

OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
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Election Officer

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August 14, 1991

VIA UPS OVERNIGHT

Daniel Kane
12026 Rose Hill Drive
Fontana, CA 92335

Carl Lindemann
Secretary-Treasurer
IBT Local Union 396
3435 Wilshire Blvd.
Suite 2420
Los Angeles, CA 90010

United Parcel Service
1100 Baldwin Park Blvd.
Baldwin Park, CA 91706

Re: Election Office Case No. P-841-LU396-CLA

Gentlemen:

A protest was filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") on behalf of Daniel Kane. The protest contends that Mr. Kane was improperly denied access to the parking lot of the United Parcel Service ("UPS") facility located in Baldwin Park, California for the purpose of campaigning.

Mr. Kane was formerly employed at the UPS Baldwin Park facility. On November 21, 1990, he was discharged from his employment. Mr. Kane filed a grievance pursuant to the grievance procedures contained in the contract between UPS and IBT, a protest with the Election Officer and an unfair labor practice charge with the National Labor Relations Board ("NLRB") with respect to his discharge. The Election Officer denied the protest on the grounds that there was insufficient evidence that Mr. Kane's campaign activities were the motivating factor in his employer's decision to discharge him. The Election Officer further noted, however, in that decision that his investigation indicated that the motivating factor in the decision to discharge was Mr. Kane's having filed a grievance. Discharge for filing a grievance pursuant to a contractual grievance procedure is normally

considered unlawful under the National Labor Relations Act ("NLRA"). See Election Office Case No. P-067-LU396-CLA, affirmed 90-Elec.App.-23. The NLRB apparently concurred with the Election Officer's conclusion and on February 1, 1991, issued an unfair labor practice complaint against UPS alleging that Mr. Kane's discharge was unlawful under the NLRA (United Parcel Service, 21-CA-27855).

The protest filed on Mr. Kane's behalf contends that UPS should allow him to campaign as if he were an off-duty employee rather than a terminated employee. The protest argues that to the extent that Mr. Kane retains his eligibility to vote under the *Rules*, see e.g. *Rules*, Article VI, § 2(b), since he is actively contesting his discharge, he also should retain his rights to campaign on the premises of the employer whose dismissal action is the basis of the contest. The protest further contends that even if Mr. Kane is considered no longer to be a UPS employee he should be allowed to campaign inside the parking lot at the Baldwin Park UPS facility because there are no reasonable alternative means for reaching the IBT members employed by UPS at that location.

Article VIII, § 10(d) of the *Rules* provides that no restriction shall be placed on any members pre-existing rights to engage in campaigning on employer premises. UPS has consistently enforced a rule with respect to access to its parking lots which treats discharged or other former employees in the same manner as persons never employed by it are treated. UPS does not differentiate with respect to access based upon the reason for the severance of the employment relationship. As long as all former employees are treated alike, prohibiting discharged employees from access only afforded employees, even where such discharged employees have unresolved legal proceedings concerning their discharge, does not violate the pre-existing campaign rights provision of Article VIII, §10 (d) of the *Rules*. See e.g. Puerto Rico Sheraton Hotel 248 NLRB 867 (1980) (ALJDEC. at 878).¹

Having determined that Mr. Kane has no greater right to access to the employee parking lot of the UPS facility in Baldwin Park, California for the purpose of campaigning than any other former employee, the issue remains as to whether IBT members not employed by

¹In United Supermarkets Inc. 283 NLRB 130 (1987), the NLRB implied in a footnote that employees dismissed in violation of the NLRA may have greater rights to access than persons never employed by the employer. However the NLRB's analysis in that case focused on the issue of access under the access criteria in effect prior to the decision in Jean Country 291 NLRB 4 (1988). In United Supermarkets, the NLRB afforded no greater access to the wrongfully discharged employee than it afforded to union members never employed by the employer.

UPS must be given access to the employee parking lot pursuant to the *Rules*.

Union members have a right protected by the NLRA and thus by Article VIII, §10 (d) of the *Rules* to engage in communications, solicitations and the like with respect to intra-union affairs including intra-union elections. District 91, International Association of Machinists v. NLRB, 814 F.2d 876 (2nd Cir., 1987); NLRB v. Methodist Hospitals, Gary Inc., 732 F.2d 43 (7th Cir., 1984); ABF Freight Systems v. NLRB, 673 F.2d 229 (8th Cir., 1982). The right to engage in such communications includes the right of access to an employers' property under certain circumstances by labor union members who are not employees of that employer.

Where denial of all access to the property of an employer would prevent effective communications to such employer's employees by members not so employed, the employer's private property rights must accommodate the right to engage in such communication type activities. Jean Country, 291 NLRB 4 (1988). Since the substantive federal right to engage in communication and solicitation includes the right to engage in such communication and solicitations with respect to trade union election activities, the employer's right to private property must accommodate the right to engage in such campaign activities. Since the right is an existing right under substantive federal law, it is protected under Article VIII, § 10(d) of the *Rules*.

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

Under such circumstances, access to union members other than employees must be afforded. Even where the employer has restricted his property to access by its employees only, such rights cannot outweigh the rights of non-employees to have access to the property if no effective means of alternative communication exist. Lechmere v. NLRB, supra; Trident Seafoods Corp., 293 NLRB 125 (1989). The alternate means must be reasonable, not overly costly or time-consuming, and must

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generally permit face to face communications. *National Maritime Union v. NLRB*, 867 F.2d 767 (2nd Cir., 1989).

Thus, in the instant case, UPS's property interests at its Baldwin Park facility must yield to a limited right to access by IBT members not employed by UPS, if denying such access would prevent effective communication between IBT members not employed by UPS and those so employed. An Election Officer Representative has personally visited the UPS site located in Baldwin Park, California. The UPS facility at this location encompasses a full city block. All ingress and egress from the facility occurs through two adjacent driveway entrances from Baldwin Park Boulevard. One driveway entrance is used by employees for their personal cars and the other by UPS vehicles.

The driveways cross a public sidewalk which is approximately twenty feet wide. A car or a van can stop in the driveway area without blocking the street. Thus, by standing on the public sidewalk outside the UPS property, IBT members engaged in campaigning have access to IBT members employed by UPS at the Baldwin Park, California site. The Election Officer notes that Ron Carey, nominated candidate for General President, has campaigned at this facility and did so by standing on the public sidewalk and passing out literature to IBT members as they entered or exited from the property. UPS agrees that non-employees may distribute literature on the sidewalk outside of its facility in the driveway area.

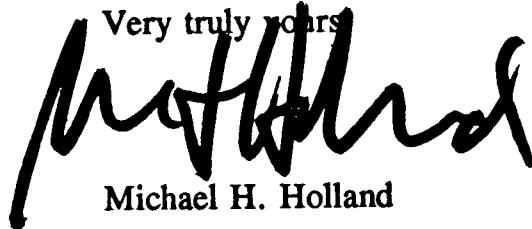
Therefore, the Election Officer determines that meaningful access to IBT members at the UPS facility in Baldwin Park, California can be provided without intrusion upon the private property rights of UPS. See Election Office Case No. P-165-LU299-MGN, affirmed 91-Elec.App.-43 (access to Yellow Freight property denied where a ten foot public area was available). Thus, the Election Officer determines that there is no requirement under the *Rules* that UPS at its Baldwin Park, California facility permit IBT members not presently employed by it to have access to its private property. Accordingly, the protest is **DENIED**.

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

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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

A handwritten signature in black ink, appearing to read "Michael H. Holland", written in a cursive style.

Michael H. Holland

MHH/mjv

cc: Frederick B. Lacey, Independent Administrator

Geraldine L. Leshin, Regional Coordinator

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