

OFFICE OF THE ELECTION SUPERVISOR
for the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

IN RE: HOFFA-HALL 2016,)	Protest Decision 2015 ESD 11
)	Issued: July 22, 2015
Protestor.)	OES Case No. P-012-071315-SO
<hr/>)	

Hoffa-Hall 2016 filed a pre-election protest pursuant to Article XIII, Section 2(b) of the Rules for the 2015-2016 IBT International Union Delegate and Officer Election (“*Rules*”). The protest alleged that members solicited accreditation signatures on work time and in work areas in violation of the *Rules*.

Election Supervisor representative Dolores Hall investigated this protest.

Findings of Fact

Article X of the *Rules* permits candidates and slates of candidates for International office to seek accredited status by which they may publish campaign material in *Teamster* magazine and obtain a union-wide membership list to be used to advance their candidacies for International office. To obtain accredited status, each such candidate or slate must obtain signatures on petitions of at least 2.5% of the membership of the union-wide or regional membership pool applicable to the office sought. Solicitation of accreditation signatures constitutes campaign activity because it “solicit[s] support for a member’s candidacy.” Article VII, Section 12(a). Generally, campaign activity may not occur on time paid for by the employer, with exceptions for paid rest and lunch breaks and for campaigning incidental to work.¹ Further, campaigning generally may not occur in employer work areas absent a pre-existing right to do so. [Kozubowski](#), 2010 ESD 61 (December 22, 2010).

The protest alleged that two members solicited accreditation signatures for Teamsters United at YRCW in Houston, TX, an employer under the jurisdiction of Local Union 988, on or about July 7, 2015.

Investigation showed that the solicitation occurred on Sunday and Monday, July 5 and 6, not on July 7 as the protest asserted. On Sunday evening, July 5, Tim Pagel, a rank-and-file member, and John Palmer, a candidate for IBT vice president – South region, solicited accreditation signatures at the YRCW-Houston worksite. Evidence shows that the solicitation by Pagel and Palmer occurred between the hours of 6 p.m. and 8 p.m. The next evening, Monday, July 6 starting at about 6:30 p.m., Pagel solicited at the same location, this time without Palmer. The details of these solicitations are as follows.

Pagel told our investigator that during the week of June 29, he spoke with YRCW terminal manager Daron Cathey and advised him that the international officer election was starting up again and that he intended to campaign. Pagel said he asked Cathey about campaigning on the loading dock, and Cathey replied that there was no question that Pagel could use the break areas (both inside and out) for campaigning but could not campaign on the loading dock. Pagel said that he and Cathey discussed a protest from the last campaign that arose at YRCW-Houston because he wanted to clearly understand

¹ “No candidate or member may campaign during his/her working hours. Campaigning incidental to work is not, however, violative of this section. Further, campaigning during paid vacation, paid lunch hours or breaks, or similar paid time off is also not a violation of this section.” Article VII, Section 12(a).

what limits Cathey would enforce. Cathey repeated that he had no problem with Pagel campaigning in the outside break area, a collection of picnic tables under an open air shelter. It is one of two break areas provided for employees, the other being inside the terminal and upstairs.

The protest from the last election that Pagel said he brought up with Cathey was *Pope*, 2011 ESD 352 (October 31, 2011). In that case, Cathey restricted Pagel's campaign activity to areas outside the main gate and in the employee parking lot across the street from the terminal; on the same day, however, Tyson Johnson, a candidate on the Hoffa-Hall 2011 slate, and others that accompanied him campaigned in the outside break area that is situated well inside the main gate and adjacent to the loading dock. We held that the different treatment of the opposing campaigners constituted impermissible discrimination under the *Rules*.

Pagel told our investigator that he told Cathey that he planned to bring Palmer to the Houston terminal to campaign, and he asked Cathey expressly about allowing Palmer into the outside break area to campaign. Pagel explained that Palmer was not a YRCW employee but was a candidate for International office, and in those respects was similar to Tyson Johnson when he campaigned in the outside break area in 2011. Pagel said that Cathey approved of allowing Palmer into that area to campaign.

Palmer told our investigator that he and Pagel arrived at YRCW-Houston at about 6 p.m. Sunday, July 5, entered the facility and proceeded to the outside break area. Enroute to the worksite, Palmer said Pagel told him that the terminal manager had said campaigning in the outside break area was permitted. When the two arrived at the outside break area, Palmer recognized it as a location where he campaigned for Ron Carey in 1995. Palmer said that he and Pagel distributed campaign literature and obtained petition signatures in the outside break area until about 8 p.m., when they left. During the time at YRCW-Houston that evening, Palmer stated that no one told them that they were not permitted there or were violating the *Rules* by being there. Terminal manager Cathey, a Monday through Friday employee, was not present when Palmer and Pagel campaigned on Sunday evening.

Pagel confirmed these details of the July 5 campaigning at YRCW-Houston, which he said occurred on his scheduled day off.

Quincy Norris, a forklift operator on the dock at the Houston terminal, told our investigator that he and several other members were in the inside break room Sunday, July 5 before their 7 p.m. starting time when Tim Pagel entered, said that he had a man outside he wanted them to meet, and invited them to the outside break area.

Raul Gonzalez, a dock worker, told our investigator he passed Pagel and Palmer in the outside break area when he was heading in to the time clock for his 7 p.m. shift. Palmer walked up and said, "Hi, my name is Palmer." Gonzalez cut him off, saying, "Not now, man, I have to clock in." He told our investigator it was 6:59 when this exchange occurred.

Ted Rivers, a YRCW driver who presently works the loading dock at the Houston terminal, told our investigator that he observed Palmer and Pagel when he reported for work on Sunday, July 5 at 7 p.m. He said that when he passed the table in the outside break area where Palmer and Pagel were set up and headed for the time clock to punch in, Palmer followed him up the steps onto the loading dock and asked him to sign a petition. Rivers declined.

The next night, July 6, Pagel again campaigned in the outside break area, this time alone. Pagel was working his regular 1:00 p.m. to 10 p.m. shift that day. He stated he normally takes his break in the outdoor break area. He gets thirty minutes for lunch and two ten minute breaks. He said the employer permits employees to combine their breaks with their lunch period, and he did so on July 6.

Pagel stated that the usual break for lunch falls between three and six hours after starting work, the timing of lunch at the employee's discretion subject to immediate work volume. He stated he took his lunch break starting at around 6:30 on July 6, choosing that time because most of the drivers were going home then and the dock workers were arriving for their shift. They all passed the outdoor break area when arriving for and leaving work.

Pagel said he brought his lunch to the outdoor break area and asked people arriving for or getting off work to sign the petition. He said he was there about 40 minutes just eating his lunch, with his clipboard at hand. He said he chatted with members as they passed, in between bites. Photos supplied by the protestor show Pagel seated at a picnic table with a plate and fork before him and a corn cob at his right hand; he is clearly on a meal break. Also depicted in the photos is a clipboard containing an accreditation petition with several lines of signatures filled in.

Rivers, who saw Pagel and Palmer in the outside break area the previous evening, saw Pagel there again on July 6. This time he approached Pagel and asked him if he was special, that the *Rules* didn't apply to him. He phoned Dan Morris to tell him what Pagel was doing, then he took photos of Pagel with his phone and emailed or texted them to Morris. Morris is vice president of Local Union 988 and a pick-up and delivery driver for YRCW-Houston. Shortly, Morris appeared, saw Pagel in the outside break area with his plate, fork, corncob, and petition clipboard, approached him and said, "You know you can't campaign here" because Tyson Johnson had violated the *Rules* for doing the same thing in the last election. Pagel said he replied to Morris that he had discussed campaigning at that location with terminal manager Cathey and gotten Cathey's permission.

Photos that Rivers took depicted Mike Perrotte, a YRCW employee, signing a petition. Both Pagel and Perrotte told our investigator that Perrotte had just clocked off duty and was leaving the worksite when he stopped at Pagel's picnic table in the outside break area to sign the petition.

Terminal manager Cathey disputed the conversation that Pagel said the two had. According to Cathey, he told Pagel that campaigning was permitted only outside the main gate or across the street from the terminal in the employee parking lot. When our investigator contacted Pagel again to get his reaction to this evidence, Pagel stated that Cathey had recounted the *second* conversation the two had concerning campaigning at YRCW-Houston, which occurred July 8 after all campaigning at issue in this protest had concluded. Pagel stood by his statement that he spoke with Cathey during the week of June 29, discussed campaigning generally, the break areas and the dock in particular, and the fact that Palmer, a non-employee candidate for international office, would be campaigning at the terminal. According to Pagel, Cathey consented to campaigning by Pagel and Palmer at all locations Pagel identified except the loading dock.

Despite repeated attempts, our investigator was unable to reach Cathey again to resolve the discrepancy between his evidence and that received from Pagel. However, YRCW labor relations staff forwarded a YRCW policy, distributed to all sites nationwide on May 28, 2015 and titled "Distribution

July 22, 2015

of Literature and Solicitation – Teamsters International Union Delegate and Officer Elections.” Among other things, the policy instructs terminal managers as follows:

[E]mployees must be permitted to conduct such [verbal campaign] solicitations during non-working time (e.g., before and after shifts, during breaks) in both working areas (e.g., warehouses, loading docks) and non-working areas (e.g., lunchrooms, locker rooms, parking lots), as long as such conduct does not interfere with the employer’s operations or production.

Employers may prohibit employees from distributing union campaign literature during working time and in working areas. However, employees must be permitted to distribute campaign materials during non-working time, but such distribution may be restricted to non-working areas. Employers may prohibit distribution if it creates a documented litter problem.

Employees may not solicit during working time of either the employee doing the soliciting or the employee being solicited.

For off-duty YRCW employees, the policy states the following:

An off-duty employee is one who is present prior to 30 minutes before the commencement of his/her scheduled shift or working time or who is present 30 minutes after the termination of his/her shift of working time.

Employers may restrict access to off-duty employees to engage in union campaign activities in interior and working areas, but only if the employer has an established no-access policy (written or unwritten) which has been clearly disseminated to employees and which broadly prohibits off-duty access to interior and working areas.

Finally, for non-employees, the policy states:

In areas other than employee parking lots, employers generally may refuse nonemployees entry on to Company property.

Analysis

Article VII, Section 12(d) states that “no restrictions shall be placed upon candidates’ or members’ preexisting rights to solicit support, distribute leaflets or literature, conduct campaign rallies, hold fund-raising events, or engage in similar activities on employer or Union premises. Such facilities and opportunities shall be made available to all candidates and members on a non-discriminatory basis.”

Preexisting rights are derived from law, a collective bargaining agreement, employer policies, or past practice. *Rules*, Definition 36.²

² For preexisting rights derived from law, *see, e.g., Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (Section 7 of the NLRA protects the right of members to campaign in non-work areas during non-work times) and *Sik*, 2011 ESD 322 (September 8, 2011) (preexisting free speech right to leaflet in a public park). For rights

We focus our inquiry on the rights Pagel and Palmer had to campaign at YRCW-Houston on each occasion at issue in this protest. First, we examine Pagel’s right as an off-duty employee to be campaign in the workplace on Sunday, July 5, his scheduled day off. We conclude that he had a pre-existing right to be present in the outside break area that day. YRCW’s policy regarding dissemination of literature and solicitation by off-duty employees for the IBT International officer election explicitly provides that access to “interior and working areas” may be restricted, but contains no provision to restrict access to exterior non-work areas such as the outside break area. In addition, the terminal manager had granted Pagel express permission to be there.

Second, although employer policy granted terminal manager Cathey the right to exclude Palmer as a non-employee from all areas except the employee parking lot, we conclude that Cathey granted Palmer permission by telling Pagel that Palmer would be allowed into the work site to campaign.³ Further, YRCW policy did not bar solicitation on the loading dock during non-working time, so Palmer’s act of following Rivers up onto the dock to request his signature did not violate employer policy.⁴

Third, we conclude that Pagel had the preexisting right to campaign in the outside break area during his lunch period on Monday, July 6, a right he enjoyed pursuant to the NLRA, employer policy, express permission granted him by Cathey, and past practice. We further find that Pagel was on break time in a non-work area and Perrotte was off-duty when Perrotte signed the petition. In finding that the *Rules* gave Pagel the right to campaign in the outside break area, we observe that Rivers, Morris, and the protest misconstrued the holding in *Pope*. We did not hold there that the outside break area was off-limits to Tyson Johnson and his entourage; instead, we found that access to that area had been granted to a non-employee on a discriminatory basis, and that violated the *Rules*. Here, no allegation has been made of discrimination, and pre-existing rights otherwise exist to permit campaigning in that area.

On this last point, we note that the protestor did not seek to campaign in the outside break area at YRCW-Houston before filing this protest. As Election Appeals Master Conboy stated in *Cobb*, 2001 EAM 100 (October 19, 2001), *recon. den.*, 2001 EAM 100(a) (October 26, 2001), “to state a viable protest, the candidate or campaigner [protesting improper campaign access by an opponent to the employer’s workplace] must affirmatively establish that he specifically requested, on reasonable notice,

derived from employer policies, see *Walter*, 2001 EAD 525 (October 25, 2001) (distribution of literature in drivers’ cubbyholes permitted by employer policy); and *Ferguson*, 2011 ESD 132 (February 22, 2011) (employer policy permitted personal use of employer-provided email). For rights derived from past practice, see *Hoffa Unity Slate*, 2001 EAD 539 (November 2, 2001) (past practice gave non-employee pre-existing right to campaign in employee break room); *Brinkman*, P151 (September 18, 1995), *aff’d*, 95 EAM 21 (October 10, 1995) (workplace bulletin board by practice was used as a general purpose board, establishing pre-existing right to post campaign material there); and *Ream et al*, 2011 ESD 339 (October 10, 2011) (practice established pre-existing right to post material on walls in break room).

³ As this access has been granted to Palmer, a non-employee candidate for international office, similar access must be given to other non-employee candidates for international office who seek to campaign at YRCW-Houston. *Pope, supra*.

⁴ We note the difference between Cathey’s statement to Pagel forbidding campaigning on the dock and YRCW’s written policy permitting it during non-work time. Cathey’s blanket prohibition was incorrect under YRCW policy. The activity in question was allowed because Rivers was off the clock when Palmer approached him on the loading dock.

access and was denied.” *Cf. Pope, supra*, where Pagel requested access to the outside break area at YRCW-Houston, was denied, and then Johnson was permitted such access.

Accordingly, we DENY this protest.⁵

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:

Kathleen A. Roberts
Election Appeals Master
JAMS
620 Eighth Avenue, 34th floor
New York, NY 10018
kroberts@jamsadr.com

Copies of the request for hearing must be served upon the parties, as well as upon the Election Supervisor for the International Brotherhood of Teamsters, 1050 17th Street, N.W., Suite 375, Washington, D.C. 20036, all within the time prescribed above. A copy of the protest must accompany the request for hearing.

Richard W. Mark
Election Supervisor

cc: Kathleen A. Roberts
2015 ESD 11

⁵ In addition to defending the protest on the merits, Teamsters United argues that it is untimely filed. The protest was filed July 13, alleging conduct the protest stated occurred July 7 but investigation showed occurred July 5 and 6. The protest further stated that the protestor became aware of the conduct on July 7, six calendar days and four working days before the protest was filed. Article XIII, Section 2(b) states that protests must be filed within two working days of the day the protest becomes aware or reasonably should have become aware of the action protested. We note the probable untimeliness of the protest but decide it on the merits to give guidance to the parties.

Hoffa-Hall 2016, 2015 ESD 11
July 22, 2015

DISTRIBUTION LIST (BY EMAIL UNLESS OTHERWISE SPECIFIED):

Bradley T. Raymond, General Counsel
International Brotherhood of Teamsters
25 Louisiana Avenue, NW
Washington, DC 20001
braymond@teamster.org

David J. Hoffa
1701 K Street NW, Ste 350
Washington DC 20036
hoffadav@hotmail.com

Ken Paff
Teamsters for a Democratic Union
P.O. Box 10128
Detroit, MI 48210-0128
ken@tdu.org

Barbara Harvey
1394 E. Jefferson Avenue
Detroit, MI 48207
blmharvey@sbcglobal.net

Teamsters United
315 Flatbush Avenue, #501
Brooklyn, NY 11217
info@teamstersunited.org

Louie Nikolaidis
350 West 31st Street, Suite 40
New York, NY 10001
lnikolaidis@lcnlaw.com

Julian Gonzalez
350 West 31st Street, Suite 40
New York, NY 10001
jgonzalez@lcnlaw.com

David O'Brien Suetholz
515 Park Avenue
Louisville, KY 45202
dave@unionsidelawyers.com

Fred Zuckerman
P.O. Box 9493
Louisville, KY 40209
fredzuckerman@aol.com

Tim Pagel

John Palmer

Teamsters Local Union 988
4303 N. Sam Houston E
Houston, TX 77032
988teamsters@sbcglobal.net

Dolores Hall
1000 Belmont Pl
Metairie, LA
dhall@ibtvote.org

Jeffrey Ellison
214 S. Main Street, Suite 210
Ann Arbor, MI 48104
EllisonEsq@aol.com