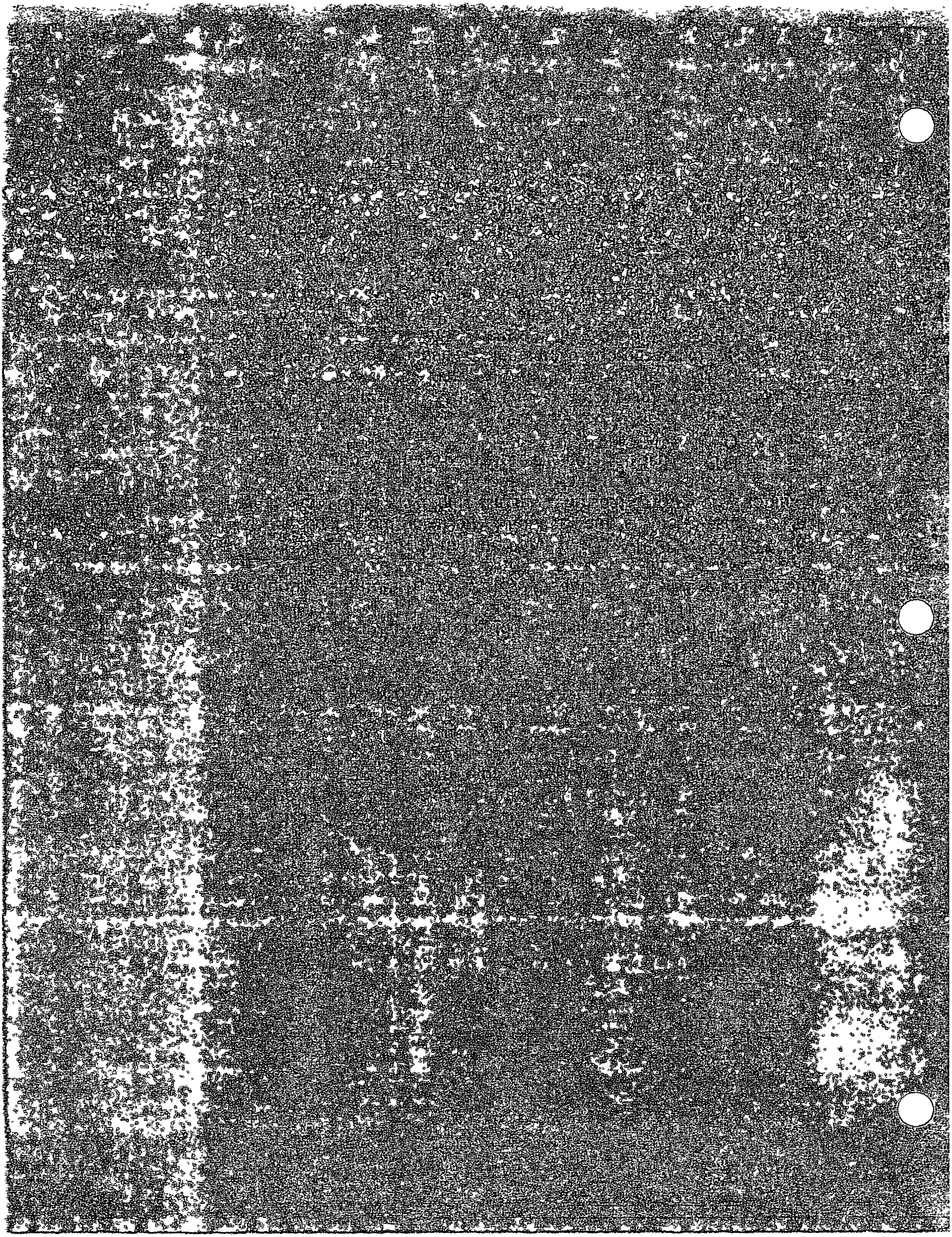

OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, NW
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(202) 624-8778
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Michael H Holland
Election Officer

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October 31, 1991

VIA UPS OVERNIGHT

Doug Mims
IBT Local Union 728
2540 Lakewood Avenue, S.W.
Atlanta, GA 30315

Larry D. Parker
President
IBT Local Union 385
126 North Kirkman Road
Orlando, FL 32811-1498

Super Foods, Inc.
8201 Chancellor Drive
Orlando, FL 32809

Re: Election Office Case No. P-994-LU728-SEC

Gentlemen:

A protest was filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") by Doug Mims, a candidate for International Union Vice President on the Ron Carey Slate. The protest alleges that on October 18, 1991 Mr. Mims and two members of Local 385, both supporters of the Ron Carey Slate, were denied access for the purpose of campaigning to the employee parking lot of Super Foods, an employer of IBT members, located on Chancellor Drive in Orlando, Florida.

This protest was investigated by Regional Coordinator Don Williams. The investigation revealed that on October 18, 1991 Mr. Mims and two other IBT members made three attempts to gain access to the property of Super Foods for the purpose of campaigning. IBT members employed at Super Foods are represented by Local 385. Mr. Mims is not an employee of Super Foods, nor is he a member of Local 385. The two members, Mario Ferenak and Danny Peterson, who accompanied Mr. Mims on that date are members of Local 385 but not employed by Super Foods.

During his initial visit, Mr. Mims proceeded to the guard shack, identified himself and requested admittance to the parking lot. The guard called the Chief of Security, Bob Watkins, who advised Mr. Mims, Mr. Ferenak and Mr. Peterson that they would have to leave the property. Two subsequent visits to the property on that date resulted in conversations with Mr. Watkins but continued denial of access to the parking lot. During the Local 385 delegate election, Mr. Ferenak and Pat Tolbert, another Local 385 member, were permitted access to the parking lot by a guard for the purpose of distributing literature and were not requested to leave the property while campaigning.

Super Foods, in response to the protest, states that it is the policy of Super Foods not to permit access to its facilities for the purpose of campaigning to other than its employees. Super Foods suggests that IBT members not employed by it wishing to campaign have the opportunity to do so on the right-of-way immediately off Super Foods' property where employees exit the employee parking lot.

Super Foods denies knowingly allowing access to its property by IBT members not employed by it for the purpose of campaigning. Super Foods pointed out that on September 25, 1991, when Mr. Ferenak, identifying himself as a driver for Consolidated Freight, gained access to the facility--under what Super Foods characterizes as false pretenses--he was told to leave the property at once upon being discovered distributing campaign literature.

According to Mr. Ferenak, he did enter a Super Foods facility on September 25, 1991 while working for his employer, Consolidated Freightways, in order to briefly speak with another Consolidated driver who was on the premises. Mr. Ferenak states that this occurred at the Super Foods facility located on Director's Row, approximately one mile from the main business office facility of Super Foods at which he, Messrs. Mims and Peterson sought to campaign on October 18, 1991. Mr. Ferenak identified himself to the guard at the Director's Row facility and requested permission to enter the property to speak briefly with another employee of Consolidated Freight. He remained on the property for approximately three minutes and left of his own accord. No one requested that he leave the property.

Super Foods admits that a Local Union official entered the plant of the Super Foods facility during the third shift accompanied by an IBT member not employed by Super Foods. Both members remained for some 10-15 minutes in the facility. Super Foods claims that it did not know the purpose or the background for the visit.

The response received from Super Foods does not address--and thus, does not deny--Mr. Ferenak's contention that he was affirmatively permitted to campaign in the Super Foods parking lot during the 1991 IBT International Union delegate election campaign. Super Foods is aware of Mr. Ferenak's allegations regarding such campaign activity.

From the investigation of this matter, it was determined that International Union Vice President candidate Vicky Saporta was inside the Super Foods facility with the business agent of Local 385 and campaigned within the facility. There is no evidence to suggest that Super Foods had knowledge of or condoned this conduct. No other International Union Officer candidate has requested that Local Union 385 seek similar access on his or her behalf.

The Election Officer credits the testimony of Mr. Ferenak as to his campaign activities in the parking lot of the Super Foods facility located on Chancellor Drive in December of 1990. Super Foods has presented no evidence to the contrary. The evidence, as found by the Election Officer, thus demonstrates that Super Foods, through its security personnel, had knowledge of and affirmatively permitted campaigning in its parking lot.

Article VIII, § 10(d) of the *Rules* provides that "no restriction shall be placed upon candidates' or members' pre-existing rights to solicit support, distribute leaflets or literature, conduct campaign rallies, hold fund raising events or engage in similar activities on employer or Union premises." During the delegate election process, Super Foods at its main facility, located on Chancellor Drive, allowed IBT members not employed by it access to its parking lot for the purpose of distributing campaign literature. In accordance with Article VIII, § 10(d) of the *Rules*, Super Foods may not now deny such access.

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). That decision was affirmed by the Court of Appeals for the Second Circuit on October 29, 1991.

Accordingly, this protest is GRANTED. The Election Officer directs that Super Foods allow IBT members, including those not employed by it, access to its employee parking lot for the purpose of campaigning. Super Foods may require that any members seeking such access identify themselves to the security guard prior to entering the parking area. The ballots for this election will be mailed in approximately one and one-half weeks. For this reason, an appeal will not stay the order of the Election Officer that access be afforded (*Rules*, Article XI, § 2(z).

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/ca

cc: Frederick B. Lacey, Independent Administrator

Donald H. Williams, Regional Coordinator
1013 Smith Drive
Metairie, LA 70005

Ron Carey
c/o Richard Gilberg, Esquire
Cohen, Weiss & Simon
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R. V. Durham
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IN RE: DOUG MIMS and SUPER FOOD SERVICES, INC. and IBT LOCAL UNION NO. 728	91 - Elec. App. - 227 (SA) DECISION OF THE INDEPENDENT ADMINISTRATOR

This matter arises as an appeal from the Election Officer's decision in Case No. P-994-LU728-SEC. A hearing was held before me by way of teleconference at which the following persons were heard: John J. Sullivan for the Election Officer; Donald Williams, a Regional Coordinator; Thomas P. Moran for Super Food Services, Inc. ("Super Foods"); and Richard Gilberg for the Committee to Elect Ron Carey. The Election Officer provided a written Summary in accordance with Article XI, Section 1.a.(7) of the Rules For The IBT International Union And Delegate Officer Election (the "Election Rules"). In addition, Super Foods submitted a written statement along with exhibits including a map and photographs of its facility.

This is a campaign access case in which non-employee IBT members seek access to an employer's parking lot for campaign purposes.

On October 18, 1991, Doug Mims, an IBT member and candidate for International Union Vice President on the Ron Carey Slate, attempted to campaign in the parking lot of the Super Foods' facility on Chancellor Drive in Orlando, Florida, but was denied access by Super Foods. He was accompanied by Mario Ferenac and Danny Peterson who are members of IBT Local Union 385 which represents Super Foods' employees. None of the three are employed by Super Foods.

Super Foods asserts that it maintains a strict no-access policy of barring non-employees from its premises including its employee parking lot.[1] Super Foods further suggests that non-employee IBT members who wish to contact its employees may do so by campaigning along a right-of-way that leads from a public road to the parking lot in question.

The resolution of this case involves an application of Article VIII, Section 10.d. of the Election Rules which provides that an employer may not restrict an IBT member's pre-existing right to campaign on an employer's premises. As previously stated by the Election Officer in In Re Frechin, Election Case No. P-852-LU174-PNW, aff'd 91 - Elec. App. - 195 (SA) (October 4, 1991):

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[1] As a preliminary matter, Super Foods objects to the jurisdiction of the Election Officer and the 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 (D.N.E.), slip op., at pp. 3-7 (S.D.N.Y. April 3, 1991), aff'd, United States v. IBT, No. 91-6096 (2d Cir. Oct. 29, 1991).

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

In an Advisory Regarding Political Rights issued on December 28, 1990, the Election Officer affirmed, inter alia, that federal labor law gives IBT members who are not employees 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 captivity, 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).

The Second Circuit Court of Appeals has recently endorsed such an approach, noting that Article VIII, Section 10.d. of the Election Rules may be applied to "invoke both past practice or agreement among employers and the IBT . . . and substantive rights of union members to engage in conduct as established applicable

law." United States v. IBT, No. 91-6096, slip op., at p. 21 (2d Cir. October 29, 1991).

In the instant case, the Election Officer concluded that Super Foods had established a past practice of permitting non-employees to campaign in its employee parking lot. This conclusion is based on two separate events: (1) an allegation by Mr. Ferenac that in December 1990 a Super Foods security guard allowed him to distribute campaign literature in the parking lot; and (2) a visit to the interior of the Super Foods' plant by Vicki Saporta, another candidate for International Union Vice President.

Because he found a pre-existing right in the form of a past practice, in his decision the Election Officer did not discuss the balancing test articulated in Jean Country, 291 NLRB No. 4 (1988), NLRB LEXIS 568 (1988), in which the non-employee's right of access is weighed against the employer's property interest and the availability of reasonable alternative means of communication. However, at the hearing before me, the Election Officer stated that, under a Jean Country analysis, the complainants would not be permitted access to the parking lot where they sought to campaign. I agree with that conclusion.

Under a Jean Country analysis, the campaigners have a reasonable alternate means of communication by standing on the access road. The access road is limited in its traffic. At most, approximately 30 cars, travelling approximately 10 miles per hour, exit the facility at once. The campaigners can easily stop these

cars to distribute literature and converse without causing congestion or creating a safety hazard. In fact, the campaigners have, in the past, campaigned in front of a speed bump and some railroad tracks which cross the access road. This location is ideal as the cars are forced to slow down at that point. Thus, the only issue to be resolved on this appeal is whether a past practice of campaigning in the parking lot has been established.

Super Foods denies that it has ever given any employee or non-employee permission to solicit support or distribute literature of any kind in its employee parking lot. Super Foods further states that, if Mr. Ferenac campaigned in the parking lot in December of 1990, he did so without its knowledge or permission.[2]

As noted, the Election Officer also cited to the Saporta visit to the interior of the facility as evidence of an ongoing right of access to the employee parking lot. However, this visit does not involve the soliciting of support or distribution of campaign literature in the parking lot and, therefore, it does not support a finding that there exists a practice of using the lot for campaign purposes.[3]

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2 At the hearing before me, Super Foods recounted an incident in December of 1990 in which one of its security guards discovered someone in the lot who left when the guard approached to investigate. This, they suggest, may have been the incident cited by Mr. Ferenac. However, no facts are available to confirm or deny this.

3 This visit might have been viewed, in its own right, as a campaign opportunity that Super Foods should have made "equally available on the same basis to all candidates and members." (continued...)

Given the foregoing, it is clear that the only evidence supporting the existence of the practice in question here is one disputed instance of using the parking lot to distribute campaign literature in December of 1990. Compare In Re: Haefling, 91 - Elec. App. - 291 (SA) (November 7, 1991) (routine distribution of literature in employee locker room held to be a past practice).

It is clear that Super Foods has consistently sought to bar all forms of solicitation from its employee parking lot. The complainants themselves were repeatedly denied access. Moreover, this is not a case where an employer has suddenly revitalized a dormant policy as in In Re: Haefling, supra, or, a case where the employer claims it lacks knowledge of preferentially granting a one-time opportunity to one candidate as in In Re: Moerler and UPS, 91 - Elec. App. - 224 (SA) (November 12, 1991). At best, what we have here is one exception to the employer's usual rule barring access which occurred unbeknownst to the employer and in spite of the employer's continued enforcement of its no-access policy. Under these circumstances, it can not be said that a past practice exists.

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[3](...continued)
Election Rules, Article VIII, Section 10.d. However, at the hearing before me, the Election Officer noted that the complainants had not sought a one-time visit to the plant, but were interested solely in campaigning in the parking lot.

Moreover, an ongoing right of access to an employer's property must be distinguished from a right that exists on a one-time basis only. See, e.g., In Re: Moerler and UPS, 91 - Elec. App. - 224 (SA) (November 12, 1991) (employer who knowingly or unknowingly permitted one candidate to campaign in the plant required to offer a similar one-time opportunity to other candidates).