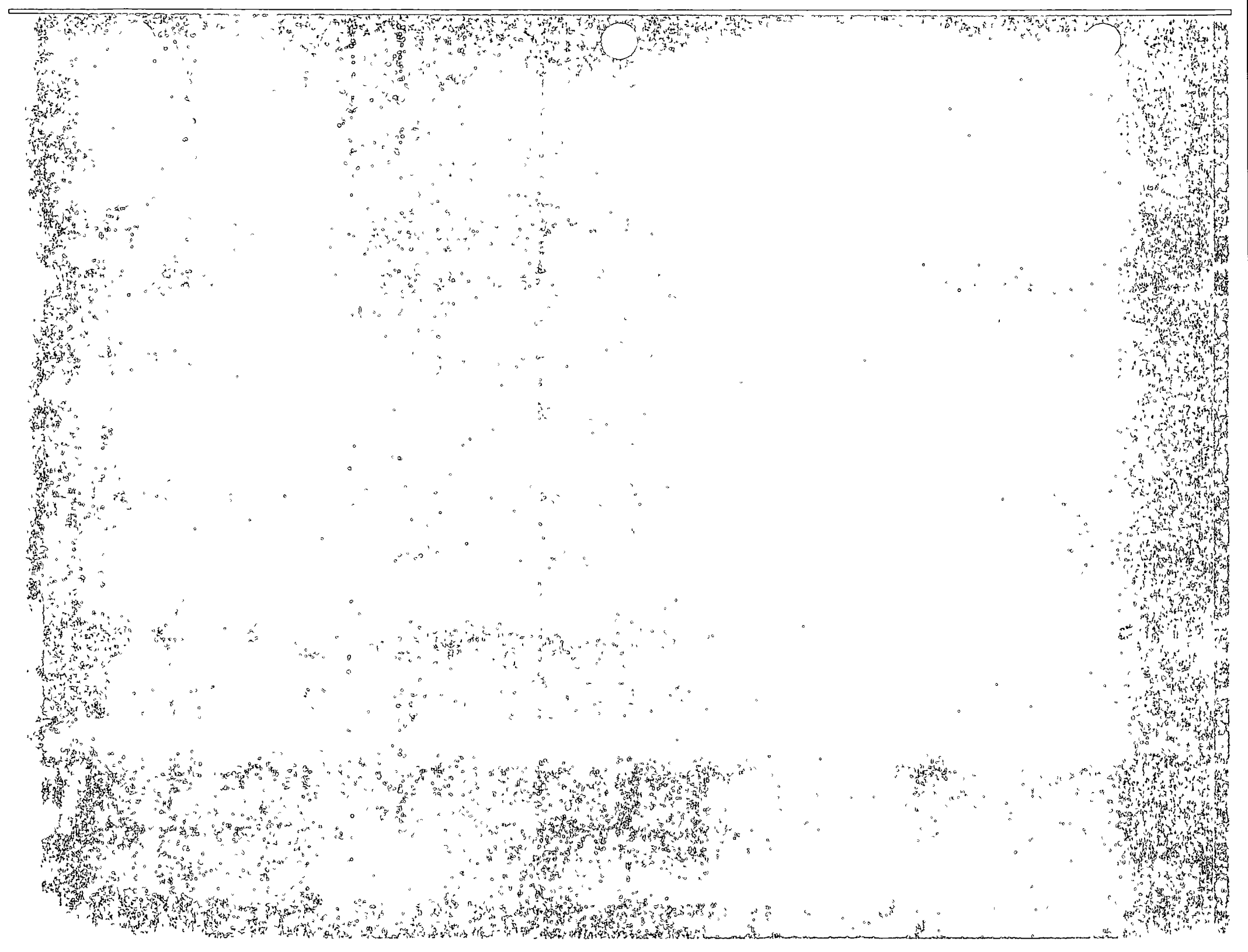

OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, NW
Washington, DC 20001

Michael H Holland
Election Officer

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

September 25, 1991

VIA UPS OVERNIGHT

Tom Gilmartin, Jr.
48 Wilbert Terrace
Feeding Hills, MA 01030

Jack Powers
Secretary-Treasurer, IBT Local Union 1150
390 East Main Street
Stratford, CT 06497

Paul Thompson
Ted Garbian
Personnel Department
Sikorsky Aircraft Corporation
6900 Main Street
Stratford, CT 06494

Vicki Saporta
IBT, Organizing Dept.
25 Louisiana Avenue
Washington, D.C. 20001

Re: Election Office Case No. P-900-LU1150-ENG

Gentlemen and Ms. Saporta:

A protest was filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") by Tom Gilmartin, Jr., a nominated candidate for Eastern Conference Vice President seeking election as a member of the Ron Carey Slate. In his protest, Mr. Gilmartin contends that Sikorsky Aircraft Corporation permitted Vicki Saporta, a nominated candidate for International Vice President At-Large and a member of the Shea-Ligurotis Action Team slate, access to the interior of its facility in Stratford, Connecticut for campaign purposes. Mr. Gilmartin contends that Sikorsky refused to permit him, Mr. Carey or other nominated candidates on the Ron Carey Slate the right to campaign - including distribution of campaign literature - either in the interior of its facility or in the employee parking at the facility. Neither Ms. Saporta, Mr. Gilmartin, Mr. Carey nor any other candidate on the Ron Carey Slate is an employee of Sikorsky or a member of Local 1150, the Local which represents employees at Sikorsky. The protest was investigated by the office of the Regional Coordinator as well as the Washington, D.C. office of the Election Officer.

James Miller, the Director of Labor Relations for Sikorsky Aircraft Corporation, confirms that Ms. Saporta was permitted to enter the Sikorsky facility in Stratford, Connecticut. The Election Office investigation discloses that Ms. Saporta was at the facility with Jack Powers, Secretary-Treasurer of Local 1150 and Congresswoman Rosa

Delora on September 5, 1991. She toured the plant with Mr. Powers and also spent some time in the lunch room with Local Union members who were on their lunch break. No campaign literature was distributed by her or anyone else during her visit; Ms. Saporta did not wear or distribute campaign buttons.

Sikorsky has indicated to the Election Officer that it would permit Mr. Gilmartin, Mr. Carey and other nominated candidates for IBT International Union office the same type of access afforded Ms. Saporta, that is, a tour of the facility without the candidates wearing campaign buttons and without them distributing campaign literature to the IBT members employed at the facility. Mr. Gilmartin objects to this offer, contending that he and Mr. Carey and other nominated International Union officer candidates aligned with them have a right to engage in campaign activities, including the distribution of campaign material either in the interior of the facility or in the employee parking lot at the facility.

Article VIII, § 10(d) of the *Rules* provides that no restriction shall be placed upon International Union officer candidates' rights to solicit support, distribute leaflets and the like on employer premises. As noted in the Advisory Regarding Political Rights, issued December 28, 1990, pre-existing rights are rights established under substantive law or rights established by reason of the prior practices of the employer. In this case the employer permitted a candidate for Vice President, associated with one of the slates of candidates seeking election to IBT International Union office, access to its facilities. However, this access does not include distribution by Ms. Saporta or any of her supporters of campaign literature while at the facility; Ms. Saporta did not distribute any literature either during her tour of the facility or in the employee parking lot either before or after she toured the facility.

Substantive law does not require an employer to permit access to the interior of its facility for campaign purposes to union members not employed by it. If, however, an employee has permitted access into its facilities by persons other than its employees for other than official business, it may not discriminate against access for campaign activities and must treat all candidates equally. Since Sikorsky permitted a nominated candidate for IBT International Union office, Ms. Saporta, access to the interior of its facilities, the *Rules* require it to provide similar access to all other candidates for International office of the IBT.

The Election Officer has an obligation to enforce the *Rules*. The *Rules* were adopted by the United States District Court for the Southern District of New York, United States v. IBT, 742 F. Supp. 94 (S.D.N.Y., 1990); their adoption was approved by the United States Court of Appeals for the Second Circuit, United States v. IBT, 931 F. 2d 177 (2nd Cir., 1991). The United States District Court for the Southern District of New York has ruled that the Election Officer and the Independent Administrator have the authority to enforce the *Rules* against employers of IBT members. United States v.

IBT (In re: Yellow Freight Systems, Inc.) No. 88-CIV-4486 (DNE) slip op. (S.D.N.Y., April 3, 1991).

However, neither the *Rules* nor the Advisory Regarding Political Rights require the employer to provide greater access to Mr. Gilmartin, Mr. Carey or any other nominated candidate than the access afforded to Ms. Saporta. Since Ms. Saporta was not permitted to distribute campaign literature in the interior of the Sikorsky facility, Sikorsky need not permit any other candidate the right to engage in literature distribution.

Under and in accordance with the foregoing, the Election Officer finds that Sikorsky must permit all other candidates for International office in the IBT access to its facilities similar to the access afforded to nominated candidate Vicki Saporta. No candidate need be permitted access on more than one occasion. No candidate may distribute literature nor wear campaign buttons during the time of such access. The access shall consist of a tour of the facility, similar to the tour afforded Ms. Saporta. All candidates may be accompanied by other candidates or the candidates' supporters during the period of their campaign visit to Sikorsky; however, in no case may the number of persons entitled to access - including the candidate(s) - exceed five. All such candidates or their representatives shall give reasonable prior notice to Sikorsky of the time and date of their visit; reasonable prior notice shall mean notice at least 48 hours in advance of the visit.

Mr. Gilmartin, however, seeks the right to distribute campaign literature, if not in the interior of the Sikorsky facility, on the employee parking lot located at that facility. No evidence has been presented demonstrating that Sikorsky has previously permitted IBT members not employed by it or any other persons other than its employees, or their certified bargaining representatives, access to its parking lot for campaign purposes or for any other purposes. Thus, the right of Mr. Gilmartin and all other IBT members not employed by Sikorsky to have access to the parking lot at Sikorsky's facilities for campaign purposes depends on whether the denial of such access would prevent effective communications with the IBT members employed by Sikorsky.

Union members have a right protected by the National Labor Relations Act, 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 Lodge 91, International Association of Machinists v. NLRB, 814 F. 2d 876 (2nd Cir., 1987); NLRB v. Methodist Hospitals of Gary, Inc., 732 F. 2d 43 (7th Cir., 1984); ABF Freight System v. NLRB, 673 F. 2d 299 (8th Cir., 1982). The right to engage in such communications includes the right to 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 with 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 No. 4 (1988). Since the substantive federal right to engage in communication and solicitation includes the right to engage in such communications and solicitations with respect to intra-union election activities, the employers right to private property must accommodate the right to engage in such campaign activities. Since the right is an existing right under substantive law, it is protected under Article VIII, § 10(d) of the *Rules*. Even where the employer has restricted its 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 alternate means of communication exist. Lechmere v. NLRB, 914 F. 2d 313 (1st Cir., 1990); Trident Seafoods Corp., 293 NLRB 125 (1989). The alternate means must be reasonable, not overly costly or time-consuming and must generally permit face-to-face communication. National Maritime Union v. NLRB, 867 F. 2d 767 (2nd Cir., 1989).

Accordingly, in the instant case, Sikorsky's property interest must yield to a limited right of access by IBT members not employed by Sikorsky if denying such access would prevent effective communications between IBT members not employed by Sikorsky and those so employed. An Election Officer representative has personally visited the Sikorsky site. The Sikorsky property, including the employee parking lot, is surrounded by a fence approximately twelve feet in height. Entry is by three separate gates, the north gate, the south gate and the delivery gate, all gates adjoin Route 110, a north-south multi-lane highway. (Route 110 intersects with the exit ramp from the Merrit Parkway, which forms the southern boundary of the Sikorsky property). Vehicles turn directly from this multi-lane highway into the parking lot.

The gates at each entry are located approximately eight to twelve feet from Route 110. The employer contends that this eight to twelve feet area in front of the gates is of sufficient area for IBT members not employed by it to have access to the IBT members employed at the Sikorsky facility. The Election Officer has previously found that a public area of approximately ten feet provided sufficient access to permit campaigning without intrusion upon the employer's private property. See Election Office case No, P-165-LU299-MGN. However, the situs of the Sikorsky plant and the lack of entry to that facility from other than from Route 110 distinguishes this facility from the facility in Election Office Case No. P-165-LU299-MGN and other cases where the Election Officer has found the public area of ten to twelve feet to be sufficient. Cars entering the lot are traveling at a high rate of speed; vehicles leaving the lot are required to exit out on a multi-lane highway. Under such circumstances, a public area of even ten feet, and the public area here in question may be less than ten feet, is insufficient. With respect to campaigning among IBT members entering the parking lot, traffic congestion would clearly result, creating a dangerous situation along Route 110. Further, to require IBT members to stand alongside a busy route such as 110 is in and of itself an unsafe situation.

For the foregoing reasons, the Election Officer determines that IBT not employed by Sikorsky do not have a means to communicate with IBT members employed at that facility without entry on Sikorsky's property. Denial of such access would constitute a violation of substantive law, as outlined above, and thus Article VIII, § 10(d) of the *Rules*. As discussed *infra*, the Election Officer has an obligation to enforce the *Rules*; the United States District Court for the Southern District of New York has determined that the *Rules* are enforceable against third party entities such as employers of IBT members. Accordingly, the Election Officer finds that Sikorsky is obliged under the *Rules* to permit IBT members not employed by it to have access to its parking lot for purposes of engaging in campaign activity. Sikorsky may limit such access to an area adjacent to the three driveway entries to the parking lot, but inside the gate within the parking lot. Sikorsky may also require any IBT member wishing to campaign in the area immediately adjacent to the entries to the parking lot to first "check in" with the security personnel located at each such entry and provide identification to such security personnel.

The protest is GRANTED to the extent noted above.

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

Elizabeth A. Rodgers, Regional Coordinator

Ron Carey
c/o Richard Gilberg, Esquire

Walter Shea
c/o Robert Baptiste, Esquire

Edward J. Dempsey, Esq.
United Technologies Corp.
United Technologies Bldg.
Hartford, CT 06101

IN RE:	:	
TOM GILMARTIN, JR.	:	
and	:	91 Elec. App 196 (SA)
SIKORSKY AIRCRAFT DIVISION UNITED TECHNOLOGIES CORP.	:	DECISION OF THE INDEPENDENT ADMINISTRATOR
and	:	
IBT LOCAL UNION NO. 1150	:	

This matter arises as an appeal from the Election Officer's decision in Case No. P-900-LU1150-ENG. A hearing was held before me by way of telephone conference on October 1, 1991 at which the following persons were heard: John Sullivan on behalf of the Election Officer; Elizabeth Rodgers, the Regional Coordinator; Edward J. Dempsey and Peter Robb for Sikorsky Aircraft Division, United Technologies Corporation ("Sikorsky"); Tom Gilmartin, the Complainant; Robert Baptiste for Walter Shea and his slate; and Susan Davis on behalf of the Complainant and the Committee to Elect Ron Carey. The Election Officer submitted 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"). Complainant's counsel also provided a written submission which included a rough map of the Sikorsky facility in question.

In this matter, Tom Gilmartin, a candidate for IBT International Vice President on the slate headed by Ron Carey, seeks access to Sikorsky's Stratford, Connecticut plant for

campaign purposes. Gilmartin has also protested that Sikorsky permitted Vicki Saporta, a rival candidate for International Vice President on the Shea ticket, to access the plant for a tour and visit with IBT members employed there. Sikorsky has offered to allow other candidates the same tour and visit it allowed to Saporta. However, Sikorsky denies any further obligation to allow campaigning by non-employees at its facility and asserts that there is adjacent public space that can be used for that purpose. At the hearing before me, the parties agreed that the issue of plant tour was settled. The remaining unsettled issue was whether or not non-employee IBT members were entitled to campaign in the parking lot or elsewhere on company property.[1]

The principles that govern the resolution of this issue were stated by the Election Officer as follows:

> Article VIII, Section 10(d) of the **Election Rules** provides that no restrictions shall be placed on candidates' pre-existing rights to campaign on employer premises.
>
> 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

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[1] As a preliminary matter, Sikorsky objects to the jurisdiction of the Court-appointed Officers to enforce the Election Rules promulgated under the Consent Decree against a non-consenting employer. Sikorsky also argues that the Court-appointed 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 the 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).

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 members 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.2nd 313 (1st Cir. 1990), cert. granted, 111 S.Ct. 1305 (1991). However, "reasonable" access implies that the alternative means not on the employer's property is not unduly costly, burdensome or unsafe, and generally permits face-to-face contact. E.g., national Maritime Union, 867 F.2d 767 (2d Cir. 1989). Accordingly, if IBT members are not able to safely or effectively communicate with their fellow members from public property, limited intrusion by IBT members onto the employer's private property may be required. Jean Country, 291 NLRB No. 4 (1988).

Since there is no relevant past practice, the resolution of this access issue requires use of a balancing test in which the IBT member's right to engage in campaign activity is weighed against the employer's property right and the availability of a reasonable alternative means of communication. This in turn calls for a fact

laden inquiry into the physical details of the employer's worksite layout and location.

The facility in question here employs approximately 6500 workers of whom approximately 4200 are members of IBT Local Union 1150. The actual plant is set back more than a quarter of a mile from Route 110, a four lane highway. The parking area is a one half mile long, four hundred yard wide, rectangular lot which is located between the plant and the highway. A four lane access road runs along the two sides and rear of the lot. The access road intersects Route 110 at two points that are controlled by traffic lights and that are one-half mile apart. There is also a company security booth near each intersection. Evidently, these two security booths are usually unmanned except at shift changes when they are used to control traffic. From these booths the guards are able to regulate the timing of the traffic lights. The security checkpoints that Sikorsky relies upon to control actual access to its buildings and operations are located on the far side of the access road across from the rear of the parking lot where the plant is located.

There is a narrow strip of public land between Route 110 and the front of the parking lot near the entrances. The Election Officer determined that this space did not lend itself to effective or safe communication with the employees entering or leaving the plant. Both the speed of travel along Route 110 and the speed with which employees entered and exited the access roads made effective contact difficult or impossible and would create hazards of traffic control and congestion at the side of the highway. Therefore, the

Election Officer concluded that a limited intrusion onto Sikorsky property was needed to effectuate the rights of IBT members under the Election Rules.

Before further considering this conclusion, it is necessary to observe that home visits are clearly not a reasonable alternative under these circumstances. Contacting 4200 individuals would be prohibitively costly and time consuming. Ballots for the Election at issue will be in the hands of the members beginning November 7th. Given the cost and the time limitations, home visits would be unduly burdensome if not impossible. Accordingly they are not a reasonable alternative means of communication in this situation.

Given the volume and speed along the access roads and Route 110, there is no reasonable way an IBT member can campaign in person with fellow members at the Sikorsky plant without entering the property. Therefore, I affirm the Election Officer's conclusion that some limited right of entry is required. However, the remedy ordered by the Election Office was to permit IBT campaigners to stand on Sikorsky property next to the Security booths where the access roads intersect Route 110. The presentations made at the hearing before me indicate that problems of speed, congestion and ineffective contact similar to those concerning the strip of public land along Route 110 are present at the entrances to the four lane access roads as well. Therefore, I modify the Election Officer's remedy as follows: non-employee IBT members will be allowed to campaign in the rear of the Sikorsky parking lot at the two points leading to the crosswalks which feed into the security checkpoints at the plant entrances. This

decision fully respects Sikorsky's heightened need for security in connection with its defense work. At the same time it respects the rights of IBT members to conduct their campaigns.

Conclusion

For the foregoing reasons, I affirm the conclusion of the Election Officer with modifications to the remedy as noted.

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

Dated: October 4, 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.	:	ORDER 88 CIV. 4486 (DNE)

IN RE: MOTION FOR STAY OF DECISION 91-ELEC. APP.-196 OF THE INDEPENDENT ADMINISTRATOR

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 promulgated by the Election Officer (the "Election Rules") and approved by this Court by Opinion & Order dated July 10, 1991, 742 F. Supp. 94 (S.D.N.Y. 1990), and the Court of Appeals United States v. International Brotherhood of Teamsters, slip opinion, (2d Cir. April 12, 1991). These Election Rules provide a "framework for the first fully democratic, secret ballot election in the history" of the IBT. July 10, 1990 Opinion, 742 F. Supp. at 97. The Election Rules are the linchpin of the Consent Decree's efforts to cleanse the IBT of La Cosa Nostra's corrupt influences. Id.

In the Independent Administrator's October 4, 1991 decision in 91-Elec. App.-196, the Independent Administrator determined that under the Election Rules, Sikorsky Aircraft Division ("Sikorsky")

had to permit non-employee IBT members access to the rear of its company parking lot for the purposes of campaigning in connection with the upcoming IBT first ever rank and file election. Sikorsky moves this Court for a temporary restraining order and an order to show cause seeking to enjoin enforcement of the Independent Administrator's October 4, 1991 decision.[1] The Government opposes the requested relief, and moves for an order of this Court compelling immediate compliance with the Independent Administrator's decision upon pain of contempt.

I. Temporary Restraining Order and Order to Show Cause

Rule 65(b) of the Federal Rules of Civil Procedure provides that a temporary restraining order may be granted if "it appears from specific facts shown . . . that immediate and irreparable injury, loss, or damage will result." Pursuant to Local Civil Rule 3(c)(4), "[n]o order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary." Further, this Court's Rule 5 provides that applicants must: "(1) state the earliest time that the injury could have been discovered and explain any delay in applying, [and] (2) explain specifically what irreparable injury is claimed will occur between the application and the time when notice motion could be returnable."

[1] Sikorsky has proceeded by way of filing an action, 91 Civ. 7235, naming the Independent Administrator and the Election Officer as defendants.

Sikorsky claims that the October 4, 1991 decision of the Independent Administrator will cause irreparable injury because access under these circumstances: (1) has the potential to compromise the security of Sikorsky's military related business operations; (2) will deprive Sikorsky of a fundamental property right; and (3) may lead to violence.

Sikorsky's arguments are wholly without merit. The October 4, 1991 decision of the Independent Administrator limited campaign related access to the back of the employee parking lot at the two points leading to the cross-walks which feed into the security check points at the plant entrances. In limiting access to these areas, the Independent Administrator specifically stated, "this decision fully respects Sikorsky's heightened need for security in connection with its defense work." In fact, given the restraints imposed by the Independent Administrator's decision and Sikorsky's extensive plant security, the security concerns raised here are unfounded. Denying access in this limited fashion and under these circumstances would not serve any legitimate purpose. Accordingly, Sikorsky has failed to show a threat of irreparable harm.

Further, Sikorsky waited three weeks to seek emergency relief of this Court from the Independent Administrator's decision. The Independent Administrator decided Election Appeal 91-Elec. App.-196 on October 4, 1991. No application was made to this Court to review the decision until today, October 25, 1991. Sikorsky makes the disingenuous argument that they first learned of impending irreparable injury on October 22, 1991, which Sikorsky claims is

the first time that a non-employee candidate for Union office demanded access to the premises pursuant to the October 4, 1991 decision. It is fantastic to argue that Sikorsky, Sikorsky's counsel, or any sentient person confronted with this "great" threat to its security interest, would not seek emergency relief, such as an application for a temporary restraining order or order to show cause, immediately following the October 4, 1991 decision. Therefore, Sikorsky has utterly failed to comply with Local Rule 3(c)(4) and this Court's Rule 5. Accordingly, Sikorsky's application for a temporary restraining order and order to show cause are returned unsigned.

II. The Government's Application

The Government seeks an order directing compliance with the Independent Administrator's October 4, 1991 decision upon pain of contempt. 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 findings when it determines that they are, on the basis of all the evidence, "arbitrary or capricious." United States v. International Brotherhood of Teamsters, supra, 905 F.2d at 622; 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). In its motion, Sikorsky argues, as it must to succeed, that the decision of the Independent Administrator is arbitrary and capricious. Sikorsky has utterly failed to make any such showing.

First, Sikorsky argues that this dispute should go before the National Labor Relations Board (the "NLRB"). Second, Sikorsky argues that the Independent Administrator's decision is inconsistent with the National Labor Relations Act (the "NLRA"). The Election Rules state that "no restrictions shall be placed upon

candidates' or members' pre-existing rights to solicit, distribute leaflets or literature, conduct campaign rallies, hold fund raising events, or engage in similar activities on employer or Union premises." Election Rules, Art. VIII, §10(d). 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).

In Yellow Freight, slip opinion, (April 3, 1991 S.D.N.Y.), this Court determined that the election rules extend to entities that could jeopardize the IBT membership's right to a free, fair and honest election pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651. 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.; May 13, 1991, Memorandum & Order, 764 F. Supp. 817, 821 (S.D.N.Y. 1991). In this case, Sikorsky is in the same position as Yellow Freight. It also raises the same arguments as Yellow Freight concerning this Court's jurisdiction, which this Court has already determined are without merit. See April 3, 1991, Memorandum & Order, slip opinion (S.D.N.Y. 1991). Sikorsky's attempts to raise these arguments from the dead, while appropriate for this Halloween season, are wholly inappropriate here.

Further, Sikorsky's contention that the Independent Administrator violated the Consent Decree and the NLRA is

frivolous. Sikorsky cites paragraph 12(A) of the Consent Decree for the proposition that the Independent Administrator is bound to follow the NLRA and accompanying caselaw. Paragraph 12(A) of the Consent Decree, entitled "DISCIPLINARY AUTHORITY," is not applicable to the Election Provisions of the Consent Decree. Further, paragraph 12 does not refer to the NLRA, but to applicable "Federal laws and statutes." As the preamble to the Election Rules state, the Independent Administrator in ruling on Election issues is in no way bound by the NLRA, but makes decisions based on the IBT Constitution, varied where necessary to conform to the Consent Decree, as interpreted by subsequent Court decisions and other relevant law affecting Union Elections.

The Independent Administrator may look to the NLRA for guidance, and did so in this case. Sikorsky argues that the Independent Administrator failed to consider two of the three factors required in determining when an employer must grant access and misapplied the third. Despite this argument, the limited remedy fashioned by the Independent Administrator adequately addresses the relevant factors under the NLRA.

In sum, the decision of the Independent Administrator is fully supported by the record and is neither arbitrary not capricious. Sikorsky's arguments to the contrary are wholly without merit. Accordingly, the decision of the Independent Administrator is affirmed. Sikorsky is ordered to comply immediately with the October 4, 1991 decision of the Independent Administrator in Election Appeal 91- Elec. App.-196.

CONCLUSION

IT IS HEREBY ORDERED that Sikorsky's application for a temporary restraining order and an order to show cause are returned unsigned; and

IT IS FURTHER ORDERED that the Independent Administrator's decision is affirmed; and

IT IS FURTHER ORDERED that Sikorsky comply immediately with the Independent Administrator's October 4, 1991 decision in Election Appeal 91-Elec. App.-196 under pain of contempt.

SO ORDERED.

Dated: October 25, 1991
New York, New York.

Vincent L. Broderick
U.S.D.J.

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.

ORDER

88 CIV. 4486 (DNE)

IN RE: MOTION FOR STAY OF DECISION 91-ELEC. APP.-196 OF THE INDEPENDENT ADMINISTRATOR

EDELSTEIN, District Judge:

In the Independent Administrator's October 4, 1991 decision in 91-Elec. App.-196, he determined that under the election rules Sikorsky Aircraft Division ("Sikorsky") had to permit non-employee IBT members access to the rear of its company parking lot for the purposes of campaigning in connection with the upcoming IBT first ever rank and file election. Sikorsky moved this Court for a temporary restraining order and an order to show cause seeking to enjoin the Independent Administrator's October 4, 1991 decision. By Order dated October 25, 1991, this Court returned the application unsigned and granted the government's application to affirm the Independent Administrator's decision. Sikorsky now moves this Court for a stay of this Court's October 25, 1991 decision, which denied their application and granted the government's application to: (1) enter an order affirming the Independent Administrator's decision; and (2) require that Sikorsky

comply with the Independent Administrator's decision upon pain of contempt.

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 stay should be denied. First, the movants have not made a strong showing that they are likely to succeed on the merits. In Yellow Freight, slip opinion, (April 3, 1991 S.D.N.Y.), this Court determined that the election rules extend to entities that could jeopardize the IBT membership's right to a free, fair and honest election pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651. 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.; May 13, 1991, Memorandum & Order, 764 F. Supp. 817, 821 (S.D.N.Y. 1991). In this case, Sikorsky is in the same position as Yellow Freight. It also raises the same

arguments as Yellow Freight, which this Court has already determined are without merit. See April 3, 1991, Memorandum & Order, slip opinion (S.D.N.Y. 1991).

Furthermore, the findings of the Independent Administrator "are entitled to great deference." United States v. Int'l 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 when it determines that they are, on the basis of all the evidence, "arbitrary or capricious." United States v. Int'l Brotherhood of Teamsters, supra, 905 F.2d at 622; 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). Sikorsky has made absolutely no showing that they are likely to succeed on the merits. However, Sikorsky has shown that they are likely to fail miserably on the merits.

Second, I find that the movants will not suffer irreparable harm from the actions ordered by the Election Officer and Independent Administrator. The third criteria is whether staying the ruling will cause injury to any other interested party. Granting a stay will prejudice the candidates for IBT office and the IBT rank and file in general. Finally, the public interest lies in furthering the purpose of the election rules to "guarantee honest, fair, and free elections completely secure from harassment, intimidation, coercions, hooliganism, threats, or any variant of these no matter under what guise." July 10, 1990, Opinion & Order, 742 F. Supp. 94, 97 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir. 1991). Over the years, the IBT has been tarnished with a patina of corruption, and actions to clear this troubled past are squarely in the interest of IBT officials, the IBT rank and file, and the public in general.

Accordingly, the petition for a stay is hereby denied.

CONCLUSION

IT IS HEREBY ORDERED that Sikorsky's motion for a stay is denied.

So Ordered.

Dated: October 25, 1991
New York, New York.

U.S.D.J.

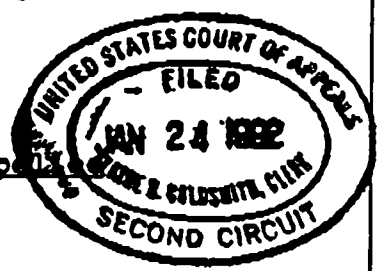
Seq. #33/88C1932/CJF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 719 -- August Term 1991

(Argued November 6, 1991 Decided JAN 24 1992; 1992)

Docket No. 91-6268



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

CARDAMONE, Circuit Judge:

Pursuant to a consent decree entered into by the United States and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (IBT), the IBT's 1.5 million members were scheduled to elect, for the first time, their union leadership in a rank and file secret ballot in November and December of 1991. The campaign was the culmination of an 18-month election process supervised by court-appointed officers and conducted in accordance with election rules approved both by this Court and by the district court. See United States v. International Brotherhood of Teamsters (In re Yellow Freight), No. 91-6096, slip op. 8379, 8383-84 (2d Cir. Oct. 29, 1991) (describing consent decree); United States v. International Brotherhood of Teamsters, 931 F.2d 177, 187-90 (2d Cir. 1991) (approving the Election Rules).

Sikorsky Aircraft (Sikorsky), a division of United Technologies Corporation, appeals from an order of the United States District Court for the Southern District of New York (Edelstein, J.), dated October 25, 1991, denying it declaratory and injunctive relief, and upholding the prior orders of the court-appointed Election Officer and Independent Administrator that directed appellant to provide limited access to its facility to nonemployee union candidates campaigning for leadership positions in the IBT.

BACKGROUND

Sikorsky is a manufacturer of helicopter equipment, much of it for military contracts, and employs about 7,200 persons. Of those employees, 1,964 are members of IBT's Local 1150. IBT member Tom Gilmartin, Jr. was a candidate for Eastern Conference regional vice-president of IBT, a position which serves a region spanning from Maine to North Carolina and includes 300,000 IBT members. Gilmartin is a member of a "reform" slate of candidates headed by Ron Carey -- candidate for IBT General President (and who was elected to that office). Gilmartin is neither an employee of Sikorsky, nor a member of Local 1150. Ballots for the elections were mailed to IBT members in early November and were to be returned to the Election Officer by December 10, 1991 in order to be counted.

The Election Officer issued a written decision on September 25, 1991 granting nonemployees limited access to the Sikorsky property. Access was granted only to areas immediately inside three gates leading to Sikorsky's parking lot and was solely for purposes of campaigning. The Election Officer noted that access to an employer's property by union members not employed by that employer is proper only where no reasonable alternative means for effective communication -- one that is not overly costly or time-consuming and generally permits face-to-face communication -- exist. He concluded, however, that campaigning on a small strip of land outside the gates and next to the adjacent highway was not a reasonable alternative means of communicating with the IBT

member employees because entering and exiting vehicles made this alternative ineffective, dangerous and likely to result in traffic congestion.

Sikorsky appealed this adverse order to the Independent Administrator on September 26, 1991. The Administrator held a telephone hearing on October 1, 1991 -- prior to which the government and appellant were permitted to file written submissions of their arguments. On October 4, 1991 the Independent Administrator affirmed the Election Officer's decision to provide access for nonemployee candidates, but modified the ruling to permit campaigning in areas located nearer the entrances of the facility itself because soliciting immediately inside the parking lot entrance gates would still present congestion and safety problems. He also concluded that home visits, as a means of providing face-to-face communication, would not be a reasonable alternative to jobsite access because

> [c]ontacting 4200 individuals would be prohibitively costly and time consuming. Ballots for the Election at issue will be in the hands of the members beginning November 7th. Given the cost and the time limitations, home visits would be unduly burdensome if not impossible. Accordingly they are not a reasonable alternative means of communication in this situation.

Appellant decided not to appeal the Independent Administrator's decision, and filed instead the instant action in the district court for declaratory and injunctive relief on October 25, 1991, after being notified by Gilmartin of his plans to visit the facility pursuant to the access decree. On that very

same day Judge Edelstein denied appellant's requested relief, affirmed the administrative decision, and ordered appellant to comply with it immediately. The district court, inter alia, rejected appellant's arguments that, because it was not a party to the consent decree, no jurisdiction existed to make it subject to the access order or, alternatively, the National Labor Relations Board (NLRB) had exclusive jurisdiction over the matter. The district court's decision on these issues was in accord with In re Yellow Freight. See slip op. at 8388-98.

This expedited appeal followed. After oral argument on November 6, 1991, because of extremely limited time constraints, we vacated the stay of the district court order granted by a motions panel that expedited the appeal. Our vacation of the stay effectively granted Gilmartin access to Sikorsky's facility. We stated that our opinion would follow. Despite the fact that the election has now been held, we think it necessary to write in this case. Although federal courts are generally precluded by Article III's "case or controversy" requirement from deciding cases in which events subsequent to filing suit have effectively resolved the dispute, see Chemerinsky, Federal Jurisdiction, § 2.5.1 (1989), the mootness doctrine is "flexible" and recognizes the "uncertain and shifting contours" of Article III justiciability. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 400-01 (1980) (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)). Consequently, because the issues presented in this case are of general and recurring applicability in the Labor-Management

context, we decline to dismiss this appeal as moot. See Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122-25 (1974).

DISCUSSION

Appellant argues that the administrative officials and the district court failed to apply appropriate and binding National Labor Relations Act (NLRA) standards requiring consideration of whether alternative means were available for effectively communicating campaign information before granting access to the employer's plant property. In particular, appellant claims that, as in In re Yellow Freight, no consideration was given to alternative means of communicating with IBT members other than in areas immediately adjacent to the employer's facility. It adds that the union candidate carries the burden of establishing that alternative means are not available, and that Gilmartin offered no testimony or evidence on this point.

The record shows that although the Election Officer failed to consider any alternatives to compelled access -- except for alternatives immediately adjacent to the employer's facility -- the Independent Administrator did discuss home visits. The Independent Administrator, however, held no evidentiary hearing on this or any other alternative. Despite this, the district court concluded that "the decision of the Independent Administrator is fully supported by the record and is neither arbitrary [nor] capricious." In so concluding, we think the district court erred.

It is not disputed that "when the inaccessibility of employees makes ineffective the reasonable attempts by

nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956); see also District Lodge 91, Int'l Ass'n of Machinists v. NLRB, 814 F.2d 876, 880 (2d Cir. 1987) (right of self-organization under § 7 of the NLRA, 29 U.S.C. § 157 (1988); includes intra-union campaign activities). Nevertheless, an employer may not be ordered to grant access either when reasonable alternatives exist or when the administrative officer or district court fails to find that reasonable alternatives do not exist. See In re Yellow Freight, supra at 8399; National Maritime Union of America v. NLRB, 867 F.2d 767, 775 (2d Cir. 1989). Further, as Sikorsky correctly points out, under Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 205 (1978), the union candidate has the burden of establishing the unavailability of reasonable alternatives to compelled access. We agree with Sikorsky that the appealed-from ruling improperly shifted the burden to it because the union candidate failed to make even a minimal showing that access to Sikorsky's facility was the only reasonable alternative for communicating with IBT member employees.

In National Maritime Union, we decided that an employer of 75 persons residing in 12 states could exclude union organizers from its vessels because the record was inadequate to establish that no reasonable alternative means of communication were available. 867

F.2d at 775. We emphasized the importance of face-to-face contact and concluded that mailings, telephone solicitations and invitations to meet -- three other common alternatives for communicating campaign information -- were not, in the absence of a realistic opportunity for such contact, reasonable alternatives. Nevertheless, we declined to rule that home visits were an unreasonable alternative because the record was inadequate to support such a finding. Significantly, the burden of proving that alternative means of communication were not reasonable was imposed not on the employer, but on the union. Id. at 773-75.

In a similar vein, In re Yellow Freight reversed a district court order that sustained an Election Officer's direction compelling an employer to grant limited access to nonemployee union candidates. There we held the Election Officer improperly restricted his consideration of alternative means of communication to those immediately adjacent to the employer's facility. Slip op. at 8401-02. We noted further that the consideration of alternative means of communication must be reported in more than general or conclusory terms in order for an appellate court to be assured that alternative possibilities were carefully weighed. See id.

Here, we have a record that reveals slightly more consideration of alternatives than in In re Yellow Freight. Yet, whatever consideration was given appears to have been restricted to home visits and areas immediately adjacent to the employer's facility. In addition, review of other possibilities, if any, was

conducted without requiring the union candidate to satisfy his minimal burden of establishing that alternative means of communication were not available, and without permitting the employer to respond to or rebut those allegations.

The present scenario is the converse of National Maritime Union. There, other alternatives were considered, but home visits were not. Here, home visits were considered, but other alternatives were not. National Maritime Union does not stand for the proposition that mailings, telephone solicitations and invitations to meet will never be sufficient, or that home visits need be the only alternative considered. Rather National Maritime Union and In re Yellow Freight clearly mean that any reasonable alternatives or combination of alternatives be scrutinized and their availability established. Thus, the quantitative examination of alternatives below was insufficient. Moreover, the qualitative examination of alternatives in the instant case was only marginally greater than that found deficient in In re Yellow Freight and then only because of the short analysis made by the Independent Administrator with respect to home visits. Plainly the record below does not support a determination that no reasonable alternatives to compelled access were available.

We are well aware of the time constraints involved in the election context and believe this factor should be incorporated into the burden placed on the union candidate and considered when determining if various alternatives are available. Further, we observe that exhaustive consideration and discussion need not

accompany every decision to compel access to an employer's facility for nonemployee union candidates. Rather, the extent of factfinding incorporated into the trial record should reflect the closeness posed by the question of whether alternative means of communicating are available. Close questions require greater consideration. The minimum consideration given in the instant case affords us no assurance that alternative means of communicating were not available.

Judgment reversed and case remanded for further proceedings not inconsistent herewith.