

**OFFICE OF THE ELECTION ADMINISTRATOR
for the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

IN RE: ROBERT HIGDON,)	Protest Decision 2001 EAD 325
)	Issued: April 24, 2001
)	OEA Case No. PR022215MW
Protestor.)	
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Robert Higdon, member and delegate candidate in Local Union 734, filed a pre-election protest pursuant to Article XIII, Section 2(b) of the Rules for the 2000-2001 IBT International Union Delegate and Officer Election (“*Rules*”). He alleges his employer and his union retaliated against him for his delegate candidacy.

Election Administrator representative Dennis Sarsany investigated the protest.

Findings of Fact and Analysis

On February 16, 2001, Higdon was suspended from his job as a route driver with Best Foods Baking Company pending investigation of a charge that he failed to remit to the employer several thousand dollars in cash receipts he collected over a lengthy period. On March 12, the suspension was converted to discharge. Higdon grieved each disciplinary action under the collective bargaining agreement. He filed this protest arguing the employer imposed the disciplinary action to retaliate against him for his delegate candidacy. In addition, he contends his business agent has failed to process the grievance properly because of the same retaliatory animus.

Investigation showed that Higdon, a four-year employee of Best Foods, often collected cash for baked goods delivered to a particular customer on his route. On November 10, 2000, Joe Schuch, a manager for the employer, orally warned Higdon to turn in his cash receipts daily. Higdon responded that daily turn-in constituted a new policy, noting that while some drivers followed that practice, others including Higdon turned in their cash receipts sporadically. The previous month, Higdon had been given a “due bill” showing he had failed to remit \$3,723.32 in cash receipts collected over several months. Higdon had not paid the bill, saying he did not believe he owed that much. On November 10, he told Schuch he would pay what he owed once the employer demonstrated precisely what that amount was.

On November 13, the employer posted a notice requiring daily turn-in of cash receipts. Higdon was directed to sign a copy of the notice. Thereafter, he remitted his cash receipts daily.

Three months later, Higdon was suspended for failure to pay the arrearage of cash receipts. At the suspension meeting, he complained he had not been given the accounting report stating the amount he owed. The employer’s representatives responded by asking Higdon repeatedly why he had not turned in the money when it was collected. Don Kay, Schuch’s

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supervisor, declared, "What I don't understand is why you kept the money and then have the gall to ask us to prove it." An audit report presented during the meeting showed an amount due of \$2,658.84.

Higdon filed a grievance immediately protesting the suspension. Higdon was represented at a grievance meeting held February 20 by Robert Brooks, vice president and business agent of the local. During the meeting, Higdon argued he had not violated any rule because daily turn-in was not required before November 13. Further, he contended the employer had violated the collective bargaining agreement by moving from the verbal warning of November 10 to indefinite suspension in February. Finally, he offered to pay the amount due provided the employer could verify its accuracy. The employer's personnel director, John Engler, replied that Higdon could pay the amount shown on the audit but he would remain on suspension pending investigation, saying, "You don't rob a bank and then offer to pay it back; you can quote me." In Higdon's behalf, Brooks argued for reinstatement with back pay, asserting Higdon had done nothing wrong. Engler rejected the settlement demand.

Brooks appealed the denied grievance to the employer's general manager without success. Thereafter, Higdon's suspension was converted to discharge. At Brooks' suggestion, Higdon grieved the discharge. Both grievances remain pending.

Higdon argues the discharge is without merit and that he has been singled out for discipline because the employer seeks to interrupt his dues check-off in order to render him ineligible for delegate. He gave our investigator names of other employees he contends were not disciplined despite their failure to turn in cash receipts promptly. Investigation showed, however, that these employees were not similarly situated. One had no cash receipts whatsoever; the other declared that he turned his in daily.

Brooks told our investigator that he has processed Higdon's grievances diligently but has failed to convince the employer to grant relief. He notes the employer's assertion that Higdon is the lone employee to allow cash receipts to accumulate over a lengthy period – 23 months, according to the employer – without remitting them.

Article VII, Section 11(g) of the *Rules* prohibits "[r]etaliatiion or threat of retaliation ... for exercising any right guaranteed by ... the *Rules*." To establish a violation of this provision, the protestor must show that conduct protected by the *Rules* was a motivating factor in the adverse decision or conduct in dispute. The Election Administrator will not find retaliation if he concludes that the union officer or entity would have taken the same action even in the absence of the protestor's protected conduct. *Gilmartin*, P32 (1/5/96), *aff'd*, 95 EAM 75; *Leal*, P51 (10/3/95), *aff'd*, 95 EAM 30; *Wsol*, P95 (9/20/95), *aff'd*, 95 EAM 17.

We DENY this protest. While Higdon suspects his suspension and discharge are related to his delegate candidacy, he presented no evidence to substantiate his suspicion. Our investigation demonstrates the employer's disciplinary action was motivated by its view that Higdon had violated its requirement to turn in cash receipts. We make no assessment whether Higdon committed the conduct alleged or, if he did, whether such conduct constitutes cause for

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suspension or discharge under the collective bargaining agreement; such a determination is properly left to the contractual grievance procedure. We hold merely that no evidence links the disciplinary action to Higdon's status as a delegate candidate. Accordingly, the employer's actions do not violate the *Rules*, nor is there competent evidence to show the union has purposely failed to win Higdon's reinstatement.

Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within two (2) working days of receipt of this decision. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Administrator in any such appeal. Requests for a hearing shall be made in writing, shall specify the basis for the appeal, and shall be served upon:

Kenneth Conboy
Election Appeals Master
Latham & Watkins
Suite 1000
885 Third Avenue
New York, New York 10022
Fax: 212-751-4864

Copies of the request for hearing must be served upon all other parties, as well as upon the Election Administrator for the International Brotherhood of Teamsters, 727 15th Street NW, Tenth Floor, Washington, DC 20005 (fax: 202-454-1501), all within the time period prescribed above. A copy of the protest must accompany the request for hearing.

William A. Wertheimer, Jr.

William A. Wertheimer, Jr.
Election Administrator

cc: Kenneth Conboy
2001 EAD 325

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