

October 16, 1998

VIA FACSIMILE AND UPS OVERNIGHT

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Executive Board
Teamsters Local Union 767
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Paul Alan Levy, Esq.
Public Citizen Litigation Group
1600 20th Street, NW
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Tom Leedham Campaign Office
P. O. Box 15877
Washington, DC 20003

Re: Election Office Case No. PR-212-LU767-NYC

Gentlemen:

Dan Campbell, a member of Local Union 767, 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***”) against Wesley Jenkins, president and business manager of Local Union 767. The protester alleged that he was terminated from his position as a business agent because of his support for Teamsters for a Democratic Union (“TDU”) and for Tom Leedham, a candidate for general president. Mr. Jenkins denies that the protester’s termination was related to his TDU or Leedham campaign activities and states that Mr. Campbell’s termination was based on his misconduct and lack of respect for Mr. Jenkins’ authority as president of the local union.

This protest was investigated by New York City Protest Coordinator Barbara C. Deinhardt.¹

¹ The Election Officer notes that while the investigator was able to talk by telephone to the witnesses in this case, she was unable to interview them in person or take their depositions.

The protester is an active supporter of Mr. Leedham and has been co-chair of TDU for a number of years. Mr. Jenkins was aware of the protester's prior support for Ron Carey and his TDU involvement when he hired the protester as a business agent in early January 1998, when he and the other officers of the local union took office. Mr. Jenkins was also a supporter of Mr. Carey during the last election and was a member of TDU until the spring of 1998. Mr. Campbell states that in the early summer of 1998, he attempted to convince Mr. Jenkins to run as a candidate on the Tom Leedham "Rank and File Power" Slate. Mr. Jenkins emphatically declined and instead, at a general membership meeting on July 25, 1998, in response to a member's question regarding whom he supports in the rerun election, Mr. Jenkins publicly stated his support of James Hoffa. Mr. Jenkins further stated at the meeting that he had spoken to Mr. Hoffa in mid-July and committed his support to Mr. Hoffa's candidacy.

The day before this public announcement of support for Mr. Hoffa, on July 24, 1998, Mr. Jenkins terminated the protester subject to the approval of the Executive Board of Local Union 767.² On July 24, 1998, Mr. Jenkins presented the protester with the following letter citing the reasons for his termination.

This letter is to inform you of your continued refusal to comply with Local Union 767 Policy on Comp Time, Work Schedule and Office Hours.³

On July 10, 1998, you rescheduled a Business Agents staff meeting without approval of the Business Manager. The Business Manager gave you a verbal warning.

On July 17, 1998, the Business Manager gave a verbal warning on matters concerning prior approval.

² On August 6, 1998, the Executive Board approved the protester's termination by a vote of 5 to 2.

³ The policy on Comp Time, Work Schedule, and Office Hours reads as follows: "Regular office hours will be from 7 AM to 5 PM, Monday through Friday. Reps are responsible for planning their work schedules to complete their duties and visit members on all shifts. Work schedules will often differ from regular office hours. Reps will be allowed sufficient comp time to create a flexible work schedule to perform their duties. Comp time must be pre-approved by the Principal Officer."

Dan Campbell
October 16, 1998
Page 3

On July 22, 1998, you altered your work schedule without approval from the Business Manager and violated the policy on Comp Time, Work Schedule and Office Hours.

On July 23, 1998, you altered your work schedule without approval from the Business Manager and violated the policy on Comp Time, Work Schedule and Office Hours.

You are hereby terminated for misconduct under Article 13, subject to the approval of the Executive Board meeting on July 25, 1998.

The four incidents referred to in the letter are all subject to inconsistent descriptions by the witnesses interviewed. As to the first, Mr. Campbell admits that he made an error when he wrote on the message board on July 9 that the July 10 weekly staff meeting usually scheduled for 8 a.m., would be held at 9 a.m. "unless notified otherwise by the boss." He says he admitted his mistake to Mr. Jenkins when he became aware of it. He did not understand that he was being given verbal warning by Mr. Jenkins when he spoke to him.

According to Mr. Jenkins, Mr. Campbell was scheduled to be at the union hall on the afternoon of July 16 to have a pre-hearing grievance meeting with two fellow business agents and instead, left the office to go to a work site. Mr. Jenkins had to call the protester back to attend the meeting. According to Mr. Campbell, he attended the meeting with the business agents which had been scheduled for the morning, and left in the afternoon for his scheduled work site visit. Mr. Jenkins then called him back to attend an unscheduled meeting with the union's lawyer. The business agents corroborate Mr. Campbell's statement that the meeting was scheduled for the morning. The union lawyer corroborates that he had a meeting scheduled that afternoon with Mr. Jenkins and another business agent, and that Mr. Campbell came in at one point to discuss arbitrations.

At a meeting with the business agents on July 17, Mr. Jenkins raised the issue of modifications of the work schedule. Mr. Jenkins states that he gave Mr. Campbell a verbal warning concerning the events on July 16. Mr. Campbell denies receiving a verbal warning. He states that the need to notify Mr. Jenkins of schedule changes was raised generally.

Mr. Campbell stated to the investigator that business agents were to notify Mr. Jenkins of any schedule changes so that he was always able to reach them. Several of the business agents interviewed stated that the policy was to tell Mr. Jenkins or the office manager if there was a modification of schedule, so that Mr. Jenkins would always know where they were. According to several business agents, at the meetings in July where the schedule modification issue was raised, Mr. Jenkins was speaking to everyone, but "directing" his comments to Mr. Campbell. Mr. Campbell agrees that the issue was raised, but did not interpret the discussions as being verbal warnings to him. He states that he increased his efforts to always notify Mr. Jenkins of his whereabouts after the issue was raised on July 17.

On July 22 and 23, Mr. Campbell admits he changed his schedule from that which had been approved at the previous week's staff meeting. He says the change was precipitated by a meeting postponement by a UPS labor manager and that he had noted the change on the message in/out board and had left voice messages for Mr. Jenkins. On both days, Mr. Campbell worked for more than eight hours. On July 22, he worked for several hours in the middle of the night, he went to the union hall for four hours in the morning and then visited a UPS facility until 3:30 p.m. On July 23, he took the morning off and played golf, arriving at the union hall at about 2:30 p.m. and then worked until after 11 p.m. that night. On the morning of July 22, Mr. Campbell had a conversation with his golf partner that was overheard by a local union trustee in which Mr. Campbell allegedly made a remark about waiting for his friend at the golf course in the morning before realizing that their golf date was for July 23. Mr. Campbell acknowledges the July 22 conversation but asserts that he had called the friend to confirm the July 23 golf date and was joking about being at the course that day. Mr. Jenkins stated to the investigator several times that this exchange about the golf date was one of the reasons for the discharge and accused Mr. Campbell of stealing time.

When Mr. Jenkins called the protester into his office on July 24, Mr. Campbell had Business Agent Jacqueline Johnson present as his witness and Business Agent Gerald Thompson was present as Mr. Jenkins' witness. Mr. Jenkins reviewed the reasons for the termination as set forth in the termination letter. According to Mr. Campbell, the meeting was very short, but later that day Mr. Campbell went to see Mr. Jenkins again in his office with Mr. Thompson present. At this second meeting, Mr. Campbell states he asked Mr. Jenkins why he was doing this. The two main witnesses disagree – both about whether there was a second meeting and what took place. At that time (or at the prior meeting, according to Mr. Jenkins), there was a discussion about Mr. Campbell's TDU activities. Mr. Jenkins states that the issue was raised by Mr. Campbell, asking if it had anything to do with the decision and asking whether Mr. Jenkins wanted him to quit TDU. Mr. Campbell strongly disputes this account and asserts that it was Mr. Jenkins who stated that Mr. Campbell's high profile in TDU was causing a problem for him with the officers and agents of other local unions in the area and with UPS. Mr. Campbell states that then Mr. Jenkins turned around to his computer, called up the TDU website, and referred to a particular article or flyer featuring a statement of Mr. Campbell's about a UPS job issue. Mr. Campbell states that Mr. Jenkins told Mr. Campbell that he did not feel he could any longer count on Mr. Campbell's loyalty. Mr. Jenkins stated to the investigator that he does not recall making the latter statement. Both Mr. Jenkins and Mr. Campbell agree that Mr. Jenkins stated that he did not feel that Mr. Campbell respected his authority as president.

Mr. Campbell's termination was discussed at two executive board meetings. At the first executive board meeting held on July 26, Mr. Jenkins gave a short presentation of the reason for his recommendation to terminate Mr. Campbell. Mr. Jenkins relied primarily on the incidents set forth in the termination letter. Mr. Campbell was given an opportunity to speak. When a number of executive board members raised questions about the termination, it was decided to suspend

Mr. Campbell temporarily and schedule a special meeting to discuss the recommendation more fully. At the second meeting on August 6, Mr. Jenkins presented a much more extensive list of Mr. Campbell's alleged misconduct, including, according to various accounts, insubordination; improper use of a gasoline credit card; excessive expenditures; the protester's use of an unauthorized and inaccurate quote attributed to Mr. Jenkins in *Convoy Dispatch*, TDU's newsletter; UPS and other business agents' dislike for the protester; and the protester's controversial involvement in TDU. At that meeting, Executive Board member Patrick Christian asked why, if there had been ongoing problems with Mr. Campbell, the executive board was only just hearing about them. Mr. Jenkins replied that "they had just come to a head." Mr. Christian asked why there had been no progressive discipline and Mr. Jenkins reportedly replied only that he had the authority under the local union bylaws to terminate Mr. Campbell.

Accounts vary considerably about any reference to TDU at the second meeting. Mr. Christian states that there was a lengthy discussion about what part, if any, was played by Mr. Campbell's involvement in TDU and that Mr. Jenkins brought up Mr. Campbell's TDU involvement, specifically citing an unauthorized quote in the TDU publication, *Convoy Dispatch*, that Mr. Jenkins assumed came from Mr. Campbell. Mr. Christian and another executive board member Raul Lozada state that, in the course of this discussion about Mr. Campbell's termination, there was also some reference to checking whether there were any copies of *Convoy Dispatch* on the literature table outside the meeting room and throwing them in the trash if they were there. Mr. Christian states that Mr. Jenkins generally accused Mr. Campbell of being "controversial" and causing problems with other business agents and with UPS. Mr. Christian mentioned that the protester was not invited to the August 6, 1998 meeting. The minutes of these executive board meetings (as is the case with other such minutes) lack detail and therefore only state that there was a general discussion about the protester's termination and that the termination was approved by a vote of 5 to 2.

Following the filing of the protest, Mr. Jenkins asked four business agents to write statements related to Mr. Campbell's termination. He could not recall what instructions he had given to the business agents about the content of their statements about Mr. Campbell, although he denied showing any agents the statements of the others or giving them any written sample statement. Mr. Jenkins admitted, however, that his memory is poor. The statements he submitted to the investigator were worded virtually identically. They state the following in the same or similar language: (1) they have never changed their work schedules without the approval of Mr. Jenkins; (2) at the weekly staff meetings on July 10 and 17, the protester received serious verbal warnings for changing his schedule without prior approval; (3) political affiliations have not been discussed in the local union; (4) Mr. Jenkins announced that he supported Mr. Hoffa at the July 25 general membership meeting only in response to a member's direct question on this point and not on behalf of the local union; and (5) the protester was not terminated for his political affiliation. Two of the statements contain six paragraphs that are word for word identical, including spelling and grammar mistakes, yet the two agents and Mr. Jenkins deny that there was any comparison or exchange of statements.

In his first interview with the investigator on August 14, 1998, Mr. Jenkins focused exclusively on the reasons given in the termination letter and presented at the first executive board meeting -- the changing of the July 10 meeting and the schedule changes without approval on July 16, 22 (including the golf incident) and 23. He conceded that he had no evidence that Mr. Campbell was not working at his legitimate business agent duties for a full day on each of those days and that Mr. Campbell had in fact notified him of the changes. Mr. Jenkins expressed his concern was that, despite having been instructed to do so, Mr. Campbell did not get Mr. Jenkins explicit advance approval before making these changes.

In a follow-up letter to the investigator, Mr. Jenkins also raised an alleged misuse of a gas card, telephone calling card and cellular phone. The first charge involved an incident when Mr. Campbell had used a union credit card to purchase gas to visit his family who had not yet relocated. Mr. Campbell states that this issue arose only once, around February, and that once the policy was clarified for him, he reimbursed the union and did not use the credit card again for that purpose. Mr. Campbell denies that this incident was discussed with him in any way in connection with his termination. In a subsequent interview, Mr. Jenkins stated that the misuse of the credit card and Mr. Campbell's subsequent reimbursements had occurred on more than one occasion, but he did not produce any documentation of Mr. Campbell's reimbursement to substantiate this claim.

In the second interview, Mr. Jenkins raised a myriad of other problems he stated that he had with Mr. Campbell's performance including writing letters without Mr. Jenkins' approval, giving briefs written solely for the benefit of the union's grievance panels to grievants, and not holding hearings at the local union level for a number of cases. When pressed by the investigator whether these were in fact reasons for the termination, Mr. Jenkins equivocated and retreated to the main issues stated in the termination letter.

Other than Mr. Christian, no other local union employee had been discharged,⁴ suspended or given a written warning during the time Mr. Jenkins had been business manager of Local Union 767. When asked if any other employee had been given a verbal warning, Mr. Jenkins replied that the business agents as a group had been given a verbal warning about the need to get approval before changing their work site visitation schedules, although he stated that no one other than Mr. Campbell had changed their work site visitation schedules without approval.

⁴ Although he is a member of the executive board, Mr. Christian was discharged by Mr. Jenkins as a business agent in March 1998. This discharge concerned an audiotape that was sent to black and Latino stewards on which Mr. Christian's voice was allegedly identified. The matter is currently in litigation. Mr. Christian refused to discuss the discharge with the investigator, but stated that the discharge was not related to the International officer Rerun Election. The discharge appears to be prior to Mr. Jenkins' resignation from TDU or his declaration of support for Mr. Hoffa.

The **Rules**, at Article VIII, Section 11(f), prohibit “[r]etaliatio[n] or threat of retaliatio[n] by . . . any subordinate body . . . any employer or other person or entity against a Union member. . . for exercising any right guaranteed” under the **Rules**. To demonstrate retaliation, a protester must show that conduct protected by the Rules was a motivating factor in the decision or the conduct in dispute. Thus, the protester must show that he was terminated because he supports the candidacy of Tom Leedham or his election-related TDU activities. The Election Officer will not find retaliation if he concludes that the union would have taken the same action even in the absence of the protected conduct. See Gilmartin, P-032-LU245-PNJ, (January 5, 1996), aff’d, 95 - Elec. App. - 75 (KC) (February 6, 1996); 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). Cf., Wright Line, 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

The Election Officer has repeatedly held that the existence of a reasonable independent basis for a discharge or removal from an appointed office defeats an allegation of improper motivation, so long as such basis does not form an excuse for or is not a pretext for conduct or action which is actually in violation of the **Rules**.

The Election Officer made clear in Phelan, P-711-LU550-NYC (April 24, 1996), aff’d, 96 Elec. App. - 184 (KC) (May 6, 1996), that termination may not include any motivation linked to the International officer election:

While substantive labor law generally permits labor union officials to remove appointees for political reasons, the **Rules** do not, if such action is based on a member’s exercise of rights guaranteed under the **Rules**. See Wsol, P-095-IBT-CHI (September 20, 1995), aff’d, 95 - Elec. App. - 17 (KC) (October 10, 1995); Parisi, P-1095-LU294-PGH (December 2, 1991); Cremen, P-425-LU311-MID (March 11, 1991), aff’d, 91 - Elec. App. - 101 (SA) (March 19, 1991). As the Election Appeals Master stated on appeal in Wsol, “the Election Rules are broader than federal labor law, and prohibit any retaliation relating to the exercise of members’ rights under the **Rules**

The protester’s TDU activities in support of the election and his support for Tom Leedham’s candidacy constitute protected activity under the **Rules**. Mr. Jenkins has admitted that he was aware of the protester’s electoral preference and TDU campaign activity at the time of his termination. The issue that remains, then, is whether this protected activity was a motivating factor in causing the protester’s termination.

The Election Officer relies on the testimony of Executive Board Member Christian in reaching the conclusion that the protester was terminated in part but for his TDU activities. The investigator found Mr. Christian to be a credible witness. Mr. Christian’s testimony that there

was an extensive discussion of the protester's TDU involvement at the August 6 meeting strongly indicates that the protester's TDU activity was a motivating factor in the executive board's deliberations on the protester's termination.

The Election Officer also finds the timing of the protester's termination highly probative of pretext. The protester is a senior business agent and since early January 1998 when he was hired by Mr. Jenkins, the protester has not been subject to any progressive discipline or warnings until the July 10 and 17 "warnings" for relatively slight infractions of local union policies that eventually led to his discharge on July 24. These incidents closely align in time with Mr. Jenkins' conversation with Mr. Hoffa in mid-July and his declaration of support of Mr. Hoffa on July 25, 1998 at the general membership meeting. The Election Officer notes that this timing is particularly telling in light of the fact that the protester was not warned or otherwise disciplined for past improprieties.

Thus, the evidence establishes that Mr. Campbell's termination was motivated, in part, by his activities in the International officer Rerun Election.

Although Mr. Jenkins' discharge letter of July 24 provides an independent basis for the protester's termination, the Election Officer finds that Mr. Jenkins has not met his burden of showing that the protester was terminated solely for the reasons stated in that letter and would have been terminated despite his activity in TDU and the International officer Rerun Election. The Election Officer credits the protester's testimony regarding his July 24 conversation with Mr. Jenkins which establishes that the protester's TDU activities were politically embarrassing and problematic for Mr. Jenkins (especially after Mr. Jenkins had resigned from TDU and committed his support to Mr. Hoffa) and as a result Mr. Jenkins could not rely on the protester's loyalty.

Although Mr. Jenkins denied that he made the statements at issue on July 24 or called up TDU articles quoting the protester on the Internet, the Election Officer does not find Mr. Jenkins a credible witness. In her interviews with Mr. Jenkins, the investigator found Mr. Jenkins' responses to be less than truthful and forthcoming. When Mr. Jenkins was questioned about this July 24 conversation with the protester, there was a long pause before Mr. Jenkins denied calling up the TDU website and a similar hesitation before denying that he discussed the protester's employment with Mr. Hoffa or anyone from the Hoffa campaign. Moreover, Mr. Jenkins' credibility was further diminished by the manner in which he has inconsistently proffered after the fact reasons for the protester's termination that were not included in the discharge letter of July 24.

Based on the totality of the evidence, the Election Officer finds that Mr. Jenkins was improperly motivated, at least in part, by the protester's activities in the International officer Rerun Election in effectuating his termination, in violation of the *Rules*.

The Election Officer is aware that the protester has filed a grievance regarding his termination. However, the Election Officer retains the right to consider the matter without being bound by a decision in another forum. Golubovic, P-025-LU710-CHI (July 21, 1995); Star Market, P-760-LU25-ENG, aff'd, 91 - Elec. App.- 187 (SA) (September 18, 1991), aff'd, U.S. v. IBT, 776 F.Supp. 144 (S.D.N.Y. October 29, 1991), aff'd, 954 F.2d 801 (2d Cir. 1992).

Accordingly, the protest is GRANTED.

When the Election Officer determines that the *Rules* have been violated, he “may take whatever remedial action is appropriate.” Article XIV, Section 4. In fashioning the appropriate remedy, the Election Officer views the nature and seriousness of the violation as well as its potential for interfering with the election process. If the Election Officer finds that an IBT member has been disciplined or discharged in violation of the *Rules*, the Election Officer can order a remedy nullifying the discipline or reinstating the member with full back pay. In re Henderson, 91 - Elec. App. - 187 (SA) (September 18, 1991) (reinstatement with back pay); In re Tuffs, 91 - Elec. App.- 191 (SA) (March 15, 1991) (removal of warning letter from personnel file).

Therefore, the Election Officer orders the following:

1. Mr. Jenkins shall immediately cease and desist from retaliating against Mr. Campbell based upon activity protected by the *Rules*.
2. Local Union 767 shall offer to reinstate Mr. Campbell to his position as business agent by October 20, with back pay decreased by any interim earnings. The local union shall permit Mr. Campbell a period of two weeks to accept the offer.
3. By October 20, 1998, Mr. Jenkins shall post the attached “Notice to Local Union 767 Members and Employees” on all bulletin boards at Local Union 767 work sites and at the local union office.
4. By October 19, 1998, Mr. Jenkins is ordered to submit an affidavit to the Election Office attesting to the compliance of the local union with order of the Election Officer.

Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within one (1) 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:

Dan Campbell
October 16, 1998
Page 10

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, 444 North Capitol Street, NW, Suite 445, Washington, DC 20001, Facsimile (202) 624-3525. A copy of the protest must accompany the request for a hearing.

Sincerely,

Michael G. Cherkasky
Election Officer

cc: Kenneth Conboy, Election Appeals Master
Barbara C. Deinhardt, NYC Protest Coordinator

NOTICE TO LOCAL UNION 767 MEMBERS AND EMPLOYEES

The Election Officer has found that I have retaliated against Business Agent Dan Campbell in violation of the *Election Rules*.

All local union employees have the right to engage in activity protected by the *Election Rules* without fear of retaliation or intimidation.

I have been ordered to reinstate Mr. Campbell to his business agent position. I will not retaliate against Mr. Campbell or any other local union employee for engaging in protected activity.

Date

Wesley Jenkins, President
Local Union 767

This is an official notice which must remain posted until December 3, 1998. This notice must not be defaced or altered in any manner or be covered with any other material.

Approved by Michael G. Cherkasky, IBT Election Officer.