

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, *et al.*,

Defendants.

88 Civ. 4486 (LAP)

DECLARATION OF
RICHARD W. MARK

RICHARD W. MARK, pursuant to the provisions of 28 U.S.C. § 1746, declares as follows:

1. I make this declaration in support of the joint application of the United States of America (the “Government”) and the International Brotherhood of Teamsters (“IBT”) for an order approving a rule that provides a presumptive right of access by IBT members to employee parking lots as set forth in the Rules for the 2020-2021 IBT International Union Delegate and Officer Election (the “2021 Election Rules”).

2. I have been designated to serve as Election Supervisor for the IBT 2020-2021 International Union and Delegate Officer Election (the “2021 IBT Election”) pursuant to a 2021 Election Agreement between the International Brotherhood of Teamsters (“IBT”) and the Office of the Election Supervisor (“OES”) entered into on October 11, 2019. I previously served as court-appointed Election Supervisor for the 2006, 2011, and 2016 elections. In addition, I served as counsel to the Election Officer for the 1998 rerun election. The 2021 Election Agreement also designates the Hon. Barbara S. Jones, who served as a United States District Judge for the Southern District of New York from 1995 through 2013, as Election Appeals Master for the 2021 IBT Election.

The 2021 IBT Election and Election Rules

3. The 1989 Consent Decree that resolved claims by the United States against the IBT instituted sweeping reforms of the IBT election process. It provided that for the first time in its history, the IBT rank-and-file membership would vote directly to elect the union's International officers. The new procedures required local unions to elect delegates to a nominating convention (with the elections concentrated in the six-month period before the convention), followed by union-wide member voting to select among competing candidates for office. Under the Decree, an Election Officer, independent of the IBT and appointed by the Court, would supervise the IBT 1991 International Union delegate and officer election and, at the Government's option, the 1996 International Union delegate and officer election. In the Consent Decree, the IBT further consented to supervision by the United States Department of Labor of subsequent IBT elections.

4. The 1991 and 1996 IBT elections were supervised by court-appointed Election Officers. With respect to the 2001 IBT Election, the Government and the IBT entered into the 2001 IBT Election Agreement for the purpose of permitting the IBT to conduct the 2001 election without Department of Labor supervision as provided in the Consent Decree, while providing sufficient safeguards to ensure that the 2001 IBT election would be conducted in a manner that ensured a fair, free, democratic and informed election as mandated by the Consent Decree. The 2001 IBT Election Agreement provided for an Independent Election Administrator, and was conducted under Rules substantially similar to the first two International Officer Elections.

5. The Rules for the 1996 International Officer elections included, at Article VII, Section 11(e), a rule providing a limited right of access to parking lots used by IBT members in connection with the members' employment to conduct campaign activity pertaining to the

International Union Delegate and Officer election. The Court approved the parking lot access rule after employers had an opportunity to be heard on the matter. The Court's approval of the 1996 Election Rules specifically considers, and rejects, an objection of an employer, Pepsi-Cola Company, based on the then-recent ruling in *Lechmere v. NLRB*, 502 U.S. 527 (1992). The employer did not appeal from the District Court's ruling on the parking lot access rule. *United States v. IBT*, 896 F. Supp. 1349, 1364-67 (S.D.N.Y. 1995), *aff'd* 86 F.3d 271 (2d Cir. 1996).

6. The 2001 IBT Election was conducted under an Election Agreement that provided for an independent supervision of the election. The Election Administrator, William A. Wertheimer, Jr., submitted a declaration to the Court in 2000 specifically to support the proposed rule on parking lot access, and a copy of that declaration is attached hereto as Exhibit A. The Court approved the parking lot access rule for the 2001 IBT Election. *United States v. IBT*, 2000 WL 1682963, at *6 (S.D.N.Y. Nov. 8, 2000).

7. The Government and the IBT entered into Election Agreements for supervision of the 2006, 2011, and 2016 elections similar to the 2001 Election Agreement. The Court approved each such agreement. The Election Rules adopted pursuant to each such agreement included, at Article VII, Section 12(e), a rule providing a limited right of access to employee parking lots, identical to the rule approved by the Court and included in the 1996 and 2001 Election Rules.

8. The Government and the IBT entered into a Final Agreement and Order that was approved by the Court on February 17, 2015 ("Final Order").¹ Among other things, the Final Order established a five-year Transition Period, commencing on the date the order was entered. The Final Order provided that, during the Transition Period, "the presumptive right of access to

¹ The text of the Final Order is a document recorded on the docket as Dkt. 4409-1 (January 14, 2015). The Court approved the Final Order on February 17, 2015 (Dkt. 4414).

employer property as set forth in the 2011 Election Rules shall be adopted, upon application of either party, as an order of this Court and fully enforceable by the Parties as against third parties to the extent permissible under the All Writs Act.” Dkt. 4409-1, ¶ 23.

9. The IBT and the Government have jointly agreed to apply for the Court’s approval of a limited right of access to employee parking lots for the 2021 IBT Election, identical to the rule approved by this Court and included in the Election Rules for election cycles from 1996 through and including 2016. Indeed, the Rules proposed for the 2021 IBT Election provide, at Article VII, Section 12(e), as follows:

Subject to the limitations in this Subsection, (i) a candidate for delegate or alternate delegate and any member of the candidate’s Local Union may distribute literature and/or otherwise solicit support in connection with such candidacy in any parking lot used by that Local Union’s members to park their vehicles in connection with their employment; (ii) each member of a candidate’s Local Union has the reciprocal right to receive such literature and/or solicitation of support from such candidate or candidate’s advocate; (iii) a candidate for International office and any Union member within the regional area(s) in which said candidate is seeking office may distribute literature and/or otherwise solicit support in connection with such candidacy in any parking lot used by Union members to park their vehicles in connection with their employment in said regional area(s); (iv) each member of the International Union who is employed within the regional area(s) in which said candidate is seeking office has the reciprocal right to receive such literature and/or solicitation of support from such candidate for International office or candidate’s advocate.

The foregoing rights are available only in connection with campaigning during the 2020-2021 IBT International Union Delegate and Officer Election conducted pursuant to the Final Order and only during hours when the parking lot is normally open to employees. The rights guaranteed in this Subsection are not available to an employee on working time, may not be exercised among employees who are on working time and do not extend to campaigning which would materially interfere with the normal business activities of the employer. An employer may require reasonable identification to assure that a person seeking access to an employee parking lot pursuant to this rule is a candidate or other member entitled to such access. Nothing in this Subsection shall entitle any candidate or other Union member to access to any other part of premises owned, leased, operated, or used by an employer or to access to a parking lot for purposes or under circumstances other than as set forth herein.

The foregoing rights are presumptively available, notwithstanding any employer rule or policy to the contrary, based upon the Election Supervisor's finding that an absence of such rights would subvert the Final Order's objectives of ensuring free, honest, fair, and informed elections and opening the Union and its membership to democratic processes. Such presumption may be rebutted, however, by demonstrating to the Election Supervisor that access to Union members in an employee parking lot is neither necessary nor appropriate to meaningful exercise of democratic rights in the course of the 2020-2021 election. An employer seeking to deny access to Union members in an employee parking lot may seek relief from the Election Supervisor at any time.

The text of the proposed rule is the same as that approved by the Court for previous IBT Elections (except for the years of the election).

The Continuing Need for a Rule That Presumptively Provides
Access to Employee Parking Lots For the Purpose of Campaigning

10. I have substantial experience with labor union elections and with the IBT delegate and officer elections in particular since the inception of the process for the 1991 Election. I have also reviewed the declaration of former Election Administrator William A. Werthheimer, Jr., attached hereto as Exhibit A, which supported entry of the parking lot access rule for the 2001 Election, and fully agree with its statements regarding the significance to the IBT Election process of access to employee parking lots for campaign purposes. Finally, I have reviewed prior Court opinions in this case regarding the parking lot access rule, specifically, *United States v. IBT*, 896 F. Supp. 1349, 1364-67 (S.D.N.Y. 1995), *aff'd* 86 F.3d 271 (2d Cir. 1996); *United States v. IBT (Anheuser-Busch)*, 27 F. Supp. 2d 436 (S.D.N.Y. 1998); and *United States v. IBT*, 2000 WL 1682963, at *3 (cited previously).

11. Based on my experience and my review of relevant materials, I believe that a rule providing IBT members with a limited right of access to employee parking lots for campaign purposes is essential to continue the promotion of democracy in the IBT in the 2021 IBT International Election. The structure of the union and the distribution of its members is substantially the same as in previous elections, and that gives rise to the same need to provide a

mechanism for the rank-and-file voters to receive information directly from delegate and officer candidates. The parking lot access rule serves that purpose. As set forth more fully below, campaigning in employee parking lots enables candidates to reach a workforce that is spread over multiple sites. The membership of many IBT local unions consists of employees who work at a variety of different employers and locations. Candidates for election under the Rules, whether for national or regional office in the International Officer election or for delegate seats in a local union, will often not be employed by the same employer or at the same location as significant clusters of members whose support the candidates seek. For this reason, members may not have access to a candidate unless the candidate has access to employers premises where members work. These same circumstances have arisen in each of the International Officer Elections that I have supervised. Thus, there is often no location other than employee parking lots at which large numbers of IBT members can efficiently and with relatively little expense interact directly with candidates and exchange ideas. This process helps to develop an informed electorate. There is no alternative to campaigning in employer parking lots that provides comparable direct access to voting IBT members. I believe that the access rule will promote participation in the election process and will further the Final Order's goals of ensuring open, free, honest, fair, and informed democratic IBT elections, and that the absence of such access would subvert those objectives.

12. Other alternative means of face-to face campaigning are often not available in the context of IBT elections. Home visits are not a practical alternative, given the size of the union and the expense and time-consuming nature of such an endeavor. Campaigning at the local union office similarly is not a viable alternative to employer parking lots. By contrast, campaigning at an employee parking lot before or after a shift allows a candidate to meet

members where they are on a daily basis—at a worksite—and to meet a concentrated group of members in a relatively short time period with little expense.

13. It is also often problematic to campaign immediately outside of an employer's property. Traffic conditions and physical layout often make it unsafe to campaign adjacent to an employer's premises. Nor is it generally possible to exchange meaningful campaign information through the window of a car as IBT members are driving to or from work.

14. The Court's explicit approval of a parking lot access rule substantially improves its effectiveness. Indeed, employers have historically respected the judicially-endorsed parking lot access rule. In the 2016 IBT International Officer Election that I supervised, a member of the OES staff was assigned to address parking lot access questions if issues arose with employers. On the basis of the approved parking lot access rule, that OES staff member facilitated campaign access at more than 20 sites, involving 17 employers in 11 different states. Almost all of these access questions were resolved on a basis permitting access, and without a formal protest.

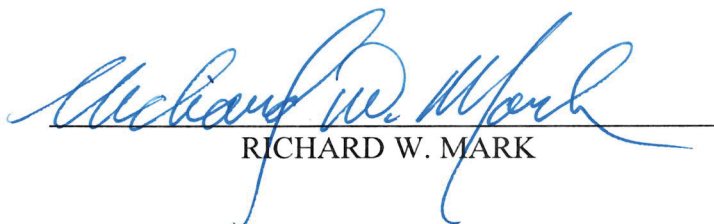
15. The proposed rule is narrowly tailored to allow important campaign access while taking into account the legitimate employer interests. Access to members will be allowed only in employee parking lots and only for purposes of campaigning during normal business hours. The right to campaign does not extend to a member on working time and may not materially interfere with the normal business activities of the employer. An employer may require reasonable identification for persons seeking access to a parking lot for campaign purposes. Moreover, an employer may rebut the rule's presumption by showing that exercise of the right is neither necessary nor appropriate to meaningful campaigning. An employer would have the opportunity to present evidence and make its case that the presumption contained in the access rule should

not be applied to it. If the Election Supervisor does not grant an exemption, an employer may seek review by the Election Appeals Master.

16. I believe that this limited access rule is an extremely important means of achieving the goals of the Final Order. It will help promote democracy in the IBT and foster membership participation in the next election.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 12, 2020, in New York, New York.



RICHARD W. MARK