



OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
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Michael H Holland
Election Officer

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April 3, 1991

VIA UPS OVERNIGHT

Gary Shrader
3859 Meadowlark Rd , SW
Roanoke, VA 24018

Pete Marcus
Arkansas Best Freight
1819 Planation Street , NE
Roanoke, VA 24012

Jim H Gynn
President
IBT Local Union 171
2015 Melrose Ave , NW
Roanoke, VA 24017

Re: Election Office Case No. P-561-LU171-MID

Gentlemen

A pre election protest was filed pursuant to Article XI of the Rules for the IBT International Union Delegate and Officer Election, revised August 1, 1990 ("Election Rules") In his protest Gary Shrader alleges that he was fired from his job with Arkansas Best Freight ("ABF") because he filed a protest with the Election Officer. The investigation of this protest revealed the following

Gary Shrader is employed by ABF as a driver at its Roanoke, VA terminal Shrader is a shop steward for Local Union 171 and has been active in the campaign for the election of delegates and alternate delegates to the 1991 IBT International Convention A pre-election protest, dated February 19, 1991, was filed on Shrader's behalf alleging that ABF and Local Union 171 violated the Election Rules by denying him the opportunity to distribute campaign literature at his work place on nonwork time in nonwork areas That protest was assigned the case number P-533-LU171-MID

Mr Shrader alleged in his protest in case number P-533-LU171-MID, that the ABF Roanoke terminal manager, Pete Marcus, told him that no distribution of campaign materials was allowed anywhere on ABF property at any time It was further alleged that Mr Marcus persisted in his refusal to permit Shrader to distribute campaign literature despite Shrader's showing Marcus a copy of the Election Rules and a notice issued by the Election Officer concerning the right of IBT members to campaign on their

Gary Shrader
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employer's property in nonwork areas during nonwork time. A copy of the protest was served by the Election Office on James H. Guynn, the President of the Local Union, who received it on the morning of February 21, 1991.

After receiving a copy of the protest from the Election Office, Jim Guynn contacted Pete Marcus by phone to discuss the allegations. This conversation took place on the morning of February 21, 1991. During that conversation, Shrader entered the Local Union hall to see Guynn and was announced over the union's intercom system. Shrader stopped by the union hall to discuss a grievance with Guynn. Guynn believed that Marcus heard Shrader's name announced over the intercom and knew Shrader was at the Union hall. Marcus denies it that he heard Shrader's name during his conversation with Guynn.

A few minutes after the completion of the conversation between Guynn and Marcus regarding Shrader's protest, Marcus arrived at the Local Union hall. Marcus instructed Shrader to call into the terminal after the completion of his next two runs. Shrader was subsequently told to report to the terminal and upon his arrival was terminated by Marcus. The basis for his termination was "stealing time" as a result of his stopping off at the Local Union hall for approximately twelve minutes between deliveries.

Mr. Shrader has never been disciplined by ABF. There is no dispute that Shrader went to the union hall on legitimate union business; that the hall was on the direct route to his next delivery stop, that the visit lasted approximately twelve minutes; and that the stop was properly recorded on Shrader's log sheet. Nor is there any dispute that other ABF employees have made personal stops, e.g., to go to the bank, between deliveries and that such conduct has not resulted in discipline.

Article 45 of the collective bargaining agreement between ABF and the IBT requires the employer to give employees at least one warning notice prior to discharge or suspension, except for certain enumerated offenses including "dishonesty". The agreement also provides that discipline shall only be imposed for just cause. Article 54 of the agreement permits two ten minute break periods a day, one prior to and one after the meal break. Article 54 goes on to provide that "[r]est periods are to be taken work station to work station, and not to coincide with or extend the meal period". While not stated in the agreement, pursuant to ABF practice, employees are not permitted to take their first break during the first two hours of their shift. Article 4 of the agreement permits stewards "reasonable time to investigate, present and process grievances on the company property without loss of time or pay during his regular working hours".

A grievance was filed on Shrader's behalf by the Local Union challenging his discharge. A hearing was held on the grievance before the Virginia State Grievance Committee on March 21, 1991. The Committee rescinded Shrader's discharge and

ordered him reinstated, without back pay. The effect of the Committee's action was to convert Shrader's termination into thirty day suspension without pay.¹

The right to invoke the protection of the Consent Order and the Election Rules through the filing of a protest with the Election Officer is a fundamental right of IBT members. The right to file a protest, like the right to campaign or to vote, may not be denied, restrained or interfered with by anyone. Retaliation against an IBT member for filing an election protest is clearly violative of the Election Rules.

In the instant case the Election Officer concludes that Shrader was disciplined by his terminal superintendent Pete Marcus in retaliation for Shrader's filing of an election protest against ABF naming Marcus. This conclusion is supported by the following: Shrader's lack of a past disciplinary record, the fact that Marcus took the action almost immediately after being informed of the allegations in the protest; the severity of the discipline imposed and the lack of justification for the discipline.

The charge against Shrader, i.e., "stealing time", was merely the pretext cited by the employer in an attempt to disguise its retaliation against Shrader for his filing of his election protest. Shrader did not steal any time. He utilized his contractually provided break, whether or not the break was taken prior to his completion of the first two hours of his shift.² The time the break was taken and the place where he went during the break were all noted in writing by Shrader on the trip or time sheet which he completed prior to his return to the terminal and presented to the company prior to his discharge, further refuting any contention that Shrader was acting dishonestly. The discipline cannot be allowed to stand.

The Election Officer orders the following relief to remedy this violation of the Election Rules.

1 ABF, its officers, agents and employees, shall cease and desist from any further or similar conduct interfering with, restraining or coercing IBT members in the exercise of their rights under the Consent Order and the Election Rules, including the right to file protests with the Election Officer.

2 ABF shall remove all references to any discharge or suspension with respect to the February 21, 1991 incident from Shrader's personnel file, and shall be

¹The Election Officer did not conclude that the Local Union's representation of Shrader was inadequate or violative of the *Rules*.

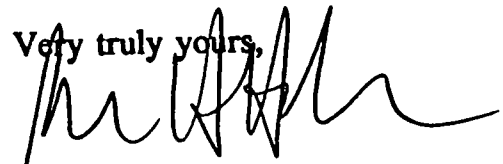
²The Election Officer investigation determined that the discipline imposed by ABF for this violation is a warning. ABF does not consider the offense to constitute dishonesty, i.e., a theft of time. On this basis, the Election Officer refuses to permit the month suspension, the grievance decision, for this minor offense to stand.

permanently enjoined from relying upon any alleged suspension or discharge arising from the incident in any future personnel action concerning or involving Mr. Shrader.

3. ABF shall make Shrader whole for any losses resulting from his suspension.
4. ABF shall post the attached notice on all bulletin boards at its Roanoke, VA terminal.
5. ABF shall, within 10 days of the date of this order, file with the Election Officer an affidavit setting forth, in detail, its compliance with this order.

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 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,



Michael H. Holland
Election Officer

cc Frederick B Lacey, Independent Administrator, IBT
Grant Crandall, Regional Coordinator
Karen A. Keys, Esq
TDU
2000 P Street, N W, Suite 612
Washington, D C 20036

Melvin R Manning, Esq
Manning, Davis & Kirby
1108 Ross Building
801 East Main Street
Richmond, VA 23216

³To the extent that Shrader took his break prior to the completion of the first two hours of his shift, ABF may impose a warning on Shrader for the February 21, 1991 incident consistent with its prior practice

**NOTICE TO ALL MEMBERS OF
IBT LOCAL UNION 171**

You have the right to support and campaign on behalf of candidates for delegate and alternate delegate to the 1991 IBT International Convention

You have the right to support and campaign on behalf of candidates for International Office in the IBT.

You have the right to engage in the distribution of campaign literature on the premises of Arkansas Best Freight ("ABF") in nonwork areas during nonwork times

You have the right to file protests in accordance with the Rules for the IBT International Union Delegate and Officer Election, revised August 1, 1990, if you believe that these rights, or any other right set forth in the Election Rules, have been violated

The undersigned and ABF, its officers, agents and employees, will not interfere with, restrain or coerce you in your exercise of these rights

**Pete Marcus
Arkansas Best Freight**

This is an official notice which must remain posted for a period of not less than forty five days from the initial date of posting. This notice must not be defaced or altered in any manner and must not be covered over with any other material.

APR 12 1991

171/MELO

91 - Elec. App. - 124 (6A)

IN RE:

GARY SHRADER,
and
ARKANSAS BEST FREIGHT,
and
IBT LOCAL UNION NO. 171

DECISION OF THE
INDEPENDENT
ADMINISTRATOR

XMH
BJH
JS
CRANDA

This matter arises out of a appeal from an April 3, 1991, decision of the Election Officer in Case No. ~~91-561-587-511~~ A hearing was held before me by way of telephone conference on April 10, 1991, at which the following persons were heard: John J. Sullivan, on behalf of the Election Officer; Grant Crandall, the Regional Coordinator; the complainant, Gary Shrader; Karen Keys, an attorney on behalf of Mr. Shrader; F. William Kirby, Jr., an attorney on behalf of Arkansas Best Freight ("ABF"); and Jim Guynn, President of Local 171. In addition, ABF submitted a written memorandum setting forth its position. Still further, as usual, the Election Officer submitted his Summary.

BACKGROUND

Mr. Shrader is a member and Shop Steward of Local 171. He is also employed by ABF as a truck driver. Mr. Shrader is an active participant in the election process which is being supervised by the Election Officer in accordance with the Rules For The IBT International Union Delegate And Officer Election (the "Election Rules").

On February 19, 1991, Mr. Shrader filed a protest alleging that ABF prohibited him from engaging in campaign activity during non-work time in non-work areas. The Election Officer upheld that protest in a March 18, 1991, decision in Case No. P-533-LU171-MID. ABF did not appeal that decision. The Election Officer's March 18, 1991, decision is not at issue in this case. It is significant, however, in that two days following the filing of Mr. Shrader's protest (on February 21, 1991), Mr. Shrader was discharged from his employment for allegedly "stealing" time while on duty.

The material facts underlying the "stealing" time incident are not in dispute. On the morning of February 21, 1991, Mr. Shrader stopped at the Union hall, while on duty, to process a grievance. While at the Union hall, Mr. Shrader was approached by ABF Manager Franklin Marcus. Mr. Marcus told Mr. Shrader to report back to the ABF terminal after his next two deliveries. When Mr. Shrader went back to the terminal he was terminated for "stealing" time due to his stop at the Union hall. Mr. Shrader's stop at the Union hall lasted only twelve minutes and was recorded in his driver's log. In addition, Mr. Shrader's stop did not divert him from his route as the Union hall was on the way to his next stop. Mr. Shrader had never been disciplined by ABF before the incident in question.

Mr. Shrader filed a grievance pursuant to the Local's collective bargaining agreement challenging his discharge. A grievance hearing was held on March 21, 1991. The Virginia State Grievance Committee sustained the grievance, rescinded the

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discharge, and ordered Mr. Shrader reinstated without back pay, but with his seniority.

THE JURISDICTION ARGUMENTS

ABF raises a threshold jurisdiction claim arguing that the Independent Administrator and the Election Officer have no jurisdiction over it as it was not a party to the Consent Order. ABF recognizes, however, that such claims have already been rejected by the Independent Administrator. See In Re: McGinnis, 91 - Elec. App. - 43 (January 23, 1991), aff'd, United States v. IBT, slip. op., 88-CIV-4486 (DNE) (S.D.N.Y. April 3, 1991). The Independent Administrator's ruling in McGinnis is fully applicable here.

ABF suggests that this case is distinguishable from McGinnis. ABF suggests that "only a United States District Court, under Section 301 of the Taft-Hartley Amendments to the National Labor Relations Act, may entertain an action for breach of a collective bargaining agreement in a proper case brought pursuant to the Federal Rules of Civil Procedures. In such case, ABF is entitled to trial by jury." In making this argument, ABF misses the point. In considering Mr. Shrader's protest, the Election Officer is not "entertain[ing] an action for breach of a collective bargaining agreement," rather the Election Officer is considering an alleged violation of the Election Rules.

Moreover, ABF argues that "to the extent the matters arising in this case involve unfair labor practices, it is the position of

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ABF that under the provisions of Section 10(a) of the National Labor Relations Act, only the National Labor Relations Board has jurisdiction to hear and decide such matters, pursuant to its Rules." What is at stake here is not an "unfair labor practice," but rather a potential violation of the Election Rules.¹

ABF further argues that the Election Officer cannot "overturn" the decision of the Grievance Committee. In addition, ABF argues that the decision of the Grievance Committee is in full accordance with the provisions of the collective bargaining agreement. ABF further notes that the Grievance Committee decision followed a full and complete hearing.

The Election Officer has jurisdiction independent of the Grievance Committee. The Election Officer is not overturning the decision of the Grievance Committee, but rather addressing a violation of the Rules independent of the Grievance Committee's actions. That the Election Officer's decision may have the effect of modifying the decision of the Grievance Committee is of no moment.²

¹ Nonetheless, in McGinnis, the Independent Administrator such that the National Labor Relations Board does not have such exclusive jurisdiction that would preclude either him or the Election Officer from interpreting and applying federal labor law.

² In the Election Officer's supplemental letter of April 11, 1991, he stated that the claim raised by Mr. Shrader:

[I]s analogous to a claim brought under Section 8(a)(4) of the National Labor Relations Act 29 USC §158(a)(4). Section 8(a)(4) of the Act protects employees from discrimination because of their filing a charge or giving testimony before the National Labor Relations Board. It is a well-recognized principle that the NLRB and the
(continued...)

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THE MERITS OF THE PROTEST

Turning to the merits of Mr. Shrader's protest. As stated by the Election Officer in his Summary:

[T]he right to file a protest and invoke the protections of the Election Office is a fundamental right guaranteed by the Election Rules and the underlying Consent Order of March 14, 1989.

The Election Officer concluded that:

In this case, the conclusion that Mr. Shrader was discharged in retaliation for filing a protest is inescapable. As an employee who had no prior discipline, Mr. Shrader was summarily discharged -- in the absence of the warning generally required by the collective bargaining agreement -- for taking 12 minutes from his working day to discuss a grievance at the union hall. Processing grievances is part of the activities of a union steward authorized by the contract.

In addition, Mr. Shrader was entitled by the contract to a 10-minute break. Mr. Shrader did not deviate from his route to make the stop; the Union hall was on the route between his deliveries. Even assuming this brief stop was for personal business outside of normal break time, it was established that it was common practice, and in accord with the collective bargaining agreement, for the drivers to run brief personal errands between deliveries. Although such breaks were generally not taken within the first two hours of work, ABF's practice in regard to this conduct was not to discharge offending employees but only to impose a warning.

The conversion of Mr. Shrader's infraction -- if indeed there was any infraction at all -- to that of "stealing time" appears motivated solely by a desire to force a minor charge into the "dishonesty" exception that would allow Mr. Marcus to circumvent the contractual warning requirement. Mr. Shrader cannot be said by any stretch of the English language to have "stolen" time; he reported his stop at the union hall accurately on his manifest. Even if ABF found that he abused his time in some way that is not apparent to the Election Officer,

²(...continued)

courts will not defer to an arbitration award in cases where the employee alleges a violation of Section 8(a)(4).

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that does not constitute "dishonesty" as used to absolve ABF of the normal requirement of a warning prior to more severe discipline.

The collective bargaining agreement allows Shop Stewards "reasonable time" during working hours to process grievances "on the company property." The collective bargaining agreement also provides that Shop Stewards may take such action "off the property" as mutually agreed to by the Local and the employer. There was no such agreement here. Thus, Mr. Shrader's stop may have constituted a technical violation of this provision.

In addition, the collective bargaining agreement provides that employees may have two 10-minute rest periods during each shift. Pursuant to its contract, however, ABF does not permit such breaks before the second hour of work. Since Mr. Shrader's 12-minute stop at the Union hall was before his second hour of work, this also may have constituted a technical violation of ABF's contract.

The past practice of ABF, however, is wholly inconsistent with the action taken here. It appears that ABF has never disciplined a member, let alone a Shop Steward, for stopping at the Union hall while in route to another destination. Moreover, it is apparently a common practice for drivers to take care of brief personal business, such as stopping at a bank or visiting a store, between deliveries.

As for taking an untimely break, the collective bargaining agreement provides that a warning must first be given before further discipline is taken. Mr. Shrader had no prior discipline,

thus if any discipline was warranted, a warning should have first been issued.

The obligation to first issue a warning is waived if the transgression involved concerns, inter alia, an act of "dishonesty." Obviously, ABF was attempting to avail itself of this exception by characterizing Mr. Shrader's twelve-minute stop as "stealing" time. Despite ABF's characterization, there was no dishonesty here. Mr. Shrader stopped, during business hours, at his Union hall. He did not attempt to hide his stop in any way. I find it especially significant that Mr. Shrader logged his twelve-minute stop in his own manifest.³ Certainly, if he was trying to "steal" time, he would not have documented his action.

ABF argued that its characterization of Mr. Shrader's "stealing" time is not a pretext and is supported by precedent. ABF relies on the decision of the Virginia State Grievance Committee in Local Union No. 592 v. Yellow Freight Systems, Inc. (discharge of Al E. Elmer decided July 18, 1984) in support of its position. The Local 592 case has no relevance here.

First, while Local 592 involved the same collective bargaining agreement, it concerns a different employer than ABF. It is the past practice of ABF that is probative. ABF did not come forward with a single example of its having disciplined an employer for "stealing" time in the past. Second, Local 592 involved a clear pattern of abuse of time and the intentional falsification of the

³ ABF suggests that Mr. Shrader's entry in his manifest was made after the fact. Nothing was offered to support this contention and I reject it.

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driver's log to cover-up the abuse of that time. In short, Local 592 involved an unambiguous act of dishonesty. Such is not the case here.

Moreover, the timing of the discharge can not be ignored. It occurred two days after Mr. Shrader filed his protest with the Election Officer challenging ABF's overly restrictive stance on campaign activity.⁴

In the past, when the Independent Administrator has reviewed allegations that a discharge or discipline was motivated, at least in part, by an employee's protected campaign activity, he has applied a "mixed motive" analysis. See In Re; Coleman, 90 - Elec. App. - 18 (SA) (December 14, 1990). As explained in Coleman:

The National Labor Relations Board has adopted a rule for resolving cases involving a "mixed motive." This rule, adopted by the Board in Wright Line, 251 NLRB 10182, 105 LRRM 1169 (1980), aff'd, 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), requires:

that the [complaining party] make a prima facie showing sufficient to support an inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

105 LRRM 1175. The Board's Wright Line test for resolving mixed motive cases was drawn from the Supreme Court's decision in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1979). The Supreme Court upheld the Board's Wright Line analysis in

⁴ In addition, ABF alleges that Mr. Marcus' observation of Mr. Shrader at the Union Hall was purely coincidental. The record suggests that Mr. Marcus may have had knowledge of Mr. Shrader's presence at the Hall and thus, rushed over to the Hall to catch Mr. Shrader.

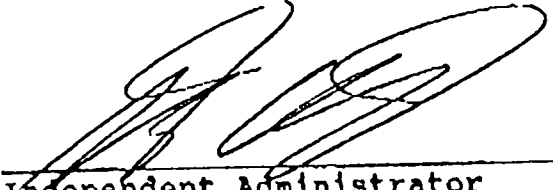
NLRB v. Transportation Management Corp., 462 U.S. 393
(1983).

The Election Officer did not rely on the Wright Line analysis in reaching his conclusion here. The Election Officer suggests that the Wright Line test is only applicable when protected "campaign activity" is at issue. Here, what is at issue is the right of Mr. Shrader to file a protest under the Election Rules, not his right to campaign, per se.

Under either a strict application of the Wright Line test or simple consideration of the totality of the circumstances, it is clear that the Election Officer reached the proper conclusion.

Examining the totality of the circumstances, I agree with the Election Officer that "the conclusion that Mr. Shrader was discharged in retaliation for filing a protest is inescapable." Following Wright Line, it can not be denied that Mr. Shrader made a prima facie showing that the filing of his protest was a "motivating factor" in his discharge. Thus shifting the burden, ABF has not demonstrated that it would have taken its action but for the filing of the protest. As noted, ABF did not come forward with a single instance of its disciplining on employees for "stealing" time.

Accordingly, the decision of the Election Officer is affirmed in all respect.



Independent Administrator
Frederick B. Lacey
By: Stuart Alderoty, Designee

Dated: April 12, 1991