

OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
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Michael H Holland
Election Officer

October 28, 1991

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343 South Dearborn Street
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VIA UPS OVERNIGHT

Jack Haefling
8357 Lakeshore Trace
Indianapolis, Indiana 46250

Ken Walters
Terminal Manager
United Parcel Service
5380 West 81st Street
Indianapolis, Indiana 46268

John L. Neal
Secretary-Treasurer
IBT Local Union 135
1233 Shelby Street
Indianapolis, Indiana 46250

Re: Election Office Case No. P-978-LU135-SCE

Gentlemen:

A protest was filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") by Jack Haefling, a member of Local Union 135, employed at the United Parcel Service ("UPS") feeder terminal in Indianapolis, Indiana. Mr. Haefling contends that the manager of the UPS facility destroyed campaign literature which had been left in the employee locker room at UPS for IBT members employed by UPS to take. The protest was investigated by Regional Coordinator Peggy A. Hillman.¹

The employee locker room is a non-work area of the UPS Indianapolis, Indiana feeder terminal facility. Accordingly, UPS permits its employees - as it must pursuant to the *Rules* and substantive federal labor relations law - to engage in campaign activities in that locker room, on the employees' non-work time, including the distribution of campaign materials. When he happened to be in the locker room, the terminal manager,

¹ By letter dated October 16, 1991, the Election Officer issued a decision in this matter finding that the issue presented by the protest had been resolved by agreement with UPS. Subsequent to the Election Officer's issuance of his determination, the employer, by counsel, determined to file an appeal from the Election Officer's decision. Finding that the circumstances required him to make a determination as to the *Rules* violation committed by the employer and the requirements of the *Rules* with respect to literature distribution, the Election Officer by letter dated October 21, 1991 withdrew his prior decision in the matter.

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Ken Walters, will "police" the locker room for cleanliness, disposing of materials left on the floor of the locker room as well as other garbage.

Mr. Walters contends that the campaign materials which he removed from the locker room on Friday evening, October 11, 1991 were folded and crumpled; some even had footprints on them. Mr. Walters is emphatic that he never and did not on October 11, 1991 throw away material stacked on the benches. While the protester insists that Mr. Walters disposed of literature other than trash, no direct evidence has been uncovered during the investigation of this protest demonstrating that the material Mr. Walters threw away on October 11, 1991 was anything but materials that were crumpled and strewn on the floor of the locker room. The Election Officer concludes that UPS is not obliged to allow litter to remain in its locker room and thus materials, including campaign materials, which are strewn about the floor of the locker room, may be properly removed. Accordingly, the Election Officer does not find that UPS or its terminal manager, Mr. Walters, violated the *Rules* by Mr. Walters' disposal activities of October 11, 1991.

UPS, by its counsel and district labor relations manager, contend that UPS policy prohibits materials from being distributed other than by UPS employees; they state that UPS policies will not permit employees to leave materials unattended on company property, even in non-work areas of the company's facilities, for distribution purposes. The Indianapolis, Indianapolis feeder terminal manager, the managerial official of UPS with responsibility over the locker room here in question, professed as of October 15, 1991 not to know UPS policy in this regard:

She [Peggy A. Hillman] then asked me what I would do if the materials were stacked neatly in the locker room but left unattended. I responded by telling Ms. Hillman that I did not know what to do, because I did not set company policy.

The Election Officer investigation revealed that IBT members employed at the UPS feeder terminal in Indianapolis, Indiana have habitually utilized the locker room for distribution of materials by leaving such materials stacked but unattended on benches in the locker room. Among the material distributed in this way were leaflets distributed in the summer of 1990 concerning the ratification of the then new UPS-IBT collective bargaining agreement, notices of golf outings and the like. Intra-Union election material has also been distributed in this manner. During the 1991 International Union delegate election for Local 135, campaign literature was stacked on benches in the locker room. Convoy Dispatch, a newspaper published by the Teamsters for a Democratic Union, a caucus of IBT members with a partisan political viewpoint with respect to the 1991 IBT International Union delegate and officer elections, was also distributed in this manner. For the past few months, literature on behalf of Ron Carey and the Ron Carey Slate has

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been left stacked on benches in the locker room for IBT members employed at the Indianapolis, Indiana feeder facility to pick up. The material remains undisturbed, as long as it stays stacked on the locker room benches, until janitorial employees remove it - if it is not otherwise removed by the distributor - during the night when they clean the locker room. The conclusions drawn by the Election Officer as a result of his investigation are further buttressed by the fact that the UPS managerial official with responsibility for the terminal was unaware at least through ~~October 15, 1991~~ that the official policy of UPS was to the contrary.

Article VIII, § 10(d) of the *Rules* provides that "no restrictions shall be placed upon candidates' or members' pre-existing rights to solicit support, distribute leaflets, or literature...on employer or Union premises. Such facilities and opportunities shall be made equally available on the same basis to all candidates and members." Pre-existing rights are those available by operation of substantive law or those established by past practice at any particular facility of an employer. See Advisory Regarding Political Rights, issued December 28, 1990.

Based on his investigation, the Election Officer concludes that there is an established past practice at the Indianapolis, Indiana feeder terminal permitting IBT members employed at that terminal to distribute literature by leaving materials unattended but stacked on benches in the feeder terminal locker rooms. The Election Officer finds that the prior practice extends only to permitting those materials to remain undisturbed until the locker room is cleaned over the night by janitorial employees.

Pursuant to the *Rules*, the nature and extent of the pre-existing rights available to IBT members with respect to this type of literature distribution is that established by past practice. Accordingly, the Election Officer finds that IBT members employed at the UPS feeder terminal in Indianapolis, Indiana may distribute campaign literature by leaving such materials unattended but neatly stacked on benches in the locker rooms of such facility. To the extent that the member does not remove the material himself or herself prior to the time that janitorial employees clean the locker rooms, the janitorial employees may discard the literature even if it remains stacked on the benches. UPS is not obliged to allow litter in its locker rooms and thus materials, including campaign materials, which are strewn about the floor of the locker room, may be properly removed at any time.²

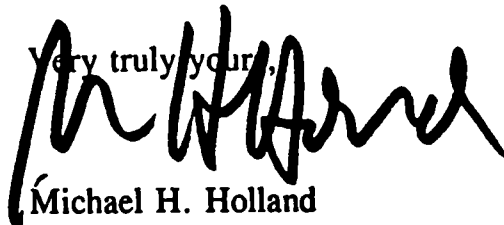
² UPS' objection to allowing the distribution of materials by permitting unattended stacks to remain on locker room benches is that the materials may end up on the floor, causing a litter or safety problem. The Election Officer notes, however, that material distributed even by an IBT member handing it to another IBT member may also end up on the floor, causing the same litter or safety problem. The Election Officer's determination in this case does not enhance either the litter or safety problem professed

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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

Peggy A. Hillman, Regional Coordinator

Martin Wald, Esquire
Schnader, Harrison, Segal & Lewis
Suite 3600
1600 Market Street
Philadelphia, Pennsylvania 19103

by UPS to be the basis for its policy.

IN RE:

JACK HAEFLING

and

UNITED PARCEL SERVICE

and

IBT LOCAL UNION NO. 135

91 - Elec. App. - 221 (SA)

DECISION OF THE
INDEPENDENT ADMINISTRATOR

This matter arises as an appeal from the Election Officer's decision in case No. P-978-LU135-SCE. A hearing was held before me by way of teleconference at which the following persons were heard: John J. Sullivan and Barbara Hillman for the Election Officer; Peggy Hillman, a Regional Coordinator; Jack Haepling, the Complainant; Nicholas N. Price for United Parcel Service ("UPS"); and Ken Walters, Gary Langston, and John Higgins, Managers for UPS. In addition, the Election Officer provided a written Summary in accordance with Article XI, Section 1.a.(7) of the Rules For The IBT International Union Delegate And Officer Election (the "Election Rules").

Jack Haepling is a member of IBT Local Union 135 and is employed by UPS at its feeder terminal in Indianapolis, Indiana. In his protest to the Election Officer, he charged that UPS removed and destroyed campaign literature that he had left stacked on benches in the employee locker room in accordance with an

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established past practice. Upon investigation, the Election Officer determined that UPS had disposed of materials strewn about the floor of the locker room but had not removed any material stacked on the benches. This aspect of the protest was therefore denied.

The Election Officer did find, however, that there was an established practice at this facility of employees distributing literature by leaving it stacked in neat piles on the benches in the employee locker room until it was removed by the nightly custodial staff. Accordingly, the Election Officer preserved this right in his decision. UPS appealed the Election Officer's conclusion in this connection.

Under Article VIII, Section 10.d. of the Election Rules, an employer may not restrict an IBT member's pre-existing right to engage in campaign activities -- including the distribution of literature -- on an employer's premises. Pre-existing rights may come from substantive federal labor law, contract, or from the past practice at a particular worksite. The relevant issue on this appeal is whether or not there was a past practice of employees distributing literature by leaving it stacked and unattended on the benches in the locker room, subject to removal by the night janitors, at the UPS facility in question. UPS asserts that it maintains a firm policy against such a practice.

At the hearing before me, UPS proffered the statements of its managers on this point. The managers also stated that they had

never seen literature neatly stacked on the benches in the locker room. Accordingly, UPS argued that the Election Officer had based his finding on a hypothetical situation that had never existed and that was, in any event, contrary to UPS policy.

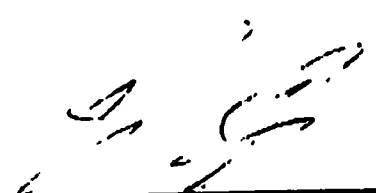
Contrary to the assertions of UPS, the Election Officer's investigation disclosed that employees had routinely and historically left material stacked on the benches in the locker room when they wanted it distributed. Campaign material had been distributed in such a fashion as recently as the IBT delegate election. Non-campaign material, including leaflets, newspapers, and notices of social events, had also been distributed in this manner. The sudden emergence or revitalization of a heretofore non-existent or dormant policy -- coinciding as it does with these historically crucial elections -- must be viewed as suspect. In any event, it does not change the proven past practice involved here.

As the only neutral factfinder in the process, the Election Officer's findings are entitled to deference. The statements of the UPS management officials, to the extent they are contrary to the Election Officer's findings, are not of sufficient weight to defeat those findings.

Accordingly, I conclude that in the past, UPS employees at the Indianapolis facility were able to distribute literature by leaving it stacked on benches in the locker room until it was removed by the nightly custodial staff. Thus, they have a pre-existing right

to engage in this practice when it comes to distributing campaign literature in connection with International officer elections. That right may not now be suddenly abrogated.

Accordingly, the Election Officer's decision is affirmed in all respects.



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

Dated: November 7, 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

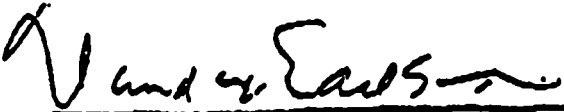
WHEREAS UPS could have timely appealed before the close of the campaign period, see Election Rules, Art. XI, §1(a)(8), but did not do so; and

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
-----X

UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :

-v-

ORDER

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

88 CIV. 4486 (DNE)

-----X

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.

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: *July 23*, 1992
New York, New York



U.S.D.J.