

***PRE-ELECTION
PROTEST
DECISIONS***

ELECTION OFFICE CASE NOS.

P-451-LU623-PHL to P-500-LU630-CLA

VOLUME X

***Michael H. Holland
Election Officer
June 1992***

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May 2, 1991

VIA UPS OVERNIGHT

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Mr Paul Sharp
UPS
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Richard Opalesky, Secretary-Treasurer
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Division Manager
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Re: Election Office Case No. P-451-LU623-PHL

Gentlemen

A pre-election protest was filed pursuant to Article XI of the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("Rules"). In his protest, John Braxton alleges that the grievance challenging his discharge by UPS was denied by the Atlantic Area Parcel Grievance Committee (hereafter the "Joint Grievance Committee" or "JGC") because of his campaign activities. Braxton specifically alleges that "[t]he only reason that the Teamster officials on the panel would vote against me was because they wanted to get rid of me because of my well-known dissident activities, especially my support for Ron Carey." This case follows Election Office Case No. P-210-LU623-PHL in which Mr. Braxton challenged his termination by UPS. The instant case, as indicated above, deals with the disposition of Mr. Braxton's discharge grievance.

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The Election Officer's investigation revealed the following In Election Office Case No P-210-LU623-PHL the Election Officer considered Braxton's protest against UPS concerning his termination on the charges of failure to follow instructions and verbal abuse of a supervisor The Election Officer denied that protest because of his view that Braxton had failed to prove that he would not have been terminated but for his campaign activity Mr Braxton appealed the Election Officer's determination to the Independent Administrator

During the hearing on his appeal, Braxton alleged that the discipline imposed for the offenses charged, i e , refusal to follow instructions and verbal abuse of a supervisor, was discriminatory and motivated by his campaign activities The Election Officer representative stated during the hearing that Braxton's claim, that the discipline imposed was either disproportionate to the offenses charged or discriminatory, was not considered in the investigation or determination of Braxton's protest The Independent Administrator remanded the case to the Election Officer for consideration of Braxton's discrimination claim and any new evidence presented in support of that claim

After consideration of additional evidence, the Election Officer reaffirmed his initial determination holding

The Election Officer denied the instant protest because he concluded that the employer had satisfied its burden of showing that it had a reason, other than punishing Braxton for his campaign activity, for taking the action it did The new evidence presented by both Braxton and UPS did not show that Braxton received disproportionate discipline for the offense charged or that he was treated in a discriminatory fashion because of his campaign activity

The Election Officer also noted that the decision in P-210-LU623-PHL was not meant to dispose of Mr Braxton's collective bargaining claim, i e a grievance based upon the just cause provision of the contract The review of the processing of that grievance is at issue in this case ¹

John Braxton was terminated from his part-time sorter position at the UPS Hog Island facility on December 27, 1990 by his supervisor Paul Sharp A grievance was

¹We asked the employer to submit a position statement The employer did so, arguing primarily that the subject matter of this case is a relitigation of the former protest That argument is rejected the former protest did not involve the issue of "just cause" Moreover, the finding that UPS did not have a motive violative of the Rules does not mean that it had just cause under the collective bargaining agreement to discharge Mr Braxton or that it did not act arbitrarily or with another improper motive This protest concerns whether the grievance process - the process by which a determination of just cause is made - was subverted by the improper motivation of the Union members of the grievance panel

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filed on Braxton's behalf by Local Union 632 and a meeting was conducted with respect to the discharge on December 28, 1991. At that meeting Braxton was represented by alternate Steward Tom Colaizzi and by Dennis J. Laczko, the President of the Local Union. After that meeting, a decision was made by UPS management to uphold the discharge and the grievance was advanced to the Atlantic Area Parcel Grievance Committee ("Grievance Committee").

The Grievance Committee was established pursuant to the agreement between the IBT and UPS. The panel consists of seven members, three appointed by the employer, three by the Union and one permanent arbitrator selected by the parties. While the arbitrator participates in the hearing, he only casts a vote if the other panel members are deadlocked, i.e., three votes for and three against the grievance. None of the employer or Union members of the panel come from the same area or jurisdiction as the grievant. The Union members of the panel which heard Braxton's case included, Ronnie Candler from Local Union 61 in Hickory, North Carolina, Frank Wood from Local Union 28 in Taylor, South Carolina, and Ken Hall from Local Union 175 in Charleston, West Virginia. The three UPS members of the panel were from the South East Region of UPS.

The hearing on Braxton's grievance was held before the Grievance Committee on January 15, 1991 in Williamsburg, Virginia. The hearing took approximately four hours. Mr. Braxton was represented at the hearing by Mr. Laczko. In addition, Braxton made a presentation on his own behalf. UPS was represented by Carmen Napa, Braxton's Division Manager. Both the Union and UPS submitted written statements prior to the hearing. Mr. Braxton submitted a written statement along with the statements of four present or former employees of UPS.²

Both the Union and Braxton made oral presentations in support of the grievance, Mr. Braxton's presentation lasted approximately one hour. UPS made an oral presentation and presented the testimony of Paul Sharp, Braxton's supervisor. Sharp was cross-examined by members of the panel, particularly with respect to the allegations contained in the employee statements presented by Braxton. Sharp was also cross-examined by the President of Local Union 623. Mr. Braxton does not recall whether he asked Sharp any questions. After the completion of the affirmative presentations each party, including Mr. Braxton, presented closing arguments.

The deliberations of the Grievance Committee are confidential and there is no record kept of how individual members of the panel voted. Other than a statement that the claim has been granted or denied, the Grievance Committee does not issue written opinions. In Braxton's case the panel voted to deny the claim. The arbitrator, or seventh member, did not vote in Braxton's case. Therefore, a majority of the six members of the panel, including at least one union member, voted to deny the

²These statements were submitted by Mr. Braxton to the Election Officer and were considered, along with additional evidence submitted by Braxton and UPS, by the Election Officer in the remand of Election Office Case No. P-210-LU623-PHL.

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grievance

Mr Braxton argues that the *Rules* have been violated because the Union members of the Grievance Committee voted to deny his grievance because of their hostility to his political activity during the current election campaign

The Complainant is a member of the Teamsters for a Democratic Union (TDU) and a supporter of the candidacy of Ron Carey for International General President. He provided a great deal of evidence that he had been a prominent member of TDU and an anti-IBT administration activist for many years. He was a plaintiff in two lawsuits brought against the International, both of which secured relief against the International Union. Both of these lawsuits involved national UPS-IBT contracts. He is also a member of the TDU Steering Committee. He has authored articles which appeared in TDU publications such as Convoy Dispatch, the UPS Network News and the TDU Contract Bulletin. He has been criticized by name by International officers for his political activities.

One of the members of the Grievance Committee was Frank H Wood, the Secretary-Treasurer of IBT Local 28. Wood is a delegate to the June 1991 IBT Convention and sought such position as a member of the "Delegates for a Clean IBT Slate". This slate was opposed by, but prevailed over, the Ron Carey Slate in the Local 28 delegate election. During the delegate election campaign in January 1991, Wood distributed literature critical of Ron Carey and his candidacy. See Election Office Case No Post8-LU28-MID. Wood was also openly critical of TDU during and after the delegate election campaign. Evidence was also presented to the Election Officer demonstrating that Mr Wood regularly received TDU publications such as the Convoy Dispatch and thus was likely aware of Mr Braxton's participation in the writing of articles for TDU's literature. The topic of Mr Braxton's support for Ron Carey also arose during the actual Grievance Committee hearing, although Mr Braxton states that he was very cautious with the issue in order to avoid the possibility of anti-Carey or anti-TDU bias influencing the decision.

Mr Wood stated that he did not remember the issues in the case involving Mr Braxton and denies that he did anything but decide the case on its merits. I do not credit this general denial in light of the Complainant's more specific evidence. The evidence is that the Complainant is prominent among dissidents at UPS and that Mr Braxton was closely identified with both Ron Carey and the TDU. Mr Wood was involved in an election protest dealing with anti-Ron Carey and anti-TDU literature at the same time he heard Mr Braxton's case.

It is, therefore, more probable than not that at least one member of the JGC, Frank Wood, knew that Mr Braxton was an active Union dissident and an active supporter of candidate Ron Carey. It is also more probable than not that Mr Wood had strong political beliefs in opposition to Mr Braxton.

Additionally, Mr Wood stated that 80-90% of all discharge cases are decided by

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the arbitrator on the JGC because the Union and the employer representatives on the Committee deadlock Wood stated that only the most clear-cut discharge cases are resolved without submission to the arbitrator to break the deadlock These statements were confirmed by another Union appointed member of the grievance panel, Ronnie Candler Candler stated that 90-95% suspension and discharge cases are placed before the arbitrator Candler further stated that if a case is not deadlocked it is because the employee is so obviously guilty that to place the case before the Arbitrator would insult the Arbitrator's intelligence

UPS has stated that Mr Braxton's case was not resolved by the arbitrator, which means that one or more of the Union representatives on the Committee voted to sustain Mr Braxton's discharge

This lack of a deadlock is particularly anomalous here Mr Wood and Mr Candler both stated that only the clearest discharge cases do not result in a deadlock The evidence before the Election Officer and the Independent Administrator in Election Office Case No P-210-LU623-PHL suggested that the propriety of the discharge - whether it was for just cause - was a close decision

These facts, taken all together, are sufficient to create an inference that the JGC could have held against Mr Braxton because of his assertion of his political rights in the delegate election campaign Thomas v UPS, 890 F 2d 909, 913, 923 (7th Cir 1989)(remanding case for trial because plaintiff showed anti-dissident bias of JGC and of members of JGC who heard discharge appeal)³ It is a violation of the *Rules* for a Union to act against a member because of political activity protected by the *Rules*, Article VII, §10

There remains the issue of the import of Mr Wood's possible bias on the ultimate decision of the JGC This is an issue because Mr Wood is only one of seven members of the Committee One of those members is an arbitrator, who votes only if there is a deadlock among the remaining members of the Committee Thus, it is possible that other members of the committee could have aligned themselves with Mr Wood to sustain the discharge for reasons other than Mr Braxton's political activities related to delegate or International officer selection

The Joint Grievance Committee issues no written decisions other than a statement as to whether the discharge is upheld, and does not keep a record of its deliberations

³ There is a long line of precedent from the National Labor Relations Board which holds that Grievance Committees are not entitled to the same deference as arbitrators in cases wherein the interests of the Union members of the Committee are not aligned with the interests of the grievant Hendrickson Bros, 272 NLRB No 74, 117 LRRM 1441 (1984), Mason & Dixon Lines, Inc, 237 NLRB No 21, 98 LRRM 1540 (1978), Jacobs Transfer, 201 NLRB No 34, 82 LRRM 1360 (1973), Roadway Express, 145 NLRB No 51, 54 LRRM 1419 (1963) See Taylor v. NLRB, 786 F 2d 1516, 122 LRRM 2884 (11th Cir 1986).

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Thus, it is impossible to precisely evaluate how Mr Wood may have influenced the outcome of the JGC decision. In such circumstances, the burden ought not to be on the Complainant to produce evidence particularly within the control of the JGC. Moreover, the evidence in this case points to the conclusion that Mr Wood knew who Mr Braxton was, and was aware of his political and electoral positions. The facts surrounding the discharge and its propriety, and the failure of the JGC to deadlock, support an inference that Wood did not fulfill his duty to act impartially as a member of the Committee and that the committee did not, therefore, deadlock as is the norm in discharge cases.⁴

The next logical step for the purposes of determining relief is to decide whether the parties' collective bargaining agreement has been violated. If it has been, an appropriate remedy would be ordered, including, for example, reduction of discipline, reinstatement or reinstatement and payment of back wages to Mr Braxton.

The Election Officer concludes, however, that it would improperly intrude upon the collective bargaining process for the Election Officer to determine the contractual question of just cause. In this agreement, the parties anticipated that a neutral arbitrator should make this determination in close discharge cases. In the spirit of that agreement, therefore, the Election Officer orders the parties to submit this dispute to a neutral arbitrator. At such hearing, Mr Braxton is to be allowed to retain an attorney, at his own cost, to present his case if he so desires. This resolution will allow a mutually selected neutral party to interpret the contract.⁵ This approach is consistent with both the intent of the parties to the contract and with national labor policy.

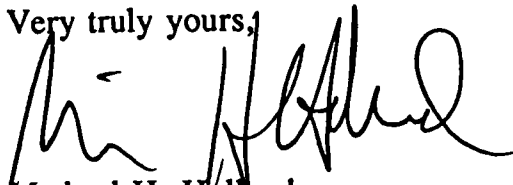
If any interested party is not satisfied with this determination, they may request a hearing before the Independent Administrator within twenty-four (24) hours of their receipt of this letter. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was 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 and MacRae, One Gateway Center, Newark, New Jersey 07102-5322, 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.

⁴The holding of the Thomas case is that the Union members of the Joint Grievance Committee have a duty of fair representation different than their duty to act as an impartial arbitrator. The argument of UPS that this is similar to one involving judicial reversal has no relevance herein because the Union Grievance Committee members are not in the role of judges.

⁵To the extent that either party refuses to submit this case to arbitration, the Election Officer will be forced to decide the contract issue of just cause and then to decide what relief is appropriate, including the issue of what entities are indispensable to relief. See e.g. F.R. Civ. P. 19.

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Very truly yours,



Michael H Holland

MHH/mjv

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IN RE:

JOHN W. BRAXTON

and

IBT LOCAL UNION NO. 623

and

UNITED PARCEL SERVICE

91 - Elec. App. - 147 (SA)

DECISION OF THE
INDEPENDENT
ADMINISTRATOR

This matter arises out of an appeal from a Decision of the Election Officer in Case No. P-451-LU623-PHL. A hearing was held before me on May 7, 1991, at which Martin Wald and Gary Turri, attorneys for United Parcel Service ("UPS") appeared in person. The following persons were heard by way of telephone conference: Richard Markowitz, an attorney on behalf of Local 623; Paul Levy, an attorney for John Braxton (the complainant); George Devakos, Jack Dempsey, Dwight Barickman, Joe Maloney, and Lou Brinkley, witnesses on behalf of UPS; Patrick J. Szymanski, an attorney on behalf of Richard Hall and Frank Wood; Griff Morgan, the Adjunct Regional Coordinator; and John J. Sullivan and Barbara Hillman, on behalf of the Election Officer. John Braxton and Richard Opalesky, the Secretary-Treasurer of Local 623 audited the hearing.

BACKGROUND

This is the third time Mr. Braxton has appealed a decision of the Election Officer. Mr. Braxton's first appeal challenged the Election Officer's determination that his discharge from UPS, while prompted in part by political motivations, would have occurred even in the absence of the political factors. In other words, the Election Officer determined that the evidence "did not show that Braxton received disproportionate discipline for the offense charged or that he was treated in a discriminatory fashion because of his campaign activity" on behalf of Ron Carey -- a candidate for International General President. The Election Officer's ruling was affirmed by the Independent Administrator in 91 - Elec. App. - 108 (SA) (March 26, 1991). Notwithstanding this finding, neither the Election Officer nor the Independent Administrator ruled on whether Mr. Braxton's discharge was for just cause or was otherwise in accordance with the collective bargaining agreement between Braxton's Local ("Local 623") and UPS.

In his next protest, Braxton alleged that the decision of the Joint Grievance Committee (sometimes referred to herein as the "JGC")¹ to deny Braxton's challenge to his discharge was again tainted by his political affiliations, constituted a violation of the Rules For The IBT International Union Delegate And Officer Election (the "Election Rules"), and may have affected the outcome of the delegate election in Local 623. Braxton lost his bid for a

¹ As explained in greater detail later on, the JGC is a panel established pursuant to the collective bargaining agreement between the IBT and UPS to hear and decide grievances.

delegate position in that election and was seeking a re-run. Assuming, just for purposes of that protest, that the JGC's decision was tainted, the Election Officer found that there was no connection between the results of Local 623's delegate election and the JGC's decision, and thus denied Mr. Braxton's protest. The Independent Administrator affirmed that decision in 91 - Elec. App. - 139 (SA) (April 30, 1991).

THIS APPEAL

At issue on this appeal is the merits of the JGC's decision. As explained in the Election Officer's Summary, he found that:

[T]he facts, taken together, were sufficient to raise the inference that the decision of the Grievance Committee to uphold Mr. Braxton's discharge may have been motivated to some degree by the animosity on the part of one or more Committee members to Mr. Braxton's political preferences.

The Election Officer found such retaliatory decision-making to be violative of Mr. Braxton's protected political rights under the Election Rules. As a remedy, the Election Officer directed that Mr. Braxton's discharge should be re-submitted to an independent arbitrator.

For the reasons discussed herein, I reverse the Election Officer's decision.

JURISDICTION

As a preliminary matter, certain jurisdictional objections must be resolved. UPS argues that as an employer, and a non-party to the 1989 Consent Order entered into between the Government and

the IBT, it is not subject to the jurisdiction of the Election Officer and the Independent Administrator. This argument has been raised repeatedly in the past, by both UPS and other employers who have become involved in the election process, and has consistently been rejected. See In Re: McGinnis, 91 - Elec. App. - 43 (January 23, 1991), aff'd, United States v. IBT, et al., 88 Civ. 4486, slip op. (S.D.N.Y. April 3, 1991); In Re: Veneziano and UPS, 91 - Elec. App. - 62 (SA) (February 8, 1991).

UPS also contends that the Election Officer lacks the authority to review decisions of the JGC, since that body is the creation of a collective bargaining agreement and, it is argued, is shielded by that agreement. UPS understates the Election Officer's powers.

The Election Rules provide all union members the right to run for office and to openly support or oppose candidates of their choice without fear of retaliatory action against them. Election Rules, Article VIII, Sec. 10. The Election Officer is empowered to protect those rights and address violations, no matter the context in which they may arise. As explained by the Election Officer in his Summary:

[T]he Election Officer is authorized to examine whether in making the determination of just cause under the contract, the Grievance Committee impermissibly based that determination on conduct of the grievant that is protected by the Election Rules, or whether the decision finding that Mr. Braxton's discharge was proper under the collective agreement was tainted by animus against him based on his political views and campaign activities specifically protected by the Election Rules.

Lastly, Richard Hall and Frank Wood, two of three Union members on the JGC, argue that as "respondents" they did not receive adequate notice of the filing of the protest. They request a remand so that they may have an opportunity to present their evidence.

First, although Mr. Braxton may have modified his protest to include allegations of individual wrongdoing on the part of the JGC members, it is clear that the import of Mr. Braxton's protest was that his protected rights under the Election Rules were violated. Moreover, the Election Officer interviewed Mr. Wood, and one of the other three Union members of the JGC (not Mr. Hall), during his investigation. Furthermore, neither Mr. Wood nor Mr. Hall appeared at the hearing to present their side of the story. Lastly, no remedy was issued against any member of the JGC. Thus, Messrs. Wood and Hall cannot now be heard to complain that they have been somehow prejudiced by these proceedings.

THE MERITS

As explained by the Election Officer in his Summary:

The Grievance Committee established pursuant to the collective bargaining agreement between the IBT and UPS is a joint panel consisting of seven members: three appointed by UPS, three by the Union, and one permanent arbitrator selected by the parties. The Arbitrator participates in the hearing, but casts a vote only if the other panel members deadlock at three votes for three votes against the grievance. The Union and employer members of the Committee are drawn from outside the area and jurisdiction of the grievant. The Union members that heard Mr. Braxton's grievance were Frank H. Wood from IBT Local 28 in Taylor, South Carolina, Ronnie Candler from Local 61 in Hickory, North Carolina, and Ken Hall from

Local 175 in Charleston, West Virginia. The three UPS members were from the South East Region of UPS.

Mr. Wood successfully ran for delegate to the IBT Convention from Local 28 on a "Delegates for a Clean IBT" slate. Mr. Wood's slate opposed the Ron Carey slate from that Local. Mr. Wood has been openly critical of TDU and during his campaign in January 1991 distributed literature opposing Ron Carey and his candidacy. See Election Office Case No. Post8-LU28-MID. He has received TDU publications such as the Convoy Dispatch.

Mr. Braxton's pro-Carey sympathies were mentioned during his hearing.²

No allegation has been made that Mr. Braxton was in any way hindered or handicapped in the presentation of his case. In fact, in making his presentation Mr. Braxton was aided by a representative of his Local. His presentation was quite complete.

Following the hearing, in accordance with regular practice, the JGC deliberated in private then announced its decision that Mr. Braxton's grievance was denied. The Election Officer, in his Summary, explained:

Because the Arbitrator was not called upon to cast a vote, a majority of members clearly voted to deny the grievance and, plainly, that majority must have included one or more Union members.

At the hearing, UPS introduced the testimony of the three employer members of the panel. All three confirmed that the vote against Braxton was unanimous -- 6 votes to none. The Election Officer did

² Mr. Braxton mentioned at the hearing that he thought he had been fired because of his political activities, which included pro-Carey activities. Mr. Braxton was told by a panel member not to "push" that issue as it was not relevant.

not have the benefit of this information when he issued his decision.³

When interviewed by the Election Officer, Mr. Wood claimed that he did not remember the issues involved in Mr. Braxton's case. The Election Officer did not find this contention credible. Given the fact that Mr. Wood's political beliefs were so antithetical to Mr. Braxton's, the Election Officer suggests that Mr. Wood would have a recollection of the case.

The Election Officer further suggests that "Mr. Braxton's grievance was unusual in failing to draw a deadlock of the Committee members." Mr. Wood told the Election Officer that a clear majority, some 80 to 90 percent of the discharge cases resulted in deadlock, and only the most clear-cut cases are resolved without submission to the Independent Arbitrator. Ronnie Candler, the third Union member on the JGC, estimated that the percentage of deadlock cases was even higher, some 90 to 95 percent. As stated by the Election Officer in his Summary:

According to Mr. Candler, it is only where an employee is so obviously guilty that to place the case before the Arbitrator would insult his intelligence that the Grievance Committee fails to deadlock and votes to uphold the discharge.

The Election Officer's conclusion is explained in his Summary as follows:

To the contrary, the facts, taken together, are sufficient to raise the inference that the decision of the Grievance Committee to uphold Mr. Braxton's discharge

³ UPS was permitted to introduce evidence at the hearing because it did not appear that it had an adequate opportunity to do so during the Election Officer's investigation.

may have been motivated to some degree by the animosity on the part of one or more Committee members to Mr. Braxton's political preferences. Although the votes of the Grievance Committee members are not disclosed, the participation of Mr. Wood on the Committee is particularly suspect because of his own political opposition to Mr. Braxton's views. And as courts have recognized, where a joint grievance panel of this nature exhibits bias against a grievant before it because of factors having nothing to do with the merits of his grievance, its decision will not be allowed to stand. Thomas v. UPS, 890 F.2d 909, 913, 923 (7th Cir. 1989). The inference of bias raised by Mr. Braxton is sufficient to suggest that deference to this Committee is not warranted in this instance.

The suggestion which runs through the Election Officer's decision is that Mr. Wood voted against Mr. Braxton because of political animosity. It is also suggested that Mr. Wood may have persuaded the other two Union members of the JGC to vote against Mr. Braxton.

While I accept the Election Officer's finding that Mr. Wood voted against Mr. Braxton for political reasons, there is simply no evidence that any other member of the panel voted against Mr. Braxton because of improper political motive. To suggest they did is only speculation.

The Election Officer relies on the statements of Messrs. Hall and Wood that except in the clearest of cases, the JGC almost always deadlocks. The implication here is that the three Union panel members always vote for the Union member, and the three employer panel members always vote for the employer. The characterization of the JGC as a mere way station to the Independent Arbitrator is not well supported.

First, the employer panel members testified that the JGC deadlocks about 50 percent of the time. In fact, one panel member's review of his own records indicated that in 1990, the JGC deadlocked in discharge cases only 45 percent of the time, and that thus far in 1991, they have deadlocked 53 percent of the time.

Moreover, the suggestion that the Union members are almost duty bound to vote for the grieving member, is without merit. As observed in Thomas v. UPS, 890 F.2d 909, 920-921 (7th Cir. 1989):

Union officials serving on a JGC are, we submit, functioning in a fundamentally different capacity. Presumably, the purpose of such committees is to review the initial decision giving rise to the grievance and render a fair decision: either affirming or reversing the earlier decision as justice requires. If the union or management representatives on JGCs were merely partisans for their respective group, deadlock and arbitration would be the inevitable result. Under such a system, the JGC would become a mere procedural way station, screening only those grievances in which either the union or management representative failed to discharge his or her "duty" and send the grievance to an arbitrator. If that is truly what the parties to the collective bargaining agreement intended, the usefulness of the JGC must be called into question. Surely, the fact that the collective bargaining agreement establishes a JGC and posits final decision-making authority in that body reflects an understanding that the JGC is to serve more than a merely nominal purpose. As the Supreme Court has stated, "[i]n providing for a grievance and arbitration procedure which gives the union discretion to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration." Vaca [v. Sipes], 386 U.S. at 191, 87 S.Ct. 917. It is more reasonable to assume that the JGC is to serve a meaningful purpose as an adjudicator of employment-related disputes, thereby requiring Committee members to exercise a fair and independent judgment on each petition presented to the Committee. Unlike the union representative assisting the grievant in preparing his petition and arguments, the union official sitting on the JGC does not have the interests of a single member at heart. The union has determined that such committees are beneficial to its members and has agreed to settle grievances according to the procedures outlined in the

collective bargaining agreement. The union official serving on a JGC discharges his responsibility to union members by not serving as an advocate for the grievant. As the Eighth Circuit has observed, the "[m]embers of these [grievance] committees essentially function as arbitrators on an adjudicatory body, and, consequently, they owe no 'duty of partiality' to either the employer or the employee." Tongay v. Kroger Co., 860 F.2d at 300 (quoting Early v. Eastern Transfer, 699 F.2d 552, 560 (1st Cir. 1983). Accord Grant, 832 F.2d at 80. Similarly, in Beckett v. Anchor Motor Freight, 113 L.R.R.M. 2608, 1982 WL 2036 (S.D. Ohio 1982), the district court rejected the plaintiffs-employees' argument that the union representatives on the committee were "obligated to deadlock their grievances to independent arbitration" and ruled instead that "[u]nion members of an arbitration panel are acting, not as representatives of the grievant, but as neutral decision-makers." Id. at 2613. [Emphasis in original]

Thomas goes on to explain the duty of a JGC panel member as follows:

[T]he nature of the union's role in sitting on a JGC is essentially that of an arbitrator and the union fulfills its duty of fair representation by rendering a fair and impartial decision on the merits. [890 F.2d at 922]

Thomas further teaches:

[T]hat a duty of impartiality and fairness will not permit JGC members to rely upon political, religious, racial, ethnic, personal, or otherwise impermissible factors when ruling upon a grievance petition. [890 F.2d at 921]

While it appears that Mr. Wood, individually, may have breached his duty as a JGC member by relying on political factors (and thus violated the Election Rules), the JGC ruling need not be displaced because there is simply no evidence that the other panel members acted improperly. This is significant. Even if Mr. Wood's vote was canceled, Mr. Braxton's grievance would still have been denied by a majority of the JGC. Thus, it cannot be said that Mr. Wood's

violation of the Election Rules "undermine[d] the integrity of the arbitral process." Thomas, supra, 890 F.2d at 922.

The Election Officer states, however, that since "it is impossible to precisely evaluate how Mr. Wood may have influenced the outcome of the JGC decision . . . the burden ought not to be on the complainant to produce evidence particularly within the control of the JGC." I disagree. The burden is on the complainant.⁴ See, e.g., Thomas, supra, 890 F.2d at 922 ("In order to establish that a union breached its duty of fair representation, the employee must show that the union conduct was 'arbitrary, discriminatory, or in bad faith.' . . . In this Circuit, the prevailing standard requires the employee to prove that the union conduct was (intentional, indivious, and directed at the employee"). (Emphasis supplied.)

Here, the complainant has not met his burden. The Thomas Court described the type of proof that may be considered in making a determination of improper political motive. In Thomas, the Seventh Circuit Court of Appeals remanded the matter to the United States District Court for the Northern District of Illinois so that the District Court could consider:

1. Statistical evidence that showed that the JGC consistently voted against dissidents;

2. Evidence that showed that all of the JGC Union panel members (in that case, two members), harbored anti-dissident sentiments; and

⁴ While the burden is described as being on the complainant, under the unique circumstances of this election, it is understood that the complainant may rely upon facts developed by the Election Officer during his investigation.

3. Evidence that Thomas' Union representative at the hearing also harbored anti-dissident sentiments.

Here, the evidence falls far short of the proof considered in Thomas.⁵ All we have here is proof that only one of three Union panel members was anti-Carey. While there was some suggestion that the JGC violated past practice by not deadlocking, that proof was rebutted by the testimony of the employer panel members. Moreover, as explained in Thomas, it would be improper to impose an obligation on the Union panel members to vote in favor of employed grievants. As also mentioned, there is no suggestion that Mr. Braxton's Local representation at the hearing was ineffective.

Lastly, I reject the suggestion that Mr. Braxton's case was so close as to compel a deadlock of the JGC. While neither the Election Officer nor the Independent Administrator reached a decision on whether UPS had good cause to discharge Mr. Braxton, both agreed that UPS's treatment of Mr. Braxton was not "disproportionate" and that Mr. Braxton was not treated in a "discriminatory fashion."⁶

⁵ The Thomas Court made no determination on whether such evidence was sufficient to sustain the employee's burden; it only ruled that such proof should be considered.

⁶ At the hearing, UPS also submitted a May 1, 1991, "Referee's Decision," denying Braxton's claim for unemployment insurance. In that decision, the Referee found, following a hearing, that Braxton was discharged for "wilful misconduct connected with his work." The Referee defined wilful misconduct "as an act of wanton or wilful disregard of the employer's interests, a deliberate violation of the employer's rules, or a disregard of the standards of behavior which the employee has a right to expect of an employee." This decision is relevant only insofar as it shows that another independent judge, in that case the workers compensation Referee, did not consider Mr. Braxton's case a close one.

For the reasons expressed herein, the decision of the Election Officer is reversed and his remedy is vacated.

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

Dated: May 10, 1991