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

Michael H. Holland
Election Officer

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October 11, 1991

VIA UPS OVERNIGHT

Ronald L. Mahood
223210 City Center Dr., #2128
San Lorenzo, CA 94580

Chuck Mack
Secretary-Treasurer
IBT Local Union 70
70 Hegenberger Road
Oakland, CA 94621-0170

UPS
Attn: Mike Morrison, Division Manager
8400 Pardee Drive
Oakland, CA 94621

Re: Election Office Case No. P-934-LU70-CSF

Gentlemen:

A protest was filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") by Ronald L. Mahood, a member of Local 70. Mr. Mahood contends that on September 23, 1991, he was attempting to distribute campaign material in the employee parking lot of a UPS facility located in Oakland, California when he was instructed by a Division Manager, Mike Morrison, to leave the property voluntarily or the police would be called.

Subsequent to the filing of this protest, UPS has agreed, consistent with the Election Officer position, IBT members including those not employed by UPS[1] may campaign in the employee parking lot of the UPS facility located on Pardee Drive in Oakland, California. Accordingly, this protest is considered RESOLVED.

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

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[1] Mr. Mahood was discharged by UPS on or about September 11, 1991. He is presently contesting his discharge through the contractual grievance procedure. Pursuant to prior decisions of the Election Officer, he is to be accorded the same access rights as any other IBT member not employed by UPS for the purpose of campaigning. (See Election Office Case No. P-852-LU174-PNW, affirmed 91-Elec. App.-195).

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

Donald E. Twohey, Regional Coordinator

Martin Wald, Esq.
Schnader, Harrison, Segal & Lewis
Suite 3600
1600 Market Street
Philadelphia, PA 19103

OCT 22 1991

70/CSF

IN RE:

RONALD L. MAHOOD

and

UNITED PARCEL SERVICE

and

IBT LOCAL UNION 870

91 - Elec. App. - 205 (SA)

DECISION OF THE
INDEPENDENT ADMINISTRATOR

XMHH
BJH
JJS

This matter arises as an appeal from the Election Officer's decision in Case No. P-934-LU70-CSF. A hearing was held before me by way of teleconference at which the following persons were heard: John Sullivan and Barbara Hillman for the Election Officer; Robin Matt, an Adjunct Regional Coordinator; Ronald L. Mahood, the Complainant; Gabe Ybarrulaza, for Mahood; Nicholas Price for United Parcel Service ("UPS"); and Mike Morrison, Larry Ferrigno and Jim Kaminsky, management employees from UPS. The Election Officer also submitted a written summary in accordance with Article XI, Section 1.a.(7) of the Rules For The IBT International Union Delegate and Officer Election ("Election Rules").

In this appeal Mahood, an IBT member and former UPS employee[1], seeks access to the UPS employee parking lot in Oakland, California for campaign purposes. Mahood was barred by

1 Mahood was fired by UPS on or about September 11, 1991. He is challenging his discharge through the contractual grievance procedure.

UPS management from the lot at the Oakland facility while attempting to distribute campaign literature on September 23, 1991.

As a campaign access case, this matter implicates Article VIII, Section 1d. of the Election Rules which provides that no restriction shall be placed on IBT members' pre-existing rights to 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.
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> 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.
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> 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 fact 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 intrusions by IBT members onto the employer's private property may be required. Jean Country, 291 NLRB No. 4 (1988).

Fundamentally, the issue presented here may be resolved. 1) by determining whether there is a pre-existing right to campaign on UPS' property in the form of a past practice; and 2), if there is no past practice, by balancing the employee's campaign rights under federal substantive law against the employer's property interest and the availability of a reasonable alternative means of communication. The Election Officer found both that there was a past practice of allowing access, and that even in the absence of a past practice, the balancing test weighed in favor of a right to limited access.

UPS argues[2] that it only allowed unobstructed campaigning in its' parking lot before it had divided the parking lot into two segments -- the smaller "public" segment for customers and the larger segment for employees. UPS agrees that non-employee IBT

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2 UPS reserves it jurisdictional challenges to the authority of the Election Officer and Independent Administrator over employers who were not signatories to the Consent Decree. However, it is now well settled that the Court-appointed officers have jurisdiction over non-consenting employers to enforce the Election Rules. See In Re McGinnis, 91 - Elec. App. - 43(January 23, 1991), aff'd, United States v. IBT, 88 Civ. 4486 (DNE), slip op. at pp. 3-7 (S.D.N.Y. April 3, 1991)

members may campaign in the public part of the lot, that is, the portion reserved for UPS customers. UPS asserts that the prior use of the entire lot for campaigning can not be considered a past practice since the lot had not been clearly divided into a public section and a private section. At the time open campaigning was permitted the public and employee portions of the lot were mixed. Thus, even though non-employee IBT members previously campaigned at the employee entrance to the parking lot, UPS states that this area has now been officially reserved for employee use only.

The new public customer area is marked off from the main lot by six-inch high, movable concrete "bumpers" or "stanchions" and a series of pennants strung between two saw horses. It is remote from the employee entrance and does not afford the same access to IBT members employed at the facility as the area previously used by campaigning IBT members.

The relevant fact here, however, is not that UPS now designates part of the lot as public and separates it from the main lot by certain flags and barriers, but that during the delegate elections UPS permitted non-employee IBT members to campaign freely in that portion of the lot -- by the employee entrance -- which will permit the greatest opportunity for face-to-face contact with UPS employees. The Election Officer found, and UPS does not dispute, that this location provides more extensive access to employees than does the part of the lot now designated as public. In fact the public portion of the lot will allow for little, if any, face-to-face contact.

Therefore, I must reject UPS' assertions that its new configuration of the parking lot negates its past practice of permitting free access to the employee lot.

Even without this past practice, the Election Officer found that the balancing of the parties' interests required a right of access to the employee lot. UPS suggests use of the grassy area just outside of parking lot. The Election Officer found, however, that this location posed substantial safety and traffic problems and permitted only minimal contact with employees. Accordingly, use of this grassy area does not constitute a reasonable alternative means of communication. In addition, UPS has not demonstrated any heightened security interest to weigh against a non-employee's right to meaningful campaign access to fellow union members. In fact UPS' parking lot is not even surrounded by a fence. Accordingly, I affirm the Election Officer decision on this issue.

For the foregoing reasons, the Election Officer's decision is affirmed in all respects.

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

Dated: October 22, 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)

EDELSTEIN, District Judge:

WHEREAS United Parcel Service ("UPS"), an employer of members of the International Brotherhood of Teamsters ("IBT"), has appealed six decisions of the Independent Administrator concerning protests filed under the Election Rules for the IBT International Union Delegate and Officer Election (the "Election Rules"); and

WHEREAS the Government argues that these appeals are moot; and

WHEREAS these six decisions affirmed decisions of the Election Officer finding that UPS had violated the Election Rules; and

WHEREAS all six decisions involved the rights of IBT members to campaign in connection with the recently completed International Union Officer Election; and

WHEREAS the remedies imposed were limited to the campaign period for International Union Officer Election, which ended on December 10, 1991 -- the date by which mail ballots had to be received by the Election Officer in order to be counted, see International Union Officer Election Plan, Art. II; and

WHEREAS UPS could have timely appealed before the close of the campaign period, see Election Rules, Art. XI, §1(a)(8), but did not do so; and

WHEREAS these appeals, which challenge the imposition of remedies no longer in effect, are moot;

IT IS HEREBY ORDERED that UPS's appeals are dismissed as moot.

SO ORDERED.

Dated: December 20, 1991
New York, New York

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-v-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, et al.,

Defendants.

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ORDER

88 CIV. 4486 (DNE)

EDELSTEIN, District Judge:

United Parcel Service, Inc. ("UPS") has moved this Court pursuant to Local Civil Rule 3(j) for reargument of this Court's December 20, 1991 order, which dismissed as moot UPS's appeal from six decisions of the Independent Administrator. These decisions concerned the campaign rights of members of the International Brotherhood of Teamsters (the "IBT") in connection with the recently concluded International Union officer election.

Local Civil Rule 3(j) provides that a motion for reargument shall set forth concisely the "matters or controlling decisions which counsel believes the court has overlooked." This Court enunciated the standard governing motions to reargue as follows:

> The strong interests in finality and the procedural directions of Local General Rule 9(m) [Rule 3(j)'s predecessor] lead this court to conclude that the only proper ground for a motion for reargument is that the court has overlooked "matters or controlling decisions" which, had they been considered, might reasonably have altered the result reached by the court.

United States v. International Business Machines Corp., 79 F.R.D.

412, 414 (S.D.N.Y. 1978). This has been adopted as the governing standard. See Morser v. AT&T Information Systems, 715 F. Supp. 516, 517 (S.D.N.Y. 1989); Adams v. United States, 686 F. Supp. 417, 418 (S.D.N.Y. 1988); Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n, Inc., 624 F. Supp. 856, 857 (S.D.N.Y. 1985). This stringent standard is necessary to "dissuade repetitive arguments on issues that have already been considered fully by the court." Caleb & Co. v. E.I. DuPont de Nemours & Co., 624 F. Supp. 747, 748 (S.D.N.Y. 1985). A party moving under Rule 3(j) may not submit new facts, issues or arguments. See Travellers Ins. Co. v. Buffalo Reins. Co., 739 F. Supp. 209, 211 (S.D.N.Y. 1990).

All of the matters and controlling decisions proffered by UPS in this motion were considered by this Court in issuing its December 20, 1991 order. There is no actual controversy at this stage of appellate review. See Roe v. Wade, 410 U.S. 113, 125 (1973). UPS's appeals are therefore moot.

UPS has only itself to blame for not obtaining prompt judicial review of the Independent Administrator's decisions, the last of which was issued on November 14, 1991. If UPS had promptly appealed any of the Independent Administrator's decisions, it would have received a decision well before the close of the election campaign on December 10, 1991. However, UPS delayed until November 24, 1991 before filing an appeal, which this Court rejected as fatally vague on December 2, 1991. UPS did not file a proper appeal until December 6, 1991, four days before the close of the election campaign.

UPS next argues that the issues presented in the appeals are capable of repetition, yet evading review. UPS's argument that the issues presented in its appeals will recur is purely speculative. Even if the 1996 election is governed by the Election Officer, the election may be governed by a completely different set of rules. Further, even if the 1996 Election is governed by the Election Officer and the same rules apply, there is no reason that UPS would be unable to obtain judicial review at that time. See DeFunis v. Odegaard, 416 U.S. 312, 318-319 (1974) ("just because this particular case did not reach the Court until the eve of the petitioner's graduation from law school, it hardly follows that the issue he raises will further evade review"). Thus, while the issues decided against UPS in 1991 might be capable of repetition in 1996, there is no reason that the issues they present will evade review.

Finally, UPS argues that if this Court determines that UPS's appeals are moot, it should vacate the Independent Administrator's decisions as moot, rather than dismiss UPS's appeals as moot. While vacatur might have been appropriate had UPS diligently prosecuted its appeal, it did not do so. Instead, UPS "slept on its rights" and rendered its appeal moot by its own inaction. See United States v. Munsingwear, 340 U.S. 36, 41 (1950).

Accordingly, UPS's motion to reargue is denied in all respects.

SO ORDERED

DATED: June 25, 1992
New York, New York

U.S.D.J.