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70

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March 14, 1991

**VIA UPS OVERNIGHT:**

Committee to Elect Ron Carey  
c/o Richard Gilberg, Esq.  
Cohen, Weiss and Simon  
330 West 42nd Street  
New York, N Y. 10036-6901

Chuck Mack  
Secretary-Treasurer  
IBT Local Union 70  
70 Hagenberger Rd.  
Oakland, CA 94621

Joseph W Ballew  
Co-Chairman and Secretary  
Western Conference of Teamsters  
Pension Trust Fund  
101 Elliott Avenue, West  
Suite 500  
Seattle, WA 98119

Jack Bookter  
Secretary-Treasurer  
IBT Local Union 278  
150 Executive Park, Suite 4500  
San Francisco, CA 94134

Re Election Office Case No. P-291A-LU70 & 278-CSF

Gentlemen:

A pre-election protest was filed pursuant to Article XI of the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("Rules"). In that protest, the Committee to Elect Ron Carey ("Carey") alleges that the Co-Chairman and Secretary of the Western Conference of Teamsters Pension Trust ("Trust"), the Union trustees of the Trust, and the principal officers of IBT Local Unions 70 and 278 violated the *Rules* when they used Trust and Union resources, including official union stationary, to prepare and distribute a letter to discredit and disparage the Carey campaign. The Election Officer's investigation revealed the following.

The Trust is an employer-employee jointly administered pension plan covering members of IBT Local Unions affiliated with the Western Conference of Teamsters. Joseph W Ballew is the Co-Chairman and Secretary of the Trust and is also an official of the Western Conference of Teamsters<sup>1</sup>. The Union trustees of the Trust include the

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<sup>1</sup>. Mr Ballew is not an employee of the Trust. The Trust reimburses the Western Conference for all of the expenses incurred by Mr Ballew in his capacity as Co-Chairman/Secretary of the Trust, including travel, office and clerical expenses as well

Ron Carey  
Page 2

Director of the Western Conference as well as twelve other officials of the Western Conference or of Joint Councils or Local Unions affiliated with the Western Conference. Chuck Mack, Secretary-Treasurer of Local Union 70, is a trustee of the Trust. Four of the Trustees are announced candidates for International Office aligned with the Durham-Mathias Unity Team.

As part of his campaign for General President of the IBT, Ron Carey prepared and distributes a video tape campaign speech. In that presentation Carey discusses, *inter alia*, the features of a pension plan he negotiated on behalf of members of IBT Local Union 804. Carey is the President of Local Union 804. A copy of that video tape was acquired by Jack R. Bookter, Secretary-Treasurer of Local Union 278 who in turn sent it to Mr Ballew.

In a letter to Bookter, dated November 28, 1990, (hereinafter "Ballew letter") Ballew contrasts the benefits available under the Local Union 804 plan with those available under the Trust. The letter begins with Ballew's claim that Carey, in the videotape, "takes great liberties with the facts" and goes on to state that "I am sure that all would like to have the same scenario Mr Carey has in pension considerations". The letter then goes on, in some detail, to contrast the benefits of the Trust and the Local Union 804 plan. The letter concludes with the statement "the appeal of the Local 804/UPS Plan lies only in its ability to provide benefits prior to age 55".

In addition to sending the letter to Mr. Bookter, Mr. Ballew distributed copies of his letter to each of the union trustees of the Trust. In his transmittal memo, dated November 30, 1990, Mr. Ballew stated that:

Several Local Unions have contacted me regarding claims made by Mr Ron Carey relative to pension matters and, in particular, the Western Conference of Teamsters Pension Plan. The enclosed response addresses many pension issues which are important to us all, particularly as trustees.

While Mr Bookter stated to the Election Officer representative that he personally only distributed the Ballew letter to several members of his Local Union, Mr. Bookter also stated that he had received comments about the letter from several IBT officials from outside of his Local Union. By memo dated December 5, 1990, written on official Local Union 70 stationery, Chuck Mack distributed copies of the Ballew letter to "All Officers and Officials" of Local Union 70.

While the Ballew letter on its face appears to be a response to an inquiry from Mr Bookter, the substantive portions of the letter were prepared well in advance of Ballew's receipt of the Bookter inquiry. By letter dated January 23, 1990, Ballew asked

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as stationery and supplies. The Trust also retains the services of pension plan administrators, e.g., Northwest Administrators, Inc.; actuaries, e.g., Milliman & Robertson, Inc., and, attorneys, e.g., Pillsbury, Madison & Sutro.

the Trust's consultants to prepare an analysis of the Local Union 804 pension plan because "this plan will be one that our Western Conference Plan will be compared to". At the time that Ballew made the request for this analysis, he had received no inquiries about the Local Union 804 plan or any requests for a comparison of the benefits available under that plan with those available under the Trust.

The analysis of the Local Union 804 plan was prepared, at Trust expense, by Northwest Administrators, Inc. and Milliman & Robertson, Inc. The narrative description of that analysis is contained in a letter, dated March 19, 1990, to Ballew from Mr. Richard Pirnke, Pension Service Manager for Northeast Administrators, Inc. The November 28, 1990 Ballew letter is based on, and excerpts large portions of, the Pirnke analysis.

During the course of the investigation of this protest, counsel for the Trust alleged that the Ballew letter was not unusual and that the union trustees often receive inquiries from participants in the Trust regarding pension benefits. Counsel for the Trust also alleged that the Trust routinely preforms comparisons of its benefits with benefits offered under other pension plans or arrangements. At the request of the Election Officer, the Trust provided the Election Officer with copies of such comparative analyses. Three types of documents were produced: 1) responses prepared by the Trust to inquiries from participants regarding the availability of a "30 and out" pension benefit, 2) comparisons between the benefits available under the Trust and benefits available under non-collectively bargained pension plans or arrangements; and, 3) comparisons of benefits available under the Trust with the benefits available under other IBT negotiated pension plans.<sup>2</sup> The Election Officer's request covered the five year period prior to the filing of the instant protest.

Among the documents provided to the Election Officer by the Trust were a number of inquiries from Trust participants concerning a "30 and out" pension benefit. These requests, including several from UPS employees, are dated from mid-1985 to 1988. In his responses to these inquiries, Mr. Ballew stated that such an option had been considered by the trustees in their design of the Trust and was not incorporated into the Trust's benefit structure. Mr. Ballew also stated that such a benefit formula would "not meet the requirements of the Internal Revenue Service".

Counsel for the Trust also provided the Election Officer with copies of approximately 25 comparisons between the Trust and other pension plans and arrangements. These analysis involved comparisons between the Trust and plans that were not the product of collective bargaining involving IBT subordinate entities. The

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<sup>2</sup> Counsel for the Trust also provided a copy of a comparison of two plans negotiated by IBT Local Union 710. However, this comparison was between two plans, both negotiated by the same Local Union, one for UPS employees and the other for the remainder of the Local Union 710 membership. That analysis does not involve a comparison of the benefits offered by the Trust and another IBT negotiated plan and was therefore not relevant to the issue before the Election Officer.

purpose of the comparisons between the Trust and the employer sponsored plans was to support organizing or collective bargaining efforts by the IBT. Such comparisons were intended to demonstrate that employees not represented by the IBT were enjoying inferior pension benefits or that pension plans that were not the product of collective bargaining were inferior to a collectively bargained plan, i.e., the Trust.

One of the two comparisons involving the Trust and an IBT negotiated plan involved the Southern California Rock Products and Ready Mixed Concrete Industries Teamster Employees Retirement Plan ("Rock Products Plan"). The Rock Products Plan was set up in the late 1950's to cover IBT members in the rock products industry. The employers participating in that plan claimed that the Rock Product Plan would pay benefits comparable to the Trust. In the late 1980's the IBT alleged that the Rock Products Plan benefits were falling behind those offered by the Trust. The analysis prepared by the Trust was for use in bargaining with employers participating in the Rock Products Plan. The employers participating in the Rock Products Plan ultimately agreed to merge that Plan with the Trust.

The other comparison between the Trust and an IBT negotiated plan is the comparison with the Local Union 804 plan. As stated above, this comparison, prepared in early 1990, was not in response to a request for information from a plan participant. Nor is there any evidence that the analysis was prepared for collective bargaining or organizing purposes. Mr. Ballew, through counsel, informed the Election Officer, through counsel, that Owen Bennett, the Chairman of the Trust, may have received a copy of the Prinke analysis of the Local Union 804 plan. Mr. Ballew does not recall anyone else receiving a copy of the analysis. The information contained in the original comparison was incorporated into the letter drafted by Ballew in response to a campaign video produced by the Carey campaign. The Ballew letter in turn was distributed to IBT officials and members throughout the Western Conference.

Article X, Section 1 (b)(3) of the *Rules* prohibits the use of Union funds or resources for campaign purposes unless the Union is reimbursed and all candidates are given equal access to such resources. That provision of the *Rules* also prohibits the use of official union stationary "irrespective of compensation or access".

Further, Article X, Section 1 (b)(1) of the *Rules* provides that "[n]o employer shall be permitted to contribute anything to any campaign." This prohibition extends beyond "strictly monetary contributions" and includes any thing of value. Moreover, the prohibition with respect to contributions extends not only to "employers" but to "foundations", "trusts" or "similar entities". *Rules*, Article X, Section 1(a), see also, Consent Order, paragraph 8. Campaign activity includes not only seeking support for a candidate but opposing a candidate for delegate or International Office. Similarly, the rules regarding trust contributions regulate "any direct or indirect contribution where the purpose, object or foreseeable effect of that contribution is to influence the election of a candidate. *Rules*, Definitions, Paragraph (6).

In investigating the instant protest, the Election Officer first considered whether

the preparation and dissemination of the analysis of the Local Union 804 pension plan was a campaign contribution in violation of the *Rules*. The Election Officer then went on to determine whether the distribution of the Ballew letter constituted campaign activity involving an unreimbursed, or prohibited, use of union resources.

As a threshold matter, counsel for the Trust challenges the jurisdiction of the Election Officer over the Trust's Co-Chairman and other trustees, claiming that the exercise of jurisdiction over these individuals constitutes the exercise of jurisdiction over the Trust. The Election Officer first observes that each of the union trustees of the Trust, including the Trust's Co-Chairman and Secretary, are members of the IBT subject to the jurisdiction of the Election Officer under the Election Rules and the Consent Order. But more importantly, the Election Officer has jurisdiction over the Trust for the same reason it has jurisdiction over employers who employ IBT members. The Trust, like the employer in Yellow Freight, 91 - Elec. App.- 43, affirmed, U.S. v. IBT et al (S D N.Y., March 4, 1991) has the power to interfere with the election process mandated by the Consent Order. In fact, there is a greater danger of such interference posed by the Trust, than by any single employer, because the trust has more resources than any single employer, its participants are greater in number than the employees of any single employer and the fact that officers of the IBT, who may have their own political agenda, have the power to influence the conduct of the Trust.

Counsel may argue that the exercise of jurisdiction by the Election Officer over the Trust is beyond the scope of the Consent Order and the *Rules* promulgated in accordance with that Order. The Consent Order states, at paragraph 18, that:

Except as provided by the terms of this order, nothing else herein shall be construed or interpreted as affecting or modifying: . . . (c) the conduct and operation of the affairs of the IBT or any IBT-affiliated entity or any employee benefit fund as defined in ERISA or trust fund as defined by Section 302 (c) of the Labor management Relations Act, as amended. . ."

However, in the instant case the Election Officer does not seek to affect or modify the conduct or operation of the Trust, but rather is attempting to insure that the Trust does not interfere with the conduct of the election process through unlawful campaign contributions. The regulation of campaign contributions by Trusts and similar entities is a prominent element of both the Consent Order and the Election Rules. To the extent that the Trust is alleged to have made a prohibited campaign contribution, the Election Officer, and the Independent Administrator, clearly have the jurisdiction to investigate such claim and in impose a remedy to cure such violation.

In the instant case it is alleged, inter alia, that the Trust made a contribution in the form of a study critical of the campaign statements allegedly made by an accredited candidate for General President of the IBT as part of his campaign, i.e. the Ballew letter. Counsel for the Trust argue that the Ballew letter and the comparison of the

Ron Carey  
Page 6

Local Union 804 plan "is no more campaign literature than the summary plan booklets and other explanatory materials the Pension trust is legally required by Federal pension law to distribute to the participants in the WCT Plan." Whether the Ballew letter, and the study which serves as the basis of the letter, is a campaign contribution or a piece of campaign literature will depend on whether the "purpose, object or foreseeable effect of [the analysis of the Local Union 804 Plan] is to influence the election of a candidate". *Rules, Definition (6)*. Factors involved in such a determination include reviewing whether the analysis had a legitimate Trust purpose; the timing of the study and its distribution, whether the study was prepared or disseminated in response to campaign statements, how the analysis was distributed, and, the past practice with respect to similar analyses.

The Ballew letter itself was clearly motivated by the Carey campaign tape. Mr. Ballew responded to what he perceived as Mr. Carey's campaign rhetoric regarding the Local Union 804 pension plan. The letter does not provide information, like a "summary plan booklet", but rather argues a political point, i e. our plan is better than the Local Union 804 plan, therefore, the Trustees have served the interest of the Western Conference membership better than Carey has served the members of his Local Union. Thus, the IBT members and officers responsible for the preparation and dissemination of the critical analysis of the Local Union 804 Plan will argue that the candidates they support for International General President will better serve the interests of the IBT membership than will Mr. Carey or delegate candidates committed to his nomination and election. Mr. Ballew's distribution of his letter to all of the union trustees of the Trust insures that this political message will be heard throughout the Western Conference of Teamsters.

Mr. Ballew's initial request for the preparation of the comparison in January, 1990, was also politically motivated. Ballew's request was not in response to a specific question or request from an IBT member or Trust participant. Nor is there any evidence that the analysis was prepared for collective bargaining or organizing purposes. Moreover, with the exception of the Rock Products Plan discussed above, Ballew's request for a comparison with another IBT negotiated plan was highly unusual. The Rock Products comparison was produced in an effort to obtain improved pension benefits during collective bargaining.

While the Trust had addressed a series of questions concerning a 30 and out benefit, the past responses focused on the merits of the Trust's benefits and the limitations of IRS regulations. Never in the past has the Trust attempted to disparage a pension plan negotiated by another IBT affiliate in a comparison with the Trust.

The Election Officer concludes that the "purpose, object or foreseeable effect" of the comparison of the Trust with the Local Union 804 plan, and the distribution of the results of that comparison, was to adversely affect the Carey candidacy. This conclusion is supported not only by the unusual nature of the comparison, but also by the timing of the request, i e , after the start of the Carey campaign and during the period of delegate elections, and its distribution throughout the Western Conference

The source of this contribution was the Trust and therefore the contribution was violative of the *Rules*.

The Election Officer further concludes that the copying and distribution of the Ballew letter, by officials of the IBT, including the principal officers of Local Unions 70 and 278, was violative of the *Rules* to the extent that such distribution involved the use of union funds and resources, including official union stationary.

Accordingly, the Election Officer orders the following relief for these violations of the *Rules*:

1. The Western Conference of Teamsters Pension Trust, its trustees, agents and representatives, shall cease and desist from any further direct or indirect contribution of anything of value, including any further distribution of the Local Union 804 pension plan comparison or the Ballew letter, where the purpose, object or foreseeable effect of that contribution is to influence the election of a candidate for delegate, alternate delegate or International Officer of the IBT.
2. Joseph W Ballew and the Western Conference shall reimburse the Trust for all costs and expenses associated with the preparation and dissemination of the comparison between the Trust and the Local Union 804 pension plan.
3. Joseph Bookter and Chuck Mack shall cease and desist from any further distribution of the Ballew letter and shall personally reimburse their respective Local Union for all expenses associated with such distribution.
4. Chuck Mack shall cease and desist from any further use of official Local Union 70 stationary for campaign purposes
5. The Western Conference of Teamsters shall cause to be published, in the publication entitled "A Report from the ... Western Conference of Teamsters", an article on pension issues prepared by the Carey campaign. The article shall be three quarters of a page in size and shall appear within the first three pages of the publication in the edition following the submission of the article by the Carey campaign. The Carey campaign shall provide to the individual identified by the Western Conference with a camera ready copy of the article. The article shall not contain any photographs. The Carey campaign shall provide, simultaneously with its transmission to the Eastern Conference, a copy of the article to the Election Officer. The Western Conference shall provide the

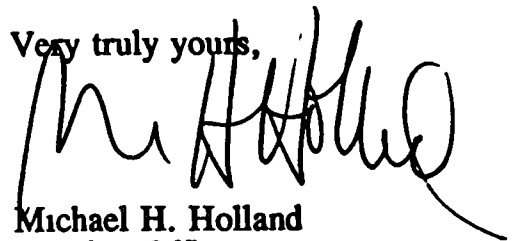


Election Office and the Carey campaign with a page proof of the edition of the newspaper containing the article, prior to publication with the anticipated publication date.

6. Joseph W. Ballew shall, at his own expense, distribute copies of the attached Ballew notice to all trustees of the Trust as well as to any member of the IBT to whom he sent, or caused to be sent, copies of his letter.
7. Chuck Mack shall, at his own expense, distribute copies of the attached Mack notice to all recipients of his memorandum dated December 5, 1990 and to any other IBT member to whom he sent, or caused to be sent, the Ballew letter.
8. Jack R. Bookter shall, at his own expense, distribute copies of the attached Bookter notice to all recipients of his memorandum dated December 5, 1990 and to any other IBT member to whom he sent, or caused to be sent, the Ballew letter.
9. The Western Conference, Ballew, Bookter and Mack shall each file affidavits with the Election Office within fifteen days of their receipt of this decision setting forth in detail their compliance with the terms of this order.

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  
Election Officer

Ron Carey  
Page 9

cc: Frederick B. Lacey, Independent Administrator, IBT  
Geraldine L. Leshin, Regional Coordinator  
Christine M. Mrak, Regional Coordinator  
Donald E. Twohey, Regional Coordinator  
Robert A. Gordon, Esq.  
Pillsbury, Madison & Sutro

**NOTICE TO ALL RECIPIENTS OF THE LETTER FROM  
JOSEPH W. BALLEW, CO-CHAIRMAN AND SECRETARY  
WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST  
DATED NOVEMBER 28, 1990**

The Rules for the IBT International Union Delegate and Officer Election prohibit campaign contributions by any employer, trust or similar entity. The Western Conference of Teamsters Pension Trust is a trust as defined by the Election Rules.

This prohibition includes any direct or indirect contribution where the purpose, object or foreseeable effect of that contribution is to influence the election of a candidate for delegate or International Office in the IBT.

In response to a protest filed on behalf of the Committee to Elect Ron Carey, the Election Office found that the Election Rules were violated by the preparation and dissemination, at the expense of the Western Conference of Teamsters Pension Trust, of a comparison of the benefits available under the Trust with those available under the IBT Local Union 804 pension plan.

The Western Conference of Teamsters Pension Trust hereby disclaims the letter from Joseph W. Ballew, dated November 28, 1990, as well as the contents of that letter and affirmatively states that neither the letter nor its contents are endorsed by the Western Conference of Teamsters Pension Trust.

The undersigned and the Western Conference of Teamsters Pension Trust shall cease and desist from any further campaign contributions or any other violations of the Election Rules.

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**Joseph W. Ballew  
Co-Chairman and Secretary  
Western Conference of Teamsters Pension Trust**

NOTICE TO ALL RECIPIENTS OF THE LETTER FROM  
JOSEPH W. BALLEW, CO-CHAIRMAN AND SECRETARY  
WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST  
DATED NOVEMBER 28, 1990

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This prohibition includes any direct or indirect contribution where the purpose, object or foreseeable effect of that contribution is to influence the election of a candidate for delegate or International Office in the IBT.

In response to a protest filed on behalf of the Committee to Elect Ron Carey, the Election Office found that the Election Rules were violated by the preparation and dissemination, at the expense of the Western Conference of Teamsters Pension Trust, of a comparison of the benefits available under the Trust with those available under the IBT Local Union 804 pension plan.

Local Union 70 hereby disclaims the letter from Joseph W. Ballew, dated November 28, 1990, as well as the contents of that letter and affirmatively states that neither the letter nor its contents are endorsed by Local Union 70.

The Western Conference of Teamsters Pension Trust shall cease and desist from any further campaign contributions or any other violations of the Election Rules.

I will not copy or distribute any campaign literature at Local Union 70 expense and shall reimburse Local Union 70 for all expenses associated with my copying and distribution of the letter from Joseph W. Ballew, dated November 28, 1990. I will not use Local Union 70 official stationary for campaign purposes irrespective of reimbursement.

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Chuck Mack  
Secretary-Treasurer  
IBT Local Union 70

NOTICE TO ALL RECIPIENTS OF THE LETTER FROM  
JOSEPH W. BALLEW, CO-CHAIRMAN AND SECRETARY  
WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST  
DATED NOVEMBER 28, 1990

The Rules for the IBT International Union Delegate and Officer Election prohibit campaign contributions by any employer, trust or similar entity. The Western Conference of Teamsters Pension Trust is a trust as defined by the Election Rules.

This prohibition includes any direct or indirect contribution where the purpose, object or foreseeable effect of that contribution is to influence the election of a candidate for delegate or International Office in the IBT.

In response to a protest filed on behalf of the Committee to Elect Ron Carey, the Election Office found that the Election Rules were violated by the preparation and dissemination, at the expense of the Western Conference of Teamsters Pension Trust, of a comparison of the benefits available under the Trust with those available under the IBT Local Union 804 pension plan.

Local Union 278 hereby disclaims the letter from Joseph W. Ballew, dated November 28, 1990, as well as the contents of that letter and affirmatively states that neither the letter nor its contents are endorsed by Local Union 278.

The Western Conference of Teamsters Pension Trust shall cease and desist from any further campaign contributions or any other violations of the Election Rules.

I will not copy or distribute any campaign literature at Local Union 278 expense and shall reimburse Local Union 278 for all expenses associated with my copying and distribution of the letter from Joseph W. Ballew, dated November 28, 1990.

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Jack R. Bookter  
Secretary-Treasurer  
IBT Local Union 278

IN RE:

COMMITTEE TO ELECT RON CAREY,

Complainant,

and

JOSEPH W. BALLEW, Co-Chairman  
and Secretary Western  
Conference of Teamsters  
Pension Fund; JACK BOOKTER,  
Secretary-Treasurer of IBT  
Local Union 278; and CHUCK  
MACK, Secretary-Treasurer  
of IBT Local Union 70;

Respondents.

91 - Elec. App. - 106 (SA)

DECISION OF THE  
INDEPENDENT ADMINISTRATOR

This matter arises out of an appeal from a March 14, 1991, decision of the Election Officer in Case No. P-291A-LU278-CSF. A hearing was held before me by way of telephone conference on March 20, 1991, at which the following persons were heard: John J. Sullivan, on behalf of the Election Officer; Susan Davis, on behalf of the Committee to Elect Ron Carey; William Roberts, on behalf of the Western Conference of Teamsters, and Arnie Weinmeister; Duane Beeson, on behalf of Jack Bookter (Secretary-Treasurer of Local 278), and Chuck Mack (Secretary-Treasurer of Local 70); and Robert Gordon, on behalf of the Western Conference of Teamsters Pension Trust (the "Trust"), Trust Chairman Owen Bennet, Trust Co-Chairman

Joseph Ballew; and Steven Tallent, another attorney on behalf of the Trust. Mr. Booker and Mr. Mack also audited the hearing.

This matter implicates Article X of the Rules For The IBT International Union Delegate And Officer Election (the "Election Rules"). Article X is devoted to restrictions on campaign contributions and the use of Union funds and goods to promote the candidacy of any individual. The Trust is a pension plan covering members of IBT Local Unions affiliated with the Western Conference of Teamsters. The Trust is administered jointly by employers and employees. Mr. Ballew is the Co-Chairman and Secretary of the Trust. Mr. Ballew is not an employee of the Trust, but rather, is employed by the Western Conference of Teamsters.

The Trust has 14 employee trustees, including Mr. Ballew. In addition to Mr. Ballew, two other trustees are employees of the Western Conference. The remaining employee trustees are officers or officials of the Western Conference of Teamsters or of IBT subordinate entities affiliated with the Western Conference. Four of the employee trustees, Arnie Weinmeister, Chuck Mack, Ben Leal, and Michael J. Riley, are announced candidates for International Office aligned with the "Durham-Mathis Unity Team."

On January 23, 1990, Mr. Ballew wrote to a Mr. Richard Pirnke of Northwest Administrators, Inc., the administrators of the Trust. Upon request, Northwest Administrators will compare the benefits available under the Trust to benefits available under other pension plans or arrangements. In his January 23 letter, Mr. Ballew

forwarded Mr. Pirnke a copy of the Local 804 IBT/Local 447 IAM United Parcel Employees Pension Plan covering the New York City UPS membership (the "804 Plan"). In his letter, Mr. Ballew wrote:

Since this plan will be one that our Western Conference plan will be compared to, I am sending this to you for your review and comments.

In his letter, Mr. Ballew specifically noted that:

This is the pension plan that UPS employees cite as an example of the 30-and-out concept they favor as it pays \$1650/monthly with 30 years of service.

Ron Carey is President of Local Union 804 and is also an accredited candidate for IBT General President. Mr. Carey also serves as a Trustee of the 804 Plan. Mr. Carey also negotiated that Plan.

On March 19, 1990, Mr. Pirnke responded to Mr. Ballew in a three-page letter. In Mr. Pirnke's letter, he indicated:

Based on my interpretation of the information available, I do believe that on a superficial level, the East Coast [the 804 Plan] Plan will sound attractive to participants. However, as pointed out, there are several limitations which are outlined above. In comparison, the advantages of the Western Conference of Teamsters Pension Trust Fund are as follows . . . .

The Election Officer's investigation revealed that the Trust does, from time to time, make comparisons between benefits available under the Trust with benefits available under other pension plans or arrangements. With rare exception, the comparisons prepared by the Trust contrast Trust benefits with benefits available under pension plans or arrangements which were not negotiated by the IBT. The purpose of such comparison is to



assist the IBT in collective bargaining or in organizing efforts. In response to a request by the Election Officer, the Trust produced copies of all comparisons made by the Trust for the last five years. Twenty-two of those comparisons involve non-IBT bargained plans as described above. Three comparisons, however, involved plans negotiated by the IBT or its affiliates.

Of the three analyses involving IBT negotiated plans, one does not involve a comparison with the Trust, but rather an analysis involving two plans maintained by Local Union 710. This analysis contrasts the two Local 710 plans with one another and not with the Trust.

The second IBT negotiated plan analysis performed by the Trust involved the Southern California Rock Products Plan. The analysis of the Rock Products Plan included a comparison of the benefits available under that plan with those available under the Trust. In collective bargaining with employers participating in the Rock Products Plan, representations were made by such employers that benefits under this plan were comparable to those under the Trust. The analysis revealed that the benefits under Rock Products Plan were inferior to those of the Trust and collective bargaining proposals were made by the Union to improve benefits, so such benefits would, in fact, equal Trust benefits. The Rock Products Plan was ultimately merged into the Trust.

The last comparison of Trust benefits with those available under an IBT negotiated plan involves the comparison of the 804 Plan, which is the subject of this appeal.

At the time Mr. Ballew requested the analysis from Mr. Pirnke, no request had been made to the Trust for a comparison of the 804 Plan to the Trust benefits. The Trust suggests, however, that there was much talk concerning the 804 Plan benefits, specifically the "30-and-out" provision. Notwithstanding this fact, it is clear that no one urged or suggested that Ballew request Northwest Administrators, Inc. to prepare the analysis.

When Mr. Ballew received the analysis from Mr. Pirnke, it was not generally distributed within the Trust or within the Western Conference. Moreover, the analysis of the 804 Plan was not used for collective bargaining or organizing purposes.

In November of 1990, Mr. Bookter, Secretary-Treasurer of Local 278, sent Mr. Ballew a copy of a video tape of a campaign presentation by Ron Carey. In that presentation, Mr. Carey makes reference to the Trust and discusses other pension matters, including the 30-and-out benefit found in the 804 Plan. Mr. Carey specifically urges members to make inquiries concerning the benefits available under their Plan.

On November 28, 1990, Mr. Ballew responded to Mr. Bookter. A copy of Mr. Ballew's letter is attached hereto as Exhibit A. Mr. Ballew opens his letter by stating:

Thanks for forwarding the video tape, which I will return once our copy is obtained.

Mr. Carey is an effective speaker, but with respect to pension matters, I think he takes great liberties with the facts and implies that the Local 804/UPS Pension Plan is the model of design and a reality for other pension plans to obtain.

There are over 200 Teamster Pension Plans throughout the United States and Canada. I am sure that all would like to have the same scenario Mr. Carey has in pension considerations. Factors such as a single work force of some 6,000-10,000 employees with largely a single company working in an industry of high turn-over rates that typically hires young employees with significant part-time employment, are features that any pension plan would be blessed to have.

Mr. Ballew then goes on to specifically compare the 804 Plan with the Trust. This portion of Mr. Ballew's letter effectively tracks Mr. Pirnke's analysis. Copies of Mr. Ballew's November 28 letter was sent to all employee trustees of the Trust. None of the employer trustees received a copy. Copies were also sent to Arnie Weinmeister, Director of the Western Conference, and Vincent Aloise, Western Conference UPS Division Chairman.

After receiving the November 28 letter from Ballew, Bookter made copies of the letter and distributed it to members of Local 278 who had asked him about the Carey presentation.

Chuck Mack, a member of the Western Conference Policy Committee as well as the Secretary-Treasurer of Local Union 70, distributed copies of the Ballew letter to "All Officers and Officials" of Local 70. The distribution was accompanied by a memo from Mr. Mack, on official Union stationery, stating:

The letter compares and contrasts in some detail the Western Conference Plan and that of Local 804 in New York. In almost every aspect, the Western Conference

Plan is superior. This information should prove helpful as you perform your duties.

Both Mr. Bookter's distribution and Mr. Mack's distribution of the November 28 letter were paid for by their respective Locals.

Article X, Section 1.b.(1) of the Election Rules provides that "no employer shall be permitted to contribute anything to any campaign." This prohibition is rooted in Paragraph 8 of the Consent Order which amends Article IV, Section 2 of the IBT Constitution to provide that: "No candidate for election shall accept or use any contributions or other things of value received from any employers, representative of an employer, foundation, trust, or similar entity." (Emphasis supplied). The Election Rules define a "campaign contribution" to include "any direct or indirect contribution where the purpose, object or foreseeable effect of that contribution is to influence the election of a candidate." It is not disputed that the Western Conference of Teamsters Pension Trust is a "Trust" as that term is used in Article X, Section 1 of the Election Rules and the Consent Order.

It is not disputed that Mr. Carey announced his intention to seek the General Presidency of the IBT sometime in the Fall of 1989, shortly before Mr. Ballew wrote to Mr. Pirnke seeking an analysis of the Local 804 Plan. It is also not disputed that as part of his campaign, Mr. Carey comments on pension issues and makes reference to the Local 804 Plan. It is also conceded that pensions and pension negotiations are among the issues being debated during the campaign for International Office in the IBT.

Much of the campaign literature distributed by Carey, and by delegate candidates seeking election committed to Carey's nomination, discuss Local 804's pension plan and extol its virtues.

Given all this, it is readily apparent that Ballew's November 28 letter was designed to refute Carey's campaign statements regarding pensions and the 804 Plan. In short, the Ballew letter is intended to influence the election of Carey as General President. Stated even more plainly, the Ballew letter constitutes anti-Carey campaign literature. Given the fact that the Trust is prohibited from making any campaign contribution, its distribution of the Ballew November 28 letter violates the Election Rules.<sup>1</sup>

The Trust defends the actions of Mr. Ballew, suggesting that he was merely conducting the normal operations of the Trust by requesting the Pirnke analysis and by distributing that analysis to Mr. Bookter. I reject this suggestion. As already noted, the only time the Trust specifically compared an IBT-negotiated plan to its own benefits was in the context of a collective bargaining negotiation. That was not the case here. Moreover, the focus of the 804 analysis was the 30-and-out provision. The 804 Plan,

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<sup>1</sup> The Election Officer recognizes that the Trust did not make a contribution to a particular "campaign." Although it is clearly suggested that the Ballew letter was written to benefit the four Trust trustees who are candidates for International Office aligned with the Durham-Mathis slate, no conclusion was drawn that the Durham-Mathis team was the recipient of the Trust's "contribution." The violation of Article X, Section 1.b.(1) of the Election Rules is not mitigated by the fact that a particular campaign was not identified as receiving the contribution. The Election Rules are designed to prohibit employer contributions either in favor of or opposed to a particular candidate.

however, is not the only IBT-negotiated plan with this benefit. Local 710 has a 30-and-out provision as does the Central Conference of Teamsters. Neither Ballew's request to Pirnke nor his November 28 letter mentions these other plans. Instead, Ballew's request to Pirnke specifically targets the 804 Plan. In addition, his November 28 letter not only targets the 804 Plan, but specifically targets and criticizes Carey. Given this, it is clear that the Ballew letter is imbued with political overtones.

I also agree with the Election Officer's finding that Messrs. Bookter and Mack violated the Election Rules when they used Union resources to duplicate and distribute the Ballew letter. See Article X, Section b(3) of the Election Rules ("No union funds or goods shall be used to promote the candidacy of any individual. Use of Union equipment, stationery, facilities and personnel in connection with any campaign is prohibited . . .") Mr. Beeson, on behalf of Messrs. Bookter and Mack, argues that they cannot be held to have violated the Election Rules because the Election Officer failed to demonstrate that they had knowledge of the campaign implications of the Ballew letter or that they acted in bad faith in any way. In short, Beeson argues that Messrs. Bookter and Mack were simply serving their membership well by distributing information concerning trust benefits. Mr. Beeson's contentions are disingenuous. Mr. Mack has already been elected as a delegate to the 1991 IBT International Convention. In addition, Mr. Mack is a candidate for International Trustee on the Durham-Mathis slate.

It is clear, given Mr. Mack's political affiliations and aspirations, that he knew or should have known of the political overtones of the Ballew letter. Moreover, the necessity of distributing information concerning a plan generated out of the New York/Metropolitan area to officers and officials of a Local in Oakland, California is suspect.

Similarly, Mr. Bookter is a candidate for delegate in his Local in San Francisco, California. The delegate election in that Local is contested and pro-Carey candidates are seeking delegate positions. Thus, Mr. Bookter, too, either knew, or should have known, that the Ballew letter carried clear political overtones. In addition, as with Mr. Mack, the necessity of Mr. Bookter distributing information about a New York pension plan to his constituency in San Francisco is suspect.

The Election Officer ordered an extensive remedy to cure these violations.

First, the Election Officer ordered the Trust, its trustees, agents and representatives, to cease and desist from any further direct or indirect contributions of anything of value including any further distribution of the Local 804 Plan comparison or the Ballew letter, where the purpose, object or foreseeable effect of that contribution is to influence the election of a candidate for delegate, alternate delegate or International Officer of the IBT.

In addition, the Election Officer directed Mr. Ballew, at his own expense, to distribute copies of the notice attached hereto as

Exhibit B to all trustees of the Trust as well as to any member of the IBT to whom he sent, or caused to be sent, copies of his November 28 letter. In the Ballew notice, the following language appears:

The Western Conference of Teamsters Pension Trust hereby disclaims the letter from Joseph W. Ballew, dated November 28, 1990, as well as the contents of that letter and affirmatively states that neither the letter nor its contents are endorsed by the Western Conference of Teamsters Pension Trust.

The Trust objects to this remedy on two grounds. First, the Trust argues that neither the Election Officer nor the Independent Administrator has jurisdiction over it, as it was not a party to the underlying Consent Decree. In In Re: McGinnis, 91 - Elec. App. - 43 (January 23, 1991), the Independent Administrator rejected a similar jurisdictional challenge by a third party, in that case, an employer (Yellow Freight Systems, Inc.). In short, the Independent Administrator concluded that enforcement of the Election Rules requires jurisdiction over third parties. The Trust attempts to distinguish McGinnis by arguing that the fundamental issue in that case centered on rights guaranteed by the National Labor Relations Act, 29 U.S. §258(a)(1), and the decisions of the National Labor Relations Board and federal courts interpreting that Act. Specifically, it was found that the National Labor Relations Act guaranteed non-employee IBT members limited rights to engage in campaign activity on third-party employer premises. The Trust argues that no such rights exist or are being sought to be enforced here. In making this argument, the Trust misinterprets McGinnis.



The jurisdiction over third parties that was confirmed in McGinnis was rooted not in the National Labor Relations Act, but rather in the Consent Order. That jurisdiction is fully applicable here.

In addition, the Trust argues that the Election Officer cannot prevent it from performing its obligations to respond to requests for comparison of benefits. In fact, the Trust argues that it may have a legal obligation to respond to such requests. As already discussed in some detail, however, the Trust was unable to cite to any example in which it openly disparaged a plan negotiated by another IBT entity or openly criticized another official of the IBT in such a comparison. Thus, it cannot be said that the Election Officer's ruling prevents the Trust from performing any of its obligations. In fact, Susan Davis, on behalf of the Committee to Elect Ron Carey, acknowledged that the Trust could have distributed an analysis, untainted by the reference to Ron Carey or Local 804, of the comparative benefits of the Trust to the 30-and-out benefit.

As part of his remedy, the Election Officer also ordered the Western Conference of Teamsters to publish, in its publication entitled "A Report From The Western Conference Of Teamsters," an article on pension issues prepared by the Carey campaign. In addition, the Western Conference, along with Mr. Ballew were ordered to reimburse the Trust for all cost and expenses associated with the preparation and dissemination of the comparison between the Trust and the 804 Plan.

The Western Conference argues that since it was not a party to this protest proceeding, it cannot be subject to the Election Officer's remedies. In addition, the Western Conference argues that it did not participate in either the request for the Pirnke analysis or Ballew's distribution of that analysis.

It matters not that the Western Conference was not a party to this protest. Article XI, Section 2 of the Election Rules provides, in pertinent part, as follows:

If as a result of any protest filed or any investigation undertaken by the Election Officer with or without a protest, the Election Officer determines that these Rules have been violated or that any other conduct has occurred which may prevent or has prevented a fair, honest and open election, the Election Officer may take whatever remedial action is appropriate.  
[Emphasis supplied.]

In this case, the Election Officer has determined that conduct has occurred which may prevent or has prevented a fair, honest and open election -- that is the distribution of the anti-Carey campaign literature by Ballew, Mack, and Bookter. Thus, the Election Officer is authorized to require a subordinate entity, such as the Western Conference, "to mail or otherwise distribute, at its own expense, candidate campaign materials." Election Rules, Article XI, Section 2.(h). In directing the Western Conference to publish the Carey article on pension issues, the Election Officer is merely curing the improper taint of the Ballew letter. See, e.g., In Re: Lozanski, 91 - Elec. App. - 97 (SA) (March 15, 1991). (Wherein the Independent Administrator upheld the ruling of the Election Officer ordering a Local to post a notice guaranteeing the

campaign rights of its members, despite having found no merit to an allegation that the Local Shop Steward had violated the Election Rules.)

I do not, however, find it proper for the Western Conference to be held jointly and severally liable with Ballew to reimburse the Trust for all the cost and expenses associated with the preparation and dissemination of the comparison between the Trust and the 804 Plan. Although Mr. Ballew is an administrator of the Western Conference, there is no evidence that Mr. Ballew acted in that capacity in soliciting and distributing the Pirnke analysis. The evidence suggests that Ballew acted simply as a trustee of the Trust. Thus, the Election Officer's remedy is modified to provide that Mr. Ballew shall be solely responsible to reimburse the Trust for all cost and expenses associated with the preparation and dissemination of the comparison between the Trust and the Local 804 Pension Plan.

Still further, as part of the remedy ordered by the Election Officer, both Messrs. Mack and Bookter were directed, at their own expense, to distribute copies of notices attached hereto respectively as Exhibits C and D. Messrs. Mack and Bookter object to these notices in that the notices require them, on behalf of their respective Locals, to "disclaim" the information contained in the Ballew letter. Messrs. Mack and Bookter argue that there are no facts which could support a finding that either of their Locals had at any time taken responsibility for, or otherwise made a

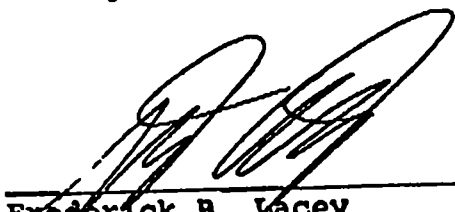
"claim" to the Ballew letter or its contents. The fear here is that the notices may communicate to the recipients that the Locals had done something which cannot reasonably be attributed to them. In making this argument, Messrs. Mack and Bookter ignore the fact that they are both high-ranking officials in their respective Locals. In addition, Mr. Mack distributed the Ballew letter using his Local stationery. Mr. Bookter also used Union resources to distribute the letter. Messrs. Mack's and Bookter's respective Locals were clearly implicated in the distribution of the Ballew letter.

Messrs. Mack and Bookter also object to the notices in that they indicate that the Trust "shall cease and desist from any further campaign contributions or any other violations of the Election Rules." It is argued that there is no reasonable ground for requiring either Mack or Bookter to notify anyone of prescriptions applicable to the Trust. It is suggested that the effect of this provision is to communicate to the recipients that either Mr. Mack and/or Mr. Bookter were in some way involved in activities of the Trust which had been found to violate the Election Rules. While a plain reading of the notices in question does not raise such an inference, the 5th paragraph of the notices should be modified to read as follows:

The Election Officer has directed that the Western Conference of Teamsters Pension Trust shall cease and desist from any further campaign contributions or any other violations of the Election Rules.

By addition of the words "the Election Officer has directed that," it is clear that the injunction imposed on the Trust emanates from an Election Officer directive, not from either Mack or Bookter.

Except as modified herein, the ruling of the Election Officer is affirmed.



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

Date: March 22, 1991

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA, :  
 :  
 Plaintiff, :

-v- :

MEMORANDUM & ORDER

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

88 CIV. 4486 (DNE)

-----X  
IN RE. PETITION FOR REVIEW OF :  
 DECISION 91-ELEC. APP.-106 OF :  
 THE INDEPENDENT ADMINISTRATOR :  
-----X

APPEARANCES. OTTO G. OBERMAIER, United States Attorney for the  
Southern District of New York, (Edward T. Ferguson,  
III, Assistant United States Attorney, of counsel)  
for the Government.

FREDERICK B. LACEY, Independent Administrator of the  
International Brotherhood of Teamsters, (Stuart  
Alderoty, of counsel);

MICHAEL HOLLAND, Election Officer of the  
International Brotherhood of Teamsters, (Barbara  
Hillman, of counsel);

COHEN, WEISS & SIMON, New York, New York (Susan  
Davis, of counsel, for Committee to Elect Ron Carey;

GIBSON, DUNN & CRUTCHER, New York, New York (Robert  
Sacks, Steven Tallent, William Highberger,  
Pillsbury, Madison & Sutro, San Francisco,  
California, Robert A. Gordon, Christopher L. Byers,  
of counsel) for Western Conference of Teamsters  
Pension Fund and Joseph A. Ballew.

EDELSTEIN, District Judge:

This decision arises from the implementation of the rules for  
the International Brotherhood of Teamsters ("IBT") International  
Union Delegate and Officer Election promulgated by the Election

Officer (the "election rules") and approved by this Court by Opinion & Order dated July 10, 1991, 742 F. Supp. 94 (S.D.N.Y. 1990), and the Court of Appeals United States v. International Brotherhood of Teamsters, slip opinion, (2d Cir. April 12, 1991). These election rules provide a "framework for the first fully democratic, secret ballot election in the history" of the IBT. July 10, 1990 Opinion, supra, 742 F. Supp. at 97.

Petitioners Western Conference of Teamsters Pension Trust Fund (the "Trust") and Joseph Ballew, an employee of the Western Conference of Teamsters and Co-chairman of the Trust appeal decision 91-Elec. App.-106 of the Independent Administrator, which affirmed as modified the Election Officer's decision P-291A-LU278-CSF pursuant to Article X, §1(a)(8) of the election rules. The Election Officer and Independent Administrator determined that Ballew had violated Article X, §1.b.(1) of the election rules in connection with the preparation and distribution, at Trust expense, of written materials about Ron Carey, an accredited candidate for IBT General President. Petitioners seek to overturn the findings of the Independent Administrator. This petition was ripe for this Court's review on April 25, 1991. Petitioners twice moved this Court to stay the decision of the Independent Administrator. This Court denied the first application on April 11, 1991, and the second on May 10, 1991.

The decision of the Independent Administrator is affirmed.

#### I. Background and Procedural History

The Trust is affiliated with the Western Conference of Teamsters ("WCT"), a subordinate entity of the IBT. The Trust is a multi-employer pension plan established pursuant to §302(c) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §186(c), and a pension plan as defined in the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1002(2)(A). The Trust has 14 employee trustees, including Ballew, two other employees of the WCT, with the remaining employee trustees being officers or officials of the WCT. Four of the 14 employee trustees, Arnie Weinmeister, Chuck Mack, Ben Leal, and Michael Riley, are announced candidates for International Office on the "Durham-Mathis Unity Team" slate. (Decision of Independent Administrator [Dec. In. Ad.] at 2).

Ron Carey is the president of IBT local 804 in Long Island City, New York, and a Trustee of the Local 804 IBT/Local 447 IAM United Parcel Employees Pension Plan (the "Local 804 plan"). A notable feature of the Local 804 plan is the "30 and out" feature, where participants may begin receiving full benefits after 30 years of service, rather than benefits being tied to reaching a certain age. Carey negotiated the Local 804 plan. Carey is an accredited candidate for IBT General President. (Dec. In. Ad. at 3).

The following facts were found by the Election Officer and affirmed by the Independent Administrator. On January 23, 1990, Ballew wrote to Mr. Richard Pirnke, an independent trust administrator, asking Pirnke to review and comment on the Local 804 plan. In that letter, Ballew wrote "Since this plan will be the



one that our WCT plan will be compared to, I am sending this to you for your review and comments." (Dec. In. Ad. at 3). That inquiry was not made for the purpose of any pending collective bargaining negotiations, or at the request of any participant in, or beneficiary of the Trust. That inquiry was found to be in response to Carey's campaign and candidacy. (Dec. In. Ad. at 4-5).

On March 19, 1990, Pirnke responded, adversely comparing the local 804 plan to the Trust (the "Pirnke letter"). That comparison noted in particular the demographic differences between the WCT and Local 804 memberships that made the "30 and out" feature less attractive to Trust participants. (Dec. In. Ad. at 5).

In November, 1990, Jack R. Bookter, Secretary-Treasurer of Local 278 in San Francisco, California (affiliated with the WCT), sent Ballew a videotape of a campaign presentation by Carey. In that videotape, Carey makes specific reference to the Trust, and the Local 804 plan's "30 and out" feature. (Dec. In. Ad. at 6-7).

On November 28, 1990, Ballew wrote back to Bookter, on Trust stationery, in his capacity as co-chairman/secretary of the Trust (the "Ballew letter"). In that letter, Ballew made unfounded and pejorative remarks about Carey, stating that Carey took unfounded liberties in describing the Local 804 plan. The Ballew letter went on to set out the "limitations of significance" in the Local 804 plan, and then emphasized positive features of the Trust. (Dec. In. Ad. at 6-7).

The Election Officer and Independent Administrator found that

Ballew did not circulate the information in the Pirnke letter or use that information for collective bargaining purposes until he was contacted by Bookter. (Dec. In. Ad. at 6-7).

Ballew then sent copies of his letter to all other employee trustees of the Trust. No employer trustee received a copy. Bookter distributed copies of the Ballew letter to members of his local who inquired about the Carey presentation at local 278 expense. Chuck Mack, a member of the WCT policy committee, distributed the Ballew letter to all members of his Local 70, at IBT expense. (Dec. In. Ad. at 6-7).

After considering the facts as found by the Election Officer and Independent Administrator, the Independent Administrator concluded the following:

[I]t is readily apparent that Ballew's November 28, 1990 letter was designed to refute Carey's campaign statements regarding pensions and the Local Union 804 plan. In short, the Ballew letter is intended to influence the election of Carey as General President. Stated more plainly, the Ballew letter constitutes anti-Carey campaign literature. Given the fact that the Trust is prohibited from making any campaign contribution, its distribution of the November 28, 1990 letter violates the Election Rules.

(Dec. In. Ad. at 8).

The Election Officer ordered the Trust and Ballew to take curative steps (the "curative steps"). These steps were affirmed as modified by the Independent Administrator. Those steps are as follows:

1. The Trust is prohibited from making any further contributions of value, including distribution of the Ballew letter where the purpose, object, or foreseeable effect of that contribution is to influence the election of a candidate for delegate, alternate delegate or International Officer of the

IBT.

2. Ballew is to reimburse the Trust for the cost and expense of the preparation and disbursement of the Ballew letter.
3. Ballew is to bear the expense and distribute copies of a notice to be sent to all persons to whom he had sent his letter advising the recipients of the subject Election Rules violation and a disclaimer by the Trust of the Ballew letter.

(Dec. In. Ad. at 13-16). The Trust and Ballew appeal the findings of the Independent Administrator to this Court.

## II. Discussion

With respect to the electoral provisions of the Consent Decree, the Court of Appeals and this Court have now determined that the Investigations Officer and Independent Administrator are stand-ins for the General President and GEB, who properly delegated their power to those Court Officers pursuant to Article XXVI, §2 of the IBT Constitution. United States v. International Brotherhood of Teamsters, *supra*, Slip Opinion, (2d Cir., April 12, 1991) at 3617, *aff'g* July 10, 1990 Opinion & Order, 745 F. Supp. 94; May 6, 1991 Opinion & Order, slip opinion, at 5 (S.D.N.Y. 1991); January 17, 1990 Opinion & Order, 728 F. Supp. 1032, 1048-57, *aff'd* 907 F.2d 277 (2d Cir. 1990);

This Court and the Court of Appeals have interpreted ¶K.16 to mean that decisions of the Independent Administrator "are entitled to great deference." 905 F.2d at 616 (2d Cir. 1990) *aff'g* March 13, 1990 Opinion and Order, 743 F. Supp. 155 (S.D.N.Y. 1990); May 10, 1991 Memorandum & Order, slip op., (S.D.N.Y. 1991); May 6, 1991 Opinion & Order, *supra*, at 5; December 27, 1990 Opinion & Order,

754 F. Supp. 333, 337 (S.D.N.Y. 1990); September 18, 1990 Opinion & Order, 745 F. Supp. 189, 191-92 (S.D.N.Y. 1990); August 27, 1990 Opinion & Order, 745 F. Supp. 908, 911 (S.D.N.Y. 1990); March 13, 1990 Opinion & Order, supra, 743 F. Supp. at 159-60, aff'd 905 F.2d 610, 622; January 17, 1990 Opinion & Order, supra, 728 F. Supp. at 1048-57, aff'd 907 F.2d 277 (2d Cir. 1990); November 2, 1989 Memorandum & Order, 725 F.2d 162, 169 (S.D.N.Y. 1989); Joint Council 73 et al. v. Carberry et al., 741 F. Supp. 491, 493 (S.D.N.Y. 1990); Local 27 v. Carberry et al., July 20, 1990 at 3-4 (S.D.N.Y. 1990).

Petitioners make the following four arguments on appeal to this Court: (1) There is no jurisdiction over the Trust; (2) carrying out the curative steps would interfere with the Trust's fiduciary duties to its participants and beneficiaries; (3) Ballew did not violate the election rules; and (4) the curative steps are improper. These arguments will be addressed in turn.

#### A. Jurisdiction over the Trust and Ballew

The Trust and Ballew argue that since they were not parties to the underlying litigation and non-signatories to the Consent Decree, they cannot be held bound by the Election Rules. They further argue that the Trust and its employees are legally independent from the IBT. This Court and the Court of Appeals have rejected virtually identical arguments numerous times.

The Court of Appeals has repeatedly ruled that IBT affiliated local unions, joint councils and area conferences--which

specifically argued that they were (i) not parties to the underlying litigation, (ii) non-signatories to the Consent Decree, and (iii) legally independent of the IBT--are subject to the Consent Decree, and the election rules promulgated pursuant to the Consent Decree. United States v. International Brotherhood of Teamsters, supra (2d Cir. April 12, 1991) aff'g July 10, 1990 Opinion & Order, supra; United States v. International Brotherhood of Teamsters, supra, 905 F.2d 610, aff'g March 13, 1990 Opinion & Order, supra; United States v. International Brotherhood of Teamsters, 907 F.2d 277, aff'g January 17, 1990 Opinion & Order, supra; Local 27 v. Carberry, supra.

This Court has determined that it may extend the reach of the election rules to reach entities which could jeopardize the IBT membership's right to a fair, free and honest election, pursuant to its authority under the All Writ's Act, 28 U.S.C. §1651. This Court has ruled that Yellow Freight System, Inc., ("Yellow Freight") a company employing IBT members but not affiliated with the IBT, was subject to the election rules because they were in a position to frustrate the implementation of the Consent Decree and the election rules, lawful orders of this Court. April 3, 1991 Memorandum & Order, slip op., at 4-6 (S.D.N.Y. 1991) ("Yellow Freight"). An injunction was issued under the All Writs Act requiring that all Consent Decree related litigation must be before this Court. January 17, 1990 Opinion & Order, supra, 728 F. Supp. 1032 (S.D.N.Y.), aff'd 907 F. 2d 277 (2d Cir. 1990).

The need to assert jurisdiction over the Trust and Ballew is

even more compelling than in Yellow Freight. The Trust is an affiliated IBT entity, and Ballew its employee. Four of its trustees are candidates for International Office and have a direct stake in the outcome of this election. The Trust administers the pension benefits of over 300,000 WCT members. Like Yellow Freight, the Trust and Ballew are in a position to frustrate the membership's right to a free, fair and honest election.

The Election Officer and Independent Administrator found that Ballew in his position as trustee circulated "anti-Carey campaign literature" at Trust expense. The Trust and Ballew must be subject to the election rules so they cannot use Trust personnel, resources, and status to support a particular slate of candidates. The Trust is barred by Article X, §1.b.(1) of the election rules from making any campaign contribution to a candidate. A campaign contribution is defined by the election rules as "any direct or indirect contribution where the purpose, object or foreseeable effect of that contribution is to influence the election of a candidate." (Election Rules, §A-1 at p. 6) See United States v. International Brotherhood of Teamsters, supra, slip op. at 3630-31 (2d Cir. April 12, 1991) (holding that Election Officer must construe definition of "campaign contribution" in broad manner mandated by Consent Decree.)

The Trust and Ballew argue that they cannot be bound by the Consent Decree's election process by the Supreme Court decision in Martin v. Wilks, \_\_\_ U.S. \_\_\_, 109 S.Ct. 2180, 2184 (1989), since by that decision non-parties to a Consent Decree cannot be bound

by its terms. The Second Circuit has twice held that Martin v. Wilks is inapplicable to this ongoing case, United States v. International Brotherhood of Teamsters, supra, (2d Cir. April 12, 1991); United States v. International Brotherhood of Teamsters, supra, 905 F.2d at 622 (2d Cir. 1990), and this Court has so held in five published opinions. See Yellow Freight, supra; January 29, 1991 Opinion & Order, 754 F. Supp. 333, 134 F.R.D. 50 (S.D.N.Y. 1991); Joint Council 73 v. Carberry et. al. supra; January 17, 1991 Opinion & Order, supra; November 2, 1989 Memorandum & Order, supra.

Martin v. Wilks concerns the procedural fairness due entities affected by a Consent Decree. By the election rules, the Trust and Ballew have had a full and complete opportunity to argue the substance of their claims before the Election Officer, the Independent Administrator, and this Court. In addition, they have twice moved this Court for stays of the curative steps, and have filed a notice of appeal, and petitions for a stay pending appeal and mandamus to the Court of Appeals. The Trust and Ballew have had their day in Court.

#### B. The Trust and Ballew's Fiduciary Duties

Ballew and the Trust argue that the curative steps would force them to violate their duties as fiduciaries of the Trust. Ballew and the Trust also argue that the Ballew letter was an appropriate exercise of Ballew's responsibilities under ERISA.

The status of the Trust, and the duties of Ballew as a fiduciary of the Trust are set by §§ 1104-06 of ERISA, 29 U.S.C.

§§1104-06. The fiduciary duty to provide plan comparisons is set out at §1022 of ERISA, 29 U.S.C. §1022. Section 1022 of ERISA requires trustees to furnish participants with "summary plan descriptions" upon request, and contains no statutory requirement to specifically compare one plan with another, as done by Ballew here. Id. Thus, the relief ordered would not hinder the Trust's duty to provide plan information.

The record established by the Election Officer and Independent Administrator demonstrate that the Ballew letter was not an appropriate response to a participant inquiry, but instead a partisan attack on the Carey campaign. It was found that there was no prior Trust practice of selectively comparing the Trust with another plan outside of collective bargaining or organizing efforts. (Dec. In. Ad. at 8-10). Rather, it was found that the timing and content of the Ballew letter were done only to respond to the Carey campaign. (Dec. In. Ad. at 8). Thus, enjoining such future action would not infringe on any fiduciary duties.

Accordingly, no part of the curative steps would prevent the Trust or Ballew from responding to appropriate inquiries by Trust beneficiaries for information as is their right under §1022 of ERISA.

### C. Violations of the Election Rules

Ballew and the Trust argue that the record does not support the finding of the Election Officer and Independent Administrator that Ballew's actions constituted a contribution that had a direct



or indirect effect on Mr. Carey's candidacy in violation of Article X, §1.b.(1) of the election rules. The record before this Court is to the contrary. Ballew and the Trust violated the election rules

The Independent Administrator found that Ballew's initial solicitation of the plan comparison from Mr. Pirnke, the response of Mr. Pirnke, the content and form of the Ballew letter, the sending of the Ballew letter, and its distribution were calculated to be anti-Carey campaign material. This finding by the Independent Administrator also considered Mr. Ballew's fiduciary duties as Trust co-chairman, the Trust's history of providing plan comparisons, and the presence of four candidates for international office as employee trustees of the Trust. The Trust and Ballew have failed to persuade this Court that the factual findings were arbitrary or capricious.

The Court finds no basis for finding that the conclusion that the Trust and Ballew violated the election rules is arbitrary and capricious. In fact, the evidence before the Independent Administrator is credible to support the finding that the Ballew letter was a contribution intended to influence the 1991 IBT election.

Further, the Independent Administrator also determined that Article XI, §2 of the election rules gives the Election Officer authority to correct conduct:

[I]f the Election Officer determines that these rules have been violated or that any other conduct has occurred which may prevent or has prevented a fair, honest, and open election, the Election Officer may take whatever

remedial action is necessary.

The Independent Administrator and Election Officer determined that the Ballew letter was anti-Carey campaign literature that would have the effect of preventing a fair, honest and open election. The finding is supported by the record.

D. The Propriety of the Curative Steps

The Election Officer ordered the curative steps in the context of an ongoing IBT election that will not be over until December, 1991. Well-tailored remedies for violations of the election rules should have the effect of (1) discouraging future violations of the election rules, and (11) curing the improper taint of the conduct. The curative steps are calculated to bring these about.

The curative step that prevents the Trust and Ballew from future violations of the election rules only preclude the Trust and Ballew from violating the Consent Decree and election rules, lawful orders of the Court. The curative steps do not prevent the Trust or Ballew from carrying out any of their lawful duties.

The curative step that directs Ballew to reimburse the Trust for the cost of the plan comparison, and that he circulate a disclaimer by the Trust is reasonable step to restore the status quo ante.

The curative steps do not implicate Ballew's first amendment right to free speech. Ballew sent his letter in his official capacity as trustee of the Trust. An ERISA trustee has no right to influence an election for union office. Further, the Consent

Decree bars anyone from taking any improper action which would influence the 1991 election. Additionally, the Trust and Ballew cannot establish the state action necessary for a first amendment violation. This Court has held many times for state action purposes that the Court officers act as stand-ins for the IBT General President and GEB, and not as the Government. May 10, 1990 Opinion & Order, supra, slip op. (S.D.N.Y. 1991); Cozza v. Lacey, supra; January 17, 1990 Opinion & Order, supra.

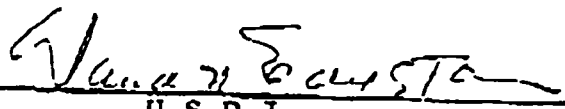
Ballew and the Trust have not demonstrated that the curative steps were arbitrary or capricious, and their objections are rejected.

### III Conclusion

For the reasons stated above, the opinion of the Independent Administrator is affirmed in all respects.

So Ordered.

Dated: May 13, 1991  
New York, New York

  
U.S.D.J.

COPY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 301 -- August Term 1991

Argued: October 9, 1991

Decided: ' ' ' ' .

Docket No. 91-6140

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA, AFL-CIO, ET AL.,  
Defendants,

IN RE: COMMITTEE TO ELECT RON CAREY,  
Complainant-Appellee,

WESTERN CONFERENCE OF TEAMSTERS  
PENSION TRUST FUND and JOSEPH W. BALLEW,  
Respondents-Appellants,

MICHAEL H. HOLLAND, Election Officer, IBT,  
Intervenor.

-----  
Before: OAKES, Chief Judge, VAN GRAAFEILAND and NEWMAN,  
Circuit Judges.

Appeal from the May 13, 1991, order of the United States  
District Court for the Southern District of New York (David N.  
Edelstein, Judge), which affirmed an order of the Elections Officer,  
as modified by the Independent Administrator, ordering remedies for  
violations of the Elections Rules issued pursuant to a Consent  
Decree.

Dismissed as moot in part and vacated in part. Judge Van  
Graafeiland concurs with a separate opinion.

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Robert A. Gordon, San Francisco, Cal. (C. Douglas Floyd, Pillsbury, Madison & Sutro, San Francisco, Cal.; Gibson, Dunn & Crutcher, Stephen E. Tallent, Richard L. Dashofsky, William F. Highberger, New York, N.Y., on the brief), for respondents-appellants.

Steven C. Bennett, Asst. U.S. Atty., New York, N.Y. (Otto G. Obermaier, U.S. Atty., Edward T. Ferguson, III, Asst. U.S. Atty., New York, N.Y., on the brief), for plaintiff-appellee.

Susan Davis, New York, N.Y. (Earl R. Pfeffer, Cohen, Weiss and Simon, New York, N.Y., on the brief), for complainant-appellee.

(Barbara J. Hillman, John J. Sullivan, Wash., D.C., submitted a brief for intervenor.)

JON O. NEWMAN, Circuit Judge:

This appeal raises the related issues of the extent to which a non-party is bound by a judgment and the extent to which a non-party may be subjected to court orders pursuant to the All Writs Act, 28 U.S.C. § 1651 (1988). The issues arise on an appeal by the Western Conference of Teamsters Pension Trust Fund ("the Trust") and Joseph W. Ballew, the co-chairman and secretary of the Fund, from the May 13, 1991, order of the District Court for the Southern District of New York (David N. Edelstein, Judge). That order affirmed an order of the Independent Administrator supervising certain aspects of

1 the implementation of a consent decree ("the Consent Decree") entered  
2 in litigation brought by the United States against the International  
3 Brotherhood of Teamsters ("IBT"). See United States v. International  
4 Brotherhood of Teamsters, 931 F.2d 177 (2d Cir. 1991) ("Election  
5 Rules Decision"). The order of the Independent Administrator  
6 purported to remedy violations of Elections Rules issued by the  
7 Elections Officer appointed pursuant to the Consent Decree. The  
8 Trust and Ballew were alleged to have violated the Election Rules by  
9 reason of a letter Ballew wrote concerning pension benefits available  
10 under the Western Conference of Teamsters Pension Plan ("WCT Plan")  
11 and a plan ("the Local 804 Plan") proposed by Ron Carey, the  
12 President of IBT Local 804 and a candidate for president of the IBT.  
13 The parties disputed whether Ballew's letter was prohibited political  
14 campaigning or permissible distribution of pension benefit informa-  
15 tion.

16 We conclude that the appeal is moot to the extent that it  
17 concerns equitable remedies, and that the portion of the order  
18 requiring Ballew to reimburse the Fund is a damage remedy that could  
19 not properly be entered either by virtue of the Consent Decree or the  
20 All Writs Act. We therefore dismiss in part and vacate in part.

#### 21 Facts

22 The circumstances giving rise to the Consent Decree and the  
23 mechanisms resulting from the decree to monitor the 1991 IBT election  
24 have been recounted before and need not be repeated. See United  
25 States v. International Brotherhood of Teamsters, 948 F.2d 98, 100-

1 101 (2d Cir. 1991) ("Yellow Freight"); Election Rules Decision, 931  
2 F.2d at 180-81; United States v. International Brotherhood of  
3 Teamsters, 905 F.2d 610, 613 (2d Cir. 1990) ("Friedman and Hughes").  
4 Suffice it to note that the Consent Decree authorizes the appointment  
5 of an Elections Officer, with authority to supervise the 1991 IBT  
6 election for international officers, and an Independent Administra-  
7 tor, with authority to adjudicate disputes concerning election  
8 rulings of the Elections Officer. Rulings of the Independent  
9 Administrator may be appealed to the District Court.

10 During his campaign for president of the IBT, Carey had  
11 occasion to discuss the virtues of the Local 804 Plan. In January  
12 1990 Ballew sent the Trust's administrators a copy of the Local 804  
13 Plan and requested an analysis of it "[s]ince this plan will be one  
14 that our Western Conference plan will be compared to." Ballew  
15 received the requested analysis in March 1990. In November 1990,  
16 Jack R. Bookter, an officer of IBT Local 278 in San Francisco and a  
17 candidate on the slate opposing Carey, sent Ballew a videotape of a  
18 campaign presentation in which Carey favorably compared the Local 804  
19 Plan to other plans including the WCT Plan. Carey suggested that IBT  
20 members make inquiries concerning the benefits available under their  
21 own plans.

22 Ballew's response to Bookter in a letter dated November 28,  
23 1990 ("the Ballew letter"), gave rise to the pending controversy.  
24 The Ballew letter analyzes various features of the Local 804 Plan and  
25 the WCT Plan, pointing out some adverse aspects of the former and

1 some beneficial aspects of the latter. An introductory sentence  
2 stated, "Mr. Carey is an effective speaker, but with respect to  
3 pension matters, I think he takes great liberties with the facts and  
4 implies that the Local 804/UPS Pension Plan is the model of design  
5 and a reality for other pension plans to obtain." The source for the  
6 comparisons made in the Ballew letter was the March 1990 analysis  
7 that Ballew had requested from the Trust administrators.

8 Ballew sent copies of his letter to the union-selected  
9 trustees of the Trust. One recipient, Chuck Mack, an officer of IBT  
10 Local 70 in Oakland, sent copies of the Ballew letter to all Local 70  
11 officers. Bookter sent copies to the officers and members of Local  
12 278.

13 The Committee to Elect Ron Carey filed a protest with the  
14 Elections Officer, alleging that the Trust and the local unions had  
15 made prohibited campaign contributions by preparing and distributing  
16 partisan materials. The Elections Officer upheld the protest. He  
17 cited provisions of the election rules (a) prohibiting the use of  
18 union funds or resources for campaign purposes unless the union is  
19 compensated and all candidates are given equal access to such  
20 resources, Election Rules, Article X, § 1(b)(3); (b) prohibiting any  
21 employer from contributing anything to a campaign, id. § 1(b)(1); and  
22 (c) extending, in the view of the Elections Officer, the prohibition  
23 against employer contributions to trusts, id. § 1(a). The Elections  
24 Officer ruled that Ballew's request to the trust administrators for  
25 a comparison of the pension plans was politically motivated and tha



1 the distribution of the Ballew letter was a contribution that  
2 violated the Election Rules.

3 As relief, he ordered the Trust and Ballew to cease and  
4 desist from any further contribution "where the purpose, object or  
5 foreseeable effect of that contribution is to influence the election  
6 of a candidate for delegate, alternate delegate or International  
7 Officer of the IBT," and ordered Ballew to reimburse the Trust for  
8 "all costs and expenses associated with the preparation and dissemi-  
9 nation of the comparison between the Trust and the Local Union 804  
10 pension plan" and to distribute at his own expense a prescribed form  
11 of notice to trustees of the Trust and any IBT member to whom he  
12 sent, or caused to be sent, the Ballew letter. The notice is  
3 required to state that the Trust "disclaims" the Ballew letter and  
14 "affirmatively states that neither the letter nor its contents are  
15 endorsed by" the Trust. Other relief, not at issue on this appeal,  
16 was ordered against Bookter, Mack, and the Western Conference of  
17 Teamsters.

18 The order of the Elections Officer was affirmed by the  
19 Independent Administrator, with a modification not pertinent to this  
20 appeal, and the latter's order of affirmance was in turn affirmed by  
21 the District Court. After oral argument, we were informed that the  
22 election has been held and Carey was elected president of the IBT.

### 23 Discussion

24 Initially we note that much of the controversy has become  
25 moot by reason of the occurrence of the IBT election. Carey's

1 election victory ends the controversy with respect to Ballew's  
 2 obligation to send a notice on behalf of the Trust disclaiming the  
 3 Ballew letter. Though in some circumstances a cease and desist order  
 4 concerning an election rule violation might remain viable after an  
 5 election, see, e.g., NLRB v. Raytheon Co., 398 U.S. 25, 28 (1970),  
 6 the order in this case has become moot because of the expiration of  
 7 the court officers' authority. By the terms of the Consent Decree,  
 8 the authority of the Elections Officer and the Independent  
 9 Administrator terminates upon certification of the 1991 IBT election  
 10 results, except for prompt investigation of certain post-election  
 11 claims of election irregularity. Consent Decree § B. Thus a live  
 12 dispute remains only with respect to Ballew's monetary obligation to  
 13 reimburse the Trust.

14 In determining whether the Elections Officer had authority  
 15 to impose a monetary obligation upon Ballew, we consider first  
 16 whether Ballew is bound by the Consent Decree and, if not, whether he  
 17 may nonetheless be ordered to reimburse the Trust pursuant to the All  
 18 Writs Act. If the Consent Decree of its own force binds Ballew,  
 19 then, like any party bound by a judgment, he may be ordered to comply  
 20 with its terms and may be held accountable for violating its terms.  
 21 Even if the Decree of its own force is not binding upon him, he may  
 22 still be subject to the District Court's authority to issue orders  
 23 pursuant to the All Writs Act, in which event the issue becomes  
 24 whether the monetary reimbursement order is the type of order  
 25 permitted under the Act.

1 A. Does the Consent Decree authorize Ballew's Monetary Obligation?

2 The Independent Administrator found that, with respect to  
3 the matters pertinent to this appeal, Ballew acted "simply as a  
4 trustee of the Trust," and the District Court ruled that "Ballew sent  
5 his letter in his official capacity as trustee of the Trust."  
6 Therefore, our initial question is whether the Consent Decree, of its  
7 own force, binds Ballew in his capacity as a trustee of the Trust  
8 such that an obligation may be imposed upon him pursuant to the  
9 election supervision machinery established by the decree.

10 Neither the Trust nor Ballew in his capacity as a trustee  
11 were parties to the litigation in which the Consent Decree was  
12 entered, and normally a person is not bound by an in personam  
13 judgment entered in litigation in which he is neither designated as  
14 a party nor served. See Martin v. Wilks, 490 U.S. 755 (1989);  
15 Hansberry v. Lee, 311 U.S. 32 (1940). Limited exceptions exist for  
16 persons who are agents of, or acted in concert or participation with,  
17 parties bound by a judgment, see Fed. R. Civ. P. 65(d), or who were  
18 adequately represented in the litigation that resulted in the  
19 judgment, see Martin v. Wilks, 490 U.S. at 762 n.2.

20 We have previously recognized that some entities have  
21 sufficient relationships to the IBT to be bound by the Consen  
22 Decree. We have ruled that IBT affiliates are bound because their  
23 interests were adequately represented by the IBT, see Election Rule  
24 Decision, 931 F.2d at 185-87, and that an officer of an IBT local wa  
25 bound by the disciplinary mechanism of the Consent Decree becau

1 "the investigatory and disciplinary powers of the court-appointed  
 2 officers are proper delegations of the powers of the IBT General  
 3 President and the [General Executive Board] within the scope of the  
 4 IBT Constitution that binds all members of the IBT . . . ,"  
 5 Friedman and Hughes, 905 F.2d at 622 (2d Cir. 1990). However, in our most  
 6 recent consideration of an enforcement of the Consent Decree,  
 7 involving a remedy imposed upon an employer of IBT members, we were  
 8 careful to recognize that we were not determining whether the decree  
 9 applied "of its own force" but, instead, upheld the remedy as a  
 10 proper use of the All Writs Act. See Yellow Freight, 948 F.2d at 102  
 11 (2d Cir. 1991). The District Court in the pending matter considered  
 12 our rulings in Election Rules Decision and Friedman and Hughes to  
 13 have determined the inapplicability of Martin v. Wilkes "to this  
 14 ongoing case," but we think that overstates the matter. Whether any  
 15 person is bound by a judgment always depends on the precise relation-  
 16 ship of that person to the underlying litigation, and, as Friedman  
 17 and Hughes illustrates, sometimes depends on the particular provi-  
 18 sions of the judgment sought to be applied.

19 A trust and its trustees are distinct from both the  
 20 employer and the union that authorized their existence. See Plumbers  
 21 & Steamfitters Local 150 v. Vertex Construction Co., Inc., 932 F.2d  
 22 1443, 1451 (11th Cir. 1991); Griffith Co. v. NLRB, 660 F.2d 406, 410  
 23 (9th Cir. 1981), cert. denied, 457 U.S. 1105 (1982). An employee  
 24 benefit trust is not necessarily bound by a judgment entered in  
 25 litigation involving the pertinent union. See O'Hare v. General

1 Marine Transport Corp., 740 F.2d 160, 167 (2d Cir. 1984), cert.  
 2 denied, 469 U.S. 1212 (1985). Though the members of the IBT were  
 3 adequately represented in the underlying litigation and though those  
 4 members have an interest in assuring that Trust resources are not  
 5 misused, it does not follow, as the Government contends, that the  
 6 Trust or the trustees were adequately represented by the IBT in the  
 7 underlying litigation. As the pending attempt to enforce the decree  
 8 against the Trust and Ballew indicate, substantial issues arise as to  
 9 whether conduct of the trustees is prohibited political campaigning  
 10 or permissible distribution of pension benefit information. The  
 11 interests of the IBT in agreeing to terms to regulate the conduct of  
 12 the 1991 IBT election do not necessarily coincide with the interests  
 13 of the Trust and the trustees in determining where the line is to be  
 14 drawn between prohibited campaigning and permissible informing of  
 15 Trust beneficiaries.<sup>1</sup> We conclude that the Consent Decree, of its  
 16 own force, is not binding upon the Trust and its trustees, at least  
 17 not so as to make applicable to Ballew, in his capacity as trustee,  
 18 the obligation not to take action that can be regarded as influencing  
 19 an IBT election.

20 B. Does the All Writs Act authorize Ballew's monetary obligation?

21 The All Writs Act authorizes federal courts to "issue all

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22 <sup>1</sup>For example, the Independent Administrator appeared to agree  
 23 with counsel for the Committee to elect Ron Carey that the Trust  
 24 could have permissibly distributed an analysis of the comparative  
 25 benefits of the Trust and the so-called "30-and-out benefit" of the  
 26 Local 804 Plan so long as the analysis made no reference to Carey or  
 27 Local 804.

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writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). "The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." United States v. New York Telephone Co., 434 U.S. 159, 174 (1977). We have explicitly recognized the availability of the Act to require an entity that was not a party to the underlying IBT litigation to take action deemed necessary to implement the Consent Decree. See Yellow Freight, 948 F.2d at 102-05.

Appellants contend that the All Writs Act can be used only to command some course of future conduct and cannot be used to impose a retrospective monetary obligation. The Act's reference to the authority to issue "writs" would seem to support the appellants' contention. The imposition of a monetary obligation is normally the office of a judgment, not that of an ancillary writ like the writs of scire facias, habeas corpus, mandamus, and prohibition, which were historically within the purview of section 1651. See Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34, 40-43 (1985); United States v. New York Telephone Co., 434 U.S. at 172-74; Labette County Commissioners v. United States ex rel. Moulton, 112 U.S. 217, 221 (1884). Though we have recognized the use of the Act to order prospective relief in a variety of circumstances, see, e.g., Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d

1 Cir. 1988), cert. denied, 489 U.S. 1077 (1989); Safir v. United  
 2 States Lines, Inc. 792 F.2d 19 (2d Cir. 1986), cert. denied, 479 U.S.  
 3 1099 (1987); In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985),  
 4 we have located no decision of this or any other court where the Act  
 5 was relied upon to impose a retrospective monetary obligation upon a  
 6 party not bound by a judgment.

7 The only case cited by the Government for the proposition  
 8 that the reimbursement obligation is an appropriate exercise of the  
 9 District Court's authority is Porter v. Warner Holding Co., 328 U.S.  
 10 395 (1946). That decision appears to rest solely on an interpreta-  
 11 tion of the District Court's authority under section 205(a) of the  
 12 Emergency Price Control Act of 1942, ch. 26 § 205, 56 Stat. 23, 33,  
 13 50 U.S.C. App. § 925(a) (1940 & Supp. V 1945), repealed by Act of  
 14 July 25, 1946, ch. 671, § 1, 60 Stat. 664. In any event, at most,  
 15 Porter upheld the District Court's power to require the return of  
 16 money obtained in violation of a statutory limitation. By contrast,  
 17 in the pending case Ballew is not alleged to have obtained anything  
 18 from the Trust. The reimbursement order is not a traditional order  
 19 of restitution of the sort normally issued by a court of equity, see  
 20 Porter, 328 U.S. at 402, but instead is a command to Ballew to reach  
 21 into his own pocket and pay to the Trust money to compensate it for  
 22 the expenses he is alleged to have improperly caused it to undertake.  
 23 An obligation of that sort is in substance a damage remedy, akin to  
 24 a surcharge of a trustee. The Act does not authorize that remedy.

25 We would have a different case if the Government had

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invoked the Act to obtain from the District Court a prospective order requiring Ballew to take or refrain from taking some action in order to assure the effective implementation of the Consent Decree. The "cease and desist" obligation, for example, had it not become moot, might well have been considered a permissible use of the Act. Moreover, in rejecting the reimbursement order as a permissible use of the All Writs Act, we are not determining whether, in a proper suit brought by or on behalf of the Trust, Ballew could be required to reimburse the Trust. In such litigation, the issue of whether Ballew's fiduciary obligations permitted him to incur the disputed expenses can receive plenary consideration by a court exercising its jurisdiction to enforce the trustees' obligations, rather than by a court reviewing the enforcement of union election rules promulgated under a consent decree in litigation to which Ballew was not a party.

For these reasons, we dismiss as moot the appeal from all aspects of the District Court's judgment other than the reimbursement obligation imposed upon Ballew, and we vacate that obligation.



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VAN GRAAFEILAND, Circuit Judge, concurring:

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If the issues herein had not been rendered moot by the election, I would not be as ready as my colleagues to excuse Ballew's conduct -- which both the election officer and the independent administrator found to be politically motivated -- on the ground that he acted simply as a trust officer.

With that reservation, I concur.