

**OFFICE OF THE ELECTION SUPERVISOR
for the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

IN RE: FRED ZUCKERMAN,)
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Protestor.)
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Fred Zuckerman, candidate for IBT General President, filed a pre-election protest pursuant to Article XIII, Section 2(b) of the Rules for the 2015-2016 IBT International Union Delegate and Officer Election (“Rules”). The protest alleged that Local Union 120 staff used union resources in support of the Hoffa-Hall 2016 slate.

Election Supervisor representative Mary Campbell investigated this protest.

Findings of Fact and Analysis

Local Union 120 is comprised of some 11,000 members and is headquartered in Blaine, MN. It is served by a seven-member elected executive board, four of whom are employed as business agents. The local union has ten additional business agents and two organizing staff. The local union elected fourteen delegates and five alternate delegates to the IBT convention, the large majority of whom are presently employed by the local union either as elected officers or business agents.

On the morning of October 19, 2016, president and principal officer Tom Erickson sent the following text message to the thirteen individuals comprising the entire full-time staff of the local union who serve as business agents, including the elected officers who serve in that capacity:

Gentlemen:
As of last night there were only 9% of the ballots turned in for our International election. That means there is an enormous amount of ballots sitting on tables or in the garbage. Please make a massive push to get our members at Local 120 to vote and vote for Hoffa/Hall slate! Tell your stewards to grab a seniority list and tell them to call for a new ballot, have the phone number available for them. Remind them that a great turnout helps in their next contract and that Hoffa/Hall slate saved our Local Union. Please make this push!
Thanks for all that you do!
Tom

Of the thirteen staff members to whom Erickson sent his text message, the local union provided us with information, “to the extent that it is available,” which included text messages that business agents sent to stewards at the worksites for which they had business agent responsibility. Two of the business agents for whom the local union provided information sent generic get-out-the-vote text messages that did not advocate for particular candidates or slate.¹

¹ Thus, Kevin Saylor texted: “Everyone, Ballots for the IBT election should have arrived at the members homes, please remind them to fill out the ballot and send it back right away.” Bradley Jenkins texted: “Ballots should be hitting houses today in SoDak. Please fill yours out and place in mail. Have others also. It took me two seconds to fill in my vote.”

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Three agents texted their stewards with campaign advocacy. Thus, James Heeren² texted the following:³

Need everybody to send in their ballots for Hoffa hall spread the word as of today only 9 percent of ballots have been returned out of 1.5 million members. That's sad. It's our union we need to vote. 6 year ago local 120 was second in the nation on returned ballots. Let's be number 1 this year. Can I get an amen.

The date that Heeren sent this text message is not apparent from the screenshot provided by the local union, although it was after Erickson's October 19 text and before October 28, the date the local union forwarded it to us. Evidence received from Heeren indicated the text message was directed only to the six stewards employed at Wilson Trailer, an employer of more than 150 members in Yankton, SD; it was not sent to other stewards at other employers for which Heeren has responsibility.

On Wednesday, October 19, at 8: 58 a.m. CDT, local union vice president and business agent John "Rosy" Rosenthal texted:

This a reminder that you need to fill out your international teamster election. Please get with your co workers to fill out their ballots and get them in right away. Only 9% have voted as of today. I ask that you push this with fellow teamsters to vote Hoffa Hall slate Thanks.

Evidence received from Rosenthal indicated that the text message was directed to thirty-nine stewards employed at all fifteen employers for which he has business agent responsibility.

On Friday, October 21 at 10:42 a.m. CDT, business agent Troy Gustafson⁴ texted:

Gentlemen,
Keep pushing members to send their ballots in for the HOFFA/Hall slate. 120 had the 2nd highest turnout. It's very important to have another good showing in support of what HOFFA Hall have done for us. Have them bring you their ballots.
Thanks guys!

Evidence received from Gustafson indicated that the text message was directed to seven stewards and one committeeman employed at SuperValu, an employer of more than 800 members and the largest single employer under the jurisdiction of Local Union 120. Gustafson denied sending the message to the stewards at the remaining employers for which he has business agent responsibility.

² According to the bulletin board list Local Union 120 submitted with its local union election plan in 2015, Heeren has business agent responsibility for members at sixteen employers, all situated in South Dakota.

³ All text messages quoted in this decision are verbatim, with no changes to grammar or punctuation from the original.

⁴ According to the list referenced in footnote 2, *supra*, Gustafson had responsibility for members at thirteen employers in the Greater Twin Cities area of Minnesota.

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These business agents sent these texts on union-paid time using their union-issued and paid for mobile phones. They sent the texts to lists of mobile phone numbers of their stewards kept for the performance of their business agent responsibilities on behalf of the local union.

The local union, through counsel, represented that the only text messages sent to stewards concerning the International officer election were those quoted above from the five business agents, two of which sent non-partisan get-out-the-vote messages that did not constitute campaigning within the meaning of the *Rules*. The representation ruled out that the following full-time staff who serve as business agents for the local union sent text messages to stewards at employers for which they have business agent responsibility: president Tom Erickson, secretary-treasurer Bill Wedebrand, recording secretary Joe Battaglia, and business agents Dave Schrunk, Brad Jenkins, Brian Nowak, Chris Riley, Rich Fredrick, Virgil Christofferson, and Grand Bendix.

The protest in this matter was acknowledged by email transmitted on Thursday, October 20, 2016 at 10:28 a.m. CDT. On Monday, October 24, 2016 at 8:22 a.m. CDT, four days after the protest was received, local union secretary-treasurer Bill Wedebrand sent the following text to all staff with union-provided cell phones:

Reminder this needs to be done today!!! Thanks for your urgency on this. Everybody knows that the local union pays for your cellphone for union business. With that being said I'm requesting that everybody pay the local union \$10 to cover the cost of any messages that may have been sent out for the IBT election. Thanks you and please make all checks payable to Local 120 ASAP. Any questions please call me. Bill

The local union attorney, Katrina Joseph, told our investigator that the protest filed by Teamsters United in Case No. P-327-072016-NA prompted a discussion within Local Union 120 of the campaign use of union-provided cellphones. She stated that the protest filed here "created urgency to get the checks in from the agents," and the checks were received after Erickson sent his text urging business agents to have their stewards get out the vote for Hoffa-Hall 2016 and after the protest here was served on the local union. The local union provided copies of the checks received from sixteen local union personnel with union-provided cell phones.⁵ Four checks were dated Thursday, October 20, three Friday, October 21, one Saturday, October 22, one Sunday, October 23, one Monday, October 24, and six (including the checks from president Erickson and recording secretary Battaglia) Tuesday, October 25. This total of sixteen checks included payments from the director of organizing and an organizer, neither of whom have business agent responsibilities. The information each payor inserted on the memo line gave insight into what he believed he was paying for. Six left it blank; five referred to phone use; the remaining five stated specifically that they were paying for texting. The local union's cellphone plan with Verizon showed it paid \$35 to \$40 per month, generally, for each of the officers and business agents who were issued phones; this service included unlimited calling and texting. Attorney Joseph told our investigator that she and secretary-treasurer Wedebrand settled on \$10 for each person. However, no payment was made until after the protest in this case was received by the local union.

Article VII, Section 12(b) declares that "[a]ll Union officers and employees, if members, retain the right to participate in campaign activities, including the right to ... openly support or oppose any candidate, to aid or campaign for any candidate, and to make personal campaign contributions. However, such

⁵ These payments corroborate our finding that sending these text messages was *not* Union business.

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campaigning must not involve the expenditure of Union funds. Accordingly, officers and employees (and other members) of the Union may not campaign on time that is paid for by the Union. Campaigning incidental to regular Union business is not, however, a violation of this section.

On the facts presented, we find that Erickson sent his text message to business agents on time paid for by the union. We further find that the business agents who sent partisan text messages to the stewards under their charge did so on time paid for by the union.

In the face of *prima facie* proof of a violation of Article VII, Section 12(b), Hoffa-Hall 2016 contends that the text message sent by Erickson to the local union's business agents and those partisan text messages sent by business agents to stewards may be excused under the "incidental" exception stated in that subrule. The *Rules* do allow for campaigning "incidental" to work to ensure that as members interact normally during the course of their on-the-job responsibilities, such interaction may include campaign speech. *George*, P490 (April 4, 1996). See e.g. *Benson*, Post 67 (April 16, 1991) ("use of a CB radio [for campaigning] while otherwise working ... is exactly the type of normal 'shop talk' the rule on incidental campaigning was meant to [cover]"). In assessing whether campaign activity is incidental, one looks to whether the activity caused an employee to fail to perform work, deviate from prescribed duties, or interfere with another employee's work. *Grossman*, P476 (March 6, 1996); *Jones*, P100 (December 20, 1990), *aff'd*, 90 EAM 26 (December 28, 1990); *Joseph*, 2006 ESD 114 (February 17, 2006); *Pinder*, 2006 ESD 133 (March 7, 2006); *Joyce*, 2011 ESD 111 (February 14, 2011); *Martinez*, 2011 ESD 134 (February 23, 2011); *Ziemba*, 2011 ESD 172 (March 21, 2011).

The *Rules* also protect "incidental" campaigning by union representatives, applying the principles from the shop floor to situations where union representatives interact with rank-and-file members. See, e.g., *Hosley*, 2000 EAD 21 (September 15, 2000); *Raymond*, P434 (March 14, 1996); *Newhouse*, P253 (January 4, 1996); *Dillon*, P467 (March 4, 1991) (short campaign-related conversations between business agents and stewards which occurred before commencement of contract negotiations did not violate rules). *Pinder*, 2006 ESD 133 (March 7, 2006) (no violation where campaign conversation was of short duration and did not interfere with work).

The "incidental" exception is designed to provide limited breathing room for comments expected to occur while other interaction normal to the workplace or the conduct of official union business takes place. *Hoffa*, P865 (August 26, 1996), *aff'd*, 96 EAM 232 (September 6, 1996); *Potts*, 2006 ESD 111 (February 27, 2006); *Garcia*, 2006 ESD 193 (April 20, 2006). The exception does not apply where the campaign activity is not *incidental* to regular union business. *Hoffa, supra* (no legitimate union business being conducted to which the discussions about the Carey campaign were incidental). Union officials, elected or appointed, cannot commandeer the union apparatus to organize and conduct partisan campaigning.

Here, Erickson's text message to the local union's business agents was campaign activity with no connection to the conduct of union business. The partisan text messages we have been supplied that business agents sent to their stewards were *ad hoc* communications to organize votes for Hoffa-Hall 2016. The messages were not delivered "incidental" to any union business. The *only* business the agents were performing when sending the messages was a partisan one of campaigning for one International officer candidate slate. Accordingly, we hold that Erickson's text message to the local union's agents and the partisan messages that agents sent to their stewards urging voter turnout for Hoffa-Hall 2016 violated Article VII, Section 12(b) of the *Rules*.

We further find that the partisan text communications violated Article VII, Section 12(c), which states that “Union funds, facilities, equipment, stationery, personnel, etc., may not be used to assist in campaigning unless the Union is reimbursed at fair market value for such assistance, and unless all candidates are provided equal access to such assistance and are notified in advance, in writing, of the availability of such assistance.” The messages relied on mobile phone lists of stewards that business agents used to communicate concerning union business. These lists constituted union facilities within the meaning the subrule, which could be used for a campaign purpose only if the union gave advance written notice to all candidates of the availability of such campaign assistance. Instead, principal officer Erickson implored the local union’s business agents to “make a massive push” to “tell your stewards” to “get our members at Local 120 to vote and vote for Hoffa/Hall slate!” That he expected this push to be made via text message is proven by two facts. First, he distributed the instruction by text message himself, tacitly acknowledging that agents would use the same form of communication to reach stewards. Second, secretary-treasurer Wedebrand’s “reminder” to agents, coming five days after Erickson’s text message, to pay “\$10 to cover the cost of any messages that may have been sent out for the IBT election,” confirmed the expectation that text messaging would be used to disseminate the partisan message.

The protest urged that use of the union-issued cellphones to carry out the texting also violated Article VII, Section 12(c). We so find. We further find that the \$10 assessment the local union imposed on agents, even though it came after the fact and likely was prompted by the filing of the protest here, resolved the requirement that the union be reimbursed for the fair market value of the campaign assistance. It did not, however, excuse the second requirement of the subrule that all candidates be notified in advance of the availability of the assistance in the form of the list of stewards’ phone numbers.⁶

Hoffa-Hall 2016 is the beneficiary of the *Rules* violations that Erickson and the local union’s business agents committed. No evidence was presented or found that Hoffa-Hall 2016 was aware of the violations before or as they were committed. Nonetheless, Article XI, Section 1(b)(13) makes candidates strictly liable to insure that campaign contributions are permitted. Further, Article XI, Section 1(b)(15) states that ignorance by a candidate “that union or employer funds or other resources were used to promote a candidacy shall not constitute a defense to an allegation of a violation of these *Rules*.”

With respect to Gustafson’s exhortation to stewards to have members “bring you their ballots,” such conduct encourages ballot collection. Article IV, Section 12, titled “Prohibition on Interference with Voting,” declares that “[n]o person ... may encourage or require an IBT member ... to give his/her ballot to any person or entity for marking or mailing.” Despite Gustafson’s explicit instruction to the stewards to whom he sent the text, the local union, through counsel, represented to our representative that “no ballots have been or will be collected,” representing further that stewards “have never and will never mark ballots for members, take possession of the ballots at any point from the members, or mail ballots for members.” Nonetheless, we find that Gustafson’s text message instructing stewards to have members

⁶ The *Rules* prohibit use of Union resources to assist in campaigning unless the Union receives fair market value, and all candidates are provided equal access and advance notice, in writing, of the opportunity. Article VII, Section 12(c). That was not done here. The message sent from the top of the local union shows that this was an effort organized from the start to support one side in the International officer election. The reimbursement was imposed after the fact, and the opposing candidates were never notified that they could communicate with or through this local union text ladder.

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“bring you their ballots” constitutes encouragement to surrender ballots to another for mailing, in violation of Article IV, Section 12 of the *Rules*.

Accordingly, we GRANT the protest, finding that Erickson and certain Local Union 120 business agents violated the *Rules* by using union resources to turn out the vote for Hoffa-Hall 2016, finding further that Hoffa-Hall 2016 was the beneficiary of those *Rules* violations, and finding that Gustafson compounded these violations by explicitly and impermissibly encouraging ballot collection.

Remedy

When the Election Supervisor determines that the *Rules* have been violated, he “may take whatever remedial action is deemed appropriate.” Article XIII, Section 4. In fashioning the appropriate remedy, the Election Supervisor views the nature and seriousness of the violation as well as its potential for interfering with the election process. “The Election Supervisor’s discretion in fashioning an appropriate remedy is broad and is entitled to deference.” *Hailstone & Martinez*, 10 EAM 7 (September 14, 2010).

These violations occur at a critical time in this election. Ballots have been sent to members and the deadline for receiving voted ballots is November 14. Many members of Local Union 120 cast their vote and returned their secret ballot by mail before the text message ladder began on October 19. OES has retrieved returned ballots on a daily basis, and we presume that any envelope delivered to the OES post office box in Alexandria, Virginia on or before October 22 was mailed from Local Union 120’s geographic area before October 19. Those ballots (and any subsequent receipts bearing a postmark earlier than October 19), will be checked for eligibility and processed according to regular procedures during the ballot count.

Ballots from Local Union 120 members received after October 22 (or postmarked on or after October 19) will be divided into two categories: those from members at worksites where the stewards were not sent a partisan text message by their business agents, and those where they were.

To remove the taint of the violations found here, we order Local Union 120 to SHOW CAUSE, no later than Friday, November 4, 2016, at noon EDT, why ballots, received after October 22 (or postmarked on or after October 19), returned from any member employed at a work location where business agents Rosenthal, Heeren and Gustafson have responsibility should not be VOIDED. We impose this show cause order because *prima facie* proof exists that the votes of members employed at these work locations were tainted by the partisan text messages business agents sent to stewards there. Local Union 120 members at locations served by those business agents who returned ballots on or after October 19 may call OES to request a replacement ballot.

We further order Local Union 120, its elected officers, business agents and shop stewards to cease and desist from using union resources to conduct partisan campaign activity, and admonish them to comply with the requirements of Article VII, Section 12(c), of the *Rules* if the Local Union makes resources available to candidates.

Regarding Gustafson’s direction to stewards to have members “bring you their ballots,” notwithstanding counsel’s representation, Gustafson and the stewards who received his message are ordered to cease and desist from any activity to collect ballots for marking or mailing, or encouraging that activity by others.

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In the event Local Union 120 does not respond to our show cause order or fails to satisfy the terms of the order, ballots returned from members at the affected work locations, identified above, will be VOIDED.

We further order Local Union 120 to provide us, no later than Friday, November 4, at noon EDT, the full list of mobile phone numbers of all stewards at all worksites under its jurisdiction. We will supply that list to a third-party vendor identified by the Teamsters United slate, for use in transmitting one campaign text message per steward. The vendor may not permissibly transmit or share the list with any person, including any candidate or representative of Teamsters United, and may not permissibly permit review or inspection of the list. After the list has been used as prescribed here, the vendor shall destroy the list and certify that it has been destroyed.

We further order Local Union 120 to post on all worksite bulletin boards under its jurisdiction the notice attached to this decision. Such posting shall be completed no later than Friday, November 4, 2016, and shall be maintained through and including November 15, 2016. No later than Monday, November 7, 2016, Local Union 120 shall certify by declaration under penalty of perjury that the posting order has been satisfied.

OES's investigation of this matter is continuing. If additional evidence of *Rules* violations develops, further remedies will be considered.

Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within two (2) working days of receipt of this decision. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Supervisor in any such appeal. Requests for a hearing shall be made in writing, shall specify the basis for the appeal, and shall be served upon:

Kathleen A. Roberts
Election Appeals Master
JAMS
620 Eighth Avenue, 34th floor
New York, NY 10018
kroberts@jamsadr.com

Copies of the request for hearing must be served upon the parties, as well as upon the Election Supervisor for the International Brotherhood of Teamsters, 1050 17th Street, N.W., Suite 375, Washington, D.C. 20036, all within the time prescribed above. A copy of the protest must accompany the request for hearing.

Richard W. Mark
Election Supervisor

cc: Kathleen A. Roberts
2016 ESD 324

Zuckerman, 2016 ESD 324

November 2, 2016

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Richard W. Mark
Election Supervisor

NOTICE TO MEMBERS OF TEAMSTERS LOCAL UNION 120

The Election Supervisor has found that officers and business agents of Local Union 120 violated the *Election Rules* by using local union resources to urge stewards to get out the vote for a particular slate of candidates in the IBT International officers election. Specifically, the Election Supervisor has found that Local Union 120 President Tom Erickson used union resources to direct his business agents to make “a massive push” to turnout the vote for one slate, and business agents Rosy Rosenthal, James Heeren, and Troy Gustafson used union resources to convey Erickson’s campaign message to stewards. The Election Supervisor has found that Gustafson encouraged stewards to collect ballots from members, which violates the *Election Rules*’ anti-fraud protections. All worksites that Rosenthal services in Iowa and Illinois are affected by his misconduct. The Wilson Trailer facility in Yankton, SD is affected by Heeren’s misconduct. The SuperValu facility in Hopkins, MN is affected by Gustafson’s misconduct.

The Election Supervisor will not permit any such violations of the *Election Rules*. The Election Supervisor has ordered Local Union 120 officials to cease and desist from violating the *Election Rules*. The Election Supervisor has also ordered Local Union 120 to show cause why ballots postmarked after October 19 or received after October 22 should not be voided because of the taint of these *Election Rules* violations.

If you work at a location affected by the violations the Election Supervisor found and mailed your ballot after October 19, you may request a new ballot by phoning (844) 428-8683. Voted ballots must be received by November 14, 2016 to be counted.

The Election Supervisor has issued this decision in *Zuckerman*, 2016 ESD 324 (November 2, 2016). You may read this decision at <https://www.ibtvote.org/Protest-Decisions/esd2015/2016esd324>.

Any protest you have regarding your rights under the *Rules* or any conduct by any person or entity that violates the *Rules* should be filed with Richard W. Mark, 1050 17th Street, N.W., Suite 375, Washington, D.C. 20036, telephone: 844-428-8683, fax: 202-774-5526, email: electionsupervisor@ibtvote.org.

This is an official notice prepared and approved by Richard W. Mark, Election Supervisor for the International Brotherhood of Teamsters. It must remain posted on this bulletin board through November 15, 2016 and must not be defaced or covered up.