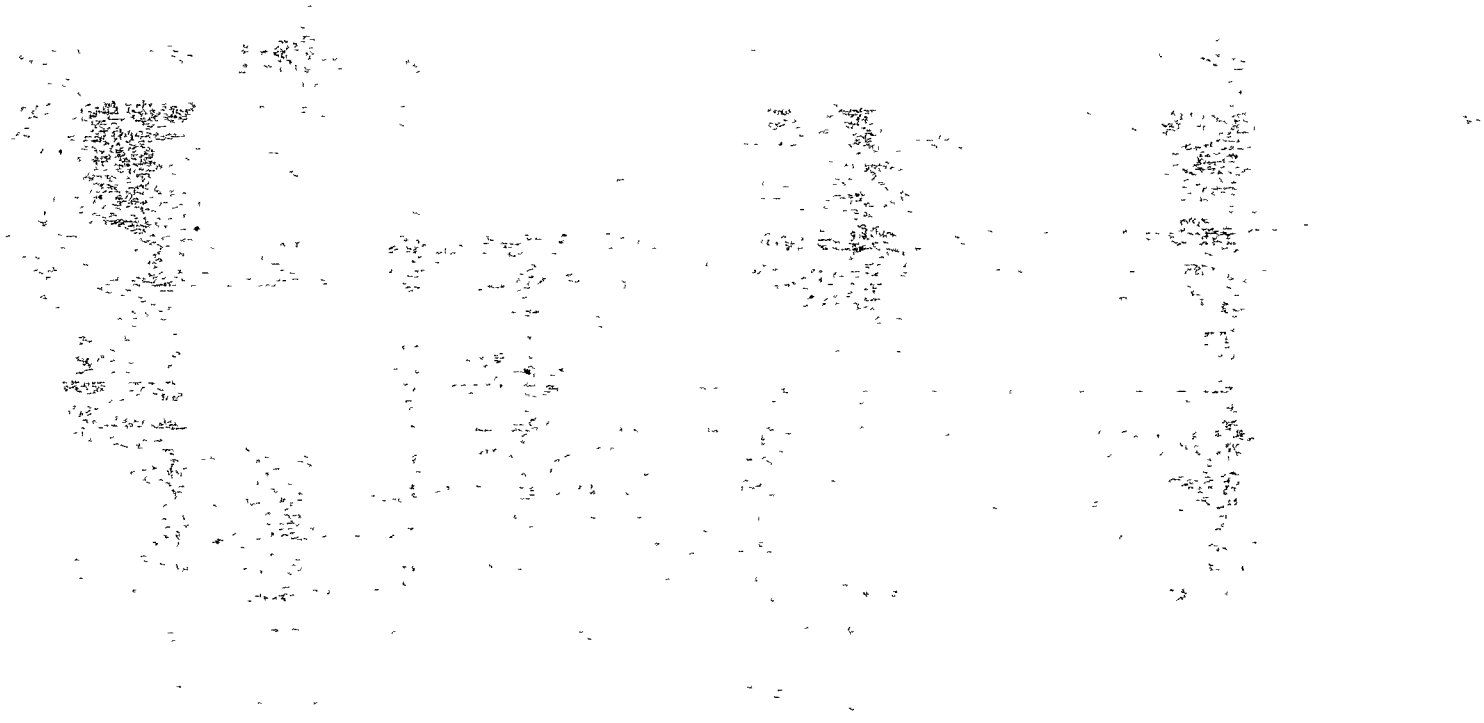

OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, NW
Washington, DC 20001

Michael H. Holland
Election Officer

(202) 624-8778
1-800-828-6496
Fax (202) 624-8792

September 9, 1991

VIA UPS OVERNIGHT

Neal Henderson
36 Waverly Street
Brockton, MA 02401-3408

William J. McCarthy
President
Teamsters Local 25
544 Main St.
Boston, MA 02129

Jack Kelliher
c/o Star Market
625 University Ave.
Norwood, MA 02062

Re: Election Office Case No. P-760-LU25-ENG

Gentlemen:

A protest was filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") by Neal Henderson, a member of Local Union 25 and a certified delegate to the 1991 IBT International Union Convention from Local Union 25. The protest concerns the propriety of Mr. Henderson's discharge by his employer, Star Markets. Mr. Henderson contends that he was discharged in retaliation for his participation in the delegate and International officer election processes as a supporter of General President candidate Ron Carey.

Pursuant to his authority under the *Rules*, the Election Officer by letter dated May 14, 1991 determined to defer his review and determination of this protest pending the results of the grievance filed concerning this discharge pursuant to the grievance/arbitration provisions of the collective bargaining in effect between Star Market and the IBT. Those processes have now concluded. Mr. Henderson's discharge was upheld by an independent arbitrator and thus the matter is now ripe for consideration and determination by the Election Officer.

In addition to questioning the propriety of his discharge by Star Market, Mr. Henderson at the time of filing of this protest also questioned whether the IBT representatives on the Joint Area Grievance Panel, or some of them, would discriminate against him on the basis of his campaign activities. Mr. Henderson noted that one IBT member on the Joint

Area Grievance Panel was his opponent in the Local 25 delegate election. As noted above the discharge grievance was referred by the Joint Area Grievance Panel to an independent arbitrator; none of the IBT members of the IBT grievance panel participated in rendering the decision on Mr. Henderson's grievance. Further, the Election Officer's investigation determined that the Business Agent representing Mr. Henderson in the grievance process, William Carnes, fairly and properly represented him. No basis exists for finding that the IBT, Local 25 or any member or officer of the IBT or of Local 25 violated the *Rules* in connection with Mr. Henderson's discharge.

Neal Henderson has been employed by Star Market since approximately 1977. He has been a Steward for approximately five years. Prior to his discharge, the last discipline meted out to him occurred in 1983; he received three warning notices in 1983. The pertinent collective bargaining agreement provides that written warning notices are not to remain in effect for a period of more than nine months.

Mr. Henderson was a successful candidate for delegate from Local Union 25. He sought such position on a slate committed to the candidacy of Ron Carey for General President. Subsequent to the election he has continued to engage in campaign activities, activities supportive of Mr. Carey's candidacy and activities which negatively impact upon other candidates and their supporters. He has engaged in such campaign activities openly and at his place of employment. Star Market and its supervisory personnel were aware of Mr. Henderson's candidacy and his continued support for nominated General President candidate Ron Carey. From time to time supervisory employees have made remarks to Mr. Henderson which could be considered disparaging of his candidacy for delegate or disparaging of his other campaign activities. For instance when Mr. Henderson, prior to his election as delegate, applied to take his vacation during the week of the 1991 IBT International Union Convention, he was asked by his supervisor, "Aren't you being a little overconfident?" Certain supervisory employees also made remarks to Mr. Henderson suggesting that Mr. Carey could not be elected.

On Thursday evening May 2, 1991 Mr. Henderson along with ten other employees of Star Market accepted a three hour overtime assignment, the overtime hours to occur immediately prior to their regular shift of 10:00 p.m. to 6:30 a.m. The collective bargaining agreement between Star Market and the IBT provides in Article 14, § 3(e) that there will be two fifteen minute break periods in each shift, fifteen minutes between the second and third hours and fifteen minutes between the sixth and seventh hours. Additionally that section of the contract provides an additional twenty minute rest period after eight hours of work, ten hours of work, and each successive two hours thereafter. Appendix D of the agreement, at paragraph 18, provides that employees in perishables, where Mr. Henderson and his fellow employees were working on May 2, 1991, may leave work when the shift is finished but that there shall be no extended non-contractual breaks or free time otherwise except by mutual agreement with Star Market. The

collective bargaining agreement does not require Star Market employees to punch in or out on their timecards except at the beginning and end of the shift and for meal periods. Collective Bargaining Agreement at Article 14, § 4.

On May 2, 1991, Mr. Henderson left his work station prior to the completion of his overtime shift and at a time when other employees working that overtime shift had not completed their work; the shift had not finished in the perishable operation. Mr. Henderson left the plant entirely. Employees of Star Market are permitted to leave the plant during their breaks.

Mr. Henderson claims that he left to obtain medicine and/or to call the Business Agent from Local 25 who had responsibilities with respect to the employees working at Star Market. Doug Darcy, a Local 25 member employed at Star Market working with Mr. Henderson on the overtime shift on May 2, 1991 in perishables left his work station shortly before Mr. Henderson and met Mr. Henderson outside the plant at Mr. Henderson's car.[1]

Mr. Henderson claims that Star Market employees working in perishables have historically and traditionally been permitted to leave their workstation and take a break when the particular employee's work assignment is finished. Thus, Mr. Henderson claims that employees may take their break prior to the time for taking breaks as established in the collective bargaining agreement, may extend their breaks longer than the time set forth in the collective bargaining agreement and commence their breaks prior to the time that all other perishable employees working that shift have completed their workload. Numerous other members of Local 25 employed by Star Market support Mr. Henderson's contention.

Subsequent to Mr. Henderson's discharge and the arbitration hearing, on June 19, 1991, Star Market posted a notice for all its employees working in perishables with respect to shift break times noting "that certain shifts are somehow unsure of the times they are to go to break." The notice also noted that the rules would not go into full effect until Sunday, June 30, 1991 since "there are a couple of changes." One of the changes referenced was that portion of Appendix D referred to above and relied upon by Star Market in discharging Mr. Henderson i.e. the provisions of paragraph 18 prohibiting non-contractual breaks, extra time for breaks or the right of the employees to take breaks

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[1] Although Mr. Darcy testified at the arbitration hearing it is not clear whether he told the arbitrator that he accompanied Mr. Henderson outside the plant. Star maintains surveillance photos of all persons entering or leaving the Star Market facility which also were not introduced at the arbitration hearing. Star Market does not claim that the surveillance photos fail to show Mr. Darcy leaving the plant shortly before Mr. Henderson left.

early except at the end of the shift when the entire shift has completed its work. The notice posted by the company thus further supports Mr. Henderson's contention that the historical practices for employees in the perishable area permitted such employees to leave their workstations and go on breaks, when such employees work assignment for the shift was completed.

The Department of Employment and Training of the Commonwealth of Massachusetts in its decision determining Mr. Henderson's eligibility for unemployment compensation benefits found that Mr. Henderson's discharge was "not attributable solely to deliberate misconduct and wilful disregard of the employing units interest." The Department found that prior to Mr. Henderson's discharge "it was not unusual for employees to take their workbreaks when they completed their overtime assignments."

With respect to the overtime shift on May 2, 1991, Mr. Henderson's regular break should have commenced at 9:25 p.m. As pointed out above, it is undisputed that he left his workstation prior to that time, at or about 9:00 p.m. Star Market does not dispute that Mr. Henderson had finished the tasks theretofore assigned him when he left. However, starting at or shortly before 9:00 p.m. John Gill, the Star Market supervisor in charge of the overtime shift, began looking for Mr. Henderson in order to give Mr. Henderson another assignment. Such other assignment was to remove a small stack of pallets left by the day shift which had tipped over and was partially blocking an aisle.

Mr. Gill was first informed of the pallet problem at or about 7:30 p.m. and then reminded that it had not yet been taken care of at or about 8:45 p.m. by the same employee who had first brought the matter to his attention. It should be noted that this employee reminded Mr. Gill of the pallet problem at a time when the employee himself was leaving his workstation to go on break although, as with Mr. Henderson, not all employees on the shift had finished their work.

On May 2, 1991 other employees besides Mr. Henderson and the employee who reminded Mr. Gill of the pallet problem, also took their breaks early, that is left their workstation prior to 9:25 p.m. and prior to the time that all employees on the overtime shift had completed their work. Other than Mr. Henderson, and perhaps Mr. Darcy, all such employees apparently took their break in the breakroom; they did not leave the plant premises. Star Market permits, however, employees on breaks to leave the plant premises if they so desire. No employee other than Mr. Henderson was disciplined.

The evidence presented to the Election Officer also reveals that other Star Market employees who have been given discipline for leaving their workstations and/or for taking "early" breaks have been disciplined far less severely than Mr. Henderson. In July, 1990 four employees left their workstations approximately fifteen minutes prior to the shift being released by supervisors. All four employees were initially given one day

suspension, later reduced to a verbal warning; the four employees received one days back pay each.

In August, 1990 an employee was found in the upstairs breakroom playing pool at a time when he was supposed to be in the warehouse working. The employee disobeyed the direct instructions from his supervisor to return to work and became verbally abusive to the supervisor. The employee also threw a cue ball down on the pool table which ball hit another ball which other ball ended up striking the supervisor in the arm. The employee received a twenty-day suspension.

In support of its decision that Mr. Henderson should be discharged, Star Market relies upon the specific terms of the collective bargaining agreement and in particular paragraph 18, Appendix D of that agreement. It further takes the position that Mr. Henderson because he is a long-time steward and indeed helped negotiate such collective bargaining agreement should know the rules and the terms of the collective bargaining agreement. As the company stated in its summation to the arbitrator, "[A]s a Steward he is supposed to set an example for his fellow employees. I would think if anyone would show responsibility and leadership, it would be the Steward. If anyone deserves the trust and respect of Management, it should be the Steward. If anyone won't break the rules or screw the Company or screw his Supervisor, it should be the Steward we can trust to be responsible."[2]

The arbitrator in his decision relied solely upon the terms of the collective bargaining agreement: "it is therefore my finding and award that the language of the agreement and appendix thereto is not ambiguous; that it means exactly what is [sic] says, and nothing has occurred legally warranting the Arbitrator to modify the terms and intent of the contract." The arbitrator does not discuss any of the issues of past practice in issuing his award. Neither does the arbitrator consider whether more severe discipline was being imposed because Mr. Henderson was a steward. Further, while contentions of discrimination based upon campaign activities were brought forth during the arbitration hearing, the arbitrator does not refer to those contentions or their factual support in his decision. The National Labor Relations Board will defer to an arbitrator's award as opposed to issuing an unfair labor practice complaint if (1) the contractual issue is factually parallel to the unfair labor practice issue and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. The National Labor Relations Board no longer requires explicit consideration of statutory issues or legal standards by the arbitrator before it will defer to an arbitrable award. Olin Corp.

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[2] It is a violation of federal substantive law if the basis for imposing discipline or more severe discipline is grounded upon the fact that the employee so disciplined is a Union steward or officer. Metropolitan Edison Company v. NLRB 460 U.S. 693 (1983); Eagle Pitcher Industries, 278 NLRB 102 121 LRM 1253 (1986).

228 NLRB 808 94 LRM 1483 (1977)[3]

Even were the Election Officer to apply a similar standard, it is unclear in this case whether the arbitrator considered the factual issues that are to be considered by the Election Officer in determining this protest. Further, certain of the evidence presented to the Election Officer referred to events occurring after the issuance of the arbitrator's award, e.g. the employer's June 19, 1991 notice about breaktime and the decision of the Department of Employment and Training. Neither of these matters were brought to the attention of the arbitrator. Thus even under the National Labor Relation Board's deferral standards, deferral would not be required here. Litton Systems 283 NLRB 144 125 LRM 1081 (1987). For these reasons the Election Officer refuses to defer to the arbitration award here.

The issue before the Election Officer is whether Mr. Henderson's discharge was based upon animus against him by Star Market due to his campaign and other activities, activities protected under the *Rules*. Star Market clearly had knowledge of Mr. Henderson's campaign activities. While independent evidence of animus towards him based upon such campaign activities is weak, the Election Officer concludes that sufficient evidence has been presented to demonstrate a *prima facia* case.

The company's rebuttal of the *prima facia* case is not supported by the evidence. The evidence is overwhelming that Mr. Henderson did nothing more on May 2, 1991 than other Star Market employees have traditionally and historically done. The company's own notice of June 19, 1991 buttresses that conclusion. Under the law, Mr. Henderson cannot be held to a higher standard than other employees merely because he is a steward. Even in those cases where the company found that an employee had engaged in a theft of time in a situation analogous to the situation on May 2, 1991 with Mr. Henderson, the discipline imposed was minuscule by comparison to the discipline imposed on Mr. Henderson. Even in a situation where the employee not only left work but refused a direct order to return to work and was verbally and physically abusive thereafter, Star Market only imposed a twenty day suspension. Star Market has failed to rebut the *prima facia* case presented by Mr. Henderson.

The Election Officer has no alternative but to reverse the discharge and order Mr. Henderson reinstated with full back pay, full seniority and all other related benefits. In accordance with discipline previously meted out for similar offenses, the Election Officer finds that the company may impose a written warning for Mr. Henderson's offense on

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[3] The United States Court of Appeals for the Second Circuit has specifically reserved judgement on whether the Olin standard sufficiently protects employees rights under the National Labor Relations Act. Nevins v. NLRB 796 F. 2d 14, 18(CA2, 1986).

May 2, 1991 and place such warning in Mr. Henderson's file.

In accordance with the foregoing the Election Officer orders the following:

1) Star Market shall immediately reinstate Neal Henderson to his former position with the company with full seniority, full back pay and the restoration of any and all other benefits. Star Market may discipline Mr. Henderson for the events of May 2, 1991 with a written warning.

2) Star Market shall cease and desist from discriminating against Mr. Henderson or any other employee because such employee engages in campaign or other activities protected under the *Rules*.

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/cdk

cc: Frederick B. Lacey, Independent Administrator
Elizabeth A. Rodgers, Regional Coordinator (For Information Only)

IN RE: NEAL HENDERSON and STAR MARKET and IBT LOCAL UNION NO. 25	91 - Elec. App. - 187 (SA) DECISION OF THE INDEPENDENT ADMINISTRATOR

This matter arises out of an appeal from a decision of the Election Officer in Case No. P-760-LU25-ENG. A hearing was held before me by way of telephone conference at which the following persons were heard: the complainant, Neal Henderson; Karen Keys, on behalf of Mr. Henderson; Francis Raucci, on behalf of the employer Star Market; and John Sullivan, on behalf of the Election Officer. Elizabeth Rogers, the Regional Coordinator, audited the hearing.

Mr. Henderson alleges that he was discharged by his employer, Star Market, in retaliation for his participation in the delegate and International officer election process protected by the Rules For The IBT International Union Delegate And Officer Election (the "Election Rules"). The Election Officer found Mr. Henderson's allegations to be meritorious and concluded that Mr. Henderson's discharge should be reversed and that he should be reinstated with full back pay, seniority and all other related benefits. The

Election Officer also found that Star Market may impose a written warning for Mr. Henderson's offense and place such warning in Mr. Henderson's personnel file. Lastly, the Election Officer ordered Star Market to cease and desist from discriminating against employees because of campaign activity or other activity protected by the Election Rules.

The ruling of the Election Officer is affirmed in all respects.

Mr. Henderson, a member of IBT Local 25, has been employed by Star Market since 1977. He has been a Union steward for Local 25 at Start Market since approximately 1986. At the time of his discharge Mr. Henderson was employed by Star Market as a warehouseman in the perishable department.

Mr. Henderson also served as a delegate to the 1991 IBT Convention on behalf of Local 25. Mr. Henderson was elected as a delegate as part of a slate of candidates committed to the candidacy of Ron Carey for General President. Mr. Henderson and his slate were opposed by an incumbent officer slate headed by William J. McCarthy, the General President of the International Brotherhood of Teamsters and the President of Local 25. Mr. McCarthy and his slate supported the candidacy of R.V. Durham for IBT General President.

Subsequent to his election as a delegate, Mr. Henderson has continued to openly engage in campaign activity supporting Carey's candidacy. Mr. Henderson's supervisors are aware of his political activities and they are also aware that Local 25's officers have

opposing political views. The Election Officer's investigation found that from time to time Star Market supervisory employees made remarks to Mr. Henderson which could be considered disparaging of his candidacy for delegate and/or disparaging of his other campaign activities.

On May 2, 1991, Mr. Henderson and ten other employees worked a "pre-shift overtime." In other words Mr. Henderson worked additional hours before his regular shift was to begin at 10:00 p.m. The pre-shift overtime began at 7:00 p.m.

Mr. Henderson had completed his pre-shift work at approximately 9:00 p.m. and after checking with his fellow employees whether his services would be needed further, he left the Star Market plant. Mr. Henderson stated that he left the plant to purchase some cold medication, purchase lunch, and contact a Local 25 business agent concerning earlier meetings held with the company.

Mr. Henderson returned to the plant at approximately 10:00 p.m. and entered the lunch room where a shift meeting was in progress. After the shift meeting was completed the Star Market supervisor on duty requested to speak with Mr. Henderson. At that time Mr. Henderson was told that he was suspended pending investigation into the circumstances of his leaving the plant. By letter dated May 13, 1991, Jack Kelleher, Manager of the perishable warehouse for Star Market, advised Mr. Henderson that his employment was terminated for dishonesty--stealing company time.

Pursuant to the grievance procedure set forth in the collective bargaining agreement between Local 25 and Star Market, Mr. Henderson's discharge was the subject of an arbitration which was held on June 12, 1991. On July 17, 1991, the arbitrator issued an award finding that Mr. Henderson was justifiably discharged and denied his grievance. In his decision the arbitrator relied solely upon the terms of the collective bargaining agreement.

JURISDICTION

Star Market claims that the Election Officer and the Independent Administrator have no jurisdiction over it. It is now settled that the Election Officer and the Independent Administrator have jurisdiction over employers to enforce the provisions of the Election Rules. See In Re: McGinnis, 91 - Elec. App. - 43 (January 23, 1991), aff'd, United States v. IBT, 88 Civ. 4486, slip op. (S.D.N.Y. April 3, 1991)

DUE PROCESS

Star Market suggests that its "rights to due process" have been violated by, among other things:

1. Lack of notice of the procedure to be utilized in review of the protest;

2. Lack of notice of any legal authority to support the Election Officer's rule;

3. Failure to provide it with a meaningful opportunity to be heard;

4. Failure to provide it with documents and information necessary to participate in a meaningful way in the process; and

5. Failure to provide it with adequate time to prepare.
[Star Market's September 17, 1991, Letter Memorandum at p. 4.]

Without addressing the extent to which the conduct of the Election Officer and the Independent Administrator constitute "state action" under these circumstances, see, United States v. IBT, 91-6052, slip op. (2d Cir. August 6, 1991), Star Market's due process concerns will be addressed.

On May 14, 1991, the Election Officer wrote to the parties acknowledging receipt of Mr. Henderson's protest under "Article XI, §1 of the" Election Rules. In that letter, the Election Officer, citing to In Re: McGinnis, also stated that he has "jurisdiction and authority to determine the instant protest on its merits." It was further stated that, "[b]ecause the Rules require protests be investigated in an expeditious manner, all interested parties . . . should immediately contact the Washington Office of the Election Officer with all information relevant to the allegations contained in the protest."

Thus, it is clear that as early as May 1991, Star Market was put on notice that the Election Officer would process the protest pursuant to the Election Rules. The Election Officer's "legal authority" to do so was also set forth.[1] Star Market was also invited to contact the Election Officer "with all information relevant to the allegations contained in the protest." This

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1 I note here that the Election Officer is under no obligation to set forth his "legal authority." That he did so is commendable.

clearly constitutes an "opportunity to be heard." If Star Market believed it needed additional "documents and information" to prepare, it should have directed such requests to the Election Officer. Concerning Star Market's claims regarding "adequate time to prepare" I again note that it was advised that the Election Officer was considering the protest in mid-May. The Election Officer's decision did not issue until some four months later in mid-September. This is certainly "adequate time to prepare." Moreover, to the extent Star Market challenges the schedule set forth in the Election Rules for resolving appeals (Article XI), it is only noted that that schedule has already been approved by the United States District Court for the Southern District of New York and affirmed by the United States Court of Appeals for the Second Circuit. United States v. IBT, 742 F.Supp 94 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir. 1991).

DEFERENCE TO THE ARBITRATOR'S DECISION

Star Market argues that the Election Officer must adhere to the arbitrator's decision issued in the collective bargaining grievance proceeding. In making this argument Star Market ignores the fact that the "Election Officer has jurisdiction independent of the arbitrator." In Re: Shrader, 91 - Elec. App. - 124 (SA) (April 12, 1991) at p. 4. As explained in Shrader:

> The Election Officer is not overturning the decision of the Grievance Committee, but rather addressing a violation of the Rules independent of the Grievance Committee's actions. That the Election Officer's decision may have the effect of modifying the decision of the Grievance Committee is of no moment.

See also, Lingle v. Norge Division, Magic Chef, 486 U.S. 399, 411 (1988) ("[T]here is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements."); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 744 (1981) (An arbitrator "has no general authority to invoke public laws that conflict with the [collective bargaining agreement] between the parties."); Alexander v. Gardner-Denver Company, 415 U.S. 36, 53 (1974) ("The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties.")

Star Market also makes much of the fact that the Election Officer postponed issuing his decision in this matter pending the arbitrator's decision. Star Market suggests that this can only be interpreted as the Election Officer's recognition of his obligation to defer to the arbitrator's decision.

As the Election Officer explained at the hearing, he postponed the issuance of his decision in the event the arbitrator sustained Mr. Henderson's grievance and thus, rendered the entire protest moot. At no time did the Election Officer concede or acknowledge that he was bound by any decision of the arbitrator.

THE MERITS

In the past, when the Independent Administrator has reviewed allegations that a discharge or discipline was motivated, at least in part, by an employee's protected campaign activity he has

applied a mixed motive analysis. See In Re: Coleman, 91 - Elec. App. - 18 (SA) (December 14, 1990). As explained in Coleman:

> 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).

Following the Wright Line standard, Mr. Henderson has made a prima facie showing that his campaign activity and his support of Ron Carey, in the face of the Union leadership's support of the opposition candidate Durham, was a "motivating factor" in his discharge.[2] Thus, the burden shifts to Star Market to demonstrate that it would not have discharged Mr. Henderson but for his

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2 As noted, Mr. Henderson's support for Carey was well known. In addition, supervisory employees had negatively commented to Mr. Henderson regarding his political activities. It can not be ignored that employers may choose to defer to the political choices of the incumbent leadership. As observed in United States v. IBT, 88 Civ. 4486, slip op. (S.D.N.Y. April 3, 1991), at p. 6:

> Employers may have developed comfortable relationships with incumbent IBT officers, and may not be anxious for new, and perhaps more assertive union representatives.

campaign activity. The Election Officer's investigation, however, did not reveal a single instance where Star Market had discharged an employee for "stealing time." The Election Officer's investigation revealed a wide range in penalties for similar violations. The most lenient penalty was a verbal warning and the most severe sanction was a 20-day suspension. The 20-day suspension arose out of a situation where an employee was shooting pool in a break room at a time when he was supposed to be working, became verbally abusive to his supervisor, and threw a pool cue ball down on the pool table, which ball hit another ball and ended up striking the supervisor in the arm.

The evidence also demonstrated that many of the other employees who had worked the pre-shift overtime on the evening in question also left the pre-shift early, just as Mr. Henderson did, but received no discipline.

Star Market suggests that it has treated Mr. Henderson more severely because he is a Union steward. Such a rationale is simply not recognized in the law. See, e.g., Metropolitan Edison Company v. NLRB, 460 U.S. 693-702 (1983) ("The Board has found that disciplining Union officials more severely than other employees for participating in" prohibited conduct is unlawful and discriminatory.

Furthermore, subsequent to Mr. Henderson's arbitration, Star Market posted a memo dated June 19, 1991, with respect to break times in the perishable department. That memo provided in part "[t]hat certain shifts are somehow unsure of the times they are

going to go to break." The memo also noted that "there are a couple of changes" in the break shift policy. This further suggests that Star Market was aware that some of its employees were leaving early for breaks. It was only Mr. Henderson, however, that lost his job for leaving his shift early.

Given the background here, there can be only one explanation for Star Market's actions. It was retaliating against Mr. Henderson because of his political activity and his support of Carey. The Election Rules simply do not tolerate such action. See Election Rules Article VIII, Section 10 ("Freedom to Exercise Political Rights."). See, also, United States v. IBT, 742 F. Supp 94, 97 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir 1991) ("This Court will only approve election rules that will guarantee honest, fair, and free elections completely secure from harassment, intimidation, coercion, hooliganism, threats, or any variant of these no matter under what guise.")

Accordingly, the decision of the Election Officer is affirmed in all respects.

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

Date: September 18, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -v- INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, et al., Defendants.	:	OPINION & ORDER 88 CIV. 4486 (DNE)

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

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

ELLIOT, BRAY & RILEY, Philadelphia, Pennsylvania, (Robert J. Bray, Jr. and Henry F. Siedzikowski, of counsel) for Star Market.

EDELSTEIN, District Judge:

This decision arises from the implementation of the rules for the International Brotherhood of Teamsters ("IBT") International Union Delegate and Officer Election (the "Election Rules"), promulgated by the Election Officer and approved as modified by this Court and the Court of Appeals. July 10, 1991 Opinion & Order, 742 F. Supp. 94 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir. 1991). The Government brought an Order to Show Cause why this Court should not: (1) affirm the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 -Elec. App.- 187, which affirmed the September 9, 1991 decision of the Election

Officer in Election Office Case No. P-760-LU25-ENG; (2) enter an order directing Star Market, Inc. ("Star Market") to comply fully, within twenty-four hours, with the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 -Elec. App.- 187; (3) in the event that Star Market fails to comply with this Court's order, adjudge Star Market in civil contempt and impose coercive sanctions, including substantial daily fines of at least $10,000 per day until Star Market complies as directed; and (4) award the Government, the Election Officer and the Independent Administrator such other relief, including attorney's fees, as this Court deems appropriate.

I. BACKGROUND

The Election Officer was appointed by the Court pursuant to its March 14, 1989 Order (the "Consent Decree"), which was agreed to by the plaintiff United States of America (the "Government") and the defendant IBT in settlement of the bulk of this civil racketeering action. The Election Officer is empowered to supervise the implementation of the Consent Decree's electoral provisions, culminating in the first-ever direct rank and file election of IBT International officers. See Consent Decree, ¶12(D); October 18, 1989 Opinion & Order, 723 F. Supp. 203, 206-07 (S.D.N.Y.), appeal dismissed, No. 89-6252 (2d Cir. Dec. 13, 1989), cert. denied, 110 S. Ct. 2618 (1990). Pursuant to his supervisory authority, the Election Officer promulgated the

Election Rules, which were approved as modified by this Court and the Court of Appeals. July 10, 1991 Opinion & Order, 742 F. Supp. 94 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir. 1991). The Election Rules are the linchpin of the Consent Decree's efforts to cleanse the IBT of La Cosa Nostra's corrupt influences. October 18, 1989 Opinion & Order, 723 F. Supp. at 206-07; October 25, 1991 Order, slip opinion at 1 (S.D.N.Y. 1991). The Election Rules protect, inter alia, the rights of IBT members to participate in union election campaign activities, see Art. VIII, §10(a), and enable the Election Officer to respond to violations of the Election Rules, or any other conduct preventing a fair, honest, and open election, with a wide range of remedial measures. See Art. XI, §2.

This matter involves the election protest of Neal J. Henderson, who is a member of IBT Local 25 in Boston, Massachusetts.[1] The principle officer of Local 25 is IBT General President William J. McCarthy. Before his discharge, Henderson had been employed by Star Market since 1977 as a warehouseman in the perishables department of one of its Boston-area facilities.

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[1] The following account is based on the findings of the Independent Administrator. As set forth more fully below, the findings of the Independent Administrator "are entitled to great deference." United States v. International Brotherhood of Teamsters, 905 F.2d 610, 616 (2d Cir. 1990), aff'g, March 13, 1990 Opinion & Order, 743 F. Supp. 155 (S.D.N.Y. 1990). This Court will overturn findings of the Independent Administrator when it determines that they are, on the basis of all the evidence, arbitrary and capricious. Id. at 622; see, e.g., October 24, 1991 Opinion & Order, slip opinion, at 4-5 (S.D.N.Y. 1991); May 13, 1991 Memorandum & Order, 764 F. Supp. 817, 820-21 (S.D.N.Y. 1991); August 27, 1990 Opinion & Order, 745 F. Supp. 908, 911 (S.D.N.Y. 1990).

Henderson has been a union steward at Star Market since 1986.

Last spring Henderson was elected as a delegate to the IBT International Union Convention on a slate supporting the candidacy of Ron Carey for IBT General President. Henderson and his slate were opposed by an incumbent-officer slate headed by McCarthy, which supported the candidacy of R.V. Durham for IBT General President.

After winning election as a Local 25 delegate to the International Union Convention, Henderson continued to engage openly, and with Star Market's knowledge, in pro-Carey campaign activities at his place of employment. Star Market's supervisors made disparaging remarks to Henderson about his candidacy for delegate and his other pro-Carey campaign activities.

On May 2, 1991 Henderson and ten other employees accepted a pre-shift overtime assignment that was to begin at 7:00 p.m. and end at 9:25 p.m. Henderson's regular shift was to begin at 10:00 p.m. Star Market employees who work pre-shift overtime are entitled to a rest period or break between the end of the overtime period and the start of the regular shift. Employees at Star Market may leave the premises during their rest periods without requesting their supervisors' permission. It was the practice of Star Market employees working pre-shift overtime to leave early for their break if they completed their work.

At about 9:00 p.m., Henderson completed his pre-shift overtime assignment. After checking with his fellow employees whether his services were needed, he left the Star Market facility to buy some

cold medicine, get something to eat, and conduct some union business. Upon returning for his regular shift at 10:00 p.m., Star Market supervisory personnel suspended Henderson. On May 13, 1991, Star Market management terminated Henderson because he "stole company time" by leaving the facility before his pre-shift overtime period ended.

Henderson filed a grievance pursuant to the collective bargaining agreement between Local 25 and Star Market. On June 12, 1991, an arbitrator held a hearing on Henderson's grievance. In a decision dated July 17, 1991, that was based solely upon the terms of the collective bargaining agreement, the arbitrator found that Star Market was justified in discharging Henderson and therefore denied his grievance. Henderson also filed a protest under the Election Rules, asserting that his discharge was politically motivated. The Election Officer deferred action on Henderson's protest pending the arbitrator's decision.

Because the arbitrator's decision did not address Henderson's claims of retaliation in violation of the Election Rules, the Election Officer decided to go forward with Henderson's protest. The Election Officer's investigation of the protest revealed that on May 2, 1991, Star Market employees other than Henderson who worked pre-shift overtime in the perishables department left their work stations before the overtime period ended. Only Henderson, however, was terminated for doing so. The investigation further revealed that the discipline imposed on Henderson was far more severe than that imposed on others who had committed similar

infractions.

In his September 9, 1991 decision, the Election Officer found that Star Market had retaliated against Henderson for engaging in Union Election campaign activity that is protected by the Election Rules. Accordingly, the Election Officer directed Star Market to reinstate Henderson to his former position with full seniority, full back pay, and full restoration of all other benefits, and to cease and desist from discriminating against Henderson or any other employee on account of campaign or other activities protected by the Election Rules.

Exercising its rights under the Election Rules, Star Market appealed the Election Officer's September 9, 1991 decision to the Independent Administrator. See Election Rules, Art. XI, §1(a)(5). On September 18, 1991, the Independent Administrator issued a decision affirming the Election Officer's decision in all respects. In that decision, the Independent Administrator found that "[g]iven the background here, there can be only one explanation for Star Market's actions. It was retaliating against Mr. Henderson because of his political activity and his support of Carey. The Election Rules simply do not tolerate such action." (Ind. Admin. Dec. at 10.)

Star Market has neither complied with the Independent Administrator's directive to reinstate Henderson, nor has it appealed the Independent Administrator's decision to this Court. Pursuant to Article XI, § 1(a)(8), the Independent Administrator's decision "must be followed unless it is stayed or overturned by the

Court." In a letter to the Government dated September 26, 1991, counsel for Star Market expressly stated that Star Market would not comply, whereupon the Election Officer requested that the Government initiate appropriate contempt proceedings against Star Market. By letter dated October 3, 1991, the Government informed Star Market's counsel that unless the company complied with the Election Officer's directives by October 7, the Government would initiate civil contempt proceedings before this Court. By letter dated October 10, 1991, Star Market's counsel informed the Government that the company would not comply.

On October 24, 1991, the Government brought an Order to Show Cause why this Court should not: (1) affirm the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 - Elec. App.-187, which affirmed the September 9, 1991 decision of the Election Officer in Election Office Case No. P-760-LU25-ENG; (2) enter an order directing Star Market to comply fully, within twenty-four hours, with the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 -Elec. App.-187, which affirmed the September 9, 1991 decision of the Election officer in Election Office Case No. P-760-LU25-ENG; (3) in the event that Star Market fails to comply with this Court's order, adjudge Star Market in civil contempt and impose coercive sanctions, including substantial daily fines of at least $10,000 per day until Star Market complies as directed; and (4) award the Government, the Election Officer and the Independent Administrator such other relief, including attorney's fees, as this Court deems

appropriate. This Court signed the Order to Show Cause and made it returnable for October 28, 1991, at which time this Court heard argument from both the Government and Star Market.

II. DISCUSSION

Star Market, although it did not appeal the Independent Administrator's decision to this Court, now objects to that decision. Specifically, Star Market asserts that: (1) this Court lacks subject matter jurisdiction because Star Market is not subject to the Consent Decree; (2) this Court lacks personal jurisdiction over Star Market; (3) the Election Officer and the Independent Administrator's handling of this matter deprived Star Market of due process; (4) the arbitrator's decision is a final and binding adjudication of this matter that pre-empts the decisions of the Election officer and the Independent Administrator; and (5) the Election Officer violated the Election Rules. This Court finds that Star Market waived its objections to the Independent Administrator's decision, and, in the alternative, that Star Market's objections are wholly without merit.

A. Waiver

Pursuant to the Election Rules, Article XI, § 1(a)(8), the Independent Administrator's decision "must be followed unless it is stayed or overturned by the Court." The Election Rules have the force of Court Orders and are "enforceable upon pain of contempt." July 10, 1990, Opinion & Order, 742 F. Supp. 94, 108 (S.D.N.Y.

1990), aff'd, 931 F.2d 177 (2d Cir. 1991). Star Market did not take the opportunity to appeal the Independent Administrator's decision to this Court. Rather, it brazenly disregarded that decision. Only now that the Government has moved for an order directing compliance under pain of contempt does Star Market argue the merits of the Independent Administrator's decision to this Court.

By failing to appeal that decision to this Court, Star Market waived its rights to contest the merits of the decision. To hold otherwise would encourage parties to disregard the Independent Administrator's decisions until the Government seeks compliance in this Court upon pain of contempt. This Court will not reward parties who flout the Independent Administrator's decisions by allowing them to delay compliance until the Government incurs the expense, time, and effort involved in seeking an order in this Court directing compliance. Furthermore, such a rule promotes enforcement and speedy resolution of Election Rule violations, which helps to ensure an "honest, fair, and free election completely secure from harassment, intimidation, coercion, hooliganism, threats, or any variant of these no matter under what guise." July 10, 1990 Opinion & Order, 742 F. Supp. 94, 94 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir. 1991).

B. Star Market's Objections

Even if Star Market had not waived its right to contest the merits of the Independent Administrator's decision, Star Market's

objections are wholly without merit.

1. Subject Matter Jurisdiction

Star market argues that this Court lacks subject matter jurisdiction because the Consent Decree is not binding on non-parties. This Court has rejected identical arguments on several occasions. See October 25, 1991 Order, slip op. at 6 (S.D.N.Y. 1991); April 3, 1991 Opinion & Order (S.D.N.Y. 1991) ("Yellow Freight"), appeal pending, No. 91-6096 (2d Cir.); May 13, 1991 Memorandum & Order, 764 F. Supp. 817 (S.D.N.Y. 1991), appeal pending, 91-6140 (2d Cir.). In Yellow Freight, this Court determined that pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651, the Election Rules extend to entities that could jeopardize the IBT membership's right to a free, fair and honest election. Specifically, this Court ruled that Yellow Freight, a company employing IBT members but not itself affiliated with the IBT, was subject to the election rules because it was in a position to "frustrate the implementation of the Consent Decree and the election rules." Id.; October 25, 1991 Order, slip op. at 6 (S.D.N.Y. 1991); May 13, 1991, Memorandum & Order, 764 F. Supp. 817, 821 (S.D.N.Y. 1991).

As in Yellow Freight, the Government does not seek to bind Star Market to the Consent Decree, but simply seeks to prevent it from interfering with the election process. Like the employer in Yellow Freight, Star Market is in a position to "frustrate the implementation of the Consent Decree and the Election Rules." This

case presents an even greater threat to the IBT membership's right to a free, fair, and honest election than did the employer's conduct in Yellow Freight. Star Market injected itself into the election process by terminating a union member for exercising his campaign rights under the Election Rules.[2] Such conduct threatens to chill the future exercise of such rights and ultimately threatens the integrity of the election process. Accordingly, the All Writs Act gives this Court subject matter jurisdiction for the limited purpose of preventing such interference with the Election Rules.

2. Personal Jurisdiction

Star Market argues that this Court lacks personal jurisdiction because it does not have minimum contacts with the State of New York or this District. In making such an argument, Star Market ignores the holdings of the Second Circuit and this Court to the contrary. Personal jurisdiction is not required to bind non-parties under the All Writs Act. January 17, 1990 Opinion & Order, 728 F. Supp. 1032, 1048 (S.D.N.Y.), aff'd, 907 F.2d 277 (2d Cir. 1990). "The All Writs Act gives the Court the power to bind those who are 'not parties to the original suit.'" Id. (quoting In re Baldwin-United Corp., 770 F.2d 328, 338 (2d Cir. 1985)). Moreover, the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18

[2] The Election Rules state that "[a]ll Union members retain the right to participate in campaign activities, including the right to run for office, to openly support or oppose any candidate, to aid or campaign for any candidate, and to make personal campaign contributions." Article VIII, §10(a).

U.S.C. §1965(d), "provides for nationwide personal jurisdiction, and this ultimately is a RICO matter." Id.

In cases where Congress authorizes nationwide federal jurisdiction, the district court's jurisdiction is co-extensive with the boundaries of the United States. Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974). All that is required is sufficient minimum contacts with the United States, not this State or District. See United States v. IBT, 907 F.2d at 281. Thus, a defendant who resides within the territorial boundaries of the United States is subject to personal jurisdiction under nationwide service of process without regard to state jurisdictional statutes. See Mariash, 496 F.2d at 1143 Further, it is not necessary that the defendant have the requisite minimum contacts with the state that would exercise jurisdiction. See, e.g., F.T.C. v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. 1981) ("a resident corporation necessarily has sufficient contacts with the United States to satisfy the requirements of due process"). Accordingly, as a corporation that resides in the United States, Star Market is subject to personal jurisdiction in this action. Star Market's objection to personal jurisdiction is therefore without merit.

3. Due Process

Star Market stressed in its papers and at oral argument that the Court Officers are private parties, and not state actors. (Star Market's Mem. at 10). Star Market also stressed in its papers and at oral argument that the hearings conducted by the

Election Officer and the Independent Administrator constituted "State Action." (Id. at 12-13). The inconsistency between these two arguments seems to elude Star Market's counsel.

Because the United States Constitution regulates the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish the challenged conduct constitutes "state action." United States v. IBT, No. 91-6052, slip op. at 6769, 6775-76 (2d Cir. Aug. 6, 1991). In this case, the Election Officer and the Independent Administrator acted pursuant to the IBT Constitution -- a private agreement -- and not pursuant to a right or privilege created by the State. Id. at 6776. In addition, neither the Election Officer nor the Independent Administrator may fairly be said to be state actors in this case. Id. at 6777. Accordingly, because Star Market can not establish the requisite "state action," its constitutional claims must fail.

Even if the Election Officer and Independent Administrator's conduct did establish "state action," Star Market's due process claim is frivolous. Due process is "flexible and calls for such procedural protections as the particular situation demands." Morrisey v. Brewer, 408 U.S. 471, 481 (1972). In this case, Star Market received all the process that it was due.

Star market had the opportunity to present its case to the Election Officer, to appeal the Elections Officer's decision to the Independent Administrator, and to appeal that decision to this Court. The Election Officer, the Independent Administrator, and

now this Court, have set forth their factual findings and legal reasoning in written opinions. Furthermore, Star Market had over three months to prepare and submit to the Election Officer evidence and arguments in support of its position. As stated previously, Star Market did not avail itself of the opportunity to appeal to this Court. It is inconsistent for Star Market to argue that it did not receive due process, when it failed to take full advantage of the process it was afforded. This inconsistency also seems to elude Star Market's counsel. Accordingly, Star Market's due process claim is frivolous.

4. Arbitrator's Decision

Star Market argues that because an arbitrator ruled that Star Market did not violate its collective bargaining agreement with IBT Local 25 when it discharged Henderson, the Election Officer may not consider whether the company's action violated the Election Rules. This Court has previously rejected a similar pre-emption argument. In Yellow Freight, this Court rejected the assertion that alleged violations of the Election Rules which might also constitute unfair labor practices under the National Labor Relations Act may be adjudicated only by the National Labor Relations Board. April 3, 1991 Opinion & Order, slip opinion at 7-8 (S.D.N.Y. 1991).

As the Election Officer and the Independent Administrator pointed out, whether Star Market violated the collective bargaining agreement's overtime provisions and whether the company violated the election campaign activity provisions of the Election Rules are

two entirely separate inquiries. The Election Officer, the Independent Administrator, and this Court need not defer to an arbitration award that interprets a collective bargaining agreement when they adjudicate a claim based on an independent source of rights. See, e.g., Barrantine v. Arkansas Best Freight Systems, 450 U.S. 728 (1981) (an employee who submitted to arbitration under a collective bargaining agreement could still bring an action under the Fair Labor Standards Act in federal district court based on the same facts); Alexander v. Gardener-Denver Co., 415 U.S. 36 (1974) (employee who submitted to arbitration under a collective bargaining agreement could still bring a Title VII action in federal district court based on the same facts). Henderson's rights under the Election Rules are entirely independent of his rights under Star Market's collective bargaining agreement with Local 25.

In Barrantine v. Arkansas Best Freight Systems, 450 U.S. at 737, the Supreme Court stated:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide substantive guarantees to individual workers.

Henderson's situation is analogous to Barrantine. Henderson's protest arises out of a violation of the Election Rules, which constitute a different source of rights than those arising out of the collective bargaining agreement between Star Market and Local

25. Just as Henderson was entitled to file a grievance under the collective bargaining agreement, he was also entitled, as an IBT member, to assert his rights under the court-approved Election Rules, which derived from the court-approved Consent Decree settling the Government's case against the IBT under RICO. Accordingly, Star Market's argument is wholly without merit.

5. The Election Rules

Star Market argues that the Election Officer violated Article XI, §1(a)(4), which provides that "within five days of receipt of the [election] protest, the Election Officer . . . shall determine the merits of the protest and . . . the appropriate remedy, [or] defer making a determination until after the election." Star Market argues that by waiting to decide the case pending the outcome of the arbitration, the Election Officer can not address this protest until after the election. As with all of Star Market's arguments, this argument misses the point.

First, the Election Officer's decision not to proceed on this election protest pending the outcome of arbitration was an appropriate "remedy" under the first prong of Article XI, §1(a)(4). Second, the Election Officer may initiate an investigation without a protest. Article XI, §2 provides that:

> If as a result of any protest filed or any investigation undertaken by the Election Officer with or without a protest, the Election Officer determines that these Rules have been violated, or that any other conduct has occurred which may prevent or has prevented a fair, honest and open election, the Election Officer may take whatever remedial action is appropriate.
> (emphasis added).

The Election Officer's investigation after the arbitrator's decision can therefore be considered an investigation undertaken by the Election Officer without an election protest. Such an investigation is appropriate in this case and consistent with the purpose of ensuring a fair, honest and open election. Accordingly, Star Market's argument is without merit.

C. The Independent Administrators' Decision

The Government asks this Court to affirm the September 18, 1991 decision of the Independent Administrator. It is well settled that the findings of the Independent Administrator "are entitled to great deference." United States v. International Brotherhood of Teamsters, 905 F.2d 610, 616 (2d Cir. 1990), aff'g March 13, 1990 Opinion & Order, 743 F. Supp. 155 (S.D.N.Y. 1990). This Court will overturn the findings of the Independent Administrator when it determines that they are, on the basis of all the evidence, "arbitrary or capricious." Id. at 622; October 25, 1991, Order, slip opinion, at 4-5 (S.D.N.Y. 1991); October 24, 1991 Memorandum & Order, slip opinion, at 4-5 (S.D.N.Y 1991); October 16, 1991 Memorandum & Order, slip opinion, at 4-5 (S.D.N.Y. 1991); October 11, 1991 Memorandum & Order, slip opinion, at 3 (S.D.N.Y 1991); October 9, 1991 Memorandum & Order, slip opinion, at 5 (S.D.N.Y. 1991); August 14, 1991 Memorandum & Order, slip opinion, at 4 (S.D.N.Y. 1991); July 31, 1991 Memorandum & Order, slip opinion at 3-4 (S.D.N.Y. 1991); July 18, 1991 Memorandum & Order, slip opinion at 3-4 (S.D.N.Y. 1991); July 16, 1991 Opinion & Order, slip

opinion, at 3-4 (S.D.N.Y. 1991); June 6, 1991 Opinion & Order, slip opinion, at 4-5 (S.D.N.Y. 1991); May 13, 1991 Memorandum & Order, 764 F. Supp. 817, 820-21 (S.D.N.Y. 1991); May 9, 1991 Memorandum & Order, 764 F. Supp. 797, 800 (S.D.N.Y. 1991); May 6, 1991 Opinion & Order, 764 F. Supp. 787, 789 (S.D.N.Y. 1991); December 27, 1990 Opinion & Order, 754 F. Supp. 333, 337 (S.D.N.Y. 1990); September 18, 1990 Opinion & Order, 745 F. Supp. 189, 191-92 (S.D.N.Y. 1990); August 27, 1990 Opinion & Order, 745 F. Supp. 908, 911 (S.D.N.Y. 1990); March 13, 1990 Opinion & Order, supra, 743 F. Supp. at 159-60, aff'd, 905 F.2d at 622; January 17, 1990 Opinion & Order, 728 F. Supp. 1032, 1045-57, aff'd, 907 F.2d 277 (2d Cir. 1990); November 2, 1989 Memorandum & Order, 725 F.2d 162, 169 (S.D.N.Y. 1989). Star Market argues that the decision of the Independent Administrator was arbitrary and capricious.

Notwithstanding Star Market's contention, the decision of the Independent Administrator was fully supported by the record and was neither arbitrary nor capricious. Applying the mixed motive analysis standard established in NLRB v. 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), the Independent Administrator found that Henderson made a prima facie showing that his support of Carey was a motivating factor in his discharge. (Ind. Admin. Dec. at 8). Further, the Independent Administrator found that Star Market did not rebut its burden of demonstrating that it would have discharged Henderson regardless of his campaign activity. (Id. at 8-9). The two major considerations support the finding that Star

Market discharged Henderson because of his campaign activities. The Independent Administrator found that there was no evidence of an employee ever having been terminated for "stealing time," and that other employees who left their work stations before the overtime period ended were not disciplined. Based on these considerations and a review of all the evidence, the Independent Administrator determined that the only explanation for Star Market's actions was that "[i]t was retaliating against Mr. Henderson because of his political activity and his support of Carey." (Ind. Admin. Dec. at 10).

The decision of the Independent Administrator is fully supported by the record and is neither arbitrary nor capricious. Star Market's arguments to the contrary are wholly without merit. Accordingly, the decision of the Independent Administrator is affirmed. Star Market is therefore ordered to comply fully with the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 -Elec. App.-187, which decision affirmed the September 9, 1991 decision of the Election Officer in Election Office Case No. P-760-LU25-ENG. Full compliance must take place within twenty-four hours of the filing of this opinion and order.

D. Civil Contempt

A court may exercise its inherent power to hold a party in civil contempt when: (1) the order the party allegedly failed to comply with is clear and unambiguous; (2) the proof of non-compliance is clear and convincing; and (3) the party has not

diligently attempted in a reasonable manner to comply. New York State Nat'l Organ. for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989). A civil contempt sanction may serve either to coerce the contemnor into future compliance or to compensate the complainant for losses resulting from the contemnor's past noncompliance. Id. at 1352. A person charged with civil contempt is entitled to notice of the allegations, the right to counsel, and a hearing at which the plaintiff bears the burden of proof and the defendant has an opportunity to present a defense. United States v. City of Yonkers, 856 F.2d 444, 452 (2d Cir. 1988), rev'd on other grounds, 110 S.Ct. 625 (1990).

As this Court has previously stated, the Election Rules are the linchpin of the Consent Decree's attempt to cleanse the IBT of the hideous influence of Organized Crime. July 10, 1990 Opinion & Order, 742 F. Supp. at 97. Star Market has violated the Election Rules by firing Henderson, a political opponent of Teamster's officials whom the company apparently favors, for engaging in clearly protected union election activity. In addition, Star Market's scorn for the dispute resolution process established by the Election Rules, and approved by this Court and the Second Circuit, has been as egregious as the company's discriminatory treatment of Henderson.

In the event that Star Market fails to comply with this Court's order, Star Market shall be adjudged in civil contempt, and will incur a coercive sanction of $10,000 per day until Star Market complies as directed by this Court. In addition, an award of

attorney's fees and other expenses to the Government and the court-appointed officers will serve to compensate them for Star Market's baseless refusal either to comply with the Election Officer's order as affirmed by the Independent Administrator or to appeal that decision to this Court. To this end, the Government, the Election Officer and the Independent Administrator are directed to submit affidavits, within ten days of the filing of this opinion and order, of attorneys' fees and other expenses incurred in connection with Star Market's refusal to comply with the Election Officer's decision as affirmed by the Independent Administrator. Further, Star Market shall submit to this Court an affidavit by a person in a senior management position stating that it has complied with this Court's order and shall also submit to this Court a copy of the letter it sends to Henderson which states that he is reinstated with full seniority, full back pay and benefits.

E. The Stay

In the event that this Court granted the Government's application, Star Market petitioned this Court for a stay of its order. In this circuit, the standards for issuing a stay encompass the following considerations: (a) Whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (b) Whether the applicant will be irreparably injured absent a stay; (c) Whether the issuance of a stay will substantially injure other parties interested in the proceedings; and (d) Where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776

(1987).

Applying these criteria to the instant application, I find that the request for a stay is denied. First, as fully set forth above, the movants have not made a strong showing that they are likely to succeed on the merits. Second, I find that the movants will face no irreparable harm from the remedies ordered to correct the retaliatory action taken by Star Market in violation of the Election Rules. The third criteria is whether staying the ruling will cause injury to any other interested party. Granting a stay will prejudice Henderson, the candidates for IBT office, and the IBT rank and file in general. Finally, the public interest lies in furthering the noble goal and promoting democratic, secret ballot elections in the IBT. Over the years, the IBT has been tarnished with a patina of corruption, thus actions to clear this ignominious and sordid history seem indubitably in the interest of IBT officials, the IBT rank and file, and the public as well. The petition for a stay is hereby denied.

CONCLUSION

In sum, the orders of this Court are as follows:

IT IS HEREBY ORDERED that the September 18, 1991 decision of the Independent Administrator in Election Appeal 91-Elec. App.-187, which decision affirmed the September 9, 1991 decision of the Election Officer in Election Office Case No. P-760-LU25-ENG, is affirmed; and

IT IS FURTHER ORDERED that Star Market must comply fully,

within twenty-four hours of the filing of this opinion and order, with this Court's order which affirms the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 - Elec. App.-187, which decision affirmed the September 9, 1991 decision of the Election Officer in Election Office Case No. P-760-LU25-ENG; and

IT IS FURTHER ORDERED that in the event that Star Market fails to comply with this Court's order, Star Market shall be adjudged in civil contempt, and will incur a coercive sanction of $10,000 per day until Star Market complies as directed by this Court; and

IT IS FURTHER ORDERED that Star Market shall compensate the Government, the Election Officer and the Independent Administrator for their attorney's fees and other expenses incurred in connection with Star Market's baseless refusal to comply with the Election Officer's decision as affirmed by the Independent Administrator; and

IT IS FURTHER ORDERED that the Government, the Election Officer and the Independent Administrator submit affidavits, within ten days of the filing of this opinion and order, of attorneys fees and other expenses incurred in connection with Star Market's baseless refusal to comply with the Election Officer's decision as affirmed by the Independent Administrator; and

IT IS FURTHER ORDERED that Star Market shall submit to this Court an affidavit by a person in a Senior Management position stating that it has complied with this Court's order, and Star Market shall also submit to this Court a copy of the letter it

sends to Henderson in which it indicates that he is reinstated with full seniority, full back pay and benefits; and

IT IS FURTHER ORDERED that Star Market's petition for a stay is denied.

SO ORDERED.

Dated: October 29, 1991 at 10:30 a.m.
New York, New York.

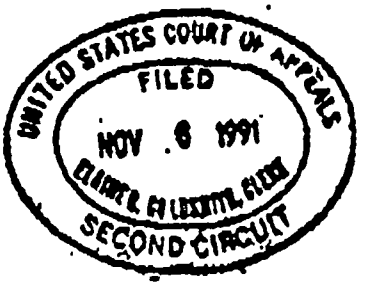
U.S.D.J.

SDNY
88-cv-4486
Edelstein

United States Court of Appeals
FOR THE
SECOND CIRCUIT

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 6th day of November, one thousand nine hundred and ninety-one.

Present: HON. RICHARD J. CARDAMONE,
HON. LAWRENCE W. PIERCE,
HON. ROGER J. MINER,
Circuit Judges.



UNITED STATES OF AMERICA,
Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al,
Defendants.

Docket No.
91-6270

It is hereby ordered that the motion for a stay pending appeal filed by the attorneys for Star Market is granted on condition that:

1) Mr. Henderson be permitted to remain on Star Market property in order to campaign as permitted by the District Court.

2) A notice be posted prominently on Star Market premises advising that Mr. Henderson's appeal regarding his discharge is pending in this court.

3) Any back pay or salary due Mr. Henderson from May 13, 1991 be held by the company in escrow pending determination of his appeal seeking reinstatement.

Further ordered that the appeal is expedited as follows: Appellant shall file and serve a brief by November 13, 1991. Appellee shall file and serve a brief by November 20, 1991. Appeal shall be heard during the week of November 25, 1991 subject to approval of the presiding judge of that weeks panel.

Elaine B. Goldsmith,
Clerk

Edward J. Guardaro

By: Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 797 -- August Term, 1991

(Argued: November 27, 1991 Decided:)

Docket No. 91-6270

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; ANTHONY PROVENZANO, also known as Tony Pro; NUNZIO PROVENZANO, also known as Nunzi Pro; ANTHONY CORALLO, also known as Tony Ducks; SALVATORE SANTORO; 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 Nutcracker, The; 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 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 PETERS, 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 LIGUROTIS, Sixteenth Vice President; SALVATORE PROVENZANO, also known as Sammy Pro, Former Vice President,

Defendants,

STAR MARKET COMPANY,

Appellant.

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B e f o r e : TIMBERS, PIERCE and WALKER, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, David N. Edelstein, Judge, entered on October 29, 1991, enforcing a determination of the Independent Administrator under a certain consent decree relating to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, ordering an employee of the Star Market Company to be reinstated with back pay.

Affirmed.

Robert J. Bray, Jr., Blue Bell, Pennsylvania (Henry F.Siedzikowski, Elliot Bray & Riley, Blue Bell, Pennsylvania, Robert J. Zastrow, Stroock & Stroock & Lavan, New York, New York, of counsel), for Appellant.

Edward T. Ferguson, III, Assistant United States Attorney (Otto G. Obermaier, United States Attorney for the Southern District of New York, Richard W. Mark, Assistant United States Attorney, of counsel), New York, New York, for Appellee.

WALKER, Circuit Judge.

Star Market Company (Star Market) appeals from an order of the United States District Court for the Southern District of New York, David N. Edelstein, Judge, entered on October 29, 1991. That order

directed Star Market to comply with the decision of an Independent Administrator, itself affirming the decision of an Election Officer, both officers having been appointed pursuant to a consent decree (Consent Decree) relating to the affairs of defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (IBT). The order required Star Market to reinstate a union employee whom it had dismissed allegedly for "stealing company time."

Star Market argues that the reinstatement proceedings conducted by the Consent Decree Officers, and enforcement hearing held in the district court, ran afoul of constitutional due process requirements. Star Market further contends that the district court's enforcement of the Officers' reinstatement order effectively reversed a binding arbitration award in violation of federal labor law. Because we find no merit in either argument, we affirm the district court's order in its entirety.

BACKGROUND

This appeal joins the ranks of what has now become a legion of cases arising out of the government's enforcement of the Consent Decree entered into on March 14, 1989 by the United States Government and the IBT. The Consent Decree was a critical part of the settlement of the government's civil RICO action, see Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C.A. §§ 1961-1968 (1984 & Supp. 1991), brought in 1988 in an effort to rid

the IBT of its domination by organized crime. The Consent Decree instituted sweeping structural reforms of the IBT's electoral and disciplinary processes. Its "central purpose" is to insure "[t]he fair and open conduct of the 1991 IBT election," U.S. v. IBT (Yellow Freight), 948 F.2d 98, 100 (2d Cir. 1991) as a means of freeing IBT's General Executive Board from the grip of La Cosa Nostra. The decree authorized the appointment of three court officers to oversee certain aspects of the IBT's affairs: an Election Officer (EO), an Investigations Officer, and an Independent Administrator (IA). The officials' particular functions have been discussed in previous opinions of this Court and will not be elaborated upon here. See generally, United States v. IBT, 905 F.2d 610, 613 (2d Cir. 1990). It suffices to state that they have been charged with implementing the free and fair election of the IBT's governing officials, and that the district court has exclusive jurisdiction to "decide any issues relating to the actions or authority of the [Independent] Administrator." Id.

The facts relevant to our review of the present controversy are largely set forth in the district court's opinion and order in United States v. IBT, 776 F. Supp. 144 (S.D.N.Y. 1991). We need only summarize them here. Other facts are ascertainable from the record on appeal, including letters between the parties, the decisions of the labor arbitrator, the EO and the IA.

On May 13, 1991, Star Market terminated Neal J. Henderson, a union steward, from his employment with the company. At the time he was fired, Henderson had been employed by the Star Market

supermarket chain for fourteen years, and was working as a warehouseman in the perishables department of one of the company's Boston-area facilities. Star Market's stated reason for terminating Henderson was that, on May 2, Henderson had "stolen company time" by leaving his assigned facility before his pre-shift overtime period had ended. Henderson admits leaving his post 25 minutes early on May 2 in order to purchase cold medicine and something to eat, as well as to conduct some union business before beginning his next shift. He argues, however, that it was common practice for Star Market employees who were working pre-shift overtime to take an early break if their work was complete.

Henderson claims that the true reason for his termination was to retaliate against him for his union election activities. In the most recent election held by his Teamster local, IBT Local 25 (Local 25), Henderson had opposed the slate of powerful incumbents, successfully campaigned for an insurgent slate of candidates, and was himself elected as a Local 25 delegate to the International Union convention. In response to these activities, Star Market supervisors made disparaging comments to Henderson regarding his candidacy for delegate, as well as his support for the opposition slate. Henderson contends that Star Market's negative reaction to his involvement in union politics culminated in his being fired.

After being dismissed from his job, Henderson filed a grievance pursuant to the collective bargaining agreement (CBA) between Local 25 and Star Market, claiming, inter alia, that his discharge was politically motivated. He also filed a protest with

the EO alleging that the retaliatory nature of his dismissal violated the Election Rules promulgated under the Consent Decree. The EO deferred decision on Henderson's protest until the contractual grievance process had culminated in a decision, but notified the parties that his investigation would proceed. The EO also advised the parties that he would not be bound by any decision reached in the grievance proceedings conducted pursuant to the CBA.

The CBA's grievance procedure provided for a two-step review. The first step consisted of a joint grievance panel comprised equally of union and employer panelists. If the panel was unable to reach a consensus, the second step was for the grievance to be submitted to binding arbitration before an independent arbitrator. Henderson advised the EO of his concern that he would not receive fair treatment from the grievance panel because a powerful incumbent union official, opposed by Henderson, controlled the selection of the union panelists. The EO advised Star Market of Henderson's concern and noted that the EO's review of the Election Rule protest would also include a review of the grievance process itself and the union's representation of Henderson in that process.

On May 22, 1991, the joint grievance panel deadlocked on Henderson's grievance, and the matter went to arbitration. On June 12, 1991, an arbitrator held a hearing on Henderson's grievance. On June 17, relying exclusively upon the provision of the CBA entitled, "Breaks and Free Time," the arbitrator found Henderson's discharge to be justified. Although Henderson argued that he was

a victim of retaliation, the arbitrator did not address the issue.

Thereafter, the EO completed his own investigation of Henderson's protest. The investigation revealed that Star Market's dismissal of Henderson was a disproportionately severe sanction as compared to those imposed for similar offenses by other employees. Other shift-break infractions of an equal magnitude had resulted in company discipline ranging from no sanctions whatsoever to verbal warnings. Indeed, in one case where an employee became verbally abusive to a supervisor and ultimately assaulted the supervisor with a billiard ball after the supervisor found him playing pool on company time, the employee was only suspended for twenty days.

The EO also considered a Star Market employee notice that had been posted after Henderson's arbitration hearing. This notice stated "that certain shifts are somehow unsure of the times they are to go to break," and went on to clarify the company's break-time policy. The notice also advised employees that the rules set out with respect to shift-break time would not go into effect until June 30, 1991 since "there are a couple of changes." Coming, as it did, on the heels of the Henderson arbitration, this notice virtually conceded the company's prior non-enforcement of the contract provision used to justify Henderson's termination. In light of this evidence, the EO concluded that Star Market had retaliated against Henderson for engaging in Union Election campaign activity, which is protected by the Election Rules, and ordered Star Market to reinstate Henderson with back pay and full

benefits.

As provided for in the Election Rules, Star Market appealed the EO's decision to the IA. On September 16, 1991, the IA conducted a hearing by telephone -- a procedure consented to by Star Market -- and accepted a written submission from Star Market which contained legal arguments concerning jurisdiction, deference to the arbitrator and due process. On September 18, 1991, the IA issued a written decision affirming the EO's decision in all respects.

Star Market did not appeal the IA's decision to the district court and steadfastly refused to comply with the IA's direction to reinstate Henderson. On October 24, 1991, at the EO's and IA's request, the government brought an Order to Show Cause in the district court directing Star Market to demonstrate why the court should not, inter alia, affirm the IA's decision and direct Star Market to fully comply within 24 hours or be in civil contempt. On October 29, 1991, the district court granted the order and imposed a coercive sanction of $10,000 per day should Star Market fail to comply. Star Market appealed. After the district court declined to stay its order pending appeal, another panel of this court entered a stay. We now vacate the stay and affirm.

DISCUSSION

I. State Action and Due Process Claims

Star Market argues that the Henderson protest proceedings conducted by the EO, and IA's review and affirmance of the EO's

decision, violated Star Market's procedural due process rights under the United States Constitution. More precisely, Star Market contends that it was not a party to the Consent Decree and is not bound by it; that it was denied sufficient notice of the charges lodged against it; that the EO and the IA did not afford it a meaningful opportunity to present evidence and be heard; and that the EO and the IA were not sufficiently impartial to pass constitutional muster. Star Market further argues that these alleged constitutional infirmities infected the enforcement proceedings held in the district court, and therefore the district court's order should be reversed. We are not persuaded by any of these arguments.

As a threshold matter, in order for Star Market to succeed on its due process claim it must establish that the officers appointed pursuant to the Consent Decree were "state actors" in the constitutional sense. See Blum v. Yaretsky, 457 U.S. 991, 1002 (1982). This argument was considered and found wanting in a prior IBT litigation. In U.S. v. IBT (Senese), 941 F.2d 1292, 1295-97 (2d Cir.), petition for cert. filed, 60 U.S.L.W. 3379 (U.S. Oct. 10, 1991) (No. 91-717), this Court specifically held that the IA's actions were not state action, and thus were not circumscribed by the provisions of the Federal Constitution. Senese arose out of an appeal from disciplinary sanctions imposed upon IBT officials by the IA for violations of the amended IBT Constitution. This Court reasoned that since the IA acted pursuant to the IBT Constitution, a private charter, and the IA was himself a paid

official of the IBT, he was not a state actor. 941 F.2d at 1296.

Star Market argues that even if the Consent Decree officers were not themselves state actors, the district court is an arm of the government, and its enforcement of the IA's decision supplies the requisite state action needed to trigger due process rights. However, in Senese, we put this argument to rest as well. There we concluded that the district court's affirmance of the IA's disciplinary action did not leave the imprimatur of governmental interference. "[G]overnmental oversight of a private institution does not convert the institution's decisions into those of the State, as long as the decision in question is based on the institution's independent assessment of its own policies and needs." 941 F.2d at 1297. The same reasoning applies equally in this case. There was no state action here, and thus the officers' intervention did not implicate constitutional due process concerns.

In any event, even if state action had been involved, we do not think that Star Market suffered from the deprivation of due process safeguards. In Yellow Freight, 948 F.2d at 104, we held that by virtue of the All Writs Act, 28 U.S.C. § 1651(a) (1988), the Consent Decree could be enforced against persons and entities not party to its entry. But we also held that the procedures employed in such enforcement would have to be "'agreeable to the usages and principles of law.'" Id. (quoting the All Writs Act). We then carefully evaluated the procedures for the administrative and judicial review of protests brought pursuant to the Consent Decree Election Rules, and concluded that they "accorded adequate

procedural protections to satisfy the All Writs Act." Id. at 105. The same procedures were available to Star Market in this case. As the government points out, Yellow Freight's conclusion that the procedures satisfied the All Writs Act, "virtually compels the conclusion that those procedures satisfy due process."

Furthermore, Star Market's claim that it was denied procedural due process is belied by the record. In a May 14, 1991 letter to Henderson, Star Market and Local 25, the EO notified Star Market of Henderson's Election Rule protest, supplied it with a copy of Henderson's grievance letter, and solicited any information that Star Market had regarding the matter. In deferring his decision until after the arbitrator rendered his decision, the EO effectively gave Star Market more than three months to prepare and submit its case. After the EO found Star Market to have violated the Election Rules and ordered Henderson's reinstatement with back pay and benefits, Star Market took an appeal to the IA. At the option of the parties, including Star Market which was represented by counsel, the IA conducted a telephone hearing. The IA invited all parties to submit written statements for his consideration and received a submission from Star Market.

Finally, Star Market declined to exercise its right of appeal from the IA to the district court under the Election Rules. Instead it chose to sit back, do nothing and force the government to initiate contempt proceedings in the district court. Star Market's argument that it was not required to be proactive, but rather could disregard the IA's order until judicially required to

comply, draws no support from the NLRB cases that it cites. See e.g. In re the National Labor Relations Board, 304 U.S. 486, 492 (1938); NLRB v. P*I*E Nationwide, Inc., 894 F.2d 887, 887-90 (7th Cir. 1990). Those cases, which hold that the NLRB's orders are not self-executing, and the underlying statutory law upon which they rely, are unrelated to the procedures at issue here. In this case, Star Market was required to comply with the appellate procedures set out in the Election Rules. The Election Rules provide that a party must obey an order of the IA "unless it is stayed or overturned by the Court." Election Rules, Article XI, § 1(a)(8). Thus, unlike orders of the NLRB, the IA's decisions are self-executing, and by failing to seek a stay or reversal in the district court, Star Market waived any due process objections that it had with respect to the IA's order to reinstate Henderson. Cf. N.L.R.B. v. Local 282, International Brotherhood of Teamsters, 428 F.2d 994, 999 (2d Cir. 1970)(civil contempt proceeding is not an avenue for collateral attack of the underlying order where appropriate procedures for reviewing the order were not attempted).

II. Displacement of the Arbitrator's Decision

Star Market's second argument is more ingenuous than its first. It contends that the district court's enforcement of the IA's decision, which effectively overruled the independent arbitrator's award upholding Henderson's dismissal, contravened long standing federal labor policy favoring arbitration and federal procedures governing judicial review of arbitration awards. See

Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185. However, we are not persuaded by Star Market's argument.

Certain labor disputes may come under the provisions of a collective bargaining contract as well as within the purview of the Consent Decree. Here, the grievance arbitration conducted pursuant to the CBA, and the parallel Election Rule proceedings held by the EO and IA, reached conflicting results with respect to Henderson's reinstatement. Under these circumstances the question arises as to which determination is controlling.

Star Market points out that the labor contract under which Henderson was employed contained an anti-discrimination provision to protect those employees who engaged in union politics. The Election Rules more specifically sought to insure that union members did not suffer retaliation as a result of disfavored campaign activities related to the 1991 national IBT election. Star Market argues that where the collective bargaining agreement affords protections which encompass rights contained in the Election Rules, the favored status of binding arbitration under federal labor law preempts related Election Rule enforcement proceedings. We disagree. Rather, we hold that (1) where a consent decree provides individual union members with a source of independent rights as a means of effectuating the consent decree's intended goal, and (2) where the purpose of the consent decree transcends the localized function of particular collective bargaining agreements and, instead, impacts upon the structure and processes of a national parent union, federal policy favoring

independent arbitration of labor disputes does not preempt the procedures created to insure the implementation of the consent decree.

Our conclusion draws support from prior holdings of this Court. In Yellow Freight, we held that the NLRB did not have sole jurisdiction over an Election Rule protest that also fit the description of an unfair labor practice. The protest concerned an employer's no-solicitation rule barring nonemployee union members from campaigning for union office on the employer's property. "We conclude[d] that the NLRB [did] 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." Yellow Freight, 948 F.2d at 106.

Yellow Freight's holding stemmed largely from our desire 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. We have considered the interest in avoiding inconsistent interpretations of the Consent Decree great enough to sustain "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 ...." Id. at 105 (quoting United States v. IBT, 907 F.2d 277, 279 (2d Cir. 1990)). This paramount interest informs our view of the instant controversy. While

arbitration pursuant to collective labor agreements may not fall directly within the sweep of the above mentioned injunction, this case demonstrates that it nevertheless can interfere with the Consent Decree's effective implementation. Arbitration cannot be the loophole through which the union and certain employers may avoid the dictates of the Consent Decree and the rules promulgated thereunder. Therefore, we conclude that to the extent an arbitration award is inconsistent with an order implementing the Consent Decree, the Consent Decree order must govern.

Our holding is grounded on the principle that a federal court need not defer to an arbitrator's decision when a plaintiff's labor-related claim stems from a source of legal rights that is separate from, although possibly coextensive with, a collective bargaining agreement. See McDonald v. City of West Branch, 466 U.S. 284 (1984)(42 U.S.C. § 1983); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981)(Fair Labor Standards Act); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)(Title VII). Star Market points out that these cases involved independent rights derived from federal statutes, and that a right of action under statutory law reflects a public policy which is not waived by virtue of a labor agreement to arbitrate. Star Market contends that since the Consent Decree is not an act of Congress, it does not have the same overriding force as a statute and cannot be used to displace a binding arbitration provision.

Our review of these decisions, however, shows that they did not simply turn on the statutory nature of the independent rights

involved. Rather, these decisions relied as much upon considerations of the limits on both the arbitrator's jurisdictional basis, and the arbitrator's particular realm of competence.

In Alexander v. Gardner-Denver Co., the Supreme Court stated that,

> [a]s the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties.

415 U.S. at 53 (emphasis added). See also Barrentine, 450 U.S. at 744 ("An arbitrator's power is both derived from, and limited by, the collective bargaining agreement."); McDonald, 466 U.S. at 290 (same).

Similarly, the Supreme Court has viewed an arbitrator's professional skill as narrowly circumscribed. While arbitrators are normally well versed in the workings of the industry from which a particular dispute arises, their field of expertise is limited to resolving individual contract disputes which rarely involve broad public interest considerations. Accordingly, "[b]ecause the 'specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land,'. . . many arbitrators may not be conversant with the" issues surrounding the enforcement of the Consent Decree. Barrentine, 450 U.S. at 743 (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960)).

Henderson's Election Rule protest raises both of these considerations. To begin with, whether or not the Consent Decree carried the force of a federal statute, it was undeniably a source of rights separate and distinct from the CBA. These rights were "designed to supplement, rather than supplant" the rights enjoyed by employees under the CBA. Gardner-Denver Co., 415 U.S. at 48. Thus, it is clear that an arbitrator was without jurisdiction to resolve protests arising under the Election Rules, see Barrentine, 450 U.S. at 744, even though "certain contractual rights are similar to, or duplicative of, the substantive rights secured by" the Consent Decree. Gardner-Denver Co., 415 U.S. at 54. Moreover, "in instituting an action under [the Consent Decree, Henderson was] not seeking review of the arbitrator's decision. Rather he [was] asserting a [separate] right independent of the arbitration process." Id.

Nor was the EO bound by the arbitrator's factual conclusions. Cf. McDonald, 466 U.S. at 292 (arbitration award has no res judicata or collateral estoppel effect in subsequent § 1983 action). In a similar context, the Supreme Court has stated that "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." Gardner-Denver Co., 415 U.S. at 60 (footnote omitted)(effect of arbitration award on subsequent Title VII litigation). A significant factor in determining the weight to be afforded an arbitration award is whether the "arbitral determination gives full consideration to an employee's" extra-contractual rights, particularly where the issue

"is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." Id. at n.21.

Here, the arbitrator's findings, which were before the EO and the IA, omit any mention of Henderson's retaliation claim. Moreover, the arbitrator could not have considered the Star Market employee notice clarifying the company's break-time policy that was posted after the Henderson arbitration hearing had ended. This evidence served to corroborate Henderson's retaliation claim. Without the benefit of this information, and given the lack of any findings with respect to Star Market's retaliatory behavior, it is clear to us that the arbitrator's factual inquiry and conclusions were incomplete. Thus, his findings were rightly refused conclusive effect in both the Election Rule protest proceedings and the subsequent enforcement proceedings held in the district court. Cf. Nevins v. NLRB, 796 F.2d 14, 18 (2d Cir. 1986)(for NLRB to defer to an arbitration award in a related unfair labor practice dispute the "issues before the arbitrator [must] have been factually parallel to those before the NLRB and the arbitrator [must] have been presented generally with those facts relevant to disposing of the unfair labor practice charges").

Given the breadth of the undertaking contemplated by the Consent Decree, we believe that arbitrators are not well-suited to grapple with the problem of its enforcement. As has been borne out by the incessant litigation spawned by the government's attempt to enforce the Consent Decree, the Consent Decree has engendered a

multiplicity of complex issues that may simply be beyond the "specialized competence" of most arbitrators. In an attempt to rid the IBT of its historic mob domination, an endeavor greatly beneficial to the public interest, the court-appointed officers have been charged with overseeing the organization and execution of a national union election. This has proven to be an arduous task, requiring extensive coordination of nation-wide activities. In anticipation of this, the Consent Decree established an entire institutional structure in order to secure its own implementation.

While certain aspects of these Consent Decree cases relate to the "law of the shop," their general import goes far beyond the provisions of any particular labor contract. We do not question the invaluable role that arbitrators serve in aid of smooth labor relations, and nothing we have stated herein should be construed as taking issue with the well established federal policy favoring arbitration of labor contract disputes. However, collective bargaining agreements and the Consent Decree address different problems and serve different purposes. The former governs the daily relations between particular employers and their employees, while the latter is an attempt to rebuild the infrastructure of an entire national labor organization. Considering these different objectives, we think it consistent with federal labor policy that where they differ, collective bargaining agreements yield to the Consent Decree, and that the Consent Decree officers and the district court remain free to complete their task unencumbered by collateral arbitration results. Cf. Barrentine, 450 U.S. at 739

(employee's action for wages under the Fair Labor Standards Act (FLSA) was not barred by prior submission of claim to contract grievance procedure since FLSA was designed to achieve specific goals not contemplated by the Labor-Management Relations Act). Therefore, we conclude that protest proceedings arising under the Consent Decree Election Rules are not preempted by binding arbitration.

CONCLUSION

For the reasons stated above, we hold that the district court and its appointed officers afforded Star Market adequate procedural safeguards, and that Henderson's Election Rule protest was not preempted by the arbitration provision in his union collective bargaining agreement. Accordingly, we affirm the district court's order enforcing the IA's decision and vacate the stay thereof.

Judgment affirmed; stay vacated.