

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

Michael H. Holland
Election Officer

(202) 624-8778
1-800-828-6496
Fax (202) 624-8792

September 11, 1991

VIA UPS OVERNIGHT

Daniel A. Tuffs, Jr.
7235 W. 109th St.
Worth, IL 60544

William Joyce
Secretary-Treasurer
IBT Local Union 710
4217 S. Halsted St.
Chicago, IL 60609

Richard Blake
City Dispatch Manager
Advance Transportation Co.
6767 W. 75th St.
Bedford, IL 60638

Tom Harper
Terminal Manager
Advance Transportation Co.
6767 W. 75th St.
Bedford, IL 60638

Re: Election Office Case No. P-844-LU710-CHI

Gentlemen:

A protest was filed with the Election Office pursuant to Article XI of the Rules for the IBT International Union Delegate and Officer Election, revised August 1, 1990 ("Election Rules"). In his protest Daniel A. Tuffs alleges that his rights under the Election Rules were violated by his employer, Advance Transportation Co. ("Advance"), as a result of the imposition of discipline for engaging in campaign activity. The Election Officer's investigation of this protest revealed the following.

Mr. Tuffs is employed by Advance as a city driver. Tuffs is a member of Local Union 710 and has been active in campaigns for the election of delegates and alternate delegates to the 1991 IBT International Convention as well as the election of International Officers of the IBT. In the instant case, Mr. Tuffs contends that he was disciplined by Advance as part of the employer's effort to restrict his legitimate campaign activity in non-work areas during non-work time.

Daniel A. Tuffs, Jr.
September 11, 1991
Page 2

Mr. Tuffs has previously complained that Advance was prohibiting him from engaging in campaign activity in non-work areas during non-work time. In a protest dated July 19, 1991, Tuffs alleged that he was informed by his dispatcher and by the Advance Bedford Park terminal manager that he would no longer be permitted to take his breaks at the terminal but would have to take them on the road. Mr. Tuffs alleged that he was informed of this prohibition while he was passing out literature on a lunch break. Tuffs argued that the intent of this prohibition was to deny him access for campaign purposes to break areas at the Bedford Park terminal.

After discussion between representatives of the Election Office and Advance, the Election Office determined that Mr. Tuffs would be "permitted to eat his lunch and/or take his breaks in the lunch/break room of the Bedford Park Advance Transportation facility and will be permitted to engage in campaigning within the meaning of Article VIII, §10(d) of the Rules during such time and in such room". See determination in Election Office Case No. P-824-LU710-CHI, dated July 29, 1991. On the basis of this representation by Advance management, the Election Officer considered Mr. Tuffs' earlier protest resolved.

On August 2, 1991, at approximately 11:10 a.m., Tuffs returned to the Bedford Park terminal after completing a delivery and informed the dispatcher that he was taking his morning break. The dispatcher told him that he had to go out immediately with a "hot load" and that he should take his break on the street. Tuffs said that he wanted to take his break at the terminal and proceeded to the break room where he posted some campaign literature on the bulletin board and passed out some literature to drivers in the break room. Tuffs was then fired by Advance.

A grievance was filed challenging Tuffs' discharge. During the processing of that grievance the discharge was reduced to a one day suspension. The discipline was further reduced to a final warning letter by the joint area grievance panel which heard the grievance.

The load that Tuffs was assigned to deliver on the morning of August 2 was to be delivered to Publix, a retailer of office supplies. The load was not a "hot load" requiring immediate shipment. Publix specifically verified that it had not requested an emergency or immediate delivery. In fact, according to Publix, the load in question was not delivered until 2 or 3 days after the incident.

Because of the size of its receiving area, Publix asks that shippers schedule deliveries to help prevent the yard from becoming overcrowded. Publix is, however, agreeable to changing the timing of previously scheduled deliveries. Assuming that the delivery had been so scheduled -- and it is unclear whether there was a scheduled

delivery time -- Publix stated that either Advance or Mr. Tuffs could have called and altered the time. Publix further indicates that a small difference in the timing of a delivery -- such as the one that would have been occasioned by Mr. Tuffs' break -- is irrelevant.

The Election Officer concludes that the Publix shipment could have been delivered by Tuffs in a timely manner after the completion of his break. His employer's insistence that he immediately leave the terminal with the load and to take his break on the street was motivated not by operational concerns but by Advance's animus to Tuffs' election activity. The alleged "hot load" was clearly a pretext to deny Tuffs an opportunity to engage in campaign activity in a non-work area during his break period. Moreover, the resulting discipline was a product of Advance's attempt to interfere with Tuffs rights under the Election Rules, and in retaliation for Tuffs' asserting such rights, and cannot be permitted to stand.

The Election Officer orders the following relief to remedy Advance's violation of the Election Rules:

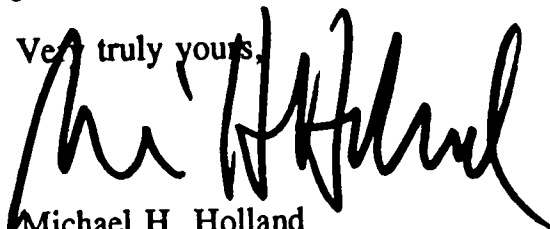
1. Within ten (10) days of the date of this determination, Advance shall, to the extent that it has not already done so, reimburse Tuffs for all lost wages and benefits resulting from his termination or suspension. Advance shall also remove any reference to the August 2 discipline, including, but not limited to, the final warning letter, from Tuffs' personnel file and shall not rely upon or make reference to the August 2 incident in any future disciplinary action.
2. Advance shall cease and desist from any further or similar violations of the Election Rules, including any attempts to interfere with Mr. Tuffs' right to engage in campaign activity on non-work time in non-work areas at the Bedford Park terminal.
3. Advance shall submit to the Election Officer, within fifteen (15) days of the date of this determination an affidavit describing in detail its compliance with this determination.

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,

Daniel A. Tuffs, Jr.
September 11, 1991
Page 4

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,

A handwritten signature in black ink, appearing to read "Michael H. Holland". The signature is written in a cursive, somewhat stylized font.

Michael H. Holland
Election Officer

cc: Frederick B. Lacey, Independent Administrator, IBT
Julie Hamos, Regional Coordinator

IN RE:

DANIEL A. TUFFS, JR.

and

ADVANCE TRANSPORTATION
COMPANY

: 91 - Elec. App. - 191 (SA)
:
:
:
:
:
:
:
:
:
:
:
:

DECISION OF THE
INDEPENDENT
ADMINISTRATOR

This matter arises as an appeal from the Election Officer's decision in Case No. P-844-LU710-CHI. A hearing was held before me by way of telephone conference at which the following persons were heard: the complainant, Daniel A. Tuffs, Jr.; Leonard R. Kofkin, on behalf of Advance Transportation Company ("Advance"); Richard Blak, City Dispatch Manager for Advance; John J. Sullivan, on behalf of the Election Officer; Julie Hamos, the Regional Coordinator; and Deborah Schaaf, the Adjunct Regional Coordinator. As usual, the Election Officer submitted his summary. See, Rules For The IBT International Union Delegate And Officer Election (the "Election Rules"), Article XI, Section 1.a.(7).

BACKGROUND

Daniel Tuffs works as a city driver for Advance at its Bedford Park, Illinois terminal. He is a member of IBT Local Union 710 and has been active in Union campaign activity. He is presently active in the International Union officer election campaign, supporting the candidacy of Ron Carey for IBT General President. Tuffs had

previously filed a protest with the Election Office on July 19, 1991, alleging that Advance had obstructed his campaign activity by discriminatorily preventing him from taking breaks or eating lunch in the employee break room at the Bedford Park terminal. That protest was settled when Advance agreed that Mr. Tuffs would be "permitted to eat his lunch and/or take his breaks in the lunch/break room of the Bedford Park Advance Transportation facility and will be permitted to engage in campaigning within the meaning of Article VIII, Section 10(d) of the Rules during such time and in such room." See determination of the Election Officer in Election Office Case No. P-824-LU710-CHI (July 29, 1991).

On August 2, 1991, at approximately 11:10 a.m., Tuffs returned to the terminal after completing a delivery and informed the dispatcher that he was taking his morning break. The dispatcher informed him that he was assigned a "hot load"¹ and directed him to leave the terminal immediately. Tuffs was advised that he could take his ten-minute break "on the street." When Tuffs went to the break room to post campaign material, the dispatch manager fired him. In the ensuing internal-Union grievance, the discipline was reduced to a suspension and then further reduced to a final warning letter.

Upon investigation, the Election Officer determined that the "hot load" was a pretext for denying Tuffs' right to take his break

¹ The term "hot load" is used to refer to a shipment that must be delivered immediately.

at the terminal and to campaign during his break. The Election Officer also found that Advance was retaliating against Tuffs for his prior assertion of his political rights. Without adopting all of the Election Officer's factual findings, I affirm his conclusion and his remedial order.

MERITS OF THE PROTEST²

At the hearing before me, Advance asserted that the Election Officer had wrongly concluded that the load assigned to Tuffs was not a "hot load." Advance specifically objected to the Election Officer's finding that the load in question was not delivered until two or three days after the incident. (See Election Officer Summary at p. 4.) Even accepting Advance's position that the load in question carried the designation "ASAP", that an 11:00 a.m. appointment for its delivery to the customer, Publix, had been scheduled, and that the load was in fact delivered later in the day, nevertheless, consideration of all the relevant facts and application of the Wright Line standard compel an affirmation of the Election Officer's ruling.

² As a threshold matter, Advance objects to the jurisdiction of the Election Officer and the Independent Administrator to enforce the Election Rules promulgated under the Consent Decree against a non-consenting employer. Advance also argues that the Independent Administrator should abstain from duplicating the proceedings of the NLRB. However, both the jurisdiction of these Court-appointed Officers over private employers, and the independent nature of their mandate apart from the NLRB have been affirmed by the Courts. See In Re: McGinnis, 91 - Elec. App. - 43 (January 23, 1991), aff'd, United States v. IBT, 88 Civ 4486, slip op., pp. 3-8 (S.D.N.Y. April 3, 1991).

The Wright Line test has previously been relied upon to evaluate allegations that a discharge or discipline was motivated, at least in part, by an employee's protected campaign activity. See, In Re: Coleman, 91 - Elec. App. - 18 (SA) (December 14, 1990).

As explained in Coleman:

The National Labor Relations Board has adopted a rule for resolving cases involving a "mixed motive." This rule, adopted by the Board in Wright Line, 251 NLRB 1083, 105 LRRM 1169 (1980), aff'd, 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), requires:

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

105 LRRM 1175. The Board's Wright Line test for resolving mixed motive cases was drawn from the Supreme Court's decision in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1979). The Supreme Court upheld the Board's Wright Line analysis in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

Following the Wright Line standard, Tuffs has made a prima facie showing that his campaign activity was a motivating factor in the company's denial of his ten-minute break and in its subsequent imposition of discipline. As noted, the Election Officer has already had to intervene to secure Mr. Tuffs' right to engage in campaign activity during his break time in Advance's break room. Thus, the burden shifts to Advance to demonstrate that it would have denied the break and imposed discipline despite Tuffs' political activity.

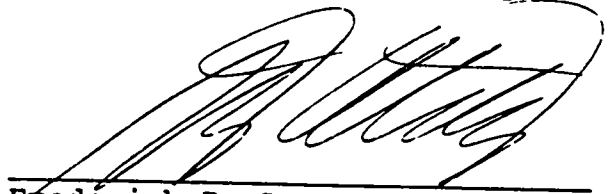
For purposes of this appeal, I have accepted Advance's contentions, presented at the hearing, that the load was designated "ASAP," that an 11:00 a.m. delivery had been scheduled and that the load was in fact delivered later in the day. However, the Election Officer's investigation disclosed uncontroverted testimony from the customer, Publix, that no emergency delivery had been contemplated, that the appointment system scheduled the use of the Publix loading platform, and that the appointment could have been rescheduled or that a small delay would have been acceptable. Moreover, it was undisputed that the delivery took approximately forty minutes to complete. Given this, and given the importance Advance attached to the 11:00 a.m. scheduled delivery, the company did not offer a convincing explanation of why it had not assigned the load to one of its 10:00 a.m. drivers. Indeed, I note that the incident provoked a verbal exchange that went on substantially longer than the ten minutes Tuffs would have spent in taking his break. The claimed urgency of the load is further weakened by the fact that Tuffs was fired and the load was re-assigned to one of the 12:00 drivers. The dispatcher's decision in this regard resulted in a further delay of the delivery.

The "hot load" rationale must also be evaluated in the context of Mr. Tuffs' prior protest. Less than a month had passed since Advance had agreed to let Tuffs continue his campaign activity during breaks and lunch at the Bedford terminal. It was predictable then that the denial of Tuffs' break would ignite

controversy and place him in the position of risking his job to engage in campaign activity which he understood to be protected.

Against this background, I find it implausible that this particular "hot load" required immediate delivery by Tuffs at 11:00 a.m. The "hot load" delivery was an obvious pretext to force Tuffs into a difficult position that Advance anticipated would result in discipline. Under the Wright Line test, Advance has not met its burden of proving it would have taken the same action despite Tuffs' political activities.

Accordingly, I affirm the decision and remedies ordered by the Election Officer.



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

Dated: September 24, 1991