

OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, NW
Washington, DC 20001

Michael H. Holland
Election Officer

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November 29, 1991

VIA UPS OVERNIGHT

Roger Rotoni
322 Pineway Drive
Nashville, Tennessee 37217

Bill "Byrns" Boner
President, IBT Local Union 327
1006 Russell Street
Nashville, Tennessee 37206

Phil Ingram, Foreman
Glen Goad, Manager
Kroger Distribution Center
1700 Elmhill Pike
Nashville, Tennessee 37210

Re: Election Office Case No. P-1118-LU327-SEC

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 Roger Rotoni, a member of Local Union 327. Mr. Rotoni contends that his employer, Kroger Company, prohibited him from distributing campaign literature in a non-work area during non-work time. The protest was investigated by Regional Coordinator Don Williams.

Roger Rotoni is a Local 327 member employed by Kroger Company at its Distribution Center located in Nashville, Tennessee. On November 25, 1991 at approximately 9:45 a.m., Mr. Rotoni entered the Kroger Distribution Center in Nashville to pick up his paycheck. Mr. Rotoni was not scheduled to work on that day. He had in his possession at that time campaign literature relating to the International Union officer election. He was proceeding to the drivers break room to distribute the literature when Phil Ingram, a supervisory employee of Kroger at its Nashville, Tennessee facility, questioned him as to his presence in the facility. Mr. Rotoni replied that he intended to distribute campaign literature in the break room; Mr. Ingram told him to leave the premises.

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Mr. Rotoni disagreed with Mr. Ingram's instruction, and Mr. Ingram stated that they should confer with Facility Manager Glen Goad. They did so. Mr. Rotoni told Mr. Goad that he had a right to be present in non-work areas of the facility for the purpose of distributing campaign literature even though he was not scheduled to work on that day. In response, Mr. Goad made a telephone call to the Kroger Company Legal Department. He then advised Mr. Rotoni that he could enter the breakroom to post his campaign literature on the bulletin board but he could not remain in the breakroom for the purpose of distributing the campaign material. Mr. Rotoni followed Mr. Goad's instructions; he posted his literature on the bulletin board located in the drivers break room and then left the interior of the facility. However, he remained outside the facility thereafter--on Kroger's property--for some period of time and was not impeded or directed to leave by Kroger personnel.

Glen Goad, Manager of the Nashville Kroger facility, admitted that he ordered Mr. Rotoni to leave the building on the morning of November 25, 1991; his instruction only applied, however, to the interior of the facility and Kroger did not interfere with Mr. Rotoni's activities while he remained outside the building, albeit on company property. Mr. Goad stated that the company's work rules provide that employees should only be in the premises during work hours; the rules prohibit the wasting of time or loitering on company property. Mr. Goad conceded that the rules are only enforced when needed: When someone causes a problem, Kroger--relying on these work rules--asks them to leave the premises; otherwise employees are permitted to enter and remain inside the building even though the employees are off-duty.

Several other IBT members employed by Kroger at its Nashville facility were contacted by the Regional Coordinator. They all stated that the work rules concerning entry into or remaining on the premises outside of normal work hours are not normally enforced to prevent off-duty employees from being inside the building.

Kroger maintains that Mr. Rotoni was asked to leave the premises because the company believed that he was going to engage in activities related to an impending ratification vote on a collective bargaining agreement between the Local and Kroger. Mr. Rotoni has been urging members to vote against ratifying the contract; Mr. Rotoni appeared on television on November 23, 1991 discussing the proposed contract; he at no time during his television appearance mentioned the 1991 IBT International Union officer election. The company further claims that they encountered a similar problem a few weeks earlier when another employee was allegedly agitating in connection with the contract negotiations; Kroger also had him leave the premises.

Mr. Rotoni contends that his only purpose for being at the Kroger facility on November 25, 1991, other than to pick-up his paycheck, was to campaign for candidates for IBT International Union office; the literature he had in his possession concerned the

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International Union officer election. There is no dispute that Mr. Rotoni did post International Union officer campaign material on the bulletin board on that date. The company maintains its belief that Mr. Rotoni had no intention of campaigning for International Union officer election candidates on November 25, 1991.

Article VIII, § 10(d) of the *Rules* prohibits restrictions from being placed upon "members' pre-existing rights to solicit support, distribute leaflets or literature, conduct campaign rallies, hold fundraising events, or engage in similar activities on employer...premises." Pre-existing rights consist of the rights granted IBT members as a matter of substantive law and/or the rights established at any particular employer facility by reasons of past practice. See Advisory Regarding Political Rights, issued December 28, 1990. As the United States Court of Appeals recently held in its decision in United States v. International Brotherhood of Teamsters, et al, ___ F.2d ___ (Docket No. 91-6096, October 29, 1991), Article VIII, § 10(d) of the *Rules* is properly construed "to invoke both past practice or agreement among employers and the IBT, ... and any substantive rights of Union members to engage in such conduct as established by applicable law." Slip opinion at page 21.

The limitations imposed by Kroger Company on the rights of IBT members, employed by it, to engage in campaign activity on its property during non-work time and in non-work areas conflicts with the rights granted such members by substantive federal law. A rule denying off-duty employees entrance to employer premises exterior to the terminal or plant building is presumptively invalid. Further, a rule denying off-duty employees access to the interior of the employer's premises is invalid unless it is and has been applied to all off-duty employees seeking access to the interior of the premises for any purpose and not just to employees seeking to engage in campaign or other Union-related activities. The rule, to be valid, must also be clearly disseminated to all employees. Tricounty Medical Center, 109 NLRB 1089 (1976), NLRB v Pizza Crust Company, 862 F.2d 49 (3rd Cir., 1988), NLRB v Ohio Masonic Home, 893 F.2d 1144 (6th Cir., 1989), NLRB v Southern Maryland Hospital Center, 906 F.2d 1499 (4th Cir., 1990).

Although Kroger apparently has a work rule prohibiting access to the interior of its facilities to employees that are off-duty--and assuming that such a rule exists and was clearly disseminated to all Kroger employees--the evidence overwhelmingly supports a conclusion that this rule is not uniformly enforced by the company against all off-duty employees. Indeed, the Manager of the Nashville Kroger facility, Mr. Goad, admits that the rule is enforced only if the employee is "creating a disturbance." There is no evidence that Mr. Rotoni was creating a disturbance. Mr. Rotoni was stopped before he even reached the drivers break room area.

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Further, there is no evidence to support the company's belief that Mr. Rotoni did not intend to campaign for International Union officer candidates on November 25, 1991, but instead intended to discuss the impending collective bargaining agreement ratification vote.¹ The literature Mr. Rotoni had in his possession was International Union officer election campaign material.

The actions of Kroger in preventing Mr. Rotoni from distributing campaign literature in the drivers break room, a non-work area of the facility, to IBT members employed there who themselves were on non-work time clearly violates the *Rules* regardless of the fact that Mr. Rotoni was not scheduled to work on that day. IBT members are entitled to engage in campaign solicitation, including the distribution of campaign literature, in non-work areas during non-work times. *Rules*, Article VIII, § 10(a). Under the circumstances existing at this Kroger facility, that right exists whether the members engaged in such solicitation are doing it during their non-work duty hours or are off-duty.

Accordingly, the protest is GRANTED. Kroger is ordered to cease and desist from preventing IBT members employed by it from engaging in campaign solicitation during off-duty hours in non-work areas in the interior of the facility. Since ballots have been mailed and IBT members are in the process of voting for International Union officers, an appeal of this decision will not stay the effectiveness of the Election Officer's cease and desist order. *Rules*, Article XI, § 2(z).

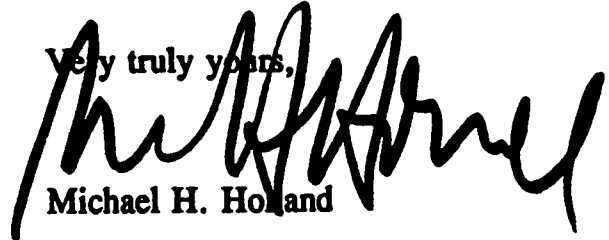
If any interested party is not satisfied with this determination, they may request a hearing before the Independent Administrator within twenty-four (24) hours of their receipt of this letter. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was 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,

¹ In accordance with the cases cited herein the Election Officer would note that even if Mr. Rotoni intended to discuss the vote on the collective bargaining agreement, selective enforcement of the company rule for this purpose would violate federal law. However, the jurisdiction of the Election Officer is limited to the IBT International Union Officer election processes and thus he makes no determination as to the validity of the Kroger's position with respect to that contract ratification issue.

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D.C. 20001, Facsimile (202) 624-8792. A copy of the protest must accompany the request for a hearing.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael H. Holland", written over the typed name below.

Michael H. Holland

MHH/ca

cc: Frederick B. Lacey, Independent Administrator

Donald H. Williams, Regional Coordinator

IN RE:

ROGER ROTONI

and

KROGER COMPANY

and

IBT LOCAL UNION NO. 327

91 - Elec. App. - 245 (SA)

DECISION OF THE
INDEPENDENT ADMINISTRATOR

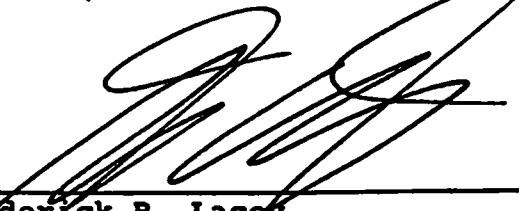
This matter arises as an appeal from the Election Officer's decision in Case No. P-1118-LU327-SEC. A hearing was held before me at which the following persons were heard in person: Howard Goldstein and John M. Flynn, attorneys on behalf of Kroger Company ("Kroger"); and Glen Goad, the Distribution Manager for Kroger's Nashville Division. In addition, by way of teleconference, John J. Sullivan and Barbara Hillman, attorneys with the Election Officer, were also heard as was the Regional Coordinator, Donald Williams. In addition, the Election Officer submitted 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"). Kroger also made a written submission at the hearing.

At issue is the right of Kroger employees to campaign on non-work time in non-work areas inside the Kroger facility. This matter was heard by me on December 10, 1991. The deadline for the return of the ballots in the election for International Union

officers is 12:00 Noon (E.D.T.) on December 10, 1991. By the time the hearing in this matter concluded, there was less than one hour left for balloting.

Accordingly, I see no need to resolve the issues raised on this appeal. There will be no more campaigning.

For the reasons expressed herein, the issues raised in this appeal are considered moot.



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

Dated: December 10, 1991