

September 11, 1996

VIA UPS OVERNIGHT

James P. Hoffa  
2593 Hounds Chase  
Troy, MI 48098

Ron Carey, General President  
International Brotherhood of Teamsters  
25 Louisiana Avenue, N.W.  
Washington, DC 20001

Bradley T. Raymond  
Finkel, Whitefield, Selik, Raymond  
Ferrara & Feldman, P.C.  
32300 Northwestern Highway  
Suite 200  
Farmington Hills, MI 48334

Re: Election Office Case No. P-857-LU170-ENG

Gentlemen:

James P. Hoffa, candidate for general president, filed a pre-election protest pursuant to Article XIV, Section 2(b) of the *Rules for the 1995-1996 IBT International Union Delegate and Officer Election ("Rules")* against Local Union 170 and its secretary-treasurer,

Richard Foley. The protester alleges that Mr. Foley, who supports the candidacy of Ron Carey for general president, terminated Al Stearns from his position as an organizer for the local union because Mr. Stearns supports Mr. Hoffa. The protester alleges that Mr. Foley terminated Mr. Stearns on July 22, 1996 just after they returned from the IBT Convention, where Mr. Stearns actively promoted Mr. Hoffa's candidacy.

Local Union 170 Secretary-Treasurer Foley responds that he terminated Mr. Stearns from his position as organizer because he did not bring sufficient newly organized members into the local union to justify the money that the local union spent on his employment. Additionally, Mr. Foley states that he believed that the union would be better served if organizing was done by the local union business agents already employed instead of by a full-time organizer. Mr. Foley took office earlier this year when his predecessor, Ernest Tusino, was suspended. Mr. Foley states that he terminated

Mr. Stearns after the Convention because the appeal of Mr. Tusino's suspension was denied by the delegates. This action removed any question of Mr. Foley's entitlement to serve as the local union's principal officer and operate the local union.

Adjunct Regional Coordinator David F. Reilly investigated the protest.

Mr. Stearns has worked as an organizer for Local Union 170 since he was hired in 1989 by then-principal officer of Local Union 170, Ernest Tusino. He describes himself as an "Ernie guy," indicating his alignment with Mr. Tusino. Since 1989, Mr. Stearns was the only full-time organizer on local union staff. Prior to 1989, organizing was done by the local union business agents. As an organizer, Mr. Stearns's duty was to bring new members into the union. Although Mr. Stearns was assigned most organizing responsibilities, business agents also regularly served as the principal organizers on campaigns. In addition to being an organizer, Mr. Stearns shared the business agent's duties for two bargaining units with Mr. Foley.

On March 14, 1996, Mr. Foley was elected secretary-treasurer at a local union executive board meeting. Prior to that time, Mr. Foley served as a local union business agent since 1983. Mr. Foley became the secretary-treasurer of the local union after the previous secretary treasurer, Mr. Tusino, was suspended from his office by the International union effective March 14, 1996. Mr. Tusino appealed his suspension to the IBT Convention held July 15 through July 19, 1996, where his appeal was denied.

The local union terminated Mr. Stearns's employment on Monday, July 22, 1996, after the IBT Convention had concluded on the previous Friday. Mr. Stearns contends that his termination was retaliatory based upon his support for general president candidate James P. Hoffa.

The **Rules**, at Article VIII, Section 11(f), prohibit "[r]etaliatio[n] or threat of retaliatio[n] by . . . any subordinate body . . . any employer or other person or entity against a Union member . . . for exercising any right guaranteed" under the **Rules**. To demonstrate retaliation, a protester must show that conduct protected by the **Rules** was a motivating factor in the decision or the conduct in dispute. Thus, the protester must show that Mr. Stearns was terminated because he supports the candidacy of Mr. Hoffa. The Election Officer will not find retaliation if she concludes that the union would have taken the same action even in the absence of the protected conduct. See Gilmartin, et al., P-032-LU245-PNJ, et seq. (January 5, 1996); Leal, P-051-IBT-CSF (October 3, 1995), aff'd, 95 - Elec. App. - 30 (KC) (October 30, 1995); Wsol, P-095-IBT-CHI (September 20, 1995), aff'd, 95 - Elec. App. - 17 (KC) (October 10,

1995). Cf., Wright Line, 251 NLRB 1083 (1980), enforced, 662 F. 2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

The *Rules* and these applicable principles require the establishment of three elements before any allegation of retaliation can be sustained:

- (1) A showing that the protester was engaged in an activity protected by the *Rules*;
- (2) A showing that the charged party had actual or constructive knowledge that the protester was so engaged; and
- (3) The activity which is protected by the *Rules* was a motivating factor in causing the adverse action.

The Election Officer has repeatedly held that the existence of a reasonable independent basis for a discharge or removal from an appointed office defeats an allegation of improper motivation, so long as such basis does not form an excuse for or is a pretext for conduct or action which is actually in violation of the *Rules*.

On the issue of protected activity, the investigation established that Mr. Stearns was an active supporter of Mr. Hoffa and that Mr. Foley was aware of this support at least as of March 14, 1996, when he became principal officer of the local union. Mr. Foley supports the candidacy of Ron Carey.<sup>1</sup>

Mr. Foley and Mr. Stearns both attended the IBT Convention. While Mr. Foley was an elected delegate, Mr. Stearns attended as a guest. During the Convention, Mr. Stearns actively campaigned on behalf of Mr. Hoffa and against Mr. Carey. Mr. Stearns states that at the Convention, he carried a sign reading "Ron Carey Sucks." Mr. Foley was aware of these activities by Mr. Stearns.

Based on the facts in this case, there is no question that the protestor engaged in protected activity and that Mr. Foley was aware of Mr. Stearns' electoral preference and campaign activity at the time of his termination. The issue that remains, then, is whether this protected activity was a motivating factor in causing Mr. Stearns' termination.

<sup>1</sup>Mr. Foley states that his political preference in the campaign for general president has not entered into his local union decision-making. He points out that in February 1996 when Mr. Hoffa visited the Worcester area to campaign, he volunteered to escort Mr. Hoffa to all of the garages where local union members work. In addition, Mr. Foley arranged with the mayor to have Mr. Hoffa presented with a key to the city.

The local union denies that its termination of Mr. Stearns was related to his protected activity. Rather, the local union asserts that it was unable to justify Mr. Stearns' continued employment based on an analysis of his financial cost to the union as compared to the results of his organizing work.

After Mr. Foley took office, the local union engaged in several efforts to reduce monthly costs and expenses. These measures have included: (1) closing the Fitchberg, Massachusetts, office, which saves more than \$450.00 per month in rent and telephone service; (2) obtaining a new trash service, which reduced yearly spending from about \$6,200 to about \$500; (3) reducing the work schedule of the local union's custodian from five days per week to three days per week; and (4) Mr. Foley's meeting with all business agents in order to review expenses and to issue new guidelines with respect to amounts being spent on trips and other normal organizing costs.

The investigation further disclosed that after his election as secretary-treasurer on March 14, 1996, Mr. Foley determined that it was not cost-effective for the local union to continue to employ Mr. Stearns as a full-time organizer. Mr. Foley provided figures during the investigation which show that from January 1994 through the first six months of 1996, Mr. Stearns brought 36 dues-paying members into the union. According to Mr. Foley, during the same period, three business agents brought in a total of 194 new dues-paying members. During the investigation, some of the business agents told the investigator that Mr. Stearns had a negative attitude and an inability "to read" people, both of which hindered his work as an organizer.

Mr. Foley also submitted figures showing that during the same 2½ year period, the expenditures of the local union for organizing, including wages and benefits paid to Mr. Stearns, totaled \$153,208.50. Mr. Foley submits that the local union's expenditures on an organizer's salary and other costs of employment during this period were much higher than the dues received from the newly organized members.<sup>2</sup>

In late-March or early-April, Mr. Foley states he asked Mr. Stearns to take on three discrete organizing campaigns at Blair House in Milford, Massachusetts, Westgate Nursing Home, and St.

<sup>2</sup>One witness stated that before the March 14 executive board meeting where he was elected secretary-treasurer, Mr. Foley, in an informal conversation in the hallway outside the meeting room with executive board members, agreed to keep Mr. Stearns on until the next local union officer election set for November 1997. Mr. Foley states that prior to the meeting he was questioned about several issues by some of the executive board members. At that time, when he was asked about Mr. Stearns' position, he stated that he would try to do everything to keep Mr. Stearns. Mr. Foley contends that when he made this statement he was unaware of the costs of Mr. Stearns' employment or the number of members he had organized.

Vincent's Hospital. Mr. Foley does not believe Mr. Stearns took any action on these assignments because he never reported back to Mr. Foley or reported on them at membership meetings.

Mr. Foley believes that the business agents employed by the local union should be responsible for organizing new members. Prior to the hire of Mr. Stearns as organizer in 1989, organizing in the local union had been done by the business agents. In reaching the decision to terminate Mr. Stearns as an organizer, Mr. Foley considered that the current business agents who were already on staff could perform organizing activities at no additional cost to the local union. He contends that most of the leads on prospective campaigns are obtained from business agents and that the International union's Organizing Department can provide organizers to the local union when needed.

Mr. Foley advised Mr. Stearns of the decision to terminate him on Monday, July 22, 1996, stating that the decision was for "financial reasons." While Mr. Foley had made the decision to terminate Mr. Stearns earlier in his tenure as secretary-treasurer, he waited until

after the IBT Convention rejected Mr. Tusino's appeal. After he knew Mr. Tusino would not be reinstated, Mr. Foley believed he could set his own priorities in running the local union.

The Election Officer finds that the local union has presented a reasonable, independent, non-retaliatory basis for its termination of Mr. Stearns. However, the analysis does not end here. Still to be addressed is whether the local union's proffered reasons for Mr. Stearns' discharge were a pretext to conceal a retaliatory motive.

The protester contends that the reasons presented by the local union are, in fact, pretextual. First, he emphasizes the timing of the decision to terminate Mr. Stearns as evidence of a retaliatory termination. He notes that Mr. Stearns had been an active and vocal Hoffa supporter at the Convention, and that his termination coincided with a promise by Mr. Foley to Mr. Carey that local union "housekeeping is now underway."

Mr. Foley denies making any "housekeeping" statement to Mr. Carey and contends that he would not make such a statement because he is well aware that his local union includes supporters of Mr. Hoffa. He further explained the delay in effectuating his decision until after the Convention as related to the finality of the removal of his predecessor, Ernest Tusino, rather than any protected activity in which Mr. Stearns engaged at the Convention. The investigator found Mr. Foley to be credible as to these statements. The Election Officer finds that no promise of "housekeeping" was made to Mr. Carey.

The Election Officer further finds it reasonable that Mr. Foley would have delayed effectuating the termination of a staff member, particularly one who was aligned with

Mr. Tusino, until after Mr. Tusino's status had been finally resolved at the Convention. The fact that the Convention was also the time when political activity in support of candidates occurred cannot insulate an employee from a decision that would have been made regardless of his political activity. The Election Officer finds that the timing of the decision in this case does not render the decision pretextual.

Mr. Stearns also contends that the reason given to him by Mr. Foley for his termination was pretextual. Specifically, he states that the local union treasury holds \$5.2 million and that there was, therefore, no financial inability to support him on staff. He argues that Mr. Foley was unwilling to reduce Mr. Stearns' salary or hours to enable him to remain an employee or to terminate a business agent, a position which has a higher salary than that of the organizer. In this regard, Mr. Stearns also cites the fact that approximately 10 months before the Convention, the International union reversed a decision of the local union during Mr. Tusino's tenure to lay off Business Agent Victor Nuzzolillo that the local contended was necessitated for financial reasons.

The Election Officer does not find that either the amount in the local union's treasury or the action taken in regard to Business Agent Nuzzolillo support a claim of pretext. The local union has not claimed a financial inability to pay Mr. Stearns, but rather that the local union was paying Mr. Stearns to be employed in a capacity not warranted by his productivity. With respect to the termination of Business Agent Nuzzolillo, the investigation disclosed that the International union had objected to the proposed lay-off of this business agent because it was not in compliance with the IBT Constitution, which required that "Any reduction in salary during a term of an elected officer in a Local Union . . . shall be made only on the basis of adverse change in financial condition as attested to by the General Secretary-Treasurer of the International Union." (emphasis added) Mr. Stearns, however, did not hold an elected position for the local union and under the local union bylaws may be terminated by the principal officer. The situation with respect to Business Agent Nuzzolillo is, therefore, not comparable.

Concerning his performance on the job, Mr. Stearns disputes the figures supplied by Mr. Foley showing Mr. Stearns has only brought 36 new members into the union from 1994 through June 1996. Mr. Stearns argues that this figure represents only those organized on campaigns for which he was solely responsible. Mr. Stearns contends, however, that Mr. Foley has failed to credit him with the additional 56 to 66 members on campaigns where he shared the work of organizing with other union staff. He states that the reason he was not always successful in organizing was that these are generally hard times for labor unions. He argues that an inference of unlawful motive is raised because he was in the middle of several active organizing campaigns when he was terminated and that his work has been reassigned to staff members with less experience and/or seniority than he had.

The Election Officer has considered the evidence presented by the local union concerning Mr. Stearns productivity and whether Mr. Foley's analysis constitutes a legitimate, non-retaliatory reason for termination. Mr. Foley presented figures showing that three other union employees serving as principal organizers on a campaign brought in a total of 194 new members during the time period reviewed. In comparison, Mr. Stearns, whose job it was to organize, admittedly brought in only 36 new members in campaigns where he was the principal organizer. This evidence establishes that it was not unreasonable for the local union to determine that its resources would be better spent utilizing business agents to perform organizing work. The fact that Mr. Stearns was terminated in the midst of several organizing campaigns is not evidence of an unlawful motive. Anytime the local union would determine to discharge an organizer, one would assume it would be while there were ongoing assignments. Moreover, the reassignment of Mr. Stearns' work to existing business agents is not unreasonable.

In considering the question of pretext, the Election Officer also evaluated evidence presented by a witness offered by the protester. This witness alleged that Mr. Foley hired another organizer in May 1996, and argues that this hiring decision belies Mr. Foley's contention that organizing should be done by business agents.

The evidence shows that in May 1996, at the request of Mr. Stearns, Mr. Foley hired a part-time organizer who was a health care professional who worked a total of 50 hours to assist Mr. Stearns on a campaign to organize health care facilities, including Blair House in Worcester, Massachusetts. Mr. Foley represents, and the evidence confirms, that this organizer was hired because of her special qualifications pertaining to one campaign for a limited period of time. There are six to eight organizing campaigns going on since the time of Mr. Stearns' termination, all being handled by business agents or Mr. Foley. Thus, the Election Officer finds that the hiring of this temporary organizer during May 1996 does not contradict the reason given for Mr. Stearns' termination and does not constitute evidence of pretext.

The Election Officer has examined this evidence in this case closely to determine whether there is evidence of pretext either in the timing of the discharge or the reasons offered for Mr. Stearns' termination. Based upon the evidence presented, the Election Officer finds that Mr. Stearns' termination by the local union was not in retaliation for his exercise of rights under the *Rules*. The Election Officer concludes that the local union would have taken the same action to terminate Mr. Stearns, even in the absence of Mr. Stearns' protected conduct. See Gilmartin, supra; Leal, supra; Wsol, supra.

Accordingly, the protest is DENIED.

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Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within one day of 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:

Kenneth Conboy, Esq.  
Latham & Watkins  
885 Third Avenue, Suite 1000  
New York, NY 10022  
Fax (212) 751-4864

Copies of the request for hearing must be served on the parties listed above as well as upon the Election Officer, 400 N. Capitol Street, Suite 855, Washington, DC 20001, Facsimile (202) 624-3525. A copy of the protest must accompany the request for a hearing.

Sincerely,

Barbara Zack Quindel  
Election Officer

cc: Kenneth Conboy, Election Appeals Master  
David F. Reilly, Adjunct Regional Coordinator