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May 21, 1991

**VIA UPS OVERNIGHT**

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**RE: Election Office Case No. P-249-LU283-MGN**

Gentlemen and Madame

Two related protests have been filed with the Election Officer pursuant to Article XI of the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") Because these protests raised similar legal and factual claims,

they were consolidated by the Election Officer. In addition, a request was filed with the Election Officer for leave to intervene in the consolidated proceeding. The following determination addresses all of the claims raised in these protests.

I Procedural Background

On January 10, 1991, three members of Local Union 283, Aaron Gully, Phil Ferretti and Anita Peek, filed a protest ("Gully protest") alleging that Donald Stone's employment by the Teamster Rank and File Legal Defense and Education Fund ("TRF") for campaign purposes constitutes an illegal employer campaign contribution in violation of Article X of the *Rules*. The original allegations in the Gully protest were supplemented on January 13, 16, and 17, 1991.

On January 25, 1991, a protest was filed by Walter Sargent, also a member of Local Union 283 ("Sargent protest"). In his protest, Sargent alleges that TRF is involved in massive funding of Ron Carey's campaign for General President of the IBT through TRF's "symbolic [sic] relationship with Carey's major support group, [Teamsters for a Democratic Union ("TDU")]". The Sargent protest was supplemented with additional factual allegations on January 30 and 31, 1991. Because the Sargent protest raised issues similar to those raised in the Gully protest, the cases were consolidated by the Election Officer under the Election Office Case Number P-249-LU283-MGN.

By letter dated February 1, 1991, the Durham-Mathis Unity Team ("Durham") filed its own claim in the consolidated Gully and Sargent protest. Durham identified the basic issue in his protest as whether TDU and its legal defense arm, TRF, made prohibited contributions to the Carey campaign. The Durham submission was supplemented on March 12, 18, 22 and April 10, 23 and 25 1991. The Durham request to participate in the consolidated protest was granted by the Election Officer.

## II Statement of the Issues

The IBT Constitution, as amended by the Consent Order, prohibits a candidate for election from accepting or using any contributions from an employer, a representative of an employer, a foundation, a trust or similar entities. See *Rules*, Article X §1 (a). In addition to the foregoing, the *Rules* also prohibit an employer or a labor organization, whether or not an employer, from contributing anything to any campaign. *Rules*, Article X §1 (b)(1) and (2). These basic prohibitions are limited in only two respects. One, a candidate may utilize financial support or services from employers, other than employers who have a collective bargaining relationship with the IBT or are the object of an IBT organizing campaign, and labor organizations to pay fees for legal or accounting services performed to ensure compliance with applicable election laws, rules or other requirements or in securing, defending or clarifying the legal rights of the candidates. Second, a caucus or group of union members, including a campaign organization of any candidate, may make contributions, and candidates may properly accept such contributions, provided that such caucus or campaign organization is itself

financed exclusively from contributions permitted under the *Rules* *Rules*, Article X §2 (b)(2) and (5)

Thus, except to the extent that its contributions are limited to legal and accounting services as defined in Article X §2 (b)(2) of the *Rules*, TDU is prohibited from making, and candidates for delegate, alternate delegate or International officer positions are prohibited from accepting, contributions if TDU is an employer, a trust, a foundation, an entity similar to a trust or foundation, or a labor organization. However, if TDU is a caucus or organization of union members, it may make and candidates may accept contributions from it, provided that TDU's campaign activities are exclusively financed by contributions otherwise permitted under the *Rules*. Based on the investigation described below, the Election Officer concludes that TDU is not a trust or foundation or an entity similar to a trust or foundation nor is it a labor organization. The Election Officer concludes that TDU is a caucus of union members. However, TDU's campaign activities have not been exclusively financed by contributions otherwise permitted under the *Rules*. Thus, it has violated the *Rules* because it has made campaign contributions to delegate, alternate delegate and International officer candidates, including General President candidate Ron Carey, and such candidates have violated the *Rules* by accepting such contributions.

The Election Officer has concluded that the violation is to be remedied by TDU disgorging and/or refunding, with appropriate interest, the prohibited contributions that

it has heretofore received TDU is also required to take certain future actions, including regular and periodic certified audits, to assure that no further prohibited contributions are received. As will be further described below, TDU has taken steps to ensure that all future contributions received and used by it for campaign purposes are contributions it is permitted to receive and utilize for campaign purposes under the *Rules*. Further, much of the campaign support provided by TDU has been unsolicited contributions, i.e., contributions not specifically solicited by any candidate. To disqualify a candidate, or to refuse to certify an elected candidate, based upon the violations committed by TDU would be a disproportionate remedy under these circumstances. Thus in accordance with Article XI §2 and in particular Article XI §2 (k) of the *Rules*, the Election Officer has determined that reimbursement, with interest, and the additional accounting and other requirements set forth in this decision, will effectively remedy the violations found to have been committed and will serve to prevent future violations of the *Rules*.

### III The Election Officer's Investigation

The Election Officer's investigation of these protests was conducted by the Election Officer and by the Washington staff of the Election Officer. Further assistance in the investigation was provided by the Center for Economic Organizing ("CEO"), consultant to the Election Officer.

The Election Officer considered each of the allegations contained in the protests and supporting documents submitted by the protestors and by Durham's counsel. The

Election Officer carefully reviewed each of the publications, tax returns, solicitations and other documents submitted by each of the parties with respect to the protests. In addition, the Election Officer conducted his own independent investigation of the claims actually raised in the protests as well as claims, though not specifically raised, which were implicit in the protests

In the investigation of these protests the Election Officer's staff reviewed the following, among other, documents

- 1 All editions of the Convoy Dispatch, TDU's periodic publication,
- 2 All literature prepared by TDU and TRF concerning the election of delegates to the 1991 IBT International Convention and the election of International Officers,
- 3 All income and disbursement journal entries for TDU from April, 1990 to the present,
- 4 All disbursement journal entries for TRF from April, 1990 to the present,<sup>1</sup>
- 5 The annual financial reports of TDU and TRF from 1987 to the present,
- 6 All grant proposals prepared or submitted by TRF from April, 1990 to the present,

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<sup>1</sup> The income journals of TRF were not reviewed because it was conceded by counsel for TRF that TRF is a foundation and TRF receives funding from, inter alia, foundations and trusts. Counsel conceded that TRF is prohibited under the *Rules* from contributing to the campaign of any delegate, alternate delegate or International officer candidate

7. All documents relating to solicitations of funds for TDU and TRF from April, 1990 to the present,
- 8 Federal income tax returns for TDU and TRF, as well as requests for tax exempt status
- 9 All documents relating to the creation and implementation of the "Huddleston allocation system" (identified and described herein), including weekly activity reports for all employees, monthly allocation reports, allocation reports for postage and copying expenses, records of payments and transfers between TDU and TRF, including payments for the transfer of office equipment,
- 10 Documents concerning the 1990 TDU convention, including the program of events and documents prepared for various workshops, and
- 11 Records of payment for the printing and distribution costs of the Convoy Dispatch

The Election Officer, with the aid of CEO, examined in detail the records of TDU's membership and contributors and compared those records to a list of active IBT members prepared by the IBT from its TITAN system for the period from April 1, 1990 through April 19, 1991 ("IBT membership list") This list - 31,367 pages in length - contains the names of 1.7 million members of the IBT active at any time from April 1, 1990 through April 19, 1990 CEO reviewed the names of all TDU members and all TDU contributors and compared the names on those lists to the TITAN generated list



of active IBT members. In addition, an investigation was conducted to determine the status of each person not otherwise shown to be an IBT member to determine whether a campaign contribution from such individual accorded with the requirements of Article X of the *Rules*. Similarly, CEO compared a randomly selected large sample of over 7,700 raffle tickets sold by TDU as a fund raising technique, and both compared that sample with the TITAN list and otherwise investigated the status of the raffle ticket purchasers.

Finally, the Election Officer conducted over four full days of depositions. Depositions, under oath, were taken of TDU's principal officer, and its chief financial staffer, as well as Mr. Stone.

#### IV Questions Presented

Based upon the submission of the parties, and the Election Officer's extensive investigation of the protests, the Election Officer finds that the following issues are raised in this consolidated protest:

1. Whether TDU is a labor organization prohibited from making campaign contributions pursuant to Article X, Section 1 (b) (2) of the *Rules*,
2. Whether TDU is a caucus, group of IBT members or campaign

organization which is permitted to make campaign contributions<sup>2</sup> pursuant to Article X, Section 1 (b) 5 of the *Rules*,

- 3 Whether TDU's campaign activities are unlawfully financed, either directly or indirectly, by a foundation, i e TRF, or by an employer who is not a member of the IBT
- 4 Whether TRF engages in direct campaign activities, or indirect campaign activities through TDU, in violation of Article X of the *Rules* and Paragraph 8 of the Consent Order

#### V Organizational Background of TDU and TRF

TDU is a membership organization which was founded in 1976 as a caucus within the IBT. Membership in TDU is open to all Teamsters and Teamster spouses as well as retired Teamster members and their spouses, however, the organization reserves the right to exclude those who are opposed to TDU or its principles. TDU is a political advocacy organization which is concerned with a variety of issues and positions, including internal union affairs, allegations of union and pension fund corruption, opposition to collective bargaining agreements and allegedly undemocratic procedures regarding the election of union officers and the approval of collective bargaining agreements. While TDU has been consistently critical of the leadership of the IBT, it has stated that it does not seek any status other than as a part of the IBT. TDU strongly

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<sup>2</sup> The terms "campaign contributions" and "campaign activities" are used interchangeably throughout this determination. "Campaign contribution" is defined at page A-2 of the *Rules*.

disclaims that it is engaged in "dual unionism" See, e g , TDU Constitution, Article Two TDU is not, nor has it sought to become, the certified or recognized collective bargaining representative of any group of employees under any state or federal collective bargaining law or the recognized representative of any group of employees otherwise not covered by state or federal collective bargaining law TDU has never filed reporting or disclosure forms, e g , LM-2 forms, with the United States Department of Labor pursuant to the Labor Management Reporting and Disclosure Act, 29 USC Section 431 (b)

TDU has a number of chapters throughout the country These chapters are largely autonomous from the national headquarters of TDU, conduct their own affairs and are responsible for their own fund-raising TDU is governed by an International Steering Committee which meets periodically between the organization's yearly convention The principal officer of the TDU is its Organizer, Mr Ken Paff, a full-time TDU employee, not presently an IBT member<sup>3</sup> In addition the TDU has three Trustees who are IBT members

TRF was formed in 1977 as a foundation organized in accordance with Section 501(c)(3) of the Internal Revenue Code TRF is an educational and legal defense foundation and not a membership organization TRF sponsors educational programs, including the publication of educational materials, for IBT members on workplace safety,

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<sup>3</sup> The Organizer was, prior to his employment with TDU, an IBT member He is currently on withdrawal from IBT Local Union 407

pension rights, the grievance process, deregulation, commercial drivers license program and internal union affairs. TRF also sponsors educational programs, and publishes materials, with respect to intra-union elections, specifically including educational programs and materials regarding the IBT International Union delegate and officer election as mandated by the Consent Order of March 14, 1989 and as regulated by the *Rules*. In addition, TRF sponsors litigation on issues of concern to IBT members. TRF is governed by a board of directors.

All campaign contributions at issue were made by TDU, TRF has not made any direct contributions to any candidate for delegate, alternate delegate or International Officer in the IBT.

TDU has engaged in campaign activities on behalf of candidates for election as delegates and alternate delegates to the 1991 IBT International Convention as well as on behalf of International Officer candidates, including, principally, Ron Carey, a candidate for International Union General President.

#### VI Funding of TDU and TRF

TRF is a nonprofit educational foundation which receives funding from a variety of sources. TRF receives contributions from IBT members and individuals who are not employers. TRF receives contributions from foundations and is itself a foundation and an employer as defined by the *Rules*. The foundations from which TRF receives

contributions are in many cases themselves employers as defined by the *Rules*

TDU does not receive direct contributions from TRF or any other foundation. However, as described in detail below, TDU and TRF share personnel and resources. To the extent that TDU uses a TRF resource, and does not reimburse TRF for the use of such resource, TRF is making a contribution to TDU, and, if TDU makes a contribution to a candidate utilizing those resources, TDU violates the *Rules*.

Practically all of TDU's direct funding comes from membership dues, contributions and donations<sup>4</sup>. The Election Officer has reviewed the records of TDU membership income, as well as contributions and donations, since April, 1990. The Election Officer reviewed TDU's handwritten journal of income from membership dues and compared that handwritten list to the TDU membership list. The Election Officer further checked each and every one of TDU's 5,393 members against a list of active members prepared for the Election Officer by the IBT to determine which members of TDU in fact were IBT members. TDU members not found initially to be active IBT members were then individually further investigated. TDU members not then found to be active IBT members were then individually scrutinized to determine whether they

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<sup>4</sup> TDU also receives income from the sale of promotional items, literature, e.g. the Convoy Dispatch, as well as income from its annual convention. Such proceeds are treated as income on TDU's financial books and records. Such income reimburses TDU for expenses associated with the production and distribution of its literature, including Convoy Dispatch, purchase of promotional items and for convention related expenses. Since the Election Officer investigation determined that the income from these sales did not exceed the associated costs, the Election Officer did not consider these items as contributions to TDU.

were retirees or spouses of members or retirees

The statistical review methodology utilized by the Election Officer in analyzing the membership of TDU yields a conclusion, based upon extrapolation of the review conducted properly projected in accordance with appropriate standards, that all but 2.5% of TDU's 5,393 members are in fact members of the IBT, retirees or spouses of IBT members or retirees. With respect to the sampled 2.5%, the Election Officer has been unable to verify that such individuals are IBT members, IBT retirees or spouses of IBT members or retirees or otherwise persons entitled to make contributions pursuant to Article X of the *Rules*. The Election Officer will require that the membership dues received by TDU from this group be disgorged by TDU, with appropriate interest from the date of TDU's receipt of these funds.<sup>5</sup> Membership dues are \$30.00. Therefore, TDU must disgorge \$4,050 plus interest calculated from the date of TDU's receipt of each such \$30.00 membership fee through the date of refund. Assuming that these membership monies were received randomly throughout the period, TDU would owe \$268.88 in interest.

In addition, the Election Officer's investigation revealed that TDU engaged in two fund-raising raffle sales since the effective date of the *Rules*. These raffle tickets were disseminated among TDU members and bundle distributors of the Convoy Dispatch. Neither the letter which accompanied the tickets nor the tickets themselves contained a

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<sup>5</sup>See discussion, infra at page 50, regarding the appropriate interest rate

disclaimer stating that no employer or union contributions may be made or accepted.

The Election Officer has reviewed the stubs from both raffles to determine whether the individuals purchasing such raffles were members of the IBT, IBT retirees or individuals otherwise entitled to make campaign contributions pursuant to Article X of the *Rules*. The Election Officer has been able to verify that 61% of the individuals who purchased the first raffle tickets were IBT members or other individuals eligible to make campaign contributions. The Election Officer has also been able to verify that 70% of the purchasers of the second set of raffle tickets were similarly IBT members or individuals otherwise eligible to make campaign contributions under the *Rules*.

Neither the letter which accompanied the tickets, nor the tickets themselves, contained a disclaimer stating that no employer or union contributions may be made or accepted. TDU argues that the Election Officer's advisory on the solicitation of campaign contributions, i.e., "Disclaimer of Employer, Union and Other Improper Contributions", dated September 5, 1990, did not issue until after the tickets were distributed and therefore they should not be held liable for the absence of a suitable disclaimer on the tickets.

Advisories issued by the Election Officer are intended to clarify or give guidance with respect to the requirements of the *Rules*. The *Rules*, which were

published long before the first TDU raffle, state that

It is strongly recommended that each candidate notify all prospective contributors of the limitations on campaign contributions prescribed by these Rules. It is thus strongly recommended that all candidate campaign literature soliciting contributions specifically provide that no employer or Union contributions may be made or accepted. It is strongly recommended that similar disclaimers be issued at all fund raising events. Article X, Section 1(c)

TDU was clearly on notice that campaign contributions could not be solicited or accepted from persons or entities prohibited from making contributions under the *Rules*

Under these circumstances the Election Officer will require TDU to disgorge, by transferring to TRF or otherwise, the proceeds from the two raffles resulting from contributions by individuals the Election Officer was unable to verify were IBT members or individuals otherwise eligible to make campaign contributions. Each raffle ticket cost one dollar. The gross proceeds from the first raffle was \$8,066, the gross proceeds from the second raffle was \$6,528. The costs associated with the raffles were paid by TDU and included prizes, printing, raffle fees to the State of Michigan, shipping, postage and the rental on the drum for the drawing. These raffle-related expenses were



\$2,617 for the first raffle and \$2,528 for the second raffle. Thus, the net proceeds for the first raffle were \$5,449. TDU is directed to disgorge or transfer 39% or \$2,124.11 of the net proceeds from that raffle. The net proceeds for the second raffle were \$4,000. TDU is required to disgorge or transfer 30% or \$1,200 of the net proceeds from that raffle. All monies transferred shall be transferred with appropriate interest calculated from the date of the raffle drawing to the date of transfer. The interest to be thus paid is \$303.67.

TDU also had a separate raffle sale at its convention. However, the sale of those tickets was preceded by a statement that no contributions would be accepted from employers who were not members of the IBT. In addition, TDU reviewed the names of the Convention participants who purchased those raffle tickets to determine whether any purchaser was a non-IBT member employer. One non-IBT member employer was identified and his contribution was transferred to TRF.

All other contributions and donations received by TDU since the effective date of the *Rules* have also been reviewed by the Election Officer. The Election Officer investigated to determine whether such donors or contributors were IBT members or persons otherwise entitled to make campaign contributions under the *Rules*. Except with respect to the raffle ticket purchasers, as described above, the Election Officer's investigation has found that all other contributors and donors were all either IBT members, IBT retirees, spouses of IBT members or retirees or individuals otherwise

entitled to make contributions.

## VII Sharing of Resources between TDU and TRF

TDU and TRF have historically shared resources in the performance of their respective functions. Both TDU and TRF share staff. TRF pays employee salary and benefits and TDU reimburses TRF for staff time and pro-rated expenses spent on certain TDU activities, i.e., campaigning. TDU pays for the printing, layout and distribution of the Convoy Dispatch. Both TDU and TRF pay for staff time and expenses incurred in writing and editing articles. TRF owns the organizations' Detroit office and rents office space in New York and Washington, D.C. TDU pays for space for its West Coast office. In addition, TRF pays for certain office expenses including taxes, utilities, taxes, maintenance, telephone expenses, etc. TDU pays TRF for a share of the rent and associated costs for office space. TDU owns most of the office equipment, e.g. computers, postage meters, fax machines, which is jointly used by TDU and TRF. TRF pays for postage and copying charges and is reimbursed by TDU on an actual usage basis.

Because TDU and TRF share personnel and resources it is necessary to allocate the expenses associated with these personnel and resources to insure that TRF, a foundation, does not pay for any campaign-related activity or expense of TDU. Such allocation must account for the use of all personnel and resources on activities "where the purpose, object or foreseeable effect of that [activity] is to influence the election of

a candidate" *Rules, Definitions, Section 6(e)*. The allocation must be based on time records, an examination of the content of Convoy Dispatch, the use of office space, and records regarding postage and copier use, as well as payments to third parties for goods or services

#### VIII The Allocation of Expenses between TDU and TRF

Labor organizations have traditionally been required to identify and allocate their expenses for a variety of purposes. In Abood v. Detroit Board of Education, 431 U S 209 (1977), Ellis v. Brotherhood of Railway Clerks, 466 U S 435 (1984), and Communications Workers v. Beck, 108 S Ct 2641 (1988), the United States Supreme Court recognized that nonmembers of a labor organization, who are compelled to pay a fee to the union as a condition of their employment (usually called an "agency fee"), cannot be required to pay for the union's ideological or political activities. In Chicago Teacher Union v. Hudson, 475 U S 292 (1986), the Court held that the union collecting the fee from nonmembers had an obligation to allocate its expenses between collective bargaining expenses, for which the objecting nonmember was required to contribute ("chargeable expenses"), and political and ideological expenses to which the nonmember could object and not be charged ("nonchargeable expenses"). The Court in Hudson went on to hold that not only did the union have an obligation to create a system for the allocation of its expenses, the union was required to disclose to all nonmembers the basis of the allocation. Since the Court's decision in Hudson, the adequacy of the allocation systems adopted by unions had been the subject of extensive litigation. See,

e g , Gilpin v. AFSCME, 875 F 2d 1310 (7th Cir 1989), cert. denied, National Right to Work v. AFSCME, 110 S Ct 278, and Estate of Gilpin v. AFSCME, 110 S Ct 278 (1989)

Unions have also had extensive experience under the federal election laws in segregating funds and resources used to contribute to, and raise funds on behalf of, candidates for federal office Under federal election laws unions are prohibited from making contributions to federal candidates However, union members may make such contributions and may pool such contributions through union sponsored political action committees Federal law requires unions not only to segregate funds used for political purposes, but to account for resources used in political activities concerning federal candidates

In the instant case the Election Rules and the Consent Order prohibit "campaign contributions" by employers, trusts or foundations Included in the term campaign contribution is "[t]he payment for the personal services of another person, or for the use of buildings or office space, equipment or supplies, or advertisements through the media " Because TDU engages in campaign activities and because TDU and TRF, a foundation, share certain personnel and resources, the Election Rules require that TDU pay all expenses associated with any campaign activity The identification and allocation of expenses between TDU and TRF, on the basis of whether they are campaign related, is virtually identical to the identification and allocation of chargeable and non-chargeable

expense required by the courts in the wake of Abood and the other agency fee cases<sup>6</sup>

In Gilpin, *supra*, the Court of Appeals rejected a constitutional challenge to the allocation of union chargeable and nonchargeable expenses based on a reporting system implemented by the American Federation of State County and Municipal Employees (AFSCME). That system was created by Huddleston and Associates. Huddleston and Associates is a consulting firm located in Madison, Wisconsin. It has functioned as a consultant to various labor organizations with respect primarily to the development and implementation of systems to allocate income and expenses to enable such labor organizations to comply with the decisions of the United States Supreme Court and lower federal courts regarding agency fee and political fund issues. Both the International Steering Committee of TDU and the Board of TRF voted to engage the services of Huddleston and Associates to prepare a record keeping system that would identify all campaign activities and insure that TDU paid the costs of such activities.

Between May and July, 1990 Huddleston and Associates met with TDU and TRF staff, reviewed their financial reporting system and publications. On the basis of the review of TDU and TRF's structure and activities, Huddleston drew up a reporting and allocation system designed to identify and record every campaign activity or related expense. The system was put into operation in the first week of July, 1990. However,

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<sup>6</sup> There are differences in the procedures set up to allocate agency fees however. Agency fee allocations are usually made on an annual basis a year in advance of the collection of the fee. The allocation at issue here is made monthly on the basis of the prior month activity and expenses.

a "back allocation" was made for the period from April 1, 1990, i e., the month in which the *Rules* became effective, based upon the activity and expense records for the period from July through November, 1990

#### IX The Huddleston System

The Huddleston System consists of a number of reports and procedures designed to track activity and expenses and to allocate them between campaign and non-campaign categories. All campaign activities, and the expenses associated with those activities, are to be funded from TDU. All other activities are to be funded by TRF. The following are the major components of the Huddleston System

A Asset Allocation TDU purchased from TRF most of the office equipment it did not already own. The exceptions are the office copier and the telephone system. TDU paid TRF the book value (i e., purchase price minus accumulated depreciation) for these assets

B Occupancy TRF owns the Detroit offices where TDU and TRF are located. In addition, TRF pays for certain occupancy-related expenses, e g., utilities, taxes, repairs, cleaning supplies, etc ("occupancy charges"). TRF rents office space in Washington and New York. TDU pays \$150 in rent for a West Coast office located in a TDU member's home. TDU pays TRF \$200 a month for rent of its Detroit Office. In addition, TDU reimburses, on a monthly basis, TRF for a portion of its occupancy

charges including the rent on the Washington and New York office space. The amount of reimbursement is based upon the percentage of TDU staff time spent on campaign activities during the month. For example, if 20% of the staff time was spent on campaign activities, 20% of the occupancy expenses are paid by TDU.<sup>7</sup>

C Staff Activity Reports A key component of the Huddleston System is a staff activity report. Staff persons are required to record on the activity report a description of their daily activity. In addition, staff are required to allocate their time into ten categories. Under the Huddleston system, two of the categories, *i.e.*, "Literature-Campaign" and "Campaign Activities", relate to the campaign. The eight other categories, *i.e.*, "Administration", "Organizing", "Membership Education", "Fundraising/P R", "Legal", "Literature-Other", "Research", and "Membership Meetings" are not campaign-related.

Many staff persons keep track of their daily time on daily worksheets and then transfer information to the activity report on a daily or weekly basis. Other employees recording their time directly on the activity report. At the end of the week, the total "campaign" time is calculated and divided by the total work time. The resulting percentage is called the "TDU percentage". This process is repeated on a monthly basis.

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<sup>7</sup> Under this calculation TDU pays slightly more than its share of the occupancy expense at the Detroit office. Another entity occupies a portion of the office space in the building and reimburses TRF for its share of the occupancy charges. However, TDU pays a percentage of the total occupancy charges, before reimbursement by the other occupant of the building.

and a monthly TDU percentage for that employee is determined

D Monthly TDU Staff Allocation Each month the individual staff activity reports are consolidated on a "TRF/TDU Allocation Sheet". Each staff person paid by TRF has a line on the form. Next to their name is a line item for salary and a line for the TDU percentage for the month. The salary amount is multiplied by the TDU percentage and recorded in the final column. This process is repeated for each staff person. The individual salaries are then totaled along with the TDU amounts. The total TDU amount is then divided by the total salary and the resulting figure is called the "Allocation Percent". The total TRF salary and benefits amount<sup>8</sup> for the month is multiplied by the allocation percentage and the resulting dollar amount is the amount that is reimbursed to TRF by TDU.

E Allocation Percentage The allocation percentage is also applied to the total occupancy costs and telephone charges. The resulting dollar figures are reimbursed by TDU to TRF. Initially all travel expenses incurred by staff was consolidated into a single monthly amount and were allocated between TDU and TRF on the basis of the allocation percentage. However, recently travel expenses have been allocated solely to TDU, unless the expense is directly, and exclusively, related to a TRF function, e.g., attendance at a TRF board meeting.

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<sup>8</sup> The benefits amount includes various employer paid taxes, e.g., the employer portion of FICA, and fringe benefits, e.g., health insurance.



F Convoy Dispatch TDU has published Convoy Dispatch on a regular basis since November, 1979. The Convoy Dispatch has historically contained articles on contract issues, strikes, Local Union by-laws (i.e., the election of business agents and stewards), pension benefits, grievance processing and work place safety and health issues. The Convoy Dispatch has also historically contained articles critical of the leadership of the IBT and their conduct or policies. TDU pays for all costs associated with the printing and distribution of the Convoy Dispatch, TRF pays the salaries for all staff editorial work time. TDU directly pays the salary for a part-timer, hired as an independent contractor, who handles distribution of Convoy Dispatch and other TDU mailings.

Since at least April, 1990, the Convoy Dispatch has contained articles about the election process, including discussions of the *Rules*, and articles reporting on candidates and campaigns. TDU has identified all articles reporting on the campaign or candidates and reimbursed TRF for any staff time spent on the writing or editing of those articles. TDU contends that the purpose of the articles about the mechanics of the election process and the *Rules* is to advise IBT members of their rights under the *Rules* and as such are properly funded by TRF. The Election Officer agrees with this contention. See *Rules*, Article X § (1)(b)(2). In addition, TDU has allocated the time spent on articles critical of IBT incumbents which mention candidates by name. While the articles critical of incumbents who are also candidates are similar to the articles which have appeared in the past, TDU has allocated all such articles and included in the

reimbursement to TRF all salary and benefit costs associated with the preparation of these articles <sup>9</sup>

G Postage and Copying Records are kept of all campaign use of the postage meter and the copy machine TDU reimburses TRF for actual campaign postage and for \$ 03 for each page of campaign material <sup>10</sup>

H Payments to Third Parties Payments to third parties are either made directly by TDU or by TRF depending upon whether they are campaign related Payments for campaign related goods and services are made by TDU, other payments are made by TRF

I Review of Activity Reports Staff activity reports are periodically reviewed by senior staff and questions are answered regarding the appropriate classification of a particular expense Counsel is also often consulted when classification questions arise

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<sup>9</sup> TDU argues that its articles which are critical of incumbents, who may also be candidates for International Office, are no different, for the purpose of the Election Rules, than article in union publications which are favorable to incumbents who are candidates See, e g , Advisory on Union Publications, dated December 21, 1990, and In re. Committee to Election Ron Carey 91-Elec App -40 (FBL) Because the TDU reimburses TRF for the time spent preparing these articles, it is not necessary for the Election Officer to address this contention

<sup>10</sup> TDU has informed the Election Officer that they have recently modified the recordkeeping system for postage and copier use Now the purpose of all copier use is recorded, campaign as well as non campaign, and all unaccounted for use is charged to TDU A similar system is now in effect for use of the postage meter

X Alleged Violations of the Election Rules, Analysis and Findings

A Timeliness of the Protest TDU argues that the instant protests should be dismissed because they were not filed within the time limits set forth in Article XI, Section 1 (a)(1) of the Election Rules. In the alternative, TDU argues that the remedy imposed by the Election Officer, if any, should not be retroactive beyond the forty-eight hour period prior to the filing of the protests. In support of its timeliness claim TDU cited the decision of the Independent Administrator in In re Brian Barclay, 91-Elec App -111(SA). TDU also point to the fact that its relationship with TRF, and the allegation that its activities have been supported by foundation grants, has been the subject of debate and IBT charges for a number of years. Similarly, TDU's support for the candidacy of Ron Carey has been know since at least November, 1989, when Carey was endorsed by the TDU at its convention.

The Election Officer denies TDU's request to dismiss the instant protest on timeliness grounds because of his view that the protest alleges a continuing violation of the *Rules*. The Election Officer also denies TDU's claim that the remedy should not extend retroactively more than forty-eight hours prior to the filing of the protests. The allegations contained in the protest implicate the Consent Order, at Paragraph 8, violations of the campaign contribution provisions of the *Rules* also state a violation of the Consent Order. Given the serious nature of such violations, and the Election Officer's inherent authority under the *Rules* to investigate and remedy conduct violative of the *Rules* even without a protest, the Election Officer declines to limit the scope either of his investigation or the remedy he imposes.

**B** TDU is not a labor organization which is prohibited from making campaign contributions under the Rules Durham alleges that TDU is a labor organization which is prohibited from making campaign contributions by Article X, Section 1 (b)(1) of the *Rules*. In support of this argument Durham points to the fact that TDU is a tax exempt organization under Section 501(c)(5) of the Internal Revenue Code, 26 U S C Section 501 (c)(5). Durham also points to the definition of labor organization in the Labor-Management Relations Act, 29 USC Section 152 (5) (LMRA). Durham argues that TDU has directly in its propoganda, and indirectly through litigation it has sponsored, raised issues concerning the wages, hours and working conditions of IBT members. On the basis of this evidence Durham asks the Election Officer to conclude that TDU exists, at least in part, for the purpose of dealing with employers and is therefore a labor organization. All labor organizations are prohibited from making campaign contributions under Article X §1(b)(1) of the *Rules*.

The Election Officer does not find that TDU is a labor organization, as defined by the *Rules*, merely because it has applied for and been granted tax exempt status as a labor organization by the Internal Revenue Service. The policies of the federal tax law with respect to the granting of tax exempt status are not in all regards the same policies which underlie the *Rules* or the Consent Order. Similarly, the definition of labor organization contained in the Labor-Management Relations Act, 29 USC Section 152 (5), is inapplicable to the regulation of an internal union election.

While the LMRA is chiefly concerned with collective bargaining rights, the Labor-Management Reporting and Disclosure Act, 29 USC Section 401, et seq ("LMRDA"), is concerned with internal union affairs and the conduct of union elections. In the Election Officer's view, the definition of labor organization contained in the LMRDA, 29 USC Section 402 (i) and (j), is the most appropriate analogy for defining "labor organization" under the *Rules*.

While there is a similarity in the definition of labor organization in the LMRA and the LMRDA, the LMRDA contains the important qualifier "labor organization engaged in an industry affecting commerce" which is not part of the LMRA definition. The "industry affecting commerce" requirement in the LMRDA definition of labor organization is defined at 29 USC 402 (j). That portion of the LMRDA limits the definition of labor organization to certified labor organizations, i.e., labor organizations certified under the provisions of the Section 9 of the LMRA or the Railway Labor Act, 45 USC Sections 151 et seq, as an exclusive collective bargaining representative, labor organizations representing or seeking to represent employees, or labor organizations which are subordinate to a national or international labor organizations representing or seeking to represent employees. TDU does not represent, nor does it seek to represent employees. It is a member caucus within the IBT which has specifically disclaimed any intent to act, or supplant the IBT, as a bargaining representative.<sup>11</sup>

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<sup>11</sup> It is also relevant to note that TDU has never filed an LM-2 report with the United States Department of Labor. The filing of such reports is mandatory for all labor organizations, 29 USC Section 431, and the failure to file such a report can subject the labor organization to criminal and civil penalties, 29 USC Sections 439 and 440. TDU

C TDU is not an "alter ego" of TRF Durham alleges that TDU is an alter ego of TRF This conclusion is, apparently, based on the fact that both TDU and TRF share staff and facilities In addition, there is a substantial identity in the composition of the Board of TRF and the International Steering Committee of Committee of TDU

The Election Officer's investigation revealed that in addition to the shared employees and resources of the two organizations, a number of IBT members sit on the governing bodies of both organizations However, the Election Officer uncovered no evidence, and no evidence was presented by the protesters, that the political positions with respect to the delegate and International Officer campaign taken by TDU was determined by TRF<sup>12</sup> TDU is a separate organization It has separate finances, activities, governance structure, constitution, and tax status See, e g In Re. Western Conference of Teamsters Pension Trust, 91-Elec App -106 (SA), slip op p. 14 affirmed (S D N Y , May 13, 1991) TDU's decision to support the candidacy of Ron Carey was made by its membership at its annual convention TDU is carrying out the

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has never been charged with a failure to file the required reporting and disclosure forms with the Department of Labor

<sup>12</sup> It is unclear what relevance, if any, the "alter ego" claim has to the issue before the Election Officer The relevant inquiry under the *Rules* is the source of funds or resources used for campaign purposes If the source of campaign funds or resources is proscribed under the *Rules* it is irrelevant whether such unlawful campaign contributions are channeled through an independent caucus or an organization that is an "alter ego" of a foundation

position of its own convention

D TDU is a caucus of IBT members which is entitled to engage in campaign activity As stated above, TDU was founded to "strengthen the Teamsters Union from within by building a unified movement of rank and file Teamsters that is organized to fight for rank and file rights on the job and in the union" TDU Constitution, Article Two Membership in TDU is open to all IBT members and their spouses, however the organization reserves the right to exclude those who are opposed to TDU or its principles TDU Constitution, Article Ten While the TDU has recently focused a greater portion of its attention on the delegate and International Officer elections, it continues to advocate the other portions of its program TDU's stated purpose and its activities clearly encompass more than the current election campaigns The Election Officer therefore concludes that TDU is a member caucus with the meaning of the *Rules*

The restrictions on campaign contributions contained in Article X of the *Rules* are applicable to caucuses of IBT members with respect to such caucuses' campaign activities In discussing that provision of the *Rules* the Election Officer in his "Commentary on Final IBT Election Rules" observed that

to the extent [the caucus] acts to advance the nomination or election of a candidate or candidates it is fundamentally a campaign organization To the extent that it makes monetary

contributions to campaigns, it is but a conduit for candidate  
contributions

The Election Officer therefore concludes that to the extent that TDU engages in activities that advance the nomination or election of a candidate, such activities must be exclusively funded by contributions permitted by the Election Rules. In determining whether TDU has complied with this requirement, the Election Officer examined not only TDU membership and donors, but also whether it received any other indirect financial support for its campaign activities from prohibited sources such as TRF.

**E The Huddleston System, if properly implemented and utilized, insures that TDU campaign activities are funded in accordance with the requirements of the Rules**

As stated above, labor organizations have implemented timekeeping and allocation systems, virtually identical to the Huddleston System, to allocate union expenses between those that can be charged to an objecting nonmember agency fee payer and those that cannot be so charged. Such time keeping and allocation systems have been consistently held sufficient to protect the constitutional rights of nonmember fee payers. See, e.g., Gilpin, supra. The task in the instant case, similar to that in the agency fee cases, is to insure that no TDU campaign activities were funded, either directly or indirectly, by employer or foundation contributions. The Election Officer concludes that the Huddleston System, properly functioning with the additional safeguards discussed below, insures that TDU's campaign activities are not financed by employer or foundation



contributions

F TDU's implementation of the Huddleston system was flawed in several respects. These errors facilitate violations of the *Rules* and must be remedied.

While the Election Officer finds that the Huddleston System on its face contains adequate safeguards to insure that TDU's campaign activities have not been funded or subsidized by TRF, the Election Officer has, during the course of his investigation, discovered instances where the Huddleston System was inadequately or improperly implemented by TDU. Several of these errors can be attributed to the implementation of a new recordkeeping system and have been corrected in the normal course of administering the system. Some errors result from the failure of TDU to reimburse TRF in a timely manner or to pay TRF interest, at an appropriate rate, on unpaid amounts and have been in part remedied. However, based on his review of the TDU activity and financial records, the Election Officer is directing TDU to take certain additional steps to insure future compliance with the *Rules*. These modifications, which are incorporated by reference in the Election Officer's remedial order, are discussed below.

1 Allocation of Physical Assets, Reimbursement by TDU to TRF

Under the Huddleston System, TDU is required to purchase and to reimburse TRF for the purchase of office equipment. The Election Officer's investigation revealed that the ownership of the equipment transferred to TDU as of the

effective date of the *Rules*, i e , on or about April 27, 1990<sup>13</sup> However, the value of these assets was calculated as of October, 1990 Thus, the book value improperly included approximately six months of depreciation TDU has recently recalculated the appropriate book value of such assets and had paid the difference in value However, TDU had failed to pay the appropriate interest on this late payment and is directed to make such payments

The funds for this purchase, as initially calculated or as recalculated, were also not transferred from TDU to TRF until the end of the year TDU has informed the Election Officer that it intends to pay interest on the unpaid amounts for this purchase However, it intends to pay interest at the rate of 8% TDU argues that TRF receives an 8% return on its short term investments

While the Election Officer agrees that interest should be paid on these late payments, the appropriate rate of interest should be the rate charged to TDU by commercial lenders for short term loans TDU shall present evidence to the Election Officer of the rate charged to TDU by commercial lenders for short term loans In the absence of such evidence, the Election Officer will assume that the appropriate rate of interest on these unpaid amounts is the prime rate, i e the average prime rate calculated by the Federal Reserve System for the relevant period, plus 2% The average Prime

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<sup>13</sup> TDU has informed the Election Officer that it has treated the Election Rules as effective, for the purpose of its allocations under the Huddleston System, on April 1, 1990

Rate for the period from April, 1990 to December, 1990 was 10% The appropriate interest rate for that period is 12% The average prime rate from January, 1991 to the present was 9 14%. The appropriate interest rate from January 1, 1991 to the present would therefore be 11 14% Applying these interest rates to the unpaid amounts on the transfer of equipment, the Election Officer concludes that TDU owes TRF \$844 22 in unpaid interest On April 11, 1991, TDU paid TRF \$541 94 in unpaid interest on the unpaid balances for its equipment purchase Therefore, TDU now owes TRF \$302 28 in unpaid interest

2 Allocation of overhead costs TDU reimburses TRF for personnel and other expenses, e g , occupancy, postage, copying, etc , on a monthly basis However, TDU does not make the transfer to TRF until the month after the expenses were incurred Because TRF is required to make payments to employees and vendors in the month the expense is incurred and does not receive reimbursement from TDU until the following month, TRF is effectively financing a line of credit to TDU The Election Officer holds that TDU is required to pay for this line of credit, at the rate discussed above, for all reimbursed amounts Interest shall accrue from the first day of the month that the expenses are incurred by TRF and shall continue to accrue until the funds are transferred from TDU to TRF <sup>14</sup> TDU can avoid these interest charges by making advance payments to TRF for monthly reimbursable expenses For example,

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<sup>14</sup> TDU is entitled to offset any amounts owed to TRF, and therefore the interest owned, with an expenditures that it makes which are properly attributed to, and reimbursed by, TRF

TDU can transfer TRF an amount equal to anticipated reimbursable expenses on the first day of each month and do a reconciliation at the end of the month for any underpayment or overpayment. The Election Officer has computed the amount of interest due on late payments or transfers from TDU to TRF and concludes that TDU owes TRF \$1237.21 in interest on these amounts.

As described above, TDU reimburses TRF, on a pro rata basis based on the TDU percentage, for certain "occupancy" costs in addition to the rental payment on the Detroit and West Coast offices. Omitted from the various elements of the occupancy cost is an allocation for depreciation and maintenance of the phone system in the Detroit office. This system is owned by TRF and used, in part, by TDU. The Election Officer holds that a pro rata portion of the depreciation and maintenance of the phone system should be allocated and reimbursed by TDU.

The telephone system at the Detroit offices of TDU and TRF was purchased in 1987 by TRF for \$3,031. The annual depreciation on the system is \$606.20 and the monthly depreciation is \$50.51. Based on the TDU allocation percentage for the period from April, 1990 through February, 1991, the latest month for which complete records are currently available, the Election Officer concludes that \$90.68 in depreciation on the telephone system is properly attributable to TDU.

### 3 Allocation of Staff Time preparing for the TDU Convention

TDU conducted its annual convention in Detroit Michigan on October 26-

28, 1990 The Election Officer's investigation revealed that while the majority of the TDU Convention was concerned with internal organizational questions and issues not involving campaign activity, a significant portion of the convention was concerned with campaign activity. Staff persons allocated their time spent at the convention between campaign related and non-campaign categories. However, all time spent by staff planning for and organizing the TDU Convention was considered as non-campaign time.

TDU argues that since the TDU Convention is a regular activity of the organization, staff traditionally prepare for and participate in the Convention, and that the campaign content of this particular convention was incidental, therefore, no allocation should be made for the Convention. TDU further argues that its allocation by the staff of a portion of their time spent at the convention as "campaign related" is evidence of their desire to overstate the amount of time spent on campaign activity by the staff in an effort to insure compliance with the Election Rules. TDU cites the decision of the Independent Administrator in the matter of In re Riga, 91-Elec. App.-60(FBL) for support of their argument.

While the Election Officer understands the argument advanced by TDU<sup>15</sup>, he concludes that the *Rules* and the Consent Order require an allocation for the convention as well as for the time preparing for the convention. Staff spent considerable time prior

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<sup>15</sup> The TDU's equal treatment argument is based on their contention that funding of its campaign activities by a foundation, i.e. TRF, is no different than funding of a union officer's campaign activities by a union, i.e., the IBT.

to the convention organizing workshops, publicizing the convention and encouraging TDU members to attend. The Election Officer directs that TDU must not only allocate all of its staff time spent at the convention on campaign related activities, it must apply an allocation percentage to all time spent by staff organizing the convention.

The allocation percentage for the TDU convention was determined by adding all time spent by all staff persons at the convention and dividing that amount by the total campaign time spent by all staff at the convention. The total staff time at the convention is 402.5 hours of which 73 hours were campaign-related. The Convention allocation percentage is 18%. Thus, 18% of the time spent by staff persons in organizing the convention is to be allocated to campaign expenses and reimbursed by TDU with appropriate interest.

#### 4 Failure to Maintain Activity Reports

As stated above, TDU and TRF maintain an office in New York City. A full-time staff person, Steven Kindred, works out of that office. Like the other staff, Mr. Kindred is paid by TRF. Prior to December 1, 1990, Mr. Kindred did not fill out the weekly activity reports and therefore was not included in the monthly calculation of the TDU percentage. TDU argues that Kindred was not involved in any campaign activity and if he performed any campaign functions such activity was incidental to his regular activity.

Without activity reports detailing Mr. Kindred's actual activity, it is impossible

for the Election Officer to sustain TDU's claim. Therefore the Election Officer directs that Mr Kindred's salary shall be "back allocated" on a monthly basis, for the period from April through November 1990 on the same basis as the TDU percentage for each month. TDU shall then recompute the TDU allocation percentage, including the allocation of Mr Kindred's time, and apply the revised TDU allocation percentage to the allocation of salary and benefits as well as the occupancy costs<sup>16</sup>

5 Allocation of Time for Staff meetings which include discussions of or planning for campaign activities

As a regular part of their jobs, staff persons attend and participate in various staff meetings. Such staff meetings include general staff meetings, Convoy Dispatch editorial and production meetings, and meetings of staff "organizers". Prior to January, 1991 no allocation was made for any portions of these meetings that dealt with campaign issues, i.e., all staff time at meetings was considered non campaign. Since January, 1991, each staff person allocates a portion of the time spent in the meetings where campaign issues were addressed. The Election Officer determines that a similar allocation must be made for all staff meetings which occurred prior to January, 1991. Because it may be impossible to reconstruct accurate records for the content of each meeting, the Election Officer directs TDU to allocate time for each staff person

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<sup>16</sup>TDU had stated that such allocation had now been made and TRF properly reimbursed. The Election Officer concludes that such reimbursement, with appropriate interest, would remedy this portion of TDU's violation. TDU shall present documentation to the Election Officer demonstrating the method of calculation, the amount(s) and date(s) of reimbursement and that appropriate interest has been paid.

attending a meeting according to the "TDU allocation percentage" for the month in which the meeting took place Reimbursement, with appropriate interest, shall be made by TDU to TRF

6 Allocation of Staff Time for planning events which have a campaign content

The Election Officer's investigation revealed that a major staff activity is planning for and attending TDU membership meetings A review of the staff time records reveals that many of these meetings had a campaign content and staff persons allocated a portion of their time at these meetings as campaign activity However, as was the case with the TDU Convention, no allocation was made for the time preparing for or organizing these meetings The Election Officer directs that allocations be made for time heretofore spent on organizing and preparing for meetings with campaign content in the same manner as allocations are to be made for time spent preparing for the TDU Convention Reimbursement, with appropriate interest, shall be provided to TRF by TDU

7 Use and retention of daily work sheets

The Election Officer's investigation revealed that most, if not all, of the staff keep daily time sheets on which they record their activities on an hourly basis These time sheets are then used to record time and allocations of time on the weekly activity reports The daily time sheet has far greater detail regarding the staff person's



actual activities than the activity report which contains a summary of daily activity. The Election Officer directs all staff persons to use and retain daily work sheets. These daily work sheets should be periodically reviewed, along with the staff activity reports, to insure that a complete and accurate allocation of time is maintained.

8 Formal definition of activity categories

The Election Officer's investigation revealed that TDU made efforts to orally define campaign vs non-campaign activities for staff members and that the staff generally understood what kinds of activities were included within those two broad categories. However, the staff were less familiar with the break down within the eight non-campaign categories. In order to foreclose any possible confusion regarding the categories, TDU shall draft and distribute to the staff written descriptions of the ten categories of activities listed on the activity report. Such descriptions shall be submitted to the Election Officer for review prior to their distribution to the staff.

9 Audits of TDU and TRF financial records

Neither TDU nor TRF have had their financial statements audited for 1990. In order to insure that the TDU and TRF financial statements accurately reflect the financial relationships of these two organizations, the Election Officer directs both TDU and TRF to have audited financial statements prepared including auditing with respect to the allocation system. In addition, similar financial reports for both TDU and TRF should be prepared, and audited, on a quarterly basis, for 1991. Copies of all such

audits are to be submitted to the Election Officer

**XI The Election Officer's Remedy**

The Election Officer hereby directs TDU to take the following actions to insure that its campaign activities have not, and will not, be financed, directly or indirectly, by contributions from foundations or non IBT member employers

1 TDU shall, within 30 days of the close of the date of this decision, pay to the TRF the amount of \$9,606 83 for its receipt of improper membership fees and contributions and its failure to properly calculate interest and all overhead costs

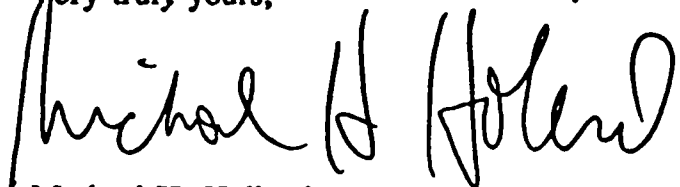
2 TDU shall immediately implement to changes to its reporting and allocation system detailed in Section X (F) of this determination including the requirements for financial auditing and the submission of such audits to the Election Officer

3 TDU shall, within 30 days of the date of this decision, recalculate its allocation consistent with its implementation of the changes required in Section X (F) of this determination, for the period for April 1990 until the present TDU shall also, within 30 days of the date of this decision, reimburse TRF, with appropriate interest, for any unpaid amounts identified by this revised allocation

4. The Election Officer shall maintain jurisdiction over TDU to insure that the modifications to the system, recalculation and reimbursement are accomplished.<sup>17</sup>

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

Election Officer

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<sup>17</sup> The Election Officer concludes that TDU's compliance with this order will cure any defect in its recordkeeping and allocation system as well as remedy any improper foundation support for TDU's campaign activities.

Walter Sargent, *et al*  
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cc Frederick B Lacey, Independent Administrator, IBT



Officer Election (the "Election Rules"), and the alleged violation of that prohibition by TDU and the Teamsters Rank and File Legal Defense and Education Fund ("TRF") in support of the campaign of Ron Carey for General President of the IBT. The Election Officer found the Election Rules were violated and ordered a remedy. The Election Officer's decision is affirmed.

#### THE PROHIBITION ON CAMPAIGN CONTRIBUTIONS

Article X, Section 1.b.(1) of the Election Rules prohibits campaign contributions from employers, foundations, trusts (including political action organizations that employ any staff and non-profit organizations that employ staff) and by labor organizations. The Election Rules broadly define a "campaign contribution" in Definition (6) at p. A-2 as follows:

The term "campaign contribution" means any direct or indirect contribution where the purpose, object or foreseeable effect of that contribution is to influence the election of a candidate . . . .

The Election Rules, as affirmed by the United States Court of Appeals for the Second Circuit, United States. v. IBT. et al., slip op., (2d Cir. April 12, 1991), contain certain exceptions to the prohibition concerning campaign contributions by employers.

Article X, Section 1.b.(2) provides that it is not violative of the Election Rules for a disinterested employer or a labor organization, other than the IBT, to make contributions for the purpose of paying "fees for legal and accounting services performed in assuring compliance with applicable election laws, rules or

other requirements or in securing, defending, or clarifying the legal rights of candidates."

Article X, Section (5) provides the following exceptions:

Nothing herein shall prohibit any candidate from accepting contributions made by any nonmember who is not an employer. Nothing herein shall prohibit any candidate from accepting contributions made by any member, whether or not such member is an employer. Nothing herein shall prohibit any candidate from accepting contributions made by any caucus or group of Union members or any campaign organization of any candidate provided that such caucus, group or campaign organization is itself financed exclusively from contributions permitted under these Rules.

This is consistent with the Election Rule's definition of the term "employer" which excepts "a caucus or group of Union members." Definition (17) at p. A-4.

Article X, Section (6) provides an additional exception:

Nothing herein shall prohibit the donation of services by an individual to a candidate rendered on the individual's personal free time without compensation in any form by any employer or labor organization and without accompanying contribution of supplies or of services of others who are compensated by an employer or labor organization for such services.

#### THE PROTESTS

As explained by the Election Officer in his decision:

On January 10, 1991, three members of Local Union 283, Arron Gully, Phil Ferretti and Anita Peek, filed a protest ("Gully protest") alleging that Donald Stone's employment by the [TRF] for campaign purposes constitutes an illegal employer campaign contribution in violation of Article X of the Rules. The original allegations in the Gully protest were supplemented on January 13, 16 and 17, 1991.

On January 25, 1991, a protest was filed by Walter Sargent, also a member of Local Union 283 ("Sargent protest"). In his protest, Sargent alleges that TRF is involved in massive funding of Ron Carey's campaign for General President of the IBT through TRF's "symbolic [sic] relationship with Carey's major support group, [TDU]." The Sargent protest was supplemented with additional factual allegations on January 30 and 31, 1991. Because the Sargent protest raised issues similar to those raised in the Gully protest, the cases were consolidated by the Election Officer under the Election Office Case Number P-249-LU283-MGN.

By letter dated February 1, 1991, the Durham [ ] Unity Team ("Durham") filed its own claim in the consolidated Gully and Sargent protest. Durham identified the basic issue in his protest as whether TDU and its legal defense arm, TRF, made prohibited contributions to the Carey campaign. The Durham submission was supplemented on March 12, 18, 22, and April 10, 23 and 25, 1991. The Durham request to participate in the consolidated protest was granted by the Election Officer.

#### THE ELECTION OFFICER'S DECISION

The Election Officer conducted an extensive investigation into these protests which involved a thorough review of TDU's books and records and four full days of depositions of TDU's principal officer, TDU's chief financial staffer and Donald Stone (the subject of the Gully protest).

The ruling of the Election Officer was summarized in his decision as follows:

Thus, except to the extent that its contributions are limited to legal and accounting services as defined in Article X §2 (b)(2) of the Rules, TDU is prohibited from making, and candidates for delegate, alternate delegate or International officer positions are prohibited from accepting, contributions if TDU is an employer, a trust, a foundation, an entity similar to a trust or foundation, or a labor organization. However,



if TDU is a caucus or organization of union members, it may make and candidates may accept contributions from it, provided that TDU's campaign activities are exclusively financed by contributions otherwise permitted under the Rules. Based on the [Election Officer's] investigation, the Election Officer concludes that TDU is not a trust or foundation or an entity similar to a trust or foundation nor is it a labor organization. The Election Officer concludes that TDU is a caucus of union members. However, TDU's campaign activities have not been exclusively financed by contributions otherwise permitted under the Rules. Thus, it has violated the Rules because it has made campaign contributions to delegate, alternate delegate and International officer candidates, including General President candidate Ron Carey, and such candidates have violated the Rules by accepting such contributions.

#### THE CHALLENGES OF THE DURHAM UNITY TEAM

##### TDU As An "Alter-Ego" of the TRF

It is not disputed that TRF is an educational and legal defense foundation which receives funding from a variety of sources including other foundations. As a foundation, it is clear that TRF is prohibited under the Election Rules from making any campaign contributions. Election Rules, Article X, Section 1.b. (1). The Durham Unity Team argues that TDU and TRF are merely "alter-egos". In short, the Durham Unity Team contends that TDU and TRF are one and the same organization and thus, since TRF is prohibited from making contributions as a foundation, it necessarily follows that TDU is similarly prohibited. In advancing this argument, the Durham Unity Team relies on the alter-ego doctrine that has been developed "to prevent employers from evading [their] obligations

altering their corporate form." NLRB v. Allcoast Transfer Co., 780 F. 2d 576, 579 (6th Cir. 1986). While the cases speak in terms of avoiding responsibility under the National Labor Relations Act, here the concern is avoiding responsibility under the Election Rules. Inherent in this argument is the suggestion that TRF and/or TDU has adopted or changed its corporate form to evade its responsibility regarding campaign contribution under the Election Rules. The Durham Unity Team's reliance on the alter-ego doctrine is misplaced.

First, the Election Rules were not implemented until April, 1990. TDU was founded in 1976 and TRF was founded in 1977. Brief for Teamsters for a Democratic Union and Teamsters Rank and File Education and Legal Defense Foundation ("TDU Brief") at p.2. Thus, it belies logic to suggest that either TDU or TRF altered its organizational form to by-pass the Election Rules' restrictions when those Rules did not come into existence until some 14-15 years later. As noted by TDU's own attorney, this is "the first time [that] TDU has endorsed a candidate for union office, and indeed a slate of candidates . . . ." TDU Brief at p. 5. To accept the Durham Unity Team's argument would be to accept the absurd premise that TDU has been acting as a shield for TRF for some 14 years waiting for just the right opportunity to funnel illegal campaign contributions to a candidate.

The fact that the alter-ego doctrine applies to "ongoing business enterprises that purport to be separate," does nothing to

strengthen the alter-ego argument. Durham Unity Team Brief at p. 9 citing Weldment Corp., 275 NLRB 1432 (1985). As stated in Weldment, "in order to find an alter ego relationship" one must consider "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the [National Labor Relations Act]." As already established, TDU and TRF were created 15 and 14 years ago respectively. The Election Rules were not created until last year. Thus, it simply cannot be said that either TDU or TRF were created to avoid any obligations under the Election Rules.

Moreover, after a comprehensive investigation, the Election Officer found that TDU and TRF are separate and autonomous organizations which pursue independent, yet sometimes overlapping, agendas. The fact that the two organizations share staff, office space and a principal officer does nothing to disturb the Election Officer's finding.

#### **TDU As A Labor Organization**

With certain limited exceptions, the Election Rules prohibit labor organizations from making campaign contributions. Election Rules, Article X, Section 1.a. The Durham Unity Team contends that TDU is a labor organization and thus falls under this proscription.

In chief support of this argument, the Durham Unity Team relies on the fact that TDU is a tax-exempt "labor organization" under the Internal Revenue Code. 26 U.S.C. §501(c)(5). The

Election Officer rejected this argument. As noted by the Election Officer in his Summary.

The Election Officer does not find TDU to be a labor organization for purposes of the Election Rules. First, that status is not accorded merely because TDU has applied for and been granted tax-exempt status as a labor organization by the Internal Revenue Service. The policies of the federal tax law with respect to tax exempt status are too dissimilar from the policies underlying the Election Rules and the Consent Order to be applicable.

TDU is not "a labor organization" as that phrase is defined in federal labor law. The Labor Management Reporting and Disclosure Act defines a "labor organization" as "any organization . . . which exists for the purpose, in whole or in part, of dealing with employers . . ." 29 U.S.C. 402(i). The tax code's definition does not include the all-important "dealing with employers" language.

In TDU's own application to the IRS for tax-exempt status it plainly states that it "is not a union," and "conducts no bargaining." Durham Unity Team Ex. 34. Simply stated, TDU does not represent employees in a traditional labor context.

As further stated by the Election Officer in his Summary:

That TDU advocates positions with respect to collective bargaining or enforcement of collective bargaining agreements does not make it a labor organization. Similarly, its institution of lawsuits against the IBT and/or employers does not make it a labor organization. By these standards, the Right to Work Committee would be a labor organization. Neither does TDU's participation in IBT elections make it a labor organization. An entity is not transformed into a labor organization by supporting a candidate who, if elected, will become the Union's chief executive officer. While the TDU seeks to influence the stance of the IBT by

publicity, leaflets, participation in Union elections, lawsuits, etc., it does not seek to supplant it; TDU as TDU does not seek to become the recognized or certified bargaining agent of any employees.

The purpose of TDU is not the purpose of a labor organization as contemplated by the LMRDA. For similar reasons, TDU is not appropriately deemed a labor organization as contemplated by the Election Rules.

#### **TDU's Status As A Caucus**

The Durham Unity Team challenges the Election Officer's characterization of the TDU as a caucus. By so doing, it is, of course, attempting to remove TDU from the exception to the campaign contribution restrictions granted caucuses by the Election Rules. Election Rules Article X, §1.(5). Relying on a narrow definition of a "caucus" found in a labor law dictionary, the Durham Unity Team asserts that "caucuses are temporary, special-purpose entities with narrowly tailored purposes." Durham Unity Team Brief at pp. 20-21.

The controlling definition of caucus for purposes of construing the Election Rules is the one ascribed to it by the Election Officer. As explained by the Election Officer in his Summary:

Durham attempts to limit the definition of caucuses to an ad hoc group of Union leaders who meet prior to conventions. The Election Officer did not intend such a limited construction of the term "caucus" in the Election Rules. In fact in many labor organizations such as the UAW and the ITU, caucuses serve a function analogous to political parties. They are mass organizations whose organizational existence transcends a particular convention, campaign or candidate. TDU is indistinguishable from such caucuses. Indeed, within the

IBT there are groups of members who are now and who have been organized for long periods of time as separate interest groups or caucuses, e.g. the Black Caucus, the Hispanic Caucus. As noted above, the Black caucus has participated as a caucus in the 1991 IBT International Union office election campaign.

#### **TDU As An Employer**

The Durham Unity Team also argues that because TDU employs staff, it is an employer and thus it is restricted under the Election Rules from making campaign contributions. In making this argument the Durham Unity Team closes its eyes to the Election Rules' definition of "employer" (Definition (17) at p. A-4), which specifically exempts caucuses. This exception is consistent with the other provisions of the Election Rules as well as the Consent Order. Paragraph D.8. of the Consent Order provides in pertinent part:

Nothing herein shall be interpreted to prohibit receipt of contributions from fellow employees and members of this International Union.

Accord, Election Rules, Article X, Section 1.b.(5) which provides in pertinent part:

Nothing herein shall prohibit any candidate from accepting contributions made by any member, whether or not such member is an employer.

A caucus, such as the TDU, is nothing more than a group of Union members, combining their efforts to advance a unifying goal. It would be inconsistent to allow members (even if they are employers) to make campaign contributions on an individual basis, but not allow them to do so when they ban together.

### THE ELECTION OFFICER'S REMEDY

The Election Officer found that a portion of TDU's campaign activities (admittedly in support of Ron Carey) were funded by indirect contributions, in the form of membership dues and individual donations. These indirect contributions came from individuals whom the Election Officer was unable to determine were permitted to make campaign contributions under the Election Rules.

The Election Officer also found that TDU had failed to properly account for, and reimburse TRF for, the use of TRF's resources in connection with TDU's campaign activities. This is, of course, an essential finding in that even though the Election Rules allow caucuses to make campaign contributions, those caucuses are themselves prohibited from receiving unlawful contributions. Election Rules, Article X, Section (5). TRF, as a foundation, cannot make contributions. Thus, if TDU used TRF resources to further its own campaign activities, TDU must compensate TRF for the use of those resources.<sup>1</sup>

The Election Officer also found that the candidates who received the benefit of TDU's campaign activity (most importantly,

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<sup>1</sup> The Durham Unity Team relies upon a 1989 letter from its General Counsel (Durham Ex. 24) to suggest that TDU receives direct contributions from foundations. Of course, if this were true, TDU would be prohibited from making contributions as a caucus, in that its foundation funding would strip it of its excepted status under the Election Rules. The fact is, however, that TDU does not receive funding from foundations. Notwithstanding the 1989 letter which suggests that TDU does receive foundation funding, the Election Officer's extensive audit of TDU's banks and records revealed no such funding. The only explanation for the 1989 letter from TDU's General Counsel is that it's inaccurate.

Carey) also violated the Election Rules as a result of their receipt of such contributions. The Election Rules were violated in this regard despite the fact that no direct financial contributions were made to any candidate, and no candidate was aware that TDU's campaign activity was funded, directly or indirectly, by ineligible contributions.

To remedy these violations, the Election Officer ordered TDU to disgorge to TRF those contributions from individuals whom the Election Officer was able to determine were permitted to make campaign contributions under the Election Rules. TDU was also directed to pay interest at market rate. The Election Officer also ordered TDU to reimburse TRF for all "in-kind contributions." These reimbursements were also to be made with interest at market rate.<sup>2</sup>

The Election Officer also meticulously scrutinized the allocation system that TDU had implemented to segregate its campaign activity from its and TRF's other activity. The Election Officer found the system to be an appropriate safeguard to insure that none of TDU's campaign activities were financed, either directly or indirectly, by TRF. The Election Officer found, however, that certain clarifications and additions to that system were necessary to insure that it fulfilled its intended purpose.

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<sup>2</sup> TDU complained that the Election Officer singled it out to pay interest when he has never done so to remedy any previous protest. Given the significant time period involved here, the imposition of interest was proper to cure the violations.



The Election Officer also determined that, in the future, he would monitor TDU's compliance with his modifications.<sup>3</sup>

Both the Durham Unity Team and TDU objected to the Election Officer's remedy. These objections will be considered in turn.

### The Durham Unity Team's Objections

The Durham Unity Team argues that the only just penalty here is the disqualification of Carey as a candidate for International General President. This call for such a severe remedy is somewhat expected since Durham himself is a contender for the General President position and would clearly benefit from having Carey disappear from the race. In advancing this argument, the Durham Unity Team relies on Article X, Section 1 of the Election Rules, which incorporates by reference Paragraph D.8 of the Consent Order and Article IV, Section 2 of the IBT Constitution. All of these

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<sup>3</sup> The Durham Unity Team makes much of the fact that Donald Stone, a TDU organizer, works part-time for the TDU in furtherance of the Carey campaign. In fact, the Durham Unity Team places great weight on the Independent Administrator's decision in In Re: Stone, 91 - Elec. App. - 38 (SA) (January 16, 1991), reversed on reconsideration (February 1, 1991), wherein it was said that Stone works for TRF solely to assist the Carey campaign. In a letter dated January 22, 1991, Mr. Levy (TDU's attorney here) wrote to the Independent Administrator stating that this statement was incorrect and that Stone "performs for TRF a variety of tasks . . ." Mr. Levy further stated that Mr. Stone's work "is in no way tied to the Carey candidacy, but to the extent that he does work on that matter, TRF does not pay for his efforts." Accord, Election officer's decision in this case at p. 25, n. 9, wherein he acknowledges that TDU reimburses TRF for employee time. Given that an allocation is made for Mr. Stone's time, it is not necessary to further examine the circumstances surrounding Mr. Stone's employment.

provisions provide that violation of the campaign contribution restrictions "shall be grounds for removal from office." The Durham Unity Team argues that "[r]emoval from office obviously includes disqualification of a candidacy." Durham Unity Team Brief at p. 27.

In calling for Carey's banishment from the IBT's political race, the Durham Unity Team ignores the fact that if I were to grant their request, Durham himself would suffer the same fate. In In Re: Committee To Elect Ron Carey (Western Conference Pension Fund), 91 - Elec. App. - 106 (SA), aff'd, United States v. IBT, slip op. (S.D.N.Y. March 13, 1991), the Independent Administrator determined that the co-chairman of the Western Conference Pension Fund had impermissibly used its resources to distribute anti-Carey campaign literature. Four of the employee trustees of the Western Conference Pension Fund were announced candidates for International Officer aligned with the Durham Unity Team. The Independent Administrator further found that the subsequent distribution of that anti-Carey campaign literature by two Local Union officers also constituted a violation of the Election Rules. Those Local Union Officers were also aligned with the Durham Unity Team. It is clear that Durham benefited from these violations. The remedy in the Western Conference Pension Fund case, however, did not implicate Durham. That remedy was directed to the parties who were guilty of the transgressions. If the Durham Unity Team's draconian demand were implemented in the Western Conference Pension Fund

matter, it would result in Durham's disqualification from the race just as Carey's disqualification would be the result here.

The Election Officer's decision not to disqualify Carey here (and not to disqualify Durham in the Western Conference Pension Fund matter) reflects a sensitivity to the severity of that remedy. To disqualify Carey would be unduly harsh. While Carey has certainly welcomed and embraced the support of TDU, there is no evidence to suggest that he had any knowledge of TDU's improper funding. Moreover, TDU never made a direct contribution to the Carey campaign. Instead, TDU has supported Carey by indirect means such as publishing pro-Carey articles in its newsletter the Convoy Dispatch and inviting him to speak at its 1990 Convention.<sup>4</sup> In short, the Election Officer's remedy is justly and narrowly drawn to cure the improprieties found.

In addition, the Durham Unity Team asks for an order enjoining the TDU from any further campaign activity. This request also

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<sup>4</sup> The TDU also invited other candidates to speak but they all declined that invitation. As for the Convoy Dispatch, the Durham Unity Team suggests that Carey did in fact directly solicit TDU's support in that publication. First it is suggested that because the TDU was selling tapes of its convention (which included Carey's speech) through advertisements in the Convoy Dispatch, Carey was benefitting directly from the proceeds of those sales. There is nothing to support that suggestion. It appears that all proceeds for that tape went directly to the TDU. In addition, the Durham Unity Team highlights the fact that the Convoy Dispatch reported that Carey invited the "support" and "financial backing" of those that attended the TDU Convention. The Durham Unity Team's reliance on these statements is disingenuous. These are mere battle cries of any candidate entrenched in a hard fought campaign and can only be reasonably interpreted as a general plea of support from the Teamster membership as a whole.

reflects an inappropriate overzealousness. There is simply no basis to enjoin Teamster members from engaging in legitimate campaign activity through their own caucus, and any attempt to do so would run afoul of the primary goal of the Consent Order -- to bring free and open democracy to this troubled Union.

The Durham Unity Team takes another exception to the Election Officer's remedy. In calculating how much money the TDU needed to disgorge to remedy its violations the Election Officer used April, 1990 as the cut-off month. The Election Officer found this date significant because the Election Rules were promulgated effective April 27, 1990. The Election Officer also found that little campaign activity occurred prior to September, 1990, when the first nominations for election of delegates held by IBT Local Unions began.

The Election Officer's approach here further reflects his careful and studied treatment of this matter, and thus it will not be disturbed.

#### **TDU's Objections**

The TDU's chief complaint concerning the Election Officer's remedy is that the Election Officer has ordered it to disgorge certain contributions, not because he found them to have been improper, but because he could not verify that they were proper. TDU "objects to being required to give up some of its funds without

having been found to have received money improperly." TDU Brief at p. 28.

As noted at the outset, the Election Officer conducted a comprehensive audit of TDU's books and records, reviewing TDU's membership and contribution lists. Where the Election Officer was unable to confirm whether such members or individual contributors were either IBT members (active or retired), or spouses of such IBT members, disgorgement was required. A similar analysis was conducted with regard to two fund-raising raffles conducted by TDU.

The Election Officer states that his remedy is proper for two reasons. First, the TDU did not include a disclaimer on its membership information or fund-raising solicitation, warning against improper contributions. In addition, many of the membership records reviewed by the Election Officer contained incorrect information on the members of their Local Union affiliation. Similarly, Local Union information for contributions was often non-existent.

The Election Officer's approach here is proper under the circumstances. It is not based on mere speculation, as TDU suggests. The Election Officer audited the TDU's membership and contributor rolls name by name and compared them to the IBT's TITAN generated membership list -- a list which was some 31,367 pages long. After completing that meticulous review, the Election Officer weighed the results against the TDU's failure to include appropriate disclaimers and the failings in its own internal

records. With all this in mind, the Election Officer concluded that to insure a fair, honest and open election, it would be best for TDU to disgorge those dues and contributions for which the Election Officer could not verify the source.

TDU suggests, in the alternate, that the matter be remanded so that it can satisfy whatever additional concerns the Election Officer has. There is no need to do so and, in fact, any remand would be wasteful and dilatory given the nature and extent of the investigation to date.

This is not a "burden of proof" issue as TDU suggests. The Election Officer did not place any impermissible burden on TDU. The Election Officer examined the totality of the circumstances and rested his conclusion against the vast background developed.

The TDU's suggestion that the Election Officer's ruling would prevent caucuses, such as TDU, from engaging in such grass-roots fund-raising activities as raffles is unduly alarming. To the contrary, the Election Officer has suggested some basic precautions which may very well protect such fund-raising drives from future attack.

Turning to another issue, the Election Officer allocated all of TDU's staff time spent at its Convention between campaign-related and non-campaign activities. He also similarly allocated all the time the staff devoted to organizing the Convention. The TDU objected to this approach arguing that:

[T]he proper treatment of such time depends on the relative quantity of campaign time spent at such meetings. Where the time spent on campaign matters is minor compared to the bulk of the meeting, and especially where campaign matters emerge only in the course of the discussion, none of the organizing time and expenses, and only such preparation time as is related specifically to the campaign, should be allocated to the TDU.  
[TDU Brief at p. 36.]

In making this argument, TDU relies on In Re: Riga, 91 - Elec. App. - 60 (February 6, 1991), in which the Independent Administrator addressed the issue of how best to deal with situations where Union officials combine business and campaign-related activities in one trip. The Independent Administrator held that in determining whether it is proper for the Union to incur the expense of such trips, the inquiry is whether the Union official would have made the trip to attend to the Union-related business, if there was no campaign-related activity also involved.

The Riga approach is misplaced here. In Riga, the Independent Administrator was faced with Union officials travelling to Union-related meetings and then leaving those meetings to attend a campaign fund-raiser. There were two distinct functions involved and the Union officials served two distinct roles at each function. Here there is an overlapping of roles that would make it difficult, if not impossible, to apply the Riga standard. The allocation system is clearly the most effective means to capture and segregate the campaign-related time.

TDU also argues that the protests regarding the allocation of TDU's campaign-related activities are untimely under the Election

Rules. The Election Rules require such protests to be filed within 48 hours of the wrongdoing. Election Rules Article XI, Section 1.a.(1)(c). TDU suggests that issues surrounding its financing were well-known for many years, prior to January, 1991, when the protests were filed. Thus, it is urged, if the protests are not dismissed, the relief ordered should only be deemed effective for the period commencing 48 hours prior to the filing of the protests.

TDU's argument here is without merit. I view the Election Officer's action here, although perhaps prompted by the protest, to fall squarely within his authority to investigate and remedy violations of the Election Rules even without a protest. Election Rules Article XI, Section 2. Thus, the Election Officer, acting pursuant to his Article XI, Section 2 power, was not limited by the timing of the protests.

#### Conclusion

For the foregoing reasons, the decision of the Election Officer is affirmed in all respects.

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

Dated: June 12, 1991