

OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
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Michael H. Holland
Election Officer

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September 20, 1991

VIA UPS OVERNIGHT

Christopher Scott
R. V. Durham Unity Team
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Washington, D.C. 20003

Teamster Rank & File Education
& Legal Defense Fund
7437 Michigan Avenue
Detroit, MI 48210

Paul A. Levy, Esq.
Public Citizen Litigation Group
2000 P Street, NW
Suite 700
Washington, DC 20036

Re: Election Office Case No. P-822-IBT

Gentlemen:

A protest was filed pursuant to Article XI, §1 of the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") by Chris Scott as an IBT member and as a representative of the R.V. Durham campaign. Mr. Scott alleges that a letter distributed by the Teamsters Rank and File Education and Legal Defense Foundation, ("TRF"), in June of 1991 constitutes campaign propaganda for nominated General President candidate Ron Carey and amounts to a fundraiser for the Carey campaign. Mr. Scott further alleges that TRF is an ". . . employee [sic] foundation . . ." and thus it violates the *Rules* by being involved in campaigning or fundraising for a candidate for IBT International Union office.

An investigation conducted by the Election Officer of this protest discloses the following facts. On or about June 17, 1991 a letter was sent by TRF on TRF letterhead, although apparently in TDU envelopes, to approximately 1,786 individuals who had previously made a donation to TRF for the purpose of raising funds.¹ Although many

¹ Counsel for TRF argues that the protest should be dismissed as untimely having been filed on July 17, 1991, more than 48 hours after the letter should have been received. The Election Officer notes that Mr. Scott was at the Convention in Orlando at the time the letter was most likely delivered; the letter was sent to his home address.

of the recipients were not members of the IBT, some of the individuals who received the letter were IBT members. The letter was signed by Ken Paff as Director of TRF and National Organizer for TDU. The letter contains a disclaimer stating that no contributions would be accepted from employers who are or a may be engaged in bargaining with the Teamsters, i.e. interested employers. Enclosed with the letter was a reprint of a newspaper article from the Seattle Post Intelligencer concerning the IBT International Union election process.

TRF is an educational and legal defense foundation which receives funding from a variety of sources including other foundations. It is also an employer. See Election Office Case No. P-249-LU283-MGN, affirmed 91-Elec. App.-150(SA). Thus, except to the extent that its contributions are limited to legal or accounting services as defined in Article X, §2 (b)(2) of the *Rules*, TRF is prohibited from making contributions to candidates for delegate, alternate delegate and International Union officer positions, and candidates for delegate, alternate delegate, or international officer positions are prohibited from accepting contributions from TRF *Rules*, Article X, §1(b)(1). Publishing and disseminating material favorable to a particular candidate constitutes a contribution to that candidate. See *Rules*, Definitions (6). Thus, the prohibition of Article X of the *Rules* with respect to contributions by trusts, foundations or employers also extends to any effort of TRF to campaign on behalf of any candidate for IBT International Union officer position. Therefore, the questions presented by the protest are (1) whether the June, 1991 letter and accompanying newspaper article is a fundraising activity on behalf of Ron Carey and (2) whether the letter and newspaper article may be considered campaign literature on behalf of Ron Carey. An affirmative answer to either question requires of finding of a *Rules* violation.²

As to the first question, the Election Officer determines that the letter and the accompanying newspaper article cannot be considered as a request for funds for the Carey campaign. The letter clearly requests funds for the purpose of educating IBT members in the electoral process. One of the express purposes of TRF is educating union members about their rights both within the union and vis-a-vis their employers.

Mr. Scott has been in Washington, D.C. since the Convention. It therefore appears likely that Mr. Scott first actually received the letter shortly before the time the protest was filed. Further, the Election Officer considers this protest to raise important and substantial issues in the ongoing election process justifying a determination of the protest on its merits. (See Election Office Case No. P-249-LU283-MGN).

² The Election Officer does not consider his determination in Election Office Case No. P-249-LU283-MGN to be *res judicata* of the new issues raised by this protest. Moreover, of all the TRF fundraising letters examined by the Election Officer during the course of investigating P-249-LU283-MGN, only one dated prior to the effective date of the *Rules* even referred to Mr. Carey.

There is no indication in the letter that any funds received by TRF will be used for any other purpose and certainly no statements that would lead any person to believe that donations received by TRF would be transmitted to the Carey campaign. Thus, the Election Officer determines that the June, 1991 letter from TRF is not a fundraising letter for Ron Carey.³

With respect to the second issue, however, the Election Officer determines that TRF improperly used its resources by distribution of the June, 1991 letter by the letter's discussion of Ron Carey as a candidate in the IBT upcoming International Union officer election. In the letter, Mr. Carey was characterized as "a reformer who has been endorsed by TDU and is bringing his campaign straight to the members". The letter does not mention any other candidates for International office or discuss their campaign strategies or endorsements. And at least some IBT members received the letter.⁴ The Election Officer determines that the inclusion of the remarks concerning Ron Carey in the June, 1991 letter is violative of the *Rules*.

The Election Officer determines however that the newspaper article accompanying the letter is not campaign material. It is a reprint of an article generally concerning the International Union election process, the Consent Order and TDU. All candidates for General President are referenced.

The Election Officer finds that the mention of Ron Carey in the context of TRF's solicitation letter was minor, essentially a two line paragraph within a two page letter. However, this letter was sent to approximately 1,786 individuals, at least some of whom are IBT members. The reference to Mr. Carey was flattering. The IBT members who received the letter arguably would be more likely to vote for Mr. Carey than if no letter had been received. Further, other recipients of the letter, if not employers, might be moved to contribute to Mr. Carey's campaign by the contents of the letter.

The Election Officer finds that the *Rules* were violated. His investigation discloses, however, that the violation was not at the behest of Mr. Carey or his campaign, nor did Mr. Carey or his campaign have any knowledge of the letter or its contents before its distribution. Accordingly, it would be inappropriate to impose a remedy against Mr. Carey.

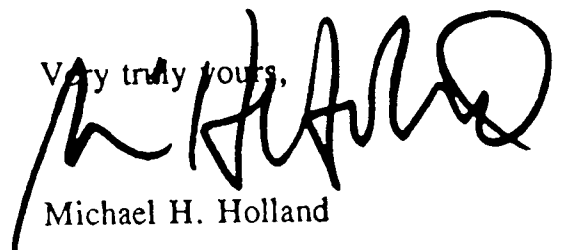
³ To the extent any funds raised may be utilized for permitted contributions for legal and accounting services as set forth in Article X, §2(b)(2) of the *Rules*, the Election Officer notes that the letter contains the required disclaimer.

⁴ Contrary to the position taken by TRF through its counsel, the Election Officer finds that TDU was the soliciting entity in all prior solicitations for donations which discussed or extolled any particular candidate.

A benefit was provided to nominated General President candidate Carey in violation of the *Rules*. The only appropriate remedy under the circumstances of this case is to provide a similar benefit to the other two nominated candidates for IBT General President, a "make whole" remedy. Accordingly, the Election Officer directs that TRF compensate the other candidates for General President, Walter Shea and R.V. Durham, for the benefit wrongfully given to Mr. Carey. The Election Officer finds that the benefit provided is measured by the costs incurred in providing that benefit, i.e., the cost of the mailing. The Election Officer finds that the cost of postage (bulk-rate non-profit permit), envelopes and paper is approximately \$300.00. Therefore, the Election Officer directs TRF to pay the sum of \$300.00 to each of the other candidates for General President, R.V. Durham and Walter Shea, within fifteen (15) days of the date of this decision. Concurrently TRF should file an affidavit with the Election Officer indicating compliance with this determination. The Election Officer further directs that TRF cease and desist from using its funds to campaign for any candidate in the IBT International Union officer election.

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/mjv

cc: Frederick B. Lacey, Independent Administrator

Ron Carey
c/o Richard Gilberg, Esq.
330 West 42nd Street
New York, NY 10036

Christopher Scott
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Walter Shea
c/o Robert Baptiste
1919 Pennsylvania Ave., NW
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Washington, DC 20006

R. V. Durham
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BACKGROUND

TRF, founded in 1977, is an educational and legal defense foundation which receives funding from a variety of sources including other foundations. "As a foundation, it is clear that TRF is prohibited under the Election Rules from making any campaign contributions." See In Re: Gully, 91 - Elec. App. - 158 (SA) (June 12, 1991) at p. 5. See also, Election Rules, Article X, Section 1.

On June 17, 1991, TRF sent a letter to 1,786 individuals whose names were drawn from a list of persons believed to have made previous donations to TRF. Some, but not all, of the letter's recipients were members of the IBT. Although the stated purpose of the letter was to solicit funds for TRF, the letter contained positive comments concerning Ron Carey, a candidate for IBT General President in the upcoming elections. The letter made no reference to any other candidate.

While the letter was printed on TRF letterhead it was mailed in envelopes provided by Teamsters for a Democratic Union ("TDU"), a caucus of IBT members who support Carey's candidacy. The letter was signed by Ken Paff as Director of TRF and National Organizer for TDU. It offered a one year's free subscription to the Convoy Dispatch -- TDU's newsletter which has published pro-Carey articles¹ -- in return for a thirty dollar contribution to TRF.

¹ See In Re: Gully, 91 - Elec. App. - 158 (SA), at p. 15.

One of the letter's recipients was Christopher Scott, an IBT member and representative of the campaign of Durham. Durham is also a candidate for IBT General President. Scott filed a protest with the Election Officer asserting that TRF's letter constituted Carey campaign propaganda and amounted to a fund raiser for the Carey campaign. Upon investigation, the Election Officer determined that the letter was not a fund raising effort for Carey. However, the Election Officer found that the letter, in disseminating material favorable to a particular candidate, was an impermissible campaign contribution under the Election Rules. As a remedy, the Election Officer directed TRF to pay \$300.00 -- the cost of a similar mailing -- to Durham, and Walter Shea (the third candidate for General President). In addition the Election Officer directed TRF to cease and desist from using its funds to campaign for any candidate in the IBT International Union officer election.

Timeliness

TRF first questioned the timeliness of Scott's protest which was filed on July 17, 1991, more than 48 hours after the anticipated delivery date of the June 17th letter. See Election Rules, Article XI, Section 1.a(1) (requiring protests to be filed within 48 hours of the complained of activity). Apparently, TRF assumed that the one month delay meant that Scott had actually read the July 17 letter at or near the expected delivery date and that he had failed to act timely. However, in accepting the protest,

the Election Officer noted that Scott was at the IBT Convention in Orlando, Florida, at the time of the letter's expected delivery, that Scott was subsequently in Washington, and that the letter was sent to his home address. The Election Officer therefore found that Scott actually received the letter much later and acted on it promptly. At the hearing Scott stated that he had in fact been away from home due to a combination of the Convention, a subsequent vacation and campaign business and that he had acted within the time limit. Since there is no evidence to the contrary, I find that the protest was timely filed.

Merits Of The Protest

As noted, under the Election Rules, TRF is a "foundation" which may not contribute to a campaign. Election Rules, Article X, Section 1.b. (1). A campaign contribution is defined in the Rules as "any direct or indirect contribution where the purpose, object or foreseeable effect of that contribution is to influence the election of a candidate." Election Rules, Definition (6) at A-2. TRF first asserts that the facts here do not sustain a finding that it made a campaign contribution.

The focus at the hearing before me was on one sentence in TRF's June 17th letter characterizing Carey as a "reformer who has been endorsed by TDU and [who] is bringing his campaign straight to the members." TRF argues that this is no more than a passing reference which it is entitled to make as part of its fund raising

efforts. However, the overall effect of the letter is more favorable to the Carey candidacy than the sentence taken by itself suggests. Taken in context, the sentence in question also represents Carey as one of the "real alternative[s] to the style of non-leadership that has been weighing down our union for so long." Of course, no other candidates are mentioned in the letter.

It is evident that TRF, by referencing Carey in its fund raising letter, sought to endorse the Carey campaign. In using favorable descriptions of Carey to solicit funds, it has gratuitously conferred a benefit on the Carey campaign effort. The letter thus accomplishes two goals -- campaigning for Carey and fund raising for TRF.

TRF took exception to the fact that the Election Officer did not require any intent to contribute on TRF's part. In making this argument TRF relied on Donovan v. Carpenters District Council, 797 F.2d 140 (3rd Cir. 1986). Donovan, however, does not support the proposition advanced by TRF. Donovan does not compel the conclusion that the absence of intent to contribute would require a different result than that reached by the Election Officer in this situation. Nonetheless, I find it implausible that sophisticated and politically savvy lawyers, such as those at TRF, cannot, at a minimum, be charged with the knowledge that their gratuitous comments regarding Carey would have the "purpose, object or foreseeable effect" of influencing Carey's candidacy.

Moreover, I do not accept TRF's argument that, because the definition of "campaign contribution" refers to "the ... foreseeable effect" (emphasis supplied), the rule against employer contributions would not cover a situation where the complained of activity has a dual purpose -- such as fund raising and campaigning. This suggested reading would allow those prohibited from contributing to bypass the Election Rules by pursuing a dual agenda, such as fund raising and campaigning.

TRF also points to the Election Officer's decision in In Re: Leebove, P-284 - IBT, aff'd in part and rev'd in part, 91 - Elec. App. - 194 (SA) (October 2, 1991), and suggests that to the extent it profited from its fund raising activities it cannot be considered to have made a contribution. Any analogy between TRF's fund raising activities here and Leebove's activity in In Re: Leebove is a disingenuous one. Leebove was an independent entrepreneur hawking a product, albeit one designed to influence the election, that customers purchased at a commercially reasonable price. TRF, when it is engaged in fund raising activity, simply cannot be described as an independent entrepreneur like Leebove.

Finally I note that the Election Rules do not require the Election Officer to find an actual measurable effect on a particular candidate's campaign to find that a prohibited campaign contribution has been made. It is sufficient that the Election Officer finds a "foreseeable effect" of influence.

Constitutional/Jurisdiction Issues

TRF also asserted that the Election Officer and the Independent Administrator have no authority to bind it to any remedial orders. The argument is twofold. First, TRF argued that its behavior here was not a sufficiently direct interference with the Election Rules to warrant an exercise of jurisdiction over it. Compare, In Re: McGinnis, 91 - Elec. App. - 43 (SA) (January 23, 1991). This is really just another way of stating the TRF does not believe it has violated the Election Rules. However, once a violation is made out, the exercise of authority cannot depend on subsequently drawn distinctions between direct or indirect violations. In any event, I view the violation here as a direct one.

Second, TRF argued that the Election Officer and the Independent Administrator are governmental actors subject to the United States Constitution and thus they cannot chill TRF's free-speech rights when it chooses to speak out in favor of a particular candidate.

Assuming that TRF's "state action" argument is correct, it appears that the Court appointed officers have acted within proper constitutional bounds in this instance. Compare, United States v. IBT, 745 F. Supp. 908 (S.D.N.Y. 1990), aff'd, slip op., Docket No. 91-6052 (2d Cir. August 6, 1991). As important as first amendment concerns are, they are not absolute and they have consistently been balanced against other important societal values, particularly in

the labor relations context. In fact, the Labor Management Reporting and Disclosure Act's restriction on union and employer campaign contributions, 29 U.S.C. 481(g), has consistently withstood first amendment attacks. See McLaughlin v. American Federation of Musicians, 700 F. Supp. 726, 733-739 (S.D.N.Y. 1988) ("While 481(g) impacts on speech activity, it is narrowly directed to serve important government interests and, as such, does not impermissibly infringe on the First Amendment."); Hodgson v. Liquor Salesman Union, Local No. 2, 334 F. Supp. 1369, 1379-81 (S.D.N.Y.), aff'd, 444 F.2d. 1344 (2d Cir. 1971) (articles in Union Journal criticizing challengers violated 29 U.S.C. 481(g) and were not entitled to first amendment protection). See also, Marshall v. Local Union 20 IBT, 611 F.2d 645, 652-53 (6th Cir. 1979) (the important interests of the government in creating 29 U.S.C. §481(g) were unrelated to the suppression of speech and therefore Section 481(g) is constitutional).

This unique and historic effort to reform the IBT certainly constitutes a compelling state interest and both the Election Rules as well as their application here are the least restrictive means available to advance this interest. Without the power to prevent contributions from improper sources, the Election Officer would be unable to prevent the introduction of tainted resources into the campaign. A failure to properly limit improper campaign contributions in the interest of preserving unfettered "free

speech" interests² would render the entire election process suspect. Rather than adopt arguments that would eviscerate the Election Rules and the process they are designed to protect, I would find that the Election Officer's conduct here conformed to constitutional norms.

Cross Appeal of the Durham Unity Team

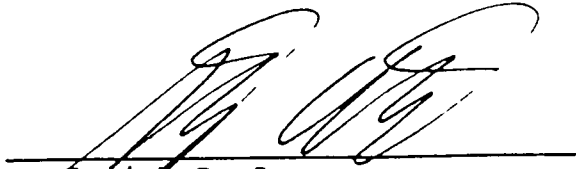
The Durham Unity Team ("Durham") also appeals the election Officer's decision. The essence of Durham's objection is that TRF and TDU are, in effect, the same entity and that the real issue is whether TDU has given resources to TRF to conduct a campaign. However, this office has previously resolved the issue of the TDU/TRF relationship and I find no basis for revisiting that issue now. See In Re Aaron Gully, 91 - Elec. App. - 158 (SA) (June 12, 1991).

Durham also urges the imposition of harsher remedies impacting upon Carey and his campaign. There is also no basis for adopting the remedies suggested by Durham. The Election Officer's decision grants Durham the cost of a comparable mailing, thus any advantage gained by Carey by the TRF letter will be offset by the Durham mailing.

² As the Hodgson Court noted, however, although 29 U.S.C. 481(g), "involv[es] speech activity, [it] is directed solely at campaign contributions, a non-speech activity." Hodgson, supra 611 F.2d at 653, citing, U.S. v. O'Brien, 391 U.S. 367, 377 (1968).

CONCLUSION

For the foregoing reasons the Election Officer's decision is affirmed in all respects.



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

Dated: October 9, 1991