

**OFFICE OF THE ELECTION SUPERVISOR  
for the  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

<b>IN RE: WILLIAM LOBGER,</b>	)	Protest Decision 2017 ESD 387
<b>FRANK HALSTEAD,</b>	)	Issued: August 7, 2017
<b>TIM SYLVESTER,</b>	)	OES Case Nos. P-410-110416-NA,
<b>TEAMSTERS UNITED, and</b>	)	P-411-110416-NA, P-412-110416-NA,
<b>TEAMSTERS for a</b>	)	P-419-120316-NA & P-420-120316-NA
<b>DEMOCRATIC UNION,</b>	)	
	)	
<b>Protestors (After Remand).</b>	)	
	)	

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In *Lobger*, 2017 ESD 378 (February 10, 2017), we denied several protests asserting that alleged IBT *Rules* violations may have affected the outcome of the International officers election. The protests asserted that the IBT impermissibly withheld or delayed production of documents requested by the Independent Investigations Officer (“IIO”), and that the purpose of doing so was to conceal from the IBT membership evidence the protestors asserted would have shown corruption, theft of union funds, and breaches of fiduciary duty by candidates on the Hoffa-Hall 2016 slate. In addition, some protests argued that the delay in adjudication of charges referred against Rome Aloise by the Independent Review Board constituted a use of union resources to support a candidate for International Office.

Following appeals, the Election Appeals Master remanded the matter to the Election Supervisor for further investigation, stating the following:

As noted above, the alleged violation of Article XI is not addressed in ESD 378, or the Election Supervisor’s submission in opposition to the appeals. This allegation was, however, addressed orally by the Election Supervisor and by the IBT in the hearing on the appeal of ESD 378, and in the hearing on the appeal of ESD 383. At those hearings, a number of factual representations and arguments were made to the Election Appeals Master regarding the asserted institutional interest of the IBT in resisting or limiting document production to the IIO that are not part of the investigative or written appellate record. The Election Appeals Master therefore concludes that the most prudent course is to remand these protests for appropriate investigation, consideration and decision by the Election Supervisor with respect to alleged violations of Article XI, with particular focus on the asserted institutional interest of the IBT in expending resources to resist or limit production of documents to the IIO.

In response to the Election Appeal Master’s decision, we conducted an extensive investigation. This investigation included witness interviews and extensive document review. The witnesses interviewed included Bradley Raymond, Gary Witlen, Leah Ford, Ken Hall, David Martin, Joe diGenova, and Charles Carberry. We requested documents from the IBT. We reviewed the full, unredacted transcript of the July 20, 2016 meeting between IBT and IIO representatives. We reviewed all correspondence between IBT and IIO representatives concerning the document production requests and the Aloise trial on

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internal union charges sent between February and November 2016. We also reviewed all email correspondence between individuals who may have played roles with respect to these issues.<sup>1</sup>

From this accumulated evidence, we conclude that the IBT had bona fide institutional interests that guided its approach in responding to the notices of examination and addressing the requests for adjournment of the Aloise trial on internal union charges.<sup>2</sup> Moreover, we conclude that the document production that is the centerpiece of the protests had no effect on the outcome of the election.

A. *Facts bearing on the IBT's institutional interest with respect to document production.*

The March 4 and March 11, 2016 notices of examination were the first ones issued under the authority of the IIO after entry of the Final Agreement. Two earlier experiences were significant to shaping the IBT's response to the 2016 notices of examination. First was the communications and resulting process related to notices of examination the Independent Review Board's ("IRB") chief investigator had served on August 19, 2015 and September 4, 2015. As detailed below, the IBT's experience in fielding those requests and locating, collating, and producing the documents in response to them affected its decision-making process when responding to the notices of examination received in March 2016. Second, the IBT leadership believed that the Final Order's disciplinary provisions, with the Independent Disciplinary Officers ("IDO") disciplinary structure established by the IBT "to replace the IRB," was expected to change the relationship between the union and the IIO in the cooperative pursuit of union discipline, a belief reflected in the union's response to the March notices of examination.

1. *The Record on the IBT's Response to IRB Notices of Examination in August and September of 2015*

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<sup>1</sup> We made two requests of the IBT that produced the emails. For the Aloise hearing matter, we requested "any and all memoranda, emails, and all other documents in the possession of the IBT that were sent or received by (including as CC and/or BCC) any of the following individuals between the dates February 10, 2016 and November 13, 2016 and that concern the charges pending against Aloise: James P. Hoffa, Ken Hall, Rome Aloise, William C. Smith, Todd Thompson, Christy Bailey, Richard Leebove, Bradley Raymond, Gary Witlen, and Viet Dinh." For the document production matter, we requested "any and all memoranda, emails, and all other documents in the possession of the IBT that were sent or received by (including as CC and/or BCC) any of the following individuals between the dates March 4, 2016 and November 13, 2016 and that concern the IIO's notice of examination dated March 4, 2016 and/or the IIO's notice of examination dated March 11, 2016: James P. Hoffa, Ken Hall, Rome Aloise, William C. Smith, Todd Thompson, Christy Bailey, Richard Leebove, Bradley Raymond, Gary Witlen, Leah Ford, and Viet Dinh." We refined each request by listing search terms that the IBT's Information Systems Department used to locate and produce emails. The IBT produced all emails and attachments, including faxes, responsive to the time parameters and search terms, withholding none as privileged or non-responsive. These yielded a comprehensive, real-time log of communications between the IBT and the IIO, and the IBT's unvarnished internal discussions of the proceedings. All of the emails and email strings produced (exceeding 3,000 emails) were reviewed in the investigation. We also inquired specifically whether the individuals involved communicated by text message concerning the subject matters indicated by the search terms and were advised that no such communications occurred.

<sup>2</sup> With respect to document production, the protestors assert that the IBT is bound by the institutional interests it identified to Judge Preska. As the decision details, we find that the IBT's conduct during the period it was responding to the document requests was broadly directed at defining its relationship with the Independent Investigations Officer within the new structure created by the Final Order, which the IBT believed would be materially different than what existed under the Consent Order, and the document requests were the IBT's first opportunity to test that belief.

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In our previous decision, we detailed the IIO's two March 2016 notices of examination to the IBT, which together sought emails for Ken Hall (6 months in separate segments of 2013 and 2014), WC Smith (38 consecutive months beginning in January 2013), Nicole Brener-Schmitz (38 consecutive months beginning in January 2013), and John Slatery (20 consecutive months beginning June 30, 2014). The volume of documents encompassed by these requests greatly exceeded any similar request made in the past by the IRB.

As noted, these requests were the first made following the change in disciplinary structure that the Final Order provided. Under the Consent Decree, the Independent Review Board, through its Chief Investigator, investigated allegations of misconduct and, when evidence warranted it, referred charges to the IBT General President for adjudication under the IBT constitution's disciplinary provisions, with the IRB retaining authority to review the adjudicatory outcome for sufficiency. Under the Final Order, the IRB was replaced by the IIO, as the investigative and charging official, and the Independent Review Officer ("IRO"), as the appellate disciplinary official.

Some seven months before the March 2016 notices of examination, the IRB's chief investigator on August 19, 2015 submitted a notice of examination to the IBT seeking Slatery's email messages and attachments for the period July 1, 2012 through June 30, 2014, the 24-month period that immediately preceded the period sought for Slatery's emails in the March 11, 2016 notice of examination. Bradley Raymond, the IBT's General Counsel, responded to the August 19 notice by producing, on September 11, 2015, a thumb drive containing emails identified in the document request. The emails were culled from the IBT's server by staff of the IBT's Benefits and Information Systems Departments. Appended to the September 11 letter producing the thumb drive was a three-page list of some 58 individuals, their email addresses, and descriptions of each individual's capacity or relationship with respect to Slatery. These persons included Slatery's spouse, his brother, mother, daughter, cousin, and uncle, some friends, and his daughter's coaches and teachers. In addition, the list named a number of attorneys, one person (Nora Johnson) identified as an "administrator for IBT staff health plan," two IBT representatives (Sheba Venson and Rome Aloise) said to be "overseeing IBT Health plan," and two plan participants. The September 11, 2015 letter explained the purpose of this list in the following terms:

[E]mails to or from the entities and individuals listed in the attached exhibit have been excluded because they may involve communications which are attorney[-]client privileged, may involve confidential information relating to the administration of the Union's benefit plans with respect to individual claims or may involve communications with family or friends which are unrelated to the business of the IBT. Emails have been excluded for the foregoing reasons. If necessary, we are prepared to address with you the excluded materials if you determine they may contain information which is relevant to your investigation which is not privileged or confidential.

Chief Investigator Carberry replied to Raymond's September 11 letter on September 16, 2015, requesting in part that the IBT produce "all emails between Slatery and Rome Aloise, between Slatery and Nora Johnson and between Slatery and Sheba Venson," the three individuals in the list of 58 who were identified as administering or overseeing the IBT staff health plan. In addition, Carberry requested "Slatery's emails with Cheiron and its representatives."<sup>3</sup> With respect to other emails withheld from the

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<sup>3</sup> Cheiron played a role in vendor bidding processes with respect to a VEBA trust that covered certain IBT members.

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September 11 production, Carberry stated that “[i]f any document is withheld based upon a claim of privilege, please provide a log which includes the date of the email, all individuals who received and sent the email and the basis for the claim of privilege.”

Raymond replied for the IBT the next day, September 17, 2015, stating by letter that the Information Services Department had been directed to produce the emails involving Aloise, Johnson, Venson, and Cheiron. With respect to withheld emails, the letter stated that “the only emails that were not disclosed were those where IBT attorneys were copied, where they contained confidential claim information concerning the administration of benefit plans (e.g., involving individual benefit claims) or where they were sent to or from Mr. Slatery’s personal friends and family members.”

The next day, September 18, 2015, the IBT produced another thumb drive, this one containing all known emails between Slatery and Aloise, Slatery and Johnson, and Slatery and Venson for the requested 24-month period. In addition, the response included all known emails to and from Cheiron. With respect to other emails withheld from the responses to the August 19, 2015 notice of examination for personal or attorney-client reasons, Carberry made no further request for them and did not challenge the assertions of privacy or privilege in Raymond’s September 17 letter.

The process of identifying, collating and producing the requested Slatery emails from the IBT’s server presented technological challenges. Dave Martin, the principal in the IBT’s Information Systems Department, used Outlook Client to identify and copy to the thumb drives the large volume of Slatery emails that the request sought. Doing so crashed the IBT’s server, interrupting work in IBT headquarters and requiring a reboot of the server.

After submitting the August 19, 2015 notice of examination to the IBT and before receiving any documents in response to it, Carberry issued another notice of examination on September 4, 2015, requesting documents concerning the awarding during the 2012-2014 period of a pharmacy benefits manager contract for the IBT’s VEBA trust. The notice of examination sought bids and revised bids; the bidding procedure; communications with the manager of the bidding process; documents concerning negotiations between the trust and Optum RX, the bidder selected for the contract; policies with respect to the reporting of gifts from employers, vendors, and service providers; travel and expense records for 2013 for specified IBT officials, including James Hoffa, Ken Hall, and Rome Aloise; and additional documents.

A connection between the August 19 and September 4, 2015 notices of examination was apparent, both from the documents each sought and from what Carberry and Raymond wrote about them. Slatery, whose emails were the subject of the August 19, 2015 notice, was director of the IBT Benefits Department and played an important role with the VEBA trust and the bidding process Cheiron managed concerning selection of the trust’s pharmacy benefits manager. With his September 16, 2015 letter, Carberry expressly requested emails between Slatery and three individuals who had administrative or oversight responsibility concerning the IBT staff health plan, *i.e.*, the VEBA trust; further, Carberry specifically requested emails with Cheiron. The request for Slatery’s emails was complementary to the September 4, 2015 notice of examination that sought the VEBA trust bidding documents for the pharmacy benefits manager. Raymond noted the connection between the two requests in his September 18, 2015 letter enclosing the second tranche of Slatery emails and all emails for the requested period involving Cheiron, *viz.*

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[Enclosed are emails archived by] a subordinate of Mr. Slatery's [who] worked on the process that led to the renewal of Optum Rx as the pharmacy benefit manager for the IBT VEBA programs. These appear to contain a number of exchanges with Cheiron, the consultant that was assigned to conduct the bidding for the pharmacy benefit manager business. Mr. Slatery appears to have been copied on some of these emails, although not all of them. This material should be included in the IBT's response to your request of September 4, 2015, but I thought it would be helpful also to provide it to you now.

In addition to the August 19 and September 4, 2015 notices of examination concerning Slatery's emails and VEBA documents, Carberry issued a notice of examination dated August 17, 2015 that sought documents with respect to Nicole Brener-Schmitz. Brener-Schmitz served as the IBT's political director and had responsibility for recommending disbursement of funds of the IBT and its political action committee to other PACs, candidates for public office, and other organizations. The notice sought all documents concerning work-related expenses claimed by Brener-Schmitz for the period beginning January 2010, expenses reimbursed to her by the IBT during that period, IBT reviews, audits, and investigations of her expenses, emails of specific IBT officials concerning her expenses, IBT policies regarding receipt of things of value from entities seeking contributions, and records concerning all contributions the IBT or its political action committee made to some 33 specific PACs, candidates, and organizations. The IBT produced the requested documents.

## 2. *The IDOs Replace the IRB*

By the accounts of all IBT witnesses interviewed in the remand investigation, the replacement of the IRB with the IDOs on the February 2016 anniversary of adoption of the Final Order was expected to start a new relationship of collaboration and cooperation between the IBT and the IIO to deter misconduct and corruption, and to remedy and punish it where it might be proved to occur. Joseph diGenova was appointed as the first IIO. Previously Mr. diGenova had served as the IBT's designee to the IRB. Benjamin Civiletti, who had served as the government's designee to the IRB, was appointed the first IRO.<sup>4</sup>

IBT representatives told us they were shocked when, as his first actions, the IIO issued the March 4 and 11 notices of examination, with no advance notice, less than a month after the start of what they anticipated would be a new era of cooperation. As noted, these notices apparently sought the largest volume of documents ever requested of the IBT by the independent disciplinary officers in the Consent Order era. The March 23, 2016 letters from IBT outside counsel Viet Dinh to IIO Joseph diGenova (referenced in our original decision) objecting to the requests for years' worth of emails for several officials are contemporaneous memorials of this view of the IBT. As one IBT witness told us during the remand investigation, "We were taken aback by the scope of the requests. The Final Order was supposed to make things better, not worse." As Dinh would characterize it in his letter to diGenova of April 5, 2016, the Final Order "was the product of the IBT's efforts to reclaim self-governance after demonstrating substantially changed circumstances in the 25-plus years since the Consent Order. Among other things, the Final Order acknowledges the 'significant and positive change in the culture and processes of the IBT' and the 'significant success in eliminating corruption from within the IBT.' The Final Order is intended

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<sup>4</sup> Civiletti resigned from the position effective October 31, 2016. Barbara Jones was subsequently appointed to serve as IRO.

to mark a new era of self-governance by the IBT and constructive cooperation with those charged with ensuring that the goals of the Final Order are achieved.”

3. *Chronology of the IBT’s Response to the 2016 Notices of Examination*

As indicated in our original decision, the IBT retained Dinh’s firm to respond to the notices of examination. Three factors drove this decision. First, Raymond concluded that the breadth of the requests suggested the need for an expert in electronic discovery, which expertise Dinh’s firm could provide. Second, Dinh’s central role in the negotiations that resulted in the Final Order – and the changes the IBT had expected to flow from it – demonstrated the merit of having him lead the initiative to produce to the IIO the documents that office needed while reducing the burden on the IBT of producing documents the IIO did not need. Third, and not insignificantly, the effort to respond to the August 19, 2015 request for two years of Slatery’s emails had crashed the IBT’s email server, causing disruption to work at IBT headquarters; the technological challenges of responding to requests significantly greater in volume demanded an alternative that minimized the potential for similar disruption.

Dinh first aimed to get the IIO to particularize the requests, with the hope of substantially reducing the volume of material to be produced. He did this with two March 23, 2016 letters (one responding to each notice of examination) that objected broadly to the scope and breadth of the notices and complained that they lacked particularity that Carberry had used in past requests.

diGenova responded by letter dated March 30, 2016. The IIO rejected Dinh’s general objections to the notices of examination but offered the following as a procedure to use in responding to the notices:

We will continue to accommodate the IBT regarding records requests as has been done consistently in the past. For example, the March 4, 2016 notice for an on-site books and records examination was accompanied by a letter to the IBT’s General Counsel stating that it might be more convenient and inexpensive for the IBT to produce copies of the documents rather than have an on-site examination conducted. In addition, when the IBT makes a reasonable request for additional time to respond to a document request, that has routinely been agreed to. Furthermore, in past response to IRB document requests, with our consent, the IBT has withheld privileged emails, personal emails unrelated to union business and confidential information related to individual claims under the IBT’s benefit plans. For example, with its September 11, 2015 response to an IRB document request for John Slatery’s emails, the IBT provided a list entitled “Emails not included in IRB response.” The list contained 58 names and email addresses in the categories “personal,” “attorneys” and “health plan and privacy related” for which emails were withheld. Such lists could be provided in response to the March 4 request. Should it be necessary that any of the withheld documents be produced, the IBT will be notified.

The IIO’s March 30, 2016 letter response to Dinh’s letter concerning the March 11, 2016 notice of examination for Slatery’s emails also acknowledged the past practice by which the IBT had asserted privilege to withhold documents. The response directed the IBT to produce the requested documents “and any privilege log” no later than April 8, 2016.

One additional round of correspondence between Dinh and diGenova concerning the scope and breath of the notices of examination produced no narrowing of the requests. However, diGenova on April

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12, 2016 repeated that he was amenable to the IBT's preliminary withholding, subject to follow-up demand by the IIO, of certain categories of emails based on privilege and privacy. Thus, he wrote:

It would not be helpful to discuss limiting the document requests in the abstract. If there are specific areas that the IBT believes are voluminous and not relevant, please describe them particularly. We found helpful the procedure the IBT used in its September 11, 2015 response to an earlier document request for John Slatery's emails. In that response, the IBT produced a list entitled "Emails not included in the IRB response." A copy is attached. The list contained 58 names and email addresses in three categories: "personal," "attorneys" and "health plan and privacy related. For each individual, the list also included that person's "Capacity/Relationship" which described the person. If we found emails on the list were within what was being investigated we were in a position to request them. Such lists could be provided for the March 4, and March 11 requests. Should the Independent Investigations Officer decide any of the withheld emails needed to be produced, the IBT would be notified.

During the back-and-forth between Dinh and diGenova, the IBT, using Relativity litigation software licensed to another outside law firm, was engaged in the process of reviewing the emails that fell responsive to the notices of examination. Martin of the IBT's Information Services Department located all emails that met the time and person parameters of the requests and transferred them by secure file transfer protocol to the outside law firm that held the Relativity license. An IBT attorney then undertook a review, document by document, of the emails. Using the Relativity software, the IBT attorney viewed an image of each email and assessed it for production. The attorney made decisions about production using several criteria, including documents that were communications to or from attorneys, personal communications with family members, documents that concerned the subject matters of the August and September 2015 document requests, and the like.

The first tranche of responses, which consisted of emails for Ken Hall, WC Smith, and Nicole Brener-Schmitz, was prepared and produced on April 22, 2016. Dinh's letter accompanying the first production both explained the framework of the production and asserted general objections to the requests (even as the documents were produced). Dinh first criticized the IIO for failing to tailor the requests. As he put it, "[t]he IBT must shoulder the burden (and expense) of reviewing *all* documents, produce some documents but withhold others, and then await yet another follow-up request for additional documents, once you have apparently decided what it is you are looking for" (*italics emphasis in original*). Dinh's letter stated that its production was "consistent with the withholding procedure contemplated by [the IIO's] April 12 letter. As such, the IBT is not producing categories of documents it believes to be voluminous and irrelevant, and the IBT is furnishing logs of withheld documents." The IBT produced Ken Hall's emails that fell within the requested time frames, but listed the following categories of withheld documents:

- Privileged: Emails privileged according to applicable legal privileges.
- Contract negotiations: Emails related to Mr. Hall's work for the IBT in contract negotiations with employers.
- Contract administration: Emails related to carrying out the language of contracts with employers.
- IBT administration: Emails concerning the day-to-day operations of the IBT.
- IBT/UPS pension: Emails related to Mr. Hall's role on the IBT/UPS pension plan and 401(k) plan.

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- Legislative strategy: Emails related to legislative proposals relevant to the IBT.
- Policy strategy: Emails related to policy positions of interest to the IBT.
- Local union: Emails related to Mr. Hall's role as President of Local 175 in West Virginia.
- Mass emails and listservs: Emails for which Mr. Hall is one of numerous recipients addressed in a mass communication.

For Brener-Schmitz, the IBT produced her emails for the requested time frame, but listed the following categories of withheld documents:

- Legislative strategy: Emails related to legislative proposals relevant to the IBT.
- Mass emails and listservs: Emails for which Ms. Brener-Schmitz is one of numerous recipients addressed in a mass communication.
- Personal: Personal correspondence with family members.

Finally with respect to WC Smith, the IBT produced his emails for the requested time frame, but listed the following categories of withheld documents:

- Privileged: Emails privileged according to applicable legal privileges.
- Contract administration: Emails related to carrying out the language of contracts with employers.
- Legislative strategy: Emails related to legislative proposals relevant to the IBT.
- Policy strategy: Emails related to policy positions of interest to the IBT.
- Local union and Joint Council: Emails related to Mr. Smith's role as President of Local 891 and Joint Council 87 in Mississippi.
- Trusteeships: Emails related to the administration of trusteeships.

Logs prepared with the Relativity software and produced to the IIO generally described each email withheld. The information provided included the sender's name and email address, all recipients' names and email addresses, the subject line of the email, the date and time sent, and the category describing the reason it was withheld. The withholdings were consistent with diGenova's instructions stated in his April 12, 2016 letter ("If there are specific areas that the IBT believes are voluminous and not relevant, please describe them particularly."). In addition, they followed the outlines of the September 11, 2015 IBT production, which the IIO cited approvingly in his letters of March 30, 2016 and April 12, 2016. Both the IBT and the IIO understood that the IBT's decisions on withholding were not the final word. Both acknowledged expressly that the IIO retained authority to direct the IBT to produce specific documents and whole categories of documents it had withheld.

On December 27, 2016, Judge Preska ruled that the Consent Order and the Final Order required the IBT to produce any and all documents the IIO requested, including documents the IBT contended were protected from disclosure by attorney-client privilege. We therefore investigated the circumstance and process by which the IBT withheld documents on a claim of that privilege. In response to our questions about precedent, Raymond for the IBT and diGenova and Carberry for the IIO stated that the IBT had often over the history of the Consent Order asserted attorney-client privilege on document production. The September 2015 production of emails exemplified the assertion of this privilege. In that instance, the IBT withheld emails where an attorney was either the sender or the recipient, as the emails "may involve communications which are attorney-client privileged." The assertion did not specifically declare that any withheld communication constituted a confidential communication between privileged persons for the purpose of seeking, obtaining, or providing legal assistance to the client. Instead, it noted only that the



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communication *may* be privileged, and the basis for this claim was that an attorney appeared on the email either as the sender or a recipient. Notably, the IRB did not challenge the assertion of privilege in that instance. Indeed, neither the IBT nor the IIO could identify any instance prior to the March 4 and 11, 2016 notices of examination at issue here in which the independent disciplinary authority (whether IRB or IIO) had overruled the assertion of privilege by the IBT or directed that documents asserted as privileged be produced notwithstanding the claim. Both the IBT and the IIO agreed, however, that prior privilege assertions had encompassed far fewer documents than were the subject of that claim in connection with the 2016 notices of examination.

The IIO told us that, until the Government filed its motion in November 2016 to enforce the Final Order and require the IBT to produce all requested documents, the IIO and the IRB had as a courtesy permitted the IBT to assert attorney-client privilege when withholding certain requested documents.

The IBT had also historically asserted other bases for withholding certain documents that fell within the broadly stated parameters of document requests. Again, referring to the September 11, 2015 production, the IBT withheld emails between Slatery and his family members and his daughter's coaches and teachers as personal, non-work-related communications in which the IRB would have no interest. The IRB did not overrule this withholding and demand production. Similarly, the IBT withheld for personal medical privacy reasons emails concerning individual plan participants' communications with respect to benefits they sought or obtained under the plan, again without objection from the IRB. In contrast, when the IBT withheld emails between Slatery and an administrator and overseers of the union's health plan, the IRB overruled that withholding and directed the IBT to produce the withheld documents, which the IBT promptly did.

With the April 22, 2016 production of emails of Hall, Brener-Schmitz, and Smith, the IBT asserted attorney-client privilege and non-work-related personal privacy as bases for withholding certain emails, consistent with what it had done in the past and consistent with the procedures stated in IIO diGenova's March 30, 2016 and April 12, 2016 letters. In addition to these bases for withholding, the IBT also cited contract negotiations as a basis for withholding. diGenova and Carberry separately had told Raymond that the IBT need not produce Hall's emails that bore on contract negotiations between the IBT and UPS, and diGenova confirmed that permission in writing in his April 12, 2016 letter. The IBT in its April 22, 2016 production expanded that withholding beyond UPS to include negotiations with other employers of Teamster members. IBT witnesses told us that they did so to protect the confidentiality of communications with those employers, who often operated in competitive industries and wished to avoid alerting their competitors of concessions and strategies they were implementing with the IBT. IBT witnesses cited a past instance where an IRB report referred to a confidential negotiating communication with an employer; the revelation prompted an employer to contact the IBT and express its concern that industry competitors might gain an unwarranted competitive advantage because negotiation communications were published in IRB reports. For a similar reason, the IBT in its April 22, 2016 production withheld emails concerning administration of existing collective bargaining agreements.

The IBT also withheld emails that it believed to be so far afield from any subject in which the IIO had indicated investigative interest that production was unnecessary. The IBT's relevance assessment was guided by the August and September 2015 notices of examination, which concerned the bidding process for the VEBA pharmacy benefits manager contract and Brener-Schmitz's expense reimbursement issues. Through this lens, emails concerning legislative strategy and policy strategy were, in the IBT's belief, irrelevant to the IIO's investigation, as were mass emails and listservs, emails concerning Hall's

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role on the IBT/UPS pension and 401(k) plans and his function as principal officer of his home local union, and Smith's role in his home local union and joint council. The IBT also withheld as unrelated subject matter emails concerning Smith's administration of trusteeships the IBT had imposed on local unions. Finally, the IBT identified and withheld from production emails to and from Hall "concerning the day-to-day operations of the IBT."

Leah Ford, the IBT attorney employed as executive assistant to Ken Hall, was the principal IBT employee to conduct the email review. She told us that she excluded emails as "non-responsive," a category available on the Relativity software, in an effort to give the IIO documents she believed that office was interested in and to reduce the IIO staff time, and hence the costs charged back to the IBT, spent reviewing obviously extraneous material that could not be relevant to an ongoing investigation. Examples she gave us of emails she withheld as non-responsive were mass emails of Washington Post news updates, invitations to fundraising events for members of Congress, and the menu in the IBT headquarters cafeteria. The titles for the sub-categories of withheld emails listed in Dinh's April 22 production letter were devised by Dinh's firm. Ford used the sub-category "IBT Administration" under the "non-responsive" heading as a designation for emails confirming Hall's travel reservations, Ford's request for time off, an electronic roster of IBT affiliates, communications about a merger of one local union into another, and monthly department financials. The logs of withheld emails the IBT produced to the IIO identified sender, recipients, date sent, subject line, and reason for withholding.

The "IBT Administration" category drew a reaction from diGenova. In his letter to Dinh dated April 29, 2016, diGenova criticized the April 22 production, stating the following:

Prior to the production, you did not engage in discussions I offered with my staff to see if your suggested narrowings of the search were acceptable to this office or others could be reached. Your initial production unilaterally withheld material covered by requests. For example, "IBT Administration" is not an acceptable basis for withholding documents requested.

diGenova did not, however, overrule the IBT's position and direct the IBT to produce some or all of the categories of emails it had withheld. Instead, he stated that he "will address the substantial problems in your initial production once the defects are documented."

The exchange of letters between Dinh and diGenova in the next few weeks focused on two issues: the IBT's use of the Relativity software to process its response to the discovery request, and what diGenova characterized as the IBT's unilateral decision with respect to what to withhold. On the first issue, use of Relativity had resulted in the IIO receiving documents as individual images rather than in native Outlook format. The IIO's office had capacity to examine documents in Outlook but did not have a Relativity license; accordingly, the images the IBT produced, while they could be viewed on a page-by-page basis, could not be searched using Outlook Client. Nonetheless, Relativity is the industry standard with respect to electronic discovery, and the IBT's decision to use it expedited the process of reviewing the tens of thousands of emails that the notices of examination encompassed and created a clear, fixed production record. The solution available to the IIO for reviewing the IBT's production was either to license the software itself or to contract with a firm that owned a license. On the second issue, diGenova had invited the categorization of withheld emails in his April 12, 2016 letter ("If there are specific areas that the IBT believes are voluminous and not relevant, please describe them particularly.") The April 22

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production letter listed specific areas and the logs of non-responsive documents that accompanied the produced documents described the documents not produced.

From correspondence, we conclude that before the April 22, 2016 document production the expectations of the IBT and the IIO coincided with respect to categorizing the emails the IBT withheld subject to follow-up discussion or request from the IIO. The IBT's effort, according to the person reviewing the emails, was to produce emails on subject matters the IRB and IIO had shown to be under investigation. The IBT expected that the IIO would, as it had with the September 16, 2015 response to the September 11, 2015 production of a two-year tranche of Slatery's emails, instruct the IBT to produce additional specific emails or categories of emails if the IIO found the IBT's production deficient. The September 16 directive, coming promptly upon the IBT's September 11 production, required the IBT to produce four additional categories of emails (emails between Slatery and Aloise, Slatery and Johnson, Slatery and Venson, and Cheiron emails). The IBT produced them two days later. For the March 4 and March 11, 2016 notices of examination, the IIO had stated it would follow a similar procedure (diGenova wrote on April 12: "Should the Independent Investigations Officer decide any of the withheld emails needed to be produced, the IBT would be notified.") As such, both the IBT and the IIO expressed the expectation that the IBT could withhold certain emails, subject to a requirement that they be produced merely upon the directive to do so from the IIO. After the initial production, the IIO expressed dismay in his April 29, 2016 letter about the "IBT Administration" category, but did not then assert or exercise authority to overrule the withholding or direct the IBT to produce immediately the withheld emails in that or any other category. In this significant way, the IIO's response to the IBT's production with respect to the March 4 and March 11, 2016 notices of examination differed from Carberry's response to the IBT's production the previous summer.

On May 13, 2016, the IBT, following the general pattern it had established with respect to the production of Hall, Brener-Schmitz, and Smith emails, produced its first installment of Slatery emails in response to the the March 11, 2016 notice of examination. A large volume of documents was produced and emails in discrete, identified categories were withheld. The Slatery corpus was large, exceeding 50,000 emails, and dwarfed the email volumes of the other three individuals who were the subject of the notices of examination. In an effort to produce the documents the IBT believed the IIO was most interested in, the IBT used Relativity to search the Slatery corpus for key terms related to the VEBA investigation it understood the IIO to be pursuing. Initial terms the IBT used were "VEBA," "GrandFund," "Bertucio," "Optum RX," and "Prescription Solutions." From the results these searches produced, the IBT withheld certain emails because of attorney-client privilege and certain additional emails because they addressed legislative or policy strategies. The resulting production totaled 2,696 emails.

Dinh stated expressly in the May 13 letter accompanying the Slatery email production that it was an installment of documents the IBT believed the IIO was most interested in and was produced that date because the IIO's May 13 deadline gave insufficient time to complete the review of the huge volume of emails. Dinh's letter listed the search terms the IBT had used on the corpus of Slatery emails to generate the production set. The IBT followed this production up a week later, on May 20, 2016, with the results of further searches using key terms related to the VEBA investigation. Those terms ("TeamStar," "TeamsteRX," "PDP," "United American," "ESI," "Caremark," "Medicare Part D," and "Ullico"), which were also listed for the IIO in the document production letter, produced 2,591 emails, after withholdings for attorney-client privilege and legislative and policy strategy emails.

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Further production of Slatery emails was made on June 3, 2016 using additional key terms (“Ed Sullivan,” “PBM,” “Prescriptions Benefit Manager,” “supplemental trust,” “supp trust,” “Rome Aloise,” and “WC Smith”). After withholdings for attorney-client privilege and legislative and policy strategy emails, the IBT produced 1,293 emails. Another production was made June 14, 2016 (key terms: “JLM,” “JLMC,” “Rich Cox,” “America’s Agenda,” “Mark Blum,” “Met Life,” “VSP,” “Vision Services,” “Capital One,” and “Ed Smith”). After withholdings for attorney-client privilege and legislative and policy strategy emails, the IBT produced 2,397 emails this date. The June 3 and June 14 document production letters listed the search terms that had been used to generate the production sets.

Through these months of production, the IBT repeatedly sought to meet with diGenova in an effort to narrow the scope of the email requests, with the aim of reducing the staff work both at the IBT and the IIO in reviewing irrelevant material. The first contact for this purpose, by phone between Dinh for the IBT and diGenova and Carberry for the IIO, occurred April 6, 2016. The purpose of the call was to get a two-week extension on production to April 22, 2016. Dinh reported the results of the call to Raymond by email the same day, stating the following, in part:

They said no urgency and agreed to a two week extension. But then Charlie [Carberry] said, two weeks for what? Just to review for privilege or to tell us to go pound sand? I said to do my job, and I am not waiving any arguments. I am not going to tell you to pound sand but I am also not going to roll over and play dead. We had a nice and spirited discussion. Charlie at one point said that they would be fine if we don’t want to produce something they don’t need—and I said so then it is not limited to privilege. You get the full petty picture.

Raymond forwarded this report to Witlen with the comment, “Clear as mud...” Witlen noted the irony, replying, “I like the part that we don’t have to produce anything they don’t need, while they refuse to give us any idea what they are looking for.” Raymond agreed, “Yes. I raised that with Viet.” Witlen commented further, “It does sort of jump out at you.”

In an email sent April 12, 2016, Dinh wrote diGenova the following:

As I indicated to you last week, I think it would be worthwhile for us to get together in person to discuss steps going forward. For example, I think you and Brad [Raymond] had previously discussed carving out documents relating to IBT’s negotiations with UPS, and Charlie [Carberry] suggested in our call that there may be some things that you may have no interest in and that would be cumbersome for IBT. A meeting to talk through this process I think would benefit both our cooperation and your inquiry. It can be with just the two of us, or include Charlie and Brad, as you wish. I am available any time this Thursday and Friday according to your schedule.

diGenova repeatedly stated that a meeting involving him was unnecessary. Rather, in his April 12, 2016 letter to Dinh, diGenova stated that “it would be more productive for you to speak in the first instance with Charlie [Carberry] or one of the other lawyers on my staff he designates [with respect to specific requests]. If you cannot resolve the matter with them, I will be available.” diGenova repeated this suggestion in an email to Dinh on April 14, 2016, stating, “[a] meeting is not necessary. Please contact Charlie Carberry (or someone he designates) for any issues related to compliance. As noted in my letter, if there are disagreements that cannot be resolved at that level, they will be brought to my attention by the

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Independent Investigations Officer staff.”<sup>5</sup> The IBT did not engage the IIO at the staff level as diGenova suggested. Instead, Dinh wrote in his April 22 letter producing emails for Hall, Brener-Schmitz, and Smith that, because diGenova stated a meeting was unnecessary, “the IBT has attempted to comply with your expectations based on your previous communications, but it has not had the benefit of your direct involvement when questions have arisen.”

Following diGenova’s April 29, 2016 letter that criticized the IBT for not meeting with IIO staff before “unilaterally with[holding] material” and for withholding documents in the category “IBT Administration,” Raymond on May 3, 2016 emailed his fellow in-house IBT lawyers the following, in part:

1. It seems kind of disingenuous for them to complain that we didn’t engage in discussion with them after April 12, when Joe [diGenova] shut down the discussion, saying it wouldn’t be productive.
2. I’m more than a bit perplexed about the reference to Outlook. We obviously found Outlook awkward in terms of trying to get a handle on the emails. Seems to me this is a pretty transparent demand that we produce emails without meaningful review of what is being produced. Either way, this issue cries out for a discussion. If he or his people don’t like “IBT Administration” or the other categories of excluded emails, I thought we gave them a log which would give them a pretty decent opportunity to identify what they are looking for. Either way, a conversation would be an efficient way to try and get on the same page, as opposed to firing more rockets.

On June 15, 2016, when corresponding with the IBT on an unrelated matter, diGenova signaled to Raymond a willingness to meet. He wrote: “I am willing to meet with you as you requested to discuss those issues you have raised that concern the Independent Investigations Officer. Any such meeting would also include a discussion of the union’s and its top officer’s lack of compliance with their obligations under the Final Agreement and Order.” A meeting with diGenova was set for the week of July 18, 2016.

Two things occurred to upset this scheduled meeting. First, diGenova wrote to Ken Hall on June 28, 2016, the second day of the IBT convention, directing Hall “to produce all documents you were required to produce by July 5,” the first business day following the conclusion of the convention. Dinh replied on July 5 that the IBT had been producing tranches of emails regularly in accordance with the process diGenova outlined in his March 30 and April 12 letters, that it was impossible to complete production by July 5 because of the press of convention business, that the IBT had resumed reviewing

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<sup>5</sup> Also in his April 12, 2016 letter to Dinh, diGenova expressed concern about the IBT’s pace in reviewing documents for production, stating, “The union has had our requests for over a month and should have been gathering the responsive documents. If the union is only beginning the [review] process now that is a serious concern about its meeting its Court imposed obligation to comply. I understand time may be required but it is expected the IBT will produce promptly. We would expect most responsive documents by April 22 and a rolling production until it is completed.” Dinh rejected the suggestion that the IBT was not proceeding deliberately and apace. On April 14, he replied by email with the following: “Please be assured that we are continuing to review the documents and formulate our response. You state ominously: ‘If the union is only beginning the process now that is a serious concern about its meeting its Court imposed obligation to comply.’ That threat, of course, ignores the unprecedented and enormous burden your boil-the-ocean requests have put on IBT. We will continue to proceed with all deliberate speed. If you have external deadlines of which we are not aware, please advise. If you really think IBT is violating its obligations to the Court, we would welcome an opportunity to answer to the Court.”

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Slatery's emails with the intention of making additional production, and that the IBT welcomed the opportunity to meet with diGenova during the week of July 18 "in order to address and resolve the several matters that are the subject of dispute between the parties." On July 11, diGenova emailed Raymond to state that the meeting would occur July 20 at the IIO's offices. The next day, July 12, diGenova emailed Raymond again, this time stating without explanation to "ignore my previous email," adding that he would "be in further communication shortly." On July 13, diGenova wrote Raymond that "our July 20 meeting is canceled," set a new deadline of July 26, 2016 for full compliance, and stated further that "[w]hen the union has complied fully with its obligations [to produce all documents requested in the March 4 and March 11 examination notices], we can discuss having a meeting." The IBT had sought the meeting to discuss narrowing the scope of the document requests; the IIO set full compliance with the document requests as the condition of holding a meeting.

diGenova sent a similar letter to Dinh on July 13, in which he declared that the IBT's production did not comply with the Final Order, "was not consistent with my March 30 and April 12 letters," and that a log for withheld Smith emails "did not provide reasons for withholding." He concluded by ordering produced by July 26 "all withheld documents, with the exception of those covered by a legal privilege and those of Mr. Hall's emails previously identified as related to UPS negotiations."

At this turn, Dinh sent two letters. First, he replied to diGenova, declaring the cancellation of the meeting both "inexplicable" and "unprofessional." The letter also defended the volume of the IBT's production. With respect to diGenova's contentions that the production did not comply with the Final Order, Dinh wrote that "*you authorized* the withholding of documents in your letters of March 30 and April 12, so your reference to the Final Order providing 'no basis' for withholding documents is mystifying." (Emphasis in original.) In response to diGenova's complaint that the log of withheld Smith emails "did not provide reasons for withholding," Dinh stated that such a reason "has never been a requirement." He elaborated, "Indeed, in the very example you provided for withholding documents (in your April 12 letter), the 'log' was simply a three-page list of names, email addresses, and relationship to the targeted individual. Not only did that log not include 'reasons for withholding' a document, but Mr. Smith's log includes *far more* information, including the date, subject, to, from, and cc for some thousands of documents. Thus, you are invoking a 'requirement' that does not exist, is contradicted by your own example, and, when it comes to conveying relevant information, is vastly inferior to what the IBT has provided." Dinh affirmed the IBT's intention "to cooperate with you in good faith under the Final Order to produce the documents you need to carry out your important work. But we cannot build the cooperative relationship necessary to accomplish the shared goal of bettering the IBT while you persist in propounding overbroad demands for documents, making unfounded and contradictory allegations, and, perhaps most of all, renege on your commitments to discuss disputes that arise."

The same date Dinh replied to diGenova, he also contacted the US Attorney's office, requesting the lawyers there to intervene with the IIO to reschedule the meeting. Dinh stated the IBT's interest as follows:

The Final Order and accompanying Rules give the IIO the authority to investigate allegations of corruption, and his right to demand documents flows from that defined power. The Final Order and Rules do not grant the IIO the blanket authority to conduct an unbounded fishing expedition. Moreover, the Final Order was the hard-earned product of the IBT's efforts to reclaim control over its affairs, which the text and purpose of the Final Order reflect. *See, e.g.*, Final Order at 2-3 (praising the IBT's "significant and positive

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change in [its] culture and process” and “significant success in eliminating corruption”). The IIO’s overbroad demands ignore all of this and instead intrude upon core aspects of the IBT’s self-governance, including internal deliberations, executive decision-making, collective bargaining, and political activity. Documents produced by the IBT reflecting these sensitive matters, moreover, may well find their way into publicly available documents released by the IIO, jeopardizing the IBT as well as its relations with senders or recipients of those documents.

Compounding the problems with the overbroad, burdensome document requests is the IIO’s arbitrary, contradictory, and at times simply perplexing conduct since propounding them. For example, the IIO has alleged that the IBT has “unilaterally withheld” documents in response to the March 4 and March 11 requests. But on March 30 and April 12, the IIO instructed the IBT that it could withhold documents from its productions according to categories it defined so long as it produced an accompanying log listing the withheld emails. The IIO stated that if it were then necessary to produce any of the specific withheld emails, the IBT would be notified. The IBT relied on those assurances and complied with that approach when making its productions. The IIO’s about-face, demanding that the IBT produce all responsive documents except those subject to a legal privilege, is a complete 180-degree reversal from his previous position, and it completely disregards the purpose of the provided logs, which was to permit the IIO to request particular emails or groups of emails relevant to his investigation.

Given the July 26 deadline for full compliance, Dinh requested a prompt response from the Government so that the IBT could seek judicial relief should relief not be forthcoming from the IIO.

Tara LaMorte, Assistant US Attorney, replied to Dinh by email Tuesday morning, July 19, 2016, *viz.*

Thank you for bringing this matter to our attention. In light of your email, we reached out to the IIO to get his side of the dispute, and, not surprisingly, he has a different take on this. We did not advocate that he take any course of action concerning this dispute, nor are we inclined to get involved at this point. Please feel free, however, to keep us in the loop on any developments.

Dinh replied two hours later, stating:

Thank you very much. In light of your conversation, the IIO has placed the previously cancelled meeting back on the agenda for tomorrow [July 20, 2016] at 10:00. We are hopeful for a productive meeting, but will file the pre-motion letter by COB tomorrow if he persists with the ultimatum deadline and its threat of noncooperation charges. I appreciate you taking the time; I know you have much more important matters, and apologize for having to trouble you with this.

Attending the rescheduled July 20 meeting for the IBT were Dinh and his law partner George Hicks, as well as Raymond and Ford. For the IIO, diGenova was accompanied by John Cronin and David Kluck. As was revealed in court filings in November 2016, someone from the IBT’s delegation to the meeting recorded it, without advising the IIO’s representatives of this fact.

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The recording showed that diGenova opened the meeting stating:

It seems to me you deserve some time, given the convention and everything, to complete your process in a way that is complete, thorough. Do your privilege logs. Make sure the UPS stuff for Ken Hall is out, produce whatever you think is not privileged, and then ... tell me how much time you need to comply – a month, two months, three months, what is your zone of reasonable time limits, and then I am happy. We don't need a deadline. We need production. So it's real simple. You can have as much time as you need.

Dinh acknowledged diGenova's statement but responded:

The much more significant issue is whether or not we can follow instructions of your April 12<sup>th</sup> letter. In our mind, we have. [But] we need your help. We need your staff's help in telling us in what ways we have not. Because that's how I read the letter laying out the process which is, produce what you can, tell us what you don't produce and we will tell you what else we need. ... And so right now, as I see it, we have made the production in accordance with your instructions in the first paragraph. I know that your staff, your office, see that as excessively withholding ... and so, in the interest of moving forward and continuing the conversation according to the process you have laid out here, I think that the process now should be, should the IIO decide to do anything with how documents need to be produced, IBT would be so notified. So we've set out categories, we've laid out logs, ... and so if you can help us help you by simply giving us an idea as to what categories, what specific emails within each categories, that we can do, we would be glad to do that.

Following on a discussion of withholding of emails involving UPS negotiations, which diGenova expressly had permitted, Dinh and Raymond then explained to diGenova their reluctance to produce emails concerning contract negotiations with other employers of Teamster members. Dinh said, "as you know, we deal with thousands of employers. And so I can ask you and your staff to think about the same principles, because UPS is especially sensitive because of their competitor position ... but every single employer we negotiate with can claim special sensitivity. And we're a union, Joe, we have 1.3 million members." diGenova replied that "I understand the sensitivities" but stated that "I can't say I am going to give you a blanket exemption for something that has absolutely no reason to be withheld." Dinh then made a proposal: "Why don't we do this? We will give you a list of employers, a full list of employers and at the very least, you can identify which ones you want." diGenova replied:

You do whatever you want – let me just say this. I am not interested in a fight. I am interested in production. Whatever I can do to make it easier for you to comply with the lawful order for document requests, I will do. If you want to give me a list of employers, that's fine. ... We will work with you to ensure that the things that you care about, which are the confidential negotiations or discussions, between an employer and the union, are protected. We could care less about legitimate negotiations and discussions. We will go out of our way to do anything we can to assuage your concerns. So believe me, do what you think will be helpful. ... You guys do whatever you have to do to figure out how to produce what's required, which is what was requested in the March 4 and March 11 [notices], produce privilege logs, explain why things are being withheld in vast categories



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for individuals, whatever, and then what we will do is at that point, we will get together and discuss it with you, as I indicated in my April 12 letter.

Dinh summarized the understanding as follows: “[W]ith respect to the contract negotiations, we will give you a list of all the employers that we have, same thing with contracts administration, we will give you a list of all those contracts that are being administered so you can tell us which ones you want and which ones you don’t want.” diGenova replied, “That’s a good start.”

Dinh then turned to emails involving legislative and policy strategy. He said, “I know that you have questions about and concerns about our political director [Brenner-Schmitz], and in no ways that we’re stepping into that. [But] we’ve withheld documents related to legislative strategy and by legislative strategy, we mean things like how we’re going to deal with TPP, which Congressional offices are we talking to and who will we support in the election, the legislative and political strategy that would be, that is, at the core, what we do as an advocacy organization.” diGenova assured Dinh that “we will work with you, and we will respect the zones of privacy that you have outlined, TPP, legislative strategies, particular offices.” diGenova, however, reserved the right to obtain documents falling in those categories when necessary to an investigation of misconduct, stating, “remember, at a certain point, as a result of third-party informants, it may be necessary to say this office, this legislative discussion, this XYZ, cannot be within that penumbra.” Dinh stated he agreed.

The meeting also focused on using the Relativity software, with diGenova committing to license it to the IIO office so that it could have the capabilities, most notably a robust search function, that the software provided.

The meeting concluded on the document production issue with diGenova instructing the IBT to “just continue to produce.” He went on to state: “My hope is that by Labor Day, we’ll be in a good place. ... We will be able to see what you produced. During that process, we’ll have conversations. We can try to figure out what we need, be more specific if it’s possible to do so without compromising the investigation. It should not be a problem. We don’t have to be at loggerheads over this.”

During the meeting, diGenova acknowledged the difference of opinion between the IBT and the IIO concerning the latter’s authority under the Final Order. He suggested that the issue may ultimately be resolved by the Court, but cautioned the IBT against going that route. He stated:

I understand that you believe that our claim that we have the authority to ask and receive any document under the Consent Decree, now the Final Order agreement, is suspect. You do not believe that that’s the case. I categorically believe that it is the case and I understand from your discussions with the US Attorney’s office over the last 24 hours that you are contemplating some form of litigation ultimately about my authority. That’s fine.

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You have every right – let me finish, because this is important. You have every right in the world and so does the union to challenge a specific action, a series of actions, even the authority of the Independent Investigations Officers and the disciplinary officers if you deem it appropriate. I would never say that the union can’t go to court.

I would only say this: If you intend to do that, I think the consequences of that for the union would be dire and a big mistake, but I absolutely recognize that the union may feel at a

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certain point that it has to do something for whatever reason to do that. I would just ask people to be really thoughtful about how –

Dinh replied to diGenova, stating in part the following:

We do not deny your authority to get information to do your job right. ... I appreciate that beyond measure, because I do not want to go to court on this anymore than you do. ... I would much rather appreciate this process you laid out in the April 12<sup>th</sup> letter, which is essentially a way in order to take the two respective positions and whittle them down, and hopefully by the end of this process you will see us as your partner in solving this chicken-and-egg problem that we can see in the specifics.

Following the meeting, diGenova sent a July 27, 2016 letter stating that he believed “our conversation was productive” and he was “confident that we now have forged a workable plan for ... full compliance with the March 4 and March 11 examination notices.” Additional points of the letter, however, differed from or added to what had been discussed at the July 20 meeting. For example, while diGenova repeated that the IBT could withhold documents it deemed privileged, the July 27 letter for the first time stated that the privilege log must meet the requirements of SDNY Local Rule 26.2(a). In no previous records production we learned about from any witness was the privilege log ordered to meet the standard of this court rule. Indeed, the September 11, 2015 production stated that emails to or from attorneys were withheld as privileged because they *may* include privileged communications. Second, diGenova’s July 27 letter asserted that he did not “agree to blanket exceptions of entire categories of documents.” The transcript of the July 20 meeting shows, however, that he agreed to permit the IBT to withhold emails bearing on contract negotiations and contract administration with all employers, and legislative and policy strategy emails, subject to follow-up by the IIO directing that particular emails or categories of emails be produced (diGenova on July 20: “produce what’s required, ... produce privilege logs, explain why things are being withheld in vast categories for individuals, ... [a]nd then ... we will get together and discuss it with you, as I indicated in my April 12<sup>th</sup> letter”).

Following the July 20 meeting, the IBT continued its review of Slatery’s emails, shifting from key word search to email-by-email review, and made further productions of them on September 2, 2016. The September 2 production included emails for Hall, Brener-Schmitz, and Slatery and was intended “to supersede all prior productions responding to the March 4 and 11” notices. The production for each individual was accompanied by two logs, one of which identified emails withheld because of legal privilege, the other detailing emails withheld on other grounds.<sup>6</sup> Each log identified sender, recipients, date and time sent, subject matter, and reason for withholding. The letter explained the non-privileged grounds for withholding emails as follows:

The IBT has, at present, withheld documents in the following categories. The first category consists of documents pertaining to the IBT’s legislative and political efforts. As explained at the July 20 meeting, these documents underlie the core of the IBT’s purpose as an advocacy organization. There are 13,176 such documents, and they are largely

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<sup>6</sup> Southern District of New York Local Rule 26.2(a) concerns privilege logs, so the log of non-privileged documents withheld was, categorically, not a log within the local rule. We do not reach any determination as to whether the log asserting privilege meets the local rule standard.

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confined to Nicole Brener-Schmitz and John Slatery. The second category consists of documents pertaining to the IBT’s negotiation and administration of contracts with third-party employers. There are 184 such documents, and they are confined to Ken Hall. During the July 20 meeting, you agreed that the IBT could provide a list of companies with whom Mr. Hall negotiates and administers contracts, such that you could then inform the IBT “which ones you want and which ones you don’t want.” Further to that discussion, and to aid in your determination whether any of these particular documents should be produced, the IBT herewith provides the following list of companies:

UPS	Sysco	USF Reddaway
Republic	Rite Aid	Anheuser Busch/InBev
Waste	YRCW	
Cummins	ABF	
Engines	Kroger	

Finally, as to these three custodians, the IBT has withheld 1,167 highly personal documents, that is, documents of both a personal and extremely sensitive nature. As with the two other categories, information regarding such documents is provided in the included logs to enable you to inquire further about them.

Dinh stated that the logs “should amply permit you to identify any documents you believe should be disclosed in a subsequent production pursuant to the iterative process discussed on July 20.”

Additional productions were made on September 7 and September 9, 2016 and were limited to Smith emails. The IBT withheld some emails because of legal privilege and others as Dinh explained in his September 7 cover letter, *viz.*

The IBT is also withholding ... documents concerning (1) negotiation and administration of contracts with third-party employers; (2) personnel decisions made by the General Executive Board following deliberative process; or (3) personal and highly sensitive matters. Mr. Smith is involved in the negotiation and administration of contracts with the following third-party employers: YRCW, ABF, Red Cross, and Republic Air.

According to Dinh’s September 9 letter, the logs for Smith’s emails, delivered to the IIO with the September 9 production, “should amply permit you to identify any further documents you believe should be disclosed.”

George Hicks (Dinh’s law partner) in an internal email to Dinh, Raymond, Ford, and Gary Witlen on September 9, 2016, stated the IBT’s understanding that the production just completed on the March 4 and 11 notices of examination was subject to further requests and directives from the IIO, *viz.*

All—we have made the second, and last, production of WC Smith documents to Joe diGenova; see below and the attached letter. ...For all intents and purposes, ... the IBT’s “first round” of production in response to the March 4 and 11 requests is complete. The ball is now in Joe’s court to tell us what additional documents he wants or (more likely) what gripes he has with the production. Thanks to all for their efforts throughout this process.

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Unlike the experience in September 2015, where Carberry contacted Raymond five days after receipt of the Slatery emails at issue in that notice of examination to request that specific categories of emails be produced, there was no correspondence or contact from the IIO to the IBT following the final September 2016 production of the Hall, Brener-Schmitz, Smith, and Slatery emails. The IIO had earlier indicated to the IBT that discussion of any documents withheld from production in response to the 2016 notices would follow after the IBT had made its production. See IIO April 12, 2016 letter (“Should the Independent Investigations Officer decide any of the withheld emails needed to be produced, the IBT would be notified.”); July 20, 2016 transcript (“produce what’s required, ... produce privilege logs, explain why things are being withheld in vast categories for individuals, ... [a]nd then ... we will get together and discuss it with you, as I indicated in my April 12<sup>th</sup> letter”). Instead, the IIO responded by bringing a single charge of obstruction and interference with the investigation against Ken Hall for failing or refusing to produce all requested emails.

Following written arguments to Judge Preska, the IBT was ordered on December 27, 2016 to produce all withheld documents, privileged and so-called “non-responsive” alike, with the exception of the Hall emails concerning UPS negotiations that diGenova and Carberry had stated need not be produced. The IBT complied with this order.

By letter to Raymond dated February 17, 2017, the IIO withdrew the October 31, 2016 recommended charge against Hall, having been “persuaded that Mr. Hall did not play a personal role in the International Brotherhood of Teamsters’ (‘IBT’) noncompliance with my March 4 and 11, 2016 document requests.” The IIO accepted that Hall “did not participate in the IBT’s legal strategy, did not review any documents, and did not decide whether to withhold any documents or categories of documents.” The withdrawal of the charge was expressly conditioned on the IBT designating “an individual officer at the IBT [to be] personally responsible for ensuring document requests of the Independent Disciplinary Officers (‘IDOs’) for International Union records under the Final Agreement and Order and fully complied with.” The IIO’s letter concluded: “I share your aspiration of advancing the goals of the Final Order in a cooperative manner and I trust this arrangement will further that aim.”

diGenova and Carberry told us the investigations for which the March 4 and 11, 2016 notices of examination were issued are ongoing. Carberry stated that further investigative work is required, including third-party subpoenas, before any decision can be made about referring charges. Carberry also stated that because of the complexity of issues presented in the investigation, he believed that, even had the IBT produced all requested emails promptly following issuance of the March 4 and 11, 2016 examination notices, no charging decisions would have been reached before the conclusion of the International officers election in November 2016.

*B. Facts bearing on the IBT’s institutional interest in adjourning the Aloise trial on internal union charges.*

Our original decision detailed the charges the IRB recommended be filed against Rome Aloise, IBT vice president at large. The charges were first forwarded to General President Hoffa for action on February 10, 2016. The exhibits supporting the charges were forwarded a week later, on February 17, 2016. Under the Consent Order, the General President was required to decide within seven days of receipt whether to adopt and file the charges or to decline to do so. Were the General President to adopt and file the charges, the IBT was required by the Consent Order to take “whatever action is appropriate” on the

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charges within ninety days of referral. For the usual case, the appropriate action taken on charges referred to the IBT by the IRB was the following: the IBT appoints a hearing panel; the hearing panel holds a hearing; the hearing panel issues a written recommendation on the charges to the General President; the General President determines whether to accept, reject, or modify the recommendation of the hearing panel; and the General President's decision to that effect is forwarded to the IRB. After the General President forwarded the decision to the IRB, the IRB reviewed it for sufficiency, but this review was not included in the ninety day time limit the Consent Order established. As the Aloise charges were initially filed one week before the transition from the IRB to the Independent Disciplinary Officers under the Final Order, the hearing process to be followed was a hybrid which substituted the Independent Review Officer for the IRB. In addition, the Final Order expressly permitted extensions for good cause of the ninety day period permitted for taking "whatever action is appropriate," codifying a practice under the Consent Order that permitted such extensions.

On March 15, 2016, the IBT tentatively scheduled the Aloise hearing for April 28, 2016. The next day, Aloise's lawyer, Ed McDonald, requested a later hearing date, not to occur before May 16, 2016, citing the complexity of the charges filed against Aloise and the need to prepare for them, as well as counsel availability. Under the Final Order and the disciplinary rules incorporated therein, the IBT has flexibility to schedule and reschedule hearings on charges referred to it by the IRB and IIO that have been adopted by the General President, such as those filed against Aloise. However, for those charges for which it assumes and retains jurisdiction, the IBT is required to comply with the adjudication deadline of the Final Order. In Aloise's case, that adjudication deadline was calculated from February 17, 2016, the date the exhibits accompanying the charges were delivered to the General President by the IRB. Given these facts, granting McDonald's request for a hearing date no earlier than May 16, 2016 would likely cause the IBT to exceed the ninety day adjudication deadline of May 17, 2016 that the Final Order permitted. Accordingly, on March 31, 2016, Raymond communicated the request for hearing adjournment to IRO Benjamin Civiletti and asked for additional time to complete the adjudication of the charges. Raymond's letter stated the following, in part:

The IBT has previously adopted and filed the recommended charges, has appointed a hearing panel and has initially scheduled a panel hearing for April 28, 2016. Attorneys representing Mr. Aloise, however, have recently requested that the hearing be postponed to a date not sooner than May 16, 2016, citing the complexity of the charges, personal and professional scheduling conflicts, and the need to prepare to call a comparatively large number of witnesses. The IBT is willing to accommodate this request, although we understand that this will make it unlikely that the case can be completed prior to the expiration of the 90 day deadline. In this regard, the IBT has concluded that it would be efficient for all parties concerned to schedule two days of hearing in California and two days of hearing in Chicago, in order to accommodate travel for various witnesses.

In either case, we respectfully believe there is good cause for extending the 90 day deadline. I have advised the Independent Investigations Officer, Mr. diGenova, about the need for this extension, and he has indicated to me that he does not object to it.

By letter dated April 5, 2016, IRO Civiletti granted a 60-day extension on the adjudication period, to July 17, 2016. On April 7, 2016, the IBT issued notice of hearing on the matter for June 6 and 7 in San Francisco and June 14 and 15 in Chicago. On April 26, 2016, notice was issued to all parties that IBT Legal Department Director Gary Witlen was appointed as counsel to the hearing panel.

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On May 13, 2016, McDonald, Aloise's lawyer, wrote Witlen the following:

We understand that when the Independent Review Board ("IRB") issued their report referring proposed charges against Rome Aloise to the International Brotherhood of Teamsters ("IBT"), they also sent their report and thereby referred their proposed charges to the United States Department of Justice. We learned this week that a federal grand jury in the District of Columbia has issued a subpoena calling for the production of documents relating directly to the pending charges against Mr. Aloise. Clearly the Department of Justice is conducting an investigation of the IRB's charges against Mr. Aloise.

In view of the foregoing, I hereby assert Mr. Aloise's right under Article XIX, §7(a) of the IBT Constitution not to stand trial on the charges that are to be heard by an IBT panel commencing on June 6, 2016, in San Francisco while federal criminal proceedings involving the same charges are being conducted. It would be manifestly unfair to compel Mr. Aloise to defend against the charges while in jeopardy of a criminal prosecution, and the IBT Constitution clearly provides that he may not be required to do so.

I would very much appreciate your informing me as soon as possible of the IBT's position on Mr. Aloise's assertion of his right.

McDonald sent Witlen a second, more detailed, letter on this subject on May 18, 2016, adding that he had learned from a federal prosecutor in the USDOJ's Organized Crime and Gang Section that Aloise was a target of the grand jury investigation. McDonald elaborated on the argument presented in his previous letter with the following points, among others:

- 1) We had planned to have Mr. Aloise testify about all of the charges at the panel hearing. Because of the pendency of the grand jury proceedings, Mr. Aloise now faces a Hobson's choice: either he will testify, foregoing his fifth amendment protections and placing himself in jeopardy of criminal charges being reviewed by the grand jury or he will not testify, thereby emasculating our defense at the hearing. This is manifestly unfair to Mr. Aloise. Indeed, the very rationale for Section 7(a) is to protect against such unfairness.
- 2) We had planned to call as witnesses individuals who are identified in the report as knowledgeable about the facts alleged to constitute the charges against Mr. Aloise. The pendency of a criminal investigation virtually unlimited in scope either has or will have a chilling effect on these witnesses. Indeed, we have already been informed that some witnesses will not appear. We have no doubt that when others learn of the grand jury investigation and their potential jeopardy in light of its vast scope, they will also decline to testify. This dramatically undermines Mr. Aloise's ability to defend himself.

IBT leadership concluded that the IRB's action in referring the Aloise investigation to USDOJ at the same time it referred the internal union charges to the General President for adjudication was unfair to Aloise and, so far as it knew, was unprecedented in the history of the Consent Order. Moreover, they were concerned that these circumstances would impede the union's ability to fulfill the obligations it owed Aloise under the LMRDA, 29 USC 411(a)(5), which bars disciplinary action by a labor organization

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against a member “unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.” They concluded that the IRB’s referral of the matter to USDOJ effectively checkmated Aloise’s ability to defend himself at the internal union hearing, thereby depriving him of “a full and fair hearing.”

There was no disagreement among IBT lawyers that the constitutional provision, were it interpreted in a case of first impression, should operate to forestall indefinitely an internal union hearing on charges that were the subject of a grand jury investigation. Although no indictment had issued against Aloise, the lawyers saw no meaningful distinction between “target” status in a grand jury proceeding and indictment, for purposes of the protections Article XIX, Section 7(a) sought to provide. Construing the constitutional provision in this way protected the IBT’s interests in complying with the LMRDA’s requirement to provide a member accused of misconduct a “full and fair hearing,” because he was not required to waive his Fifth Amendment privilege as a condition of exercising his testimonial right at the hearing.

The question the IBT lawyers, in-house and retained, debated was how to effectuate the indefinite stay they believed the IBT constitution warranted. The first draft circulated to IBT in-house lawyers was a letter prepared by Witlen, as counsel to the hearing panel, to diGenova, advising that Aloise had been named the target of a federal investigation arising from the same allegations contained in the IRB referral and had invoked Article XIX, Section 7(a) to avoid hearing on the internal union charges until any court action that might be brought had concluded. The draft letter stated that Aloise’s “concern with the prospect of having to testify about matters that are the subject of a criminal investigation is apparent. The Union is equally concerned about satisfying its commitments under the Final Order within the currently established timeframe.” Citing “these unprecedented and unique circumstances,” Witlen wrote that “we invite your input as to a course of action that the Union may pursue that will balance Article XIX, Section 7(a) with the IRB’s Rules.” This draft was prepared May 17, 2016. It was circulated among IBT lawyers but was not sent to diGenova.

A second draft letter to diGenova from Witlen, circulated May 19, 2016 to in-house lawyers, adopted a stronger tone. It read in part:

In the lengthy history of the Consent Decree, this is the first occasion of which the Union is aware that the IRB has provided materials to DOJ at the same time it has referred charges involving the same conduct to the Union. As a result, this is the first time a member awaiting the opportunity to confront the charges and be exonerated in a Union hearing has had to weigh the possible and obvious adverse consequences of participating in such a hearing and giving testimony on the record and under oath, at the same time he has been informed that he has been identified as a target in an ongoing criminal investigation.

I convey the Union’s view that by your actions, you have created an impossible situation for Mr. Aloise and the Union as well. Quite simply, you have compromised Mr. Aloise’s due process right to defend himself under the terms of the Union’s constitution and the IRB’s procedures. Moreover, you have placed the Union in the position, if it proceeds with its disciplinary processes under these circumstances, of being accused of violating Mr. Aloise’s rights as a member that are protected by 29 U.S.C. §411(a)(5). And you have made it impossible for the Union to sort out these competing interests and also comply with the timeframe established by the IRB for issuing a decision regarding the

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referral. In short, by not permitting the procedures set forth in the Consent Decree and the Final Order to function, you have created a conundrum from which there is no easy escape.

The draft letter concluded by declaring that the IBT would not proceed with the scheduled hearing on the internal union charges because doing so “will not provide Mr. Aloise with the opportunity to confront his accusers and answer the charges, but, rather, will subject him to greater jeopardy. The constitutional provision was adopted to prevent such a consequence.”

Witlen’s second draft to diGenova was not sent either. After an initial circulation among in-house IBT lawyers, it was discussed with General President Hoffa and the approach tentatively approved. It was then forwarded to Dinh for review. Dinh’s law partner, Hicks, returned a re-draft of the Witlen letter, maintaining its form as a letter from Witlen to diGenova. The re-draft retained much of the substance of Witlen’s draft, adjusted the tone somewhat, and added the following argument:

Forcing Mr. Aloise to defend himself at a hearing while under criminal investigation by the DOJ compromises Mr. Aloise’s due process rights under the IBT constitution and the Final Order. If the IBT proceeds with disciplinary proceedings under these circumstances, it may well face suit by Mr. Aloise asserting a violation of 29 U.S.C. §411(a)(5). *See* Final Order ¶ 35 (providing that nothing in the Final Order limits the rights of members to seek judicial review of union discipline under the LMRDA). Thus, it is impossible for the IBT to conduct disciplinary proceedings that comply both with the previously established timeframe for issuing a decision and with Mr. Aloise’s rights as set out in the IBT constitution and federal law.

Hicks’s draft of a Witlen letter to diGenova concluded with a statement of intention to request an extension on the hearing schedule for the internal union proceeding until USDOJ closed its investigation or, if a judicial proceeding were initiated, that process was concluded. The draft letter acknowledged that any such extension request must be made to IRO Civiletti. The draft requested IIO diGenova’s “non-opposition to this extension.”

Some internal debate ensued among the lawyers. Witlen asked the rationale for requesting diGenova’s agreement before approaching Civiletti with the request. He emailed on May 23, 2016:

I think it is safe to assume that diGenova will not agree and may even make the effort to unload on us for even asking ... Thus, before we even make the request to Civiletti, the reasons for him to reject it will already have been presented. Delaying the ultimate response from Civiletti only extends the scheduling uncertainty of our panel members, Aloise and his defense team, and Acevedo. I’m not sure to what end?

Hicks replied the same afternoon:

Gary—regarding whether to ask Joe D. first rather than going straight to Civiletti, we debated this internally. There is no obligation that we go to Joe first, since the Final Order only gives extension authority to the IRO. The reason we came down on the side of asking Joe first is because it would make us look more reasonable to a third party (e.g., the judge or US Attorney who might be reading this as part of a written record down the road), and also because it is consistent with what the IBT did in its previous extension request. And



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if there is little delay in Joe's/Carberry's eventual denial (as we expect), then there didn't seem to be a material downside to it. Finally, if we expect Civiletti to say no to an extension, then we have at least pushed things out further for when we move into stage 2, which is where the IBT doesn't act on the proceedings and instead lets the IRO conduct a de novo hearing. We're not wedded to this approach and are happy to discuss, but that was our thinking on the matter.

Hicks's re-draft was not sent. Instead, it went through one more re-draft to make Dinh the letter's sender rather than Witlen. This final draft was sent on May 25, 2016. Discussion by email among the lawyers the day before the letter was sent considered the course of action should diGenova reject the request for agreement and Civiletti deny the extension. Witlen, as counsel to the hearing panel, felt some urgency to make a decision about the IBT's course of action in advance of the hearing date. On May 24, 2016, he emailed Hicks: "I appreciate that it is appropriate to ask Civiletti [for an indefinite extension], but we are running out of time and I feel an obligation to tell the hearing participants before they get on planes to San Francisco." Hicks replied, "We will prepare a letter requesting the extension from Civiletti, but also saying that if it is not granted, we intend to postpone the proceedings."

The response from diGenova was prompt, arriving the next day, and stating that diGenova would oppose any adjournment request made to the IRO. The letter implicitly denied that the IRB had forwarded the Aloise charges to USDOJ, stating that they were public and available to anyone willing to examine them.<sup>7</sup> The letter continued:

DOJ's decision to investigate Mr. Aloise's conduct for possible criminal violations is a government decision. He is no different than the other union members who when in similar situations whose hearings had not been stayed despite their requests. Finally, the IBT Constitutional provision you cite to justify an adjournment is not applicable on its face, since Mr. Aloise has not been criminally charged as of this date.

The IBT expected diGenova's decision to oppose the request for indefinite stay. Hicks emailed the IBT lawyers on May 26 to state "[w]e have drafted a letter to Civiletti formally requesting the extension, which we will soon circulate." Dinh replied that they should do more than a "bare bones letter," concerned that Civiletti "will reject [it] out of hand." Instead, he suggested that they "prepare and send Civiletti a well-reasoned letter brief, articulating why we are legally required or at least legally entitled to respect Aloise's right to due process, and refuting the cases and provisions [diGenova] discusses in this letter." In the meantime, the IBT notified the parties to the Aloise hearing and the hearing panel that the hearing had been postponed. As noted previously, the IBT controlled the scheduling of the hearing, subject only to the obligation to complete the process on the referral by July 17, 2016, absent further extension.

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<sup>7</sup> We make no determination as to whether the IRB referred the Aloise matter to USDOJ. The Final Order, however, expressly authorized the IRB to make such referrals in the course of winding up its work and transferring "pending disciplinary matters" to the IDOs "and/or" to "appropriate law enforcement agencies." Final Order, ¶ 27. No similar right to refer disciplinary matters to law enforcement was expressly stated in the Consent Order. Our investigation did not examine whether the IRB had, under the Consent Order, referred disciplinary matters to law enforcement while also pursuing internal union charges arising from the same facts and circumstances.

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What appeared to take the IBT lawyers by surprise was Civiletti's letter, also received May 26, 2017, rejecting the requested adjournment before the IBT presented it to him. Civiletti's letter arrived a few hours after diGenova's and stated that the IBT's letter to diGenova had been forwarded to him. Civiletti replied on his own motion, stating "I find that good cause has not been shown for the grant of such an indefinite extension of the hearings, and I therefore deny the requested further extension."

That Civiletti denied the request before the IBT presented it to him required the IBT lawyers to recalibrate, and they settled on sending a letter brief to Civiletti on June 3, laying out the arguments in favor of the indefinite extension.

During the preparation of this letter by lawyers at Dinh's firm, Raymond considered the likely consequences to Aloise of the IBT taking unilateral action to suspend the hearing process while the grand jury investigation continued. He predicted the following by email on May 31, 2016 to the other in-house IBT lawyers: "this strategy will almost certainly lead to Civiletti assuming original jurisdiction. This will almost certainly lead to Rome being 'convicted,' and probably in pretty short order. Just wondering if Rome and his lawyers are fully engaged on this issue."

The letter Dinh sent to Civiletti on June 3, 2016 advised that the IBT had "suspend[ed] the scheduled hearing on charges against Mr. Aloise until the conclusion of the criminal inquiry. By this action to protect the integrity and fairness of any eventual proceeding, the IBT takes no position on the allegations against Mr. Aloise."

After reciting the essential facts of the situation, Dinh's letter first criticized at some length Civiletti's action in denying the requested extension before the IBT even had made it. Thus:

To say the least, your preemptive denial of a request that the IBT had not even yet made blatantly disregards the procedures set forth in the Final Order and undermines constructive relations between the IBT and the Independent Disciplinary Officers. The Final Order expressly provides that the Independent Review Officer may extend the period in which the IBT must provide written findings "upon request for good cause." To be sure, the Independent Review Officer is entitled to deny the requested extension, but the IBT is entitled first to "request" it, by making its full panoply of arguments for the extension. To deny a putative extension before even receiving the request—much less before having a full understanding of the reasons for the request—is the antithesis of reasoned, impartial adjudication.

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[Y]ou must surely recognize the deleterious effects your preemptive denial will have on relations between the IBT and the Independent Disciplinary Officers. The IBT sought to follow the letter and spirit of the Final Order by voluntarily seeking non-opposition from the Independent Investigations Officer before requesting an extension from the Independent Review Officer. What it got in return was a sucker punch: the Independent Investigations Officer *ex parte* transmitted the IBT's non-opposition request to the Independent Review Officer, and the Independent Review Officer denied an extension before the IBT even had a chance to submit a formal and detailed request. If the Independent Disciplinary Officers' purpose in undertaking this discreditable tag-team exercise was to undermine trust and cooperation between themselves and the IBT—in turn

jeopardizing the constructive relationships envisioned by the Final Order—they have attained that unfortunate goal.

Turning to the merits of Article XIX, Section 7(a), Dinh asserted that the IBT had “both the duty and the right under the Final Order not to proceed with its disciplinary hearing against Mr. Aloise until completion of the ongoing criminal investigation against him based on the Independent Investigation Officer’s report.” Dinh explained that under the Final Order, hearings before the IBT “resulting from Independent Investigations Officer referrals . . . shall be conducted under rules and procedures consistent with the requirements of Article XIX of the IBT Constitution and applicable law.” Article XIX, Section 7(a) “reflects the obvious dilemma that any member faces” when confronted with internal union charges at the same time he is facing criminal or civil trial on the same set of facts: “if he or supporting witnesses testified on his behalf during the IBT hearing, that testimony could be used against him in a criminal or civil proceeding; however, if he or supporting witnesses refused to testify during the IBT hearing—to avoid providing inculpatory evidence in another proceeding—his defense before the IBT would be emasculated and his right to the full and fair hearing required by federal labor law undercut.” Dinh stated that “the IBT has construed the provision to encompass circumstances where a member has been notified by law enforcement that he is a target of a criminal investigation based on the same set of facts underlying a putative IBT hearing, since statements made in an IBT hearing could be immediately used elsewhere against that member to that member’s detriment.” Dinh’s letter further asserted that a union’s interpretation of its constitution was entitled to deference unless patently unreasonable, citing *Sim v. New York Mailers’ Union No. 6*, 166 F.3d 465, 470 (2d Cir. 1999) (observing that “a Union’s interpretation of its own constitution is entitled to great deference in order to avoid interference with internal union affairs and therefore, the interpretation of bylaw provisions by Union officials will be upheld unless patently unreasonable” (brackets, ellipsis, and quotation marks omitted)); and *Hughes v. Bricklayers & Allied Craftworkers Local No.45*, 386 F.3d 101, 106 (2d Cir. 2004) (“We, of course, defer to a union’s construction of its own constitution and rules unless that interpretation is patently unreasonable.”). Dinh concluded this argument with two points. First, “for the IBT to conduct a hearing against Mr. Aloise at this juncture would not be ‘consistent with the requirements of Article XIX of the IBT Constitution’ and would therefore contradict the terms of the Final Order.” Second, given the IBT’s obligation under the LMRDA to provide a “full and fair hearing,” the IBT was unwilling to “expose itself to civil liability” to Aloise by conducting an internal union hearing against a member facing grand jury proceedings on the same facts.

Without citing the case expressly, Dinh distinguished *US v. IBT (Carey & Hamilton Discipline)*, 247 F.3d 370 (2d Cir. 2001). In that case, the IRB referred charges to the IBT’s General Executive Board (GEB) alleging that Hamilton brought reproach on the IBT by embezzling funds to support the Carey re-election campaign. Similar charges were referred to the GEB for Carey. The GEB adopted the charges against both individuals and returned the matters to the IRB for trial before the IRB. A short time before the IRB hearing was to commence, Hamilton requested an adjournment of the hearing “until the completion of any investigation by the United States Attorney’s Office for the Southern District of New York regarding any conduct relating to these proposed charges.” The request did not cite the IBT constitution as the basis for the stay. The IRB granted a brief adjournment but then proceeded with the hearing, which consumed four days over several months. Hamilton did not testify, but his counsel cross-examined witnesses presented against him. After the proofs were closed but before the IRB issued a decision on the merits of the charges, Hamilton was indicted on felonies related to the campaign finance scheme and its cover-up. The same day the indictment was returned, Hamilton requested a second stay of proceedings, this time citing Article XIX, Section 7(a) of the IBT constitution, and stating that the

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indictment made it inadvisable to file a post-hearing brief on the IRB proceeding. The IRB denied the stay and subsequently found that the internal union charges had been proved against Hamilton, barring him from membership, office, and employment with the IBT for life. The District Court and the Court of Appeals affirmed the IRB's action and expressly found that the IRB did not violate Hamilton's rights by denying his requests for stay. Dinh's June 3, 2016 letter to Civiletti argued that *Carey & Hamilton* was inapposite to the Aloise hearing, principally because the IBT – not the IRB or the IRO – was trying the charges.

Mr. diGenova claims that Mr. Aloise “is no different than the other union members who when in similar situations whose hearings had not been stayed despite their requests.” *Id.* [*sic*]. Mr. diGenova provided no support for this cryptic statement, but in all events, the IBT is aware of no time when the Independent Disciplinary Officers or their predecessor, the IRB, have required *the IBT* to proceed with a disciplinary hearing against one of its members when that member is also under criminal investigation for the same alleged conduct. Furthermore, the Consent Order contained no provision for extensions of time, whereas the superseding Final Order expressly contemplates extensions of time for good cause. The supposed absence of extensions under a previous regime that did not even provide for them has little, if any, relevance now.

(Italics emphasis in original.)

As a final point, Dinh submitted that the IBT was not required by the Final Order to conduct a hearing on charges referred to it by the IIO. Rather, citing paragraph 35 of the Final Order, the IBT was obliged only to take “whatever action is appropriate” within the time permitted by the Final Order. Dinh elaborated on this point as follows:

Finally, the IBT not only is obliged by its Constitution and federal law to forgo Mr. Aloise's hearing for the time being; it has the right to do so under the Final Order. Nothing in the Final Order requires the IBT to hold a disciplinary hearing against a member after the Independent Investigations Officer refers a written investigation report to it. To the contrary, the Final Order expressly provides that after the Independent Investigations Officer refers a report to the IBT, the IBT entity to which the matter has been referred “shall promptly take *whatever action is appropriate* in the circumstances and shall, within ninety (90) days of the referral, make written findings setting forth *the specific action* taken and the reasons for that action.” Final Order ¶32 (emphases added). Indeed, the Final Order notes that “[*i*n the event that” the IBT files disciplinary charges, the IBT shall be the charging party, confirming that the IBT has the option of not proceeding with a disciplinary hearing.

All that is required of the IBT under the Final Order is that the IBT entity to which a report is referred must provide, in response, “written findings setting forth the specific action taken and the reasons for that action.” Those findings must be provided within 90 days of the referral, which time period may be extended for good cause. The Independent Review Officer then reviews those written findings to determine whether further action is necessary; if so, he notifies the IBT entity, which has 20 days to identify additional actions it has taken or will take to correct the defects noted by the Independent Review Officer. The Independent Review Officer then reviews the IBT entity's response and, if still

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dissatisfied, conducts a de novo hearing according to the Rules appended to the Final Order. *Id.* ¶¶33-34; *see also id.* ¶35 (preserving member’s ability to seek judicial review under the LMRDA).

The Final Order thus sets out a clear, step-by-step disciplinary process that carefully allocates certain authority to designated entities at certain times. That detailed framework was the hard-earned product of negotiations between the IBT and the government and cannot be disregarded cavalierly. The IBT intends to comply with the Final Order by adhering to the process it sets forth.

The Dinh letter of June 3, 2016 declared that the IBT intended “to suspend the scheduled hearing on charges against Mr. Aloise until the conclusion of the criminal inquiry.” This declaration constituted the action the IBT concluded was appropriate under the circumstances. Under the Final Order, the matter then shifted to the IRO for review of that action.

The IRO did not respond for nearly six weeks. In the meantime, the IBT’s General Executive Board met on or about June 24, 2016, received a report of General President Hoffa on the decision not to proceed with the hearing, and adopted a resolution of support for the General President’s action. The report the General President gave the GEB stated the following:

As you know, the Independent Investigations Officer referred charges against Vice President Rome Aloise. You all received copies and are familiar with the allegations.

I want to update you on the status of the charges. I don’t want to discuss the substance of the charges.

I have appointed a panel to consider the charges and give Rome an opportunity to present his case. We had scheduled two days of hearings in San Francisco on June 7-8 and two days in Chicago the following week.

Shortly before the hearing, we were notified by Rome’s attorney that he became aware that the Justice Department in Washington had commenced an investigation of the allegations in the referral and was targeting Rome for possible criminal charges. He advised that a grand jury might eventually consider the findings at the completion of the investigation. Based upon that information, Rome’s attorney requested that the hearings be postponed indefinitely, invoking Article XIX, Section 7(a) of the Constitution, which provides that a member need not stand trial on charges involving the same set of facts as to which he is facing criminal or civil trial until the final court appeal has been concluded.

I granted that request and we had our outside counsel, Viet Dinh, communicate that decision to the IDO. We have not heard back from them as to their reaction. In the meantime, our time within which we were supposed to issue a decision on the charges has expired.

I bring this to your attention so you are aware of the reason the charges have not been heard and to understand the position we have taken.

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IRO Civiletti replied to Dinh's letter on July 18, 2016 by notifying General President Hoffa that "the Union has not pursued the disciplinary proceeding against Rome Aloise in a lawful, responsible, or timely matter [*sic*]; and that the Union's decision, based on Mr. Aloise's request, to stay for an indefinite period of time the date of the hearings on the charges against him, pending the resolution of any criminal investigation against him, is inadequate under the circumstances." The letter relied on *Carey & Hamilton Discipline* to hold that Aloise had no entitlement to a stay under Article XIX, Section 7(a) of the IBT constitution. In reaching this conclusion, Civiletti did not recognize the distinction Dinh had drawn between the union conducting the hearing (in Aloise's case) and the IRB doing so in Hamilton's.

Based on his determination that the IBT's action with respect to the Aloise hearing was inadequate, Civiletti gave the IBT notice to correct the inadequacy, *viz.*

Pursuant to Paragraph 33 of the Final Order, the Union has 20 days to inform the Independent Review Officer in writing that a prompt hearing on the charges against Mr. Aloise has been scheduled. If the Union does not do so, the Independent Review Officer will promptly schedule a de novo hearing on the charges against Mr. Aloise.

Given the time that has passed since Mr. Aloise was first notified of the charges against him, and given the prior grant of the Union's request for an extension of time to conduct its disciplinary hearing, the Independent Review Officer will consider the Union's actions to correct the defects set forth in this Notice not to have been pursued in a lawful, responsible or timely manner, and to be inadequate in the circumstances, unless the Union disciplinary hearing is scheduled to be held and completed, and written findings concerning the specific actions taken by the Union and the reasons for those actions submitted to the Independent Review Officer, by no later than September 15, 2016.

Civiletti's letter prompted further internal debate among IBT lawyers. In a three-paragraph email Dinh's law partner Hicks sent to all involved IBT lawyers on July 18, 2016, he first dissected Civiletti's assertion that the IBT's decision not to go forward with the Aloise hearing was a "serious violation" of the Final Order. Thus:

1. The "serious violation" language appears to be bloviation. The Final Order doesn't say that refusing to proceed with a hearing following a charge is a violation of the order, much less a serious violation. The process is working exactly the way the Final Order sets out: the union did not proceed in a lawful, responsible, or timely manner (says the IRO, parroting the language of the Final Order), so now the IRO is contemplating conducting a *de novo* review—exactly what the Final Order provides for. Frankly, the fact that he is providing even further time before initiating the *de novo* hearing is interesting, since he does not have to do so under the Final Order. It is almost as if he doesn't really know what to do should he actually have to conduct the *de novo* hearing himself, and is hoping the IBT will capitulate in the face of his made-up "serious violation" allegation and undertake the hearing itself.

Commenting on Civiletti's discussion of *Carey & Hamilton Discipline*, Hicks wrote the following, in part:

2. The letter says that the Second Circuit has already rejected our argument that the IBT Constitution isn't triggered if a member is merely under criminal investigation and not

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yet charged. This is somewhat true, and we knew that going in—the decision he cites isn’t a good one for us. But the passing language in that decision is arguably dicta, and the court certainly didn’t grapple with the counterargument that the IBT is entitled to construe its own Constitution.

Finally, Hicks turned to the question Civiletti’s letter posed, a question the IBT leadership had already considered and decided, which was whether to proceed with the internal union trial of the charges against Aloise. Hicks framed the question as follows:

3. Whether it is more prudent for the IBT simply to conduct Rome’s hearing on its own vs. let the IRO handle it is a strategy question more for the IBT folks. However, there may be a benefit to having the IBT do it—Rome is more likely to be acquitted or given a lighter remedy than under anything the IRO would do, where he will surely be convicted and receive a very stiff penalty. If the IBT does it, the IRO might object to the outcome and try to then override the result or conduct a new hearing himself, but we’ve eaten up more of the clock in the meantime (if that is one of the goals here—to get past the election season).

This paragraph brought a sharp reaction from Witlen. Writing to another IBT in-house lawyer just twelve minutes after Hicks sent his email, Witlen said, “Please shoot me.” Witlen explained in his interview with us that the leadership had already been through the pros and cons of proceeding with the trial and made the decision to interpret the IBT constitution so as to require that the proceeding be stayed, understanding that the IRO would then control the timing and conduct of any hearing. That they would consider reversing course on that core issue Witlen found irritating.

Dinh too weighed in, just five minutes after Hicks’s email arrived: “I don’t think we are going to do 3. I told Ed McDonald [Aloise’s principal lawyer] two weeks ago that our letter articulated our position and that is it.” That position was for the IBT to defer hearing on the charges until the grand jury proceeding and potential indictment was fully resolved, with the consequence that the IRO would control the conduct and timing of any hearing.

IBT lawyer Ford reported to her fellow in-house lawyers later on July 18, 2016, after Civiletti’s letter had been received, that Aloise told her “[w]e should expect a letter from McDonald tomorrow telling us they expect that we will continue on our path of not hearing the case which means the IDO will take jurisdiction. The letter will also ask us to join them when they file in court.” As Aloise foretold, a 13-page letter from McDonald arrived on July 19, 2016. It asserted that the IBT’s decision to grant the stay was a proper interpretation of the IBT constitution.<sup>8</sup> With respect to the *Carey & Hamilton Discipline* issue Civiletti had raised in his July 18, 2016 letter, McDonald argued that Civiletti had misconstrued the Court’s decision. The Court did not rest its decision on Article XIX, Section 7(a). Rather, as McDonald put it, “[t]he Second Circuit *expressly held* that, ‘[a] violation of a procedural provision of a union’s constitution is actionable only if the violation deprived the party of a full and fair hearing under the LMRDA,’ and that ‘[e]ven if the denial was a violation of the IBT’s Constitution, Hamilton cannot show

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<sup>8</sup> The letter also presented an argument that Civiletti as IRO had an irreconcilable conflict of interest that barred him from hearing the charges against Aloise, as Civiletti had been a member of the three-person IRB that brought the charges and could not therefore sit in judgment of them.

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that it deprived him of a fair hearing, as he was able to mount a vigorous defense against his accusers.”<sup>9</sup> McDonald submitted that the constitutional provision “was not relevant under the particular circumstances” of Hamilton’s case, and the Court’s holding that the IRB’s decisions to deny the stays Hamilton requested did not have binding effect on the IBT in Aloise’s matter.

Civiletti’s July 18, 2016 letter giving the IBT twenty days to issue a notice of hearing on the internal union charges required a response. Dinh wrote Civiletti on August 5, 2016, advising that, as he had said in his June 3, 2016 letter, “the IBT will not be able to convene a hearing” on the Aloise case because of the pending grand jury investigation. Dinh disputed Civiletti’s contention that the IBT’s decision constituted “a serious violation of the Final Order.” He wrote that the Final Order permitted the IBT to decline to file charges altogether and that, if charges were filed, to take “whatever action is appropriate,” including relying on a provision of the IBT constitution to stay the proceedings. If the IRO concluded the IBT’s action was inadequate, it had the authority to assume jurisdiction of the matter and conduct a de novo hearing. Dinh cited more than fifteen previous cases under the Consent Order where the union either declined to file charges or filed them and referred the matter back to the IRB for hearing. Dinh concluded on this point by declaring that “it offends plain text, confounds logic, and upends settled precedent for your letter to assert that the IBT would violate the Final Order by following its prescriptions to decline a hearing in deference to due process and the IBT Constitution.”<sup>10</sup>

Dinh also countered Civiletti’s contention in his July 18, 2016 letter that the IBT violated the Final Order by “basing its indefinite stay of the Aloise hearings on an interpretation of its Constitution that has been expressly rejected by the federal courts.” Dinh reasoned that because the Final Order did not require the IBT to conduct a hearing on referred charges at all, “there is no basis for premising a separate violation of the Final Order on the IBT’s asserted legal justification for declining to do so.”

Dinh then argued that *Carey & Hamilton Discipline* was inapposite. He wrote:

First, *Hamilton* involved an *IBT member’s* after-the-fact claim in district court that the *IRB’s* refusal to adjourn *IRB* proceedings foreclosed a “full and fair hearing” under the Labor-Management Reporting and Disclosure Act. *Id.* at 378. Here, it is the *IBT* that has declined to conduct *its own* proceedings based on its interpretation of *its own* Constitution. The particular circumstances in *Hamilton*—an LMRDA claim brought by an IBT member, challenging IRB proceedings, untimely invoking a constitutional provision—presented the Second Circuit no occasion to consider the IBT’s own construction of Article XIX, §7(a), as raised by the IBT *itself* with respect the IBT’s *own* proceedings.

Second, as I explained in my June 3 letter and unlike in *Hamilton*, the IBT’s Executive Board here has formally construed that provision to encompass circumstances where a member has been notified by law enforcement that he is a target of a criminal investigation based on the same set of facts underlying a putative IBT hearing, since statements made in

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<sup>9</sup> Footnotes omitted; italics emphasis in original.

<sup>10</sup> Notably, this statement of the IBT’s position to the IRO varied significantly from that argued by Aloise’s counsel to the IBT, who urged that the IBT bring or join a suit to bar the IRO from proceeding with a hearing while the grand jury continued to investigate Aloise. Dinh’s letter to Civiletti acknowledged and did not challenge the IRO’s authority under the Final Order to proceed with the disciplinary matter, despite Article XIX, Section 7(a), if the IRO deemed the IBT’s action on it inadequate.



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an IBT hearing could be immediately used elsewhere against that member to that member's detriment. Under well-established Second Circuit law, that reasonable construction of the IBT's constitutional provision by the IBT is entitled to "great deference." *Sim v. New York Mailers' Union No. 6*, 166 F.3d 465, 470 (2d Cir. 1999); *see also Hughes v. Bricklayers & Allied Craftworkers Local No.45*, 386 F.3d 101, 106 (2d Cir. 2004).

(Italics emphasis in original.)

Dinh conceded that Civiletti "may disagree with the IBT's decision not to hold a hearing, its deference to historical practice, its interpretation of its own Constitution, or its counsel's analysis of legal precedent." But Dinh cautioned that Civiletti should not characterize that disagreement as a violation of the Final Order by the IBT.

Civiletti's sole response to Dinh's letter was not directed to Dinh. Rather, it was a notice of hearing to Aloise and the IBT dated August 9, 2016, stating that the IRO "has determined that a de novo hearing" shall take place on October 11, 2016. The hearing was subsequently adjourned by Civiletti to November 30, 2016, at the request of Aloise's lawyer, McDonald. The November 30 hearing date was subsequently adjourned without date when Civiletti resigned effective October 31, 2016. Following the appointment of Barbara Jones to succeed Civiletti as IRO, the hearing was rescheduled on January 11, 2017 for March 14, 2017. The hearing was held that date. Written summations were filed post-hearing, and the charges are now pending the decision of IRO Jones.

*C. Facts bearing on the IBT's institutional interest when invoking the International officers election in its dealings with the IDOs.*

*1. The IBT's requests that the IDOs refrain from being drawn into the election.*

In both the document production matter with the IIO and the Aloise hearing matter with the IRO, the IBT made the disciplinary officers aware of the ongoing International officers election and urged them to conduct their work according to established norms to avoid additional acts that could affect the election. The relevant facts are as follows.

The IBT first raised the election when Dinh emailed Assistant US Attorneys Tara La Morte and Rebecca Tinio on July 19, 2016. This line of email correspondence commenced the previous Friday, July 15, 2016, when Dinh wrote La Morte and US Attorney Bharara seeking their intervention to get the canceled meeting between the IIO and the IBT that concerned document production rescheduled. While Dinh's request for intervention was pending, IRO Civiletti, on Monday, July 18, 2016, notified General President Hoffa of his "determination that the Union has not pursued the disciplinary proceeding against Rome Aloise in a lawful, responsible, or timely matter" [*sic*], and gave the IBT 20 days to schedule a hearing or cede jurisdiction to conduct a de novo hearing to the IRO. Civiletti's action concerning Aloise was unrelated to Dinh's correspondence with the US Attorney's office about document production.

Civiletti's letter was addressed to Hoffa, with Raymond, Dinh, Aloise, McDonald (Aloise's attorney), and IIO diGenova listed as copy recipients. The next day, July 19, 2016, however, the letter was posted to TDU's website, linked to an article titled "Rome Aloise Under Criminal Investigation." That same day, Dinh and La Morte wrapped up their email correspondence concerning document production, with La Morte telling Dinh that the US Attorney's office had spoken with the IIO but had not

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recommended a course of action and was for the time being staying out of the matter, and Dinh replying that the IIO had put the canceled meeting back on the schedule for the next day, July 20. At 9:05 p.m. that evening, July 19, 2016, Dinh sent a final email to La Morte and Tinio, copying in the in-house and retained IBT lawyers as well. It read, in relevant part:

Dear Tara,

Thank you. And to confirm that I am not just being paranoid, the front page of the TDU website today contained a link to a letter dated yesterday threatening the General President with non-violation with respect to another lawyer dispute (this time for a failure to address CA2 precedent): [here was inserted a link to the article and Civiletti letter on TDU's website].

The letter was copied only to the IBT, the affected person and his counsel, and Mr. diGenova. This type of unwarranted threat and escalation debases the IIO and IRO, threatens the integrity of the disciplinary mechanism under the Final Order, and quite frankly undermines all that we have worked so hard together to move the IBT to a better place.

Worse, the intentional leaking of an unwarranted nuclear threat to the electoral opponents of current IBT leadership I fear bespeaks an effort, at best, of illegitimate entanglement in IBT electoral politics and, at worst, of deliberate destabilization of the IBT.

La Morte replied 12 minutes later *in toto*: “Thanks Viet – we appreciate you letting us know.”

Neither IBT nor IIO witnesses we interviewed could identify any previous matter in which a so-called “20-day letter” had been made public. Also, neither the IBT constitution, the Consent Order, the Final Order, nor the disciplinary rules requires such publication by the disciplinary authority.

The Consent Order and the constitution declare that *charges* referred by the IRB to the IBT for action shall be made public. Thus, paragraph G.(d) of the Consent Order stated that the IRB “[s]hall issue, upon completion of an investigation, a written report detailing its findings, charges, and recommendations concerning discipline of officers, members, employees, and representatives, and concerning the placing in trusteeship of any subordinate body, which reports shall be available during business hours for public inspection at the International Union’s office in Washington, D.C.” This provision was adopted verbatim into the constitution at the 1991 IBT convention as Article XIX, Section 14(b)(5), and remained there until Section 14 underwent a wholesale replacement at the June 2016 convention to reflect the requirements of the Final Order. The practice that had grown up surrounding this provision was that the IRB would release charges and the exhibits supporting them to any person who requested a copy, with no requirement that the requesting individual appear at IBT headquarters to inspect the charging documents.

Neither the Final Order nor the Disciplinary Rules, however, contains any similar provision that requires the public release of charges referred by the IIO to the IBT. The IBT constitutional amendments adopted at the June 2016 convention to effectuate the terms of the Final Order similarly lack any provision requiring or permitting public release of charges referred by the IIO to the IBT. The sole public notice provision the Final Order contains for the IDOs is paragraph 41, which provides the following: “The Independent Review Officer shall be responsible for preparing and distributing to the membership annual

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reports of the work of the IBT Disciplinary Officers, which reports shall include detailed descriptions of the disciplinary, trusteeship, compliance, and other actions taken by the IBT Disciplinary Officers during the preceding year, including a summary of the number and types charges referred by the Independent Investigations Officer, the disposition of those charges, and an analysis of those dispositions as compared with the dispositions of similar charges in previous years.”

The Consent Order, at Section G.(f), permitted the IRB to give notice *to the IBT* that a matter referred to the IBT by the IRB had not been pursued or decided “in a lawful, responsible, or timely manner” or that the resolution was “inadequate under the circumstances.” The verbatim language was carried forward into the IBT constitution at Article XIX, Section 14(c)(2) at the 1991 convention. Section G.(g) of the Consent Order required the IBT to respond to the notice within 10 days. This requirement was adopted in the IBT constitution at Article XIX, Section 14(c)(2). This provision was carried forward in paragraph 33 of the Final Order, except that the 10-day time limit for responding, as recited in the Consent Order, was lengthened to 20 days in the Final Order, and the authority empowered to give the notice to the IBT was shifted from the IRB to the IRO. However, neither the Consent Order, the Final Order, the disciplinary rules, nor the constitution contained language requiring the IRB *to make public* the notice it had given the IBT that the resolution the IBT had decided was “inadequate under the circumstances.” In contrast, *a hearing conducted by the IRO* is, under the disciplinary rules adopted by the Final Order, “open to IBT members in good standing.” Disciplinary Rules, Section G. This provision presumes that notice of the hearing has been made public.

No witness we interviewed could recall any instance other than the Aloise matter in which a 20-day letter (or its predecessor 10-day letter under the Consent Order) had been publicly released. Looking to recent examples, investigation found that 20-day letters were issued in 2016 in the disciplinary matters of Manny Quintero and Charles Bertucio; neither was publicly released. The concern Dinh raised with the Assistant US Attorneys in his July 19, 2016 email was that the release of the 20-day letter concerning Aloise was inconsistent with procedure and practice and had the potential of affecting the pending election.

Dinh raised the release of the 20-day letter directly with diGenova on July 20 that he had complained to the US Attorney’s office about the previous evening. diGenova explained to Dinh and the others present how the release of the letter came about. Thus:

Monday [July 18, 2016] we delivered a letter to President Hoffa about Aloise. Close of business on Monday we get a call from the TDU saying that they had heard from inside your building that Aloise was going to have a 20-day letter, or something like that they heard, could they get it. And we said, we’ll consider that. We want to give the union time to review the letter. The next day, we gave them a copy of the letter.

Dinh replied that the release of the letter was unusual, was inconsistent with historic practice, and, coming during the electoral period, had the potential improperly to interfere with the election. diGenova argued that the 20-day letter was a public document. He said, “[A]ll of these letters are public. The charges are made public. The letters are made public. \*\*\* You have to understand, first of all, that we -- every one of our records, unless it’s an investigative document, is public and the union members have a right to see every bit of it.” Raymond disagreed, stating: “Not the way it’s been explained to me in the past.” Raymond told us that investigative reports were made public, but 10-day and 20-day letters were not. diGenova replied:

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Are you asking me not to release any documents, even though they're not investigatory – remember, we're not at the investigatory stage now. We're at the adjudicatory stage and the members have a right to attend those hearings and to do whatever they want to do to attend them. So if you want me not to issue any – not to answer those requests, here's what I'll do –

Dinh interrupted diGenova, stating:

No, we're not asking for that. You asked me what our position is, our position is not to make any specific requests or demands on you with respect to any particular action. Our request is very simple. As you noted, we are in the middle of an election season and there is intense interest amongst all of our 1.3 million members in that election. And the rules, constitution, tradition of IBT is very, very clear. That is, union officials -- certainly applies to us and we consider all the IIOs and IROs to be part of the union official, because we're all working together, even though you're an independent regulatory mechanism – It's sensitive that they cannot use their union positions in order to entangle themselves in the elections. There is a real danger – there is a real danger that in the middle of this election season, every single one of our actions has effects on that electoral process.

What is normal ... – so what would be your normal judgment that on whatever issue, I'm not making specific requests. What would be your normal judgment, I would think is – has to be viewed with – because it should be viewed. The laws and rules are required to be viewed in the context of an ongoing election fight, because none of us wants to be -- none of us wants to be unwittingly or deliberately entangled in that election process. So that's why – that's why we're very concerned about any – any of these actions that can be seen as excessive escalation and aggression that may be construed as -- that may be construed as something other than a lawyerly dispute into an actual sort of violation or noncooperation, anything like that.

With these words, Dinh asked diGenova to follow normal practice and procedure with respect to public release of certain documents, with Raymond arguing that 20-day letters are not a category of documents that historically have been released.

diGenova replied as follows:

I understand completely and I certainly understand what you just said about the anxiety surrounding the election and everything. What we'll do is, it's really simple, we'll just shut down this process of public information and what we'll do is we'll try to do it on a case-by-case basis. If something comes up what I'll do is, I'll get on the phone with Brad and I'll say here's the request we received, what do you think, et cetera, et cetera, in order not to throw a wrench into the election process. It seems to me that your request is quite reasonable. I don't see any reason in the world that we shouldn't try to make some sort of accommodation, given that it's a highly, I would say, emotional situation.

diGenova qualified this plan with the following, however:

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I'm very sorry about the – about the letter, but I got to tell you something – And, Brad, I have to disagree with you respectfully. When a union member calls up and asks for something, unless it's an investigative document, we give it to them. That's been the – that's been the rule for the IRB from the beginning.

Now, this turns out – as I said, we got the call from TDU after they got a call from inside your headquarters, ... I just want you to know that there was a process – we didn't just do this on our own. I don't give a damn who knows Aloise has got a 20-day letter. I could care less. But here's the thing, I do appreciate the fact that you brought it to our attention in a professional and respectful way. We will take care of this. This will not happen again. Because first of all, you've asked that it not happen again and since you said that it can have a profound effect on the election, it's not going to happen, we're not going to be a party to it, that's not our job. We give information that they ask for. Now if they ask for it, I'll talk to Brad and we'll figure out whether or not it's good or bad.

diGenova elaborated:

Let me tell you something: We don't want to get involved in the election at all. We have enough work to do. I'm very glad that you've raised your concern about this. We will make sure that nothing goes out without consultation with Brad. I mean, obviously the ordinary things which are going to go out are going to go out. We will explain to people who call. I don't know what we're going to tell them, because they clearly believe they have a right and they'll start writing to Judge Preska, they'll write to me, they'll write to everybody.

The bottom line is we will make absolutely certain that nothing that we do can even be slightly construed as interfering with the electoral process. As a result of our role, we understand that this process that's about to occur in November is sacrosanct in terms of union membership. It's not a problem, believe me, no problem whatsoever. Whoever TDU calls up the next time, I assume they're not going to be very happy with us about they want something and we can't give it to them.

The discussion demonstrated disagreement between the IIO and the IBT concerning what documents were to be released publicly. The upshot, however, was diGenova's commitment to contact Raymond to solicit the IBT's position when releasing documents in response to specific requests for them, while at the same time stating that "the ordinary things which are going to go out are going to go out," presumably meaning charges, investigative reports, supporting exhibits, and notices of hearing.

Dinh also requested that the IIO exercise caution with respect to public disclosures concerning the document production in which the IBT was engaged, again citing the pending election. He said:

The second thing that I take from this meeting is your appreciation of the intense political situation we're in here.

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Part of my concern regarding the – regarding the electoral process is that the – and I don't mean this to be obnoxious or to walk back old things – is that a threat of a charge of noncooperation or violation in this kind of environment is akin to threatening to indict Hillary Clinton, because it can be spun badly. It has been used badly, because – because we are in a political – we are in political season. And that is one of the – as you know from the spike of cases, that is a common political refrain that somebody is being charged or somebody is not cooperating, you know, that we're going back to the Teamsters of 1980s.

I understand that we may have legal differences, we may have operational differences amongst – amongst counsel, and I consider that to be professional legal differences and we have worked out ways in order to resolve. I only ask for your consideration, as you have with the deadline, that the -- that – to use that threat of a non[-cooperation] violation, especially in writing, carefully, because it will be used. It has been used for the purpose beyond what you intend it to be, which is – ... We may have a difference as to what the Order requires, you and I may have a difference as to process under paragraph 32, 33, and 34 [of the Final Order], but there is absolutely no intention, no – any contemplation of us violating or not cooperating under the Final Order. Period. Full stop.

Later in the meeting, Dinh returned to this theme:

The only thing I want to make clear is that – and I think it is clear, because I just don't want for us to be following the Fin – precisely the dictate, the Final Order, and be accused of noncooperation or violation of Final Order with the same electoral sensitivities that you appreciate.

diGenova replied:

Believe me, I am so glad. See, we don't think about this election cycle for the union. I didn't even know when the damn convention was until it became obvious that people were out of town and nobody was around. I didn't even know there was an election in November. I mean, in the back of my mind, I knew there was an election coming up. Now that I know that, believe me, we're on due notice. We will be subtracted from this process. We will be so invisible, the union members are going to think we're not around anymore. This is – this is not a problem. Believe me, you are – I agree with you a hundred percent. I think it's – it would look bad and I think it's unnecessary. We can do our job without the union members having any idea what we're doing, that's not important.

## *2. The IDO's subsequent actions.*

The IBT's takeaway from the July 20 meeting was that the IIO understood the electoral environment in which the union membership was immersed and, as a result, 1) would continue to issue "ordinary things" without consulting the IBT, which the IBT believed included charges, investigative reports, supporting exhibits, and notices of hearing; 2) would consult with Raymond about making public requested documents that were not routinely made public; and 3) would carefully consider whether disagreements about document production were a "lawyer's squabble" that should be resolved or non-cooperation. The IBT did not request the IIO to refrain from referring charges during the electoral period.

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On August 9, 2016, IRO Civiletti issued notice of hearing on the de novo proceeding for Aloise. The notice was made public and was published by TDU the same date. Internally, IBT lawyers initially saw this release as contrary to diGenova's commitment to consult with Raymond. diGenova replied that hearing notices were uncontroversial documents that routinely were made public.

The IIO's public referral of separate internal union charges against Brener-Schmitz, on November 9, 2016, and Smith, on November 17, 2016, were "ordinary things which are going to go out," and registered no public response from the IBT.

The IBT lawyers, however, viewed the charge against Hall alleging obstruction and non-cooperation by the IIO as contrary to the IIO's prior representations to the IBT, stated in writing in the March 30 and April 12, 2016 letters ("Should the Independent Investigations Officer decide any of the withheld emails needed to be produced, the IBT would be notified.") and orally at the July 20 meeting ("You guys do whatever you have to do to figure out how to produce what's required, which is what was requested in the March 4 and March 11 [notices], produce privilege logs, explain why things are being withheld in vast categories for individuals, whatever, and then what we will do is at that point, we will get together and discuss it with you, as I indicated in my April 12 letter.") Further, the IBT lawyers were shocked that the charge came during the balloting period in the election, given diGenova's statement that he would avoid having the disciplinary process itself becoming an election issue ("[B]elieve me, we're on due notice. We will be subtracted from this process. We will be so invisible, the union members are going to think we're not around anymore. This is – this is not a problem. Believe me, you are – I agree with you a hundred percent. I think it's – it would look bad and I think it's unnecessary. We can do our job without the union members having any idea what we're doing, that's not important.")

Dinh's letter motion filed November 3, 2016 with Judge Preska made this point. He argued that the IIO's charge against Hall was politically motivated and in bad faith, that

on October 31, in the middle of the voting period, the IIO dropped its bombshell: It charged GST Ken Hall, heretofore absent from the dispute save being the recipient of the IIO's unilateral demands, with "bringing reproach upon the IBT and violating its and his legal obligations" by "obstruct[ing] and otherwise interfer[ing] with work of the IIO," to wit, "fail[ing] to provide the IIO with all the IBT documents the IIO informed Hall that he had deemed necessary to examine."

Dinh's filing for the IBT concluded: "We need your help, your Honor, to stop this nonsense, to resolve the underlying discovery dispute, and to forestall further damage to the IBT's electoral integrity—and, more precisely, to the IIO and the Final Order under which the IIO operates—inflicted by the misguided actions of his office."

Dinh argued that the IBT had interests in its obligations under the Final Order and in a fair election and that the charge against Hall, given the IIO's promises to consult about document production and be invisible during the election process, constituted the bad faith exercise of disciplinary authority under the Final Order that was intended to upset the integrity of the election.

Judge Preska denied Dinh's motion to enjoin the charge against Hall, concluding that the IIO had authority to refer the charge and make the charge public. The Court did not expressly address Dinh's argument concerning the IIO's promises, except to state the following:

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Even if the Court were inclined to agree that the IIO's instructions have been unduly contradictory, the Court finds the IIO's documents requests to be perfectly clear at this stage of the dispute and consistent with the Final Order's broad grant of authority to the IIO.

As previously stated, the Court subsequently ordered the IBT to produce all withheld emails, except those bearing on UPS negotiations, concluding that the IIO had authority under the Final Order to review all documents and had voluntarily modified its request to exclude the UPS emails.<sup>11</sup> The IBT produced documents on January 10, 2017. One month later the IIO withdrew his charges that had been lodged against Hall.

## ANALYSIS

### *1. Introduction and our mandate on remand.*

In *Lobger*, we denied the protests in part for want of jurisdiction, concluding they alleged violations of the disciplinary rules under the Final Order and did not allege a violation of the *Election Rules*. Specifically, we rejected the protestors' contention that the actions the IBT took with respect to the March 2016 notices of examination and the Aloise disciplinary proceeding constituted violations of Article I's provision empowering the Election Supervisor to insure an "informed election," for the reason that that phrase, properly construed, required notice of and fair opportunity to participate in the election process within the scope of *Rules* and did not regulate or prohibit the conduct in which the protestors alleged the IBT had engaged. We further rejected the contention that the time the IBT took in responding to the notices of examination and in granting Aloise's request for an indefinite stay of his disciplinary hearing constituted "interference with voting" prohibited by the *Election Rules*.

In addition, we found that, even had the conduct protestors complained of violated the *Rules* (which we held it did not) the conduct did not disadvantage protestors and their allies in the election for two reasons. First, the Aloise charges were made public in February 2016, were well-known, and the protestors and their allies campaigned vigorously on them. Despite more than four months of campaign activity by Teamsters United and TDU that was critical of Aloise and the Hoffa-Hall 2016 slate for the acts alleged in the IRB's charges, Aloise was elected as an IBT vice president for the West region at the IBT convention in late June 2016 because no Teamsters United candidate in the West region garnered sufficient votes among the delegate body to meet the 5% threshold necessary to achieve the rank-and-file ballot. We concluded that, even had the hearing on the charges been held as scheduled in mid-June 2016, the written decision of the hearing panel would have been published after the convention and thus after Aloise's election. As such, regardless of whether the panel sustained or dismissed the charges, the decision could have not affected Aloise's candidacy because it would have come after his election had been accomplished.

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<sup>11</sup> Contrary to protestor Halstead's argument, the Court did not order the documents produced as a "sanction" for what Halstead calls "abusive" claims of privilege. The Court's opinion does not use "sanction," "abusive," or any variant of those terms. Rather, the Court held that the union had no privilege to assert under the Final Order and therefore was required to produce the requested documents. As such, the Court's opinion constitutes an interpretation of the Final Order only; it does not reach beyond that interpretation to punish the union, as a remedy for contumacious conduct might.



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Second, we concluded that the charge of obstruction and non-cooperation the IIO referred against Hall arising from the notices of examination gave protestors and their allies a campaign argument against the Hoffa-Hall 2016 slate they otherwise would not have had if the IBT had produced all requested documents promptly. Despite this advantage, the Teamsters United candidates still did not prevail in any of the contests for the twelve at-large positions up for election.<sup>12</sup>

We also noted in *Lobger* that we considered all other arguments raised in the protests and concluded they were without merit.

Central to the ensuing appeal was protestors' argument that the IBT improperly used union resources to advantage candidates on the Hoffa-Hall 2016 slate and disadvantage those on the Teamsters United slate. Specifically, protestors contended that IBT legal resources were used to delay production of documents requested in the notices of examination, and the purpose, object, or foreseeable effect of that use of union resources was to slow the IIO's investigation so that any charges the IIO might eventually refer arising from those documents would not be made public until after balloting had concluded in the International officers election. Protestors presented a similar argument with respect to the Aloise proceeding, contending that the IBT used legal resources to grant an indefinite stay in the Aloise proceeding to delay a verdict on the charges for the purpose, object, or foreseeable effect of influencing positively the election of Hoffa-Hall 2016 slate members.

To bolster their claim that the IBT impermissibly used union resources to support Hoffa-Hall 2016 slate candidates by the actions the IBT took with respect to the notices of examination and the Aloise proceeding, protestors submitted that the IBT had no legitimate institutional interest and instead had only impermissible political or electoral interests for the actions it took.

The Election Appeals Master remanded the decision for "appropriate investigation, consideration and decision by the Election Supervisor with respect to alleged violations of Article XI, with particular focus on the asserted institutional interest of the IBT in expending resources to resist or limit production of documents to the IIO."

The protestors' arguments and the Election Appeals Master's instructions implicate Article XI, Section 1(b)(3) of the *Election Rules*, which provides the following:

No labor organization, including but not limited to the International Union, Local Unions and all other subordinate Union bodies, whether or not an employer, may contribute, or shall be permitted to contribute, directly or indirectly, anything of value, where the purpose, object or foreseeable effect of the contribution is to influence, positively or negatively, the election of a candidate ... No candidate may accept or use any such contribution. These prohibitions extend beyond strictly monetary contributions made by a labor organization and include contributions and use of the organization's stationery, equipment, facilities, and personnel.

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<sup>12</sup> In the contests for regional offices, candidates on the Teamsters United slate won the regional vice president positions in the Central (4 positions) and South (2 positions) regions. They lost the 3 regional vice president positions in the East region. The slate did not successfully nominate candidates for the 3 West region vice president positions, nor did it nominate any candidates for the 3 regional vice president positions in Canada.

In addition to this prohibition, which bars a union from making a contribution to a candidate, the arguments of the protestors and the instruction of the EAM also implicate Article VII, Section 12(c) of the *Rules*, which prohibits use of “[u]nion funds [and] personnel to assist in campaigning unless the Union is reimbursed at fair market value for such assistance, and unless all candidates are provided equal access to such assistance and are notified in advance, in writing, of the availability of such assistance.”

On the facts presented here and the *Rules* provisions cited, we conclude that the actions of the IBT in responding to the notices of examination and postponing the Aloise hearing did not have the purpose, object, or foreseeable effect of influencing, positively or negatively, the election of candidates in the International officers election, as those terms are used in Article XI, Section 1(b)(3) of the *Rules*. Nor did the IBT’s actions constitute union “assist[ance] in campaigning” that is prohibited by Article VII, Section 12(c).

The rationale supporting our conclusion follows. In evaluating the question posed to us on remand, we bifurcate our analysis of “purpose” and “object” from “foreseeable effect.”

2. *The IBT’s responses to the notices of examination were not undertaken for the purpose or object of influencing the election of any candidate.*

In the context this matter presents, we conclude that “purpose” and “object” are equivalent terms as they are used in Article XI, Section 1(b)(3). “Purpose” and “object” both articulate a goal, aim, or intention that motivates a particular action, and in this context include the element of *scienter* or knowledge that the action is wrongful or prohibited.

Our precedents construing these provisions fall into two categories. The first includes those cases where the union resource was used *directly* for a campaign purpose, whether to promote or attack a candidate in an electoral context. Examples include campaigning on union-paid time,<sup>13</sup> printing campaign flyers with union equipment,<sup>14</sup> constructing a campaign website in union hall on union-paid time,<sup>15</sup> faxing accreditation petitions or mailing fundraising appeals to individuals employed at local union halls,<sup>16</sup> posting campaign flyers inside locked union bulletin boards,<sup>17</sup> distributing local union merchandise such

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<sup>13</sup>*E.g., Garcia*, 2006 ESD 193 (April 20, 2006) (Protest alleging that union officer-candidate campaigned on union time by asking member to post flyers in employer workplace is granted, where request was not incidental to union business and officer was not on personal time when he made the request); *Prisco*, 2010 ESD 6 (July 8, 2010) (local union officials violated *Rules* by circulating accreditation petitions on union time using union resources and at union meetings); *Potts*, 2006 ESD 111 (February 27, 2006) (Business agent violated *Rules* by making campaign call from local union phone on local union time).

<sup>14</sup>*Aloise*, 2010 ESD 22 (August 27, 2010) (local union principal officer violated *Rules* by printing candidate accreditation petitions on union equipment).

<sup>15</sup>*Nichols & Hoffa-Hall 2011*, 2011 ESD 306 (August 5, 2011) (Union employee built campaign website on union-paid time in union hall with knowledge of LU principal officer, in violation of *Rules*).

<sup>16</sup>*Gegare*, 2010 ESD 1 (May 31, 2010) (Campaign may not fax accreditation petition to LU fax for posting or distribution on literature table); *Reyes*, 2010 ESD 59 (December 22, 2010) (candidate may not mail campaign fundraiser flyers to individuals using local union addresses, unless mail is intended for distribution using the LU literature table).

<sup>17</sup>*Martinez*, 2011 ESD 133 (February 22, 2011) (posting campaign flyer inside locked union worksite bulletin board violates *Rules* where board has historically been used exclusively for official union notices).

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as t-shirts when campaigning,<sup>18</sup> and announcing and disseminating a union endorsement of a candidate,<sup>19</sup> among others.

The second category consists of those cases where the union resources were used *indirectly* for a campaign purpose. This category includes the diversion of union treasury funds documented in *Cheatem*,<sup>20</sup> where Election Officer Quindel found that IBT funds were contributed to non-Teamster political organizations as the result of an express agreement that those organizations and particular non-Teamster individuals associated with them make contributions to the Carey campaign. In that circumstance, Teamster funds were used indirectly to support the Carey candidacy because the campaign received the contributions from the outside political organizations and non-Teamster individuals only because Teamster funds were contributed to the non-Teamster causes. This second category also includes *Gegare (after remand)*,<sup>21</sup> where IBT officials offered to hire candidates for IBT positions in exchange for the candidates ending their candidacies. The union funds there were not offered to produce campaign messaging, finance rallies, or establish or maintain a campaign organization; rather, they were made to gain political support in exchange for the offered jobs and benefits.

The protestors' argument here, at bottom, is that union resources expended on the in-house and retained counsel who formulated and implemented the IBT's responses to the notices of examination constituted an impermissible *indirect* use of union funds to influence the election of incumbent candidates. However, unlike the *Cheatem* or *Gegare* cases, the expenditure the protestors point to was made in responding to IIO document requests about matters unrelated to the conduct of the election. We found no direct or circumstantial evidence establishing or tending to establish that the expenditure the protestors point to had the purpose or object of influencing the election of any candidate. Instead, we conclude from the evidence presented that the IBT's actions in responding to the document requests were taken for the following purposes or objects unrelated to the election of any candidate.

First, a purpose or object of the IBT's use of legal services was to review the requested documents for privilege and to withhold those documents it considered protected by privilege. Protestors argue that the IBT had no right under the Final Order to withhold any documents at all, including those asserted to be privileged, and that Judge Preska's December 2016 order validates protestors' argument. However, the better course is to view the IBT's obligations in light of the circumstances that existed when decisions were made about reviewing and withholding assertedly privileged documents, rather than through the prism of a judicial pronouncement made months after the fact.<sup>22</sup> At the time the IBT made the decision,

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<sup>18</sup> *Sandberg, Anderson & Cook*, 2011 ESD 192 (March 28, 2011) (local union principal officer who was a delegate candidate violated *Rules* by using local union pins and hats as gifts to stewards who supported him, where officer delayed distribution of annual gift by a month or more to coincide with delegates election and where he did not distribute items to stewards he believed opposed his delegate candidacy).

<sup>19</sup> *Rivers*, 2011 ESD 137 (February 24, 2011) (candidate violated *Rules* with campaign flyer that reported endorsement of candidate by union).

<sup>20</sup> Post-27-EOH (BZQ) (August 21, 1997).

<sup>21</sup> 11 EAM 3 (February 16, 2011).

<sup>22</sup> In adopting this view, we reject protestor Halstead's argument that the IBT is "estopped" by the Court's ruling from asserting an institutional interest in challenging the IIO's notices of examination. We similarly reject protestor Sylvester's contention that the Court's ruling resolved the protest. As discussed more fully below, the Court's

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in March and April 2016, to review documents before producing them, it and the IRB had developed an extensive history by which the IBT withheld from production documents it claimed were privileged. That history was accompanied by the IRB's right, expressly acknowledged by the IBT, to demand that withheld documents be produced notwithstanding the claimed privilege, and if such demand was made, the IBT well understood its obligation to satisfy the demand. Based on that history that the IIO invited the IBT to withhold privileged documents and to provide a log of the withholdings that would permit the IIO to assess whether production was necessary or desired notwithstanding the privilege claim. We conclude, therefore, that a purpose or object of the IBT's expenditure of resources on counsel was to produce requested documents while withholding privileged ones.

An additional purpose or object of the IBT's use of legal services in responding to the document requests was to maintain collective bargaining relationships with employers of its members by withholding from production to the IIO documents related to contract negotiations. This action guarded against the possibility that information sensitive to an employer's industry-competitive position would appear in charges that might result from the investigation, making the employer less willing to offer benefits or concessions to the IBT in future negotiations that the employer's industry competitors had not already granted. The IBT had express permission from the IIO to withhold such documents that concerned UPS negotiations, and it withheld similar documents concerning nine additional employers. As with documents the IBT claimed were privileged, the IBT provided logs identifying the withheld documents and understood that it may be required to produce the withheld documents concerning contract negotiations if the IIO demanded them.

An additional purpose or object of the IBT's use of legal counsel to review documents before producing them was to withhold from production information protected by HIPAA, thereby protecting the medical privacy of benefit plan participants concerning medical benefits those individuals sought under the plans. This action was consistent with what it had done in its September 2015 responses to notices of examination. As with other withheld documents, the IBT produced a detailed log of these withheld documents and understood both the IIO's right to demand production of them and the IBT's obligation to comply with that demand.

An additional purpose or object of the IBT's use of legal counsel to review documents before producing them was to withhold documents that were unrelated to any known investigation or were irrelevant to any possible investigation. The purpose or object of this action was two-fold, first to reduce the expense charged back to the IBT by IIO lawyers and investigators that would be incurred in reviewing irrelevant documents, and second, to establish a precedent for such withholdings with respect to future notices of examination. The IBT understood the document requests as directed to investigations of Brenner-Schmitz, the awarding of the pharmacy benefits manager contract under the VEBA, and the investigation of Smith that was ancillary to the Aloise charges. Documents the IBT deemed unrelated to any possible investigation consisted principally of mass emails and listservs. As with the other withholdings, the IBT prepared a log for each category of documents it withheld, and it recognized that the IIO might require it to produce particular documents or whole categories of documents that had been withheld. These

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adjudication of the meaning of the Final Order is a different question from whether the IBT was entitled to rely on the IIO's statements concerning the documents to be produced and those it was permitting the IBT to withhold.

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withholdings complied with the IIO's instructions in his April 12, 2016 letter, as reaffirmed at the July 20, 2016 meeting.

The purpose or object of the IBT's use of search terms in its initial review of Slatery's emails was to produce more promptly the emails from that massive body of documents that were relevant to the known investigation of the awarding of the pharmacy benefits manager contract under the VEBA. The volume of Slatery's emails and the press of other IBT business, particularly the convention, meant that the review of Slatery's emails would be a lengthy process. As a result, the IBT culled documents with the standard methodology of applying search terms selected in light of the investigations it understood the IIO to be conducting. After the convention, the IBT continued its review of Slatery's emails and completed its production of large volumes of them in early September. The documents it withheld were logged and described, and the IBT recognized that the IIO may elect to order some or all of them produced.

Throughout the production process, the IBT sought to narrow the scope of the notices of examination so as to reduce the time and work burden at the IBT of producing irrelevant documents and reduce the time, work, and expense at the IIO of doing the same. The IBT had an institutional interest in deploying its workforce efficiently and promoted that interest by urging the IIO to tailor its requests.

The purpose or object for using litigation software to review the requested documents was to save the time spent by staff in the review process. The software permitted documents to be categorized; it also created a log of the withheld documents. The principal result of the use of this software was that documents were reviewed and produced more quickly than they would have been otherwise. A second important purpose for using the software was that it minimized the likelihood that the email server would crash from the strain of the document production, thereby minimizing the possibility that work at IBT headquarters would be disrupted as a result.<sup>23</sup>

Accordingly, we conclude that the IBT's actions on the notices of examination were motivated by the foregoing interests and did not have the purpose or object of supporting a candidate. For this reason, we find no violation of Article XI, Section 1(b)(3)'s prohibition on union "contributions" of a "thing of value" that have the "purpose [or] object" of influencing the election.

We reach this conclusion after examining two categories of evidence and the reasonable inferences derived from them. First with respect to the notices of examination, the correspondence and other communications between IBT lawyers and IIO staff, which included letters exchanged between Dinh and diGenova, emails between the two, and oral statements by IBT lawyers and diGenova at the July 20, 2016 meeting, persuade us that the IBT was at all times motivated by the purposes and objects articulated above. This conclusion is reinforced by the second category of evidence, which consists of the candid views the in-house and retained IBT lawyers expressed to each other in private emails concerning the notices of examination.

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<sup>23</sup> In reaching this conclusion, we reject protestor Sylvester's contention that the IBT's use of litigation software to process its response to the notices of examination was obstructionist. To the contrary, we find that the use was proper for a document production of this magnitude.

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In response to protestors' assertion that the IBT had no right to withhold any documents at all – and therefore it had no legitimate purpose or object in undertaking a page-by-page review of documents and withholding broad categories of them from production<sup>24</sup> – we find that this assessment of the IBT's rights was contradicted by the written instructions the IIO gave the IBT in March and April 2016, and the oral reinforcement of those instructions made at the July 20, 2016 meeting. Judge Preska's December 2016 pronouncement does not, in our view, change the fact that the IBT relied on the repeated statements of the IIO, or make that reliance illegitimate, that permitted the IBT to review documents before producing them, to withhold documents it asserted were privileged, and to withhold non-privileged documents "that the IBT believes are voluminous and not relevant." We would be presented with a different issue had the IIO responded to the IBT's objections, first presented in March 2016, by demanding that all documents be produced without exception, the result the Government eventually obtained from the Court.<sup>25</sup> But the IIO did not make this demand. Instead, it agreed that the IBT could withhold broad categories of documents, subject to further request from the IIO that specific documents or categories of documents be produced.<sup>26</sup>

Protestors' assertion is further undercut by the fact that the documents the IBT produced were responsive to the known investigations the IIO was pursuing. For example, its production of Slatery emails in May and June 2016 was based on search terms that were likely to flag documents for production that concerned the bidding process for the pharmacy benefits manager contract with the VEBA. While protestors criticize the search terms as not exhaustive, we find that they were substantially calculated to identify documents for production that were relevant to an investigation of that bidding process. Moreover, the search terms and their use was fully disclosed to the IIO who, not making any objection, appeared to find the approach satisfactory. Therefore, we find no merit to protestors' suggestion that the IBT used the search terms to attempt to shield supposedly incriminating documents from production.

We reject protestors' further argument that Dinh's invocation of the pending election, first to the US Attorney's office and the next day to diGenova directly, was an improper "contribution" of a "thing of value" made for the purpose or object of assisting the incumbent candidates in the election. Instead, we find that Dinh's statements were aimed at the conflicting statements emanating from the IIO's office. On one hand, those statements permitted the IBT to withhold privileged documents and those it believed were voluminous and irrelevant. Other statements, however, threatened a charge of obstruction for failing to produce more documents. Dinh asserted that the IBT was complying with the IIO's instructions with respect to withholding documents, and he cautioned that, were the IIO to follow through on its threat of an obstruction charge despite the IBT's compliance with the IIO's instructions, not only would such a charge be unfair, it also would tend to inject the IIO into the election process by accusing a candidate of conduct the IIO had otherwise permitted. Dinh promised the IBT would complete production by Labor Day 2016, which it did, and diGenova promised in return both to consult with the IBT about its

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<sup>24</sup> We note, however, that protestor Halstead conceded in a position statement to us that "[a]ny entity should be entitled to review documents within the scope of a document request in a disciplinary investigation of its officers, representatives, and staff." Although Halstead contends that such review should be limited to whether production adversely implicates any legitimate union interest, he agrees that the review itself is proper.

<sup>25</sup> With the exception of the UPS negotiations documents the IIO voluntarily excluded from the production order.

<sup>26</sup> Protestor Halstead asserted to us that the IBT "could have sought to work with the IIO." The record demonstrates that the IBT justifiably believed it was doing just that. The interactions with diGenova show further that the IIO was engaged with the IBT on that basis. We therefore reject Halstead's assertion as without factual basis.

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withholding and to steer clear of an obstruction charge that potentially would have consequences for the election, which he did not.<sup>27</sup>

For these reasons, we conclude that the facts on remand establish that the foregoing purposes motivated the IBT's actions with respect to production and withholding of documents sought by the notices of examination. We found no evidence that would support a conclusion that the IBT's actions had the purpose or object of supporting a candidate in the election.

3. *No evidence suggests that, in granting the request for indefinite stay of the Aloise proceeding, the IBT had the purpose or object of influencing the election.*

As with the notices of examination, we find no evidence that supports the conclusion that the IBT's indefinite adjournment of the Aloise hearing was for the purpose or object of supporting the Aloise candidacy or that of any other member of the Hoffa-Hall 2016 slate. Instead, the evidence demonstrates that the indefinite adjournment was for the purposes or objects of complying with the IBT constitution, avoiding potential liability under the LMRDA, and establishing a precedent under both that Article XIX, Section 7(a) required the IBT to adjourn a hearing indefinitely at the request of any member facing internal union charges who also was the subject of a grand jury investigation arising from the same facts.

Substantiating this conclusion is the response to lawyer Hicks's email of July 18, 2016, sent after receipt of IRO Civiletti's 20-day letter, in which Hicks suggested that the IBT had the option of reversing positions and conducting Aloise's hearing, notwithstanding having told Civiletti it would not do so. Hicks stated that conducting the hearing would eat "up more of the clock in the meantime (if that is one of the goals here—to get past the election season)." Both Witlen and Dinh rejected the suggestion, with Dinh stating that the IBT would adhere to its decision not to hold the hearing while the grand jury proceeding was ongoing, recognizing that the IRO could then schedule and conduct a hearing on the charges.

Further substantiating our conclusion that the IBT's decision to adjourn the hearing was not for the purpose or object of influencing Aloise's election was the timing involved. Had the IBT proceeded with the hearing as scheduled in mid-June 2016, the panel's report and recommendation would not have issued before Aloise's election as IBT vice president for the West region on June 28, 2016. Accordingly, the decision not to hold the hearing had no impact on his election.

For these reasons, we conclude that the facts on remand establish that the foregoing purposes motivated the IBT's decision on Aloise's request for indefinite stay of his hearing. We found no evidence that would support a conclusion that the IBT's decision had the purpose or object of supporting Aloise or any other candidate in the election.<sup>28</sup>

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<sup>27</sup> Protestor Sylvester asserted that the IBT "claims to have understood the July 20 meeting as resulting in a broad agreement that Teamsters members would hear nothing from the IIO until after the election because of electoral sensitivities and the IBT was free to take as long as it liked to respond to the March 4 and 11 document requests." This statement is without basis. The IBT understood that the deadline for responding to the document requests was extended to Labor Day. There is no evidence to suggest that the IBT sought or the IIO agreed that no charges of any kind issue during the electoral period.

<sup>28</sup> The evidence we evaluated to reach the conclusions in this section included the material discussed in Section B (pp. 21-40), which included the full transcript of the July 20, 2016 meeting between IBT and IIO representatives.

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4. *Article XI, Section 1(b)(3)'s provision prohibiting a union from "contributing" a "thing of value" where the "contribution" had the "foreseeable effect" of influencing the election is not violated if the union's action promotes its legitimate institutional interest.*

Sections 2 and 3, above, hold that the IBT's decisions on the notices of examination and the staying of the Aloise hearing did not have the purpose or object of influencing the election. We now turn to whether those decisions had the "foreseeable effect" of influencing the election.

We start with the acknowledgment that nearly every official action of a labor organization may have the foreseeable effect of influencing, positively or negatively, the election of a candidate. For example, it is foreseeable that an incumbent union official who is credited with negotiating a successor collective bargaining agreement the membership embraces may reap the reward of that favorable contract in the form of votes from a membership seeking to retain the official for a job well done. Conversely, it is foreseeable that a successor contract that contains fewer or different benefits than were provided previously or were expected by the membership may influence positively the election of a candidate or slate running against the incumbent administration responsible for the contract.

In a similar manner, an employer's actions in contract negotiations may have the foreseeable effect of influencing an election, thereby implicating Article XI, Section 1(b)(2), which prohibits an employer from contributing "anything of value, where the purpose, object, or foreseeable effect of the contribution is [to] influence, positively or negatively, the election of a candidate. An employer's grant of a bargaining concession may redound to the credit of the union official with whom the employer is bargaining; conversely, an employer's attack on that official as one bargaining in bad faith may diminish the official's standing in the eyes of his/her membership.

Although such effects are foreseeable, we have not construed Article XI, Section 1(b)(3) or Section 1(b)(2) to prohibit a union or an employer, respectively, from taking action to advance or achieve a legitimate institutional goal it holds, as the following decisions illustrate.

We have examined Article XI, Section 1(b)(3) most extensively in the context of a union's participation in the *Rules'* protest procedure. We summarized these precedents in *Halstead*, 2016 ESD 245 (June 16, 2016):

Article XI, Section 1(b)(3) prohibits a union from contributing anything of value to a candidate; the provision also bars a candidate from accepting contribution of anything of value from a union. It has often been held that filing a protest "is protected, and does not constitute support for a candidate or campaigning under the *Rules*." *Randolph*, 2000 EAD 28 (September 27, 2000) (use of union fax machine to file a protest no violation); *Keiffer*, P360 (March 19, 1996) (same).

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The evidence showed that the IBT adopted its position based on Article XIX, Section 7(a). We found it unnecessary to review the record of the Aloise hearing before IRO Jones, as protestor Halstead urged us to do, concluding that it did not bear on the IBT's decision to stay the IBT hearing because of the pending grand jury proceeding.



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This protection is not without limitation. Whether the filing and subsequent processing of a protest constitutes an improper use of union funds depends on whether the protest furthers the independent, institutional interest of the union. *Jenne*, 2000 EAD 64 (December 14, 2000); *Koch*, 2006 ESD 169 (April 3, 2006) (protest researched and prepared on union-paid time and filed on union stationery is permissible where it sought to enforce *Rules* provision limiting ballot access to eligible candidates). Local unions can expend their resources to pursue a protest filed to ensure proper implementation of the *Rules* as long as they do not take a partisan position or engage in advocacy on behalf of particular candidates. *Id.* When these criteria are met, a local union may use its funds to file and pursue such a protest. It may do so by paying for time spent by its officers in handling such protests and by hiring legal counsel. Local unions cannot, however, use their funds to finance protest activity that advances or damages a candidacy without implicating the institutional interest of the union. We apply a tolerant standard for differentiating between proper and improper expenditures in this context. *Hammons*, 2010 ESD 35 (October 12, 2010).

The same standard applies to local union expenditures in defending itself against a protest filed by a candidate or providing evidence and argument to the Election Supervisor on a protest filed by a candidate against another candidate or an employer who is alleged to have violated the *Rules*. Where the local union's participation in the protest process is in support of its institutional interests or the proper enforcement of the *Rules* and the advocacy does not take a partisan position or advocate on behalf of a candidate, it may expend its resources in participating in the protest procedure.

The protest in *Halstead* asserted that emails sent to our investigator by a local union's general counsel, who also was a candidate in the local union delegates election, constituted impermissible union contributions to a candidate or slate because they advocated positions that were consistent with the interests of the slate of which the general counsel was a member. We found that the evidence the emails presented ran to the proper enforcement of the *Rules* by insuring that the Election Supervisor's investigator had all relevant information concerning the alleged violations. In addition, the advocacy the emails made against the proposed remedy of a re-run election sought to preserve the local union's treasury. Finally, the emails did not take partisan positions. For these reasons, we held that the emails did not violate Article XI, Section 1(b)(3).

In *Bucalo*, 2016 ESD 190 (May 4, 2016), the protest alleged that an employer violated Article XI, Section 1(b)(2), the parallel provision to that under consideration in this remand decision, which bars employer contributions that have the purpose, object, or foreseeable effect of influencing the election of a candidate. There, the employer and the local union had reached impasse in contract negotiations, a strike resulted, and the employer published a notice to its employees blaming the protestor, who was the local union's secretary-treasurer and a candidate in the local union's delegates election, for canceling bargaining sessions and causing the strike. The protestor asserted that the employer's notice constituted a contribution to the protestor's opponents in the election. We denied the protest, stating the following:

The notice addressed only the impending strike involving Airgas employees and stated the employer's position as to the responsibility that should be assigned to [protestor] Bucalo

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for the cancellation of bargaining sessions. It made no reference to the delegates and alternate delegates election or Bucalo's delegate candidacy in that election. We decline Bucalo's invitation to construe the *Rules'* prohibition on employer contributions so broadly as to make it impossible for an employer to communicate with its employees and criticize a union representative for the circumstances giving rise to a strike, where no mention is made in that communication of an election or that representative's candidacy in it.

The employer's notice in *Bucalo* advanced its legitimate institutional interest in blaming the strike on the protestor. It sought to achieve the result of ending the strike and resuming full operations by persuading its employees to compel the protestor to return to bargaining.

The import of these decisions is that Section 1(b) of Article XI is not violated if the action of the institution, whether union or employer, is motivated by its institutional interests and is not undertaken for an expressly partisan rationale, even if the foreseeable effect may be to influence the election of a candidate in an election.

5. *The IBT's actions in responding to the notices of examination and the Aloise hearing scheduling promoted numerous legitimate institutional interests.*

Protestors complain that the IBT had no institutional interest in reviewing, before producing them, the documents that fell within the parameters of the March 2016 notices of examination, or in withholding documents it claimed were privileged or that fell into the various categories it deemed "non-responsive" to the notices. In addition, protestors argue that the IBT had no institutional interest in granting Aloise the indefinite stay requested by his counsel because of the pendency of a grand jury investigation into the same facts and circumstances that gave rise to the charges against him.

We find to the contrary that the IBT's actions in responding to the notices of examination and the Aloise hearing scheduling promoted numerous significant institutional interests, as we now detail. We discussed in sections 2 and 3 above the purposes and objects that motivated the IBT's decisions on these matters. We turn now to the IBT's institutional interest in those decisions.

First, the IBT promoted its institutional interest in reviewing the documents for privilege and withholding those documents it considered protected by the privilege. Attorney-client privilege barring disclosure of testimonial and documentary evidence is generally recognized where a confidential communication is made between privileged persons for the purpose of seeking, obtaining, or providing legal assistance to the client.<sup>29</sup> While Judge Preska's December 2016 declared that the IBT had no right to assert any privilege when responding to the IIO's document requests, that rule had not been regularly enforced by the IIO or the IRB over the time since the entry of the Consent Order. Accordingly, at the

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<sup>29</sup> Indeed, something close to privilege is alluded to in the Consent Order, at ¶14, which permitted the General President, "[d]uring the term of the court-appointed officers," to retain counsel to "provide consultation and representation to the IBT with respect to this litigation, to negotiate with the appropriate official and to challenge the decisions of the court-appointed officers, and [to] use union funds to pay for such legal consultation and representation." The provision barred the Independent Administrator from using his removal powers and authority over union expenditures with respect to such consultation and representation. This provision apparently expired with the expiration of the terms of office of the court-appointed officers.

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time the IBT made the decision to review documents before producing them, it and the IRB had developed an extensive history by which the IBT withheld from production documents it claimed were privileged. That history was accompanied by the IRB's right, expressly acknowledged by the IBT, to demand that withheld documents be produced notwithstanding the claimed privilege, and if such demand was made, the IBT well understood its obligation to satisfy the demand. It was based on that history that the IIO invited the IBT to withhold privileged documents and to provide a log of the withholdings that would permit the IIO to assess whether production was necessary or desired. As recently as the September 2015 production of Slatery's emails, the IRB's chief investigator had not demanded production of assertedly privileged documents that were otherwise responsive to the notice of examination. We conclude that withholding of documents based on privilege, subject to later production on specific request, was therefore consistent with the IBT's institutional interest.

We conclude further that the IBT promoted its institutional interest in developing and maintaining collective bargaining relationships with employers of its members by withholding documents related to contract negotiations. It had express permission from the IIO to withhold such documents that concerned UPS negotiations, and it withheld similar documents concerning nine additional employers. The reason for making these withholdings was to guard against a disclosure of bargaining history in a charging document that might put an employer at a competitive disadvantage with an industry rival and in the future or tend to make the employer reluctant to grant any benefit or concession to the union that its industry competitors had not already granted.<sup>30</sup> As with documents the IBT claimed were privileged, the IBT provided logs identifying the documents and understood that it may be required to produce the withheld documents concerning contract negotiations if the IIO demanded them. We conclude that these withholdings, subject to later production on specific request, promoted the IBT's institutional interest in obtaining favorable terms and conditions of employment for its members.

As it had done in its September 2015 responses to notices of examination, the IBT withheld from its production in response to the March 2016 notices those documents that contained information protected by HIPAA. In doing so, the IBT asserted an institutional interest in protecting the medical privacy of benefit plan participants concerning medical benefits those individuals sought under the plans. As with other withheld documents, the IBT produced a log of these withheld documents and understood both the IIO's right to demand production of them and the IBT's obligation to comply with that demand. We conclude that these withholdings, subject to later production on specific request, promoted the IBT's institutional interests in complying with HIPAA and encouraging plan participants to communicate with plan administrators about benefits.

The IBT withheld as "non-responsive" documents that were unrelated to any known investigation or irrelevant to any possible investigation. The known investigations for which the IBT provided documents concerned Brener-Schmitz, the awarding of the pharmacy benefits manager contract under the VEBA, and the investigation of Smith that was ancillary to the Aloise charges. Documents it deemed

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<sup>30</sup> We reject protestor Halstead's argument that the IBT had no attorney-client privilege against the union membership relating to collective bargaining. We find this argument mischaracterizes the IBT's position in two ways. First, the IBT did not assert privilege with respect to bargaining emails; it contended instead that those documents were confidential and should be maintained as such in order to on producing emails that concerned bargaining, which was to preserve confidentiality for the purpose of

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unrelated to any possible investigation consisted principally of mass emails and listservs. Its institutional interest in withholding these documents was to reduce the expense charged back to the IBT by IIO lawyers and investigators that would be incurred in reviewing irrelevant documents. In addition, establishing a precedent for such withholdings might have the positive effect of permitting similar withholdings in response to future notices of examination. As with the other withholdings, the IBT created a log for each category of documents it withheld, and it recognized that the IIO might require it to produce particular documents or whole categories of documents that had been withheld. These withholdings complied with the IIO's instructions in his April 12, 2016 letter, as reaffirmed at the July 20, 2016 meeting. We conclude that these withholdings, subject to later production on specific request, promoted the IBT's institutional interests in limiting costs to its treasury of IIO staff members' review of irrelevant documents.

The IBT's use of search terms in its initial review of Slatery's emails promoted its institutional interest in producing more promptly documents relative to the known investigation of the awarding of the pharmacy benefits manager contract under the VEBA. The process of applying the search terms and the resulting productions has been described previously. We conclude that the IBT's use of search terms promoted its institutional interest of expediting the production of relevant documents in response to the notices of examination.

Throughout the production process, the IBT sought to narrow the scope of the notices of examination so as to reduce the time and work burden at the IBT of producing irrelevant documents and reduce the time, work, and expense at the IIO of doing the same. The IBT had an institutional interest in deploying its workforce efficiently and promoted that interest by urging the IIO to tailor its requests to issues in which the IIO had an investigative interest.

The IBT's use of litigation software to review the requested documents saved time to be expended by its staff that was engaged in that process. The software permitted documents to be categorized and created a log of the withheld documents. The principal result of the use of this software was that documents were reviewed and produced more quickly than they would have been otherwise. This promoted the twin institutional interests of reviewing documents before producing them while producing them as quickly as possible under the circumstances. A further institutional interest the IBT had in using the software was that it minimized the likelihood that the email server would crash associated with the document production and that the work performed at IBT headquarters would be disrupted as a result.

With respect to the decision to grant Aloise the indefinite stay his counsel had requested, the IBT promoted multiple institutional interests. Among them was compliance with its constitutional provision, which was incorporated into the Final Order and the disciplinary rules, and by extension compliance with its obligation under the LMRDA to provide a "full and fair hearing." The IBT had not previously construed its constitutional provision as it related to a grand jury investigation, but when doing so here, it concluded that the union was barred from holding a hearing on internal union charges that arose from the same facts and circumstances that were being investigated by a grand jury.<sup>31</sup> That the IRO disagreed with

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<sup>31</sup> Protestor Halstead states that the Court of Appeals had previously invalidated the interpretation of Article XIX, Section 7(a) the IBT adopted on the Aloise request for stay, apparently relying on *Hamilton*. This statement is incorrect, as the IBT had not previously interpreted the constitutional provision in this context. The Court of

the IBT's interpretation of its constitution was made manifest by his May 26 and July 18 letters. But the Final Order contemplated that the IBT may in a particular case decline to proceed with a trial, and the IBT agreed in that order that if the IRO believed the IBT's decision was unacceptable, the IRO would assume jurisdiction and try the matter. The IBT informed the IRO on June 3, 2016 that it would not proceed with the hearing so long as the grand jury proceeding or any criminal case arising from it was pending. This communication was transmitted with the IBT being fully aware that the IRO could and likely would schedule a de novo hearing on the matter. Had the IRO promptly exercised the right he had under the Final Order, such a hearing could have been completed in July 2016.

## CONCLUSION

For the foregoing reasons, we find that the IBT did not violate Article XI, Section 1(b)(3) or Article VII, Section 12(c) with the decisions it made when responding to the March 2016 notices of examination or the Aloise request to stay indefinitely his IBT hearing on internal union charges. We conclude that the IBT's decisions on these matters did not have the purpose or object of influencing the election of any candidate on the Hoffa-Hall 2016 slate or of Aloise in particular. We further conclude that the decisions did not have the foreseeable effect of influencing the election because they were motivated by legitimate institutional interests of the IBT and did not take a partisan position or advocate on behalf of a candidate.

During this additional investigation on remand, we found further evidence to support the support the conclusion we reached in *Lobger* that, even had any conduct of the IBT alleged by the protestors with respect to the March 2016 notices of examination violated the *Election Rules*, that conduct did not affect the outcome of the election. As stated in the original decision, protestors' claim hinged on the contingency that the documents produced by the IBT to the IIO would have resulted in the IIO preparing public disciplinary charges against one or more candidates on the Hoffa-Hall 2016 slate (or their allies) sufficiently in advance of the close of the voting period to sway the outcome. Protestors' argument centered on their claims that the awarding of the pharmacy benefits manager contract for the IBT's VEBA was corrupt, that the documents the IIO requested from the IBT would provide a basis to refer corruption charges, and that the investigation would be complete and the charges made public before the voting period had concluded. In this scenario the time the IBT took to produce the documents the protestors believed would be incriminating served the purpose of improperly delaying the referral of such charges until after the election had concluded.

The evidence we found during this remand investigation proves protestors' arguments about the possibility that IIO charges would have issued and made information available to candidates and members during the campaign are mere speculation and unsupported. First, based on the IBT's approach to document review and production, the responsive documents likely most relevant to the pharmacy benefits manager bidding process were produced in April, May, and June 2016. Second, *all* documents requested in the March 2016 notices of examination were produced, after Judge Preska's ruling, in early January 2017. Some seven months have passed since all documents were produced (and fourteen to sixteen months since the IBT made its initial productions in April, May and June 2016), and the no charges against IBT officers or employees related to the pharmacy benefits manager contract award have been referred. Protestors rely on the referral and publication of such charges to support their argument that the voting

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Appeals reviewed the *IRB's* refusal to grant Hamilton a stay based on Article XIX, Section 7(a). The IBT had no input into the *IRB's* interpretation.

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membership would have been swayed to support the Teamsters United slate in numbers sufficient to change the outcome of the election. Yet such charges have not been referred even at this date. Accordingly, this additional evidence, reflecting the time it takes to conduct a complex investigation (whether or not allegations are ultimately substantiated) reinforces our conclusion in *Lobger* that the conduct of which protestors complain with respect to document production did not affect the outcome of the election.

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, 34<sup>th</sup> 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, c/o Jeffrey Ellison, 214 S. Main Street, Suite 212, Ann Arbor, MI 48104, 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  
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**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 31<sup>st</sup> Street, Suite 40  
New York, NY 10001  
lnikolaidis@lcnlaw.com

Julian Gonzalez  
350 West 31<sup>st</sup> 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

William Lobger  
wlobger@gmail.com

Cathy Highet  
cathy@highetlaw.com

Viet Dinh  
Viet.dinh@kirkland.com

Jeffrey Ellison  
214 S. Main Street, Suite 212  
Ann Arbor, MI 48104  
EllisonEsq@aol.com