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January 13, 1992

VIA UPS OVERNIGHT

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Consolidated Freightways
Attn: Labor Relations
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Milwaukee, WI 53221

Darryl Connell
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George T. Mueller
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IBT Local Union 43
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Kenneth Friesner
Secretary-Treasurer
IBT Local Union 200
6200 Bluemond Road
Milwaukee, WI 53118

Re: Election Office Case No: P-950-LU200-NCE

Gentlemen:

A protest was filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("Rules") by Darryl Connell on behalf of Raymond Connell, his father. The protest alleges that Raymond Connell was terminated from his position with Consolidated Freightways because of his support of Ron Carey. The protest further alleges that Raymond Connell was inadequately represented by the Union, specifically Local Union 200, Wisconsin Joint Council 39 and George T. Muller of IBT Local Union 43, because of Raymond and Darryl Connell's activities on behalf of Ron Carey. This protest was investigated by Election Office Regional Coordinator Barbara Zack Quindel.

Until his discharge on August 29, 1991, Raymond Connell was employed as a driver by Consolidated Freightways ("CF") at its Slinger, Wisconsin terminal. Raymond Connell was employed by CF for 33 years and is a member of Local Union 200. Raymond Connell is the father of Darryl Connell who is also a member of Local Union 200 and an active supporter of Ron Carey and the "Time for a Change" slate of delegates to the 1991 IBT International Convention who sought election committed to Ron Carey's candidacy for IBT General President.

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At approximately 11:40 a.m. on the morning of July 29, 1991, Raymond Connell was driving a CF tractor, without a trailer, eastbound on Highway 60 in the vicinity of the CF terminal in Slinger, Wisconsin. In connection with his employment at CF, Raymond Connell traveled on this road almost every day. This portion of Route 60 has been undergoing construction for approximately two years and as a result has been reduced from a four-lane divided highway to a two-lane undivided highway. While the posted speed limit for Highway 60 is 45 miles per hour, the speed limit in the construction area is 35 miles per hour. Local roads and streets enter directly into Highway 60 in the construction area, i.e., there are no entrance or exit ramps or lanes. The weather on the morning of July 29 was cloudy and the condition of the road was clear and dry.

Raymond Connell stated that as he was proceeding east he encountered a car that had slowed or had come to a complete stop at the entrance to Wheel Estate, a trailer park. The eastbound lane of Highway 60 prior to the entrance to Wheel Estate is on a slight upgrade and is then straight for approximately 1/4 mile prior to the entrance. Mr. Connell applied his breaks and his tractor began to skid. The skid marks were 58 feet long. He then released his breaks and reapplied them losing control of the vehicle. The tractor proceeded an additional 24 feet, swerving into the westbound lane of the highway. His tractor struck an oncoming passenger car falling over and coming to rest in the westbound lane. Connell stated in his "Driver's Preliminary Report of Accident at Scene" that he was traveling between 7 to 10 miles per hour at the time of the collision.

The collision demolished the passenger vehicle and resulted in substantial damage to the tractor. Of the four occupants of the vehicle, a family of four with two small children, three were injured and required hospitalization. The driver was removed from the vehicle with a "Jaws of Life" device and evacuated by helicopter to a hospital in Milwaukee. The mother, who was in the front passenger seat, and one of the children were taken by ambulance to a local area hospital but were later transferred to Milwaukee hospitals because of the extent of their injuries. Mr. Connell suffered minor injuries and was treated and released from an area hospital.

Before being transported to the hospital, Connell was interviewed by an officer of the Slinger Police Department who arrived on the scene within minutes of the accident. Because the accident effectively blocked traffic in both directions on Highway 60 there were a number of individuals present at the site of the accident when the officer arrived. Motorists, residents of the surrounding area and construction workers were on the scene. Some were attempting to give aid to the members of the family who were still trapped in the car. Witnesses were interviewed and statements taken. No criminal charges were brought or traffic citations issued against Connell as a result of the police investigation of the accident.

CF sent investigators to the accident scene a short time after the accident. Photographs were taken and measurements of the skid marks were made. In addition, CF personnel tested the same model tractor as that driven by Connell to determine the distance necessary to come to a complete stop when it was being driven at 35 miles an hour. Those tests showed that such a tractor could be stopped within 50 feet. On that basis CF concluded that Connell was exceeding the posted speed limit at the time of the accident.

CF determined, based upon its investigation, that Connell was going too fast and/or following too closely behind the car in front of him. The accident was caused by Connell's attempt to "panic stop" the tractor and the loss of control resulting from the tractor's breaks locking due to the panic stop. CF concluded that the accident was preventable, serious and caused by Connell's recklessness. Pursuant to Article 64 of the National Master Freight Agreement, CF discharged Mr. Connell on August 29, 1991.

The Election Officer's investigation revealed that CF has a policy of terminating drivers who are involved in serious preventable accidents.¹ In the last 10 years, CF drivers employed in Wisconsin have been involved in 11 serious preventable accidents, in addition to Connell's July 29, 1991 accident, resulting in discharges. Mr. Connell's accident was the most serious of all of these accidents in terms of injuries sustained by third parties.

While some of these earlier cases were ultimately resolved in the grievance process, these drivers were involved in fewer preventable accidents during the terms of their employment and/or were involved in far less serious accidents than Mr. Connell. For instance, CF itself reversed the discharge it issued to Robert Voeltner, another CF driver involved in a serious preventable accident, i.e., overturning a rear trailer in severe snowy weather. However, Mr. Voeltner's accident did not involve any damage to other vehicles or personal injury to himself or third parties. Further, Mr. Voeltner, voluntarily reinstated by CF with a 43-day suspension, had only four prior preventable accidents in his 34 years with the company. Mr. Connell, on the other hand, has had 18 preventable accident--prior to the instant accident--during his 32 years with CF.²

¹ The Election Officer is familiar with the operation of this CF policy in other states, e.g., Illinois, and it appears that such policy is consistently applied by CF in these other areas. See, e.g., Election Office Case No. P-896-LU772-SCE, affirmed 91-Elec. App.-204, denying a protest where CF had discharged the member for a serious preventable accident.

² The National Master Freight Agreement prevents an employer from utilizing prior discipline imposed more than nine months prior to the incident which gives rise to the discipline in hearings before the Joint Area Committee ("JAC"). However, an

Samuel Jackson, another CF driver discharged by CF for a preventable accident, was also subsequently reinstated. Mr. Jackson was discharged for overturning a rear trailer while attempting to make a lane change. Although Mr. Jackson's prior record of preventable accidents during his tenure with CF was not dissimilar to Mr. Connell's, 18 preventable accidents during a 30-year period, the accident in which Mr. Jackson was involved did not result in damage to any other vehicles or in any personal injury. Mr. Connell's accident not only damaged the vehicle with which Mr. Connell collided, but caused serious personal injury to three of its occupants.

While as noted above, CF in certain cases agreed to reduce the disciplinary discharges for preventable accidents during the grievance procedure, it did not always do so. Further, CF-initiated discharges have been upheld by the JAC and the drivers permanently removed from CF's employment.

A grievance was filed protesting Connell's discharge. Connell was represented by Local Union 200 business agent Chris Varsos. Mr. Varsos has been a business agent for Local Union 200 for 30 months prior to his representation of Mr. Connell. During that period, Varsos was involved in 300 grievances on the agenda of the Wisconsin State JAC with 125 to 150 grievances actually going to hearing before the Board. Mr. Connell's grievance was Varsos' first case involving an allegation of recklessness because of a driver's involvement in a serious preventable accident. Given the relatively small number of terminations of Wisconsin-based CF drivers for involvement in serious preventable accidents, the fact that Varsos was not previously involved in such a termination case is not unusual.

Connell's case was heard by the JAC on October 10, 1991. The Union members of the Board were David Shiply from Local Union 695 in Madison; Jim Newell from Local Union 662 in Eau Claire; and Jim Peterson from Local Union 563 in Appleton. Varsos argued in Connell's defense that there was insufficient evidence to find that Connell was reckless and, in light of his long service to the company, Connell should be given another chance. Varsos also challenged the employer's analysis of the skid-mark evidence arguing that the recreation of the stop was flawed because the driver in the test vehicle knew he was going to stop and was prepared to control the vehicle. Varsos also argued that while Connell was familiar with the area, he did not know the exact road conditions on the day in question until he actually drove through the area. Finally, Varsos argued that a tractor without a trailer is difficult to control in an

employer is not barred from considering an employee's prior disciplinary and work record in total in deciding whether to exercise discretion in reducing a disciplinary penalty or settling a grievance with the Union prior to the time the matter reaches the JAC. Both the employer and the JAC may consider the seriousness of the accident with respect both to monetary loss and personal injury.

emergency stop situation and his failure to control the vehicle could not be considered reckless. Mr. Connell was present at the hearing and responded to questions from the Board. Connell denied that he was responsible for the accident and also denied that he did anything wrong.

All of the Union members of the panel who heard Mr. Connell's case were interviewed during the Election Officer's investigation of this protest. Jim Newhall had never served on the JAC prior to the date when Connell's case was heard. Newhall stated that he did not know Ray or Darryl Connell. Newhall voted to deny the grievance because he believed that Connell was driving in excess of the posted speed limit at the time of the accident. Newhall stated that the act of going beyond the posted speed limit was inherently reckless and was the cause of the accident. Jim Peterson also stated that he did not know Ray or Darryl Connell at the time of the hearing. Peterson also believed that Connell was traveling at an excessive rate of speed and, as a result, was unable to safely stop the tractor in order to avoid the accident. David Shiply, the third union member of the panel, stated that he knew Darryl Connell from the 1991 IBT International Union Convention and that he may have known Ray Connell many years ago when Shiply worked for Central Wisconsin Trucking Company. Shiply relied on the skid mark evidence as well as the fact that Connell was familiar with the construction zone to conclude that Connell was driving recklessly.

Connell alleges that he was terminated by CF because of his activity on behalf of Ron Carey. The Election Officer's investigation revealed that Ray Connell was an open supporter of Ron Carey. However, his activity on behalf of Carey was not extensive prior to his discharge and it appears that the level of his activity increased in the period after his discharge. Assuming for the sake of analysis that Raymond Connell's termination by CF was motivated in part by CF's animus to his campaign activity--a conclusion not supported by the record--the Election Officer concludes that Connell has nonetheless failed to satisfy the "mixed motive" test relied upon by the Election Officer.

The National Labor Relations Board has adopted a rule for resolving cases involving similar allegations of a "mixed motive" for employer discipline. This rule, adopted by the Board in Wright Line, 251 NLRB 1083, 105 LRRM 1169 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), requires:

that the General Counsel 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.

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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 NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). The Election Officer has used this test in mixed motive cases arising under the *Rules* and such reliance has been affirmed by the Independent Administrator. See, eg. In Re: Coleman, P-016-LU710-CHI, aff'd 90-Elec. App.-18(SA); In Re: Henderson, P-760-LU25-ENG, aff'd 91-Elec. App.-187(SA); In Re: Jenkins, P-855-LU891-SEC, aff'd 91-Elec. App-190(SA).

In applying this test to the facts of this case, the Election Officer concludes that given the severity of the accident and the evidence of recklessness, based on either excessive speed or following too closely a vehicle through a construction area, CF would have terminated Connell regardless of his campaign activity. Similarly, CF's failure to settle the grievance challenging the discharge on the basis of a lesser penalty does not constitute a violation of the *Rules*. The other cases settled by CF are distinguishable from the instant case both with respect to the severity of the accident and the fact that Connell was involved in a number of preventable accidents during his employment with CF.

Connell also alleges that he was inadequately represented by his Local Union in the processing of his grievance because of his support of Ron Carey and the support and activities of his son, Darryl Connell, on behalf of the Carey campaign. While the Election Officer assumes that Chris Varsos was aware of the Connells' support and campaigning on behalf of Ron Carey, the Election Officer found no evidence that such knowledge affected his representation of Ray Connell in any way. Varsos presented all of the defenses which were supported by the evidence and challenged each element of the employer's affirmative case. In addition, Varsos made a plea for leniency based upon Connell's long tenure with the employer. While Varsos representation of Connell was unsuccessful, the Election Officer does not conclude that it was inadequate or violative of the *Rules*.

Finally, Connell alleges that the Union members of the JAC discriminated against Ray Connell because of Ray and Darryl Connell's support and activity on behalf of the Carey Campaign. In the submission to the Election Officer on behalf of the JAC and its union members, counsel contends that the union members of the JAC owe no duty of fair representation to the members whose grievances they are considering. While the duty of a union member of a JAC to a grievant may not be the same as the duty of a union official representing that grievant, it is inaccurate to say that the member of the JAC owes no duty to the grievant.

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First and foremost, under the *Rules*, a member of the IBT, even one serving as a member of a JAC, may not discriminate against a member because of their support or campaigning on behalf of a candidate. See, e.g., *Rules*, Article VIII, § 10. The Election Officer clearly has the power to prohibit such discrimination and to make members whole who have been adversely affected by such discrimination. In addition, under general principles of labor law, a member of a JAC owes a grievant a duty of impartiality and the duty to decide cases on the facts presented. Such duty is breached if the member of the JAC votes to deny a grievance because of the grievant's campaign activity or affiliation. See, e.g., Johnson v. U.P.S., 890 F. 2d. 909 (7th Cir. 1989); In Re: Braxton, 91-Elec. App. 147 (SA).

In this case, the Election Officer concludes that the decisions of each of the three union members of the JAC to deny Connell's grievance was not based upon any hostility or animus to Connell but on the evidence presented at the hearing. Each member felt that Connell was reckless because he was driving too fast or traveling too close to the car in front of him and that this recklessness was the cause of the accident. There is no basis for concluding that the members of the JAC would have decided this grievance any differently if Ray Connell had not been a Carey supporter or if he had not been the father of Darryl Connell.

For the foregoing reasons, the instant protest is DENIED.

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,



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cc: Frederick B. Lacey, Independent Administrator

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