

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

Michael H Holland
Election Officer

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

March 20, 1991

VIA UPS OVERNIGHT

Rudy Hernandez
32276 Valiant Way
Union City, CA 94587

Albert Costa
Secretary-Treasurer
IBT Local Union 853
8055 Collins Drive
Oakland, CA 94621

Warden West Corp
ATTN Tom Lozier
28701 Hall Rd
Hayward, CA 94545

Re: Election Office Case No. P-569-LU853-CSF

Gentlemen

A pre-election protest was timely filed pursuant to Article XI of the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") In his protest, Rudy Hernandez alleges that he has been denied campaign access to IBT members employed by Warden West Corporation in violation of the *Rules*

The protest was investigated by Regional Coordinator Donald Twohey The investigation discloses the following Hernandez was a candidate for delegate from Local 853 On February 21, 1991 at around 3 15 p m , he and another delegate candidate, Robert Gunnerson, commenced distributing campaign literature in the parking lot of Warden West Neither Hernandez nor Gunnerson is employed by Warden West Tom Lozier, the President of the Corporation, approached both men and demanded that they leave the parking lot

The parking lot at issue is a secured lot enclosed by a six foot fence There are no sidewalks outside the fence The two streets that border the parking lot are Hall Road and Hesperian Boulevard, both public thoroughfares It is unsafe for IBT members to stand in either street for campaign purposes Inside the parking lot, a sidewalk borders the employee entrance to the facility

Article VIII, § 10 (d) of the *Rules* provides that no restrictions shall be placed on IBT members' pre-existing rights to utilize and have access to employer premises for

Rudy Hernandez
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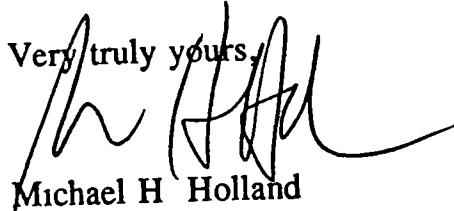
campaign purposes and campaign activities. IBT members who are employed by a different employer also have rights to have reasonable access to the "targets" of the campaign activities, i.e., fellow IBT members.

In this case, IBT members could not safely engage in face to face campaigning among those members who are employed by Warden without access to the parking lot. Moreover, the company has advanced no security or other reason that justifies its refusal to allow such access to the parking lot.

The Election Officer concludes that it is a violation of the *Rules* for Warden to deny access to its parking lot to IBT members for campaign purposes.¹ To remedy the violation, the Election Officer directs Warden to permit IBT members not employed by it to campaign on the sidewalk inside the parking lot, adjacent to the employee entrance to the facility.

If any interested party is not satisfied with this determination, they may request a hearing before the Independent Administrator within twenty-four (24) hours of their receipt of this letter. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Officer in any such appeal. Requests for a hearing shall be made in writing, and shall be served on Independent Administrator Frederick B. Lacey at LeBoeuf, Lamb, Leiby & MacRae, One Gateway Center, Newark, New Jersey 07102-5311, Facsimile (201) 622-6693. Copies of the request for hearing must be served on the parties listed above, as well as upon the Election Officer, IBT, 25 Louisiana Avenue, N.W., Washington, D.C. 20001, Facsimile (202) 624-8792. A copy of the protest must accompany the request for a hearing.

Very truly yours,



Michael H. Holland

MHH/mca

cc Frederick B. Lacey, Independent Administrator
Donald E. Twohey, Regional Coordinator

¹The delegate and alternate delegate election in Local 853 was concluded on March 14, 1991. This protest is not moot, however, since IBT members will engage in campaign activities during the election of International Officers.

Appeal

IN RE:

RUDY HERNANDEZ,
Complainant,
and
WARDEN WEST CORPORATION,
and
IBT LOCAL UNION NO. 853,
Respondents.

91 - Elec. App. - 112 (SA)

DECISION OF THE
INDEPENDENT ADMINISTRATOR

This matter arises out of an appeal from a March 20, 1991, ruling by the Election Officer in Case No. [REDACTED]. A hearing was held before me by way of telephone conference on March 27, 1991, at which the following persons were heard: John J. Sullivan, on behalf of the Election Officer; Don Twohey, the Regional Coordinator; the complainant, Rudy Hernandez; and Thomas Burke, an attorney on behalf of Warden West Corporation (hereinafter referred to as "Warden West").

Preliminarily, Warden West challenges the jurisdiction of the Independent Administrator contending that it is a non-party to the Consent Order. Warden West also argues that the Independent Administrator is precluded from applying federal labor law to define the "pre-existing rights" of the complainant, by virtue of

the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). The Independent Administrator has already had occasion to address the issue of jurisdiction over employers of IBT members as well as the arguments concerning the exclusive jurisdiction of the NLRB. In In Re: McGinnis, 91 - Elec. App. - 43 (January 23, 1991), the Independent Administrator found that he did, indeed, have jurisdiction over employers and that he was not precluded from applying federal labor law. A copy of the McGinnis decision is attached hereto. The McGinnis holding regarding the jurisdiction and preemption arguments are fully applicable here and thus, to the extent Warden West attempts to rely on those arguments, they are denied for the reasons expressed in McGinnis.

Concerning the merits of this appeal,¹ this matter implicates Article VIII, Section 10.d. of the Rules For The IBT International Union Delegate And Officer Election (the "Election Rules"). Article VIII, Section 10.d provides that no restrictions shall be placed on members' pre-existing rights to solicit support, distribute literature or otherwise engage in campaign activities on an employer's premises. The extent of a non-employee's right to campaign on employer premises was discussed in detail in McGinnis. In McGinnis, the employer, Yellow Freight Systems, Inc., was

¹ Mr. Burke, Warden West's attorney, agreed to argue the merits of the appeal upon the representation of the Election Officer and the Independent Administrator that his doing so would not be considered a waiver of Warden West's jurisdiction and preemption arguments.

refusing access to non-employees at two of its plants. As stated in McGinnis:

In the present case, the Election Officer properly determined that the appropriate analysis for resolving the conflict between the complainants' right to campaign against incumbents and Yellow Freight's property interests is a balancing test in which the strength of the IBT member's right to engage in campaign activity, the strength of the employer's property right and the availability of a reasonable alternative means of communication are weighed against one another. See Jean Country, 291 NLRB No. 4 (1988). I agree that this balancing test is the proper analysis to apply to the present protests and any other similar conflicts that may arise between campaigning union members and employers.

Mr. Hernandez is a member of Local 853 and a candidate for delegate to the 1991 IBT International Convention. He is not an employee of Warden West. Warden West has denied access to Mr. Hernandez, and a Robert Gunnerson (another candidate for delegate) to its parking lot. Messrs. Hernandez and Gunnerson wish to distribute campaign literature to employees of Warden West in its parking lot.

In the Election Officer's Summary, the following description of the Warden West property is provided:

In this case, the parking lot used by employees at Warden West is a secured lot enclosed by an eight-foot fence. Inside the parking lot, there is a sidewalk between the lot and the employee entrance to the facility. Outside the lot, there are no sidewalks. The lot is bordered by two public thoroughfares, Hall Road and Hesperian Boulevard.

Hesperian Boulevard is a heavily trafficked thoroughfare. It would clearly not be safe for IBT members to stand there while campaigning. While Hall Road does not present the same traffic problems, campaigning in the middle of any public road creates the potential for safety problems and traffic tie-ups. Nor

is there sufficient reason for IBT members to have to brave traffic to make personal contact with the Warden West employees.

At the hearing before me, Mr. Burke provided a more detailed description of the area surrounding the Warden West facility. This description was corroborated by Mr. Hernandez. In addition, the Election Officer indicated that it could not refute Mr. Burke's description. Mr. Burke indicated that the main entrance to the facility is by way of an open gate adjoining Hall Road. Abutting the outside of Warden West's fence on the Hall Road side is a setback of approximately 10-15 feet. This setback extends all the way to and adjoins the open gate area. Thus, Mr. Hernandez can stand near the open gate on the setback. He does not have to stand on Hall Road. In addition, on Hesperian Boulevard, there is a pedestrian gate. Admittedly, this pedestrian gate is used infrequently but nonetheless there is a sidewalk adjoining Hesperian Boulevard leading to the pedestrian gate. Thus, Mr. Hernandez can stand on that outside sidewalk near the pedestrian gate.

This was precisely the situation presented to the Independent Administrator in the matter of In Re: St. Clair, 91 - Elec. App. - 88 (SA) (March 7, 1991). In that matter, Mr. St. Clair, a member of the Local Union in question, but not an employee of Leprino Foods, was seeking access into Leprino Foods' parking lot to distribute campaign literature. The Election Officer, however, found that Mr. St. Clair had sufficient access to the Leprino Food

employees by standing outside the facility near the entryway gate. In affirming the Election Officer's ruling, the Independent Administrator stated:


In short, although Mr. St. Clair may have a greater access to Leprino Foods' employees if permitted to roam freely in its employee parking lot, he has a reasonable alternative means of communicating with his fellow IBT members on the public sidewalk adjacent to the entrance to the fenced employee parking lot. When measured against the strong property interest Leprino Foods has demonstrated in protecting its employee parking lot, it is clear that the Election Officer's denial of Mr. St. Clair's protest is correct and thus should be, and is, affirmed in all respects.

In this case, Warden West's property interest is just as strong as was Leprino Food's in the St. Clair matter. As noted, Warden West's facilities is surrounded by an eight-foot high fence. That fence is topped with razored wire. In addition, guards patrol the interior of the Warden West facility. Still further, Warden West's collective bargaining agreement is explicit in its restrictive use of the Warden West facilities. That collective bargaining agreement has been relied upon to prevent campaigning on Warden West's property in past Local Union elections.

Given the revelation of new facts at the hearing before me and consistent with the Independent Administrator's ruling in the St. Clair matter, it would appear that while Mr. Hernandez would have greater access to Warden West's employees if permitted access into Warden West's facilities, he has a reasonable alternative means of communicating with his fellow IBT members on the setback on the Hall Road side and on the sidewalk on the Hesperian Boulevard side.

When Mr. Hernandez's rights of access are measured against the strong property interest Warden West has demonstrated in protecting its premises, there is no need to require encroachment onto Warden West's private property given the alternative access afforded.

Accordingly, the decision of the Election Officer is reversed.



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

Dated: April 1, 1991