

OFFICE OF THE ELECTION SUPERVISOR
for the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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| IN RE: TEAMSTER POWER, |) | Protest Decision 2020 ESD 10 |
| |) | Issued: August 10, 2020 |
| Protestor. |) | OES Case No. P-003-060320-NA |
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Teamster Power, a slate of candidates for International office, filed a pre-election protest pursuant to Article XIII, Section 2(a) of the Rules for the 2020-2021 IBT International Union Delegate and Officer Election (“Rules”). The protest alleged that O’Brien-Zuckerman 2021 violated the Rules by using for campaign purposes Facebook “Likes” acquired in a previous election.

Election Supervisor representative Jeffrey Ellison investigated this protest.

Findings of Fact

On June 3, 2018, Brian Rainville of the O’Brien-Zuckerman 2021 campaign created a campaign Facebook page titled “O’Brien Zuckerman 2021.” The page is categorized on Facebook as a “labor union,” a sub-category of organization. As with all other Facebook pages, the O’Brien-Zuckerman 2021 page was established without charge by Facebook. The campaign has used the page to announce additions to its slate, promote campaign issues, and solicit support for the slate.

On March 30, 2020, some twenty-two months after it was created, the O’Brien-Zuckerman 2021 Facebook page name was changed to “O’Brien-Zuckerman/Teamsters United 2021.” Ten days after that change, a Facebook page titled “Teamsters United” was merged into the O’Brien-Zuckerman/Teamsters United 2021 Facebook page.

The Teamsters United Facebook page was established on February 26, 2015.¹ It was created as a principal campaign tool of the Fred Zuckerman Teamsters United slate that competed in the 2016 IBT International officer election. The first posts to it were made in March 2015 and documented campaign kickoff events at locations around the U.S. Thereafter, the page was used to advertise in-person campaign events and telephone conference calls with slate members, raise issues the slate promoted as campaign issues, organize get out the vote efforts, and generally solicit electoral support for the slate.

Following the 2016 International officer election ballot count, posts continued to be made to the Teamsters United Facebook page. Some posts concerned the slate’s post-election protest to the election results and the adjudication of it. Most posts, however, focused on issues facing the union, especially the contract negotiations involving UPS and UPS Freight.

Most posts on the Teamsters United Facebook page, both before and after the election vote tally, generated “Likes.” Facebook describes clicking Like below a post as “a way to let people

¹ Although it was merged with the O’Brien-Zuckerman 2021 page, the original Teamsters United page still exists at www.facebook.com/teamstersunited/.

know that you enjoy [the post] without leaving a comment.”² When the Like button is clicked for a post, the page owner is notified of the Like; in addition, other viewers of the page can see that the post was Liked and who Liked it.

In addition to Likes on individual posts, viewers of the Teamsters United Facebook page also Liked the page.³ Facebook describes Liking an organization’s Facebook page as a way to indicate that the viewers are “showing support for the Page and that they want to see content from it. The Page will show up as being liked in the About section of that person’s profile.”⁴ In addition, according to Facebook, a person who Likes an organization’s page automatically becomes a follower of the page; the total number of page Follows includes all of the page Likes.⁵

“Liking” an organization’s Facebook page “means [the user] *may* receive updates about the Page in their News Feed.” *See* footnote 4 (italics emphasis added). The effect is the same for a user who “Follows” an organization’s page. Facebook changed its News Feed algorithm in 2018 to limit the frequency with which business and organization posts appear in individuals’ news feeds. As Facebook CEO Mark Zuckerberg explained in a January 2018 post announcing the coming change, “we’ve gotten feedback from our community that public content – posts from businesses, brands and media – is crowding out the personal moments that lead us to connect more with each other.”⁶ The Zuckerberg post continued: “Based on this, we’re making a major change to how we build Facebook. ... As we roll this out, you’ll see less public content like posts from businesses, brands, and media.” *Id.* One analysis of these News Feed algorithm changes noted that an organization could expect a given post to its page to appear organically in the News Feeds of only about 5.5% of its total followers (comprised of its page Likes and page Follows).⁷

When it was merged into the O’Brien-Zuckerman 2021 page in April 2020, the Teamsters United Facebook page had 9,783 page Likes and 10,129 page Follows.⁸ However, the page does not reveal when the page Likes and page Follows occurred. Specifically, the page data does not reveal the number of Likes and Follows that were made during the 2015-2016 election cycle up

² *See* Facebook Help Center, “What does it mean to “Like” something on Facebook?” <https://www.facebook.com/help/110920455663362>. This is Facebook’s interpretation of a user’s motivation for Liking a post. Of course, users may have other motivations.

³ The page Like button appears just beneath the banner photo on the home page of an organization’s Facebook page, immediately adjacent to the Follow and Share buttons. Facebook allows viewers to Like an organization’s page, but that action is not available for personal Facebook pages. For the latter, the equivalent of a page Like is to Friend the person, which requires agreement by the person who is the page owner. A viewer can Like an organization’s Facebook page without the organization’s consent.

⁴ *See* Facebook Help Center, “What does it mean when someone likes or follows a Page?” <https://www.facebook.com/help/171378103323792>.

⁵ A person can “Follow” a page without Liking it by clicking the “Follow” button, but all page Likes are also automatically categorized as page Follows.

⁶ <https://www.facebook.com/zuck/posts/10104413015393571>

⁷ <https://blog.hootsuite.com/facebook-algorithm/>

⁸ This difference illustrates two facts. First, a user who Likes an organization’s page is automatically a Follower, as the page Like total is included in the page Follow total. Second, a user may Follow an organization’s page without Liking it.

through the tallying of ballots, as differentiated from the number that occurred after balloting was completed. Rainville, the O'Brien-Zuckerman 2021 campaign staffer who operates the merged Facebook pages now, told our investigator that in November 2016, the number of page Likes on the Teamsters United page was less than 5,000.

We examined the frequency of posts made to the Teamsters United Facebook page during the period February 2015, when it was created, and October 2018, when posting to the page largely stopped, to assess whether a connection might exist between posting activity and page Likes. We found that in the twenty-one months from creation of the page through November 17, 2016, the date ballots were fully tallied in the International officer election, 266 posts were made to the Teamsters United page, a rate of nearly 13 posts per month. In the period from November 17, 2016 through October 19, 2018, the twenty-three months that followed the 2016 balloting, posting activity increased. During that period, 350 posts were made to the page, a rate of more than 15 posts per month.⁹ The negotiations for the UPS and UPS Freight contracts and the Vote No campaigns that followed tentative agreements occurred in the period from June 2017 through October 2018: that was a particularly active period for postings, with 300 posts made over 16 months (nearly 19 posts per month). If page Likes reflect viewer response to posting activity, a sizeable number of total page Likes likely occurred during the UPS negotiation period, which began after the 2016 tallying of ballots.

The O'Brien-Zuckerman 2021 Facebook page, with the Teamsters United page merged into it, had 13,162 page Likes and 13,515 page Follows, as of the date this decision issued.

Posts an organization makes to its page may appear in the News Feeds of its page Likes and page Follows organically, *i.e.* for free. However, with the 2018 changes in News Feed algorithm discussed above, the likelihood of an organic appearance is approximately 1 in 20. The organization can raise the reach of its posts through a number of methods, including a paid "boost" of the post and by paid advertising to its page Likes and page Follows of the post. O'Brien-Zuckerman 2021 ran paid ads beginning as early as October 2018, targeting users with a vote no message related to the UPS contract. Its ads in August 2019 promoted O'Brien-Zuckerman 2021 campaign shirts, jackets, and hats. In 2020, ads promoted campaign issues and introduced candidates joining the slate.

Following merger of the Teamsters United Facebook page into the O'Brien-Zuckerman 2021 page, the slate ran eight ads in April and May 2020. Most ads ran three days, with one running five and another eight. These ads generated impressions¹⁰ ranging from 1,000 to 2,000 screen views at the low end to 10,000 to 15,000 at the high. The page reports the total cost of all

⁹ Posting to the Teamsters United Facebook page effectively ceased on October 19, 2018 (a single post made March 15, 2019 is the exception to this statement). The next activity involving the page was its merger into the O'Brien-Zuckerman 2021 on April 9, 2020, some eighteen months after regular posting to the page stopped.

¹⁰ An "impression" is "counted as the number of times ... an ad is on screen for the first time." <https://www.facebook.com/business/help/675615482516035>

ads, from October 2018 to May 2020, at \$676.¹¹ Rainville told our investigator that the targets for the ads were generated by a Facebook algorithm based on criteria Rainville provided. Rainville did not direct any ad to the page Likes or page Follows of the O'Brien-Zuckerman 2021 Facebook page. Instead, he sought to reach potential voters who had not previously engaged with the O'Brien-Zuckerman 2021 Facebook page.

Research shows that a competitor organization can reach the page Likes and page Follows of its competition indirectly through paid advertising by targeting its Facebook advertisements to an audience with interests described by the competitor's Facebook page Likes and page Follows.

Analysis

Protestor Teamster Power contends that O'Brien-Zuckerman 2021 violated the Rules by merging the Teamsters United Facebook page into the slate's Facebook page, which protestor argues gave the slate the ability to reach the page Likes and page Follows of the Teamster United page that were developed during the 2015-2016 election cycle.

Article XI, Section 1(b)(1) declares that "[o]nly contributions which are properly solicited, made, accepted, and reported under these Rules may be expended or used by candidates, slates, or independent committees for the 2020-2021 International Union Delegate and Officer Election." Protestor contends that the page Likes applied to the Teamsters United Facebook page are "contributions" within the meaning of this rule, and O'Brien-Zuckerman 2021 is barred from using them because they were contributed in a previous election cycle.

The Rules define "campaign contributions" generally as "any direct or indirect contribution of money or other thing of value where the purpose, object, or foreseeable effect of that contribution is to influence, positively or negatively, the election of a candidate for Convention delegate or alternate delegate or International Officer position." Definition 5. The Rules identify eight discrete categories of contributions, seven of which can be described in monetary terms, including direct contributions of "money, securities, or any material thing of value;" payments for fund-raising events or tickets; discounts on goods or services or extensions of credit that are not commercially reasonable; payments made for services of a person, rental of space or equipment; solicitations on behalf of a candidate; and "the performance of personal services or the making available for use of space, equipment," etc. Definition 5, subsections a. through e., g., and h.

The definition also includes as a campaign contribution "[a]n endorsement or counter-endorsement by an individual, group of individuals, or entity." An endorsement is a personal campaign right guaranteed to members by Article VII, Section 12(a), which reserves to members "the right to participate in campaign activities, ... to support ... any candidate, to aid or campaign for any candidate, and to make personal campaign contributions." *Hoffa-Hall 2016 & Meyer*, 2015 ESD 28 (August 28, 2015).

¹¹ Two ads have been run since the protest here was filed. One commenced August 4, 2020 and promotes the slate's candidates; the second began August 8 and promotes the sale of campaign t-shirts.

Our decisions have not directly addressed whether a page Like on the Facebook page of a candidate or slate constitutes an endorsement within the meaning of this definition. The decisions demonstrate, however, that an endorsement, as the term is used in Definition 5, means a public and definite expression of support for a candidate or slate. This principle is a central feature of our cases addressing impermissible endorsements made by or falsely attributed to union bodies. Thus, we found endorsements in the form of public and definite statements of support in *Pope*, 2000 EAD 3 (August 1, 2000) (A written resolution to “hereby endorse” a candidate and his slate, adopted at an open meeting of a union body, was a public and definite statement of support and therefore an endorsement); *Custer*, P-1098 (November 18, 1991) (A notice posted on union bulletin boards and distributed in worksites that the local union’s executive board unanimously endorsed a slate of candidates for International office was a public and definite statement of support); and *Rivers*, 2011 ESD 137 (February 24, 2011) (A campaign mailing stating that a formal sub-entity of a local union “backs” a candidate was a public and definite statement of support).

We have also found that public and definite statements of support were endorsements in cases where the communication did not use the words “endorse,” “back,” or an equivalent. In *Gegare*, 2010 ESD 3 (June 24, 2010), *aff’d in relevant part*, 10 EAM 3 (July 8, 2010), we held that the wide dissemination of signed written instructions encouraging collecting slate accreditation petition signatures constituted a slate endorsement by the signers of the instructions, even where the word “endorse” was not used. In *Collins & Strohl*, 2011 ESD 143 (March 2, 2011), we found that a campaign communication mailed to local union members urging support for particular candidates implied that the sender, listed as “International Brotherhood of Teamsters,” publicly and definitely supported the candidates.

We conclude that the act of clicking a Facebook page Like, in contrast to the foregoing examples, cannot be construed as an endorsement because it is neither public nor a definite statement of support. It is not public because the person clicking the page Like button is not identified publicly and the page Like is not disseminated to an audience.¹² Rather, only two users know that a particular user has liked an organization’s page – the organization and the user himself/herself. The only public evidence the page Like button has been clicked is that the total number of page Likes rises by one.

Similarly, clicking the page Like button is not a definite statement of support for a candidate or slate. First, the object of a page Like is a Facebook page. This is important because a user may click the page Like button for any number of reasons relating to the content on the page. The page Like cannot be interpreted definitely as a statement of support for a candidate.¹³

¹² In this way, a page Like differs from a post Like. With the latter, any user with access to a page can click the Like icon beneath a post (or the number next to the icon) and see the names of all users who Liked the post. The same access is not available for page Likes. Instead, only the total number of page Likes is displayed on the organization’s page; the identities of the users who Liked the page are not displayed and generally are not available.

¹³ We recognize that organization Facebook pages have both page Like and page Follow buttons. The tally of Likes and Follows does not provide a basis to conclude that a user clicked the Like rather than the Follow button after deliberating the choice, or that either response is keyed to a candidate or slate, and not other page material (i.e., a presentation on issues, such as a discussion of UPS contract negotiation).

Given these possibilities, we cannot conclude that merely clicking the page Like button is a definite statement of support for the O'Brien-Zuckerman 2021 slate.

For these reasons, we hold that the act of clicking a page Like of a campaign Facebook page is not an endorsement within the meaning of Definition 5(f) of the Rules.¹⁴ Nor is it a campaign contribution within the meaning of the rule in any other respect. It is not a monetary contribution, as the use of the page and the act of clicking the page Like are free to the user and do not result in a monetary payment to the organization. Nor is the click of the page Like button a contribution of volunteer or in-kind services, or a contribution soliciting others to support a candidate or slate.

More generally, it is not a “thing of value” that has the purpose or effect “to influence ... the election of a candidate,” as Definition 5 defines “campaign contribution,” because the act of clicking the page Like button – an essentially private action that does not definitely state support for a candidate or slate – does not have the purpose or effect of *influencing others* to support the candidate or slate because it is opaque to other users. For these reasons, we find that the act of clicking the Like button on a campaign’s Facebook page is not a campaign contribution within the meaning of the Rules.¹⁵

Having reached this conclusion, we turn now to the question of whether *a record* of page Likes, some of which were accumulated during a previous election cycle, constitutes a campaign contribution that may not permissibly be used by candidates during the current cycle.

Protestor contends that O'Brien-Zuckerman 2021 has accepted and is using or may use the page Likes accumulated by the Teamsters United slate during the course of the 2015-2016 election. The acceptance, according to protestor, occurred when the Teamsters United page was merged into the O'Brien-Zuckerman 2021 page. One benefit the slate gains by merging the Teamsters United Facebook page into its own, according to protestor, is to inflate its total number of page Likes, giving the slate the appearance of a particular level of support.

¹⁴ Were we to reach the opposite conclusion and hold that a page Like rendered during the 2015-2016 election constituted an endorsement of a candidate running in that election, we would also hold that the “contribution” the endorsement represented expired – it was exhausted and had no further value – at the conclusion of that election cycle when the candidate who was subject of the endorsement ceased to be a candidate. Even were that candidate to stand for election in the next (*i.e.*, the current) cycle, the endorsement of his/her election in the previous election would be a historical fact in that election but not an endorsement in the current one. However, given our holding that a page Like does not constitute an endorsement within the meaning of the Rules, this issue need not be reached.

¹⁵ Research has not uncovered any judicial decisions or election regulator interpretations concluding that a Facebook Like is a campaign contribution. One authority has held that accumulated Facebook Likes are not property of the page owner and so cannot be the subject of a conversion claim, although the decision was not rendered in the context of campaign financing. *Mattocks v. Black Entertainment Television LLC*, 43 F. Supp. 3d 1311, 1321 (S.D. Fla. 2014) (because of control over the “Like” function “if anyone can be deemed to own the ‘likes’ on a Page, it is the individual users responsible for them”).

The starting point on this question is Article XI, Section 1(b)(1), which declares that “[o]nly contributions” made and accepted “under these Rules”¹⁶ may be used by candidates in the current election cycle. Given our holding that clicking the page Like button on a campaign Facebook page was not a campaign contribution under identical Rules in that cycle, we hold for the same reasons that the record of that click cannot be a campaign contribution under the Rules in the current cycle, even if the result of the merged pages is to increase the number of page Likes. In short, because a page Like is not a campaign contribution, an accumulation of page Likes also is not a campaign contribution.

Protestor’s second complaint about the merger of the Teamsters United Facebook page into O’Brien-Zuckerman 2021’s page is that each page Like rendered in the previous election cycle conveyed from the user to the Teamsters United campaign rudimentary contact information in the form of a Facebook address. The act of merging the pages delivered this page Like contact information to the O’Brien-Zuckerman 2021 slate, which protestor characterizes as the contribution of a “thing of value” generated in a previous election.

This argument misconstrues the Rules in two important respects. First, a user’s disclosure of a means to contact him/her through a page Like is not a campaign contribution because it does not have the purpose or effect of influencing the election of a candidate. Definition 5.

Second and more importantly, even were the contact information gleaned from Facebook page Likes rendered in a previous election considered a “contribution” in the current election, the Rules would not bar its use. The principal requirement for all “contributions” is that they be “properly solicited, made, accepted, and reported under these Rules.” Article XI, Section 1(b)(1). Nothing in this provision limits or even examines *when and under what circumstances* the funds or other things of value that form the corpus of the contribution came into existence. Rather, the provision requires that the candidate or slate properly solicit, accept, and report the contribution and that the contributor properly make the contribution.

Although it has been argued that Article XI, Section 1(b)(1) bars contribution of campaign funds to a current candidate that were raised in a previous election, it does not. That prohibition is found in the combination of several other Rules provisions. Thus, Article XI, Section 2(a) requires all candidates for International office and slates of candidates to report all contributions and expenditures. Article XI, Section 1(b)(12) limits the amount each member may contribute to candidates. Article XI, Section 1(b)(5) limits the amount members and non-members who are not employers may contribute to the legal and accounting fund of a candidate or slate. Finally, Article XI, Section 1(b)(14) and related Advisories mandate that after certification of the election, a candidate’s remaining funds “shall be returned to contributors, or donated to charity.” *See also* Memorandum on the Conclusion of Campaign Finance Reporting – 2015-2016 International Officer Election at 2-3 (December 12, 2016). It is the combination of these provisions that bar use of “funds” in the current election that were raised in a previous election. The Rules’ method for preventing funds raised previously¹⁷ from being used in the current election is to make them non-existent at the conclusion of the previous election, which the Rules accomplish by requiring that remaining funds be disposed of.

¹⁶ This phrase means the Rules that govern the 2020-2021 election of International officers.

¹⁷ “War chests,” as one witness termed it.

No similar Rules provision or combination of provisions requires disposal at the conclusion of an election of “things of value” that are not “funds.” Protestor concedes this point. Because the Rules permit such “things of value” from a past election to continue to exist, they may be contributed to a candidate or slate in the current election. The essence of protestor’s argument to the contrary is that Article XI, Section 1(b)(1) requires that things of value such as the contact information must be *raised* – and specifically with respect to contact information associated with page Likes, developed or generated – under the current Rules. For the reasons just stated, this argument reads an element into Article XI, Section 1(b)(1) that is not there.

To accept protestor’s contention here – that contact information derived from page Likes produced in one election cycle could not be used in the next – would also require, for example, that a candidate who developed a contact list of supporters in past cycles could not use that list to call on past supporters for support in a current election.¹⁸ It would preclude a first-time candidate from calling on prior personal contacts for support because such contacts would have been accumulated outside of the *Rules*. It could also limit a candidate’s “contributions” of other personal assets – such as personal name recognition gained from running in one election or good will from other activity not conducted under the Rules – to a slate competing in an election under the Rules. We reject this view. The Rules define “campaign contribution” broadly but not so broadly to reach contact lists developed over time through a candidate’s own efforts.

For these reasons, 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. Any party requesting a hearing must comply with the requirements of Article XIII, Section 2(i). All parties are reminded that, absent extraordinary circumstances, no party may rely in any such appeal upon evidence that was not presented to the Office of the Election Supervisor. Requests for a hearing shall be made in writing, shall specify the basis for the appeal, and shall be served upon:

Barbara Jones
Election Appeals Master
IBTappealsmaster@bracewell.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, all within the time prescribed above. Service may be accomplished by email, using the “reply all” function on the email by which the party received this decision. A copy of the protest must accompany the request for hearing.

Richard W. Mark
Election Supervisor

cc: Barbara Jones
2020 ESD 10

¹⁸ The LMRDA and the Rules strictly regulate access to and use of Union membership lists in officer campaigns. 29 U.S.C. § 481(c); Rules, Article VII, Sections 2 and 3; Article X.

Teamster Power, 2020 ESD 10
August 10, 2020

DISTRIBUTION LIST (BY EMAIL UNLESS NOTED):

Bradley T. Raymond, General Counsel
International Brotherhood of Teamsters
braymond@teamster.org

Jeffrey Ellison
EllisonEsq@gmail.com

Edward Gleason
egleason@gleasonlawdc.com

Patrick Szymanski
szymanski@me.com

Will Bloom
wbloom@dsgchicago.com

Tom Geoghegan
tgeoghegan@dsgchicago.com

Rob Colone
rmcolone@hotmail.com

Kevin Moore
Mooregp2021@gmail.com

F.C. "Chris" Silvera
fitzverity@aol.com

Fred Zuckerman
fredzuckerman@aol.com

Ken Paff
Teamsters for a Democratic Union
ken@tdu.org