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March 5, 1991

VIA UPS OVERNIGHT

William Fleeger
4151 Bethel
Houston, Texas 77092

Richard A. Hammond
President
IBT Local Union 988
3100 Katy Freeway
Houston, Texas 77270

Houston Dairy
Tom Kelleher, General Manager
701 Waugh
Houston, Texas 77019

Re: Election Office Case No. P-436-LU988-SOU

Gentlemen:

On February 2, 1991, a timely pre-election protest pursuant to Article XI, Section 1 of the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*") was filed by William Fleeger, a candidate for delegate from Local 988 to the 1991 IBT International Convention. In his protest, Mr. Fleeger charges that on February 1, 1991, Houston Dairy, his employer, gave him a written reprimand for his engaging in campaign activities specifically permitted under the *Rules*. Mr. Fleeger further charged Union complicity in the determination and issuance of the discipline against him, contending that the union was motivated to do so because he was seeking a delegate position.

I. THE FACTS.

The Election Officer's investigation disclosed the following facts. The employer is in the business of producing dairy products. The employer's general offices are on the floor above the boiler room.

Mr. Fleeger works in the boiler room as a boiler operator. On the door to the boiler room are the words "Restricted Area." Four boiler operators maintain the engines over a 24 hour daily schedule in the boiler room, only one being scheduled at a time. Mr. Fleeger's shift at the time in question was 6:00 A.M. to 2:00 p.m. Each operator

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has a key to the room. The only other keys to the room are in the possession of boiler room supervisors.

It is undisputed that, for many years, a coffee pot has been in the boiler room and the boiler operators have had the option of either taking their breaks there or in the general break area. The operators habitually take unrecorded and unscheduled breaks. There is no supervisory monitoring of the breaks.

Mr. Fleeger filed an earlier protest contending that Houston Dairy was denying him the right to post campaign material on general purpose bulletin boards. That protest was resolved by the agreement of Thomas Kelleher, General Manager of Houston Dairy, to permit, consistent with the Election Officer's position, campaign postings on specified bulletin boards. See P-417-LU988-SOU.

Fleeger then complained to the Election Officer that, notwithstanding the agreement, he was not permitted by Kelleher to place materials on the general purpose boards. Richard Hammond, the President of Local 988, and Kelleher told the coordinator that Fleeger's materials were in fact on the bulletin boards designated as general purpose boards. The Adjunct Coordinator then suggested to Mr. Fleeger that he have witnesses other than himself establish that his materials were not on the bulletin boards, if that was the case.

Lee Sutton, the individual who had seconded Fleeger's nomination as a candidate, works in the milk plant. Fleeger arranged for Sutton to view the bulletin boards in question during their common lunch breaks. Sutton then went into the boiler room where Fleeger was showing him his campaign materials that Fleeger claimed he had not been permitted to place on the bulletin boards.

According to Kelleher, at this time, he was proceeding from the general offices down to the boiler room to talk to Fleeger about the campaign materials which, according to Kelleher, were on the bulletin boards. He states that through the glass in the door he observed Fleeger showing Sutton his campaign material. He then banged on the door which was opened by Fleeger.

According to Fleeger, once in the room, Kelleher stated to Fleeger that would receive a warning letter for campaigning on company time. Fleeger informed Kelleher that both he and Sutton were on their lunch breaks. According to Fleeger, Kelleher then notified him of the two designated general purpose bulletin boards he could use for campaign postings.

On February 1, 1991, Kelleher issued a reprimand letter to Fleeger, but took no action as to Sutton. That letter constitutes discipline under the cumulative discipline procedure followed under the collective bargaining agreement between Houston Dairy and the Local. The text of the reprimand letter reads as follows:

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On January 31, at 12 10 P M. I personally viewed you perform IBT campaign activities on company time in a company work area with a bargaining unit employee.

You will in the future conduct campaign activities on personal time in non-working areas of the premises. Please check with John Manning, your department head, to determine our two ten-minute break periods while you are on the clock, so that it can't be misconstrued as time theft or being off the job without permission on your part.

This is a written warning notice to William Fleeger.

On the same day, the company posted a notice addressed to all operators and others stating

"No one other than operators and engineering staff will be allowed in the boiler room area, shop, etc. The use of a coffee maker is not allowed."

Fleeger stated that he regularly eats his lunch and takes his breaks in the boiler room. He further stated that there has historically been a refrigerator, a coffee pot, a table, and some chairs in the area. He contended that, for many years, company employees from the boiler room as well as from the other areas of the facility would regularly take their coffee breaks in the boiler room. He stated that this use of the boiler room as a break area was constant, during most of any shift, employees would be present in the boiler room drinking coffee.

Other employees confirmed Fleeger's contentions. Employee Eddie Caso stated that the practice of using the boiler room for coffee breaks had persisted for at least 14 years until the Company stopped it, as discussed above. To purchase the coffee and other items consumed by employees using the boiler room for their breaks, a coffee fund was maintained by one of the employees in the boiler room, presently Eddie Hill. Employees from all over the facility, who take their breaks in the boiler shop, contributed to the fund.

Hill stated that he started the milk fund in the boiler room about 14 years ago. The fund would be accumulated by participating individuals making 25 cent deposits in a milk can. According to Hill, both bargaining unit and management personnel would come in together to drink coffee. Hill further stated that the door to the locker room was normally propped ajar with a dolly.

According to boiler operator Ronnie Sorell, he was formerly responsible for maintaining the coffee fund. He stated that the average sum in the fund ranged from \$60 to \$80. He estimated that 1/3 to 1/2 of the company personnel participated in the boiler room coffee fund arrangement. Sorell stated that management supervisors would have coffee in the boiler room together with bargaining unit personnel from other areas in the

facility He specifically named the following management personnel: Joe Gambrell, John Morales, Juan Sadana and Tony Estragard.

Sorell related that in January 1987, while he was working the night shift and maintaining the fund, two non-employees gained access to the facility and the boiler room, demanded the coffee fund, robbed Sorell of both the contents of the fund and his wallet and then locked Sorell in a locker. This incident was the subject of considerable notoriety in the facility. The police were called and Sorell submitted an incident report to the company. The robbery was a subject of discussion by both bargaining unit employees and management officials.

Employee Elroy Hendricks works in the warehouse. He stated that he transports paper cups provided by the company to various areas of the plant. One of those areas is the boiler room break room, where according to Hendricks, hundreds of cups are delivered. Hendricks must get approval from his supervisor, both as to the number of cups and their destination, prior to delivery.

Kelleher admitted that he had no factual basis for concluding in the reprimand that Fleeger was on company time during the incident. He asserted that he did not believe Fleeger's contention that he was on his lunch break. Kelleher freely conceded that he considered Fleeger to be a nuisance. Kelleher admitted that he knew about the coffee pot being in the boiler room, but denied prior knowledge that unauthorized persons were going into the boiler room to drink coffee or for any other purpose. When asked why he did not issue a reprimand to Sutton for going into the unauthorized area, he responded that he felt that Fleeger, who had the key and was responsible for protecting the area, had invited Sutton into the boiler room.

II. FINDINGS.

(1) There is no evidence of union complicity related to the reprimand received by Fleeger. This element of the protest is therefore denied.

(2) IBT members are entitled to campaign in non-work areas of their employer's premises during non-work time. The employer is not entitled to prevent such activities. *Rules*, Article VIII, Section 10, see also Advisory Regarding Political Rights. The evidence is unrefuted that Fleeger's activities at issue were conducted during non-work time.

(3) There remains the question of whether the area in the boiler room was a non-work area. Given the substantial non-work activities conducted in that area, I find that it was at least in part, a non-work area.

(4) Kelleher contends, however, that the boiler room was a restricted area, and Fleeger violated the company policy clearly stated on the door when he invited Sutton into the boiler room. While the area may have been a non-work area for Fleeger, Kelleher apparently contends that Fleeger had no right to engage in campaign

activities in that area, except with other personnel authorized to be in the boiler room. This contention might carry weight under different circumstances. But under the facts of this case, management clearly condoned and on a large scale even participated in the use of the boiler room as a general non-work area. I do not question Kelleher's contention that he personally was unaware of the practice. However, under the circumstances of this case, it is absolutely clear that management as a whole was aware of this long standing and extensive practice of utilizing the boiler room as a general break room for and by employees other than and in addition to the employees authorized to be in the boiler room.

(5) Thus, the boiler room must be considered a non-work area. Under the *Rules*, Fleeger, therefore, has a right to campaign in the boiler room. Since he was on non-work time, his lunch break, the *Rules* granted him the right to engage in campaign activities in the boiler room on January 31, 1991, at 12 10 p m.

(6) The Independent Administrator, in Yellow Freight Systems, Inc., ruled that the Election Officer has jurisdiction over conduct by an employer alleged to have interfered with the right of IBT members to campaign in non-work areas during non-work time. He stated as follows.

The *Rules* promulgated by the Election Officer and approved by order of Judge Edelstein recognize the necessity of equal access to work-sites for campaigning IBT members and provide for jurisdiction over employers in order to enforce this rule. Article VIII, Section 10(d) of the *Rules* states that "no restrictions shall be placed upon candidates' or members' pre-existing rights to solicit support, distribute leaflets or literature . . . or engage in similar activities on employer or Union premises." In addition, in Article XI, Section 2, the *Rules* provide that the Election Officer may take "whatever remedial action is appropriate" including "requiring or limiting access" to such premises. Enforcement of these *Rules* requires jurisdiction over employers such as Yellow Freight.

(7) Since Fleeger was in a non-work area during non-work time, his being reprimanded by his employer for engaging in campaign activities at such time and place constituted interference with Fleeger's rights under Article VIII, Section 10 of the *Rules*

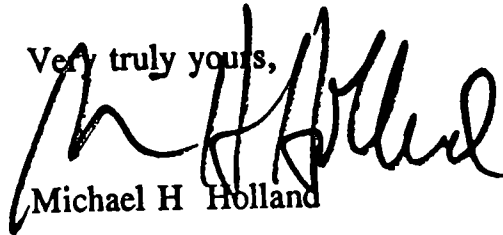
Accordingly, the protest is **GRANTED**. Houston Dairy is ordered to remove the reprimand letter from Fleeger's file and to treat the letter as a nullity with regard to Fleeger's disciplinary record. Houston Dairy shall file an affidavit with the Election Officer within five days of its receipt of this decision demonstrating its compliance.

If any interested party is not satisfied with this determination, they may request a hearing before the Independent Administrator within twenty-four (24) hours of their

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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 Independent Administrator Frederick B. Lacey at LeBoeuf, Lamb, Leiby & MacRae, One Gateway Center, Newark, New Jersey 07102-5311, Facsimile (201) 622-6693. Copies of the request for hearing must be served on the parties listed above, as well as upon the Election Officer, IBT, 25 Louisiana Avenue, N.W., Washington, D. C. 20001, Facsimile (202) 624-8792. A copy of the protest must accompany the request for a hearing.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael H. Holland". The signature is fluid and cursive, with a large initial "M" and "H".

Michael H. Holland

MHH/mca

cc Frederick B. Lacey, Independent Administrator
Larry R. Daves, Regional Coordinator