

IN RE:

MIKE SCHAFFER

00 - Elec. App. – 002 (KC)

DECISION OF THE ELECTION  
APPEALS MASTER

This matter is an appeal from the Election Administrator’s decision, (“the Decision”), dated August 1, 2000, Office of the Election Administrator Case No. PR-071301-NA, Protest Decision 2000 EAD 8. The request for a hearing was filed by the following; Mr. Garnet Zimmerman, President of Teamsters Local Union 31 on August 3, 2000; James L. Hicks, Esq. on behalf of candidates Ken Wood and Tyson Johnson on August 3, 2000; Joseph Kaplon, Esq. on behalf of Teamsters Local Union 104 on August 3, 2000; J. Douglas Korney, Esq. on behalf of the Hoffa 2001 Campaign, on August 3, 2000; Mr. Jon Rabine, Secretary Treasurer of Teamsters Local Union 763 on August 4, 2000; Martin J. Costello, Esq. on behalf of C. Thomas Keegel, General Secretary-Treasurer of the International Brotherhood of teamsters (“IBT”) on August 4, 2000; and Richard Volpe, on August 4, 2000.

A hearing was held before me on August 10, 2000. The following persons were heard by way of teleconference: Jeffrey Ellison, for the Election Administrator’s Office; Mr. Zimmerman; Mr. Hicks; Mr. Kaplon; Mr. Korney; Mr. Rabine; Mr. Costello; Bradley Raymond, Esq. for the IBT; and Barbara Harvey, Esq., on behalf of Michael Schaffer, the protester.

Mr. Schaffer asserted in his protest that the Hoffa 2001 campaign distributed, by facsimile to local unions, blank candidate accreditation petitions for its candidates on the Hoffa 2001 Unity Slate (“Slate”), in violation of Article VII, Section 11(c) of the Rules for the 2000-2001 IBT International Union Delegate and Officer Election (“Rules”).

The Election Administrator received from the protester's counsel, Susan Harvey, what purported to be four separate fax transmittals, all containing petition blanks that had the name and office sought of various Slate candidates typed out at the top of each petition sheet, (except two sheets that had no candidate named) and invited IBT members to sign a petition sheet. The blanks themselves contained no cautionary admonition warning that no union resources could be used to copy and/or distribute the petitions. Two of the four transmittals did, however, have the warning on covering materials that specifically noted that the petition blanks could not be duplicated or distributed at Union expense. It is unclear from the Decision, the Election Administrator's supplemental, post hearing submission dated August 10, 2000, and his supplemental, post hearing letter dated August 14, 2000 if he ever established that the two transmissions provided by Ms. Harvey without cautionary warning language had no cover sheets with such language at the time of transmission by the Hoffa campaign.

The Election Administrator notes that "the Hoffa campaign admits in its position statement that 'the items set forth in Mr. Schaffer's [protest] were indeed faxed to most of the locals throughout the country'. This admission does not, by its terms, concede that any materials were sent without cover sheets containing the warnings. The Election Administrator concluded that "[a]t a minimum, union resources in the form of local union fax machines and supplies, and local union personnel, were used to receive these campaign fax transmissions." There are no findings of fact establishing anything about what happened in any local after these materials appeared, apparently unbidden, in its incoming fax tray. There is nothing in the Decision that establishes a discriminatory practice with respect to any local's response to or handling of the petitions of rivals of the Hoffa Unity Slate.

The Election Administrator specifically found a violation of Article VII, Section 11(c), which provides that “[u]nion funds, facilities, equipment, stationery, personnel, etc. may not be used to assist in campaigning unless all candidates are provided equal access to such assistance and are notified in advance, in writing, of the availability of such assistance.” As a remedy, he declared that all Hoffa Slate petition signatures from any source anywhere in the United States or Canada, are presumptively invalid. Absent a rebuttal of the presumption by each and every candidate on the Slate, the Election Administrator has barred all Hoffa candidates from access to the battle pages of the Teamster Magazine and membership lists of rank and file Teamsters, for the duration of the campaign.

The Rule itself appears on its face to be directed at local unions and the International Headquarters, and not at campaign organizations of candidates, since it seeks to control the use of union resources in connection with facilitating campaign communication and political dialogue in union facilities. The advance notice provision clearly refers to candidate’s forums, distribution points (tables) for campaign literature and timely access to membership records. Certainly, this Rule would implicate local candidates and local allies and members of a Union-wide slate who connived with local officials to deny equal access to rival candidates. There is no evidence of such connivance here.

Read literally, however, the Rule appears not to apply to the circumstances before us, since it could not be read to impose upon the Hoffa campaign a duty to notify its rivals in advance in writing of “the availability of [fax distribution] assistance” at all locals across the nation and in Canada. Indeed, the Rules clearly do not require locals to provide any assistance to campaigning, and such written notice from any campaign organization stating otherwise would

be both unprecedented and adverse to the principle that local unions are to determine the ground rules for equal access to their resources for campaign purposes. Furthermore, the absence of advance written notice regarding candidates' faxing rights to locals may here be a mere technical deficiency, since the Election Officer's previous published decisions have made it quite clear that faxing of campaign materials to locals, absent discrimination, is not only allowed, but encouraged, under the Rules.

There is nothing in the Decision that references, no less establishes, a lack of equal access in any local relating to its incoming fax facility. Nor are there any findings with respect to the disposition of the faxed material, on tables or otherwise, in any local.

Recognizing the problematic nature of applying the Rule in haec verba to the circumstances before us, the Election Administrator reviewed three protest decisions that he concluded control the outcome of this case. He cited Committee to Elect Ron Carey, P512 (March 28, 1991), in which the then Election Officer asserted that "the Election Rules are not violated when a candidate asks a Local Union to distribute campaign literature [because t]he distribution of campaign literature is an appropriate means of apprising Union members about the candidates and the issues on which they will be voting, and is encouraged under the Election Rules" (emphasis added). However, the case goes on to state that "[a] failure by a Local Union to honor requests for the distribution of campaign literature in the same manner, and to the same extent, that it distributed [the campaign material in issue] will constitute a violation of the Election Rules...each Local Union that received [the campaign material in issue] must inform any candidate who inquires of the manner and extent of the Local Union's distribution [of the

campaign material in issue]. A failure of the Local Union to respond to such a request... shall constitute a violation of the Election Rules” (emphasis added).

Clearly, this case is inapposite to the matter before us. It’s holding clearly asserts that the violation is grounded in the conduct of the Local, and is predicated upon a premise of some kind of inquiry or intervention by a rival candidate. The Election Administrator’s findings of fact, such as they are, address neither.

The Election Administrator also cites Hall, PR106 (June 8, 1998), in which a candidate for General President in the re-run election, protested that the Hoffa campaign violated the Rules when it broadly faxed campaign materials to local unions throughout the United States and Canada. There the Election Officer found a violation of the 1995-1996 Rules different from the 2000-2001 Rule relied upon here. The Hall decision relies on Article XII, Section 1(b)(1) and (3) of the previous Rules that prohibited a Union from using its funds “to promote the candidacy of any individual” (emphasis added). As already noted, however, there is no evidence in the record before us that any Local did anything affirmatively to promote the Hoffa campaign in its handling of the four fax transmissions, or any other fax transmissions. There is, of course, the passive reception of the transmissions, which the Local cannot control. Article VIII, Section 11(c) of the 1995-1996 Rules also relied upon by the Election Officer in Hall, “prohibits the use of union funds and facilities to assist in campaigning unless the Union is reimbursed for the fair market value for such assistance, and unless all candidates are provided equal access to such assistance and notified in advance, in writing, of the availability of such assistance,” (emphasis added) at 2.

The Hall ruling, as the present Decision before us, in substance sustained the protest on the apparent ground that if a candidate faxes campaign material to a Local Union without an admonitory label stating that it cannot be copied using union resources and that it can only be distributed on a literature distribution table open to all candidates, the candidate is in violation of the Rules, even in the absence of any evidence that a Local Union did anything to “assist” the campaign.

The Hall case, however, cannot support the outcome here. There is no proof in the record that when transmitted, each of the four fax transmittals handed to the Election Administrator lacked the admonition against copying. Furthermore, they contained broader language than required by Hall to the effect that the materials could not be distributed at all at union expense.

The Election Administrator also cites Buck, P919 (November 5, 1999), aff’d, 96EAM274. There, he states, “the Election Officer found, as alleged, that ‘the facilities of Local Union 745 have been improperly utilized to promote [a] candidacy...through extensive use of the union telephones and by storing and distributing Hoffa campaign materials.’” In point of fact, the Election Officer did not find a violation with respect to telephone usage; at 7. Furthermore, the affirmance of the Election Appeals Master explicitly related only to the issue of timeliness of the protest; at 2.

More to the point, the Election Officer in Buck, found extensive violations of the Rules with respect to the storage and distribution of conventional campaign materials (not certification petitions) at facilities of Local 745 in Dallas and El Paso, Texas. The Election Officer then drew a distinction between materials intended by candidates for distribution within

the premises of the Local Union and materials intended by candidates for distribution outside the premises of the Local Union.

The Election Officer will require all candidates sending campaign literature to IBT local unions for distribution to advise them, in writing, that campaign literature may be distributed only in a non-discriminatory manner through the use of a literature distribution table open to all candidates. The Election Officer recognizes that the Hoffa Campaign, and perhaps other campaigns as well, has sent literature to supporters in a local union for distribution outside the confines of the local union. The Election Officer finds that literature destined for this type of distribution must be sent to a supporter's home address or to a campaign address. In this way, all questions about the storing of campaign material and other improper uses of union resources will be avoided;" at 9.

It is clear that in Buck the Election Officer imposed an outright ban on the use of Local Union facilities as a conduit, partisan or otherwise, for distribution or dissemination of campaign materials outside the premises of the Local Union. She gave a conditional approval to the use of Local Union facilities as a locus for distribution of partisan campaign material inside the Local, as long as the candidate sending the materials advises the Local of its obligation to distribute it in a non-discriminatory manner through the use of a "literature table open to all candidates," but, as noted, this latter scenario is not implicated here.

There is no evidence of record in the Decision in the matter before us, which sheds light on whether the identified four faxed transmissions were "destined for distribution", inside or outside the Local Union premises, or whether the faxed materials were in fact handed out or distributed to members inside or outside the Local Union premises.

In the case before us, the Election Administrator notes the "significant" addition of Section 7(g) to Article VII, Section 8 to the present Rules, which requires that:

The Union shall adopt procedures for complying with candidates' requests for distribution of literature and shall specifically advise all candidates of those procedures.

It is, however, unclear what significance or relevance the Election Administrator attributes to this addition.

The Election Administrator predicates his finding of a violation of the Rules by the Hoffa campaign in this matter upon three grounds, set out at pp. 6-7 of the Decision:

a) though there is no evidence that anyone at any Local Union either distributed or furthered the Hoffa campaign in any way, the Election Administrator argues that the clear inference to be drawn from the text of the covering materials of the transmissions in issue is that the Hoffa campaign intended that persons at the Locals distribute the material, even though the covering material contained an explicit warning against such distribution, and that this is sufficient under the case precedents for a violation. However, the Rules do not punish intent alone without effect. A precedent to the contrary will establish a very slippery slope for Rules enforcement in the hundreds of protests to come;

b) the Election Administrator flatly declares that election accreditation petitions are by their very nature "destined for distribution outside the confines of the local union" and may not, under Buck, be faxed to Local Unions under any circumstances;

c) the language on the covering materials doesn't comply with the Hall mantra for its non-partisan campaign table procedure, and therefore, under the case precedents, a violation is sustainable.



The Election Administrator's formal grounds for supporting a violation of the Election Rules in a) and c) above, are rejected. As already noted, there is no adequate basis in the evidentiary record establishing a finding that any Local Union affirmatively assisted the Hoffa campaign in any way or that the warnings were not in fact adequately given at the time of transmission, thereby rendering the legal conclusion in a) untenable. Since the Election Administrator made a definitive finding in b) that the campaign materials in question were necessarily structured for external distribution, the finding in c) is inconsistent under Buck and the legal conclusion is therefore untenable.

We are left with b) as the sole legal basis supporting a violation of the Rules, pursuant to the Buck analysis. Under this approach both Committee to Elect Ron Carey and Hall are irrelevant. All that need be established under Buck is that the nature and purpose of the campaign materials transmitted were consistent with the circulation at large of accreditation petitions beyond the confines of the Union premises. The record here is unmistakably and irrefutably clear that that was both the purpose and the consequence of the broadcast faxing done by the Hoffa campaign. Accordingly, the protest was properly granted and this part of the Decision is affirmed.

The remedy imposed by the Election Administrator is both unprecedented and draconian. He has declared presumptively invalid every petition to be submitted by every candidate affiliated with the Hoffa campaign across the United States and Canada, and placed the burden on these candidates to demonstrate that their completed petition forms were not in any way connected to or derived from the four transmissions investigated in the protest, or any others

that might have been faxed by the Hoffa Slate and were not the subject of the investigation . The precise language of the order is as follows:

Petitions for each of these candidates will be valid for accreditation purposes only if it is shown by evidence acceptable to the Election Administrator that the submitted petition forms do not find their source in petition forms or copies of petition forms that were faxed to local unions or other IBT bodies by the Hoffa campaign. Acceptable evidence must prove a chain of custody that completely excludes the fax transmission of accreditation petitions by the Hoffa campaign. Decision, at 9.

This order is unenforceable and impractical for the following reasons:

- the LMRDA case authority cited but not analyzed as purportedly supporting the imposition of a presumption of invalidity of all Hoffa Slate petitions does not apply to these circumstances;
- there is a complete absence of factual findings relating to, or indeed, apparently even investigation of, the addressees, physical description of the materials sent, and mechanics and scope of distribution. There are in the record only the four transmissions handed to the Election Administrator. Yet, the Hoffa Slate candidates are required, on pain of losing accreditation, to distinguish their petitions “completely” from wholly abstract and amorphous petition forms that the Election Administrator hasn’t seen and cannot describe.
- The Election Administrator announces that only evidence “acceptable” to him will suffice to rebut the presumption, and that a chain of custody excluding any nexus to all faxed Hoffa petitions is required. This is a standard that cannot be met. The consequence will be exclusion of the Hoffa Slate from

vital campaign rights. If the Hoffa Slate loses the election, there is a high likelihood that the outcome will be nullified and a rerun ordered. This remedy, if approved, would be a self-inflicted wound that carries with it the strong likelihood that the democratic institution building efforts of the IBT over the years would be severely compromised.

- recognizing this, the protester recommended an alternate penalty of requiring the Hoffa Slate to pay for a mailing of an appropriate quantity of Leedham campaign materials to be distributed at the locals under strict controls imposed by the Election Administrator.
- in justifying the harsh penalty imposed, the Election Administrator referenced a claim by the protester that the Hoffa Slate had obtained “a significant distributional and psychological advantage” in petition circulation over the rival Leedham Slate. He did nothing, however, to investigate this claim, and the record is without evidence or findings on it.

At the hearing of the appeal in this case, Garnet Zimmerman, President of Local 31 in Canada and a Hoffa Slate candidate, described the impact of the remedy upon him in an area covering thousands of miles, and insisted that even if an adequate non-taint showing could be made (a point he did not concede) as to each sheet of petition signatures, it would require the preparation and execution of hundreds of affidavits. Jon Rabine, Secretary Treasurer of Teamster 763 and a Hoffa Slate candidate asserted that the penalty imposed a hardship out of all proportion to the offense. On the Election Administrator’s “excluding the taint” evidentiary standard, Mr. Rabine stated “I do not know what this means, nor how to comply. There is less

than a month before the petitions are due.” The Election Administrator did not directly respond to these hardship concerns during the argument. Of course, the Decision makes no finding as to or reference to either Mr. Zimmerman or Mr. Rabine, or anyone else for that matter, except the General President.

Subsequent to the hearing, Barbara Harvey, counsel to the protester, submitted a letter dated August 10, 2000 surprisingly containing a broad attack on the Election Administrator’s analysis of and reliance upon the Hall and Buck precedents and asserts that they do not apply in broadcast faxing cases, a term that she does not define. See pp. 3-4 of her Letter. She claims that the facts require an outright ban on broadcast faxing, a wholly unprecedented outcome never before addressed in the hundreds of protest decisions and appeals, and nowhere mentioned in the Rules, which as noted, have for almost a decade encouraged candidates to send campaign materials to the locals.

The Election Administrator submitted a supplemental filing after the hearing in which he belatedly concedes that offending and non-offending accreditation petitions can be distinguished by simply looking at them. Accordingly, the presumptive invalidity of Hoffa Slate accreditation petitions component in the remedy is vacated and dissolved. The Election Administrator will examine each petition submitted and determine, with specific findings of fact, whether the proffered sheet does or does not comply with the requirements of the Rules, including whether or not it is derived from materials found in his Decision to have been transmitted by the Hoffa Slate in violation of the Rules.

Although in the Hearing we explored the possibility of augmenting the remedy with requiring compensatory access to the locals for the Leedham Slate, we have been advised in

a letter from Stefan Alan Ostrach, its Treasurer, dated August, 10, 2000 that it rejects such relief. Accordingly, none will be ordered.

As the Decision in this case is among the very first in what will be a long series of such decisions, it is appropriate, though regrettable, to note the following:

- the factual investigation in this matter was manifestly shallow and inadequate;
- the Decision and supplement filing is laced with overheated rhetoric which very likely will find its way into an adversary's campaign literature and rhetoric. All previous election officers were careful to let facts and logic, and not purple prose, support the outcome; such intemperate language risks undermining the perception of the neutrality of the Election Administrator;
- the strengths, weaknesses and factual distinctions of cited cases should be candidly reviewed and factored into a determination to rely or not rely upon them.

Accordingly, the Election Administrator's decision is affirmed, with a modified remedy as indicated.

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Kenneth Conboy  
Election Appeals Master

Dated: August , 2000