# *PRE-ELECTION PROTEST DECISIONS*

## *ELECTION OFFICE CASE NOS.*

## *P-1036-LU812-NYC to P-1070-LU840-NYC*

## *VOLUME XXV*

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*Election Officer*
*June 1992*

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November 14, 1991

**VIA UPS OVERNIGHT**

Allan B. Petre
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Louis DiDio
c/o IBT Local Union 812
202 Summerfield Street
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Anthony Rumore
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**Re: Election Office Case No. P-1036-LU812-NYC**

Gentlemen:

A protest was filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") by Allan B. Petre. Mr. Petre, a member of Local Union 812, alleges that a lawsuit claiming libel, slander and malicious prosecution was filed against him by Local 812 Business Agent and Executive Board Member Louis DiDio in violation of the *Rules*.

In an earlier protest, Election Office Case No. [redacted] Mr. Petre alleged that Mr. DiDio had removed Ron Carey campaign literature from the bulletin board located at the Staten Island facility of Coca-Cola, an employer of IBT members. As part of that same protest, Mr. Petre also alleged that Mr. DiDio had threatened members, warning them not to participate in dissident Union activity. By decision dated September 16, 1991, the Election Officer denied the protest, basing his decision on the lack of evidence that Mr. DiDio engaged in the alleged conduct.

Thereafter, Mr. DiDio filed a lawsuit against Mr. Petre in the Supreme Court of the State of New York, Kings County, on October 9, 1991. Mr. Petre received notice of the lawsuit on October 31, 1991.

The lawsuit alleges that the contents of Mr. Petre's protest against Mr. DiDio, as set forth in Election Office Case No. P-874-LU812-NYC, were libelous and slanderous and further, that the protest was pursued by Mr. Petre for the sole purpose of maliciously defaming Mr. DiDio. The complaint asks that the Court award both compensatory and punitive damages against Mr. Petre. The sole basis for the lawsuit

is the contents of Mr. Petre's protest. All of the alleged libel and slander was uttered or published in the protest document.

These underlying facts are undisputed. The question posed by this protest is whether Mr. DiDio's action in filing the lawsuit against Mr. Petre is violative of the *Rules*. For the reasons following, the Election Officer determines that Mr. DiDio violated the Rules when he filed the lawsuit.

The concept of privilege is fundamental to the law of libel and slander. The present case involves the application of the well established principle of absolute privilege in connection with a judicial proceeding. As frequently enunciated by courts in the State of New York, statements made in judicial proceedings, including statements made in the papers instituting the proceedings, are absolutely privileged; stated otherwise, absolute immunity against the imposition of liability in a defamation action attaches to judicial proceedings.[1] This principle has been applied in "quasi-judicial" proceedings and proceedings which have attributes similar to a court, such as a complaint filed with the grievance committee of a bar association [2] and a complaint filed by a union with the Department of Labor regarding an apprenticeship program. [3] The underlying rationale, as explained in Weiner v. Weintraub, supra at 331-332, is:

> It is in the public interest to encourage those who have knowledge of [improper] conduct to impart that knowledge to [the appropriate authorities]. If complainants were to be subject to a libel action by the accused, the effect in many instances might well be to deter the filing of legitimate charges. We may assume that on occasion false and malicious complaints will be made. But whatever the hardship on a particular [individual], the necessity of maintaining the high standards of our bar--indeed, the proper administration of justice--requires that there be a forum in which clients or other persons, unlearned in the law, may state their complaints, have them examined and, if necessary, judicially determined.

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[1] Toker v. Pollak, 44 NY 2d 211, 376 NE2d 163, 405 NYS 2d 1 (1978); Spieler v. Gottesman, 11 NY 2d 815, 182 NE 2d 110, 227 NYS 2d 437 (1962); Grasso v. Mathew, 164 AD 2d 476, 564 NYS 2d 576, 1991 NY App. Div. 47 (1991); Baratta v. Hubbard, 136 AD 2d 467, 523 NYS 2d 107, 1988 NY App. Div. 2 (1988).

[2] Weiner v. Weintraub, 22 NY 2d 330, 239 NE 2d 540, 292 NYS 2d 667 (1968).

[3] Stilsing Electric, Inc., v. Joyce, 113 AD 2d 353, 495 NYS 2d 999 (1985).

The concept of absolute privilege in connection with a judicial proceeding applies even more forcefully to proceedings before the Election Officer. Most protestors are not represented by legal counsel and are totally unfamiliar with the niceties of legal language. The Rules are a new phenomenon to most IBT members. The Election Officer has intentionally crafted the rules concerning the filing of protests to permit easy and ready access to the Election Office and to provide for prompt resolution of protests. IBT members are encouraged to used the protest machinery. IBT members are encouraged to use the protest procedures of the Rules. If members were subject to defamation lawsuits for having filed a protest, their willingness to file protests would clearly be deterred. The threat of defamation lawsuits against protestors would seriously impede the Election Officer's efforts to investigate and to remedy violations of the Rules and would therefore undermine his ability to provide for a fair, honest and open election as required by the *Rules* and the March 14, 1989 Consent Order.

The Election Officer concludes that Mr. Petre was absolutely privileged in filing the protest against Mr. DiDio. Even though the protest was ultimately dismissed, Mr. Petre's access to the Election Office's protest procedures is entitled to protection. Subjecting him to a defamation lawsuit because of his protest violates this absolute privilege.

Moreover, in view of the obvious applicability of the absolute privilege doctrine, Mr. DiDio and his attorneys knew or should have known that his lawsuit could not be sustained and the filing was frivolous. Thus, it is clear that Mr. DiDio's motivation in filing the lawsuit was solely to retaliate against Mr. Petre for having filed a protest; such an improper motivation violates the Rules. See In Re Jack Barmon, 91 Elec. App. 76, affirming Election Office Case No. P-352-LU769-SEC.

Therefore, the Election Officer sustains Mr. Petre's protest and directs Mr. DiDio to dismiss his lawsuit with prejudice. A motion seeking the dismissal, with prejudice, of the lawsuit shall be filed by Mr. Didio or his counsel within seven (7) days of the date of this decision. A copy of such motion shall be submitted to the Election Officer simultaneously with its being filed with the court. A copy of the dismissal order or any other court orders issued in connection with this lawsuit shall be submitted by Mr. Didio or his attorney to the Election Officer within one (1) business day of the receipt of such order(s) by Mr. Didio or his attorney.

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

MHH/ca

cc: Frederick B. Lacey, Independent Administrator

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| IN RE:<br><br>ALLAN B. PETRE<br><br>and<br><br>LOUIS DIDIO<br><br>and<br><br>IBT LOCAL UNION NO. 812 | 91 - Elec. App. - 238 (SA)<br><br>DECISION OF THE INDEPENDENT ADMINISTRATOR |

This matter arises as an appeal from the Election Officer's decision in Case No. P-1036-LU812-NYC. A hearing was held before me at which the following persons were heard by way of teleconference: John Sullivan and Barbara Hillman for the Election Officer; Amy Gladstein, a Regional Coordinator; and Louis Nikolaidis for Allan Petre, the Complainant. In addition, the following individuals appeared before me in person: Mr. Petre; Louis DiDio, Business Agent for Local Union 812; and I. Philip Sipser and Jerome Talbert for Mr. DiDio. The Election Officer provided a written Summary in accordance with Article XI, Section 1.a.(7) of the Rules For The IBT International Union Delegate And Officer Election (the "Election Rules"). Prior to the hearing, Mr. DiDio submitted a memorandum detailing his position. Subsequent to the hearing and by agreement of all parties, Mr. DiDio submitted another memorandum addressing additional issues.

At issue here is a challenge to the Election Officer's determination that an IBT member who files a protest under the

Election Rules enjoys an "absolute privilege" protecting him from liability in a collateral action.

In the underlying protest, the Election Officer specifically determined that Mr. DiDio violated this "absolute privilege" by filing a two million dollar lawsuit in New York State Court for defamation and malicious prosecution naming Mr. Petre, a fellow member of Local 812, as the defendant. The Election Officer directed Mr. DiDio to withdraw his lawsuit with prejudice.

The Election Officer concluded that Mr. DiDio's suit was filed in retaliation against Mr. Petre because Mr. Petre had previously filed an Election Rules protest implicating Mr. DiDio. In that protest, Mr. Petre alleged that Mr. DiDio removed Ron Carey campaign literature from a bulletin board at a work site. It was also alleged that Mr. DiDio warned Local 812 members against engaging in "dissident" political activity. Ultimately, the Election Officer denied Mr. Petre's protest, having been unable to verify any of Mr. Petre's allegations. See Decision of the Election Officer, Case No.P-874-LU812-NYC (September 16, 1991).

Mr. Petre supports Ron Carey for International General President, as well as the entire Carey slate of candidates. Mr. DiDio, and other officers on the Local 812 Executive Board, are known to support the candidacy of Walter Shea for General President, and the rest of the candidates on the Shea-Ligurotis Slate. In fact, in connection with a previous appeal, I found that Anthony Rumore, the Local 812 President, transformed a general

membership meeting into a "one party political rally" for the Shea-Ligurotis Slate while disparaging the rival candidacies of Ron Carey and the third General President candidate, R.V. Durham. Mr. Rumore, while speaking from the podium, had singled out a Carey supporter in attendance and told him, "I'll take care of you later." Following this remark, an unidentified member shouted "kill him," referring to the Carey supporter. In Re: Farkas, 91 - Elec. App. - 210 (SA) (October 24, 1991).

In the first instance, it is clear that as a matter of policy, the Election Officer's decision is not only correct, but essential to the successful implementation of the historic secret ballot rank-and-file elections for IBT International officers contemplated by the March 14, 1989, Consent Order entered into between the United States and the IBT leadership. The election process is the linchpin in the Court-supervised effort to transform the IBT from a Union which has been characterized as "the historic marionette of organized crime" to a democratically-run organization where every rank-and-file member has a voice. United States v. IBT, 742 F. Supp. 94, 97 (S.D.N.Y. 1990), aff'd, 907 F.2d 277 (2d Cir. 1990). The Honorable David N. Edelstein of the United States District Court for the Southern District of New York adopted the Election Rules, as modified by him, as his own order to "guarantee honest, fair, and free elections completely secure from harassment, intimidation, coercion, hooliganism, threats, or any variant of

these no matter under what guise." Ibid at 97. As the Election Officer noted in his Summary:

> The Election Rules depend on the protest procedure to insure that the election remains fair, honest and open. For that reason, access and utilization of the protest procedures are critical features of the election process established by the Rules.
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> Plainly, members cannot be expected to utilize the procedure, if they are subjected to the threat of litigation as a result of bringing information to the attention of the Election Officer.

In addition to these policy concerns, the Election Officer's position finds support in the well-established concept that statements made in the course of judicial or quasi-judicial proceedings are absolutely protected. This is well-recognized in the courts of New York State, the venue of Mr. DiDio's action. See, Spieler v. Gottesman, 11 N.Y.2d 815, 182 N.E.2d 110, 227 N.Y.S.2d 437, (1962) (statement contained in pleading and within "scope of issues involved in pleading" is absolutely privileged); Grasso v. Mathew, 164 A.D.2d 476, 564 N.Y.S.2d 576, (3d Dept. 1991) (sanctions imposed against attorney for bringing libel action where statements by parties and attorneys in connection with divorce litigation were found absolutely privileged); Baratta v. Hubbard, 136 A.D.2d 467, 523 N.Y.S.2d 107, (1st Dept. 1988) (statements made in litigation are absolutely privileged so long as statements "may possibly bear" on the issues in litigation); Youmans v. Smith, 153 N.Y. 214, 47 N.E. 265 (1897) (questions printed in preparation for witness examination absolutely privileged). See also, Silver v.

Mahasco Corporation, 94 A.D. 820, 462 N.Y.S.2d 917 (3d Dept. 1983), aff'd, 62 N.Y.2d 741, 476 N.Y.S. 2d 822, 465 N.E.2d 361 (1984) (statements made before State Division of Civil Rights are absolutely privileged); Stilsing Electric Inc. v. Joyce, 113 A.D.2d 353, 495 N.Y.S.2d 999 (3d Dept. 1985) (letters of complaint written to State Department of Labor are absolutely privileged); Weiner v. Weintraub, 22 N.Y. 2d 330, 292 N.Y.S.2d 667, 239 N.E.2d 540 (1968) (letter containing accusations against attorney and sent to bar association grievance committee was the initiation of a judicial proceeding and therefore absolutely privileged). See also, Meyers v. Amerada Hess Corp., 647 F. Supp. 62 (S.D.N.Y. 1986) (statements made before New York State Division of Human Rights investigation conference -- a quasi-judicial proceeding -- are absolutely privileged).

Mr. DiDio asserts that an Election Rules protest is neither a judicial nor quasi-judicial proceeding but is more akin to an internal Union grievance proceeding. Thus, it is argued that at best a qualified privilege applies. Unlike an absolute privilege which stands as an absolute bar to any action arising out of statements made in connection with a proceeding, a qualified privilege requires the plaintiff in a collateral lawsuit to prove actual malice to sustain his cause of action. Mr. DiDio's position is meritless.

Again returning to the venue of Mr. DiDio's action, New York State, the election protest procedure would be considered a quasi-

judicial proceeding protected by an absolute privilege. New York Courts have recognized that absolutely privileged quasi-judicial proceedings are any proceedings: (1) which result "in a determination based upon the application of appropriate provisions in the law to the facts"; (2) which are "susceptible to judicial review"; and (3) where relevant policy considerations support the application of such a privilege. Stilsing Electric, supra, 495 N.Y.S.2d at 1001. Compare, Meyers v. Amerada Hess Corp., supra, 647 F. Supp. at 65.

Following this standard, it is evident that the protest processes are quasi-judicial proceedings protected by an absolute privilege. As already discussed, the policy considerations here are overwhelming. Moreover, it cannot be disputed that in adjudicating protests under the Election Rules, the Election Officer applies appropriate law (including the Election Rules themselves) to the facts to arrive at his findings. Those findings are subject to review by the Independent Administrator and then ultimately by Judge Edelstein in the United States District Court for the Southern District of New York. See Election Rules, Article XI, Section 1.

Mr. DiDio's attempt to limit the Election Officer's role to one of an internal Union officer, supervising an internal Union election, pursuant to internal Union rules, is a strained one designed to avoid the inescapable conclusion that the protest process implemented by the Election Officer is quasi-judicial.

This point is made most clear by the fact that the Election Rules themselves, are enforceable as a Court Order. In carrying out the mandate of the Election Rules, the Election Officer serves as a Court-appointed officer. Mr. DiDio's suggestion that the Election Officer is anything less is frivolous.[1]

Mr. DiDio suggests that even if Mr. Petre's alleged defamatory statements enjoyed an absolute privilege, Mr. Petre could still be subject to a state court suit for malicious prosecution. This position is also without support. See Sullivan v. Crisona, 54 Misc. 2d 478, 283 N.Y.S.2d 62, 66 (1967) (action by attorney for malicious prosecution based on bar association grievance proceeding was subject to defense of absolute privilege). See also, Toft v. Ketchum, 18 N.J. 280, 287 (1955) ("We therefore find that the

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[1] This issue is separate and apart from the issue of whether the Court-officers are "state actors." In an attempt to advance his position, Mr. DiDio blurred the two questions. See, United States v. IBT, 753 F. Supp. 1181 (S.D.N.Y. 1990) aff'd, 941 F.2d 1292 (2d Cir. 1991); United States v. IBT, 88 Civ. 4486 (DNE), Opinion and Order, November 19, 1991, rev'd and vacated, Docket No. 91-6284 (2d Cir. November 22, 1991). In any event, a "state actor" need not preside over a "quasi-judicial" proceeding for it to enjoy the protection of an absolute privilege. See Weiner v. Weintraub, supra, in which a bar association grievance proceeding administered by private attorneys was considered a protected quasi-judicial proceeding. Moreover, arbitration proceedings under private agreements, where the arbitrator exercises a judicial function, are generally considered to be absolutely privileged. See Restatement of Torts 2d, §585, Comment c; §587, Comment f. See also, Hasten v. Phillips Petroleum Co., 640 F.2d 274, 276-278 (10th Cir. 1981) (federal labor policy requires absolute privilege for statements made in the context of arbitration under a collective bargaining agreement including discharge letter that triggered arbitration procedure); General Motors Corporation v. Mendicki, 367 F.2d 66, 70 (10th Cir. 1966) (statements made during conference and bargaining session having for its purpose the adjustment of a grievance are absolutely privileged).

filing of a complaint with an ethics and grievance committee is privileged and that an attorney cannot predicate a malicious prosecution action or similar suit upon it."); E.E.O.C. v. Virginia Veneer Corp., 495 F.Supp 775, 778 (W.D. Va. 1980) ("To entertain claims in the nature of malicious prosecution for the filing of a single . . . complaint would seriously undermine the clear policy . . . to protect an employee who utilizes the procedures provided by Congress for the vindication of his right to be free from unlawful discrimination.").

Simply stated, the compelling policy concerns developed earlier could easily be defeated by simply drafting a complaint to include a malicious prosecution count.[2]

It is also significant that even absent the protection of an absolute privilege, Mr. DiDio's malicious prosecution suit fails to state a cause of action because he has failed to claim, let alone establish, any "special injury." Kalso Systemet v. Jacobs, 474 F. Supp. 666, 670 (S.D.N.Y. 1979) ("Moreover, in extending the tort of malicious prosecution to civil suits, the New York courts have required the additional element that the person or property of the plaintiff 'is interfered with by some incidental remedy such as

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2 In this same connection, Mr. DiDio makes much of the fact that his complaint includes an allegation made "on information and belief" that Mr. Petre repeated the statements made in his protest to other members of the Local and the public. This too is nothing more than a transparent attempt to avoid the cloak of the absolute privilege. Neither in the course of the Election Officer's investigation nor during the hearing before me did Mr. DiDio offer one shred of proof to substantiate this vague and conclusory allegation.

arrest, attachment, or injunction.'"). See also, Tedeschi v. Smith Barney, 548 F. Supp. 1172, 1174 (S.D.N.Y. 1982) ("In order to establish a claim for malicious prosecution . . . a plaintiff must show among other matters that there was some interference with his person or property. This requirement is satisfied only if a court issues a provisional remedy, such as an attachment, an order of arrest or an injunction.") Mr. DiDio was not arrested, his property was not attached nor was he enjoined provisionally prior to the issuance of the Election Officer's decision denying Mr. Petre's original protest. Thus, Mr. DiDio has not suffered any special injury.

In advancing his position, Mr. DiDio places much reliance on Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 461 U.S. 731 (1983). That reliance is misplaced. Bill Johnson's Restaurant established the standard pursuant to which the NLRB may enjoin prosecutions of retaliatory state court actions brought by employers against employees. The Court found that the NLRB may enjoin such suits when they are based on "insubstantial claims," but may not enjoin such suits when they are well-founded upon "meritorious" allegations. 461 U.S. at 743.

Bill Johnson's Restaurant has no application on this appeal. The conduct being challenged in Bill Johnson's Restaurant by the employer did not concern the very act or process of a filing a charge with the NLRB. Unlike the scenario in Bill Johnson's Restaurant, the very filing of a protest with the Election Officer

by Mr. Petre is being attacked in the state court action. As the Election Officer explains in his Summary:

> In this case, in contrast, the conduct that forms the basis of the lawsuit is the bringing of information before the Election Officer for appropriate resolution. In the context of NLRB charges, courts have consistently recognized the importance of access to the Board's processes: "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion . . . against reporting them to the Board." Nash v. Florida Industrial Commission, 389 U.S. 235, 238-39 (1967). See also, NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 424 (1968) "Any coercion used to discourage, retard, or defeat . . . access [to the Board for relief] is beyond the legitimate interests of a labor organization"). Even Bill Johnson acknowledged that "rights secured by § 7 of the Act . . . include[e] . . . the right to utilize the Board's processes -- without fear of restraint, coercion, discrimination, or interference from [the] employer." 103 S.Ct. at 2168. For that reason, "complete protection [must] be given persons who, in good faith, file charge or testify" in Board proceedings. United Credit Bureau of America v. NLRB, 643 F.2d 1017, 1024 (4th Cir. 1981).

In conclusion, it is clear that the protest process contemplated under Article XI of the Election Rules is a quasi-judicial proceeding in which the participants are entitled to an absolute privilege which protects them against liability for their participation in the process. Given what is involved here, there can be no other conclusion reached. The Election Officer said it plainly in his Summary:

> Mr. DiDio's lawsuit implicitly warns Mr. Petre not to file a protest against Mr. DiDio or other officers of Local 812 with access to and resources for employing counsel. Equally important, it sends a message to other members of Local 812 that they, too will find themselves faced with the trauma and expense of defending against a lawsuit if they utilize the protest procedure to the displeasure of Mr. DiDio, or any other member whose

conduct they wish to challenge. Thus, there is no doubt that the threat of litigation will chill the willingness of IBT members to file protests. In turn, that threat will seriously impede the Election Officer's ability to investigate and remedy violations of the Election Rules so as to ensure a fair, honest and open election process.

For the foregoing reasons, the decision of the Election Officer is affirmed in all respects.[3]

Frederick B. Lacey
Independent Administrator
By: Stuart Alderoty, Designee

Dated: December 6, 1991

[3] It must also be noted that had it been determined that all, or any portion, of Mr. DiDio's state action could have been sustained, the matter would then have been referred to the United States Attorney for the Southern District of New York for a determination of whether the state action would have to be transferred to the United States District Court for the Southern District of New York in accordance with Judge Edelstein's "All Writs Act" decision. United States v. IBT, 728 F. Supp. 1032 (S.D.N.Y. 1990), aff'd, 907 F. 2d 277 (2d Cir. 1990). See, e.g., In Re: Campanella, 91 - Elec. App. - 144 (SA) (May 7, 1991). In Campenella, the Independent Administrator found that the Election Officer had properly referred a matter to the United States Attorney for the Southern District of New York that involved a state court action touching upon the election process, for a determination whether the All Writs Act was violated. As stated in Campenella, "[i]n fact, not only did the Election Officer act appropriately, but given his obligation as a Court-appointed officer, it appears that [he] had no other choice but to refer the matter to the United States Attorney."