

November 13, 1996

VIA UPS OVERNIGHT

Roger Lewis
R.R. 1, Box 121
Greentop, MO 63546

Philip Blackman
Roadway Express
2000 Lincoln Highway
Chicago Heights, IL 60411

Richard Bennett
Roadway Services, Inc.
1077 George Boulevard
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Barbara Leukart
Jones, Day, Reavis & Pogue
901 Lakeside Avenue
Cleveland, OH 44114

Ron Carey Campaign
c/o Nathaniel Charny
Cohen, Weiss & Simon
330 W. 42nd Street
New York, NY 10036

Bradley T. Raymond
Finkel, Whitefield, Selik, Raymond,
Ferrara & Feldman, P.C.
32300 Northwestern Highway, Suite 200
Farmington Hills, MI 48334

Re: Election Office Case No. P-1079-LU710-CHI

Gentlepersons:

Roger Lewis, a member of Local Union 710, filed a pre-election protest pursuant to Article XIV, Section 2(b) of the ***Rules for the 1995-1996 IBT International Union Delegate and Officer Election ("Rules")*** alleging that his employer, Roadway Express, Inc. ("Roadway"), retaliated against him for attempting to campaign for the reelection of General President Ron Carey in the parking lot of Roadway's Chicago Heights facility on September 25, 1996. At that time, Mr. Lewis was on medical leave. He contends that Roadway retaliated against him by issuing him a letter, dated September 27, ordering him to report back to work or suffer disciplinary action.

Roadway responds that: (1) the Election Officer has no authority over employers such as Roadway, which were not parties to the Consent Decree; (2) "the *Rules* improperly purport to place the burden of proof regarding 'election interference' on non-party employers;" and (3) the letter it sent to Mr. Lewis on September 27 was based on several months of prior actions in processing Mr. Lewis' workers' compensation claim and had nothing to do with

Mr. Lewis' campaigning on September 25.

This protest was investigated by Regional Coordinator Julie E. Hamos.

The investigation revealed a substantial history behind the letter that Mr. Lewis received from Roadway, on which he bases this protest.

On August 30, 1995, Mr. Lewis was involved in an accident which occurred while he was sleeping in the back of a truck cab. Since that time, he has complained of lower back pain. According to Mr. Lewis' attorney, Mr. Lewis' personal physician has given his opinion that Mr. Lewis can only return to modified duty at Roadway and will never be able to return to driving a truck. Mr. Lewis began receiving workers' compensation benefits in December 1995.

Roadway uses a contractor, Helmsman Management Services ("Helmsman"), to administer its workers' compensation program. In June 1996, Helmsman began efforts to schedule Mr. Lewis for a medical evaluation by a doctor other than Mr. Lewis' personal physician. On August 22, Mr. Lewis was examined by Robert Uteg, M.D., who rendered an opinion that Mr. Lewis was able to return to work at a modified level. Helmsman sought clarification from Dr. Uteg on September 5, and Dr. Uteg responded by letter dated September 23, addressed to Helmsman Case Manager Elizabeth Mindykowski in which he stated that Mr. Lewis "could return to work immediately."

The investigation revealed that Ms. Mindykowski faxed Dr. Uteg's letter of September 23 to Roadway on September 27. According to Roadway, Dr. Uteg's clarification letter constituted an opinion that Mr. Lewis could return to work without restrictions. On September 27, Roadway wrote to Mr. Lewis that "Helmsman Management has advised that you have been released to return to work, full duty, per Dr. Uteg. You are instructed to contact the Company to place yourself back in service immediately." The letter further stated that Mr. Lewis' D.O.T. Medical Examiner's Certificate had expired and that he was required to have his blood pressure rechecked and a new certificate issued.¹

Two days earlier, on September 25, Mr. Lewis had attempted to campaign in the parking lot at Roadway's Chicago Heights facility. Roadway ejected him, and Mr. Lewis protested that action on September 27, by faxing a protest to the Election Officer, which was docketed as P-1024-LU710-CHI.

¹Over the course of the next week, Mr. Lewis' attorney discussed the possibility of having Mr. Lewis return to work in Roadway's modified duty program, and Roadway refused.

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1. Roadway's Arguments Concerning Jurisdiction and Burden of Proof

Before addressing the merits of this protest, the Election Officer notes that Roadway raises a jurisdiction defense based on its argument that the Election Officer does not have authority over non-parties to the Consent Decree. The Election Officer has previously reiterated her jurisdiction over non-parties, including Roadway. See Cetinske, P-886-LU480-SCE et seq. (decision on remand) (November 1, 1996).

Roadway also argues that the **Rules** "improperly place the burden of proof regarding 'election interference' on non-party employers." That argument is misplaced. Article XIV, Section 1 of the **Rules** provides: "With respect to any protest, it shall be the burden of the complainant to present evidence that a violation has occurred."

2. Allegation of Retaliation

Article VIII, Section 11(f) of the **Rules** prohibits any retaliation against anyone by the Union or its agents for exercising any right guaranteed by the **Rules**.² To demonstrate retaliation, a protester must show that conduct protected by the **Rules** was a motivating factor in the adverse decision or conduct in dispute. The Election Officer will not find retaliation if she concludes that the union officer or entity would have taken the same action even in the absence of the protester's protected conduct. Gilmartin, P-032-LU245-PNJ (January 5, 1996), aff'd, 95 - Elec. App. - 75 (KC) (February 6, 1996). See Leal, P-051-IBT-CSF (October 3, 1995), aff'd, 95 - Elec. App. - 30 (KC) (October 30, 1995); Wsol, P-095-IBT-CHI (September 20, 1995), aff'd, 95 - Elec. App. - 17 (KC) (October 10, 1995).

Mr. Lewis states, "It is my contention and fervent belief that the actions taken by Roadway and [Assistant Relay Manager] Blackman stem directly from the incident in the parking lot on the 25th of September!"

On this record, however, the Election Officer finds that Roadway's September 27 letter to Mr. Lewis, instructing him to return to work, was based on Dr. Uteg's September 23 letter to Helmsman, which Helmsman transmitted to Roadway by fax on September 27. Dr. Uteg's letter was part of Helmsman's ongoing process of seeking a different evaluation of Mr. Lewis' physical condition than Mr. Lewis' personal physician had given.

²Article VIII, Section 11(f) states:

Retaliation or threat of retaliation by the International Union, any subordinate body, any member of the IBT, any employer or other person or entity against a Union member, officer or employee for exercising any right guaranteed by this or any other Article of the **Rules** is prohibited.

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Thus, the Election Officer finds that Mr. Lewis' campaigning at Roadway's Chicago Heights facility on September 25 was not a motivating factor in Roadway's issuance of the return-to-work letter on September 27. Helmsman had already sought clarification from Dr. Uteg, and it had been received. As noted above, the Election Officer will not find retaliation under the **Rules** if the evidence indicates that the protested action would have been taken even in the absence of alleged protected activity.

For the foregoing reasons, the protest is DENIED.

Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within one day of 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:

Kenneth Conboy, Esq.
Latham & Watkins
885 Third Avenue, Suite 1000
New York, NY 10022
Fax (212) 751-4864

Copies of the request for hearing must be served on the parties listed above as well as upon the Election Officer, 400 N. Capitol Street, Suite 855, Washington, DC 20001, Facsimile (202) 624-3525. A copy of the protest must accompany the request for a hearing.

Sincerely,

Barbara Zack Quindel
Election Officer

cc: Kenneth Conboy, Election Appeals Master
Julie E. Hamos, Regional Coordinator