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April 3, 2009

DECISION

Protest I-01-09 [Blazejewicz]
Track Vice Chairs

By email dated March 26, 2009, Jack Blazejewicz, a member of Local 100 in the Track Division, filed a challenge to the Election Rules. Mr. Blazejewicz challenges the reduction of Vice Chairs in the Track Division from six to five.

The decision as to the number of officers in any particular division is within the discretion of the Executive Board and will not be disturbed by the Neutral Monitor unless that decision violates the Union Bylaws or Constitution or federal law. In this instance, there is no such violation.

According to James Mitchell, Chair of the Elections Committee, the Executive Board voted in 2002 to create a new Track Equipment Maintainer (TEM) section within the Track Division and to designate the Chair of the new TEM section to also serve as a division Vice Chair. The action of the Executive Board did not provide for the election of an additional Track Division Vice Chair. In the past two elections, the Election Committee erred in allowing five nominations for Division Vice Chair, in addition to the TEM Section Chair. Track never had or was authorized to have six Vice Chairs. The argument that because the division has grown it deserves six Vice Chairs is flawed both because other divisions have more members than Track and yet have fewer Vice Chairs and, more importantly, if Track needs another Vice Chair, the Executive Board has to make that decision, not the Election Committee.

The protest is DENIED.

In accordance with the International Constitution and the Election Rules, any interested party unsatisfied with this determination may appeal to the Transit Workers Union of America Committee on Appeals. Any appeal shall be in writing and shall be filed in accordance with the procedure set forth in Article IV(6)(I)(1) of the Election Rules and Articles XV and XXII of the International Constitution for the appeal to the International from decisions of Local Unions.

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April 15, 2009

DECISION

Protest I-02-09 [Ireland]
Tower

By memorandum dated April 3, 2009, Edward Lee Ireland filed a protest concerning the requirement in the Election Rules that only tower operators may run for Recording Secretary of the Conductor Tower Division; while they are free to run for all other positions as well. By contrast, Conductors may not run for Recording Secretary. The Protester believes this is discriminatory. In addition, he believes that out of the 400 tower operators, only about two of them fulfill the meeting requirement in order to be eligible to run for this office. He bases this on his personal observation of tower operators' attendance at the meetings. As a remedy he is asking that the limitation of only allowing a tower operator to run for this position be stricken. Alternatively, he asks that the meeting requirement for tower operators to run for this position be stricken.

The decision as to the requirements to run for office in any particular division is within the discretion of the Executive Board and will not be disturbed by the Neutral Monitor unless that decision violates the Union Bylaws or Constitution or federal law. In this instance, there is no such violation.

According to James Mitchell, Chair of the Elections Committee, through a past practice dating back some 15 or 20 years, the RTO Department has mandated that in order to provide better representation for the smaller section, the Tower Section Chair automatically becomes the Division Recording Secretary. (This scenario is similar to the Track Division trying to get more representation for the TEMs by having the Chair of that section becoming a division vice chair.) This is a lawful determination and will not be overturned.

The election for this position will take place at the time later this year and the meeting requirement will be determined at that time. There is no evidence that there will be any problem in finding tower operators who are eligible for nomination. Thus, the protest is premature since it cannot now be determined who will satisfy the meeting requirement by cutoff date for nominations. If such evidence exists at the time of the section nominations, a protest can be filed at that time.

The protest is DENIED.

In accordance with the International Constitution and the Election Rules, any interested party unsatisfied with this determination may appeal to the Transit Workers Union of America Committee on Appeals. Any appeal shall be in writing and shall be filed in accordance with the procedure set forth in Article IV(6)(I)(1) of the Election Rules and Articles XV and XXII of the International Constitution for the appeal to the International from decisions of Local Unions.

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May 8, 2009

DECISION

Protest I-03-09 [Ferretti]
Campaigning on Union time

By email dated April 15, 2009, John Ferretti filed a protest complaining that DJ Small and Mariano Rosado were soliciting petition signatures on time that was paid for by the Union. According to Ferretti, he saw Small soliciting signatures at the 148th Street-Lenox Terminal Crew room on Monday, April 13 between 11:30 a.m. and 12:10 p.m. Ferretti believes that Small was on union release time. The next day, Ferretti saw Rosado collecting signatures at the 242nd Street-Van Cortlandt Park crew room between 2:15-3:15 p.m. Co-workers told Ferretti that Rosado had been there collecting signatures for hours. The protester believes that Rosado was also on union release time.

According to Union records, Small was working for the Union from 10:00 PM on April 12 to 6:00 AM on April 13. Rosado was not working for the Union at all on April 14. Thus neither man was on work time during the time Ferretti saw him campaigning. This part of the protest is denied.

Ferretti also alleges that both United Invincible and TBOU supporters were spreading misinformation to the membership about the rules on members signing multiple petitions, telling members that they could only sign one petition and that if they signed multiple nominating petitions, their signatures would be considered invalid. He attached a copy of a newsletter from TBOU that he asserts deliberately misled the membership on this issue. The TBOU newsletter was from March 2009 and thus any protest related to any statements therein is untimely. The only other evidence presented in support of this allegation was a statement by DJ Small. Even if Small had said this, there is no evidence that he made this to mislead any member or that any member was misled. Further, any confusion on this subject should have

been cleared up by the posting on the Election Committee website of a clarification about duplicate signatures.

Therefore, the protest is denied.

In accordance with the International Constitution and the Election Rules, any interested party unsatisfied with this determination may appeal to the Transit Workers Union of America Committee on Appeals. Any appeal shall be in writing and shall be filed in accordance with the procedure set forth in Article IV(6)(I)(1) of the Election Rules and Articles XV and XXII of the International Constitution for the appeal to the International from decisions of Local Unions.

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May 8, 2009

DECISION

Protest I-04-09 [Chiarello]
Conduct of J Mitchell

By email dated April 27, 2009, John Chiarello filed a protest complaining that the Chairman of the Election Committee, James Mitchell, has engaged in certain conduct that Chiarello found offensive. In specific, the protester alleges that Mitchell made comments implying that the members of the Take Back Our Union slate are racists, specifically that the slate would take the union back to the days of slavery. Chiarello asks that the Neutral Monitor “speak to him to put a stop to his outrageous misconduct.”

According to Mitchell, he spoke to Chiarello on several occasions about the connotation of the slate’s name—taking the union back. On the time in question, Chiarello had complimented a temp worker, calling him a “good boy.” Mitchell suggested to him that that term could be an insult and that he hoped the slate did not intend to “take us back” that far.

As Neutral Monitor, I have only the jurisdiction and authority conferred on me by the Election Rules. Even if the incident had happened the way the protester alleges, the conduct is not conduct covered by those Rules. Therefore, the protest is denied.

In accordance with the International Constitution and the Election Rules, any interested party unsatisfied with this determination may appeal to the Transit Workers Union of America Committee on Appeals. Any appeal shall be in writing and shall be filed in accordance with the procedure set forth in Article IV(6)(I)(1) of the Election Rules and Articles XV and XXII of the International Constitution for the appeal to the International from decisions of Local Unions.

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May 13, 2009

DECISION

Protest I-05-09 [Local 100]
Fraudulent misappropriation of
Union identity

By email dated May 3, 2009, Roger Toussaint, on behalf of Local 100, filed a protest that the TBOU slate and/or Israel Rivera violated the Election Rules by using a website domain name that appeared to be related to the Union, but that in fact directed users to a TBOU website.

The facts are not in dispute. If one enters the website address www.rogertoussaint.com or www.rogertoussaint.net, the website www.twubus.com comes up automatically. This website is a pro-Take Back Our Union website. It appears that these domain names and the twubus website are owned and/or controlled by Israel Rivera, Jr., the candidate for Secretary-Treasurer on the TBOU slate.

According to the protester, not only is this conduct unethical, but it is also illegal impersonation, identity theft and improper in the context of an election campaign, in that it appropriates the identity of the union president and connects it with a particular slate.

TBOU argues that Mr. Rivera

purchased the domain name "rogertoussaint.com" about a year and a half ago. Since then, if someone searches for this domain they are directed to a web site that Mr. Rivera has been maintaining since then, TWUbus.com. It is not a TBOU web site; it is Mr. Rivera's web site. Mr. Rivera says that he has never at any time used the domain name, "rogertoussaint.com" to send emails to anyone.

Mr. Toussaint is not a candidate in this election although he is the chief supporter of United Invincible, and probably playing an active role in the campaign against TBOU. But even so, Mr. Rivera legally owns the domain name at issue. As it is his property - he is free to use it as he sees fit. Nothing he has done, which long predates the election and pre-election period, constitutes something over which [the Neutral Monitor has] any jurisdiction. ..

Under the Election Rules and federal law, union resources may not be used to support any candidate. Under federal law, this prohibition includes the use of union stationary and logo, as well as money, addresses, facilities, etc. In the case of *McLaughlin v. AFM*, 700 F.Supp. 726 (S.D.N.Y.1988), the union president wrote letters to the delegates on union stationary, with the union logo, endorsing a particular candidate in the election. In finding a violation, the court quoted from the decision in *Brennan v. Sindicato Empleados de Equipo Pesado, Construccion y Ramas Anexas de Puerto Rico*, 370 F.Supp. 872,878 (D.P.R. 1974), "Section 401(g) does not require an actual cash outlay to establish a violation. The 'logos' of the union, the credit and goodwill of the union, together with the time of the union's Secretary, constitutes assets of a labor organization which cannot be used to support the candidacy of one running for union election."

This case has elements of such a violation. The name of the union president, and by implication his imprimatur and the good will of the Union, have in essence been misappropriated by Israel Rivera and then used in a deceptive manner. The only reason to use Toussaint's name is essentially to trick people who want to know something about him or who want to contact him into going instead to a website that supports a slate. Consider if the Union or Toussaint himself had had possession of the domain names and had used them for a website supporting United Invincible. Surely TBOU would have objected and rightly so. And here there is the exacerbating factor of deception. Rivera has many other websites that he uses to "communicate and educate" the members about TBOU. He doesn't need to mislead them by using the name of the union president to do so.

Therefore, the protest is sustained.

While TBOU argues that Rivera owns these domain names in his personal capacity, given that he is a candidate for the second highest position on the TBOU slate and that when the website is opened it prominently features the TBOU logo and email address, I find that his actions can be attributed to the slate. In any event, the remedy is the same. Rivera is required to discontinue the direction of the robertoussaint addresses to the twubus site. Instead he is to post this decision, as the sole content of the two websites, for the duration of the campaign. Whether Toussaint may have other actions for the misappropriation of his name is not a question for the Neutral Monitor.

In accordance with the International Constitution and the Election Rules, any interested party unsatisfied with this determination may appeal to the Transit Workers Union of America Committee on Appeals. Any appeal shall be in writing and shall be filed in accordance with the procedure set forth in Article IV(6)(I)(1) of the Election Rules and Articles XV and XXII of the International Constitution for the appeal to the International from decisions of Local Unions.

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April 2, 2009

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(by email)

Re: Protest 01-09-TBOU
Omnibus Pre-election Protest

Dear Mr. Cary:

By memorandum dated March 25, 2009, John Samuelson, announced candidate for President on the Take Back Our Union Slate, filed an omnibus pre-election protest 1) alleging that the Election Rules as written are unreasonable on their face and violate federal law in that they create two categories of members with unequal rights to vote, i.e. members employed before June 1, 2009 and members employed after; 2) requesting that the Neutral Monitor issue a rule for the safeguarding of the ballots that will be stored from the time they are received on June 22, 2009 until they are opened on December 7, 2009; 3) requesting that a rule be promulgated requiring the Union/Election Committee release departmental lists showing who is in good standing; 4) requesting that the Rules be amended to reduce the number of signatures required for nomination of a Union-side officer from 1000 to 500; and 5) requesting that the Neutral Monitor verify that the Election Rules are being mailed to every member of Local 100, regardless of good standing. These allegations and requests will be discussed seriatim.

The Protester argues that the Rules are unlawful in that they require members employed before June 1 to have their dues paid up even though the ballots will not be counted until six months later, while those employed after June 1 have until November to pay up their dues. The Protester relies on a Dept of Labor regulation which reads:

After a member has resumed his good-standing status, it would be unreasonable to continue to deprive him of his right to vote for a period longer than that for a new member. A new member may reasonably be required to establish a relationship with the union by remaining in good standing for a continuous period of time, e.g., 6 months or a year, before being permitted to vote in an election of officers. However, while the right to vote may be deferred within reasonable limits, a union may not create special classes of nonvoting members.

The Protester argues that the Union has “create[d] a special class of nonvoting members by requiring members employed before June 1, 2009 to be in good standing six months before and when the election is conducted on December 7, 2009, but not for new members, i.e., those first employed after June 1, 2009 and before the election.”

I disagree. Under the Election Rules, a member can become eligible to vote by paying dues arrearages and thus coming into good standing even up to the day before the ballots go out. This applies to those who are employed and thus potentially eligible to vote (i.e. if s/he is in good standing) in the first round of balloting or those who become employed and thus potentially eligible to vote (i.e. if s/he is in good standing) in the second round of balloting. The member who resumes his/her good-standing status is not deprived of his/her right to vote for even a day. I therefore deny this part of the protest.

Secondly, the Protester requests that the Neutral Monitor issue a rule for the safeguarding of the ballots that will be stored from the time they are received on June 22, 2009 until they are opened on December 7, 2009. The American Arbitration Association is charged under the Rules with securing the ballots during that period. According to AAA Vice President, Jeff Zaino, “the AAA will purchase a metal container containing a key lock. On June 22nd, before observers and at the AAA, we will store all ballots, lock the container, and then wrap tape around the complete container. The container will be stored on the 10th floor of the AAA offices in a locked storage area. Only AAA personal will have access to the 10th floor office space – there are special key locks and cameras on the 10th floor. Also, I will be in possession of the key. On December 7th, we can then either transfer to the hotel sealed and then open at that location before observers or open at the AAA before observers.” I find that the procedures developed by the AAA will be sufficient to ensure the integrity of the election and that a further rule is not necessary.

Thirdly, the Protester asserts that the Union should be required to release departmental lists showing which members are in good standing. The Protester argues that because there is a

great proportion of the membership, perhaps as much as half, who are not in good standing, it will be very difficult for candidates to collect a sufficient number of valid names on their nominating petitions. This is particularly true, the Petitioner argues, because the Union has never advised members who are not in good standing and thus “there are many members who think they are in good standing and will say so if asked but are not because of relatively minor amounts that they owe.”

The Union is in the process of sending out a notice to all members who are not in good standing, notifying them of their status and explaining how they can come into good standing, including how to determine the amount of their arrearages. The notice which will be mailed on or before April 6, should alleviate the problem cited by the Protester about members signing petitions because they are ignorant of their membership status. Candidates and those soliciting signatures on their behalf can thus simply ask members whether they are in good standing (and if they don't know, ask if they recently got this notice from the Union) and encourage members who are not to pay their arrearages. Moreover, any member can obtain this information by calling the Membership Office. Copies of the membership list have never been available to candidates in past elections and neither the Union bylaws nor federal law requires that they be available. While not required to do so, the Election Committee decided to permit candidates an extra week to inspect the membership list, from Monday April 6 to Friday April 10. Thus candidates will have more than a week before petitioning starts to inspect the list. Finally, I note that the Union has a substantial legitimate interest in not allowing its membership lists to potentially be widely distributed. Accordingly, this protest is denied.

The Protester also asserts that because so many of the members are not in good standing, the 1000 signature requirement for nomination to one or a slate of the top union-wide offices should be reduced. Since almost half of the membership is not in good standing, the Rule in essence requires a candidate to collect over 2000 signatures to seek to ensure that 1000 are from members in good standing. The decision about how many signatures are required for nomination is within the discretion of the Executive Board and should not be disturbed by the Neutral Monitor unless that decision is contrary to the Union Constitution or Bylaws or to federal law. The Protester cites 29 USC Sec 481 that requires in a union officer's election that “a reasonable opportunity shall be given for the nomination of candidates” and argues that under the circumstances here, where “5 and in some instances 10 percent of the membership must sign a petition and do so in only ten days,” the 1000 signature requirement may make

nomination so difficult as to deny the members a reasonable opportunity to nominate. Thus, it violates federal law and regulation.

It is difficult to understand how the Protester figures that 10% of the membership would have to sign a petition in order to nominate a candidate for one of the top offices. A candidate for one of those offices (or a slate of the four top offices) has to collect 1000 out of 38,000 members, which is less than 3%. Even if one assumes that by April 23, despite the notice from the Union notifying those who are not in good standing, only 20,000 members are in good standing, that is still 1000 out of 20,000, which is 5%. If, as the Protester alleges, a candidate would have to collect twice as many signatures as the minimum required number in order to be sure that s/he has 1000 valid signatures, that is 2000 out of 38,000, again just a little over 5%.

I note also that the Protester does not seem to contest the signature requirements for the Vice-President or Executive Board nominations. Yet for a full slate, if members in good standing signing for Vice-Presidents or Executive Board members on a slate also sign the petition for the top four offices, the slate will have more than enough signatures for those top offices, since the aggregate minimum number of signatures needed for the seven VP candidates and for the 39 Executive Board members is 1960. Further, in this Union, most members are easy to reach, as many work in yards and depots. Historically, slates have submitted between 5000 and 10,000 signatures. For all these reasons, I do not find that the 1000 minimum signature requirement for the union-wide offices operates to deny members a reasonable opportunity to nominate candidates.

Finally, the Protester requests that the Neutral Monitor ensure that the Election Rules containing the Notice of Nominations and Elections is being mailed to every member of Local 100, regardless of whether they are in good standing. The Election Rules are now being sent to all members who are not in good standing. In June, a Notice of Nominations and Elections will be sent to members in good standing as part of their ballot package. Thus the Union is in compliance with federal law.

The protest is DENIED.

In accordance with the International Constitution and the Election Rules, any interested party unsatisfied with this determination may appeal to the Transit Workers Union of America Committee on Appeals. Any appeal shall be in writing and shall be filed in accordance with the

procedure set forth in Article IV(6)(I)(1) of the Election Rules and Articles XV and XXII of the International Constitution for the appeal to the International from decisions of Local Unions.

Sincerely,

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April 9, 2009

DECISION

Protest TBOU-02-09
Mailing and Local 100 Express

By memorandum dated March 27, 2009, John Samuelson, announced candidate for President on the Take Back Our Union Slate, filed a protest alleging that the Election Committee refused to permit the slate to do a mailing as required by the Election Rules and that the February issue of the *Local 100 Express* constituted a campaign literature distributed by the Union in violation of the Rules. The Protester requests that the Election Committee provide it with the information needed to proceed with the MABSTOA mailing it had requested and that the Union distribute to the membership, at Union expense, a three page flyer written by the Take Back Our Union slate.

As to the first allegation, the Protester alleges that on or about March 20, he requested from the Election Committee the information needed to do a mailing at his expense to members in good standing in MABSTOA and received no response. According to the Election Committee, at the time the request was made, the arrangements to get the Union mailing list to the American Arbitration Association and to designate a mail house were not yet complete. Since then, the Committee has designated a mail house and arranged for the list of MABSTOA members to be sent to the mail house in preparation for Samuelson's mailing, and on April 1, notified the Protester of the name of the mail house and advised him to communicate directly with the mail house about the mailing. There is no evidence that the Protester was prejudiced by this slight delay, since it was almost two weeks before the petitioning period began. Thus, I find that this protest is moot.

The more significant allegation concerns the February issue of the *Local 100 Express*. The Protester asserts that particular content of the newspaper renders the publication campaign literature improperly distributed at Union expense:

- 1) The photograph of Curtis Tate, Acting President of the Union and candidate for president on the United Invincible slate, appears seven times; his name appears ten times.
- 2) In his Editorial Address, Tate describes the upcoming officer election as “posing dangers for us as an organization.”
- 3) A full page of the newspaper is devoted to showing the names and pictures of 12 of the candidates for officers in the United Invincible slate.
- 4) The eight-page section about the 75 year history of the Union extols the virtues of the current administration.

The Election Rules prohibit any candidate from receiving a contribution from a labor organization. Under the Rules,

A. 1. No candidate for election shall accept or use any contributions or other things of value received from any employer, representative of an employer, foundation, trust, union or similar entity. Nothing herein shall be interpreted to prohibit receipt of contributions from fellow employees and members of the International Union, unless that employee or member is an employer.

A. 2. No employer shall be permitted to contribute anything to any campaign. The prohibition on employer contributions extends to every employer regardless of the nature of the business, or whether any union represents its employees, and includes but is not limited to political action organizations (other than a candidate’s or slate’s campaign organization), nonprofit organizations such as churches or civic groups, law firms, and professional organizations. These prohibitions include a ban on the contribution and use of stationery, equipment, facilities and personnel.

A. 3. The prohibition on campaign contributions extends to all labor organizations, whether or not they are employers, except as permitted below.

B. No Local Union services, facilities, equipment or goods—including, but not limited to, time, staff, copying machines, fax machines, telephones, printing and postage—shall be used to promote the candidacy of any individual or slate unless the Local notifies all candidates of the items available for use and all candidates are provided equal access at equal cost to such goods and services. The use of the Local Union’s official stationery is prohibited irrespective of compensation or access.

29 U.S.C. sec. Section 401(g) of the Labor Management Reporting and Disclosure Act (LMRDA) provides:

No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this subchapter.

While LMRDA § 401(g) broadly prohibits the use of union funds to promote candidates, it also contains a "safe harbor" which expressly states that "such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates. . ." 29 U.S.C. Sec 401(g). In interpreting these provisions, courts have held that the critical issue is whether the literature in question went beyond the scope of legitimate coverage of newsworthy activities and into the realm of violative union-financed campaign literature. Such a determination necessarily revolves around the timing, tone and content of the literature in question, in the context of the surrounding circumstances. *McLaughlin v. AFM*, 700 F.Supp. 726 (S.D.N.Y. 1988).

In examining the February issue of *Local 100 Express* and applying the factors set out above, I find that the newspaper did not constitute campaign literature.

The content of the publication was clearly newsworthy, relating as it did to recent events relevant to Local 100 members—the financial cutbacks facing the MTA and the threat they pose to the Union, the Union’s involvement in supporting pro-labor candidates in a recent City Council Special Election, the dissolution of the CTA section, a big contract win at Liberty Bus, MLK Day celebrations, an AFL-CIO conference in New Orleans, members’ attendance at the Obama inauguration, Employee Free Choice Act, etc.

The timing was also legitimate. The issue was a regularly scheduled one, coming two months after the previous issue. The events reported on in the newspaper occurred in the period since the last issue, e.g. the January AFLCIO conference, Martin Luther King Day, Black and Hispanic Caucus meeting, the February meeting of the Board.

The tone was appropriate, as it factually related the events covered, with no reference to members of the United Invincible Slate except where relevant to the event described. The comment by Acting President Tate, that the mixture [of the settling of outstanding contracts and the intense political season involving the elections] can pose dangers for the Union as an organization, does not constitute electioneering. It does not support one candidate or group of candidates. It merely notes that a combination of the contracts and the elections can present a

challenge the union. While the Protester objects to the number of times that Tate's name and picture appear (almost all of the names appear in captions to the pictures), the Union notes that Tate attended, hosted or represented the Union in most of the events in which he was pictured. In addition, it is not unusual to have numerous pictures of the top Union officer in the newsletter. For example, according to the Union, in the October 2008 newspaper, there were eight pictures of President Toussaint.

The Protester further alleges that the "Know Your Union: A guide to the officers and staff of TWU Local 100" that includes the pictures of the top union-wide officers, Vice-Presidents, staff and lawyers is gratuitous publicity for the members of the United Invincible slate. While it is true that ten of the eleven intended candidates for top officers on the UI slate are pictured in the guide, it is because they are in fact current officers of the union. Previous issues of the newspaper have included pictures of officers in various formats. None of the other pictures included in the guide are, as of now, candidates for office.

Finally, the Protester objects to the supplement in the newspaper setting forth the history of the Union and cites the case of *Guzman v. Local 32B-32J*, 151 F.3d 86 (2nd Cir 1998) as standing for the proposition that the distribution of a history of the union that extols the virtues of and incumbent administration promotes the candidacy of the incumbents and violates the law. In that case, as described in the decision,

the Local mails a 142-page book to the membership. The book is called Local 32B-32J, 1934-1994, Sixty Years of Progress. It is a chronological narrative of events in the Local's history, interspersed with brief biographical comments about the Local's six presidents. About half of the text is devoted to the period of Bevona's presidency. The incumbent president figures prominently in the narrative of recent events. Bevona's name appears on 51 of the 59 pages in the second half of the text, usually more than once, and the president is invariably portrayed in a very favorable light. A sample: "While completing preparation for a walkout, the union president brought to bear all the negotiating skills he developed in a 30-year career as a trade union professional." Bevona is among the subjects in at least 49 photographs in this section. The text closes with a 12-page comparison of the Local's "Achievements 'Before' " and " 'During' the Bevona Administration," under the heading, "The Bevona Record: More for Members." Guzman's name is never mentioned, but the publication devotes eight paragraphs to the 1992 election, belittling the opposition candidates led by Guzman for contesting the election and "inconvenienc[ing] the thousands of members who turned out to vote.

In the instant case, on the other hand, the history supplement celebrates the Union's 75th anniversary. Most of the history—6½ of the 8 pages—is devoted to the years before 2000. The section entitled "Local 100 today" recounts the progress made by the Union over the past

nine years, during which there has been more than one administration. No individual officer is named, other than Mike Quill, and no officer is pictured. Rather than extolling the virtue of any one officer or administration, the piece extols the virtues of the union and the service it provides to its members. I find the *Guzman* decision to be distinguishable and the insert in question not to constitute campaign literature.

The protest is DENIED.

In accordance with the International Constitution and the Election Rules, any interested party unsatisfied with this determination may appeal to the Transit Workers Union of America Committee on Appeals. Any appeal shall be in writing and shall be filed in accordance with the procedure set forth in Article IV(6)(I)(1) of the Election Rules and Articles XV and XXII of the International Constitution for the appeal to the International from decisions of Local Unions.

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May 13, 2009

DECISION

Protest TBOU-04-09
Delay in Election Committee check of
eligibility

By email dated April 8, 2009, Larry Cary, on behalf of the Take Back Our Union slate, filed a protest that the Election Committee violated the Election Rules by refusing a request of TBOU to make a determination in advance of the petition period on the eligibility of the candidates running on the TBOU slate.

According to the protester, on April 6 TBOU submitted to the Election Committee nomination forms for the top four officers, the vice-presidents and the Executive Board members. Slate representatives asked James Mitchell, Chairman of the Election Committee, on several occasions to verify that the submitted names were eligible to run. Mitchell advised them that it could not be done right away since it takes a lot of work to determine if candidates are eligible and the Rules do not require that work to be done before the petitioning period. TBOU argues that Chairman Mitchell's refusal to check the eligibility when he was asked to do so prevented the slate from knowing which members of its slate might be ineligible to run and thus the slate would be prevented from choosing someone to fill that particular slot. While members were told that they could check their dues status online or through the union, it is often very difficult to tell from the records whether good standing has been broken.

The Election Committee responds that it had no obligation to check the eligibility as soon as a candidate expressed his or her intention to run for office. The time from the submission of nomination forms, to the preparation and distribution of petitions, and then to the filing and checking of petitions is an extremely busy one for the Elections Committee. There are hundreds of candidates who sought nomination. It would have been a tremendous burden

to have had to check the eligibility of all those candidates prior to the petitions being prepared. There is no meeting requirement for the candidates for whom TBOU sought verification. The only requirement is that a member be in continuous good standing for 12 consecutive months. Any member could have gone to the union dues office and requested a dues printout and asked someone there if there were any remaining questions. The Committee argues that “it is difficult and unfair for the onus of creating a viable slate be put on the Elections Committee. The procedure the committee is relying upon to check dues status is the same course of action the individual member has to check his/her dues status--a request to the dues center.” It also notes that while it was not obligated to do so, it made an offer for candidates to come in to the Union over the weekend before the petition period or any day thereafter to check their dues. The other problem with the protester’s assertion that it had a right to have an eligibility ruling prior to the petition period is that members have a right to contest any Election Committee’s determination of candidates’ eligibility. Thus any earlier ruling could not have been a final one. In summary, the Committee argues that this is not a protest, but rather a request to change the Rules.

Under the Election Rules, the Election Committee is obligated to “determine the eligibility of candidates as promptly as possible...The inclusion by the Election Committee of a candidate’s name on a petition shall not be construed as a final ruling about whether that candidate has met the eligibility requirements for election...” There is no requirement to make a ruling in advance of the petition period. In fact, the reference to the inclusion of a candidate’s name on a petition not constituting a ruling on eligibility must mean that such rulings will not be made, or at least need not be made, before the petitions are prepared. To find otherwise would be to require that the Election Committee, in contrast to the Union dues department, check a member’s eligibility even before s/he is a candidate. The Rules do not impose such a requirement. A member considering a run for office should have known whether s/he had paid all required dues on a timely basis and, if unsure, could have checked online or, if still confused, gone to the Union hall, obtained a printout of their dues payment history and asked any questions s/he had. Further, all potential candidates were operating under the same requirements and limitations and thus there was no discrimination in the Election Committee procedure.

TBOU also asserts that the fact that UI was able to post a flyer on their website on April 23 about the ineligibility of Jimmy Colon, a potential slate member, somehow demonstrates that

the Union was able to figure out his eligibility easily and then gave this information to UI. In fact, after Colon reviewed his dues records he immediately told someone affiliated with UI that his news was not good. The UI supporter interpreted that as meaning that Colon learned of a delinquency in his dues. Thus, if anything, this proves that a member was able to go to the Union and determine his or her own good standing status.

Therefore, the protest is denied.

In accordance with the International Constitution and the Election Rules, any interested party unsatisfied with this determination may appeal to the Transit Workers Union of America Committee on Appeals. Any appeal shall be in writing and shall be filed in accordance with the procedure set forth in Article IV(6)(I)(1) of the Election Rules and Articles XV and XXII of the International Constitution for the appeal to the International from decisions of Local Unions.

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May 5, 2009

DECISION

Protest TBOU-05-09
Use of Union Offices

By memorandum dated April 13, 2009, Larry Cary, attorney for Take Back Our Union (TBOU), filed a protest alleging that on April 13 Local 100 allowed candidates running on the United Invincible Slate (UI) to use Union office space for campaign purposes, but did not make such space available to candidates running on the TBOU slate. The protest also alleged that TBOU was engaged in distribution of campaign material and shopping bags that said "HIP" on them. It is asserted that the bags are the property of HIP or the Union inappropriately made available to UI.

April 13 was the first date that signature petitions were distributed. In the prior election, candidates or slates that requested Union space on the first day of petition distribution were provided a room for campaign purposes, such as distributing petitions and other campaign materials to supporters. The campaigning that was conducted within each room was permissible because the Union space was given equally to all candidates who requested such space.

Anthony Utano, a member of the Union and a candidate for Vice President of Maintenance of Way on the TBOU slate, provided an affidavit that states that on the morning of April 13, he and other members of TBOU went to Room A at the direction of Election Committee Chair James Mitchell to discuss the mechanics of the petitioning process. He saw that many supporters of the UI slate were already in Room A distributing UI tee-shirts and buttons. The materials were being packed into blue shopping bags that said "HIP" [Health Insurance Plan] on them.

The UI slate does not contest that its slate handed out campaign material on April 13 in Room A and asserts that it was given access to Room A upon its request of the Election Committee. According to Peter Lewnes, a member of the Election Committee, he told representatives from both slates on April 3 that the same procedure regarding the use of rooms that was utilized in the prior election for the first morning of petitioning would be utilized this year. Mr. Lewnes provided documentary evidence that he spoke to Mr. Utano about the distribution of petitions on April 3. The record did not specifically state that Mr. Utano was informed about the use of the rooms on April 13. Mr. Utano denies ever receiving information on room usage on April 13. . He notes that he asked Mr. Cary on April 10 to inquire whether the same procedure on the use of rooms would be in place this year as was in place during the last election cycle and that he would not have made this inquiry if he was informed that he need only ask the Election Committee for a room. Mr. Cary confirmed that Mr. Utano asked him to inquire if a room would be available on April 13, but that he did not communicate Utano's request because April 10 was Good Friday, and Cary believed it would not be possible to get an answer from the Election Committee on that date. In fact, the Election Committee was at the Union offices that day and could have received Mr. Cary's request.

Mr. Cary has also stated that he did not make the request for a room because the reason rooms were made available during the prior election cycle did not exist this year and so he assumed that no slates would be using rooms as they had in the prior election. Last election, a member could only sign one petition and the Election Committee was concerned that members would not have access to the lists if they were precluded from coming onto Union property because many members on an opposing slate stood in their way. This year, he notes, a member's signature would not be disqualified merely because he/she signed another petition. Why this change in membership voting would necessarily alter the decision on the room available, however, is not clear. Neither Mr. Cary nor Mr. Utano made a request for a room on April 13 after observing that the UI slate was using Room A.

While there is a difference in recollection as to whether Mr. Utano was informed by the Mr. Lewnes that he could request that a room be available to his slate on April 13 and he validly notes that he would not have made given the instructions to his lawyer to inquire about the room availability if he had known the room would be available, it is also true that Mr. Utano clearly had an expectation that a room for campaigning would be made available, as that was the reason for his instruction to Mr. Cary to make the inquiry. (It may also be the case that Mr.

Utano was told of the room availability but simply did not recall the conversation.) While Mr. Cary may have believed that the change in the rule on membership signing altered the reason for making rooms available on the first day of petition signing, this misapprehension did not relieve TBOU of the obligation to state an objection and request a room either on April 10 or on April 13. Absent such a request, I am unable to conclude that TBOU was improperly denied the use of Union resources or the use of a room.

As to the use by UI of HIP bags, it appears that the bags were promotional bags discarded by HIP after a Union membership meeting in December 2008. Members who were helping to clean up after the meeting were told that they could take the bags if they wanted. The bags never were brought to the Union hall. I conclude that they were of nominal or insignificant value did not constitute a donation from HIP or the Union.

Based on the foregoing, the protest is denied.

In accordance with the International Constitution and the Election Rules, any interested party unsatisfied with this determination may appeal to the Transit Workers Union of America Committee on Appeals. Any appeal shall be in writing and shall be filed in accordance with the procedure set forth in Article IV(6)(I)(1) of the Election Rules and Articles XV and XXII of the International Constitution for the appeal to the International from decisions of Local Unions.

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May 13, 2009

DECISION

Protest TBOU-09-09
Telephone polling

By email dated May, 2009, Larry Cary, on behalf of TBOU, filed a protest that the United Invincible slate violated the Election Rules by accessing the Union telephone list for an election-related poll.

The facts are not in dispute. Following a request by the UI slate to do robo-calling, the Election Committee posted an announcement on the Election Committee website. The announcement read:

Announcement Regarding Telephone Lists

The Election Committee has received a request that member's telephone numbers be supplied to an entity which will place "robo-calls." The Election Committee will comply with the request in the same manner it handles mailing requests, following a procedure developed during the 2006 election. The calling entity must be screened by the Election Committee and the entity must have an agreement with Local 100 that the phone numbers will not be shared with any candidate, will not be copied, and will not be stored for later use. The Election Committee will respond to such requests as expeditiously as possible; candidates, however, should allow five business days lead time for requests to be processed.

The Protester alleges that because the announcement refers only to "robo-calls," UI violated the rules when it engaged Global Strategy, the entity authorized by the Election Committee to receive the Union telephone lists under an obligation of confidentiality, to place anonymous polling calls, soliciting members' views about the upcoming election.

The Election Committee announcement of a procedure for supplying telephone numbers to an entity that will place "robo-calls" does not prohibit that entity from also placing polling calls. Nor does it explicitly permit it. The Election Rules do not address the issue of access

to telephone numbers at all. I note that the announcement refers to adopting the procedure used in the 2006 election. The rule in that election permitted “telephone outreach” to members through authorized entities, although the issue of polling did not arise or at least was not the subject of a protest. It is not clear whether the Election Committee intended this year’s announcement to be more restrictive than last election’s rule.

I find that it is a matter for the Election Committee to clarify its intent, upon a request from a slate or candidate. Until such time as the Election Committee were to prohibit polling, TBOU and all other slates and candidates are, of course, free to make requests similar to that made by UI.

Therefore, the protest is dismissed.

In accordance with the International Constitution and the Election Rules, any interested party unsatisfied with this determination may appeal to the Transit Workers Union of America Committee on Appeals. Any appeal shall be in writing and shall be filed in accordance with the procedure set forth in Article IV(6)(I)(1) of the Election Rules and Articles XV and XXII of the International Constitution for the appeal to the International from decisions of Local Unions.

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May 9, 2009

DECISION

(amended)

Protest TBOU-3; 6; 8-09
Delay in arranging email and
telephone communications

By emails dated April 1, April 30, and May 1, 2009, Take Back Our Union filed protests that the Election Committee has violated the Election Rules by failing to allow TBOU to have access to the Union's email list or to arrange for the slate to send email communications to the membership. In addition, the protester alleges that the delay in arranging for the slate to be able to communicate with members through "robo-calling" violates the Rules.

According to the protester, it is apparent that the United Invincible slate has had access to the Local 100 email list because the UI slate sent campaign materials by email to a significant number of members and that it therefore has a right to have the Union email list. In the alternative, TBOU asserts that it has a right to have the Union send TBOU campaign material to the members on the Union email list. It made requests to the Election Committee on a number of occasions and the Committee failed to make arrangements for such an emailing. In addition, TBOU claims that it has a right to have the Union send the Union telephone list to an independent entity to make phone calls on behalf of the slate. TBOU made requests of the Election Committee on several occasions and the Committee failed to make arrangements within five days of the TBOU request.

The Election Rules permit candidates to have written materials mailed to the membership at the candidates' expense. Pursuant to the Rules, the Election Committee has designated a mailhouse and has arranged for membership lists to be sent to the mailhouse in

response to requests by the candidates. There is no comparable Rule, and thus no comparable right, related to candidate access to the Union email list or telephone list.

On or about April 14, 2009, following a request by United Invincible, the Election Committee posted the following statement with regard to making the Union's list of the membership's telephone numbers available to the candidates:

Announcement Regarding Telephone Lists

The Election Committee has received a request that member's telephone numbers be supplied to an entity which will place "robo-calls." The Election Committee will comply with the request in the same manner it handles mailing requests, following a procedure developed during the 2006 election. The calling entity must be screened by the Election Committee and the entity must have an agreement with Local 100 that the phone numbers will not be shared with any candidate, will not be copied, and will not be stored for later use. The Election Committee will respond to such requests as expeditiously as possible; candidates, however, should allow five business days lead time for requests to be processed.

Following that announcement, TBOU also made a request to the Election Committee to do a telephone and email blast. The Union spent the following two weeks making arrangements for a vendor to make the telephone calls, including having the vendor sign a confidentiality agreement to ensure that the telephone numbers not be available to the candidates, only to the vendor. TBOU attorney Larry Cary was notified on April 29 of the identity of the vendor.

The only requirement for the Election Committee under the "Announcement" regarding telephone calling is to respond to requests "as expeditiously as possible." Contrary to the protester's assertion, there is no five-day deadline. Rather, the obligation is on the requester to allow at least five days notice before it wants to have the calls made. While there was a two week delay in providing the information necessary for TBOU to do a telephone blast, I find that the Committee responded as expeditiously as it could, since the initial arrangements with the vendor had to be made. No other candidate or slate had any earlier access, although United Invincible also had made a request on April 13 for such access, so there was no discrimination. I deny the protest related to delay in responding to the request for telephone access to the membership.

In response to the TBOU request for email lists, the Election Committee initially advised Cary that the vendor would also be able to do email blasts. However, no rule or announcement was issued and a few days later he was advised that there would be restrictions on the emails that would be permitted. The Union developed a procedure under which it would permit email access to members. Any slate or candidate could send up to two emails in the course of the

campaign, through a vendor selected by the Union, so long as the slate/candidate paid the cost of the mailing, the mailing had no internal links and the subject line clearly indicated that the email was campaign related and was sent by the particular slate or candidate. TBOU was advised of this procedure on May 1. No candidate or slate has sent an email blast pursuant to this procedure.

Title IV of the LMRDA provides that every local labor organization “shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization,...to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate’s expense campaign literature in aid of such person’s candidacy to all members in good standing... .” The Union has stated its intent to allow the protester two emails to all addresses maintained by the Union. It has required that the subject box identify the nature of the email and that there be no links to other sites in the email. The protester objects to these restrictions.

The issue appears to be whether the request by TBOU for unlimited and unrestricted email access was reasonable. The limitation on including links to other sites and the requirement that the subject of the email identify the sender are, in my judgment, reasonable limitation on the usage of email. There are legitimate concerns about viruses and potential fraud and I will not reverse the Union’s policy on these matters because they do not unduly limit the candidate’s ability to communicate with the membership.

The more difficult question is whether the limitation on the number of emails is appropriate. While I do not believe that the statute mandates that unlimited email mailing must be allowed to all candidates, it is a closer question whether more than two would be a reasonable request. The Union is justifiably concerned with members’ complaints about receiving too much spam. To mandate unlimited emails for all candidates would impede rather than serve the interests of informing the members as it would have the likely result of turning off the members to the issues in the campaign. On the other hand, the emails will only be sent until the ballots are returned and the subject matter identification permits members to delete unwanted emails. The Union also has a valid concern that the vendor may not renew its contract if it cannot certify that the email recipients want to receive the campaigns’ messages.¹

The question on whether additional emails must to approved, however, need not be answered at this time. The protester should avail itself of the emails already approved by the

¹ Such cancellation has occurred in the past.

Union and, if it believes it to be necessary, request permission to distribute additional emails. If the request is reasonable, and the Union has no overriding interest in denying the request, it should be granted by the Union. Such a determination by the Union may be based on the number of email requests that all candidates have made, the size of the emails, the response of members to the use of their emails for campaign purposes, and other relevant factors. However, at the present time, the protest is premature and is therefore denied.

TBOU alleges that the UI slate had access to the Union email list. My investigation revealed that the UI list was put together not from Union sources, but from a variety of email address lists in the possession of the candidates. For example, UI used the addresses from an email that had been sent out by TBOU that contained hundreds of addresses. (See attached) The Union list has 15,000 names on it; the UI list 3500-4000. Thus I find that the protester has not proven that the Union list was made available to one candidate and not another.

Since there was no discriminatory use of Union resources, I deny this protest.

Therefore, the protests are denied.

In accordance with the International Constitution and the Election Rules, any interested party unsatisfied with this determination may appeal to the Transit Workers Union of America Committee on Appeals. Any appeal shall be in writing and shall be filed in accordance with the procedure set forth in Article IV(6)(I)(1) of the Election Rules and Articles XV and XXII of the International Constitution for the appeal to the International from decisions of Local Unions.

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