

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

<b>IN RE: FRANK HALSTEAD,</b>	)	Protest Decision 2017 ESD 366
	)	Issued: January 13, 2017
<b>Protestor.</b>	)	OES Case No. P-168-021616-FW
_____	)	

Frank Halstead, member of Local Union 572, filed a pre-election protest pursuant to Article XIII, Section 2(b) of the Rules for the 2015-2016 IBT International Union Delegate and Officer Election (“*Rules*”). The protest alleged that UPS dismissed from employment three members of Local Union 572 in retaliation for their protected activity under the *Rules*.

Election Supervisor representative Michael Miller investigated this protest.

**Findings of Fact and Analysis**

The protest alleged that Nick James, Desmond Augustine, and Richard Arreola were dismissed from their jobs as package car drivers for UPS in retaliation for their protected activity supporting Teamsters United 572, a slate of candidates competing in Local Union 572’s delegates and alternate delegates election. All three of the discharged employees worked from the UPS hub in Gardena CA, which is under the jurisdiction of Local Union 572. James and Augustine were terminated on February 11 and 15, 2016, respectively, following an investigation of misconduct they allegedly committed in conjunction with each other. Arreola was terminated on February 12, 2016 following a separate misconduct investigation.

Our representative investigated the nature of the discharged members’ protected activity and the circumstances of their dismissals and probed for evidence relevant to the protest’s allegation that the dismissals were causally related to the protected activity.

James told our representative that he was an active supporter of Teamsters United 572. However, he said the first time he campaigned for the slate was after he was discharged. He conceded that he and company management had never discussed union politics, the Teamsters United 572 slate, or the delegate candidacy of Carlos Silva, the steward at UPS-Gardena and a friend of James. Nonetheless, James maintained that his support for Teamsters United 572 was well known, and he theorized that UPS did not favor that slate because it would mean a change in labor-management relations.

Augustine told our representative that he vocally supported Teamsters United 572 and Fred Zuckerman, campaigning for the local union slate in company parking lots and making a Facebook post on its behalf.

Arreola told our representative that he first campaigned for Teamsters United 572 on February 12, 2016, the same date he was dismissed.

Our representative investigated the circumstances of the three members’ dismissals. All three were discharged for “proven dishonesty,” the first two dismissals in the form of sporadic and repeated episodes of not working while on paid work time and the third for falsifying delivery information. The investigation of James and Augustine was conducted jointly and involved examination of ORION, telematics, and

January 13, 2017

DIAD data<sup>1</sup> as well as direct covert surveillance. The investigation of Arreola consisted of review of documentary and electronic data. The two investigations will be described here separately.

James was a 22-year employee previously terminated from employment for theft of time, with the termination converted to a lengthy suspension through operation of the grievance procedure. Augustine was a 27-year employee with no previous discipline. Morgan Tolliver, a UPS package division manager in southern California, told our representative that in January 2016, the telematics reports for both drivers revealed significant discrepancies between their self-reported lunch and break times and the times when the package cars were stopped for lunch and other breaks and at the air relay location.<sup>2</sup> For example, James's data on January 26, 2016 showed that he recorded a 30-minute lunch break beginning at 1:20 p.m. but his package car telematics showed it was stopped in one location for 43 minutes beginning at 1:15 p.m. Prior to that stop, the telematics recorded a 4-minute stop at a fast food restaurant at 12:41 p.m. at which neither a delivery nor pickup was made. Later that day, telematics showed the vehicle was stopped at the air relay location for 29 minutes, far in excess of the 5 minutes allotted for that stop. All told for January 26, the telematics data showed that James used 97 minutes for personal time, as compared with the 70 minutes he was permitted.<sup>3</sup> Similar comparison of telematics data with the break times James entered into his DIAD on January 25, 27, and 28, and February 1, 2, and 3, 2016 showed that time James's package car spent at break locations exceeded allotted break time by an average of 24 minutes daily, with the lowest overage at 18 minutes and the highest at 43 minutes.

For Augustine, by way of further example, the comparison of his vehicle's telematics for January 25, 2016 with the times he entered into his DIAD for breaks that day showed discrepancies. Thus, he had an unexplained stop for 4 minutes beginning at 9:28 a.m. Thereafter, he recorded a 30-minute lunch break commencing at 1:18 p.m. followed by a 15-minute break starting at 1:50 p.m. Telematics showed that his package car was stopped in the same location beginning at 1:07 p.m., 11 minutes before his self-recorded lunch break started, and remained there until 2:07 p.m., 2 minutes after his break ended. Further, he spent 17 minutes at the air relay location, much more than the 5 minutes permitted. All told, Augustine used 32 more minutes of personal time on January 25 than he was allotted. Similar comparison of telematics data with the break times Augustine entered into his DIAD on January 26, 27, 28, and 29, and February 1 and 2, 2016 showed that time Augustine's package car spent at break locations exceeded allotted break time by an average of 30 minutes daily, with the lowest overage at 22 minutes and the highest at 38 minutes.

Although a possible explanation for the time each package car was stopped at a given location that exceeded recorded break time was that the driver was reviewing and adjusting his load to optimize delivery efficiency, UPS management suspected time theft. Accordingly, UPS conducted daily direct covert surveillance of the drivers. James was surveilled on February 3, 4, 9 and 10, 2016. Augustine was surveilled on February 4, 8, 9, and 10, 2016.

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<sup>1</sup> ORION (On-Road Integrated Optimization and Navigation) and telematics are proprietary UPS systems that consist of GPS and on-board sensors in UPS package cars that optimize a delivery route particular to each car's load, assess vehicle performance and need for maintenance, and measure driver productivity. The DIAD (Delivery Information Acquisition Device) is the handheld computer a driver uses to record his/her time, to receive particularized delivery instructions, to scan and document delivery of packages, and to obtain the delivery customer's signature, among other things.

<sup>2</sup> Air relay locations serve as rendezvous points where drivers transfer overnight packages they have picked up along their route to a designated driver who conveys them to the hub or the airport for expedited handling.

<sup>3</sup> Package car drivers are permitted 30 minutes for lunch, two 15-minute breaks, and a third 10-minute break daily, for a total of 70 minutes of break time.

The surveillance of James, conducted by two UPS managers, showed that on February 3, he arrived at his lunch location at approximately 1:25 p.m. and remained there for 36 minutes. This was corroborated by telematics data for the package car, which also showed a 12-minute stop at the 2<sup>nd</sup> Half Sports Grill in Manhattan Beach at which no package delivery or pickup was made. Surveillance also showed that James spent 31 minutes at the air relay, 26 minutes more than is allotted, to transfer eight packages. All told for February 3, the telematics and DIAD data from February 3, as supplemented by the direct covert surveillance by UPS managers, showed that James exceeded his allotment of lunch and break time by some 52 minutes that day. Similar findings were made on the other days James was surveilled (49 minutes of overage on February 4, 11 minutes on February 9, and 30 minutes on February 10).

The surveillance of Augustine, conducted by the same two UPS managers who followed James, showed that on February 4, he arrived at his lunch location at approximately 1:10 p.m. and remained there until approximately 2:02 p.m.<sup>4</sup> Augustine recorded his 30-minute lunch beginning at 1:29 p.m., nearly 20 minutes after he stopped his package car. During the lunch, the UPS managers surveilling Augustine observed two other UPS drivers, Nick James and Carlos Silva, enter Augustine's package car and sit in the driver's and jump seats, with Augustine standing between them in the doorway leading to the package area. During the entire period Augustine's vehicle was stopped at that location, Augustine did no work in the back of his vehicle, according to the managers. Surveillance of the air relay stop on February 4 showed that Augustine arrived at 5:19 p.m., immediately delivered one 2-pound package to the relay driver, yet remained at the location until 5:36 p.m., some 17 minutes after arriving. All told, the telematics and DIAD data from February 4, as supplemented by the direct covert surveillance by UPS managers, showed that Augustine exceeded his allotment of lunch and break time by some 42 minutes that day. Similar findings were made on the other days Augustine was surveilled (30 minutes of overage on February 5, 29 minutes on February 8, 19 minutes on February 9, and 25 minutes on February 10).

On this data and surveillance, UPS was prepared to dismiss James and Augustine on February 11, 2016 and actually dismissed James that date. However, Augustine was off work and did not return until February 15, at which point he was terminated. Each filed a grievance, and the grievances were processed through the steps of the contractual procedure. Each grievance reached a joint area labor management panel on March 21, 2016. The panel presiding over each grievance hearing was comprised of three UPS managers and three Teamsters representatives, none of whom were involved either in the management of the UPS facility or in the local union that represented the employees there. Each grievance was denied by the joint panel and each dismissal sustained.

With respect to Arreola, UPS informed our representative that this package car driver had a disciplinary history that included a warning for failure to make deliveries to businesses prior to 5 p.m. daily. Despite this warning, UPS stated that it received numerous complaints from customers on Arreola's route of failures on his part of this same nature, and UPS accordingly commenced an investigation of him. The investigation determined that Arreola not only had failed to make scheduled deliveries to several business customers on time but had also improperly changed delivery ticket information to indicate that the delivery addresses were residential rather than commercial. The company explained that the effect of this change was that it permitted Arreola to claim more credibly that the packages could not be delivered because the residential customer was not at home. Once the falsification of this electronic delivery data

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<sup>4</sup> These times corresponded with telematics data showing the package car arrived at the location at 1:11 p.m. and departed at 2:01 p.m.

January 13, 2017

was discovered, Arreola's employment was terminated immediately. A grievance was filed on Arreola's behalf and, at the first meeting in the contractual grievance procedure held February 23, 2016, the grievance was settled with Arreola's reinstatement without back pay. Arreola returned to work on February 24, 2016.

Article VII, Section 12(a) describes activity protected by the *Rules* as follows:

All Union members retain the right to participate in campaign activities, including the right to run for office, to support or oppose any candidate, to aid or campaign for any candidate, and to make personal campaign contributions.

Article VII, Section 12(g) states that:

Retaliation or threat of retaliation by the International Union, any subordinate body, any member of the IBT, any employer or other person or entity against a Union member, officer or employee for exercising any right guaranteed by this or any other Article of the Rules is prohibited.

To establish a violation of this section, "the evidence must demonstrate that 1) the alleged victim engaged in activity protected by the *Rules*, 2) the charged party took adverse action against the alleged victim, and 3) the protected activity was a motivating factor in the adverse action." *Bundrant*, 2005 ESD 19 at 10 (October 25, 2005), *aff'd*, 05 EAM 4 (November 15, 2005) (quoting *Cooper*, 2005 ESD 8 (September 2, 2005)). The Election Supervisor 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 (January 5, 1996), *aff'd*, 95 EAM 75. See *Leal*, P51 (October 3, 1995), *aff'd*, 95 EAM 30; *Wsol*, P95 (September 20, 1995), *aff'd*, 95 EAM 17.

For the purpose of our analysis here, we accept that James, Augustine, and Arreola each satisfied the first element of the retaliation claim because of his support for Teamsters United 572, activity protected by the *Rules*. Each engaged in campaign activity of some sort in support of the slate.

We also accept that the dismissals of James, Augustine, and Arreola satisfied the second element of the retaliation claim as adverse action. *Williams*, 2001 EAD 152 (February 8, 2001); *Thornsberry*, 2001 EAD 172 (February 16, 2001); and *Bundrant*, 2005 ESD 19 (October 25, 2005), *aff'd*, 05 EAM 4 (November 15, 2005).

On the critical third element of the retaliation analysis, however, the evidence does not support that the protected activity was a motivating factor in the company's decision to dismiss any of these members. For each of them, we find no evidence that UPS was aware of the electoral support that James, Augustine, or Arreola had expressed for Teamsters United 572. Further, the misconduct that resulted in the decision to dismiss each member came to the attention of management in ways divorced from any hint of retaliation. Thus, for James and Augustine, suspicions were aroused through routine comparison of telematics and DIAD data, while for Arreola it was customer complaints that alerted UPS to substandard performance. From this genesis, UPS conducted thorough investigations that confirmed misconduct. Each member was dismissed because of that misconduct. For James and Augustine, the misconduct

January 13, 2017

resulted in their receipt of wages they had not earned. For Arreola, the misconduct covered up failure to perform to standard.

On this record, we find there is no causal link between the protected activity of these members and the company's discharge of them. Our conclusion is bolstered by UPS's decision to reinstate Arreola less than two weeks after dismissing him; the protest's claim that UPS was motivated by retaliatory animus is eviscerated by this reinstatement.

Accordingly, we DENY this protest.

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 Supervisor 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:

Kathleen A. Roberts  
Election Appeals Master  
JAMS  
620 Eighth Avenue, 34<sup>th</sup> floor  
New York, NY 10018  
kroberts@jamsadr.com

Copies of the request for hearing must be served upon the parties, as well as upon the Election Supervisor for the International Brotherhood of Teamsters, 1050 17<sup>th</sup> Street, N.W., Suite 375, Washington, D.C. 20036, all within the time prescribed above. A copy of the protest must accompany the request for hearing.

Richard W. Mark  
Election Supervisor

cc: Kathleen A. Roberts  
*2017 ESD 366*

January 13, 2017

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