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October 14, 1991

**VIA UPS OVERNIGHT**

Gerald Gallagher  
5078 Williamson  
Dearborn, MI 48126

Lawrence Brennan  
President, IBT Local Union 337  
2801 Trumbull Avenue  
Detroit, MI 48216

Farmer Jack/A & P  
18718 Boreman Avenue  
Detroit, MI 48228

**Re: Election Office Case No. P-937-LU337-MGN**

Gentlemen:

A protest was filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") by Gerald Gallagher, a member of Local Union 243 of the IBT. Mr. Gallagher alleges that on September 27, 1991, he was denied access for the purpose of campaigning to the parking of the Farmer Jack/A & P warehouse facility located on Boreman Avenue in Detroit, Michigan. Mr. Gallagher alleges that access was refused by security personnel after a conversation with management personnel of Farmer Jack via telephone.

Mr. Gallagher is not an employee of Farmer Jack. He is also not a member of Local 337, the Local which represents the Farmer Jack employees and the Local to which the Farmer Jack employees belong. However, he is a member of the IBT and he was attempting to campaign among the Local 337 members employed at Farmer Jack with respect to the IBT International Union officer election.

Union members have a right protected by the National Labor Relations Act, and thus by Article VIII, Section 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 8765 (2nd Cir., 1987); NLRB v. Methodist Hospital of 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 to access to an employer's property, under certain circumstances, by labor union members who are not the 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 rights to engage in such communications and solicitations with respect to intra-union election activities, the employer's right to private property must accommodate the right to engage in such campaign activities. Since the right is an existing right under substantive Federal law, it is protected under Article VIII, § 10(d) of the *Rules*.

Property that is purely public cannot be controlled by the employer, who cannot interfere with protected activity including campaigning activities on such property. Lechmere v. NLRB, 914 F. 2d 313 (1st Cir., 1990). An employer's rights with respect to property which is technically private, but open to the public, such as shopping malls, access roads and parking lots, are normally insufficient to overrule the right of access by non-employees. Where the employer has traditionally permitted non-employees to engage in solicitation, even if other than union solicitation, on its property, such practices demonstrate that the private property interest is insufficient to override access rights for union activities, including intra-union election activities, and access to union members other than employees must be afforded. 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 exists. Lechmere v. NLRB, *supra*; Trident Seafoods Corp., 293 NLRB 125 (1989). The alternate means must be reasonable, not overly costly or time-consuming and must generally permit face-to-face communications. National Maritime Union v. NLRB, 867 F.2d 767 (2d Cir., 1989).

Thus, in the instant case, Farmer Jack's property interests must yield to a limited right of access by IBT members not employed by Farmer Jack, if denying such access would prevent effective communications between IBT members not employed by Farmer Jack and those so employed. An Election Officer representative has personally visited the Farmer Jack site. She found that all employees enter the Farmer Jack property via Boreman Avenue. Boreman Avenue dead ends at the entrance to Farmer Jack property. A security station is located at that intersection. All non-employees must check in with the security station and receive a pass to enter Farmer Jack property. Once past the security station, the property extends to the right for approximately four-tenths of a mile. This area includes the "yard" in which IBT members employed by Farmer Jack work. Two office buildings are contained in this space. The parking lot used by both employees and visitors is parallel to the property area described above; the parking lot is approximately one-quarter mile in length. It is separated from the property containing the office buildings by a fence. There are three unrestricted pedestrian walkways from the parking lot. Most IBT members employed by Farmer Jack use the pedestrian

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walkway furthest from the entrance onto the property to gain access to the yard. The other two pedestrian walkways are located directly across from the two office buildings.

Based on the location of the entrance to Farmer Jack property, the Election Officer determines that, by standing at or near the guard station, but still on public property, i.e. Boreman Avenue, IBT members engaged in campaigning have access to all IBT members employed by Farmer Jack at the Boreman Avenue location. Essentially, this area is much like the entrance to a driveway, rather than a street. Since Boreman Avenue dead ends at the Farmer Jack property; cars reduce their speed to pass the guard shack.

The only traffic on Boreman Avenue at the point of entry to the property of Farmer Jack consists of individuals either entering or leaving such facility. Vehicles are proceeding slowly. There is ample opportunity -- and safe areas -- to hand campaign literature to IBT members as they enter and/or leave Farmer Jack's in their personal vehicles.

The Election Officer determines that meaningful access to IBT members at Farmer Jack can be provided without intrusion upon Farmer Jack's private property rights. See Election Office Case No. P-165-LU299-MGN, affirmed 91-Elec. App.-43 (access to Yellow Freight property denied where a ten-foot public area was available). Therefore, the Election Officer has determined that there is no requirement under the *Rules* that Farmer Jack permit IBT members not employed by it to have access to its private property located on Boreman Avenue in Detroit, Michigan. Accordingly, the protest is DENIED.

If any interested party is not satisfied with this determination, they may request a hearing before the Independent Administrator within twenty-four (24) hours of their receipt of this letter. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Officer in any such appeal. Requests for a hearing shall be made in writing, and shall be served on Independent Administrator Frederick B. Lacey at LeBoeuf, Lamb, Leiby & MacRae, One Gateway Center, Newark, New Jersey 07102-5311, Facsimile (201) 622-6693. Copies of the request for hearing must be served on the parties listed above, as well as upon the 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

**Gerald Gallagher**  
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**MHH/cb**

**cc: Frederick B. Lacey, Independent Administrator**  
**James De Haan, Regional Coordinator**  
**Deborah Schaaf, Adjunct Regional Coordinator**