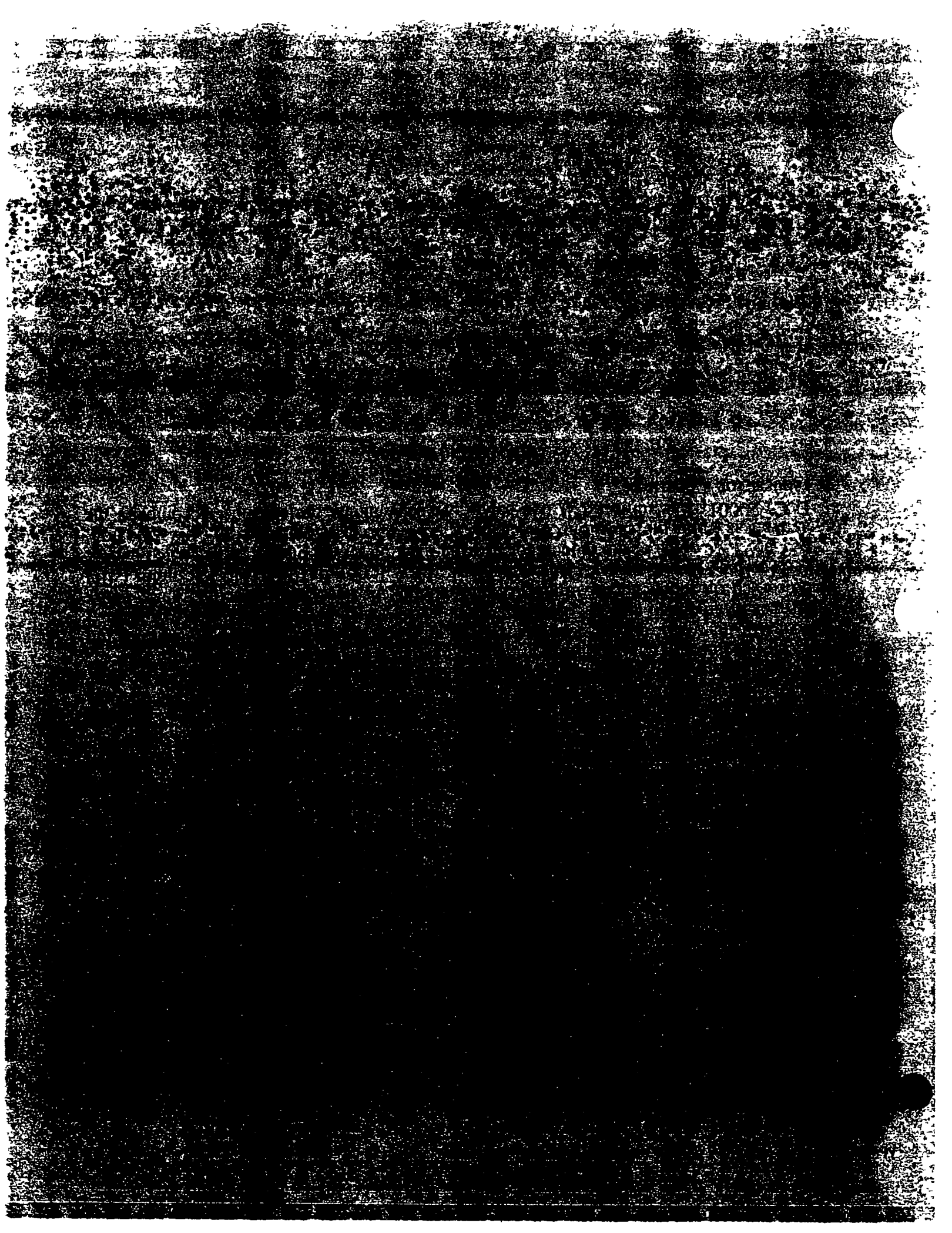

OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, NW
Washington, DC 20001
(202) 624-8778
1-800-828-6496
Fax (202) 624-8792

Michael H. Holland
Election Officer

Chicago Office:
% Cornfield and Feldman
343 South Dearborn Street
Chicago, IL 60604
(312) 922-2800

November 2, 1991

VIA FACSIMILE WHERE NOTED AND UPS OVERNIGHT ON NOVEMBER 4, 1991

Timothy J. Gallagher
5030 East 115th St.
Garfield Heights, OH 44125
(Fax: 216-566-1814)

Dave Carroll, Terminal Manager
UPS
4300 East 68th Street
Cleveland, OH 44105

C. Sam Theodus
President
IBT Local Union 407
3150 Chester Avenue
Cleveland, OH 44114
(Fax: 216-391-7353

Re: Election Office Case No. P-1030-LU407-CLE

Gentlemen:

A protest was filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") by Timothy J. Gallagher, a member of Local Union 407 and a part-time employee of United Parcel Service (UPS) employed at its Cleveland, Ohio facility, located at 4300 East 68th Street in Cleveland. The protest contends that UPS improperly prevented him from engaging in campaign activities in the parking lot at the facility at which he is employed. The protest was investigated by Regional Coordinator Joyce Goldstein.

Mr. Gallagher is a part-time employee of UPS employed at its facility located at 4300 East 68th Street in Cleveland, Ohio. He has been so employed for approximately eight years. He normally works on evening shifts starting at or about 5:30 p.m. He is a member of Local Union 407, the Local to which IBT members employed at this facility belong.

At approximately 8:00 a.m. on the morning of November 1, 1991, Mr. Gallagher arrived at the facility at which he is employed and went to the parking lot at that facility and commenced distribution of campaign literature. He stood in the parking lot outside the entrance to the facility utilized by IBT members employed at that facility. While there, he was approached first by a security guard and then a male supervisor. He explained to them that he was an employee at the facility and his campaign distribution

was occurring in a non-working area of the facility, i.e., the parking lot, during a period when he was not working and that he was distributing only to employees who were themselves not working. Neither the security guard nor the supervisor required him to leave the parking lot.

Subsequently, Mr. Gallagher was approached by Nancy Hudnutt, the head of labor relations at the facility. Ms. Hudnutt was accompanied by another supervisor. Ms. Hudnutt told Mr. Gallagher to leave the parking lot and engage in his campaign activities on the "easement" at the parking lot entrance--that is, on public property between the street and the parking lot. Ms. Hudnutt told Mr. Gallagher that since it was not the time of his normal work shift, he had no right to distribute campaign literature on the UPS property. Fearing disciplinary action against him, Mr. Gallagher left the parking lot and moved to the "easement."

Article VIII, § 10(d) of the *Rules* prohibits restrictions from being placed upon "members' pre-existing rights to solicit support, distribute leaflets or literature, conduct campaign rallies, hold fundraising events, or engage in similar activities on employer . . . premises." Pre-existing rights consist of the rights granted IBT members as a matter of substantive law or the rights established at any particular employer facility by reason of past practice. See Advisory Regarding Political Rights, issued December 28, 1990. As the United States Court of Appeals recently held in its decision in United States of America v. International Brotherhood of Teamsters, __ F. 2d __ (Docket No. 91-6096, October 29, 1991), Article VIII, § 10(d) of the *Rules* is properly construed "to invoke both 'past practice or agreement among employers and the IBT, . . . and any substantive rights of Union members to engage in such conduct as established by applicable law.'" Slip opinion at page 21.

The limitations placed by UPS on the right of IBT members employed by it at its Cleveland, Ohio facility to engage in campaign activities at that facility during non-work time in non-work areas conflicts with the rights granted such members by substantive federal law. A rule denying off-duty employees entry to the employer's premises exterior to the terminal or facility building is presumptively invalid. NLRB v. Pizza Crust Company, 862 F. 2d 49 (3rd Cir., 1988); NLRB v. Ohio Masonic Homes, 893 F. 2d 1144 (6th Cir., 1989); NLRB v. Southern Maryland Hospital Center, 906 F. 2d 1499 (4th Cir., 1990). UPS has established and has no special security needs permitting it to prohibit entry to its premises exterior to its terminal building to its employees during their off-duty hours.

UPS' action in preventing Mr. Gallagher from distributing campaign literature in its parking lot at its Cleveland, Ohio facility, a non-work area of the facility exterior to the facility building, to IBT members employed there who themselves were on non-work time clearly violated the *Rules*. It is irrelevant that Mr. Gallagher was off duty

at the time and not scheduled for duty for approximately nine hours. All IBT members employed by UPS at its Cleveland, Ohio facility are entitled to engage in campaign solicitation--including the distribution of campaign literature--in non-work areas exterior to the facility building to other members on non-work time; such entitlement exists whether the members engaged in such solicitation are doing it during their duty hours or are off duty.

Accordingly, UPS is ordered to cease and desist from preventing IBT members employed by it from engaging in such campaign solicitation during their off-duty hours in the parking lot of the Cleveland facility. Since the ballots for the IBT International Union officer election will be mailed on or about November 9, 1991, an appeal of this decision will not stay the effectiveness of the Election Officer's order requiring access. *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

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IN RE: TIMOTHY J. GALLAGHER and UNITED PARCEL SERVICE and IBT LOCAL UNION NO. 407	91 - Elec. App. - 226 (SA) DECISION OF THE INDEPENDENT ADMINISTRATOR

This matter arises as an appeal from the Election Officer's decision in Case No. P-1030-LU407-CLE. 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; Joyce Goldstein, a Regional Coordinator; Bernard Goldfarb for United Parcel Service ("UPS"); Timothy J. Gallagher, the Complainant; Sandy McNair for Mr. Gallagher; and Jim Tear, a manager for UPS. In addition, Susan Davis of the Committee To Elect Ron Carey audited the hearing. The Election Officer 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 (the "Election Rules"). UPS also provided a written brief along with various exhibits supporting its position.[1]

[1] At the hearing before me, UPS sought to combine this case with an appeal of the Election Officer's decision in Case No. P-1026-LU407-CLE. However, Case No. 1026 involves a claim of access by a non employee IBT member and is governed by a different body (continued...)

This is a campaign access case in which an IBT member seeks access to his own employer's parking lot during non-duty hours for campaign purposes. Therefore, this case must be distinguished from the usual campaign access case where a non-employee IBT member seeks access to an employer's facility. As discussed below, a different body of substantive federal labor law applies.[2]

Timothy J. Gallagher is a member of IBT Local Union 407 and a part-time employee of UPS at its East 68th Street facility in Cleveland, Ohio. Mr. Gallagher has worked at the Cleveland facility for the past eight years. He presently works evening shifts starting at about 5:30 p.m. At about 8:00 a.m on November 1, 1991, Mr. Gallagher attempted to distribute literature in the employee parking lot at the East 68th Street facility. While standing by an entrance which leads from the employee parking lot to the plant, Mr. Gallagher was directed by UPS management to move to a grassy area outside the parking lot between the lot and the

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[1](...continued)
of law. Although both cases involve facilities in Cleveland, Ohio where the employees are represented by IBT Local No. 407, the two cases were heard and decided separately to avoid any confusion.

[2] It is clear that the applicable standard regarding an off-duty employee's right to campaign in non-work areas of an employer's premises is separate and apart from the standard regarding a non-employee's right to campaign on an employer's premises as stated in Jean Country, 291 NLRB No. 4 (1988) NLRB LEXIS 568 (1988). Jean Country weighs the employee's rights against the strength of the employer's property interest and the availability of a reasonable alternative means of communication. Thus, UPS' suggestion that a Jean Country type analysis is appropriate here must be rejected.

street. Mr. Gallagher complied, but subsequently filed a protest with the Election Officer.

Whether Mr. Gallagher has the right to campaign in his employers' parking lot is determined by an application of Article VIII, Section 10.d. of the Election Rules which provides that an employer may not place any restrictions on an IBT member's preexisting rights to engage in campaign activity on an employer's premises. As the Second Circuit Court of Appeals recently confirmed, this provision may be applied to "invoke both past practice or agreement among employers and the IBT . . . and any substantive rights of union members to engage in such conduct as established by applicable law." United States v. IBT, No. 91-6096 slip op. at p. 21 (2d Cir. Oct. 29, 1991).

Relying on federal substantive law and upon UPS' prior agreement with the Election Officer to affirm the campaign rights of its employees, the Election Officer determined that Mr. Gallagher had the right to solicit support and distribute campaign literature in the parking lot at the East 68th Street facility during his non-work time.

On appeal UPS argues that it has a firm "no solicitation" rule as well as a long standing policy of preventing employees from engaging in solicitation on its premises. Moreover, UPS asserts that it is engaged in a "sensitive" business, that its parking lot and buildings are secured and fenced and that it has well established business and security reasons which justify this

policy. Finally, UPS asserts that there is a "historical practice" of campaigning along the seeded or grassy area which runs between the lot and East 68th Street and which is broken by the only driveway into or out of the lot in question.

In reaching his conclusion, the Election Officer cites to Tri-County Medical Center Inc., 222 NLRB 1089 (1976). Tri-County sets the standard for an off-duty employee's right to campaign in a non-work area of his employer's property. However, UPS also relies on Tri-County to support its exclusionary policy.

In Tri-County, it was determined that an employer was not justified in banning one of its employees from distributing campaign leaflets on off-duty time in the parking lot of the employer's facility. In Tri-County, the National Labor Relations Board (the "Board") ordered the employer to cease and desist from this exclusionary practice and stated that a rule banning access by off-duty employees "is valid only if it (1) limits access soley with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." Id. at 1089.

After listing the three criteria for a valid no-access rule concerning off-duty employees, the Board further stated: "Finally, except when justified by business reasons, a rule which denies off-

duty employees entry to parking lots, gates and other outside non-working areas will be found invalid." Ibid.

The Tri-County rule represents the well-settled law on the issue. See, e.g., NLRB v. Pizza Crust Co., 862 F.2d 49 (3rd Cir. 1988) (employer rule against off-duty employee distribution of union literature in plant parking lot held to be invalid under the Tri-County test and thus an unfair labor practice); NLRB v. Ohio Masonic Homes, 892 F.2d 449 (6th Cir. 1989) (in determining access rights of off duty employees, Board is entitled to rely on three part Tri-County test in lieu of weighing campaign rights of employees against employer's property rights); NLRB v. Southern Maryland Hospital Center, 916 F. 2d 932 (4th Cir. 1990) (under Tri-County analysis, it was found that employer improperly interfered with employee's rights when it prohibited employees from distributing union literature at front entrance to hospital on off-duty hours).

Given Tri-County, any rule barring off-duty employees from campaigning in non-work areas outside a facility would be found invalid "except where justified by business reasons." Tri County at 1089 (emphasis supplied). At the hearing before me UPS sought to establish such a business reason by citing its security concerns, its no solicitation policy and a "15 minute" rule forbidding employees from entering the facility earlier than 15 minutes prior to their start time.

UPS' attempt to establish a justified business reason for barring campaigning at its East 68th Street facility falls far short of the mark. First, its security concerns ring hollow. Access to the parking lot will not interfere with UPS' shipping concerns. Moreover, its no solicitation policy by its plain terms refers only to solicitation in work areas during working time. That is not the issue here.

As for the "15-minute rule," Mr. Gallagher, the complainant, had never heard of it. As evidence of this rule, UPS submitted a "retyped" memo with no date and no indication of what facility or facilities were subject to the rule. UPS also acknowledged at the hearing before me that the memo was not posted at the East 68th Street facility. While the memo states general considerations for such a policy, such as congestion in the parking lot and breakroom, it does not articulate a specific business reason that would justify excluding IBT employees from campaigning in the parking lot on their off duty hours at the worksite in question.

Beyond all of this, on January 11, 1991, UPS advised its regional and district managers that it had agreed to post a notice to IBT members employed at its facility from the Election Officer, regarding their campaign rights. That notice was posted for the required 30 day period at the East 68th Street facility. The notice stated in relevant part:

> You have the right to engage in such campaign activities including the distribution of campaign materials on the employers premises in non-work areas during non-work time. (Emphasis supplied).

Given this agreement between UPS and the Election Officer, it is somewhat surprising, if not outright contradictory, that the East 68th Street facility would now seek to enforce a policy forbidding the distribution of campaign materials on its premises, in non-work areas, during non-work time.

Finally, UPS argues that permitting off-duty employees to campaign in the parking lot during non-work hours would interfere with customers coming and going. In making this argument, UPS relies on an incident that occurred on November 1, 1991, at the entrance to the East 68th Street parking lot where a group of men allegedly harassed a customer by pounding on her car and putting a "white ticket" (supposedly campaigning literature) on her car as she attempted to exit the lot onto East 68th Street. As the Election Officer noted in his Summary, the conduct as alleged is not protected by the Election Rules.

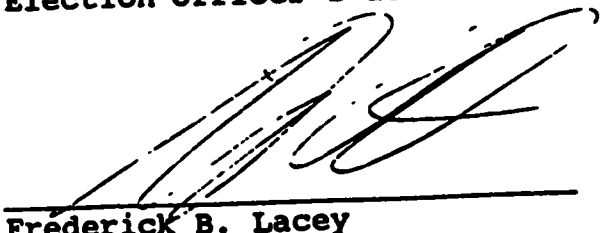
Mr. Gallagher, however, had no involvement with any UPS customers and was excluded from the lot ten hours prior to the November 1st incident. Moreover, permitting employees to campaign in the parking lot on non-work hours does not require UPS to tolerate intimidation or harassment of its customers. UPS remains free to take action against such incidents as they occur. The Election Officer clearly acknowledges as much.

In addition, it must be noted that the "historical practice" of requiring union campaigners to stand at the entrance to the parking lot on the grassy area between the lot and the street,

invites the very harassment that occurred in the unfortunate incident of November 1, 1991. Both UPS employees and UPS customers drive in and out of the parking lot through the same entry way off East 68th Street. Requiring IBT members to campaign in the grassy area on either side of the driveway places them in the position of attempting to get their message across by flagging down moving motor vehicles with unknown occupants who may or may not be IBT members. Such a removed method of campaigning presents the potential for customer interference that might be avoided by permitting the IBT members to campaign elsewhere in the parking lot. UPS' stated concern for its customers would be advanced by allowing its off-duty employees to campaign in the parking lot near the employee entrance to the interior of the facility. In this way, the campaigners will not intermingle with the customers as the customers have their own entrance to the facility far removed from the employees' entrance.

Moreover, the employee entrance is near a guard house. By permitting its off-duty employees to campaign in the parking lot near the employee entrance, UPS would not only avoid interference with its customers but it would also be able to monitor the campaigners and thus protect its stated security or property interests. In sum, I find that UPS has not asserted a business reason that would justify imposing a presumptively invalid rule barring its off duty employees from campaigning in its parking lot on off-duty hours.

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



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

Dated: November 14, 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

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:

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.