

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 23, 1991

VIA UPS OVERNIGHT

Douglas Frechin
7515 181st Place
Edwards, WA 98020

Allen McNaughton
Secretary-Treasurer
IBT Local Union 174
553 John St.
Seattle, WA 98109

Rod Robertson
P.M. Operations Supervisor
Yellow Freight System, Inc.
6203 215th St., SW
Mountlake Terrace, WA 98036

Re: Election Office Case No. P-852-LU174-PNW

Gentlemen:

A protest was filed in accordance with Article, § 1 of the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") by Douglas Frechin, a member of Local 174 in Seattle, Washington. In his protest, Mr. Frechin objects his being denied by Yellow Freight Systems, Inc. ("Yellow Freight") of the right to distribute campaign literature in the employee parking lot area or anywhere else on the premises of the Everett terminal in Mountlake, Washington. Mr. Frechin claims that the company's rule is unnecessarily restrictive and undermines his right to meaningfully campaign among the employees working at the terminal. Yellow Freight maintains that its policy does not violate the *Rules* because Mr. Frechin has reasonable access to the employees working at the facility on public property adjacent to the terminal parking lot. Yellow Freight further argues that Mr. Frechin's prior disruptive conduct at the facility justifies the company's restrictive access rule with respect to him. An investigation into Mr. Frechin's allegations was conducted by Chris Mrak, Election Office Regional Coordinator. The investigation disclosed the following facts.

Douglas Frechin is a member of Local 174 and was employed by Yellow Freight at the Everett terminal until his discharge on March 25, 1991. Mr. Frechin grieved his discharge; the matter was recently arbitrated and an arbitration decision is pending. Mr. Frechin filed a protest with the Election Officer regarding his discharge, Election Office Case No. P-706-LU174-PNW. The protest was deferred pending the outcome of the arbitration proceeding.

The essential facts concerning Mr. Frechin's protest are not in dispute. On August 5, 1991, Mr. Frechin went to the Yellow Freight Everett terminal at Mountlake Terrace, Washington to distribute copies of "The Convoy Dispatch."¹ When Mr. Frechin arrived at the terminal, he went into the parking lot area adjacent to the terminal. In addition to employee cars, the company tractor trailers are also parked in this area due to space limitations. Once Mr. Frechin arrived in the parking lot, he began placing the literature on cars and windshields of employee vehicles. As he was placing literature on the vehicles, Rod Robertson, the P.M. Dispatcher, called out to him, instructing him not to place the literature on the vehicles. Another employee, Mr. McDonald, was standing nearby Mr. Frechin and Mr. Robertson when Mr. Robertson told Mr. Frechin not to place the literature on the vehicles. Mr. Frechin then accompanied Mr. McDonald to the employee gate and asked him to be a witness in the event that he needed someone to substantiate his claims concerning the company's activities in restricting his distribution of literature. Mr. Frechin then returned to the parking lot area and tried to resume leafletting on the vehicles. Mr. Robertson approached him and told him that he could not distribute literature on the company property and that if he wished to distribute literature, he would have to exit the premises.

Yellow Freight's Everett terminal is a relatively small terminal. The parking lot area is located adjacent to the terminal and is the parking lot for employees' cars as well as tractor trailer rigs. The parking lot is surrounded by a fence. There is one exit and one entrance to the parking area; there is no physical barrier between the entrance and exit lanes. The area between the gate and the public street is about six to eight feet wide. There is no sidewalk area. On one side of the gate the strip is landscaped with trees and shrubs. The north side of the strip is banked, and is approximately six to eight feet wide. A person wishing to distribute literature to employees entering and exiting the terminal would have to move to the middle of the gate (i.e., between the ingress and egress lanes) in order to distribute leaflets or talk to the driver of an exiting vehicle. Mr. Frechin claims that the company's rule restricting him to the area outside the gate does not afford him the opportunity to campaign among IBT members working at the facility.

Union members have a right protected by substantive federal law 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);

¹"The Convoy Dispatch" is a monthly Teamsters for a Democratic Union (TDU) newspaper. This particular issue of "The Convoy Dispatch" contained numerous campaign articles in support of Ron Carey's candidacy for IBT General President and thus constitutes campaign material within the meaning of the *Rules*.

NLRB v. Methodist Hospitals, Gary, Inc., 732 F. 2d 43 (7th Cir., 1984); ABF Freight System v. NLRB, 673 F. 2d 229 (8th Cir., 1982). The right to engage in such communications includes the right of access to an employer's 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 activity. 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 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 right 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 properties, 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, must generally permit face-to-face communications. National Maritime Union v. NLRB, 867 F. 2d 767 (2nd Cir., 1989).

Accordingly, in this case, Yellow Freight's property interest at its Everett terminal must yield to a limited right of access by IBT members not employed by Yellow Freight, if denying such access would prevent effective communications between the IBT members not employed by Yellow Freight and those so employed. Chris Mrak, the Election Officer Regional Coordinator, has personally visited the Yellow Freight facility at the Everett Park terminal. All employee ingress and egress from this facility occurs through two adjacent driveway lanes from 61st Place West. The same driveway entrance is used for employees and Yellow Freight vehicles. The driveway crosses a thin strip

of land approximately six to eight feet wide. Six to eight feet is insufficient to permit any entering car to stop without blocking road traffic.

There is no land or area separating the ingress and egress lanes to the parking lot. Therefore, in order to leaflet to employees exiting the plant, Mr. Frechin would have to stand in the middle of the lane between oncoming and departing traffic.

The Election Officer determines that meaningful access to IBT members at the Yellow Freight facility at Yellow Freight's Everett terminal can only be provided if IBT members are permitted to distribute campaign literature in the employee parking area. Any other alternative presents significant safety hazards to Mr. Frechin and IBT members, congests employee and business traffic exiting and entering the terminal and does not permit meaningful face-to-face communications between IBT members.²

Thus the Election Officer determines that the *Rules* require that Yellow Freight at its Everett terminal permit IBT members not presently employed by it to distribute campaign literature, to engage in communications and solicitations in the parking lot area adjacent to the terminal.

Frechin's Status as a Discharged Employee

Yellow Freight further argues that Douglas Frechin's status as a discharged employee removes him from the general rule of non-employee access. Specifically Yellow Freight claims that at the time of his discharge, Mr. Frechin was instructed not to come back on company property. The company states that since that time Mr. Frechin has come to the terminal approximately three times in violation of the company's admonition. The company further alleges that Mr. Frechin has created disturbances during those visits.

The investigation conducted by Chris Mrak, the Regional Coordinator, established that Mr. Frechin has visited the Yellow Freight Everett terminal approximately three times since his discharge. The first time, Mr. Frechin came to the plant was on the day after his discharge for the purpose of picking up his paycheck. Neither Mr. Frechin nor the company reports any disruptive incident in reference to this visit. The second time Mr. Frechin visited the plant again for business reasons was a few weeks after his discharge. Neither the company nor Mr. Frechin indicate that there were any disturbances or problems in reference to the second visit.

²The Election Officer has also given Yellow Freight the option of permitting IBT members to distribute campaign literature in a non-work stairway area inside the facility. The company declined to permit campaigning in that space as an alternative to the parking lot space.

On April 4, Mr. Frechin went to the Everett terminal to find out why he had not received his vacation pay. Keith McDonald, another employee, was present. Mr. Zitnick, a Yellow Freight Manager, asserted that he did not believe that the company was required to issue vacation pay pending the outcome of the grievance. Mr. Frechin showed him a copy of the collective bargaining agreement and argued otherwise. Mr. Zitnick said he would check into the matter. Mr. Frechin then advised Mr. Zitnick that he would come in the following day to pick up the check. Mr. Zitnick told him not to come in or the police would be called. Mr. Zitnick also said that he would mail the check. Mr. Frechin responded, "Fine, but if it is not in the mail I will come to pick it up." Zitnick repeated that he did not want Mr. Frechin to come to the terminal.

Mr. Frechin left the office and began walking down the stairs. As he did, Keith McDonald said, "This place is a joke," which prompted Mr. Zitnick to say to Mr. McDonald -- in a very loud voice -- that he was welcome to resign. Mr. McDonald asked him to stop yelling at him, at which point Mr. Zitnick stated, again loudly, that he could yell at McDonald as much as he wanted. Mr. Zitnick then directed the sales representative, Jim Ellsworth, to call the police. Mr. Frechin, who had stopped and turned when Zitnick started yelling in order to serve as a witness for Mr. McDonald, proceeded to leave after Mr. Zitnick told Mr. Ellsworth to call the police.

The police arrived but no charges were pressed. Mr. McDonald wrote down the events of the day and submitted them to Local 174. According to Mr. McDonald, Mr. Zitnick approached him the next day at work and asked to speak to him. Mr. McDonald went into Mr. Zitnick's office where Mr. Zitnick told him that he was sorry that he had yelled at him the day before. Mr. Zitnick said that he did not mean to yell at Mr. McDonald whom he considered a valuable employee.

The company maintains that Mr. Frechin's conduct was so disruptive that it justifies barring him from the premises notwithstanding the rules guaranteeing non-employee members reasonable access for campaign activities. The Election Officer finds that the evidence does not support the company's view. Rather, the evidence suggested that the disruption which occurred on April 10, 1991 did not even involve Mr. Frechin. Moreover, the fact that the police were called but charges were not pressed indicates that the argument was not considered a serious altercation by either the company or the local authorities. Additionally, there is no evidence that Mr. Frechin has ever threatened anyone at the facility or has engaged in any destruction of company property, conduct which would bolster the company's claim that it has significant security interests in barring Mr. Frechin from the plant. See Mr. Fox Tire Co., 271 NLRB No. 145 (1984).

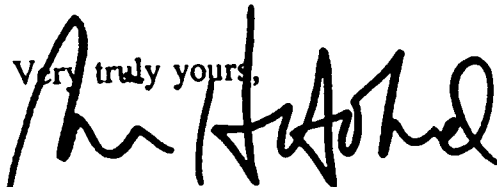
Accordingly, in light of the reasoning set forth above, Yellow Freight is ordered to permit non-employees including Mr. Frechin to engage in distribution of literature and

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solicitation of Yellow Freight Everett terminal facility employees in the parking lot area adjacent to the terminal.

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/mjv

cc: Frederick B. Lacey, Independent Administrator

Christine M. Mrak, Regional Coordinator

Daniel Hornbeck, Esquire
Counsel, Yellow Freight
Yellow Freight System, Inc. of Delaware
10990 Roe Avenue
Overland Park, Kansas 66207

Kirk Messmer, Esquire
Matkov, Salzman, Madoff & Gunn
100 W. Monroe
Suite 1500
Chicago, IL 60603

IN RE:	:	91 Elec. App 195 (SA)
DOUGLAS FRECHIN	:	:
and	:	DECISION OF THE
YELLOW FREIGHT SYSTEM, INC.	:	INDEPENDENT
and	:	ADMINISTRATOR
IBT LOCAL UNION NO. 174	:	:

This matter arises as an appeal from a decision of the Election Officer in Case No. ~~P-852-LU174-PNW.~~ A hearing was held before me by way of telephone conference at which the following persons were heard: John Sullivan on behalf of the Election Officer; Christine Mrak, the Regional Coordinator; Kirk D. Messmer and Patrick W. Kocian on behalf of Yellow Freight Systems, Inc. ("Yellow Freight"); Douglas Frechin, the complainant; and Frank Zitnick, a manager with Yellow Freight. The Election Officer provided a written summary in accordance with Article XI, Section 1.a. (7) of Rules For The IBT International Union Delegate and Officer Election. ("Election Rules"). In addition, Yellow Freight submitted a written brief setting forth its position, and provided the Independent Administrator with photographs subsequent to the hearing.

Douglas Frechin filed this protest to challenge Yellow Freight's refusal to let him campaign in the parking lot of its facility in Everett Washington. As such, this is another in a long

line of "campaign access" cases involving the right of union members to access employer worksites for campaign purposes. Frechin is a member of IBT Local Union No. 174 and had been employed at the Everett facility until Yellow Freight fired him on March 25, 1991.¹ The incident that triggered this protest took place on August 5, 1991 when Yellow Freight ordered Frechin out of its parking lot where he was distributing copies of the Convoy Dispatch, a publication of the Teamsters For a Democratic Union ("TDU"). TDU is generally recognized to support the candidacy of Ron Carey for General President. Upon investigation, the Election Officer ordered Yellow Freight to permit Frechin and other non-employees to engage in distribution of literature and solicitations of Everett facility employees in a restricted portion of the parking lot. For reasons discussed below I modify and affirm that decision.

Merits of the Protest²

¹ Frechin's discharge is the subject of grievance/arbitration proceedings under a labor-management contract as well as a separate protest filed with the Election Office. The protest was deferred pending the arbitration decision which has not yet been issued.

² Yellow Freight also objects to the jurisdiction of the Court-appointed Officers to enforce the Election Rules promulgated under the Consent Decree against a non-consenting employer. Yellow Freight also argues that the Court officers are pre-empted in these matters by the NLRB. Both the jurisdiction of the Court-appointed Officers and the independent nature of their mandate apart from NLRB have already been affirmed by Judge David N. Edelstein. United States v. IBT, 88 CIV 4486, slip. op pp. 3-8 (S.D.N.Y. April 3, 1991).

appeal. Yellow Freight framed the issue as the distribution of literature on the windshield of the cars only. The Election Officer's remedy, however, clearly contemplates broader face-to-face contact with fellow IBT members in the Everett facility. This is consistent with the Complainant's assertion that what he wants is face-to-face contact.

This matter implicates Article VIII, Section 10.d. of the Election Rules which provides that no restriction shall be placed on members pre-existing rights to solicit, support, distribute literature or otherwise engage in campaign activities on an employer's premises. As stated by the Election Officer in his Summary:

Pre-existing rights can be established by federal substantive law or by the past practice of a particular employer. The National Labor Relations Act, 29 U.S.C. § 158 (a)(1), protects the right of union members to engage in communications, solicitations and the like with respect to intra-union affairs, including intra-union elections. District Lodge 91, International Association of Machinists v. NLRB, 814 F.2d 876 (2d Cir. 1987); NLRB v. Methodist Hospital of Gary, Inc., 732 F.2d 43 (7th Cir. 1984); ABF Freight Systems V. NLRB, 673 F.2d 229 (8th Cir. 1982). And the pre-existing rights provided by federal substantive law include the right to reasonable access to their fellow union members working for another employer. National Maritime Union v. NLRB, 867 F.2d 767 (2d Cir. 1989). Accordingly, the Election Rules incorporate these pre-existing rights.

In an Advisory Regarding Political Rights issued on December 28, 1990, the Election Officer affirmed, inter alia, that federal labor law gives IBT member who are not employed at a particular location of an employer a right to campaign among their fellow IBT members. However, the Advisory

also clarifies that this right is more limited than the right to campaign at one's own place of work.

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

Fundamentally, this issue must be resolved by balancing the IBT member's right to engage in campaign activity against the strength of the employer's property right and the availability of a reasonable alternative means of communication. Yellow Freight should be well aware of this standard as it was first articulated and applied by the Election Officer in a case involving it. See In Re McGinnis, 91-Elec. App.-43 (January 23, 1991). This analysis requires a fact laden inquiry into the physical details of the employer's worksite layout and location. If this review shows that the location of the facility does not afford public areas where safe and effective face-to-face campaigning can occur, the employer's private property right may have to yield to a limited right of access for IBT members.

Yellow Freight submitted a map of its facility as part of an exhibit accompanying its 39 page brief. Subsequent to the hearing, Yellow Freight furnished seven photographs detailing various aspects of the gate and entrance. By all accounts, the Everett facility is composed of a small terminal and parking lot enclosed by a fence with one gate. Both employee vehicles and the company's tractor trailers share the lot and exit and enter through the same gate. The fence on either side of the gate is set back from a two lane road and there is a narrow strip of public property between fence and road. One of the employer's photographs (#5) depicts the curb next to a section of measuring tape indicating the strip is ten feet wide. The Election Officer and complainant estimated the width as six to eight feet. All parties agreed that one side of the entrance was heavily landscaped with trees and shrubs while the other contained a small tree on bark covered ground.

The Election Officer concluded that the amount and location of the public space outside of the Everett facility did not lend itself to effective or safe face-to-face contact with the IBT members entering or exiting the terminal. To have face-to-face contact an IBT member would have to stand in the middle of the entrance between the lanes of traffic. Certainly, this cannot be considered a reasonable alternative means of access. Frechin also asserted that if he stood at either side of the entrance he would be obscured by the shrubbery and by the wooden slats covering the cyclone fence, and that cars generally would be unable to see him until almost "on top" of him.

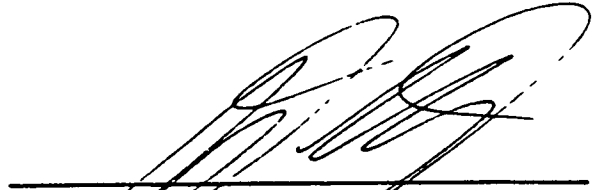
Yellow Freight suggests that given the small number of employees, at the facility - - ten - - Frechin can visit each one at home. Home visits, under these circumstances, simply are not a reasonable alternative. The employees' homes are widely dispersed and Frechin does not have all of the employees' addresses. In addition, time is of the essence because the election ballots will be distributed beginning November 7th. Requiring home visits would be unduly burdensome given the time constraints and the lack of information concerning the employees' whereabouts.

Yellow Freight finally argues that there is a special reason for keeping Frechin away because he is a discharged employee and the company has a long standing policy of excluding former employees from its premises. However, the facts do not support Yellow Freight's suggestion that Frechin has been disruptive in his returns to the facility. Accordingly, there is no basis for infringing on Frechin's campaign rights to which other non-employee's would be entitled simply because he was formerly employed at the Everett facility.

The Election Officer's remedial order suggested unfettered use of the parking lot. I am modifying that order to limit campaign activities by non-employee IBT members to a section of the parking lot consisting of a strip 20 feet wide, running parallel to 215th Street. This is generally where the employees park their cars.

Conclusion

Accordingly, the Election Officer's ruling as modified herein,
is affirmed.



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

Dated: October 4, 1991