

April 19, 1999

VIA FACSIMILE

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Re: Incumbent Status of Southern Region Vice-President Seat

Gentlemen:

On March 23, 1999, Aaron Belk, previously elected as a Southern Region Vice-President and a candidate for Southern Region Vice-President in the regional rerun election now underway, wrote to Election Appeals Master Kenneth Conboy asking for an opinion as to who, if anyone, occupied the Southern Region Vice-President position pending completion of the election. The Election Appeals Master wrote back to Mr. Belk on March 24 stating that he was not empowered to issue the type of advisory ruling sought.

The Election Officer has since received a copy of Mr. Belk's letter, and has received additional submissions from the International Brotherhood of Teamsters ("IBT") and from

counsel to Doug Mims on the merits of the question presented. Particularly because the IBT has asked for the Election Officer's guidance on this issue (which arose as a result of a remedy issued under the Rules for the 1995-1996 IBT International Union Delegate and Officer Election ("Rules")), the Election Officer has decided to address Mr. Belk's question. For the following reasons, the Election Officer determines that Mr. Belk presently occupies the Southern Region Vice-President position that is the subject of the regional rerun election.

#### I. Facts

Aaron Belk and Doug Mims were the winning candidates for the two Southern Region Vice-President positions in the initial 1996 IBT International officer election. Mr. Belk received 20,765 votes, 21 more than the 20,744 votes cast for Mr. Mims. Mr. Belk, Mr. Mims and other candidates on the Ron Carey Slate were installed in office before certification of the results and pending completion of a post-election protest investigation. *United States v. IBT*, 957 F. Supp. 55 (S.D.N.Y. 1997). The initial election was not certified (except for Central Region Vice-Presidents) and, ultimately, Mr. Belk and Mr. Mims held office subject to the results of the International officer rerun election. The ballot count for Southern Region Vice-President in the 1996 IBT International officer rerun election was as follows:

Name (Slate)	Votes
J.D. Potter (Hoffa)	14,106
Ken Wood (Hoffa)	14,388
Mike McGowan (Leedham)	13,103
Doug Mims (Leedham)	12,970
Aaron Belk (Independent)	838

On January 28, 1999, the Election Officer issued a ruling that proposed certifying election results for all International officer positions except for Teamsters Canada Vice-Presidents and one Southern Region Vice-President. *DeBella*, PR-409-JC18-NYC (January 28, 1999). The Election Officer withheld certification of one Southern Region Vice-President

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based on findings of serious misconduct by a candidate, J.D. Potter, and ordered the following remedy:

Mr. Potter is disqualified from taking office as an IBT Southern Region Vice President. One General Executive Board seat for Southern Region Vice-President will be declared vacant upon the certification of the election results.

DeBella, PR-409-JC18-NYC at 74. The Election Officer proposed to certify one Southern Region Vice-President position as vacant solely for the purpose of creating a vacancy that could be filled by appointment. Relying on his broad remedial authority under the March 14, 1989 Consent Decree (and not federal labor law), the Election Officer justified the remedy as follows:

The balloting shows clearly that the majority of voting Teamsters decided for this election to entrust the Hoffa Slate with the IBT's elective offices. By certifying the election results with one Southern Region Vice-President's seat as vacant, Mr. Hoffa and the General Executive Board would then have the authority to fill that slot. See IBT Constitution, Art. VI, § 1(a). This is the same process that would be followed if Mr. Potter were seated [and] were then removed from office. Using this remedy, the voters' intent is served by allowing the slate of officers they elected to fill the seat with an officer who holds views consistent with the other elected individuals. It is reasonable to implement this remedy now given that the next rank-and-file vote for IBT International officers must occur, under the IBT Constitution, before the end of 2001. The Election Officer has determined that this remedy is specifically appropriate to this very unique situation. The violation warrants disqualification of Mr. Potter; it affects only one of the seats to be filled by the election; there is a method available to fill the vacancy that will be consistent with the voter's intent; and it is appropriate to exercise this extraordinary authority so that the IBT will have at least a brief respite from four years of election activity before the next cycle begins. Accordingly, the Election Officer will certify the election results with this Southern Region

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Vice-President seat as vacant. The seat may be filled according to the procedures specified in the IBT Constitution, Art. VI, § 1(a).

Id. at 53-54 (footnote omitted).

On appeal, the Election Appeals Master affirmed the disqualification of Mr. Potter, but overruled the Election Officer's remedy of allowing the elected General Executive Board to fill that seat after installation. In re DeBella, 99-Elec. App.-424 (KC) (February 23, 1999) at 18. The Election Appeals Master ordered a rerun election for one Southern Region Vice-President as the remedy for the determination not to certify Mr. Potter as elected. Id. at 19. The Election Appeals Master held that under the "unique circumstances" of Mr. Potter's disqualification it would not be appropriate to allow the General Executive Board (largely the Hoffa Slate) to fill the Southern Region Vice-President seat from which Mr. Potter was disqualified. Id. at 19. The Election Appeals Master found that:

- 1) Mr. Potter's violation may have affected the outcome of the election;
- 2) the Election Officer had funds available to apply towards the expenses of a limited rerun election; and
- 3) there was insufficient evidence to support the Election Officer's finding that voter intent, as reflected by slate voting, would be served by allowing the "winning slate" to fill the seat. Id. at 18-20. The Election Appeals Master also stated that the democratic imperatives of the March 14, 1989 Consent Decree would be best served by a rerun election. Id. at 20-22. Summing up his ruling, the Election Appeals Master wrote: "For the several reasons discussed above and in the interest of promoting a free, fair, and honest election, a rerun election should be held to fill the seat of Southern Region Vice-President left open by the disqualification of Mr. Potter." Id. at 22.

On March 19, 1999, the United States District Court for the Southern District of New York affirmed the Election Appeals Master's ruling in all respects. *United States v. IBT*, 88 Civ. 4486, Opinion & Order (S.D.N.Y. March 19, 1999). In discussing the remedy for the disqualification of Mr. Potter, the Court specifically affirmed the Election Appeals

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Master's decision to order a rerun election for that seat and concluded that the Election Officer's initial remedy exceeded the authority of the Rules. *Id.* at 12-15. After observing that "the Election Officer's remedies cannot be inconsistent with the Election Rules absent a proper basis," *id.* (emphasis added), the District Court explained that, on the facts presented, the governing provision required a rerun election:

Article XIV, § 5 of the [Rules] provides that "[s]hould the Election Officer refuse to certify any election, [he] shall then immediately order that a rerun election be held, including, if necessary, the rerunning of the nomination process." [Rules], Art XIV, § 5. By disqualifying Potter, the Election Officer necessarily refused to certify the results of the election for Potter's Southern Region Vice President position. The Election Officer did not provide, nor would there appear to be, an appropriate basis for departing from the Election Rules that require a rerun election. Thus, the Election Officer's decision to permit the GEB to fill the position by appointment was an abuse of his discretion, and therefore, the Court finds that the Election Appeals Master was correct in ordering the Election Officer to hold a rerun election to fill the vacancy.

*Id.* at 15. Throughout its discussion of this remedy, the District Court refers to the Southern Region Vice-President position at issue in the rerun election as "vacant," or to the existence of a "vacancy" in that position. *Id.* at 11-15.

The Election Officer certified election results on March 19, 1999, pursuant to the District Court's decision. One Southern Region Vice-President was certified (Ken Wood) and no mention was made of the other Southern Region Vice-President position. The elected and certified candidates were sworn into office on March 22, 1999.

On Monday, March 22, 1999, General President Hoffa and General Secretary-Treasurer Keegel sent a joint letter to Aaron Belk, a Southern Region Vice-President, stating that his "term of office as an International Vice President expired in accordance with Article IV, Section 1(d) of the International Constitution."\_ Mr. Belk's letter questioning this action

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followed.

## II. Analysis and Conclusion

Mr. Belk contends that he should continue as an incumbent Southern Region Vice-President during the rerun election because “he received the most votes in the 1996 election . . .” Mr. Mims contends that he should continue as an incumbent Southern Region Vice-President during the rerun election because he received the most votes in the last certified election of IBT International union officers (1991). The IBT contends that the position should be held vacant pending the completion of the regional rerun election because the Election Officer certified the seat as vacant, and, despite their overruling of the Election Officer’s remedy for filling the seat, the decisions of the Election Appeals Master and the District Court should be read to leave undisturbed the determination that the seat is now “vacant.”

The Election Officer is empowered to supervise the International officer election and “is authorized and obligated to certify election results.” Rules, Art. I. The Election Officer exercised his supervisory authority in DeBella to disqualify J.D. Potter, and declared the position of Southern Region Vice-President vacant so that it could be filled under Article VI, § 1(a) of the IBT Constitution. The Election Officer’s declaration of the vacancy depended upon recognizing that the General Executive Board had the power to fill the position by appointment. When the Election Appeals Master and the District Court held, on the facts presented, that the position could not be filled by appointment and the election had to be rerun, that eliminated the need under the Election Officer’s remedy to certify the position as vacant.

The District Court noted that the Election Officer’s remedy allowing the elected officers to fill one Southern Region Vice-President position by appointment was not authorized under the Rules, which require the Election Officer either to certify election results or, if results cannot be certified, to order a rerun election. Rules, Art. XIV, § 5. It should be noted

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that this provision is rooted in federal labor law, which requires international unions to elect officers "not less often than once every five years," 29 U.S.C. § 481, and which allows an office to be filled by appointment only if it becomes vacant "between such regular elections." 29 C.F.R. § 452.25. The term of the IBT International officers elected in 1991 expired long ago, and under federal labor law the union must fill these positions by election, not appointment. There has not been a certified incumbent for this one Southern Region Vice-President position since the 1991 election (although the District Court installed officers in 1997 subject to the completion of the post-election protest investigation).

Whether the Consent Decree provides independent authority for an election rule that would allow a position to be certified as vacant, and to be filled by appointment, is a question of academic interest here because the Election Appeals Master and the District Court have overruled the Election Officer's remedy under the present Rules, and on these facts.

The change in the remedy requires the Election Officer to consider the effect on incumbent officers of certifying the election of less than the number of winning candidates for a particular office. As noted, the IBT Constitution sets the term of international officers at five years "and until their successor is qualified and sworn." IBT Constitution, Art. IV, § 1(d). With the swearing in of Ken Wood as an elected and certified Southern Region Vice-President, one incumbent officer was displaced. No successor has been "qualified and sworn" for the second Southern Region Vice-President position, however, and, under the IBT Constitution, the incumbent continues in that seat. By following this rule, members in the Southern Region will have their full complement of General Executive Board representation during the regional rerun.

Neither the IBT Constitution nor the Rules contains a provision that defines one Southern Region Vice-President seat as "senior," or that speaks specifically to determining the order in which equal positions are deemed filled after an election. Counsel for Mr. Mims has pointed out that Article VI, § 8(a), which sets the order of succession to the office of

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General President in case of vacancy between elections. It provides that if the Secretary-Treasurer is ineligible to fill the vacancy, the General Presidency would go to the union-wide officer elected with the highest number of votes. Using that analogy, the incumbent of the Southern Region Vice-President position subject to this regional rerun election would be the officer that received the most votes in the election preceding the one now being rerun.

In this case, the initial 1996 IBT International officer election is the most recent election preceding the Southern Region contest that is now being rerun. Aaron Belk received the highest number of votes for Southern Region Vice-President in that election. Accordingly, Mr. Belk holds the Southern Region Vice-President position as the incumbent pending the outcome of this regional rerun election.

Mr. Mims argues that the results of the uncertified 1996 International officer election have no significance here, and that the Election Officer should revert to the 1991 International officer certified election (where he received more votes than Mr. Belk) as the most recent "legitimate election." The District Court, however, did not continue the officers elected in 1991 as incumbents during the 1996 post-election protest and rerun election. Instead, the Court installed officers based on the uncertified 1996 results, and those officers continued in their positions on the basis of that installation until their successors were "qualified [on March 19, 1999] and sworn [on March 22, 1999]." The 1996 initial election ballot count therefore provides the basis for determining the hierarchy of officers sitting in equivalent positions during the rerun election. The Election Officer has no basis now to revise the District Court's installation of officers based on the initial 1996 IBT International officer election results and declare that incumbency during the recent rerun election was based on ballots cast in 1991.

Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within one (1) day of receipt of this letter. The parties are



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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, 444 N. Capitol Street NW, Suite 445, Washington, D.C. 20001, facsimile (202) 624-3525. A copy of the protest must accompany the request for a hearing.

Sincerely,

Michael G. Cherkasky

Election Officer

cc: Kenneth Conboy, Esq.

\_ Mr. Belk and Mr. Mims ran as incumbents in 1996. In the certified 1991 IBT International officer election Mr. Mims received 16,465 votes, and Mr. Belk received 16,308 votes.

\_ The IBT Constitution defines the International officers' term of office, in pertinent part, as follows: "The term of office of all International Union officers shall be five (5) years, or the interval between regular Conventions, whichever is the longer, and until their successor is qualified and sworn . . ." Art. IV, § 1(d).