

OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
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January 2, 1992

VIA UPS OVERNIGHT

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The Price Company
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Michael J. Riley
Secretary-Treasurer
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Re: Election Office Case No. P-1022-LU986-CLA

Gentlemen:

A protest was filed pursuant to Article XI of the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") by Peter Guinan. In his protest, Mr. Guinan alleges that he was terminated from his position with The Price Company ("*Price*") because of his campaign activities on behalf of the Ron Carey slate. The investigation of this protest was conducted by Election Office Regional Coordinator Geraldine L. Leshin and by the Washington D.C. staff of the Election Office.

Peter Guinan was employed by Price at its Burbank, California warehouse facility and is a member of IBT Local Union 986. By letter dated October 24, 1991, Guinan was terminated from his position with Price because he was "physically unable to perform [his] job at the Price Company." This assessment was allegedly based on a report by Dr. Mark Greenspan, Guinan's physician, dated October 16, 1991. Dr. Greenspan contested Price's interpretation of his report stating on November 5, 1991 "[p]atient is able to maintain employment. . . Note: Report of 10/16/91 does not state patient was unable to work." Mr. Guinan contends that his termination by Price is not a result of his physical condition but rather is in retaliation for his campaign activity and the evidence he provided in support of a previous protest filed against Price alleging a violation of the *Rules*. See Election Office Case No. P-946-LU986-CLA.

On or about July 28, 1987 Guinan suffered an injury while operating a fork lift while working at the Price Burbank warehouse. Mr. Guinan was out of work for a period of time as a result of that injury and returned to duty in February, 1988. Mr. Guinan also filed a worker's compensation claim against Price.

After his accident, Mr. Guinan was transferred from his position as a sales/stock employee to a membership services position. The new job did not require lifting and

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was generally considered a "light duty" job. Mr. Guinan retained his position in the membership department until his termination on October 24, 1991.

Mr. Guinan was examined and received treatment for injuries resulting from his work place injury on February 1 and 22, 1988. In a report dated March 7, 1988 Guinan's physician concluded that his condition resulting from the accident constituted a permanent and stationary disability. The doctor further concluded that Guinan could not return to his previous job and that further employment would be subject to the following restriction: "NO REPETITIVE PUSHING, PULLING, TWISTING, TURNING, TORQUING, OR HEAVY LIFTING. NO WORK AT/ABOVE THE SHOULDER LEVEL." Mr. Guinan's employment in membership services, where he was transferred after his accident, was apparently consistent with these restrictions and he continued working in that position without incident until his termination.

At the suggestion of the attorney representing him in his workman's compensation case against Price, Guinan was again examined by his doctor on September 17, 1991. In a report dated October 16, 1991, Dr. Greenspan reviewed Guinan's medical history stating, inter alia, that "I had also indicated that since the patient was working, he could continue working as long as he did not perform any activities that would aggravate his condition." Under the section of the report captioned "INTERIM HISTORY" Dr. Greenspan observed that "[Guinan] feels that his symptoms have increased but as he is performing light duty status (sic) he has been able to continue working."

While the report describes Guinan's current symptoms, it does not conclude that he is unable to perform the work he was doing since his last examination. In fact the report specifically states that Guinan can continue in his current employment unless such employment would "aggravate his condition." Moreover, while the report discusses certain symptoms that have persisted since his accident, the "Routine Upper Extremity Measurements" which is attached to both the March 7, 1988 and October 16, 1991 reports appears to reflect certain improvements in Guinan's strength and range of motion in the area affected by his accident. As stated above, on November 5, 1991 Dr. Greenspan clearly stated that Guinan was able to maintain his employment.

Price contends that it placed Guinan in the membership services position pursuant to a policy of giving injured or recuperating employees light duty with the expectation that they will be able to return to their former position after their recuperation. Price further contends that the October 16, 1991 report demonstrated that Guinan would be unable to return to his former position. Because Guinan would not be able to return to his former position he was terminated.

Soon after his forklift accident Guinan filed a workers compensation claim against Price under California law. That initial claim based on the injuries sustained in his accident was supplemented by a "cumulative trauma" claim alleging harassment by his supervisors and a stressful working environment in the period from October, 1988

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through December, 1989. In addition another claim was filed on Guinan's behalf under Section 132A of the California Labor Code alleging that he was terminated June, 1988 in retaliation for filing claims against Price. While Guinan was subsequently reinstated, such reinstatement was without back pay. All of these claims are currently pending. In addition to the claims filed on his own behalf, Guinan has filed complaints, or provided evidence in support of complaints, with various state agencies regarding working conditions at Price.

Aside from the instant protest, Mr. Guinan has not filed any other protests with the Election Office. Mr. Guinan did oppose a management policy regarding the use of union bulletin boards which was the subject of a prior protest. However, Guinan's opposition to this policy was articulated by writing the word "Censored" over a sign identifying the union bulletin board at his facility. Guinan received a warning from Price for this defacement of company property. The issuance of the warning was not included in the protest.¹ The protest concerning the bulletin board, Election Office Case No. P-946-LU986-CLA, was voluntarily resolved after Price agreed with the Election Officer that IBT members had a right to post campaign literature on general purpose bulletin boards otherwise open to posting by employees.

Mr. Guinan was a supporter of the Ron Carey Slate of candidates for International Office in the IBT and campaigned on behalf of the slate among fellow IBT members, including those employed by Price. The Election Officer's investigation has revealed no evidence that Price was opposed to the Carey Slate or favored other candidates or slates of candidates. Price did not discriminate against Carey campaign activity and permitted Carey supporters to campaign inside of its facilities. The Election Officer found no evidence that Price discharged Guinan in retaliation for his campaign activity or for his opposition to the employer's bulletin board policy.

In analyzing the facts of this protest, the Election Officer must first consider whether conduct protected by the *Rules* served as the basis for the discipline imposed on Guinan. In the instant case the stated reason for Guinan's discharge was not his protected activity but rather the employer's contention that he was unable to perform the duties of his position because of a physical disability. Given the fact that the basis for the discharge was, on its face, unrelated to his protected activity, Guinan must, in order to show a violation of the *Rules*, demonstrate that the employer was motivated at least in part by its hostility to his protected conduct and that absent such animus, the employer would not have terminated him.

The National Labor Relations Board has adopted a rule for resolving cases

¹ The filing of a protest with the Election Office regarding an allegedly improper restrictions on bulletin board use is clearly distinguishable from the Mr. Guinan's defacement of the sign designating a particular board as an exclusive Union bulletin board. Such defacement is not conduct protected by the *Rules*.

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involving similar allegations of a "mixed motive" for employer discipline. This rule, adopted by the Board in Wright Line, 251 NLRB 1083, 105 LRRM 1169 (1980), enfd, 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), requires:

that the General Counsel make a prima facie showing sufficient to support an inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

105 LRRM 1175. The Board's Wright Line test for resolving mixed motive cases was drawn from the Supreme Court's decision in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1979). The Supreme Court upheld the Board's Wright Line analysis in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). The Election Officer has used this test in mixed motive employer discharge and discipline cases arising under the *Rules* and such reliance has been affirmed by the Independent Administrator. See, e.g., In Re: Coleman, P-016-LU710-CHI, aff'd 90-Elec. App.-18(SA); In Re: Henderson, P-760-LU25-ENG, aff'd 91-Elec. App.-187(SA); In Re: Jenkins, P-855-LU891-SEC, aff'd 91-Elec. App.-190(SA).

In the instant case, the Election Officer is unable to conclude that Price's decision to terminate Guinan was motivated, even in part, by a hostility to his campaign activity or by a desire to retaliate against Guinan because of conduct protected by the *Rules*. Therefore, Guinan failed to make the requisite "prima facie showing" under the Wright Line test.

It should be emphasized, however, that the Election Officer does not conclude that Guinan's termination was lawful, but simply that it was not violative of the *Rules*. Clearly, the October 16, 1991 report of Dr. Greenspan, particularly in light of his November 5, 1991 supplement, does not support a conclusion that Guinan could not perform the job he held for the four years following his accident. Moreover, the finding that Guinan could not, because of his disability resulting from the accident, return to his former position was clearly stated in the March 7, 1988 report and simply reiterated in the October 16, 1991 report. Price, as early as 1988, was on notice the Guinan's disability was "permanent and stationary" and that he had no reasonable expectation of returning to his former position. Price knew or should have known when it placed him in the "light duty" position that he would not recover sufficiently to resume his duties as a fork lift driver. Finally, Price gave Guinan no opportunity to use his seniority to bid on another position with the employer, such as another position with membership services, which did not involve the kind of physical exertion that was inconsistent with his disability.

Further, the Election Officer has not investigated and therefore reaches no

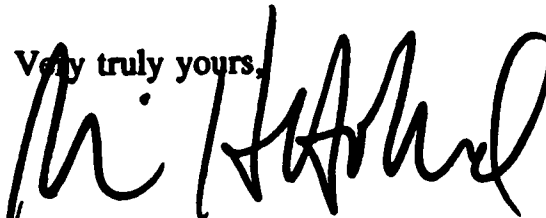
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conclusion as to whether Guinan was terminated for activity protected by statutes or case law other than the *Rules*. For instance, Mr. Guinan claims that Price discharged him in retaliation for his having filed a worker's compensation claim against it, in violation of California statutory law; this decision does not decide that issue. Neither does the Election Officer determine whether Guinan's discharge was wrongful for other reasons, e.g., wrongful because in retaliation for Guinan's filing complaints with agencies of the State of California. All the Election Officer determines is that his discharge was not substantially motivated by activity protected by the *Rules*.

For the foregoing reasons, the instant protest is DENIED.

If any interested party is not satisfied with this determination, they may request a hearing before the Independent Administrator within twenty-four (24) hours of their receipt of this letter. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Officer in any such appeal. Requests for a hearing shall be made in writing, and shall be served on Independent Administrator Frederick B. Lacey at LeBoeuf, Lamb, Leiby & MacRae, One Gateway Center, Newark, New Jersey 07102-5311, Facsimile (201) 622-6693. Copies of the request for hearing must be served on the parties listed above, as well as upon the Election Officer, IBT, 25 Louisiana Avenue, N.W., Washington, D.C. 20001, Facsimile (202) 624-8792. A copy of the protest must accompany the request for a hearing.

Very truly yours,




Michael H. Holland

cc: Frederick B. Lacey, Independent Administrator

Geraldine L. Leshin, Regional Coordinator

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