

OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, NW
Washington, DC 20001

Michael H. Holland
Election Officer

October 11, 1991

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VIA UPS OVERNIGHT

Dennis Mello
401 Old Fall River Rd.
Swansea, MA 02777

Alfred Andrade
Secretary-Treasurer
IBT Local Union 526
4 Anawan Street
Fall River, MA 02722

Brian Palmer
270 Fairwood Dr.
Tiverton, RI 02878

Howard Johnson
Vice President, Industrial Relations
Arkansas Best Freight
P. O. Box 48 301 Smith 11th Street 72901
Fort Smith, AR 72902

Re: Election Office Case No. P-782-LU526-ENG

Gentlemen:

A protest was filed with the Election Office pursuant to Article XI of the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("*Rules*"). In his protest, Dennis Mello alleges that he was fired by Arkansas Best Freight ("ABF") because of his support and campaigning on behalf of Brian Palmer, a successful candidate for delegate to the 1991 IBT International Convention. The Election Officer's investigation revealed the following.

Dennis Mello is a member of Local Union 526. Mr. Mello was employed as a driver by ABF at its Seekonk, Massachusetts terminal. On April 19, 1991 Mello was terminated by Charles Pretto, the Branch Manager of the Seekonk ABF facility. Mello was employed by ABF for 17 years, during which period he had never been issued a letter of warning or any other form of discipline. Mello previously served as the Vice President of the Local Union, and was the ABF shop steward at the time of his discharge.

Local Union 526 was authorized to send a single delegate to the 1991 IBT International Convention. In December, 1990, Brian Palmer, also an ABF employee at Seekonk, decided to run for delegate from Local Union 526. Alfred "Fred" Andrade, the principal officer of the Local Union and its sole business agent, also sought the position of delegate. Palmer solicited Mello's support for his candidacy. Mello agreed to support Palmer, and actively campaigned on his behalf among employees at ABF.

ABF and its Branch Manager, Charles Pretto, were aware of Palmer's challenge to Andrade and of Mello's support of Palmer's candidacy. On numerous occasions,

Dennis Mello
October 11, 1991
Page 2

Pretto asked Mello at grievance meetings how Palmer's campaign was going. Pretto would also ask other IBT members why they were getting involved in Palmer's campaign and, would state that, in his opinion, Andrade was doing a good job.

The nominations meeting for Local Union was held on Sunday January 20, 1991. Two candidates for the position of delegate were nominated, Palmer and Andrade. Palmer's nomination was seconded by Mello. Mello was unable to attend the meeting, and submitted his second in writing. See Article II, Section 3(f) of the *Rules*.

By letter dated January 21, 1991, Andrade protested Palmer's nomination alleging, *inter alia*, that Mello wrongfully used ABF time and stationary to prepare his written second of Palmer's nomination. The unauthorized use of time paid by the employer for personal reasons is commonly referred to as "theft of time" in the trucking industry. Pretto asked Mello about Andrade's allegation of theft of company time, which Mello denied. The Election Officer ruled that neither Palmer nor Mello wrongfully used employer time or resources for Palmer's nomination, and denied Andrade's protest. See, Election Office Case No. P-387-LU526-ENG (February 7, 1991).

The delegate campaign was hotly contested. Ballots were mailed to members of Local Union 526 on or about February 19, 1991, and counted on March 9, 1991. Palmer was elected delegate, and subsequently served in that capacity at the 1991 IBT International Convention.

On 6:00 a.m. on March 21, 1991, Mello reported for work at the ABF Seekonk terminal. He was assigned to take a load of freight to the Mark Stevens warehouse in Woonsocket, Rhode Island. Another ABF driver, Manny Alves, reported for work with Mello, and was also assigned to take a load of freight to Mark Stevens. Both Mello and Alves left the ABF terminal and arrived at Mark Stevens shortly after 7:00 am. Mello was assigned a door by Mark Stevens personnel, and moved his trailer into position to unload the freight. When Alves arrived, he was assigned a door near Mello.

Mello was assigned a Mark Stevens employee, who served as a checker for his load. The checker made sure that all of the items listed on the two delivery bills were accounted for, and that the cartons making up the shipments were properly sorted on pallets outside the truck. The unloading, sorting, and checking of Mello's load was completed by 11:30 a.m., as evidenced by the checker's notation on the delivery bill.

However, after the checker signs off on a load, the driver still has the responsibility to insure that the area and his truck are clean, pallets secured, the door of the trailer closed, any refused or damaged freight ready for shipment, and the trailer moved away from the loading dock. The driver must also recover the shipper's copies of the way bills from the warehouse office. This process usually takes a few minutes,

depending upon the condition of the freight, the number of pallets, and whether any freight has to be returned as damaged.

Mello does not recall exactly when he finished working on his load. He believes that it was between 11:40 and 11:50 when he was finished with all of the tasks associated with his load. The usual procedure when a driver finishes his load is to call the ABF dispatcher for a new assignment. However, Mello failed to call his dispatcher, but rather went to help Manny Alves to unload his freight which had shifted. Mello and Alves worked unloading and sorting the load until approximately 12:00 noon, when the lunch truck came. Both Mello and Alves took a half hour lunch break, and returned to the load at approximately 12:30. They were finished unloading and sorting the freight and cleaning up at approximately 1:00 pm. Mello then went to the bathroom to wash up, and then to the drivers' room to call his dispatcher. After waiting for another driver to finish using the phone, Mello reached his dispatcher. Mello was given another assignment, handed in his visitors badge to the Mark Stevens personnel, returned to his truck, and left the Mark Steven facility at 1:15 p.m.

Mello reported for work at 6:00 a.m. on Friday April 19, 1991. He was called into Pretto's office along with Alan Menard, another employee. Pretto showed Mello a copy of his log sheet for March 21, 1991 and the way bills for the Mark Stevens shipment. Pretto asked Mello if that was his log sheet. When Mello admitted that it was it log, Pretto stated that he was fired for dishonesty. Mello asked Pretto if he could explain what happened. Pretto said that he wasn't interested in his explanation, but then agreed to hear Mello. Mello explained that he spent the time after the completion of his load and before leaving Mark Stevens, on his lunch break and helping another ABF driver, Manny Alves, with a load that had shifted. When Mello finished his explanation, he was asked to leave the terminal by Pretto.

Mello's termination was confirmed by letter from Pretto dated April 21, 1991. In that letter, Pretto stated that Mark Stevens contacted ABF on April 11, 1991, questioning a charge for detention for Mello's delivery on March 21, 1991.¹ The letter goes on to state that:

Upon investigation of your drivers log, and their receiving records, which was completed on Thursday April 18th, it was determined that you completed your work assignment at 1130 although your log reflects 1315. This was a difference of 1 hour and 15 minutes, excluding your lunch. There was no notification from you to the dispatcher advising him of you

¹ Mr. Mello's logs were reviewed after ABF received a complaint from its customer Mark Stevens about the bill sent by ABF for the delivery time on March 21, 1991.

(sic) status in order to received another work assignment during any of this time period.

In accordance with Article 47 of the New England Supplement of the National Master Freight Agreement, this discharge letter is being issued for being dishonest.

During the course of the Election Officer's investigation, Andrade stated that he could not remember another IBT member employed at ABF's Seekonk terminal being fired during the eight years that he has been Secretary-Treasurer of the Local Union. The Election Officer requested the Local Union to produce copies of all notices of discipline imposed on ABF employees at Seekonk in the last five years. The Local Union receives copies of these disciplinary letters in the normal course of business. In response to the Election Officer's request, the Local Union produced 25 disciplinary letters issued to IBT represented employees at the Seekonk terminal in addition to Mr. Mello's termination. The oldest letter was dated July 2, 1985, and the most recent was dated July 16, 1991. During this period, there have been between 15 and 18 drivers employed at the Seekonk terminal.

Fourteen of the letters involve accidents by drivers. The punishment imposed in these cases ranged from a letter of warning to a two-day suspension. Five letters involve absenteeism, lateness, or a "failure to protect start time". The punishment ranged in these cases from a warning letter to a one-day suspension. The six other cases involve facts or allegations similar to those that served as the basis of Mello's discharge, and will be discussed individually.

On July 7, 1986, the employer found employee John Pelland guilty of "falsification of company documents". This charge was based on the fact that the employee's drivers log did not accurately reflect the times for the stops indicated. The employee was issued a letter of warning.

On October 7, 1985, driver James Warner was charged by ABF with "abuse of company time". This charge was based on the fact that the employee took 25 minutes, rather than 10 minutes, for a coffee break. The employee was issued a letter of warning.

On October 5, 1985, driver Brian Palmer was charged with "failure to follow instructions". This charge is based on the fact that Palmer was given written instructions to call the dispatcher at 11:30 a.m. for a load, but he failed to call in until 12:40 p.m. Palmer was issued a letter of warning.²

² This incident occurred well before Palmer became active in campaign activities subject to the protection of the Election Rules.

On September 12, 1985, driver Edward Papineau was charged with "failure to follow instructions" because of his failure to properly stow freight on his trailer. Papineau was issued a letter of warning.

The most severe disciplinary penalty imposed by ABF on an employee at the Seekonk terminal in the last 6 years involved Edward Cassady. On October 14, 1986, Mr Cassady's unattended truck was observed parked on Route 114 near Seekonk. The truck and trailer, with freight, was parked in the opposite direction of his destination. When Cassady's drivers log was subsequently checked, it indicated that he had taken his lunch on Route 6 in Seekonk, and there was no indication of a stop on Route 114.

By letter dated October 17, 1986, Cassady was charged with four separate offenses: Falsification of Company Documents; Unauthorized Stop; Out of Route, and Stealing Time. The punishment for this offense was a two-week suspension. On October 20, 1986, the two-week suspension was reduced by ABF to a one-week suspension after the filing of a grievance and discussion between Andrade and Preto.

The October 17, 1986 suspension was not Cassady's only or first discipline by ABF. On December 18, 1985 Cassady received a warning letter for "failure to follow instruction" because of his refusal to pick up an assigned load. He was given a warning letter for that offense. In the month prior to the incident resulting in his suspension, September 22, 1986, Cassady had been given a warning letter for lateness in reporting for work. On December 9, 1986, Cassady was given a another warning letter for an accident.

A grievance was filed on Mello's behalf by Andrade challenging the discharge. A grievance meeting was held between Mello, Andrade, and Preto in the week following the discharge. Among the items discusses was a possible reduction of the penalty imposed. Preto stated that the only modification to the discipline imposed would be to accept Mello's resignation.

The grievance was not resolved, and was ultimately heard by the New England Joint Area Committee ("NEJAC"). Mello was represented by Andrade at the NEJAC. Mello presented a number of signed and notarized statements from ABF and Mark Stevens employees, as well as statements from employees from other trucking companies who were at the Mark Stevens warehouse at the time. These statements indicated that when Mello finished unloading his truck, he helped Alves unload his trailer, that both Mello and Alves stopped for lunch, and when they returned from their lunch break, they finished their work. Other ABF employees provided statements indicating that it was not uncommon for drivers to help other ABF drivers with their loads when they were finished with their work.

In addition to the submission of the written statements, both Mello and Alves testified before the NEJAC. During his testimony, Alves confirmed that Mello had helped him with his load that had shifted. However, under cross examination, Alves seemed unsure about some of the details about the times involved and the content of his load.³ Mello testified that after he was finished with his load, he helped Alves and, with the exception of lunch, worked on the load until he left the facility. Mello confirmed that he did not call his dispatcher when he was finished with his load to let the dispatcher know that he would be helping Alves with his load. The only evidence presented by the employer to the NEJAC was the freight bill showing the completion of the unloading of Mello's freight and Mello's driver's log, indicating Mello's 1:15 p.m. departure from the Mark Steven's facility.

No allegations were raised or considered by the NEJAC regarding Mello's campaign activity. Nor was any evidence presented to the NEJAC that the discipline imposed was inconsistent with the discipline imposed in prior cases involving similar or more serious offenses by employees. The Election Officer's investigation revealed that the quality of Andrade's representation of Mello was consistent with his prior representation of other members of the Local Union. The NEJAC voted to deny Mello's grievance.⁴

Pretto discharged Alves upon his return to work after the hearing. The basis for the discharge was Alves' alleged "falsification of company documents" because of the improper notation of lunch time on his driver's log. Andrade intervened arguing that it looked as if Alves was being fired because he testified on Mello's behalf. Alves was subsequently reinstated by Pretto without any discipline or loss of pay.

³ Alves' and Mello's logs indicate that they took lunch between 11:30 to noon. Both testified that they took lunch from noon to 12:30 PM. Article 53, Section 3(c) of the New England Supplement to the National Master Freight Agreement states that employees shall begin their lunch prior to the completion of their fifth hour of work. Employee who work through the fifth hour are entitled to additional compensation. Since both Alves and Mello started work at 6:00 a.m., they should have begun their lunch between 11:00 a.m. and noon. The Election Officer's investigation revealed that Pretto has told employees that he does not care what time they mark in their logs for lunch as long as he does not have to pay any additional compensation for their working through the fifth hour.

⁴ The Election Officer concludes that Andrade did not discriminate against Mello with respect to the quality of his representation in violation of the *Rules*. Similarly, because the issue of Mello's campaign activity was not raised before the NEJAC, and the members of the committee were not otherwise aware of Mello's campaign activity, the Election Officer has no basis for concluding that the decision of the panel was tainted by campaign related animus in violation of the Election Rules. See, e.g. Thomas v. UPS, 890 F. 2d 909 (7th Cir. 1989); In Re: Braxton and UPS, 91-Elec. App-147(SA).

The right to campaign freely and openly on behalf of candidates for delegate and International Office is one of the fundamental guarantees of the **Rules**. See, e.g., Article VIII, Section 10. It is a violation of the **Rules** for the Union or an employer to discriminate against an IBT member because they have engaged in activity protected by the **Rules**. See, e.g., In Re: Coleman and Advance Transportation, 90-Elec. App.-18(SA) and In Re: Shrader and ABF, 91 -Elec. App.-124(SA). 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: Tuffs and Advance Transportation, 91-Elec. App.-191(SA) (removal of warning letter from personnel file): In Re: Henderson and Star Market, 91-Elec. App.-187 (SA)(reinstatement with back pay).

It is not unusual for an employer to justify its discipline of an employee by relying on factors other than the employee's protected activity. Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987) (Defendants of even minimal sophistication will neither admit discriminatory animus, nor leave a paper trail demonstrating it.) It is said that in such a situation, an employer has a "mixed motive" for its action; a lawful motive combined with an unlawful one. The National Labor Relations Board has adopted a rule for resolving cases involving a "mixed motive" discipline. This rule, adopted by the Board in Wright Line, 251 NLRB 10182, 105 LRRM 1169, 1175 (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.

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 NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). The Election Officer has applied the Wright Line test in a number of cases alleging employer discrimination against IBT members motivated by the members participation in protected election activities. The Independent Administrator has upheld the Election Officer's application of this test in In Re: Coleman, supra.

Applying the Wright Line test on the facts of this case, the Election Officer finds that Mello has met his initial burden of proof with respect to his prima facie case. ABF was well aware of Mello's election related activity on behalf of Mr. Palmer. On

numerous occasions, Charles Pretto would ask Mello and other employees how the campaign was going. Pretto was aware that Mello seconded Palmer's nomination for the position of delegate, running against Andrade, as a result of the protest of that nomination filed by Andrade. Mello was a prominent IBT member at the Seekonk terminal; he was the shop steward for the facility for over five years and a past officer of the Local Union, and his support of and activity for Palmer was an important part of Palmer's campaign.

Pretto clearly was interested in the outcome of the delegate election. This is evidenced by his statements to other employees concerning their campaign activity. His statements that "Andrade was doing a good job" suggest that Pretto favored Andrade's election.⁵

Under the Wright Line analysis, the burden now moves to the employer to prove that it would have fired Mello for the offense charged, even in the absence of his protected campaign activity. For the following reasons, the Election Officer finds that ABF would not have fired Mello in the absence of his protected campaign activity.

Pretto's termination of Mello was clearly an unusual event. While ABF may have had an independent basis for reviewing Mello's logs -- the billing complaint from Mark Stevens -- its determination to discharge, and the manner in which it imposed such discipline, were most unusual. In Andrade's eight years as Secretary-Treasurer, he could not remember another case involving the termination of an IBT member employed by ABF at Seekonk. In all of the disciplinary cases reviewed by the Election Officer, spanning a period of six years, none involve a discharge. The absence of discharges is particularly significant given the fact, as discussed below, that other employees were charged with similar or greater offenses. In considering pretext claims, the NLRB and the courts have considered whether the severity of the discipline in question is a departure from past practice. Southwire Co. v. NLRB, 820 F. 2d 453 (D.C. Cir. 1987); NLRB v. Bishopric Prod. Co., Oberle-Jorde C. Div., 777 F 2d 1119 (6th Cir. 1985). The severity of the discipline imposed in Mello's case was clearly a break with the past.

Mello was discharged soon after the completion of a hotly contested election campaign in which the candidate that Mello supported defeated the incumbent Secretary-Treasurer apparently favored by Pretto. The NLRB and the courts consider the timing of discipline in discrimination cases, and conclude that the proximity of the protected activity to the imposition of discipline is relevant in assessing the employer's motive.

⁵ Pretto's animus toward Mello because of Mello's election related conduct is also evidenced by Pretto's termination of Alves the day after Alves testified on Mello's behalf. The reason stated by Pretto for Alves' termination, "falsification of company records", i.e., the entry of inaccurate lunch times in his log book, was clearly pre-textual.

Dennis Mello
October 11, 1991
Page 9

Jim Causley Pontiac v. NLRB, 620 F.2d 122 (6th Cir. 1980); NLRB v. Stark, 525 F.2d 422 (2d Cir. 1975), cert. denied, 424 US 967 (1976).

In addition, as reflected in ABF's written notice to Mello of his termination, the decision to terminate Mello was made before he was confronted with the charges or given an opportunity to respond.⁶ The only evidence presented by ABF in support of its charge of "dishonesty" is limited to Mello's log book and the shipping bills from Mark Stevens. ABF did not investigate whether Mello was assisting another driver during the period in question, nor did it offer any evidence that Mello was not working during the period in question.⁷ In contrast, Mello presented substantial evidence that he was working during the period in question. The Court of Appeals in W.W. Grainger, Inc. v. NLRB, 582 F.2d 1118 (7th Cir. 1978), held that a failure to properly investigate the facts of the incident upon which the employer relies as ground for a discharge may reflect a discriminatory motive.

The best evidence in ABF's discriminatory motivation in discharging Mello, and proof of the fact that it would not have fired him but for his campaign activity, can be found in an examination of the six-year record of discipline imposed by ABF at its Seekonk facility. NLRB v. Long Island Airport Limousine Service Corp., 468 F.2d 292 (2d Cir. 1972). Assuming for the purpose of analysis that Mello is guilty of the conduct alleged, it could be argued that he is guilty of the following offenses: failure to call his dispatcher when he finished his load; falsification of company documents for the inaccurate entries in his driver's log; and, theft of time resulting from the period between the completion of his load and his departure from the Mark Stevens facility. The record of prior discipline contains other cases in which employees have been charged with similar, or more serious offenses, and have received far less discipline.

Mello's failure to call his dispatcher is similar to the offense committed by Brian Palmer in October, 1985. In that case, Palmer had been given specific written instruction to call the ABF dispatcher at 11:30 a.m. Palmer failed to call the dispatcher until 12:40 p.m. There is virtually no difference in Palmer's one hour and ten minute delay in calling the dispatcher and Mello's hour and fifteen minute delay in calling the dispatcher. For his offense, Palmer was issued a warning letter. In another "failure to follow instructions" case, Edward Cassady failed to pick up a load of freight after being

⁶ The employer's discharge letter, dated April 21, 1991, states that the employer's investigation was completed on April 18. Mello was first confronted with the allegations on April 19, when he was fired. He was only given a chance to explain, and bring relevant facts to the attention of the employer, after the decision was made to fire him.

⁷ Article 61, Section 8 of the New England Supplement provides, in part, that "[a]ll employees covered by this Agreement shall be paid for all time spent in the service of the Employer."

specifically being told to do so by his dispatcher. This offense, almost rising to the level of insubordination and resulting in a delay in picking up the load, resulted in only a written warning.

The record contains other examples of cases in which ABF has disciplined employees for "falsification of company documents". Driver John Pelland was charged with the offense because of inaccurate entries in his driver's log. Pelland apparently entered incorrect times for his stops, including his completion of pickups and deliveries, in his driver's log. Pelland was issued a warning letter.

Two drivers at the ABF Seekonk terminal, other than Mello, were charged with using employer paid time for non-work purposes. In October 1985, driver James Warner received a warning letter for the offense of "abuse of company time".⁸ The offense was based on the fact that Warner was observed extending his 10 minute coffee break to 25 minutes.

The other charge arose out of the October 14, 1986 incident involving Edward Cassidy. Cassidy was charged with "stealing time" for the incident. In addition, Cassidy was charged with three other offenses, i.e., "falsification of company documents", "out of route", and "unauthorized stop". Two of the offenses committed by Cassidy involve dishonesty, theft of time and falsification of documents to conceal the theft, and two of the offenses involve the unauthorized use of an ABF vehicle, driving out of route, and an unauthorized stop. While Mello was charged with an offense based on theft of time, he is not alleged to have compounded the offense with a fraudulent attempt to conceal the theft. Moreover, there is no allegation that Mello used a company vehicle for his own purposes. Cassidy's use of an ABF vehicle for his own benefit not only involved a misuse of company property, it exposed ABF to liability to its customers for damage to the freights and/or to third parties because of the operation of the vehicle, e.g., accidents.⁹

⁸ The employer's characterization of the offense as "abuse of company time" vs "theft of time" or "dishonesty" is significant given the contractual requirement of progressive discipline. Article 47 of the New England Supplement of the National Master Freight Agreement provides that with "respect to discharge or suspension [the employer] shall give at least one warning letter". However, the agreement goes on to provide that in certain specific situations, including cases involving "dishonesty", no warning notice is required.

⁹ Further, in the Cassidy case there was direct evidence of Cassidy's offenses based on the observation of his unattended truck on the side of the road pointing in a direction away from his direction of travel along his route. There was no mention of this stop in Cassidy's driver's log and a conflicting notation that he had taken his lunch break at another location. As noted above, the only evidence in Mello's case is his log book and the shipping bills from Mark Stevens.

Dennis Mello
October 11, 1991
Page 11

The offense allegedly committed by Mello, even if true, is far less severe than the offenses committed by Cassady. As such, the appropriate discipline in Mello's case should have been far less -- and in any event no greater -- than the one week suspension imposed in Cassady's case. Based upon the entirety of his investigation, the Election Officer concludes that imposition of discipline upon Mello greater than a one-week suspension violates the **Rules**.

ABF will argue, as other employers have done, see, e.g., In Re: Henderson and Star Market, supra, that the decision of the NEJAC denying Mr. Mello's grievance is dispositive of his claim. However, the claim advanced by Mello under the **Rules** is different from the contractual claim that was litigated in his grievance. It is well recognized that there are rights that affect employment relations that exist outside of the bounds of a collective bargaining agreement. See, e.g., Lingle v. Norge Division, Magic Chef, 486 U.S. 399, 411 (1988); Barrentine v. Arkansas-Best Freight, 450 U.S. 728, 744 (1981); Alexander v. Gardner-Denver Company, 415 U.S. 36, 53 (1974). The right of an IBT member to be free from discrimination because of their election related activity is a right separate from the rights guaranteed by the collective bargaining agreement. These rights are enforceable under the procedures established by the **Rules**.

ABF may argue that the Independent Administrator should defer to the decision of the NEJAC under the principals articulated by the NLRB in Olin Corp, 268 NLRB 573 (1984). Under Olin, the NLRB will defer to an arbitration award in an unfair labor practice case where (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. A fair presentation of the facts which underlie the unfair labor practice claim is an important element of the Olin test for deferral. See, e.g., Ryder Truck Lines, 273 NLRB 713 (1984) (no deferral because facts relating to the unfair labor practice claim did not receive an adequate "airing"); Wheeling-Pittsburgh Steel Corp., 277 NLRB 1388 (1985), enf. 821 F. 2d 342 (6th Cir. 1987) (deferral inappropriate where facts relative to safety hazard not fully presented at arbitration).¹⁰

The allegation that Mello was terminated, and otherwise discriminated against by ABF, because of his election activity was not raised before or considered by the NEJAC. Similarly, the NEJAC did not consider the facts concerning the disproportionate discipline imposed on Mello because these facts were never presented to the NEJAC. For these reasons, even if an Olin standard was appropriate in the consideration of an election protest, deferral to the decision of the NEJAC is inappropriate on the facts of this case.

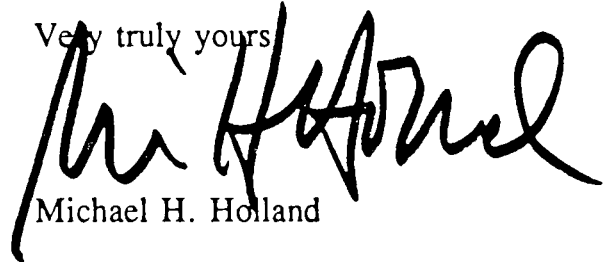
¹⁰ The General Counsel of the NLRB has, despite ABF's reliance on the decision of the NEJAC, issued a complaint alleging that Mello's termination was a violation of the National Labor Relations Act. A hearing on that complaint is currently scheduled for March 25, 1992. That this complaint is pending does not, however, require that the determination of this protest be deferred. In Re: Tuffs and Advance Transportation, supra.

Dennis Mello
October 11, 19911
Page 12

For the forgoing reasons the instant protest is **GRANTED**. ABF is directed to reinstate Dennis Mello to his former position within ten (10) days of the date of this letter with all seniority restored; ABF may impose a one-week period of suspension in lieu of the discharge. Within fifteen (15) days of the date of this letter, ABF shall further make Mello whole for all lost wages, benefits, and pension contributions, less the compensation due for the one-week period of suspension.

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

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

cc: Frederick B. Lacey, Independent Administrator
Elizabeth A. Rodgers, Election Office Regional Coordinator
David F. Reilly, Adjunct Regional Coordinator

OFFICE OF THE ELECTION OFFICER
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Michael H. Holland
Election Officer

October 24, 1991

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VIA FACSIMILE AND UPS OVERNIGHT

Judge Frederick B. Lacey
Independent Administrator
LeBoeuf, Lamb, Leiby & MacRae
One Gateway Center, Suite 603
Newark, New Jersey 07102-5311

Re: Election Office Case No. P-782-LU526-ENG

Dear Judge Lacey:

In settlement of the protest in the above-entitled cause, ABF Freight System, Inc. has agreed to the following:

1. To reinstate Dennis Mello to his former position with ABF Freight System, Inc. effective with the beginning of the contractual work week of October 28, 1991, that is 6.00 a.m. on Monday, October 28, 1991, with full seniority;
2. To pay and provide Mr. Mello with full pension credits for the period from the date of his discharge to the date of his reinstatement with ABF Freight System, Inc.;
3. To make Mr. Mello whole for health and welfare benefits and/or coverage from the date of his discharge;
4. To pay Mr. Mello three months back pay at the contractual rate of pay on or before November 11, 1991 and to simultaneously provide the Election Officer with a copy of such back paycheck demonstrating that such payment has been made

Judge Frederick B. Lacey
Page 2

The Election Officer has confirmed that the foregoing proposal is satisfactory to Dennis Mello, the protestor in this case. The Election Officer determines that this settlement effectuates the purpose of the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 and the March 14, 1989 Consent Order. Accordingly, the Election Officer concludes that the above Election Office case is settled in accordance with the foregoing.

Very truly yours,



Michael H. Holland

MHH/ca

cc: F. William Kirby, Jr.
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