Democratic Union ("TDU"). More recently, Mr. Braxton has been active in campaigning on behalf of Ron Carey and in support of his own candidacy for 1991 IBT International Convention delegate.
>
> Braxton's campaign activity was well known to his supervisor, Paul Sharp, and by Preload Manager Tom Jones. On November 14, 1990, Sharp observed Braxton passing out Carey literature. On December 7, 1990, Jones asked Braxton about his solicitation of signatures from IBT members for the Ron Carey slate. On December 24 and 27, 1990, Braxton was passing out Carey literature in the Hog Island parking lot.
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> In Riley v. UPS, Civil Action 83-811-JJF (D. Del. June 30, 1988), a case alleging a termination of a UPS driver in violation of 42 U.S.C. Section 1981 and 2000(e), the District Court found that:
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> > UPS employs a system of "progressive discipline" involving informal and formal disciplinary measures for workers who violate company work rules or procedures. These possible disciplinary measures for a given infraction include informal verbal counseling, verbal warnings, write-ups placed in an

> employee's file, center level hearings, official warning letters, suspensions, final warnings, and discharge. UPS considers an employee's entire work record in determining appropriate discipline for a given infraction.

As noted in the Election Officer's Summary, Mr. Braxton ran as a candidate for delegate to the 1991 IBT International Convention. The delegate election took place after Mr. Braxton's discharge. Mr. Braxton was defeated in the election.[2]

The Rules For The IBT International Union Delegate And Officer Election (the "Election Rules") guarantee the right of all IBT members to support candidates and participate in campaigning activities free from interference, restraint or coercion. Election Rules, Article VIII, Section 1.c. The Election Rules are violated when an employer disciplines an IBT member for engaging in campaigning activity. When faced with such a situation in the past, the Election Officer has nullified the discipline. See, e.g., In Re: Teller, Election Office Case No. P-062-LU741-PNW (February 7, 1991), aff'd., 91 - Elec. App. - 92 (SA) (March 12, 1991).

The Election Officer concluded that "Braxton's campaign activity was well known to his supervisor, Paul Sharp, and by Preload Manager Tom Jones." UPS denies this and, in fact, submits affidavits from Messrs. Jones and Sharp stating that neither was aware of any campaign activity by Mr. Braxton, either on behalf of

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2 As part of his relief Mr. Braxton requests that the delegate election be rerun.

Ron Carey or in support of his own candidacy as a IBT International Convention delegate, until after Mr. Braxton's termination. Mr. Sharp acknowledged, however, that he had some awareness of Mr. Braxton's activities on behalf of the Teamsters For a Democratic Union ("TDU").

Mr. Braxton stated at the hearing before me that both Jones and Sharp were clearly aware of his involvement with the Carey campaign. Mr. Braxton stated that Mr. Sharp first approached him in September of 1990 and told him that UPS Management was aware of Mr. Braxton's passing of Carey campaign literature. Mr. Sharp also allegedly told Mr. Braxton that both the Local and UPS did not like him.

Mr. Braxton pointed to an incident that occurred on November 14, 1990. On that day Mr. Braxton was passing out Carey campaign literature outside the UPS facility, and he was observed by Mr. Sharp. Mr. Braxton and Mr. Sharp then engaged in an exchange regarding the literature. According to Mr. Braxton, Mr. Sharp told Braxton that he had recently read an article in the Wall Street Journal about "your boy" Ron Carey. Sharp also indicated that it would be a "terrible" thing for UPS if Carey got elected, and it was "bad" for Mr. Braxton to support Mr. Carey. In his affidavit, Mr. Sharp specifically disputed that he observed Mr. Braxton passing out Carey literature on November 14, 1990.

In addition Mr. Braxton stated that on December 24, 1990, just three days prior to his termination, he was again passing out Carey

campaign literature in the UPS parking lot and was again observed by Mr. Sharp. On that day, Mr. Sharp allegedly told Mr. Braxton, "I can't believe you're still doing this."

According to Mr. Braxton a similar incident occurred on December 7, 1990, involving Mr. Jones. Allegedly Mr. Jones observed Mr. Braxton passing out Carey campaign literature, scowled at him and asked Braxton "what he was doing." In his affidavit, Mr. Jones specifically denied that this incident ever happened.

In resolving the factual dispute between Mr. Braxton, on the one hand, and Messrs. Jones and Sharp on the other, I credit Mr. Braxton's version of events. Mr. Braxton presented himself as a credible witness. His recollection of events was detailed including specific dates and the specifics of conversations. Messrs. Jones and Sharp on the other hand, did not testify before me, but rather relied on affidavits. It is difficult to believe that individuals in the management positions held by Messrs. Jones and Sharp would have been ignorant of Mr. Braxton's campaign activities, especially given his past history of active TDU affiliation.

In the alternative, UPS challenges the conclusion that it was opposed to Mr. Braxton's activities arguing that "at most . . UPS was only aware of [Braxton's] campaign activity, not that UPS was opposed to such activity " UPS' Response To Supplemental Election

Officer Summary ("UPS' Response") at p. 4.[3] In making this argument UPS understates the evidence.

As already noted, in September of 1990, Mr. Sharp confronted Mr. Braxton and told him that both the Local and UPS did not like him. This was said on the heels of Mr. Sharp's comment that UPS management was very aware of Mr. Braxton's passing of Carey campaign literature. In addition, on November 14, 1990, Mr. Sharp told Mr. Braxton that it would be "terrible" for UPS, if Carey got elected and it was "bad" for Mr. Braxton to support Carey. Yet again on December 24, 1990, Mr. Sharp told Mr. Braxton that he couldn't "believe" Mr. Braxton was "still" distributing Carey literature. Mr. Jones had a similar reaction on December 7, 1990, when he saw Mr. Braxton handing out Carey campaign literature.

Given all this, its clear that UPS, through Messrs. Sharp and Jones, opposed Mr. Braxton's campaign activity. It is also clear, as the Election Officer noted, that "the decision to terminate Mr. Braxton was motivated, at least in part, by Braxton's campaign activities." In In Re: Coleman, 90 - Elec. App. - 18 (SA)(December

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[3] UPS suggests, at p. 6 of its Response, that "[p]rior to receipt of the Supplemental Election Officer Summary, UPS was unaware of the allegations that form the basis of [the Election Officer's findings], and did not have an opportunity to respond to them." UPS' contention in this regard is simply not true. In the Election Officer's original decision of February 6, 1991, he specifically references the incidents of November 14 and December 7. Moreover in his February 14, 1991, Summary the Election Officer again describes the November 14 and December 7 incidents. Still further, at the hearing before me Mr. Braxton testified extensively concerning the exchanges between himself on the one hand, and Mr. Sharp and Mr. Jones on the other, which occurred November 14, December 7, and December 24.

14, 1990), the Independent Administrator set forth the correct standard under which terminations involving a "mixed motive"[4] must be considered:

> The National Labor Relations Board has adopted a rule for resolving cases involving a "mixed motive." This rule, adopted by the Board in Wright Line, 251 NLRB 10182, 105 LRRM 1169 (1980), aff'd, 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), requires:
>
> > that the [complaining party] make a prima facie showing sufficient to support an inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.
>
> 105 LRRM 1175. The Board's Wright Line test for resolving mixed motive cases was drawn from the Supreme Court's decision in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1979). The Supreme Court upheld the Board's Wright Line analysis in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

UPS argues that the Wright Line "mixed motive" test is not applicable here. UPS maintains "the proper test in this case is the one commonly applied in Federal Court for discrimination cases, as established by Texas Department of Community Affairs v. Burdine, 450 U.S. 248(1981)." UPS' Response at p. 2. While the Wright Line test is two a two-part test, the Burdine test has three prongs. Once a prima facie case of discrimination is established, the burden shifts to the employer and the employer must then articulate

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4 Mixed-motive refers to those cases when the termination is motivated in part by the political activity of the member and in part by performance-based activity.

a legitimate, non-discriminatory reason for the discharge. If this is done, the burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant are pretextual.

In rejecting the Wright Line test UPS argues that the "mixed-motive" test is a National Labor Relations Board ("NLRB") standard, and thus can only be properly applied by the NLRB. This argument goes hand-in-hand with UPS' contention that the NLRB has exclusive jurisdiction over this matter. UPS further argues "that, as long as this case is being litigated under the auspices of the Federal Court rather than the NLRB, the standards for the burden of proof should be those of the Federal District Court under Burdine rather than those of the NLRB under Wright Line." UPS' Response at p. 3.

The NLRB preemption argument was specifically rejected by the Independent Administrator In Re: McGinnis, 91 - Elec. App. - 43 (January 23, 1991) at pp. 10-12. As stated in McGinnis:

> 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 [National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1)]. The simple answer to this inquiry is "yes."

UPS' suggestion that the Independent Administrator is somehow precluded from applying NLRB standards because he has rejected the argument that the NLRB has exclusive jurisdiction is meritless.

The Independent Administrator had repeatedly relied on NLRB precedent to resolve election appeals. See e.g., In Re: McGinnis, supra (Wherein the Independent Administrator relied on Jean Country, 291 NLRB No. 4 (1988), to resolve a dispute regarding campaign access.) UPS, in effect, suggests that the Independent Administrator should ignore a standard specifically developed to address the very situation raised in this case (the Wright Line test) in favor of a standard designed for discharges rooted in age, gender and race discrimination (the Burdine test). Not only is UPS' suggestion without foundation, it is without logic. Given that NLRB decisions provide the greatest wealth of precedent on many of the issues raised in these election appeals it would be absurd to ignore that body of law. The Election Rules themselves are based, inter alia, on "relevant law affecting union elections." Election Rules, preamble at p. 1. In addition, the Consent Order contemplates that the Independent Administrator, in fulfilling his role as a hearing officer in disciplinary matters, will avail himself of NLRB precedent. See Consent Order para. F.12 (A)(e) at p. 9 (Disciplinary "hearing[s] shall be conducted under the rules and procedures generally applicable to labor arbitration hearings"). Thus, it is clear that the Wright Line test is the proper standard under which this appeal is to be resolved.[5]

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[5] At the hearing before me UPS' attorney argued that the Independent Administrator had misstated the Wright Line test in Coleman. At the hearing, UPS contended that the Wright Line test was in fact a three part test similar to Burdine. In its (continued...)

It has already been established that Mr. Braxton's campaign activity was a "motivating factor" in UPS' decision to discharge him. The burden thus shifts to UPS to demonstrate that it would have discharged Mr. Braxton even in the absence of his campaign activity. On remand, the Election Officer concluded that Mr. Braxton would have been discharged even in the absence of the Carey campaigning. A review of the comprehensive record developed on remand reveals that the Election Officer's conclusion here is not clearly erroneous or an abuse of discretion and, thus, I accept it.

As noted, Mr. Braxton was discharged on December 27, 1990. On April 1, 1988, and again on June 3, 1988, Mr. Braxton was suspended by UPS for "disruptive actions," "verbal abuse of a supervisor" and "failure to follow, instructions, procedures and methods." Mr. Braxton argues that these incidents cannot be used to judge the propriety of his discharge because of Local 623's collective bargaining agreement with UPS which provides at Article 48 that a "warning notice . . . shall not remain in effect for a period of more than nine (9) months from date of said warning notice."

The Election Officer at p. 5, n.1 of his Supplemental Summary explains his reliance on these two 1988 disciplines as follows:

> The Election Officer recognizes that the agreement between the IBT and UPS provides that a warning notice "shall not remain in effect for a period of more than nine months from date of said warning notice" Article

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[5](...continued)
submission on remand, however, UPS appears to have corrected that position, relying instead on the argument that the Burdine test must be applied in lieu of Wright Line.

48. However, the collective bargaining agreement does not appear to so limit the use of prior suspensions. Further, Braxton's prior discipline was considered by the Election Officer as an example of UPS discipline of employees for "verbal abuse" and "failure to follow instructions." The prior discipline was also considered because it occurred prior to Braxton's participation in campaign activity protected by the Election Rules and thus helped illuminate the issue of UPS's motivation.

In addition, Martin Wald, UPS' attorney, submitted an affidavit in which he stated that the "Company always considers, or virtually always considers, an employee's entire record before it reaches a decision on serious discipline such as discharge." See also, Riley v. U.P.S., supra, Civil Action 83-811-JJF (D Del. June 30, 1988) ("UPS considers an employee's entire work record in determining appropriate discipline for a given "infraction.") Thus, it is clear that the two 1988 incidents are relevant to the issue at hand.

Mr. Braxton's disciplinary record reveals no transgression after the 1988 suspension until May 21, 1990, when he received an official warning notice for an incident which occurred on May 18, 1990. Mr. Braxton was accused of failing to follow the instruction of a supervisor concerning the sorting of torn packages.[6] There is no evidence that Braxton received a prior verbal warning for this offense. By this time Mr. Braxton was active in the Carey campaign. The May 21 reprimand included a warning that additional

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6 Although the May 21 letter references supervisor L. Moulder, Mr. Braxton indicated at the hearing that Mr. Sharp was the supervisor involved.

violations would lead to further discipline up to and including discharge.

On May 31, 1990, Mr. Braxton received an official warning letter for "verbal abuse of supervisor."[7] This warning arose out of a May 30, 1990, incident regarding the sorting of an open package. This letter also stated that repetition of the offense would lead to further discipline up to and including discharge.

On May 31, 1990, Mr. Braxton received a one day notice of suspension for failing to follow instructions regarding the sorting of the open packages on May 30.[8] Again Mr. Braxton was warned that future transgression could lead to discharge.

On December 27, 1990, Mr. Braxton was terminated because of his "continual failure to follow instructions and verbal abuse of your supervisor." This last incident, which involved Mr. Sharp, concerned on alleged failure to follow instructions regarding the method for checking for missed packages under the conveyor belt. The alleged verbal abuse did not involve profanity or the threat of physical violence.

UPS submitted to the Election Officer over 90 disciplinary documents, covering the period January 1990 through February 1991,

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7 Again, at the hearing Mr. Braxton indicated that Mr. Sharp was the supervisor involved. The May 31, 1990, warning letter does not identify the supervisor, although it does indicate that a meeting was held between, inter alia, Mr. Braxton and Mr. Jones to discuss the incident in question.

8 The notice of suspension refers to both Mr. Sharp and Mr. Moulder, although it is not clear which "supervisor" was involved in the torn package incident.

concerning employees stationed at the UPS facility where Mr. Braxton worked.[9] Those documents revealed a termination of a Mr. Harvard for "failure to follow instructions, company methods and procedures." Mr. Harvard had previously received an official warning notice and a suspension for a similar failure to follow instructions.

The documents supplied also revealed: a suspension following an official written warning for "failure to follow instruction and dishonesty"; a suspension, following an unofficial warning notice, for "failure to follow instructions, company methods and procedures"; a suspension, with no previous written warning, for "refusal to follow specific instructions from your supervisor"; and a suspension, following an official written warning, for "failure to follow instructions and proper procedures." In addition, seven official warnings, with no further discipline reflected were issued for "failure to follow instructions."

In facilities other than the one in which Mr. Braxton worked, UPS provided records that reflected termination of employees for repeated failures to follow instructions. In addition, in

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9 Mr. Braxton's attorney requested copies of these materials. In a letter dated March 15, 1991, the Election Officer stated that "it is the policy of the Election Officer not to provide parties with copies of the evidence and/or statements obtained during the Election Officer's investigation of a protest. Unless necessary to submit such evidentiary matters to the Independent Administrator during an appeal, in which case the materials are applied to the Election Officer Summary, no Election Officer investigatory documents are provided to the parties." (Emphasis in original) There is no need to disturb this policy here.

facilities other than Mr. Braxton's, UPS provided records revealing the discharge of employees who used profanities and/or the threat of physical abuse directed at a supervisor. As noted, Mr. Braxton used neither in his confrontations. I find it significant, however, that although Mr. Braxton did not use profanity or the threat of violence, he was repeatedly disciplined for verbally abusing his supervisors.

Mr. Braxton argues that since six of the incidents relied upon by the Election Officer occurred after December 27, 1990, (the date of Braxton's discharge) they are irrelevant. I disagree. UPS' disciplinary action as highlighted by the Election Officer, is probative on the key issue of how transgressions similar to Mr. Braxton's are addressed at the UPS facility in question.

In summary, the record reflects that at the UPS facility where Mr. Braxton worked, UPS imposed discipline, including one discharge, for failure of employees to follow instructions.

Mr. Braxton submitted the statement of present and former employees of UPS who work or have worked at the UPS facility in question, specifically in the "pre-load" area -- the area where Mr. Braxton had worked. Three of those individuals stated that when other employees made the same mistakes as Mr. Braxton they would simply be told to be more careful. The fourth stated that Messrs. Sharp and Jones were repeatedly abusive to Mr. Braxton. As explained in the Election Officer's Supplemental Summary however:

> [I]n addition to the discipline outlined in Paragraph 12 above, Paul Sharp, the Preload supervisor,

> issued ten verbal warnings to employees for failure to follow instructions. Based on the evidence, it appears that the decision to impose discipline depends on whether there is a pattern of violating procedures or failing to follow work rules.

Mr. Braxton also stated that UPS followed a strict five step progressive discipline policy as follows: (1) warning; (2) one day suspension; (3) three day suspension; (4) five day suspension; and (5) termination. The record, however, does not support this contention. The Election Officer pointed to one situation where an employee, Mr. Harvard, was terminated following a warning and just one suspension. In addition, one case was cited of a suspension that was not preceded by a warning. Still further, the Election Officer found one case of two successive warnings with no suspension. It appears that Mr. Wald, UPS' attorney, accurately describes UPS' progressive disciplinary policy when he states in his affidavit:

> In regard to UPS' policy of progressive discipline, it follows no mechanistic or numerical procedures. Each case is decided on an ad hoc basis. There is no set number of oral talks, warnings, or reprimands that proceeds one or more written write-ups. Similarly, there is no number or formula for the number of write-ups, if any, which would proceed a warning letter. There is no set number of warning letters, if any, which proceeds a suspension. There is no set number of suspensions, if any, which proceeds a discharge. Indeed, sometimes discharge occurs for the first offense. This statement is true not only for the "cardinal sins" listed in the collective bargaining agreement but for offenses not listed among the cardinal sins.

Accordingly, the decision of the Election Officer is affirmed, essentially for the reasons expressed in the Election Officer's Supplemental Summary:

The Election Officer denied the instant protest because he concluded that the employer had satisfied its burden of showing that it had a reason, other than punishing Braxton for his campaign activity, for taking the action it did. The new evidence presented by both Braxton and UPS did not show that Braxton received disproportionate discipline for the offense charged or that he was treated in a discriminatory fashion because of his campaign activity.

UPS has a policy and a practice of disciplining and discharging employees for failure to follow instructions. UPS also has a policy and practice of disciplining employees for verbal abuse of supervisors. In this case, Braxton was charged with both verbal abuse and the failure to follow instructions, both of which offenses had subjected him to previous discipline.

The same supervisors who disciplined Braxton disciplined other employees for essentially the same conduct. While one employee received two formal warnirgs, no employee received two suspensions prior to discharge. In this case, Braxton had previously been suspended for the same offense for which he was discharged.

There was simply no evidence presented that employees were treated any differently because of their campaign activity or lack of campaign activity. There is no evidence that Braxton was disciplined more severely because of his election activity. This conclusion is further buttressed by the discipline imposed on Braxton in 1988 -- prior to the issuance of even the Consent Order -- for essentially identical alleged infractions.

It is important to emphasize that in finding no violation of the Election Rules the Election Officer does not conclude that UPS had just cause for Braxton's termination or that its justification was otherwise legitimate. The Election Officer's determination is limited to an alleged violation of the Election Rules.

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

Dated: March 26, 1991