

OFFICE OF THE ELECTION SUPERVISOR
for the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

IN RE: ELIGIBILITY OF)	Protest Decision 2011 ESD 98
JAMES SWAIN, TERRINGUS)	Issued: February 5, 2011
WALKER, MICHAEL HICKS,)	OES Case No. E-010-010611-AT
and ADDY ANDREWS,)	
)	
Local Union 639.)	
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Anthony Smith, member and recording secretary for Local Union 639, timely filed an eligibility protest pursuant to Article XIII, Section 2(b) of the Rules for the 2010-2011 IBT International Union Delegate and Officer Election (“*Rules*”). The protest alleged that James Swain and Terringus Walker, candidates on the Dues Too Damn High Slate, were ineligible for nomination as delegates or alternate delegates to the 2011 IBT Convention because they did not meet the 24-months continuous good standing requirement under the *Rules*. In addition, the protest challenged the validity of the nominations of Michael Hicks and Addy Andrews for delegate, as their nominations were seconded by Walker, who the protest claimed was ineligible to do so because his dues were not paid through the month prior to the nominations meeting.

Election Supervisor representative Kathryn A. Naylor investigated this protest.

Findings of Fact and Analysis

Article VI, Section 1(a) of the *Rules* provides that “to be eligible to run for any Convention delegate, alternate delegate or International Officer position, one must: (1) be a member in continuous good standing of the Local Union, with one’s dues paid to the Local Union for a period of twenty-four (24) consecutive months prior to the month of nomination for said position with no interruptions in active membership due to suspensions, expulsions, withdrawals, transfers or failure to pay fines or assessments; (2) be employed at the craft within the jurisdiction of the Local Union for a period of twenty-four (24) consecutive months prior to the month of nomination; and (3) be eligible to hold office if elected.

Local Union 639 held its nominations meeting on January 4, 2011. Accordingly, the 24 month period during which candidates must be in continuous good standing in order to be eligible for nomination ran from January 2009 through December 2010.

1. James Swain – Eligible

The TITAN records for Swain indicate that he was on check-off with his employer, UPS, and that his dues were timely paid each month during the eligibility period with the exception of October 2010. Swain explained that he was out of work on workers compensation from September 4 through October 25, 2010. TITAN records and Swain’s pay statement confirm that on September 10, 2010, he was paid for earnings for the week of August 29, 2010 through September 4, 2010, and that a timely check-off remittance for September 2010 was made to the local union. Also, Swain’s pay statement confirms that on November 5, 2010, he received

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sufficient earnings for the week of October 24-30, 2010, to fund his monthly dues obligation, and that a timely check-off dues remittance for October 2010 was made from these earnings. It is well-settled that a member on dues check-off retains her good standing even if her dues were remitted late or not at all by the employer, provided she had signed a check-off authorization and had sufficient earnings or paid leave in the month from which dues could have been deducted. IBT Constitution, Article X, Section 5(c); *Eligibility of John Gerow, et al.*, 2006 ESD 121 (March 2, 2006); *Eligibility of Thiel*, 2010 ESD 16 (July 26, 2010), *appeal withdrawn*, 10 EAM 4 (August 6, 2010). Accordingly, we find Swain ELIGIBLE for nomination as delegate to the 2011 IBT convention.

2. *Terringus Walker -- Eligible*

Walker's TITAN records show several gaps in his dues payment history for the 24 months at issue, including the issuance of a withdrawal card and two suspensions of his membership.

Walker explained that he was laid off on or around November 18, 2008 from Sheehan Pipe Line, as a result of undue interference by Local Union 639, and that he filed successive NLRB unfair labor practice charges against Local Union 639, which culminated in two settlement agreements.

Walker and Local Union 639 separately provided copies of the relevant settlement agreements and the remedial notice postings that were provided for in the agreements. Both agreements contained non-admission provisions whereby Local Union 639, "by entering into this Settlement Agreement, [as] the Charged Party does not admit that it has violated the National Labor Relations Act." However, as relevant here, the remedial notice that was signed by a representative of Local Union 639 and posted at Sheehan Pipe Line expressly required that Local Union 639 refrain from the following: (1) asking employees for cash tips in order to avoid layoff or for any other unlawful reason; (2) causing the termination of employment or layoff of Walker because he crossed a picket line, or for any other unlawful reason; (3) refusing to handle the grievance of Walker relating to his layoff because he crossed a picket line; and (4) refusing to refer Walker to work because he crossed a picket line. Also, the notice stated that Local Union 639 was required to refer Walker to work in the same way that the local union would refer work to any other similarly situated individual.

With respect to the genesis of second settlement agreement, Walker stated he filed additional charges against Local Union 639 since it failed to refer him to work for Dulles Transit Partners, LLC, as required by the terms of the first settlement agreement. In this respect, the complaint filed by the NLRB against Local Union 639 alleged that "from on or about October 26, 2009, until on or about May 6, 2010, Local Union 639 had failed and refused to refer Walker to employment with any employer signatory to the Heavy and Highway Construction Project Labor Agreement," which included Dulles Transit Partners, LLC. As relevant here, the remedial notice posted pursuant to the second settlement agreement required Local Union 639 to refrain from the following: (1) maintaining with Dulles Transit Partners, or any other employer under the Heavy and Highway Construction Project Agreement, an exclusive hiring hall system without objective criteria for referral of employees for employment; (2) maintaining with Dulles Transit Partners, or any other employer under the Heavy and Highway Construction Project Agreement, an exclusive hiring hall system without adequately notifying employees of the rules,

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criteria, and procedures used for referral of employees for employment; (3) refusing to refer Walker or any other employee to employment with Dulles Transit Partners, or any other employer under the Heavy and Highway Construction Project Agreement, because they crossed a picket line or for arbitrary, invidious or capricious reasons.

Both of the agreements and notices required Local Union 639 to make Walker whole for any loss in wages and benefits he suffered as a consequence of Local Union 639's refusal to refer work to Walker. However, neither the settlement agreements nor the remedial notices stated or specified the timeframes that the back pay awards covered. Our investigator interviewed the NLRB attorney who handled these unfair labor practice cases, and she verified that the backpay award under the first agreement covered the period from November 19, 2008 through October 26, 2009, and the backpay award under the second agreement covered the period from November 30, 2009 through May 9, 2010. Also, the NLRB attorney noted that as a settlement the make-whole remedy constituted 80% of the earnings that Walker would have received.

In addition, the Complaint and Notice of Hearing the NLRB issued alleged that from on or about October 26, 2009, until on or about May 6, 2010, Local Union 639 had failed and refused to refer Walker to employment with any employer signatory to the Project Labor Agreement, including Dulles Transit Partners. Smith noted that the Local Union determined that November 19, 2009 was the first day that Walker could have been referred to work at Dulles Transit Partners and that the timeframe for the backpay under second settlement was made on that basis.

With respect to his dues payment history, Walker confirmed that while he was employed by Sheehan Pipe Line, he paid his dues to Local Union 639 in cash. Walker acknowledged that he decided not to pay dues in November 2008, December 2008 and January 2009, in light of the local union's alleged role in his layoff and refusal to pursue his grievance challenging the layoff.

Walker confirmed that he made the cash dues payment on February 4, 2009. Walker stated he made this dues payment the same day as a local union executive board meeting held to address his grievance that challenged his layoff from Sheehan. His TITAN records reflect payment of one month's cash dues on this date, which were applied to his arrearage from November 2008.

Walker's TITAN shows also that an honorable withdrawal card was issued on February 4, 2009. It was deposited on May 21, 2009, the same date he made a cash payment of one month's dues. This payment was credited to dues for May 2009. Walker claimed that he actually attempted to pay dues in late February 2009; however, the local union refused to accept them. Walker claimed that the dues posted to TITAN on May 21, 2009 were actually the dues he attempted to pay in late February 2009.

His TITAN shows no dues payments in the months June 2009 through November 2009. TITAN indicates that the first suspension was imposed on October 13, 2009 and lifted on October 20, 2009, and that the second suspension was imposed and lifted on December 3, 2009. TITAN reflects the following cash payments: (1) \$230 on December 3, 2009 covering dues for approximately three and a half months; (2) \$65 on January 6, 2010 covering dues for one month; and (3) \$129.75 on March 15, 2010 covering nearly two months of dues. According to TITAN,

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with the payment on March 15, 2010, Walker was paid through March 2010. There was no dues payment in April 2010.

In May 2010, Walker commenced working for his present employer, Dulles Transit Partners, LLC, and is on check-off with this employer. His TITAN records reflect check-off remittances from Dulles Transit Partners made on the following dates prior to the nomination meeting: June 15, 2010; July 21, 2010; August 19, 2010; September 20, 2010; and October 25, 2010. In this respect, the TITAN reflects that Walker was paid through August 2010 with the check-off remittance posted on October 25, 2010. There were no postings for check-off remittances in November and December 2010.

It is well established that where a member on check-off is discharged and subsequently reinstated with back pay, the member's eligibility will turn on whether the back pay attributes earnings to months for which no dues were paid. *Thompson*, E20 (January 18, 1996), *aff'd*, 96 EAM 63 (January 29, 1996). In particular, where a check-off employee is discharged for misconduct but subsequently reinstated with back pay as a result of a grievance, the member is "deemed to have had income from which dues could have been deducted" in the months covered by the back pay award.

Under this precedent, the backpay award was paid by the *employer*, not the union, because the employer was at fault for discharging the member improperly. By contrast, Walker's backpay came from the local union, which was accused of violating Walker's statutory rights to refrain from collective action. We do not believe that this distinction, standing alone, compels a different treatment of the backpay award.

We reach this conclusion even though the settlement agreements provide that the local union "does not admit that it has violated the National Labor Relations Act." Although no violation was found and no concession occurred, the local union agreed to a settlement under which it paid Walker substitute wages for the periods of unemployment and would further make him whole regarding any benefits. We conclude that the "make whole" commitment from the local union included recognizing the backpay award as wages from which Walker would have paid dues. The directions to the local union in the notice postings, including the requirement for fair referral, link the local union's conduct to Walker's lost wages. We accept that there is no finding of a violation under the National Labor Relations Act; such a finding is not necessary to an independent factual finding that the local union's conduct interrupted Walker's wages: having caused that loss, the local union equally interrupted the dues stream from Walker. On these particular facts, making Walker whole includes recognizing the local union's settlement payment of substitute wages as a source for backpayment of dues as well.

We therefore find that Walker had income from which dues could have been deducted in the months covered by the back pay award which fall within the relevant 24 months from January 2009 through May 2010. Therefore, Walker is deemed to have retained his continuous good standing from January 2009 through May 2010, the period covered by the back pay under the settlement agreements, notwithstanding the local union's issuance of a withdrawal card and two suspensions of membership reflected on his TITAN.

With respect to the balance of the 24 month eligibility period, we find that Walker was on check-off authorization commencing June 2010 and continuing through December 2010. With

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respect to those months, his TITAN records reflect check-off remittances from Dulles Transit Partners made on the following dates prior to the nominations meeting: June 15, 2010; July 21, 2010; August 19, 2010; September 20, 2010; and October 25, 2010. Given our holding with respect to the backpay awards, these check-off remittances were attributable to June, July, August, September and October, respectively. No dues were remitted or posted for Walker for November or December, but he provided pay stubs that verified that he had sufficient wages in both of those months to fund his monthly dues obligation. Given Walker's status as a check-off employee and his earnings in those months in excess of his dues obligation, the failure of the employer to deduct and remit will not serve as an interruption in his continuous good standing.

For these reasons, we find Walker ELIGIBLE for nomination as delegate to the IBT convention.

3. *Michael Hicks and Addy Andrews – Eligible*

The protest further alleged that the nominations for Hicks and Andrews as delegates were invalid because the person who seconded their nominations, Walker, was ineligible to do so. To be eligible to nominate or second a nomination, a member must be "in good standing, with his/her dues paid through the month prior to the nominations meeting." Article II, Section 5(h). As such, in order to be eligible to nominate and second other candidates running for delegate or alternate delegate, Walker's dues had to be paid through December 2010, prior to the nomination meeting. As noted above, Walker was deemed paid through December 2010, and therefore, was ELIGIBLE to second the nominations of Hicks and Andrews.

Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within two (2) working days of receipt of this decision. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Supervisor in any such appeal. Requests for a hearing shall be made in writing, shall specify the basis for the appeal, and shall be served upon:

Kenneth Conboy
Election Appeals Master
Latham & Watkins
885 Third Avenue, Suite 1000
New York, NY 10022
Fax: (212) 751-4864

Copies of the request for hearing must be served upon the parties, as well as upon the Election Supervisor for the International Brotherhood of Teamsters, 1801 K Street, N.W., Suite 421 L, Washington, D.C. 20006, all within the time prescribed above. A copy of the protest must accompany the request for hearing.

Richard W. Mark
Election Supervisor

cc: Kenneth Conboy
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