

February 2, 1999

**VIA FIRST CLASS MAIL**

Nicholas Pico  
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Richboro, PA 18954

William Hamilton  
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Voorhees, NJ 08043

Gerard P. McNamara, Trustee  
Teamsters Local Union 107  
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Philadelphia, PA 19123

James P. Hoffa  
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Hoffa Slate  
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**Re: Election Office Case No. PR-437-LU107-EOH**

Gentlemen:

Nicholas Pico and William Hamilton, members of Local Union 107, 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 Gerald McNamara, trustee of Local Union 107. The protesters allege that they were discharged from their positions as business agents at Local Union 107 in retaliation for their open support of the Hoffa Unity Slate ("Hoffa Slate"), in violation of the *Rules*.

Mr. McNamara admits discharging the protesters from their positions, but asserts that the discharges were within his discretion as trustee of Local Union 107 and were not connected to the International Officer Rerun Election.

The protest was investigated by Election Office Staff Attorney Peter F. Gimbrère.<sup>1</sup>

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<sup>1</sup> The investigator interviewed Messrs. Pico and Hamilton in person. All other witnesses were interviewed by telephone.

Mr. Pico has been a member of Local Union 107 for 34 years, and a business agent for 11 years. Mr. Hamilton has been a member of Local Union 107 for 27 years, and a business agent for 9 years. He served as trustee of the local for one year in 1994. Both protesters have been open and active supporters of the Hoffa Slate since January 1996. In July 1996, Mr. Hamilton served as the Hoffa Slate whip at the IBT convention in Philadelphia. In September 1996, Messrs. Hamilton and Pico testified in federal court against the effort of John Morris, secretary-treasurer of Local Union 115 and president of Joint Council 53, to place Local Union 107 into federal trusteeship.

In November, 1996, the federal district court overturned the trusteeship. The IBT then placed Local Union 107 in "internal trusteeship." Under the IBT Constitution, Mr. McNamara was appointed by then-General President Ron Carey as the trustee of Local Union 107. Mr. McNamara still serves in this capacity. Prior to his appointment, Mr. McNamara was a business agent for Mr. Morris at Local Union 115.

Immediately after his appointment, Mr. McNamara removed from office all business agents and stewards that were overt Hoffa supporters, including Messrs. Hamilton and Pico. Shortly thereafter, according to both Mr. McNamara and Mr. Morris, the business agents were reinstated to their positions upon Mr. Morris' advice that their experience and expertise would be crucial for the local to continue to run effectively. Mr. McNamara admits that he was aware of Messrs. Pico and Hamilton's support for James P. Hoffa and the Hoffa Slate by November 1996.

I. Alleged Retaliatory Action Taken Against Nicholas Pico

On October 28, 1998, Mr. Pico went to Dan McGinley, Mr. McNamara's assistant at Local Union 107, and requested a vacation day for October 29. Mr. McNamara was not present in the office that day.<sup>2</sup> According to Mr. McGinley, Mr. Pico did not state why he wanted a leave day, but did say that he "absolutely had to have the day off." Mr. McGinley approved and signed the request form, a copy of which Mr. Pico subsequently provided to the Election Office. Mr. McGinley admits both approving the request and signing the request form.

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<sup>2</sup> Mr. McNamara was frequently unable to come to work at Local Union 107 offices for health reasons.

On October 29, Mr. Pico gave a speech at a Hoffa Slate rally in Philadelphia, attended by Mr. Hoffa, members of his campaign, numerous local Hoffa Slate supporters, and local journalists. Mr. Hoffa and his campaign manager, Thomas Pazzi, introduced Mr. Pico, who went on to state that "Local Union 107 will support the Hoffa Slate 107% and we should all stand behind him" and "I want you people to remember this day, because I may need you as witnesses, because I may be fired for this."

On November 1, the *Philadelphia Inquirer* ran an extensive article which described the October 29 rally and listed Mr. Pico as one of Mr. Hoffa's supporters. On November 2, Jack Haas, one of the secretaries at Local Union 107, told Mr. Pico that he was not going to be paid for his October 29 vacation day. According to Mr. Pico, Mr. Haas said that Mr. McNamara denied the request because, quoting Mr. McNamara, "Pico attended the fucking Hoffa rally." While Mr. Haas denies ever making that explicit statement to Mr. Pico, Jackie Hanson, another secretary in the office, specifically remembers hearing Mr. Haas quote Mr. McNamara as saying: "I'm not giving him a vacation day for going to Hoffa's fucking rally."

Mr. Haas does remember telling Mr. Pico that Mr. McNamara was visibly upset that Mr. Pico had attended the Hoffa Slate rally. Mr. Haas told the Election Office investigator that Mr. McNamara explained to him that Mr. Pico's vacation request was ultimately rejected because Mr. McGinley had no actual authority to approve it in the first place. No reason relating to Mr. Pico's work, or the staff scheduling needs of Local Union 107, was given by Mr. McNamara for reversing Mr. McGinley's approval. Mr. Pico was not paid for his vacation day.

On November 16, Mr. McGinley called Mr. Pico to a meeting to talk about his presence at the Hoffa Slate rally. Mr. Hamilton attended the meeting as Mr. Pico's witness. During the meeting, Mr. McGinley told Mr. Pico that he had seen a video of the October 29 Hoffa Slate rally and that "Morris is mad about your speech at the rally."<sup>3</sup> Messrs. Hamilton and McGinley both state that Mr. McGinley made this statement. Mr. McGinley also informed Mr. Pico that Mr. Morris was upset that other local representatives attended the Hoffa Slate rally.

After the November 16 meeting, Mr. Pico requested and received Mr. McNamara's approval for vacation time for Monday, November 30 and Tuesday, December 1. When he returned to his office on December 2, Mr. Pico was told by James Ferla, a Local Union 107 business agent, that he had heard Mr. Pico had been fired. Mr. Pico then telephoned Mr. McGinley, who stated that he did not know anything about the reasons, but that Mr. Pico had been fired and would be receiving a termination letter shortly.

On December 3, Mr. Pico received a letter from Mr. McNamara stating that Mr. Pico's employment with Local Union 107 was terminated as of November 27, 1998. The letter stated:

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<sup>3</sup> Mr. McGinley informed the Election Office investigator that to the best of his knowledge, Mr. McNamara never viewed the above-mentioned video prior to the decision to terminate Mr. Pico.

One reason is that you waived a contract with an employer going in to one of the theaters. You had no right to do that. By waiving that contract, you deprived one or maybe two Teamster Local 107 members of the right to work. Also, you accepted \$50.00 off of the employer under the pretense of a contribution to the Pension Fund. I received a letter from the employer outlining what happened. I have since turned the letter over to the IRB, who are now investigating the matter.

Second, I was informed by Kevin Lonergan, another BA with Local 107, that you told him that after this is over, meaning my removal as International trustee, you were going to spit in my face. I am taking this as a personal threat to my well-being.

Mr. Pico explained that the allegations regarding the contract waiver and \$50 kickback referred to a charity event held annually by the producing director of the Philadelphia Fringe Festival, Dominick Stuccio. All proceeds from the event, entitled "Shut Up & Dance," benefit the Metropolitan Aids Neighborhood Nutrition Alliance ("MANNA"), a Philadelphia non-profit organization that prepares and delivers hot meals to home-bound people living with HIV/AIDS. The event is traditionally held at the Forrest Theater in Philadelphia, an employer under contract with Local Union 107.

According to Mr. Pico, Mr. Stuccio contacted him in February 1997, explained the charitable nature of the event and that the equipment for the event was in a small truck that could be unloaded in approximately ten to fifteen minutes. He then requested that Mr. Pico waive the usual requirements for a Teamster team to unload and load the truck at the Forrest Theater. Mr. Stuccio suggested that MANNA would be willing to make a contribution to the Teamster Pension Fund as a token of their appreciation. Mr. Pico said he told Mr. Stuccio that he would grant his request regarding the contract waiver, but that he would have to "get back to him" regarding the donation. Mr. Pico adamantly denies receiving any contribution from Mr. Stuccio.

Mr. Pico emphasized to the Election Office investigator that there was no formal policy regarding the donation of services for charity, that it was left to the discretion of the individual business agents, and that he had given away such time in the past without seeking prior approval. Mr. Pico also stated that since he knew only one man was required to unload and load the truck and "one man is not a bargaining unit," he did not feel it inappropriate to grant Mr. Stuccio's request.

On December 14, 1998, Donald Schwally, an investigator for the Independent Review Board ("IRB"), contacted Mr. Stuccio regarding the allegations made by Mr. McNamara against Mr. Pico. Mr. Stuccio informed Mr. Schwally that in March 1997, he did tell Mr. Pico that if the Teamsters would waive a contract in order to save money for the benefit, MANNA would donate \$50 to the Teamster's Pension Fund. Mr. Stuccio then indicated to Mr. Schwally that

after he and Mr. Pico reached an agreement, he gave \$50 in cash to Mr. Pico. For the March 1998 benefit, MANNA entered into a collective bargaining agreement with the Teamsters for the services of one member at Forest Theater at a cost of approximately \$300.

On December 21, 1998, Mr. Pico provided the Election Office investigator with a sworn affidavit from Mr. Stuccio which stated, in relevant part, as follows:

6. I thanked him for his consideration and suggested that as a token of appreciation, we would make a \$50 donation to the pension fund. Pico told me that he didn't know if he could do that, but would let me know if it were possible.

7. I remember putting the \$50 in an envelope and taking it to the theatre, along with numerous other envelopes with cash in them for various purposes. I never heard from Pico again about the issue, but I do know that no one from the Teamsters ever collected the money, nor did I ever give it to anyone from the Teamsters.

8. In or about February of 1998, I again contacted Local 107 concerning the performance. I extended the same offer of a token contribution to the pension fund, even though no such contribution was in fact made the previous year. This year, however, the Union did not extend the same offer concerning the loading and unloading of trucks, so we utilized a member of Local 107 for that work.

In a December 21, 1998 conversation with the Election Office investigator, Mr. Stuccio confirmed that every statement contained in his sworn affidavit was true and correct.

Mr. McNamara is a commissioner for the Delaware Port Authority, a trustee of the local Teamster Pension Fund, and a business agent for Local Union 115. He admits that these responsibilities and a heart condition keep him out of Local Union 107's office for extended periods. According to the testimony of several witnesses, Mr. McNamara is present in the Local Union 107 office one or two days a week.

With respect to the denial of Mr. Pico's vacation day,<sup>4</sup> Mr. McNamara states that

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<sup>4</sup> Mr. McNamara informed the Election Office investigator that although Mr. Pico was denied pay for the October 29 vacation day, Mr. McNamara would currently be willing to pay Mr. Pico for the day should Mr. Pico make the request of him.

Mr. McGinley had no authority to approve Mr. Pico's request. Mr. McNamara maintains that all vacation and personal leave requests may be approved only by him. He provided a memorandum to the Election Office to that effect, signed by all of the Local Union 107 business agents and administrative employees.<sup>5</sup> However, despite this written rule, Mr. McNamara also told the Election Office investigator that Mr. McGinley "usually" called him prior to approving any leave.

Mr. McGinley confirmed that only Mr. McNamara had the authority to approve vacation and personal leave requests. He stated that he only granted Mr. Pico's request of October 28 on the spot, without calling Mr. McNamara, because he felt that Mr. Pico "must have had a genuine emergency of some sort." Mr. McGinley then asserted that he had never before approved any vacation or leave time for employees of Local Union 107. Mr. Haas also stated that Mr. McGinley did not have the authority to grant vacation or personal leave requests and had never done so except for this occasion regarding Mr. Pico.

According to the testimony of others in the office, Mr. McGinley had approved vacation and personal days in the past, especially when Mr. McNamara was not present. Mr. Hamilton asserted that Mr. Haas would often approve vacation requests over the phone, especially when it came to extending existing vacations or long weekends. Mr. McGinley had no further explanation for his decision to approve Mr. Pico's vacation request without the prior permission of Mr. McNamara.

Regarding the alleged \$50 payment to Mr. Pico in March 1997, Mr. McNamara admits that he first heard about the allegations in February 1998, when Mr. Stuccio called to request free Teamster services for the March 1998 benefit. Mr. McNamara admits that he never investigated the allegations. However, he stated that he sent a copy of the letter outlining the allegations to the IRB, relying upon them to investigate the matter. When questioned as to why he waited until November 1998 to take any sort of action against Mr. Pico regarding the allegations, despite the fact that he had never heard from the IRB concerning the issue, Mr. McNamara stated that Mr. Pico's threat to "spit in my face" was the last straw.

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<sup>5</sup> The memorandum, dated June 25, 1997, reads as follows:  
"Please be advised that unless this vacation/personal request form is followed, no vacation and or personal days will be granted. Authorization & approval must be signed by Gerard McNamara, only!"

Mr. McGinley stated that the first time he heard about the alleged \$50 payment was when he saw Mr. Pico's letter of termination. While he had heard Mr. McNamara make vague references in the past to allegations of employer payments or kickbacks, he had never heard Mr. Pico's name mentioned at the same time. Mr. Morris also denied having any knowledge of the allegations against Mr. Pico until after his termination and Mr. McNamara supported that statement. He also asserts that he never advised Mr. McNamara to fire Mr. Pico for any reason, including Mr. Pico's affiliation with the Hoffa Slate. Mr. McNamara presented no further rationale for his decision to terminate Mr. Pico.

## II. Alleged Retaliatory Action Taken Against Mr. Hamilton

On Thursday, December 3, 1998, Mr. Hamilton requested a vacation approval form from Mr. Haas.<sup>6</sup> According to Mr. Hamilton, he filled out the form, requesting a half-day off on Friday, December 4, and placed it on Mr. McNamara's desk around 4:00 p.m. on December 3. Mr. Hamilton provided a copy of the form to the Election Office. Mr. Haas and Ms. Hanson acknowledge that Mr. Hamilton requested and received a vacation approval form on December 3. Ms. Hanson stated that she knew on December 2 that Mr. Hamilton was contemplating a visit on either December 3 or 4 to the International Officer Rerun Election count site in Alexandria, Virginia ("count site"), to participate as an alternate observer for the Hoffa Slate. Mr. Haas states that Mr. Hamilton never told him why he wanted the vacation time. Mr. Haas also stated that the usual procedure would be for Mr. Hamilton to fill out the form and return it to him. He would then forward the form to Mr. McNamara. Ms. Hanson corroborated Mr. Haas's description of the approval process, but noted that Mr. McGinley would sometimes approve vacation or personal leave requests when Mr. McNamara was not in the building. Mr. Hamilton states that Mr. McGinley was not present in the building when he left the form on Mr. McNamara's desk.

When questioned as to why he deviated from the usual approval procedure, Mr. Hamilton explained that since Mr. McNamara was not in the office on December 3, he could not hand the form to him directly. As Mr. Pico had just been recently terminated, Mr. Hamilton did not want to involve Mr. Haas, an admittedly non-political employee, in an issue that could affect his job security. Consequently, he took it upon himself to place the form directly on Mr. McNamara's desk. Mr. Hamilton stated that he specifically left the vacation request form on Thursday so that Mr. McNamara would know his whereabouts on Friday afternoon. Mr. Haas was not present when this occurred. Mr. Haas recalls Mr. McNamara stating on December 4 that Mr. Hamilton's vacation request form was on his desk. Mr. McNamara told the Election Office investigator, however, that he never saw a vacation request form on his desk that day.

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<sup>6</sup> Over the course of 1998, Mr. Hamilton had retained a balance of approximately two weeks of vacation time and five sick days, all of which would be lost if it was not used by the end of the year.

The parties presented conflicting testimony regarding the actual level of adherence to the leave approval policy. According to Mr. Hamilton, he had taken vacation and personal leave days in the past without getting explicit pre-approval. For example, in instances where he had extended a short vacation or a long weekend, he merely called the office and Mr. Haas made a note of it. In 1996, he had taken a week of vacation without prior approval to attend his mother-in-law's funeral. Mr. Haas states that, to the best of his knowledge, no one at Local Union 107 had taken any vacation or personal leave time without pre-approval.

On December 4, Mr. Hamilton called the office around 8:30 a.m. and told Ms. Hanson that he was coming in to pick up records related to Wilmar, an employer with which Local Union 107 had a collective bargaining agreement, and would then meet with attorney Martin Sobel to discuss the Wilmar contract. Ms. Hanson accordingly wrote "Wilmar negotiations" in the business agent logbook across the 10:00 a.m. - 1:00 p.m. slot next to Mr. Hamilton's name. Mr. Hamilton arrived at Local Union 107, picked up the Wilmar records, and left. Martin Sobel confirmed that Mr. Hamilton met with him that morning for approximately two hours. Mr. McGinley was not in the office at that time.

According to Mr. Hamilton, his meeting with Mr. Sobel ended at approximately 12:00 p.m., after which he proceeded to the count site. At approximately 4:00 p.m. he called Local Union 107 and spoke with Mr. Haas, who said that Mr. McGinley was looking for him. Mr. Hamilton recalls Mr. McGinley asking if he had attended to the Wilmar negotiations, to which he responded that he had already met with Mr. Sobel. When Mr. McGinley asked what his plans were for the rest of the afternoon, Mr. Hamilton told him that as he had nothing else pending, he was taking the rest of the afternoon off, that he had placed a vacation request form on Mr. McNamara's desk, and that he would return to the office on Sunday. Both parties to the conversation agree that Mr. Hamilton never specifically mentioned during that phone call that he was at the count site and planned to be an alternate observer for the Hoffa Slate.

Mr. McNamara states that he received a call on Friday afternoon informing him that Mr. Hamilton had been spotted at the count site. Mr. McNamara then called Mr. McGinley and requested that he locate Mr. Hamilton. Mr. McGinley asked Mr. Haas to help him locate Mr. Hamilton. After the 4:00 p.m. phone call from Mr. Hamilton, Mr. McGinley reported back to Mr. McNamara about the conversation and heard nothing more about the matter until he returned to work on Monday, December 7.

Between Friday, December 4 and Monday, December 7, Mr. McNamara decided to terminate Mr. Hamilton as a business agent for Local Union 107. Mr. McNamara explained this decision to the Election Office investigator by stating that in the past, Mr. Hamilton had often come up with excuses after-the-fact for not being where he had informed the office he would be. When questioned about specific instances, Mr. McNamara admitted that no disciplinary action, either verbal or written, had ever been taken against Mr. Hamilton. He stressed, however, that all business agents understood that he required a strict account of all of their work time. To substantiate this point, Mr. McNamara submitted to the Election Office three inter-office memos specifically relating to this issue.<sup>7</sup>



Mr. McNamara admits that he knew Friday afternoon that Mr. Hamilton was at the count site, but had no prior knowledge that Mr. Hamilton was planning to attend the count as an alternate observer. He reiterated his position that Mr. Hamilton was not fired for attending the count, but for failing to inform anyone at Local Union 107 of his whereabouts while stating in the logbook that he was going to be at the Wilmar negotiations. Mr. McNamara denies that Mr. Morris had any role whatsoever in his decision to terminate Mr. Hamilton.

Both Mr. Morris and Mr. McGinley informed the Election Office investigator that Mr. Morris had no prior knowledge of the termination of Mr. Hamilton and that there has been no dialogue between Mr. Morris and Mr. McNamara for a number of months. Mr. McGinley also stated that Mr. Morris specifically told him that Mr. McNamara's termination of the two business agents reflected "bad timing."

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<sup>7</sup> The first memo is dated April 17, 1997 and states as follows:  
"Special Memo: Please be advised that every day by 9:00 a.m., this office must have received a phone call from each agent advising where they are, what time they will be in the hall and a contact number where they can be reached if needed. A phone log will be kept to assure this practice stays in effect."

The second memo is dated May 12, 1997 and states as follows:  
"To: All Agents  
Re: Daily Shop Visits & Daily Reports  
Please be advised that I am receiving too many calls that the members have not seen a business agent at their locations for some time. It is mandatory that the daily shop visit reports be filled out daily and given to Dan McGinley the following morning. Also, a list has been provided to each agent by area order so that any agent may visit any shop that is in the area. This is also a must. Please utilize these sheets as given. Any questions in following these simple procedures, please feel free to see me."

The third memo is dated May 27, 1997 and states as follows:  
"To: All Agents  
Re: Time between Shop Visits  
Please keep this office informed of your whereabouts before and after leaving an already scheduled meeting. We must be able to reach you in case of an emergency and this will help in locating you. Please make a phone call to the office when you are leaving a meeting and advise Jackie of your next destination and approximate time. This will help us better to let a member know when they call in, what time you will be available."

On Sunday, December 6, Mr. Hamilton went to his Local Union 107 office and met with some members. By Monday, December 7, the Hoffa Slate had taken the lead in the International Officer Rerun Election. When Mr. Hamilton arrived at the office that day, he was informed that he was not to enter the building. He went in anyway and ran into Mr. McGinley. According to the testimony of both Mr. McGinley and Mr. Hamilton, Mr. McGinley stated: "Morris is upset about losing the election. Your termination is probably political but Gerry has been very unstable lately. He thinks that you have been fucking him all along." Mr. Haas testified that both Mr. McNamara and Mr. McGinley stated to him that Mr. Hamilton was terminated because "he was down at the count site and did not request permission to go." Later that morning, when Mr. Hamilton spoke to Mr. McNamara and asked him if he wanted an explanation of his whereabouts on Friday afternoon, Mr. McNamara stated "no, if you are right, you'll be back." Mr. Hamilton then told Mr. McNamara that "it is ironic that you are firing me for stealing time when you only come in one day a week."

Mr. Hamilton received a letter from Mr. McNamara, dated December 7, 1999, which read as follows:

As of the close of the business, Friday, 12/4/98, your employment with Teamsters Local 107 is terminated.

On Friday, 12/4/98, you took it upon yourself not to work. As far as I am concerned, you were stealing time. This may have been the practice in the past, but it certainly hasn't since I have been the IBT Trustee of Local 107.

There have been a number of times in the past that your hours of work were questionable. In fact, Nick Pico made the statement, Why did he have to work so hard when you were at the gym all of the time. I plan to investigate all of your reports to see if you were where you reported being.

This letter and the outcome of my investigation will be sent to the IRB and the Ethics Committee.

You know Hamilton, you are one of the stupidest persons I have ever met. After Mr. Morris gave you the biggest break of your life, by having me re-hire you, you go and screw it up. Well, you have no one to thank for it but yourself.

On Monday, December 7, Mr. McNamara approached Mr. Haas and Ms. Hanson and requested that they sign a letter which stated that they had no knowledge of Mr. Hamilton's request for a vacation day for Friday, December 4. According to Messrs. McNamara and McGinley, Mr. Hamilton came up with four different explanations of his whereabouts on that Friday afternoon. Mr. Hamilton denies that he came up with four different explanations, stating that all he ever told them was that he was taking the time off.

### III. Legal Analysis

The **Rules**, at Article VIII, Section 11(f), prohibit “[r]etaliation or threat of retaliation 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. Here, the protesters must show that their support for the Hoffa Slate motivated Mr. McNamara's termination decision. 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 (1<sup>st</sup> 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** . . . .

IV. Election Officer's Findings Regarding Messrs. Pico and Hamilton's Allegations

The record here supports a finding that the protesters' activities in support of the Hoffa Slate constitute protected activity under the *Rules*. Mr. McNamara has admitted that he was aware of both of the protester's electoral preferences at the times of their terminations. The issue that remains, then, is whether this protected activity was a motivating factor in causing the protesters' terminations.

Based on all of the evidence, the Election Officer finds that the protesters were terminated in part due to their activities in support of the Hoffa Slate. The investigator found Ms. Hanson and Messrs. Pico, Hamilton, Haas to be credible witnesses. Numerous statements made by them, including some ascribed to Messrs. McNamara and McGinley, were corroborated by a number of other individuals as accurate.<sup>8</sup> Where their testimony differs on a material fact, the Election Officer was usually able to rely upon the testimony of a third witness to make his findings.

The Election Officer finds that Mr. McNamara's termination of Messrs. Pico and Hamilton as showing a retaliatory motive. Mr. McNamara knew of Mr. Pico's and Mr. Hamilton's political activities, and the comments made to Mr. McGinley showed Mr. McNamara's distaste for that activity. Mr. Pico and Mr. Hamilton have each made a prima facie case that they were fired in retaliation for their protected political activity.

Mr. McNamara did not provide a non-pretextual reason independent of their protected activity for firing Mr. Pico or Mr. Hamilton. The protesters are both senior business agents. They had not been subjected to any progressive discipline until their abrupt terminations in December, 1998, after their activities in support of Mr. Hoffa. While some contradictory testimony has been presented regarding the details of the protesters' terminations, the Election Officer found no evidence to sustain Mr. McNamara's contention that the terminations were not related to their support of the Hoffa Slate.

The matter regarding Mr. Pico and MANNA was used by Mr. McNamara as a pretext for the termination. This conclusion does not depend on what actually happened concerning that event. Rather, Mr. McNamara's eight-month delay in any action on this matter after first learning of it shows his use of the incident to be a pretext. Mr. McNamara became aware of the Forrest Theater allegations as early as February 1998 and did nothing to pursue this as a local matter. He only confronted Mr. Pico with these allegations immediately after Mr. Pico's attendance at the October 29 Hoffa Slate rally. This timing is particularly telling in light of the fact that Mr. Pico was not warned or otherwise disciplined for past improprieties and that no investigation of the allegations was ever initiated by Mr. McNamara.

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<sup>8</sup> A number of witnesses were extremely hesitant to answer questions or otherwise testify because they feared retaliation for speaking out for Mr. Pico or Mr. Hamilton.

Mr. McNamara's retaliatory motive is further shown by his decision to not pay for Mr. Pico's vacation day only after he discovered that Mr. Pico had attended the rally. Furthermore, the Election Officer finds the testimony of Mr. McNamara and Mr. McGinley regarding the actual process for the granting of approval for vacation and personal leave requests to be inconsistent with their own testimony as well as with that of the other witnesses interviewed. Despite the contention that Mr. McNamara alone was responsible for approving all vacation and personal leave time, Mr. McNamara himself admitted that Mr. McGinley "usually" checked with him before granting approval. Finally, while they contend that their rules on leave approval were clear, it is undisputed that Mr. McGinley approved Mr. Pico's leave request in the first place. That initial approval cannot be explained as consistent with the stated policy.

The justifications offered for Mr. Hamilton's termination are pretextual as well. As in the case of Mr. Pico, the Election Officer finds it unnecessary to determine how strictly the vacation and personal leave policy is actually enforced and whether or not Mr. Hamilton actually left a copy of the unsigned vacation request form on Mr. McNamara's desk. The Election Officer finds the overall testimony of Mr. Hamilton to be credible. Mr. Sobel confirmed that he met with Mr. Hamilton on the morning of Friday, December 3 to discuss the Wilmar contract. The relevant page of the business agent's logbook provided to the Election Officer clearly shows that Mr. Hamilton allocated 10:00 a.m. to 1:00 p.m. to meet with Wilmar and did not attempt to hide the fact that he was not going to be on official union business for the remainder of that afternoon. Ms. Hanson confirmed that Mr. Hamilton told her that he was planning to take the rest of the day off and would probably go to the count site. A number of witnesses corroborated Mr. Hamilton's testimony that it was common knowledge around Local Union 107 that he would be going to the count site that day. Mr. McGinley confirmed that he learned as early as 2:00 p.m. that Mr. Hamilton was present at the count site.

As further evidence of retaliation, the Election Officer notes the long-term history of political competition between Mr. McNamara and Mr. Hamilton as well as Mr. McGinley's admission of his own statement to Mr. Hamilton that Mr. Morris was "upset about losing the election," that "Gerry [McNamara] was upset" and that his actions were "probably political," as well as Mr. Morris' comment to Mr. McGinley that the termination actions taken by Mr. McNamara reflected "bad timing." Together, these comments strongly indicate that the protesters' activities in support of the Hoffa Slate were a motivating factor in Mr. McNamara's decision to terminate them.

Thus, the evidence establishes that Messrs. Pico's and Hamilton's terminations were motivated, in part, by their activities in the International Officer Rerun Election.

As trustee of Local Union 107, Mr. McNamara has the discretion under the *IBT Constitution* to remove business agents at will. Nonetheless, this discretion is preempted by the **Rules** when protected election-related activity is found to be the basis for a retaliatory discharge. Although Mr. Pico's discharge letter of December 3 and Mr. Hamilton's discharge letter of December 7 both state a basis for the removal of the two business agents, the Election Officer

finds that these reasons are pretextual. Mr. McNamara did not investigate the facts recited in the Hamilton letter that purportedly justify the termination;<sup>9</sup> the Pico termination letter relies on an eight-month-old allegation that Mr. McNamara never investigated; and both are inconsistent with the protestor's long records without discipline. Mr. McNamara did not meet his burden to show that the protesters would have been terminated despite their activities in the International Officer Rerun Election.

Although Mr. McNamara denied that he made the decision to terminate the two business agents on the basis of their political activities, the Election Officer does not find Mr. McNamara to be a credible witness. In interviews with the investigator, Mr. McNamara was unable to explain credibly in light of the entire record why both business agents were terminated so close in time to each other, to the election count, and to their overt and public displays of support for the Hoffa Slate.

Based on the totality of the evidence, the Election Officer finds that Mr. McNamara was improperly motivated by the protesters' activities in the International Officer Rerun Election when he fired them.

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. McNamara shall immediately cease and desist from retaliating against Messrs. Pico and Hamilton based upon activity protected by the *Rules*.

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<sup>9</sup> Since the beginning of Mr. McNamara's tenure as trustee, no business agents or staff have ever been fired or disciplined for "stealing time."

2. Local Union 107 shall offer to reinstate Messrs. Pico and Hamilton to their positions as business agents effective February 7, 1999, and shall make them whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings. The local union shall permit Messrs. Pico and Hamilton a period of two weeks to accept the offer.
3. By February 7, 1999, Mr. McNamara shall post the attached "Notice to Local Union 107 Members and Employees" on all bulletin boards at Local Union 107 work sites and at the local union office.
4. By February 9, 1999, Mr. McNamara is ordered to submit an affidavit to the Election Office attesting to his compliance with the order of the Election Officer.

An order of the Election Officer, unless otherwise stayed, takes immediate effect against a party found to be in violation of the *Rules*. In re Lopez, 96 - Elec. App. - 73 (KC) (February 13, 1996).

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:

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

## NOTICE TO LOCAL UNION 107 MEMBERS AND EMPLOYEES

The Election Officer has found that I retaliated against Business Agents Nicholas Pico and William Hamilton by firing them on account of their political activity in the IBT International Officer Rerun Election. This retaliation action violated 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. Pico and Mr. Hamilton to their business agent positions and to make them whole for any losses in wages and benefits. I will not retaliate against Mr. Pico or Mr. Hamilton or any other local union employee for engaging in protected activity.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Gerald McNamara, Trustee  
Local Union 107

*This is an official notice which must remain posted until February 26, 1999.  
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.*