ELECTION APPEALS MASTER

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IN RE: WILLIAM LOBGER,
FRANK HALSTEAD,
TIM SYLVESTER,
TEAMSTERS UNITED, and
TEAMSTERS for a
DEMOCRATIC UNION,

Protestors.

2015-2016 EAM 44 (KAR)
DECISION RE ESD 378 AND ESD 387

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This Decision addresses appeals of two decisions by the Election Supervisor, ESD 378 and ESD 387. For the reasons set forth below, the appeals are denied and the decisions of the Election Supervisor are affirmed.

Background

The 1989 Consent Decree created the Independent Review Board (IRB), a three-member panel to investigate, *inter alia*, allegations of corruption and allegations of organized crime influence, control, or domination of the union, its officers, employees and members. Under the Final Agreement and Order ("Final Order") entered by the United States District Court (S.D.N.Y.) on February 17, 2015, the IBT was required, one year after entry of the Final Order, to "establish and permanently maintain an effective and independent disciplinary enforcement mechanism with ultimate authority to discipline IBT members and require compliance by the IBT with its Constitution and rules (the 'independent disciplinary system'), to replace the IRB."[1] The independent disciplinary mechanism under the Final Order is comprised of an Independent Investigations Officer (IIO) and an Independent Review Officer (IRO) (known collectively as the "Independent Disciplinary Officers" or "IDOs"). The IRB first established by the Consent Decree continued in place for the first year of the Final Order, pending creation of the IIO and IRO positions. Effective February 17, 2016, one year after the Final Order was entered, Joseph E. diGenova, a member of the IRB, was appointed to the position of IIO, and former United States Attorney General Benjamin R. Civiletti, also a member of the IRB, was appointed to the position of IRO.

As specified by the Final Order, the IIO and the IRO "shall exercise such investigative and disciplinary authority as previously exercised by the IRB," as set forth in the Consent Decree and the disciplinary rules appended to the Final Order. In addition, the IIO and the IRO possess

[1] Final Order, ¶25.

> the authority that the General President, General Secretary-Treasurer, and General Executive Board are authorized and empowered to exercise pursuant to the IBT Constitution, as well as any and all applicable provisions of law, including, without limitation, the authority to recommend disciplinary charges against IBT members, to review decisions by the Union with respect to recommended charges, to impose discipline, to review trusteeships imposed by the IBT over affiliates and to recommend trusteeships to be imposed by the IBT over affiliates, to review disciplinary decisions issued by the IBT General Executive Board and to review the IBT's audit records for affiliates and to conduct their own audits of IBT entities. The Independent Investigations Officer shall also issue an annual report to the IBT and the United States Attorney addressing the functioning of the disciplinary system, the IBT's compliance with this Final Agreement and Order and any other matters he or she considers appropriate. During the first five-year term of office of the Independent Investigations Officer, as set forth in paragraph 27, consistent with the practice of the IRB, the Independent Investigations Officer shall be authorized to request that the Court issue subpoenas.[2]

The protests at issue in the appeals of ESD 378 and ESD 387 all stem from actions taken by the IRB and the IDOs, and the response of the IBT to those actions.

Protest Decision 2017 ESD 378 (ESD 378) was issued on February 10, 2017. ESD 378 decided and denied pre- and post-election protests P-410, P-411, P-412, P-419,[3] and P-420.

The five pre- and post-election protests consolidated for decision in ESD 378 urged the Election Supervisor to rerun the International officers election, based upon alleged violations of the *Rules* by the IBT, James P. Hoffa, IBT General President, Ken Hall, IBT General Secretary-Treasurer (both candidates for re-election to their positions on the Hoffa-Hall 2016 slate), the Hoffa-Hall 2016 slate, and IBT outside counsel Viet Dinh, Esq. First, they asserted the IBT impermissibly and indefinitely postponed the trial on IRB charges against IBT vice president at-large and candidate Rome Aloise. Second, they asserted that the IBT and Mr. Hall failed timely to produce volumes of records that the IIO had directed the IBT to produce in connection with an investigation of IBT corruption, and that the IBT impermissibly used IBT funds to mount a legal challenge to the IIO's requests, with the "purpose, object, or foreseeable effect" of influencing the election in favor of the Hoffa-Hall campaign.

The protests specifically alleged that the deliberate delay and obstruction of corruption investigations denied Teamsters members the right to "fair, honest, open, and informed elections," in violation of Articles I and XII[4] of the *Rules*. The protests also alleged that the delays interfered with the right to vote as guaranteed by Article IV, Section 12 of the *Rules*. The protests further alleged that the IBT's contribution of resources, including retained legal services, to delay the trial of Mr. Aloise and to prevent or delay compliance with the subpoenas issued by the IIO until after the International officers election violated Article XI, Section 1(b)(3) and

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[2] *Id.*, ¶30.

[3] Certain aspects of P-419 were severed and decided in 2017 ESD 386, *aff'd* 2015-2016 EAM 42.

[4] Article XII incorporates certain provisions of the LMRDA.

Article XII of the *Rules*, that the legal services constituted impermissible employer contributions to the Hoffa slate in violation of Article XI, Section 1(b)(2) and Article XII, and that the failure to report union contributions and employer support violated Article XI, Sections 2(a)(1) and 2(a)(2).

The Election Supervisor rejected the protests, based upon an analysis of the alleged violations of Articles I and XII, and Article IV. The Election Supervisor did not address the alleged violations of Article XI and XII. On February 24, 2017, all of the protestors filed appeals of ESD 378, focusing in particular on the Election Supervisor's failure to investigate and consider alleged violations of Article XI.

By Notice of Hearing sent to all identified Interested Parties, a telephonic hearing was scheduled for February 28, 2017. On February 24, the Election Supervisor submitted a written response to the appeals (which did not address alleged violations of Article XI). Also on February 24, the Election Appeals Master received pre-hearing submissions from Mr. Sylvester, the Hoffa Campaign, IBT, and Mr. Halstead and the TDU.

A telephonic hearing on the appeal was held on February 28, 2017, which was attended by Richard Mark, Esq., Election Supervisor, Jeffrey J. Ellison, Esq., on behalf of the Election Supervisor, Paul Dever (OES), Julian Gonzalez, Esq., on behalf of Mr. Lobger and Teamsters United, David J. Hoffa, Esq., on behalf of the Hoffa Campaign, Bradley T. Raymond, Esq., on behalf of the IBT, Barbara Harvey, Esq., on behalf of Mr. Halstead and TDU, Catherine A. Highet, Esq., on behalf of Mr. Sylvester, Fred Zuckerman, and David Suetholz, Esq.

In addition, certain issues pertinent to the appeal of ESD 378 were addressed in submissions and argument in connection with the hearing on the appeal of ESD 383, which was held on March 3, 2017. The appeal of ESD 383 was withdrawn following the March 3 hearing with the understanding that the Election Appeals Master may consider arguments and submissions related to ESD 383 with respect to related appeals, including the appeals of ESD 378. 2015-2016 EAM 41 (ESD 383). Finally, on March 13, the Election Appeals Master received a supplemental submission from Mr. Sylvester, to which the Election Supervisor did not have an opportunity to respond.

As noted above, the alleged violation of Article XI was not addressed in ESD 378, or the Election Supervisor's submission in opposition to the appeals. This allegation was, however, addressed orally by the Election Supervisor and by the IBT in the hearing on the appeal of ESD 378, and in the hearing on the appeal of ESD 383. At those hearings, a number of factual representations and arguments were made to the Election Appeals Master regarding the asserted institutional interest of the IBT in resisting or limiting document production to the IIO that were not part of the investigative or written appellate record. The Election Appeals Master therefore concluded that the most prudent course was to remand these protests for appropriate investigation, consideration and decision by the Election Supervisor with respect to alleged violations of Article XI, with particular focus on the asserted institutional interest of the IBT in expending resources to resist or limit production of documents to the IIO. By Order dated March 28, 2017, the Election Appeals Master remanded the protests with respect to

allegations of violations of Article XI for appropriate investigation, consideration and decision by the Election Supervisor.

In response to the Election Appeal Master's decision, the Election Supervisor conducted an extensive investigation, including witness interviews and reviewing thousands of documents, including all correspondence between IBT and IIO representatives and all internal IBT communications (including communications with counsel), concerning the Aloise trial and the IIO's document production requests, as well as the transcript of a July 20, 2016 meeting between representatives of the IBT and the IIO.[5]

On August 7, 2017, the Election Supervisor issued ESD 387, in which the Election Supervisor found:

> The IBT did not violate Article XI, Section 1(b)(3) or Article VII, Section 12(c) with the decisions it made when responding to the March 2016 notices of examination or the Aloise request to stay indefinitely his IBT hearing on internal union charges. We conclude that the IBT's decisions on these matters did not have the purpose or object of influencing the election of any candidate on the Hoffa-Hall 2016 slate or of Aloise in particular. We further conclude that the decisions did not have the foreseeable effect of influencing the election because they were motivated by legitimate institutional interests of the IBT and did not take a partisan position or advocate on behalf of a candidate.

ESD 387 at 53.

On August 9 and 10, 2017, all of the protestors filed appeals of ESD 387. By Notice of Hearing sent to all identified Interested Parties, a telephonic hearing was scheduled for September 6. The Election Appeals Master received pre-hearing written submissions from the Election Supervisor, the Fred Zuckerman Teamsters United slate, Mr. Sylvester, the Hoffa Campaign, IBT, and TDU.

A telephonic hearing on the appeal was held on September 6, 2017, which was attended by Richard Mark, Esq., Election Supervisor, Jeffrey J. Ellison, Esq., on behalf of the Election Supervisor, Paul Dever (OES), Julian Gonzalez, Esq., on behalf of Mr. Lobger and Teamsters United, David J. Hoffa, Esq., on behalf of the Hoffa Campaign, Bradley T. Raymond, Esq., on behalf of the IBT, Barbara Harvey, Esq., on behalf of Mr. Halstead and TDU, Catherine A. Highet, Esq., on behalf of Mr. Sylvester, Tim Sylvester, Fred Zuckerman, David Suetholz, Esq., and Pamela Newport.

Facts Pertaining to ESD 378 and ESD 387

Portions of the following statement of facts are drawn substantially from ESD 378 and ESD 387.

[5] See ESD 387 at 1-2.

Rome Aloise

During the time relevant to the protests, Rome Aloise was an IBT vice president at large, and principal officer of Local Union 853 and president of Joint Council 7. Mr. Aloise was nominated and declared elected to the position of IBT vice president – West region at the IBT convention, held from June 27 to July 1, 2016.

On February 10, 2016, some four and one half months before the start of the IBT convention, the IRB submitted a 122-page report, supported by 372 exhibits to the IBT General Executive Board (GEB) recommending that charges be filed against Mr. Aloise. This publicly available report concluded with the IRB's recommendation that Mr. Aloise face charges of bringing reproach upon the IBT in three particulars:

- "In 2013, while an International Vice President, President of Joint Council 7 and principal officer of Local 853, you requested and received things of value from Southern Wine and Spirits, an employer of Teamster members with whom you were negotiating. As detailed above, these things of value were six admissions to a Playboy Super Bowl party for another Teamster official and his family and friends, a job for your cousin and the retention of your cousin in his job after the employer determined he was not performing as required. In addition, as described above, in February and March 2013, you requested a thing of value, a job for your cousin, from Gillig Corporation which employed Teamster members."

- "In 2004 and subsequent years, while principal officer of Local 853, you entered into collusive, sham collective bargaining agreements with GrandFund. As described above, you allowed the employer to select the bargaining agent for his employees and caused Local 853 to commit an unfair labor practice in violation of 29 U.S.C. §158(b)(1)(A) by interfering with the employees' right to select their representative, 29 U.S.C. §157. As described above, in addition, you failed to follow IBT Constitutional and Local 853 Bylaw requirements regarding contract negotiations and ratifications. In addition, in 2012 you allowed an ineligible person to obtain and retain membership in Local 853 as detailed in the above report in violation of Article XIV, Section 3 of the IBT Constitution."

- "In 2013, while an International Vice President, and principal officer of Joint Council 7 and Local 853, you engaged in a pattern of misconduct designed to prevent a fair officer election in Local 601, including using union resources to support a candidate and subvert her opponents and attempting to deny members' LMRDA rights to free speech, to sue and to fair hearings. In addition, you breached your fiduciary duties by ignoring, when known to you, your candidate's wrongdoing and also by failing to act to end her known defiance of the General Secretary's instructions as detailed in the above report. By failing to ensure the internal political rights of members to a fair election, you also breached your fiduciary duties under 29

U.S.C. §501(a). Your pattern of misconduct is described in the above report."

The letter forwarding the IRB's recommended charges, report, and exhibits to the GEB was presented pursuant to the procedure required by the Consent Decree. Pursuant to the terms of the forwarding letter and the Consent Decree, the GEB was to have concluded the hearing on the charges the IRB recommended against Mr. Aloise within ninety days of transmittal of the report and recommendation, or by May 10, 2016. Consistent with this obligation, the IBT on March 15 issued a notice of hearing for April 28. Some two weeks later, on March 31, the IBT made a written request to the IIO for an extension of time in which to complete the matter. This request was granted, extending the completion date from the original May 10 to July 17. The IBT thereafter, on April 7, set a hearing before a panel of GEB members for June 6, 7, 14, and 15. On April 26, notice was issued to all parties that IBT Legal Department Director Gary Witlen was appointed as counsel to the hearing panel.

On May 13, 2016, Mr. Aloise's lawyer wrote Mr. Witlen:

> We understand that when the Independent Review Board ("IRB") issued their report referring proposed charges against Rome Aloise to the International Brotherhood of Teamsters ("IBT"), they also sent their report and thereby referred their proposed charges to the United States Department of Justice. We learned this week that a federal grand jury in the District of Columbia has issued a subpoena calling for the production of documents relating directly to the pending charges against Mr. Aloise. Clearly the Department of Justice is conducting an investigation of the IRB's charges against Mr. Aloise.
>
> In view of the foregoing, I hereby assert Mr. Aloise's right under Article XIX, §7(a) of the IBT Constitution[6] not to stand trial on the charges that are to be heard by an IBT panel commencing on June 6, 2016, in San Francisco while federal criminal proceedings involving the same charges are being conducted. It would be manifestly unfair to compel Mr. Aloise to defend against the charges while in jeopardy of a criminal prosecution, and the IBT Constitution clearly provides that he may not be required to do so.
>
> I would very much appreciate your informing me as soon as possible of the IBT's position on Mr. Aloise's assertion of his right.

Mr. Aloise's attorney sent Mr. Witlen a second, more detailed, letter on May 18, 2016, adding that he had learned from a federal prosecutor in the United States Department of Justice (USDOJ) Organized Crime and Gang Section that Mr. Aloise was a target of the grand jury investigation. Mr. Aloise's attorney elaborated on the argument presented in his previous letter with the following points:

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[6]Section 7(a) reads in relevant part: "No member or officer shall be required to stand trial on charges involving the same set of facts as to which he is facing criminal or civil trial until his final court appeal has been concluded."

1) We had planned to have Mr. Aloise testify about all of the charges at the panel hearing. Because of the pendency of the grand jury proceedings, Mr. Aloise now faces a Hobson's choice: either he will testify, foregoing [sic] his fifth amendment protections and placing himself in jeopardy of criminal charges being reviewed by the grand jury or he will not testify, thereby emasculating our defense at the hearing. This is manifestly unfair to Mr. Aloise. Indeed, the very rationale for Section 7(a) is to protect against such unfairness.

2) We had planned to call as witnesses individuals who are identified in the report as knowledgeable about the facts alleged to constitute the charges against Mr. Aloise. The pendency of a criminal investigation virtually unlimited in scope either has or will have a chilling effect on these witnesses. Indeed, we have already been informed that some witnesses will not appear. We have no doubt that when others learn of the grand jury investigation and their potential jeopardy in light of its vast scope, they will also decline to testify. This dramatically undermines Mr. Aloise's ability to defend himself.

The request on behalf of Mr. Aloise was considered by the IBT, which at some point sought the advice of retained counsel Viet Dinh, formerly of Bancroft PLLC, now a partner at the firm of Kirkland & Ellis.[7]

The Election Supervisor found that

IBT leadership concluded that the IRB's action in referring the Aloise investigation to USDOJ at the same time it referred the internal union charges to the General President for adjudication was unfair to Aloise and, so far as it knew, was unprecedented in the history of the Consent Order. Moreover, they were concerned that these circumstances would impede the union's ability to fulfill the obligations it owed Aloise under the LMRDA, 29 USC 411(a)(5), which bars disciplinary action by a labor organization against a member "unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." They concluded that the IRB's referral of the matter to USDOJ effectively checkmated Aloise's ability to defend himself at the internal union hearing, thereby depriving him of "a full and fair hearing."

There was no disagreement among IBT lawyers that the constitutional provision, were it interpreted in a case of first impression, should operate to forestall indefinitely an internal union hearing on charges that were the subject of a grand jury investigation. Although no indictment had issued against Aloise, the lawyers saw no meaningful distinction between "target" status in a grand jury proceeding and indictment, for purposes of the protections Article XIX, Section 7(a) sought to provide. Construing the constitutional provision in this way protected the IBT's interests in complying with the LMRDA's requirement to provide a member accused of misconduct a "full and fair hearing," because he was not

[7]There is no evidence of record regarding the IBT's decision to retain outside counsel in connection with the Aloise proceeding.

required to waive his Fifth Amendment privilege as a condition of exercising his testimonial right at the hearing.

ESD 387 at 22-23.

On May 17, 2016, Mr. Witlen prepared and circulated among IBT lawyers, a draft letter to IIO diGenova, advising that Mr. Aloise had been named the target of a federal investigation arising from the same allegations contained in the IRB referral and had invoked Article XIX, Section 7(a) to avoid hearing on the internal union charges until any court action that might be brought had concluded. The draft letter stated that Mr. Aloise's "concern with the prospect of having to testify about matters that are the subject of a criminal investigation is apparent. The Union is equally concerned about satisfying its commitments under the Final Order within the currently established timeframe." Citing "these unprecedented and unique circumstances," Mr. Witlen wrote that "we invite your input as to a course of action that the Union may pursue that will balance Article XIX, Section 7(a) with the IRB's Rules." This draft was not sent to IIO diGenova.

A second draft letter to IIO diGenova from Mr. Witlen, circulated on May 19, 2016 to in-house lawyers, read in part:

> In the lengthy history of the Consent Decree, this is the first occasion of which the Union is aware that the IRB has provided materials to DOJ at the same time it has referred charges involving the same conduct to the Union. As a result, this is the first time a member awaiting the opportunity to confront the charges and be exonerated in a Union hearing has had to weigh the possible and obvious adverse consequences of participating in such a hearing and giving testimony on the record and under oath, at the same time he has been informed that he has been identified as a target in an ongoing criminal investigation.
>
> I convey the Union's view that by your actions, you have created an impossible situation for Mr. Aloise and the Union as well. Quite simply, you have compromised Mr. Aloise's due process right to defend himself under the terms of the Union's constitution and the IRB's procedures. Moreover, you have placed the Union in the position, if it proceeds with its disciplinary processes under these circumstances, of being accused of violating Mr. Aloise's rights as a member that are protected by 29 U.S.C. §411(a)(5). And you have made it impossible for the Union to sort out these competing interests and also comply with the timeframe established by the IRB for issuing a decision regarding the referral. In short, by not permitting the procedures set forth in the Consent Decree and the Final Order to function, you have created a conundrum from which there is no easy escape.

This draft letter concluded by declaring that the IBT would not proceed with the scheduled hearing on the internal union charges because doing so "will not provide Mr. Aloise with the opportunity to confront his accusers and answer the charges, but, rather, will subject him to greater jeopardy. The constitutional provision was adopted to prevent such a consequence."

Mr. Witlen's second draft to IIO diGenova was not sent. After an initial circulation among in-house IBT lawyers, it was discussed with General President Hoffa and the approach tentatively approved. It was then forwarded to attorney Dinh for review. Mr. Dinh's law partner, George W. Hicks, Jr., returned a re-draft of the Witlen letter, maintaining much of its substance, but adding the following argument:

> Forcing Mr. Aloise to defend himself at a hearing while under criminal investigation by the DOJ compromises Mr. Aloise's due process rights under the IBT constitution and the Final Order. If the IBT proceeds with disciplinary proceedings under these circumstances, it may well face suit by Mr. Aloise asserting a violation of 29 U.S.C. §411(a)(5). *See* Final Order ¶ 35 (providing that nothing in the Final Order limits the rights of members to seek judicial review of union discipline under the LMRDA). Thus, it is impossible for the IBT to conduct disciplinary proceedings that comply both with the previously established timeframe for issuing a decision and with Mr. Aloise's rights as set out in the IBT constitution and federal law.

Mr. Hicks's draft concluded with a statement of intention to request an extension on the hearing schedule for the internal union proceeding until USDOJ closed its investigation or, if a judicial proceeding were initiated, that process was concluded. The draft letter acknowledged that any such extension request must be made to IRO Civiletti. The draft requested IIO diGenova's "nonopposition to this extension."

Some internal debate ensued among the lawyers. Mr. Witlen asked the rationale for requesting IIO diGenova's agreement before approaching IRO Civiletti with the request. He emailed on May 23, 2016:

> I think it is safe to assume that diGenova will not agree and may even make the effort to unload on us for even asking ... Thus, before we even make the request to Civiletti, the reasons for him to reject it will already have been presented. Delaying the ultimate response from Civiletti only extends the scheduling uncertainty of our panel members, Aloise and his defense team, and Acevedo. I'm not sure to what end?

Mr. Hicks replied the same afternoon:

> Gary—regarding whether to ask Joe D. first rather than going straight to Civiletti, we debated this internally. There is no obligation that we go to Joe first, since the Final Order only gives extension authority to the IRO. The reason we came down on the side of asking Joe first is because it would make us look more reasonable to a third party (e.g., the judge or US Attorney who might be reading this as part of a written record down the road), and also because it is consistent with what the IBT did in its previous extension request. And if there is little delay in Joe's/Carberry's eventual denial (as we expect), then there didn't seem to be a material downside to it. Finally, if we expect Civiletti to say no to an extension, then we have at least pushed things out further for when we move into stage 2,

> which is where the IBT doesn't act on the proceedings and instead lets the IRO conduct a de novo hearing. We're not wedded to this approach and are happy to discuss, but that was our thinking on the matter.

Mr. Hicks's re-draft was not sent. Instead, it went through one more re-draft to make Mr. Dinh the author rather than Mr. Witlen. Discussion by email among the lawyers the day before the letter was sent considered the course of action should IIO diGenova reject the request for agreement and should IRO Civiletti deny the extension. Mr. Witlen, as counsel to the hearing panel, felt some urgency to make a decision about the IBT's course of action in advance of the hearing date. On May 24, 2016, he emailed Mr. Hicks: "I appreciate that it is appropriate to ask Civiletti [for an indefinite extension], but we are running out of time and I feel an obligation to tell the hearing participants before they get on planes to San Francisco." Mr. Hicks replied, "We will prepare a letter requesting the extension from Civiletti, but also saying that if it is not granted, we intend to postpone the proceedings."

The Dinh letter was sent to IIO diGenova on May 25, 2016, who responded on the next day that he would oppose any adjournment request made to the IRO. The letter implicitly denied that the IRB had forwarded the Aloise charges to USDOJ, stating that they were public and available to anyone willing to examine them. The letter continued:

> DOJ's decision to investigate Mr. Aloise's conduct for possible criminal violations is a government decision. He is no different than the other union members who when in similar situations whose hearings had not been stayed despite their requests. Finally, the IBT Constitutional provision you cite to justify an adjournment is not applicable on its face, since Mr. Aloise has not been criminally charged as of this date.

Mr. Hicks emailed the IBT lawyers on May 26, 2016 to state "[w]e have drafted a letter to Civiletti formally requesting the extension, which we will soon circulate." Mr. Dinh replied that they should do more than a "bare bones letter," concerned that Civiletti "will reject [it] out of hand." Instead, he suggested that they "prepare and send Civiletti a well-reasoned letter brief, articulating why we are legally required or at least legally entitled to respect Aloise's right to due process, and refuting the cases and provisions [diGenova] discusses in this letter." In the meantime, the IBT notified the parties to the Aloise hearing and the hearing panel that the hearing had been postponed.

IIO di Genova's letter was followed within a matter of hours by a communication from IRO Civiletti, who stated that the IBT's letter to IIO diGenova had been forwarded to him, and that "I find that good cause has not been shown for the grant of such an indefinite extension of the hearings, and I therefore deny the requested further extension."

On June 3, 2016, the IBT sent a letter brief to IRO Civiletti, laying out the arguments in favor of the indefinite extension.

During the preparation of this letter by lawyers at Mr. Dinh's firm, IBT General Counsel Bradley Raymond considered the likely consequences to Mr. Aloise of the IBT taking unilateral action to suspend the hearing process while the grand jury investigation continued. He predicted the following by email on May 31, 2016 to the other in-house IBT lawyers: "this strategy will almost certainly lead to Civiletti assuming original jurisdiction. This will almost certainly lead to Rome being 'convicted,' and probably in pretty short order. Just wondering if Rome and his lawyers are fully engaged on this issue."

The letter that Mr. Dinh sent to IRO Civiletti on June 3, 2016 advised that the IBT had "suspend[ed] the scheduled hearing on charges against Mr. Aloise until the conclusion of the criminal inquiry. By this action to protect the integrity and fairness of any eventual proceeding, the IBT takes no position on the allegations against Mr. Aloise." After reciting the essential facts of the situation, Mr. Dinh's letter first criticized at some length IRO Civiletti's action in denying the requested extension before the IBT even had made it.

> To say the least, your preemptive denial of a request that the IBT had not even yet made blatantly disregards the procedures set forth in the Final Order and undermines constructive relations between the IBT and the Independent Disciplinary Officers. The Final Order expressly provides that the Independent Review Officer may extend the period in which the IBT must provide written findings "upon request for good cause." To be sure, the Independent Review Officer is entitled to deny the requested extension, but the IBT is entitled first to "request" it, by making its full panoply of arguments for the extension. To deny a putative extension before even receiving the request—much less before having a full understanding of the reasons for the request—is the antithesis of reasoned, impartial adjudication. ***
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> [Y]ou must surely recognize the deleterious effects your preemptive denial will have on relations between the IBT and the Independent Disciplinary Officers. The IBT sought to follow the letter and spirit of the Final Order by voluntarily seeking non-opposition from the Independent Investigations Officer before requesting an extension from the Independent Review Officer. What it got in return was a sucker punch: the Independent Investigations Officer *ex parte* transmitted the IBT's non-opposition request to the Independent Review Officer, and the Independent Review Officer denied an extension before the IBT even had a chance to submit a formal and detailed request. If the Independent Disciplinary Officers' purpose in undertaking this discreditable tag-team exercise was to undermine trust and cooperation between themselves and the IBT—in turn jeopardizing the constructive relationships envisioned by the Final Order—they have attained that unfortunate goal.

Turning to the merits of Article XIX, Section 7(a), Mr. Dinh asserted that the IBT had "both the duty and the right under the Final Order not to proceed with its disciplinary hearing against Mr. Aloise until completion of the ongoing criminal investigation against him based on the Independent Investigation Officer's report." Mr. Dinh explained that under the Final Order, hearings before the IBT "resulting from Independent Investigations Officer referrals * * * shall

be conducted under rules and procedures consistent with the requirements of Article XIX of the IBT Constitution and applicable law." Article XIX, Section 7(a) "reflects the obvious dilemma that any member faces" when confronted with internal union charges at the same time he is facing criminal or civil trial on the same set of facts: "if he or supporting witnesses testified on his behalf during the IBT hearing, that testimony could be used against him in a criminal or civil proceeding; however, if he or supporting witnesses refused to testify during the IBT hearing—to avoid providing inculpatory evidence in another proceeding—his defense before the IBT would be emasculated and his right to the full and fair hearing required by federal labor law undercut." Mr. Dinh stated that "the IBT has construed the provision to encompass circumstances where a member has been notified by law enforcement that he is a target of a criminal investigation based on the same set of facts underlying a putative IBT hearing, since statements made in an IBT hearing could be immediately used elsewhere against that member to that member's detriment." Mr. Dinh's letter further asserted that a union's interpretation of its constitution was entitled to deference unless patently unreasonable, citing *Sim v. New York Mailers' Union No. 6*, 166 F.3d 465, 470 (2d Cir. 1999) ("a Union's interpretation of its own constitution is entitled to great deference in order to avoid interference with internal union affairs and therefore, the interpretation of bylaw provisions by Union officials will be upheld unless patently unreasonable"); and *Hughes v. Bricklayers & Allied Craftworkers Local No.45*, 386 F.3d 101, 106 (2d Cir. 2004) ("We, of course, defer to a union's construction of its own constitution and rules unless that interpretation is patently unreasonable.").

Mr. Dinh concluded this argument with two points. First, "for the IBT to conduct a hearing against Mr. Aloise at this juncture would not be 'consistent with the requirements of Article XIX of the IBT Constitution' and would therefore contradict the terms of the Final Order." Second, given the IBT's obligation under the LMRDA to provide a "full and fair hearing," the IBT was unwilling to "expose itself to civil liability" to Mr. Aloise by conducting an internal union hearing against a member facing grand jury proceedings on the same facts.

Without citing the case expressly, Mr. Dinh distinguished *US v. IBT (Carey & Hamilton Discipline)*, 247 F.3d 370 (2d Cir. 2001). In that case, the IRB referred charges to the IBT's General Executive Board (GEB) alleging that Hamilton brought reproach on the IBT by embezzling funds to support the Carey re-election campaign. Similar charges were referred to the GEB for Carey. The GEB adopted the charges against both individuals and returned the matters to the IRB for trial before the IRB. A short time before the IRB hearing was to commence, Hamilton requested an adjournment of the hearing "until the completion of any investigation by the United States Attorney's Office for the Southern District of New York regarding any conduct relating to these proposed charges." The request did not cite the IBT constitution as the basis for the stay. The IRB granted a brief adjournment but then proceeded with the hearing, which consumed four days over several months. Hamilton did not testify, but his counsel cross-examined witnesses presented against him. After the proofs were closed but before the IRB issued a decision on the merits of the charges, Hamilton was indicted on felonies related to the campaign finance scheme and its cover-up. The same day the indictment was returned, Hamilton requested a second stay of proceedings, this time citing Article XIX, Section 7(a) of the IBT constitution, and stating that the indictment made it inadvisable to file a post-hearing brief on the IRB proceeding. The IRB denied the stay and subsequently found that the internal union charges had been proved against Hamilton, barring him from membership, office,

and employment with the IBT for life. The District Court and the Court of Appeals affirmed the IRB's action and expressly found that the IRB did not violate Hamilton's rights by denying his requests for stay. Mr. Dinh's June 3, 2016 letter to IRO Civiletti argued that *Carey & Hamilton* was inapposite to the Aloise hearing, principally because the IBT – not the IRB or the IRO – was trying the charges:

> Mr. diGenova claims that Mr. Aloise "is no different than the other union members who when in similar situations whose hearings had not been stayed despite their requests." * * * Mr. diGenova provided no support for this cryptic statement, but in all events, the IBT is aware of no time when the Independent Disciplinary Officers or their predecessor, the IRB, have required *the IBT* to proceed with a disciplinary hearing against one of its members when that member is also under criminal investigation for the same alleged conduct. Furthermore, the Consent Order contained no provision for extensions of time, whereas the superseding Final Order expressly contemplates extensions of time for good cause. The supposed absence of extensions under a previous regime that did not even provide for them has little, if any, relevance now.

As a final point, Mr. Dinh submitted that the IBT was not required by the Final Order to conduct a hearing on charges referred to it by the IIO. Rather, citing paragraph 35 of the Final Order, the IBT was obliged only to take "whatever action is appropriate" within the time permitted by the Final Order. Mr. Dinh elaborated on this point as follows:

> Finally, the IBT not only is obliged by its Constitution and federal law to forgo Mr. Aloise's hearing for the time being; it has the right to do so under the Final Order. Nothing in the Final Order requires the IBT to hold a disciplinary hearing against a member after the Independent Investigations Officer refers a written investigation report to it. To the contrary, the Final Order expressly provides that after the Independent Investigations Officer refers a report to the IBT, the IBT entity to which the matter has been referred "shall promptly take *whatever action is appropriate* in the circumstances and shall, within ninety (90) days of the referral, make written findings setting forth *the specific action* taken and the reasons for that action." Final Order ¶32 (emphases added). Indeed, the Final Order notes that "*[i]n the event that*" the IBT files disciplinary charges, the IBT shall be the charging party, confirming that the IBT has the option of not proceeding with a disciplinary hearing.
>
> All that is required of the IBT under the Final Order is that the IBT entity to which a report is referred must provide, in response, "written findings setting forth the specific action taken and the reasons for that action." Those findings must be provided within 90 days of the referral, which time period may be extended for good cause. The Independent Review Officer then reviews those written findings to determine whether further action is necessary; if so, he notifies the IBT entity, which has 20 days to identify additional actions it has taken or will take to correct the defects noted by the Independent Review Officer. The Independent Review Officer then reviews the IBT entity's response and, if still

dissatisfied, conducts a de novo hearing according to the Rules appended to the Final Order. *Id.* ¶¶33-34; *see also id.* ¶35 (preserving member's ability to seek judicial review under the LMRDA).

The Final Order thus sets out a clear, step-by-step disciplinary process that carefully allocates certain authority to designated entities at certain times. That detailed framework was the hard-earned product of negotiations between the IBT and the government and cannot be disregarded cavalierly. The IBT intends to comply with the Final Order by adhering to the process it sets forth.

The IRO did not respond for nearly six weeks. In the meantime, the IBT's General Executive Board met on or about June 24, 2016, received a report of General President Hoffa on the decision not to proceed with the hearing, and adopted a resolution of support for the General President's action. The report the General President gave the GEB stated the following:

As you know, the Independent Investigations Officer referred charges against Vice President Rome Aloise. You all received copies and are familiar with the allegations.

I want to update you on the status of the charges. I don't want to discuss the substance of the charges.

I have appointed a panel to consider the charges and give Rome an opportunity to present his case. We had scheduled two days of hearings in San Francisco on June 7-8 and two days in Chicago the following week.

Shortly before the hearing, we were notified by Rome's attorney that he became aware that the Justice Department in Washington had commenced an investigation of the allegations in the referral and was targeting Rome for possible criminal charges. He advised that a grand jury might eventually consider the findings at the completion of the investigation. Based upon that information, Rome's attorney requested that the hearings be postponed indefinitely, invoking Article XIX, Section 7(a) of the Constitution, which provides that a member need not stand trial on charges involving the same set of facts as to which he is facing criminal or civil trial until the final court appeal has been concluded.

I granted that request and we had our outside counsel, Viet Dinh, communicate that decision to the IDO. We have not heard back from them as to their reaction. In the meantime, our time within which we were supposed to issue a decision on the charges has expired.

I bring this to your attention so you are aware of the reason the charges have not been heard and to understand the position we have taken.

IRO Civiletti replied to Mr. Dinh's June 3 letter on July 18, 2016, citing *Carey and Hamilton Discipline*, and asserting that "Mr. Aloise is in the same position as Hamilton was at the time of his scheduled hearing; he may be under investigation for potential violation of the

criminal laws, but he is not under indictment and is not facing a criminal trial." IRO Civiletti did not address the distinction Mr. Dinh had drawn between the union conducting the hearing (in Aloise's case) and the IRB doing so in Hamilton's. The IRO directed:

> Pursuant to Paragraph 33 of the Final Order, the Union has 20 days to inform the Independent Review Officer in writing that a prompt hearing on the charges against Mr. Aloise has been scheduled. If the Union does not do so, the Independent Review Officer will promptly schedule a de novo hearing on the charges against Mr. Aloise.
>
> Given the time that has passed since Mr. Aloise was first notified of the charges against him, and given the prior grant of the Union's request for an extension of time to conduct its disciplinary hearing, the Independent Review Officer will consider the Union's actions to correct the defects set forth in this Notice not to have been pursued in a lawful, responsible or timely manner, and to be inadequate in the circumstances, unless the Union disciplinary hearing is scheduled to be held and completed, and written findings concerning the specific actions taken by the Union and the reasons for those actions submitted to the Independent Review Officer, by no later than September 15, 2016.
>
> I hereby notify you of my determination that the Union has not pursued the disciplinary proceeding against Rome Aloise in a lawful, responsible, or timely manner; and that the Union's decision, based on Mr. Aloise's request, to stay for an indefinite period of time the date of the hearings on the charges against him, pending the resolution of any criminal investigation against him, is inadequate under the circumstances.

IRO Civiletti's letter prompted further internal debate among IBT lawyers. In a three-paragraph email Mr. Dinh's law partner Mr. Hicks sent to all involved IBT lawyers on July 18, 2016, he first addressed IRO Civiletti's assertion that the IBT's decision not to go forward with the Aloise hearing was a "serious violation" of the Final Order.

> 1. The "serious violation" language appears to be bloviation. The Final Order doesn't say that refusing to proceed with a hearing following a charge is a violation of the order, much less a serious violation. The process is working exactly the way the Final Order sets out: the union did not proceed in a lawful, responsible, or timely manner (says the IRO, parroting the language of the Final Order), so now the IRO is contemplating conducting a de novo review—exactly what the Final Order provides for. Frankly, the fact that he is providing even further time before initiating the de novo hearing is interesting, since he does not have to do so under the Final Order. It is almost as if he doesn't really know what to do should he actually have to conduct the de novo hearing himself, and is hoping the IBT will capitulate in the face of his made-up "serious violation" allegation and undertake the hearing itself.

Commenting on IRO Civiletti's discussion of *Carey & Hamilton Discipline*, Mr. Hicks wrote the following:

2. The letter says that the Second Circuit has already rejected our argument that the IBT Constitution isn't triggered if a member is merely under criminal investigation and not yet charged. This is somewhat true, and we knew that going in—the decision he cites isn't a good one for us. But the passing language in that decision is arguably dicta, and the court certainly didn't grapple with the counterargument that the IBT is entitled to construe its own Constitution.

Finally, Mr. Hicks turned to the question of whether to proceed with the internal union trial of the charges against Mr. Aloise:

> 3. Whether it is more prudent for the IBT simply to conduct Rome's hearing on its own vs. let the IRO handle it is a strategy question more for the IBT folks. However, there may be a benefit to having the IBT do it—Rome is more likely to be acquitted or given a lighter remedy than under anything the IRO would do, where he will surely be convicted and receive a very stiff penalty. If the IBT does it, the IRO might object to the outcome and try to then override the result or conduct a new hearing himself, but we've eaten up more of the clock in the meantime (if that is one of the goals here—to get past the election season).

Mr. Witlen wrote to another IBT in-house lawyer just twelve minutes after Mr. Hicks sent his email, "Please shoot me." Mr. Witlen explained in an interview with the Election Supervisor "irritated" with Mr. Hicks's suggestion because the leadership had already been through the pros and cons of proceeding with the trial and made the decision to interpret the IBT constitution so as to require that the proceeding be stayed, understanding that the IRO would then control the timing and conduct of any hearing. Mr. Dinh also commented, "I don't think we are going to do 3. I told Ed McDonald [Mr. Aloise's lawyer] two weeks ago that our letter articulated our position and that is it."

On July 19, 2016, Mr. Aloise's counsel wrote the IBT, urging it to bring or join a suit to bar the IRO from proceeding with a hearing while the grand jury continued to investigate Mr. Aloise, which the IBT declined to do.

Meanwhile, on July 19, IRO Civiletti's July 18 "20-day Letter" was posted to TDU's website, linked to an article titled "Rome Aloise Under Criminal Investigation." The Election Supervisor found that the IRO's public release of his letter was inconsistent with prior practice and procedure, observing that "[n]either IBT nor IIO witnesses we interviewed could identify any previous matter in which a so-called '20-day letter' had been made public. Also, neither the IBT constitution, the Consent Order, the Final Order, nor the disciplinary rules requires such publication by the disciplinary authority." ESD 387 at 34.

The IBT was concerned that the unprecedented public release of the letter improperly injected the IIO into the election process. Mr. Dinh wrote to Assistant United States Attorney Tara LaMorte:

> The letter was copied only to the IBT, the affected person and his counsel, and Mr. diGenova. This type of unwarranted threat and escalation debases the IIO and IRO, threatens the integrity of the disciplinary mechanism under the Final Order, and quite frankly undermines all that we have worked so hard together to move the IBT to a better place.
>
> Worse, the intentional leaking of an unwarranted nuclear threat to the electoral opponents of current IBT leadership I fear bespeaks an effort, at best, of illegitimate entanglement in IBT electoral politics and, at worst, of deliberate destabilization of the IBT.

Mr. Dinh raised the release of the 20-day letter directly with IIO diGenova in a meeting on July 20, which, as was revealed in court filings in November 2016, was recorded by someone from the IBT's delegation without advising the IIO's representatives of this fact.

IIO diGenova explained to Mr. Dinh and the others present how the release of the letter came about:

> Monday [July 18, 2016] we delivered a letter to President Hoffa about Aloise. Close of business on Monday we get a call from the TDU saying that they had heard from inside your building that Aloise was going to have a 20-day letter, or something like that they heard, could they get it. And we said, we'll consider that. We want to give the union time to review the letter. The next day, we gave them a copy of the letter.

Mr. Dinh replied that the release of the letter was unusual, was inconsistent with historic practice, and, coming during the electoral period, had the potential improperly to interfere with the election. IIO diGenova argued that the 20-day letter was a public document. He said, "[A]ll of these letters are public. The charges are made public. The letters are made public. *** You have to understand, first of all, that we -- every one of our records, unless it's an investigative document, is public and the union members have a right to see every bit of it." Mr. Raymond disagreed, stating: "Not the way it's been explained to me in the past," asserting that investigative reports were made public, but 10-day and 20-day letters were not. IIO diGenova replied:

> Are you asking me not to release any documents, even though they're not investigatory – remember, we're not at the investigatory stage now. We're at the adjudicatory stage and the members have a right to attend those hearings and to do whatever they want to do to attend them. So if you want me not to issue any – not to answer those requests, here's what I'll do –

Mr. Dinh interrupted IIO diGenova, stating:

> No, we're not asking for that. You asked me what our position is, our position is not to make any specific requests or demands on you with respect to any particular action. Our request is very simple. As you noted, we are in the middle

of an election season and there is intense interest amongst all of our 1.3 million members in that election. And the rules, constitution, tradition of IBT is very, very clear. That is, union officials -- certainly applies to us and we consider all the IIOs and IROs to be part of the union official, because we're all working together, even though you're an independent regulatory mechanism – It's sensitive that they cannot use their union positions in order to entangle themselves in the elections. There is a real danger – there is a real danger that in the middle of this election season, every single one of our actions has effects on that electoral process.

What is normal … – so what would be your normal judgment that on whatever issue, I'm not making specific requests. What would be your normal judgment, I would think is – has to be viewed with – because it should be viewed. The laws and rules are required to be viewed in the context of an ongoing election fight, because none of us wants to be -- none of us wants to be unwittingly or deliberately entangled in that election process. So that's why – that's why we're very concerned about any – any of these actions that can be seen as excessive escalation and aggression that may be construed as -- that may be construed as something other than a lawyerly dispute into an actual sort of violation or noncooperation, anything like that.

Mr. Dinh asked IIO diGenova to follow normal practice and procedure with respect to public release of certain documents, with Mr. Raymond arguing that 20-day letters are not a category of documents that historically have been released.

IIO diGenova replied as follows:

I understand completely and I certainly understand what you just said about the anxiety surrounding the election and everything. What we'll do is, it's really simple, we'll just shut down this process of public information and what we'll do is we'll try to do it on a case-by-case basis. If something comes up what I'll do is, I'll get on the phone with Brad and I'll say here's the request we received, what do you think, et cetera, et cetera, in order not to throw a wrench into the election process. It seems to me that your request is quite reasonable. I don't see any reason in the world that we shouldn't try to make some sort of accommodation, given that it's a highly, I would say, emotional situation.

IIO diGenova qualified this plan with the following:

I'm very sorry about the – about the letter, but I got to tell you something – And, Brad, I have to disagree with you respectfully. When a union member calls up and asks for something, unless it's an investigative document, we give it to them. That's been the – that's been the rule for the IRB from the beginning.

Now, this turns out – as I said, we got the call from TDU after they got a call from inside your headquarters, … I just want you to know that there was a

> process -- we didn't just do this on our own. I don't give a damn who knows Aloise has got a 20-day letter. I could care less. But here's the thing, I do appreciate the fact that you brought it to our attention in a professional and respectful way. We will take care of this. This will not happen again. Because first of all, you've asked that it not happen again and since you said that it can have a profound effect on the election, it's not going to happen, we're not going to be a party to it, that's not our job. We give information that they ask for. Now if they ask for it, I'll talk to Brad and we'll figure out whether or not it's good or bad.

IIO diGenova added:

> Let me tell you something: We don't want to get involved in the election at all. We have enough work to do. I'm very glad that you've raised your concern about this. We will make sure that nothing goes out without consultation with Brad. I mean, obviously the ordinary things which are going to go out are going to go out. We will explain to people who call. I don't know what we're going to tell them, because they clearly believe they have a right and they'll start writing to Judge Preska, they'll write to me, they'll write to everybody.
>
> The bottom line is we will make absolutely certain that nothing that we do can even be slightly construed as interfering with the electoral process. As a result of our role, we understand that this process that's about to occur in November is sacrosanct in terms of union membership. It's not a problem, believe me, no problem whatsoever. Whoever TDU calls up the next time, I assume they're not going to be very happy with us about they want something and we can't give it to them.
>
> The Election Supervisor found that this discussion
>
> demonstrated disagreement between the IIO and the IBT concerning what documents were to be released publicly. The upshot, however, was diGenova's commitment to contact Raymond to solicit the IBT's position when releasing documents in response to specific requests for them, while at the same time stating that "the ordinary things which are going to go out are going to go out," presumably meaning charges, investigative reports, supporting exhibits, and notices of hearing.

ESD 387 at 37.

Mr. Dinh responded to IRO Civiletti's July 18 letter on August 5, 2016, advising that "the IBT will not be able to convene a hearing" on the Aloise case because of the pending grand jury investigation. Mr. Dinh disputed IRO Civiletti's contention that the IBT's decision constituted "a serious violation of the Final Order." He wrote that the Final Order permitted the IBT to decline to file charges altogether and that, if charges were filed, to take "whatever action is appropriate," including relying on a provision of the IBT constitution to stay the proceedings. If the IRO concluded the IBT's action was inadequate, it had the authority to assume jurisdiction of

the matter and conduct a de novo hearing. Mr. Dinh cited more than fifteen previous cases under the Consent Order where the union either declined to file charges or filed them and referred the matter back to the IRB for hearing. Mr. Dinh concluded on this point by declaring that "it offends plain text, confounds logic, and upends settled precedent for your letter to assert that the IBT would violate the Final Order by following its prescriptions to decline a hearing in deference to due process and the IBT Constitution."

Mr. Dinh also disagreed with IRO Civiletti's contention in his July 18, 2016 letter that the IBT violated the Final Order by "basing its indefinite stay of the Aloise hearings on an interpretation of its Constitution that has been expressly rejected by the federal courts." Mr. Dinh reasoned that because the Final Order did not require the IBT to conduct a hearing on referred charges at all, "there is no basis for premising a separate violation of the Final Order on the IBT's asserted legal justification for declining to do so."

Mr. Dinh then argued that *Carey & Hamilton Discipline* was inapposite. He wrote:

> First, *Hamilton* involved an *IBT member's* after-the-fact claim in district court that the *IRB's* refusal to adjourn *IRB* proceedings foreclosed a "full and fair hearing" under the Labor-Management Reporting and Disclosure Act. *Id.* at 378. Here, it is the *IBT* that has declined to conduct *its own* proceedings based on its interpretation of *its own* Constitution. The particular circumstances in *Hamilton*—an LMRDA claim brought by an IBT member, challenging IRB proceedings, untimely invoking a constitutional provision—presented the Second Circuit no occasion to consider the IBT's own construction of Article XIX, §7(a), as raised by the IBT *itself* with respect the IBT's *own* proceedings.
>
> Second, as I explained in my June 3 letter and unlike in *Hamilton*, the IBT's Executive Board here has formally construed that provision to encompass circumstances where a member has been notified by law enforcement that he is a target of a criminal investigation based on the same set of facts underlying a putative IBT hearing, since statements made in an IBT hearing could be immediately used elsewhere against that member to that member's detriment. Under well-established Second Circuit law, that reasonable construction of the IBT's constitutional provision by the IBT is entitled to "great deference." *Sim v. New York Mailers' Union No. 6*, 166 F.3d 465, 470 (2d Cir. 1999); *see also Hughes v. Bricklayers & Allied Craftworkers Local No.45*, 386 F.3d 101, 106 (2d Cir. 2004).

Mr. Dinh conceded that IRO Civiletti "may disagree with the IBT's decision not to hold a hearing, its deference to historical practice, its interpretation of its own Constitution, or its counsel's analysis of legal precedent," but argued that IRO Civiletti should not characterize that disagreement as a violation of the Final Order by the IBT.

On August 10, 2016, IRO Civiletti assumed jurisdiction of the Aloise hearing himself because the IBT had not set a hearing for Mr. Aloise according to the terms of IRO Civiletti's July 18 letter. IRO Civiletti set a *de novo* hearing on the charges against Mr. Aloise for October

11, 2016. This hearing was postponed first to November 30, 2016, and then indefinitely, owing to IRO Civiletti's retirement, effective October 31, 2016. On December 15, 2016, the Government and the IBT jointly nominated Barbara Jones, a former judge of the United States District Court for the Southern District of New York, to the vacant IRO position. Her appointment was approved by Judge Preska on December 16, 2016. The Aloise hearing was rescheduled on January 11, 2017 for March 14, 2017, and was held on that date. Written summations were filed post-hearing, and the charges are now pending the decision of IRO Jones.

IIO Document Request

On March 4, 2016 the IIO sent General Secretary-Treasurer Ken Hall a request for documents in the IBT's possession to be produced for examination, specifically, emails of William C. Smith III and Nicole Brener-Schmitz for the period March 1, 2013 to date of service and, in addition, emails of Mr. Hall for two discrete periods in 2013 and 2014. Mr. Smith was at the time and is currently the executive assistant to General President Hoffa; Ms. Brener-Schmitz was at the time IBT political director and is no longer employed by the IBT. The request was directed to Mr. Hall in his official capacity as custodian of the IBT's records. On March 11, 2016, IIO diGenova sent Mr. Hall an additional request for documents to be produced for examination, namely, emails of IBT Benefits Department Director John Slatery for the period June 30, 2014 to the date of service. Production of the requested documents was required within ten days after service of each notice. Thus, production in response to the March 4 notice was due no later than March 14; that for the March 11 notice was due no later than March 21.

The Election Supervisor found that the IBT's response to the March 4 and March 11 requests was informed by the IBT's experience in responding to earlier IIO requests. Some seven months before the March 2016 notices of examination, the IRB's Chief Investigator, Charles Carberry, on August 19, 2015 submitted a notice of examination to the IBT seeking Mr. Slatery's email messages and attachments for the period July 1, 2012 through June 30, 2014, the 24-month period that immediately preceded the period sought for Mr. Slatery's emails in the March 11, 2016 notice of examination. IBT General Counsel Raymond responded to the August 19 notice by producing, on September 11, 2015, a thumb drive containing emails identified in the document request. The emails were culled from the IBT's server by staff of the IBT's Benefits and Information Systems Departments. Appended to the September 11 letter producing the thumb drive was a three-page list of some 58 individuals, their email addresses, and descriptions of each individual's capacity or relationship with respect to Mr. Slatery. These persons included Mr. Slatery's spouse, his brother, mother, daughter, cousin, and uncle, some friends, and his daughter's coaches and teachers. In addition, the list named a number of attorneys, one person (Nora Johnson) identified as an "administrator for IBT staff health plan," two IBT representatives (Sheba Venson and Rome Aloise) said to be "overseeing IBT Health plan," and two plan participants. The September 11, 2015 letter explained the purpose of this list in the following terms:

> [E]mails to or from the entities and individuals listed in the attached exhibit have been excluded because they may involve communications which are attorney[-]client privileged, may involve confidential information relating to the administration of the Union's benefit plans with respect to individual claims or may involve communications

with family or friends which are unrelated to the business of the IBT. Emails have been excluded for the foregoing reasons. If necessary, we are prepared to address with you the excluded materials if you determine they may contain information which is relevant to your investigation which is not privileged or confidential.

Chief Investigator Carberry replied to Mr. Raymond's September 11 letter on September 16, 2015, requesting in part that the IBT produce "all emails between Slatery and Rome Aloise, between Slatery and Nora Johnson and between Slatery and Sheba Venson," the three individuals in the list of 58 who were identified as administering or overseeing the IBT staff health plan. In addition, Carberry requested "Slatery's emails with Cheiron and its representatives."[8] With respect to other emails withheld from the September 11 production, Mr. Carberry stated that "[i]f any document is withheld based upon a claim of privilege, please provide a log which includes the date of the email, all individuals who received and sent the email and the basis for the claim of privilege."

Mr. Raymond replied for the IBT the next day, September 17, 2015, stating by letter that the Information Services Department had been directed to produce the emails involving Mr. Aloise, Ms. Johnson, Ms. Venson, and Cheiron. With respect to withheld emails, the letter stated that "the only emails that were not disclosed were those where IBT attorneys were copied, where they contained confidential claim information concerning the administration of benefit plans (e.g., involving individual benefit claims) or where they were sent to or from Mr. Slatery's personal friends and family members."

The next day, September 18, 2015, the IBT produced another thumb drive, this one containing all known emails between Mr. Slatery and Mr. Aloise, Mr. Slatery and Ms. Johnson, and Mr. Slatery and Ms. Venson for the requested 24-month period. In addition, the response included all known emails to and from Cheiron. With respect to other emails withheld from the responses to the August 19, 2015 notice of examination for personal or attorney-client reasons, Chief Investigator Carberry made no further request for them and did not challenge the assertions of privacy or privilege in Mr. Raymond's September 17 letter.

The process of identifying, collating and producing the requested Slatery emails from the IBT's server presented technological challenges. Dave Martin, the principal in the IBT's Information Systems Department, used Outlook Client to identify and copy to the thumb drives the large volume of Slatery emails that the request sought. Doing so crashed the IBT's server, interrupting work in IBT headquarters and requiring a reboot of the server.

After submitting the August 19, 2015 notice of examination to the IBT and before receiving any documents in response to it, Chief Investigator Carberry issued another notice of examination on September 4, 2015, requesting documents concerning the awarding during the 2012-2014 period of a pharmacy benefits manager contract for the IBT's VEBA trust. The notice of examination sought bids and revised bids; the bidding procedure; communications with the manager of the bidding process; documents concerning negotiations between the trust and

[8] Cheiron played a role in vendor bidding processes with respect to a VEBA trust that covered certain IBT members.

Optum RX, the bidder selected for the contract; policies with respect to the reporting of gifts from employers, vendors, and service providers; travel and expense records for 2013 for specified IBT officials, including James Hoffa, Ken Hall, and Rome Aloise; and additional documents.

A connection between the August 19 and September 4, 2015 notices of examination was apparent, both from the documents each sought and from what Chief Investigator Carberry and Mr. Raymond wrote about them. Mr. Slatery, whose emails were the subject of the August 19, 2015 notice, was director of the IBT Benefits Department and played an important role with the VEBA trust and the bidding process Cheiron managed concerning selection of the trust's pharmacy benefits manager. With his September 16 letter, Chief Investigator Carberry expressly requested emails between Mr. Slatery and three individuals who had administrative or oversight responsibility concerning the IBT staff health plan, *i.e.*, the VEBA trust; further, Chief Investigator Carberry specifically requested emails with Cheiron. The request for Mr. Slatery's emails was complementary to the September 4 notice of examination that sought the VEBA trust bidding documents for the pharmacy benefits manager. Mr. Raymond noted the connection between the two requests in his September 18 letter enclosing the second tranche of Slatery emails and all emails for the requested period involving Cheiron.

> [Enclosed are emails archived by] a subordinate of Mr. Slatery's [who] worked on the process that led to the renewal of Optum Rx as the pharmacy benefit manager for the IBT VEBA programs. These appear to contain a number of exchanges with Cheiron, the consultant that was assigned to conduct the bidding for the pharmacy benefit manager business. Mr. Slatery appears to have been copied on some of these emails, although not all of them. This material should be included in the IBT's response to your request of September 4, 2015, but I thought it would be helpful also to provide it to you now.

In addition to the August 19 and September 4, 2015 notices of examination concerning Mr. Slatery's emails and VEBA documents, Chief Investigator Carberry issued a notice of examination dated August 17, 2015 that sought documents with respect to Nicole Brener-Schmitz. Brener-Schmitz served as the IBT's political director and had responsibility for recommending disbursement of funds of the IBT and its political action committee to other PACs, candidates for public office, and other organizations. The notice sought all documents concerning work-related expenses claimed by Ms. Brener-Schmitz for the period beginning January 2010, expenses reimbursed to her by the IBT during that period, IBT reviews, audits, and investigations of her expenses, emails of specific IBT officials concerning her expenses, IBT policies regarding receipt of things of value from entities seeking contributions, and records concerning all contributions the IBT or its political action committee made to some 33 specific PACs, candidates, and organizations. The IBT produced the requested documents.

Turning back to the March 4 and March 11, 2016 requests, the Election Supervisor found that the volume of documents requested "greatly exceeded any similar request made in the past by the IRB." Witnesses interviewed by the Election Supervisor in the remand investigation reported that they expected the replacement of the IRB to start a new relationship of collaboration and cooperation between the IBT and the IIO, and that they were "shocked when,

as his first actions, the IIO issued the March 4 and 11 notices of examination, with no advance notice, less than a month after the start of what they anticipated would be a new era of cooperation."

ESD 387 at 5.

The IBT engaged outside counsel, Mr. Dinh, to assist in responding to the notices to produce. The Election Supervisor found:

> Three factors drove this decision. First, Raymond concluded that the breadth of the requests suggested the need for an expert in electronic discovery, which expertise Dinh's firm could provide. Second, Dinh's central role in the negotiations that resulted in the Final Order – and the changes the IBT had expected to flow from it – demonstrated the merit of having him lead the initiative to produce to the IIO the documents that office needed while reducing the burden on the IBT of producing documents the IIO did not need. Third, and not insignificantly, the effort to respond to the August 19, 2015 request for two years of Slatery's emails had crashed the IBT's email server, causing disruption to work at IBT headquarters; the technological challenges of responding to requests significantly greater in volume demanded an alternative that minimized the potential for similar disruption.

ESD 387 at 6.

Mr. Dinh first aimed to get the IIO to particularize the requests, with the hope of substantially reducing the volume of material to be produced. In two March 23, 2016 letters (one responding to each notice of examination) he objected broadly to the scope and breadth of the notices and complained that they lacked particularity that Chief Investigator Carberry had used in past requests. Mr. Dinh asserted that that the notices were "sweeping," "open-ended," "intrusive," "burdensome," and/or "unduly vexatious." Mr. Dinh stated that production in response to "broad, limitless requests" such as the first notice would not be made "at this time," absent "[f]urther particularity." He wrote that production in response to the second notice would be limited to documents related to a specific third-party actuarial firm and would be made "in due course."

IIO diGenova responded to Mr. Dinh's letters of March 23 with separate letters dated March 30, 2016, rejecting Mr. Dinh's objections, but offering the following as a procedure to use in responding to the notices:

> We will continue to accommodate the IBT regarding records requests as has been done consistently in the past. For example, the March 4, 2016 notice for an on-site books and records examination was accompanied by a letter to the IBT's General Counsel stating that it might be more convenient and inexpensive for the IBT to produce copies of the documents rather than have an on-site examination conducted. In addition, when the IBT makes a reasonable request for additional time to respond to a document request, that has routinely been agreed to. Furthermore, in past response to IRB document requests, with our consent, the IBT has withheld privileged emails, personal emails unrelated to union

business and confidential information related to individual claims under the IBT's benefit plans. For example, with its September 11, 2015 response to an IRB document request for John Slatery's emails, the IBT provided a list entitled "Emails not included in IRB response." The list contained 58 names and email addresses in the categories "personal," "attorneys" and "health plan and privacy related" for which emails were withheld. Such lists could be provided in response to the March 4 request. Should it be necessary that any of the withheld documents be produced, the IBT will be notified.

The IIO directed the IBT to produce the requested documents "and any privilege log" no later than April 8, 2016.

Mr. Dinh responded with respect to the March 4 notice to produce, continuing to object to the request as "overbroad and remarkably vexatious," asserting that "the Independent Investigations Officer is perfectly capable of making particularized requests," and offering to "reach a mutually satisfactory resolution regarding the March 4 request." With respect to the March 11 request, Mr. Dinh wrote separately on April 5 reasserting his previous position that the request was "unacceptably open-ended" but stating that the IBT "is proceeding apace with efforts to locate and produce responsive documents."

At this point the IBT also sought to meet with IIO diGenova in an effort to narrow the scope of the email requests, with the aim of reducing the staff work both at the IBT and the IIO in reviewing irrelevant material. The first contact for this purpose, by phone between Mr. Dinh for the IBT and IIO diGenova and Investigator Carberry for the IIO, occurred April 6, 2016. The purpose of the call was to get a two-week extension on production to April 22, 2016, which was granted. Mr. Dinh reported the results of the call to Mr. Raymond by email the same day, stating the following, in part:

> They said no urgency and agreed to a two week extension. But then Charlie [Carberry] said, two weeks for what? Just to review for privilege or to tell us to go pound sand? I said to do my job, and I am not waiving any arguments. I am not going to tell you to pound sand but I am also not going to roll over and play dead. We had a nice and spirited discussion. Charlie at one point said that they would be fine if we don't want to produce something they don't need—and I said so then it is not limited to privilege. You get the full petty picture.

Mr. Raymond forwarded this report to Mr. Witlen with the comment, "Clear as mud…" Mr. Witlen replied "I like the part that we don't have to produce anything they don't need, while they refuse to give us any idea what they are looking for." Mr. Raymond agreed, "Yes. I raised that with Viet." Mr. Witlen commented further, "It does sort of jump out at you."

In an email sent April 12, 2016, Mr. Dinh wrote IIO diGenova the following:

> As I indicated to you last week, I think it would be worthwhile for us to get together in person to discuss steps going forward. For example, I think you and Brad [Raymond] had previously discussed carving out documents relating to IBT's negotiations with UPS, and Charlie [Carberry] suggested in our call that there may be some things that you may

> have no interest in and that would be cumbersome for IBT. A meeting to talk through this process I think would benefit both our cooperation and your inquiry. It can be with just the two of us, or include Charlie and Brad, as you wish. I am available any time this Thursday and Friday according to your schedule.

IIO diGenova stated that a meeting involving him was unnecessary. Rather, in an April 12, 2016 letter to Mr. Dinh, IIO diGenova stated that "it would be more productive for you to speak in the first instance with Charlie [Carberry] or one of the other lawyers on my staff he designates [with respect to specific requests]. If you cannot resolve the matter with them, I will be available." IIO diGenova repeated this suggestion in an email to Mr. Dinh on April 14, 2016, stating, "[a] meeting is not necessary. Please contact Charlie Carberry (or someone he designates) for any issues related to compliance. As noted in my letter, if there are disagreements that cannot be resolved at that level, they will be brought to my attention by the Independent Investigations Officer staff."[9]

At the same time, IIO diGenova repeated in his April 12 email that he was amenable to the IBT's preliminary withholding, subject to follow-up demand by the IIO, of certain categories of emails based on privilege and privacy.

> It would not be helpful to discuss limiting the document requests in the abstract. If there are specific areas that the IBT believes are voluminous and not relevant, please describe them particularly. We found helpful the procedure the IBT used in its September 11, 2015 response to an earlier document request for John Slatery's emails. In that response, the IBT produced a list entitled "Emails not included in the IRB response." A copy is attached. The list contained 58 names and email addresses in three categories: "personal," "attorneys" and "health plan and privacy related. For each individual, the list also included that person's "Capacity/Relationship" which described the person. If we found emails on the list were within what was being investigated we were in a position to request them. Such lists could be provided for the March 4, and March 11 requests.

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[9]Also in his April 12, 2016 letter to Mr. Dinh, IIO diGenova expressed concern about the IBT's pace in reviewing documents for production, stating, "The union has had our requests for over a month and should have been gathering the responsive documents. If the union is only beginning the [review] process now that is a serious concern about its meeting its Court imposed obligation to comply. I understand time may be required but it is expected the IBT will produce promptly. We would expect most responsive documents by April 22 and a rolling production until it is completed." Mr. Dinh rejected the suggestion that the IBT was not proceeding deliberately and apace. On April 14, he replied by email with the following: "Please be assured that we are continuing to review the documents and formulate our response. You state ominously: 'If the union is only beginning the process now that is a serious concern about its meeting its Court imposed obligation to comply.' That threat, of course, ignores the unprecedented and enormous burden your boil-the-ocean requests have put on IBT. We will continue to proceed with all deliberate speed. If you have external deadlines of which we are not aware, please advise. If you really think IBT is violating its obligations to the Court, we would welcome an opportunity to answer to the Court."

Should the Independent Investigations Officer decide any of the withheld emails needed to be produced, the IBT would be notified.

During the back-and-forth between Mr. Dinh and IIO diGenova, the IBT, using Relativity litigation software licensed to another outside law firm, was engaged in the process of reviewing the emails responsive to the notices of examination. Mr. Martin of the IBT's Information Services Department located all emails that met the time and person parameters of the requests and transferred them by secure file transfer protocol to the outside law firm that held the Relativity license. An IBT attorney then undertook a review, document by document, of the emails. Using the Relativity software, the IBT attorney viewed an image of each email and assessed it for production.

The first tranche of responses, which consisted of emails for Ken Hall, WC Smith, and Nicole Brener-Schmitz, was prepared and produced on April 22, 2016. Mr. Dinh's letter accompanying the first production both explained the framework of the production and asserted general objections to the requests (even as the documents were produced). Mr. Dinh first criticized the IIO for failing to tailor the requests. As he put it, "[t]he IBT must shoulder the burden (and expense) of reviewing *all* documents, produce some documents but withhold others, and then await yet another follow-up request for additional documents, once you have apparently decided what it is you are looking for." Mr. Dinh's letter stated that its production was "consistent with the withholding procedure contemplated by [the IIO's] April 12 letter. As such, the IBT is not producing categories of documents it believes to be voluminous and irrelevant, and the IBT is furnishing logs of withheld documents." The IBT produced Ken Hall's emails that fell within the requested time frames, but listed the following categories of withheld documents:

- Privileged: Emails privileged according to applicable legal privileges.
- Contract negotiations: Emails related to Mr. Hall's work for the IBT in contract negotiations with employers.
- Contract administration: Emails related to carrying out the language of contracts with employers.
- IBT administration: Emails concerning the day-to-day operations of the IBT.
- IBT/UPS pension: Emails related to Mr. Hall's role on the IBT/UPS pension plan and 401(k) plan.
- Legislative strategy: Emails related to legislative proposals relevant to the IBT.
- Policy strategy: Emails related to policy positions of interest to the IBT.
- Local union: Emails related to Mr. Hall's role as President of Local 175 in West Virginia.
- Mass emails and listservs: Emails for which Mr. Hall is one of numerous recipients addressed in a mass communication.

For Ms. Brener-Schmitz, the IBT produced her emails for the requested time frame, but listed the following categories of withheld documents:

- Legislative strategy: Emails related to legislative proposals relevant to the IBT.
- Mass emails and listservs: Emails for which Ms. Brener-Schmitz is one of numerous recipients addressed in a mass communication.
- Personal: Personal correspondence with family members.

Finally with respect to WC Smith, the IBT produced his emails for the requested time frame, but listed the following categories of withheld documents:

- Privileged: Emails privileged according to applicable legal privileges.
- Contract administration: Emails related to carrying out the language of contracts with employers.
- Legislative strategy: Emails related to legislative proposals relevant to the IBT.
- Policy strategy: Emails related to policy positions of interest to the IBT.
- Local union and Joint Council: Emails related to Mr. Smith's role as President of Local 891 and Joint Council 87 in Mississippi.
- Trusteeships: Emails related to the administration of trusteeships.

The Election Supervisor found that logs prepared with the Relativity software and produced to the IIO generally described each email withheld. The information provided included the sender's name and email address, all recipients' names and email addresses, the subject line of the email, the date and time sent, and the category describing the reason it was withheld. The Election Supervisor further found that the withholdings were consistent with IIO diGenova's instructions stated in his April 12, 2016 letter, and that they followed the outlines of the September 11, 2015 IBT production, which the IIO cited approvingly in his letters of March 30, 2016 and April 12, 2016. According to the Election Supervisor, "[b]oth the IBT and the IIO understood that the IBT's decisions on withholding were not the final word. Both acknowledged expressly that the IIO retained authority to direct the IBT to produce specific documents and whole categories of documents it had withheld." ESD 387 at 8.

IIO diGenova replied by letter dated April 29, 2016, stating:

> Prior to the production, you did not engage in discussions I offered with my staff to see if your suggested narrowings of the search were acceptable to this office or others could be reached. Your initial production unilaterally withheld material covered by requests. For example, "IBT Administration" is not an acceptable basis for withholding documents requested.

The Election Supervisor noted that IIO diGenova did not direct the IBT to produce some or all of the categories of emails it had withheld. Instead, he stated that he "will address the substantial problems in your initial production once the defects are documented." ESD 387 at 10.

Correspondence between Mr. Dinh and IIO diGenova also addressed the IBT's use of the Relativity software to process its response to the discovery request. The use of Relativity had resulted in the IIO receiving documents as individual images rather than in native Outlook format. The IIO's office had capacity to examine documents in Outlook but did not have a Relativity license; accordingly, the images the IBT produced, while they could be viewed on a page-by-page basis, could not be searched using Outlook Client. The IIO therefore found the IBT's document production "unusable." The Election Supervisor found that Relativity is the industry standard with respect to electronic discovery, and the IBT's decision to use it expedited

the process of reviewing the tens of thousands of emails that the notices of examination encompassed and created a clear, fixed production record. The Election Supervisor observed that "[t]he solution available to the IIO for reviewing the IBT's production was either to license the software itself or to contract with a firm that owned a license."[10]

ESD 387 at 10.

> The Election Supervisor made the following findings regarding the April 22 production.
>
> From correspondence, we conclude that before the April 22, 2016 document production the expectations of the IBT and the IIO coincided with respect to categorizing the emails the IBT withheld subject to follow-up discussion or request from the IIO. The IBT's effort, according to the person reviewing the emails, was to produce emails on subject matters the IRB and IIO had shown to be under investigation. The IBT expected that the IIO would, as it had with the September 16, 2015 response to the September 11, 2015 production of a two-year tranche of Slatery's emails, instruct the IBT to produce additional specific emails or categories of emails if the IIO found the IBT's production deficient. The September 16 directive, coming promptly upon the IBT's September 11 production, required the IBT to produce four additional categories of emails (emails between Slatery and Aloise, Slatery and Johnson, Slatery and Venson, and Cheiron emails). The IBT produced them two days later. For the March 4 and March 11, 2016 notices of examination, the IIO had stated it would follow a similar procedure (diGenova wrote on April 12: "Should the Independent Investigations Officer decide any of the withheld emails needed to be produced, the IBT would be notified.") As such, both the IBT and the IIO expressed the expectation that the IBT could withhold certain emails, subject to a requirement that they be produced merely upon the directive to do so from the IIO. After the initial production, the IIO expressed dismay in his April 29, 2016 letter about the "IBT Administration" category, but did not then assert or exercise authority to overrule the withholding or direct the IBT to produce immediately the withheld emails in that or any other category. In this significant way, the IIO's response to the IBT's production with respect to the March 4 and March 11, 2016 notices of examination differed from Carberry's response to the IBT's production the previous summer.

ESD 387 at 11.

Following diGenova's April 29, 2016 letter that criticized the IBT for not meeting with IIO staff before "unilaterally with[holding] material" and for withholding documents in the category "IBT Administration," Mr. Raymond on May 3, 2016 emailed his fellow in-house IBT lawyers:

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[10] On appeal, the protestors submitted evidence that the IBT could have produced documents in their native Outlook format using Relativity, but intentionally chose to convert the files from native to an unsearchable and therefore unusable image format in their production to the IIO. This evidence is discussed *infra*, at page 51.

1. It seems kind of disingenuous for them to complain that we didn't engage in discussion with them after April 12, when Joe [diGenova] shut down the discussion, saying it wouldn't be productive.
2. I'm more than a bit perplexed about the reference to Outlook. We obviously found Outlook awkward in terms of trying to get a handle on the emails. Seems to me this is a pretty transparent demand that we produce emails without meaningful review of what is being produced. Either way, this issue cries out for a discussion. If he or his people don't like "IBT Administration" or the other categories of excluded emails, I thought we gave them a log which would give them a pretty decent opportunity to identify what they are looking for. Either way, a conversation would be an efficient way to try and get on the same page, as opposed to firing more rockets.

IIO diGenova wrote again on May 6, 2016, setting May 13 as a new deadline for production of all requested materials, and warning that the IBT "will not be in compliance with its obligations under the Final Order" should it fail to comply.

Under continuing protest that the IIO's request was unreasonable, Mr. Dinh produced on May 13 some 2,696 documents that he said were a portion of the Slatery emails requested by the IIO. Mr. Dinh stated that the produced documents were those the IBT's software identified as containing particular search terms. Of those, Mr. Dinh stated that documents he asserted were protected by attorney-client privilege or pertained to healthcare legislation and policy strategy were not produced.

On May 20, 2016, Mr. Dinh produced an additional 2,591 documents from Mr. Slatery's emails that were culled using particular search terms, again excluding documents that were said to be protected by attorney-client privilege or legislation and policy strategy.

IIO diGenova responded to this production with a letter to Hall dated June 28, 2016 stating that the production in response to the notices was unacceptable. Specifically, the letter said with respect to the March 4 notice to produce that Hall had "shielded 67% of the documents from review" by failing to produce them. Concerning the March 11 notice to produce, the letter stated that "[r]ather than complying with its obligations under the Order and Rules, the IBT unilaterally chose search terms and produced a limited number of Slatery's emails responsive to those selected terms." IIO diGenova stated that "you are to provide all documents you were required to produce by July 5." Mr. Dinh responded to this letter on July 5, 2016, not by producing additional documents but by stating the totals produced thus far, noting an upcoming meeting to discuss further production, and expressing appreciation for the IIO's "forbearance." IIO diGenova responded to Mr. Dinh's letter on July 13, 2016, disputing Mr. Dinh's assertion that the IBT had permission to exclude categories of documents from its production and stating further as follows:

> In a final accommodation to Mr. Hall and the IBT, all withheld documents, with the exception of those covered by a legal privilege and those of Mr. Hall's emails previously identified as related to UPS negotiations, must be produced in un-redacted form by July 26. All documents withheld based upon a legally

recognized privilege must be clearly described on a log including the basis for the privilege claim and the necessary information to assess the claim's validity including the names of all who received it. Your previously produced documents did not identify redactions, although they appeared to have been made. All documents that were redacted must be produced in their entirety by July 26.

Meanwhile, on June 15, 2016, when corresponding with the IBT on an unrelated matter, IIO diGenova signaled to Mr. Raymond a willingness to meet. He wrote: "I am willing to meet with you as you requested to discuss those issues you have raised that concern the Independent Investigations Officer. Any such meeting would also include a discussion of the union's and its top officer's lack of compliance with their obligations under the Final Agreement and Order." A meeting with IIO diGenova was set for the week of July 18, 2016.

Two things occurred to upset this scheduled meeting. First, IIO diGenova wrote to Ken Hall on June 28, 2016, the second day of the IBT convention, directing Mr. Hall "to produce all documents you were required to produce by July 5," the first business day following the conclusion of the convention. Mr. Dinh replied on July 5 that the IBT had been producing tranches of emails regularly in accordance with the process IIO diGenova outlined in his March 30 and April 12 letters, that it was impossible to complete production by July 5 because of the press of convention business, that the IBT had resumed reviewing Mr. Slatery's emails with the intention of making additional production, and that the IBT welcomed the opportunity to meet with IIO diGenova during the week of July 18 "in order to address and resolve the several matters that are the subject of dispute between the parties." On July 11, IIO diGenova emailed Mr. Raymond to state that the meeting would occur July 20 at the IIO's offices. The next day, July 12, IIO diGenova emailed Mr. Raymond again, this time stating without explanation to "ignore my previous email," adding that he would "be in further communication shortly." On July 13, IIO diGenova wrote Mr. Raymond that "our July 20 meeting is canceled," set a new deadline of July 26, 2016 for full compliance, and stated further that "[w]hen the union has complied fully with its obligations [to produce all documents requested in the March 4 and March 11 examination notices], we can discuss having a meeting."

IIO diGenova sent a similar letter to Mr. Dinh on July 13, in which he declared that the IBT's production did not comply with the Final Order, "was not consistent with my March 30 and April 12 letters," and that a log for withheld Smith emails "did not provide reasons for withholding." He concluded by ordering produced by July 26 "all withheld documents, with the exception of those covered by a legal privilege and those of Mr. Hall's emails previously identified as related to UPS negotiations."

In response, Mr. Dinh sent two letters. First, he replied to IIO diGenova, declaring the cancellation of the meeting both "inexplicable" and "unprofessional." The letter also defended the volume of the IBT's production. With respect to IIO diGenova's contentions that the production did not comply with the Final Order, Mr. Dinh wrote that "*you authorized* the withholding of documents in your letters of March 30 and April 12, so your reference to the Final Order providing 'no basis' for withholding documents is mystifying." In response to IIO diGenova's complaint that the log of withheld Smith emails "did not provide reasons for withholding," Mr. Dinh stated that such a reason "has never been a requirement." He elaborated,

"Indeed, in the very example you provided for withholding documents (in your April 12 letter), the 'log' was simply a three-page list of names, email addresses, and relationship to the targeted individual. Not only did that log not include 'reasons for withholding' a document, but Mr. Smith's log includes *far more* information, including the date, subject, to, from, and cc for some thousands of documents. Thus, you are invoking a 'requirement' that does not exist, is contradicted by your own example, and, when it comes to conveying relevant information, is vastly inferior to what the IBT has provided." Mr. Dinh affirmed the IBT's intention "to cooperate with you in good faith under the Final Order to produce the documents you need to carry out your important work. But we cannot build the cooperative relationship necessary to accomplish the shared goal of bettering the IBT while you persist in propounding overbroad demands for documents, making unfounded and contradictory allegations, and, perhaps most of all, reneging on your commitments to discuss disputes that arise."

The same date that Mr. Dinh replied to IIO diGenova, he also contacted the US Attorney's office, requesting the lawyers there to intervene with the IIO to reschedule the meeting. Mr. Dinh stated the IBT's interest as follows:

> The Final Order and accompanying Rules give the IIO the authority to investigate allegations of corruption, and his right to demand documents flows from that defined power. The Final Order and Rules do not grant the IIO the blanket authority to conduct an unbounded fishing expedition. Moreover, the Final Order was the hard-earned product of the IBT's efforts to reclaim control over its affairs, which the text and purpose of the Final Order reflect. *See, e.g.*, Final Order at 2-3 (praising the IBT's "significant and positive change in [its] culture and process" and "significant success in eliminating corruption"). The IIO's overbroad demands ignore all of this and instead intrude upon core aspects of the IBT's self-governance, including internal deliberations, executive decision-making, collective bargaining, and political activity. Documents produced by the IBT reflecting these sensitive matters, moreover, may well find their way into publicly available documents released by the IIO, jeopardizing the IBT as well as its relations with senders or recipients of those documents.
>
> Compounding the problems with the overbroad, burdensome document requests is the IIO's arbitrary, contradictory, and at times simply perplexing conduct since propounding them. For example, the IIO has alleged that the IBT has "unilaterally withheld" documents in response to the March 4 and March 11 requests. But on March 30 and April 12, the IIO instructed the IBT that it could withhold documents from its productions according to categories it defined so long as it produced an accompanying log listing the withheld emails. The IIO stated that if it were then necessary to produce any of the specific withheld emails, the IBT would be notified. The IBT relied on those assurances and complied with that approach when making its productions. The IIO's about-face, demanding that the IBT produce all responsive documents except those subject to a legal privilege, is a complete 180-degree reversal from his previous position, and it completely disregards the purpose of the provided logs, which was to

permit the IIO to request particular emails or groups of emails relevant to his investigation.

Given the July 26 deadline for full compliance, Mr. Dinh requested a prompt response from the Government so that the IBT could seek judicial relief should relief not be forthcoming from the IIO.

Assistant US Attorney LaMorte replied to Mr. Dinh by email on July 19, 2016:

> Thank you for bringing this matter to our attention. In light of your email, we reached out to the IIO to get his side of the dispute, and, not surprisingly, he has a different take on this. We did not advocate that he take any course of action concerning this dispute, nor are we inclined to get involved at this point. Please feel free, however, to keep us in the loop on any developments.

Mr. Dinh replied two hours later, stating:

> Thank you very much. In light of your conversation, the IIO has placed the previously cancelled meeting back on the agenda for tomorrow [July 20, 2016] at 10:00. We are hopeful for a productive meeting, but will file the pre-motion letter by COB tomorrow if he persists with the ultimatum deadline and its threat of noncooperation charges. I appreciate you taking the time; I know you have much more important matters, and apologize for having to trouble you with this.

Attending the rescheduled July 20 meeting for the IBT were Mr. Dinh and his law partner Mr. Hicks, as well as Mr. Raymond and IBT attorney Leah Ford.

IIO diGenova opened the meeting stating:

> It seems to me you deserve some time, given the convention and everything, to complete your process in a way that is complete, thorough. Do your privilege logs. Make sure the UPS stuff for Ken Hall is out, produce whatever you think is not privileged, and then … tell me how much time you need to comply – a month, two months, three months, what is your zone of reasonable time limits, and then I am happy. We don't need a deadline. We need production. So it's real simple. You can have as much time as you need.

Mr. Dinh acknowledged IIO diGenova's statement but responded:

> The much more significant issue is whether or not we can follow instructions of your April 12th letter. In our mind, we have. [But] we need your help. We need your staff's help in telling us in what ways we have not. Because that's how I read the letter laying out the process which is, produce what you can, tell us what you don't produce and we will tell you what else we need. … And so right now, as I see it, we have made the production in accordance with your instructions in the first paragraph. I know that your staff, your office, see that as excessively

> withholding ... and so, in the interest of moving forward and continuing the conversation according to the process you have laid out here, I think that the process now should be, should the IIO decide to do anything with how documents need to be produced, IBT would be so notified. So we've set out categories, we've laid out logs, ... and so if you can help us help you by simply giving us an idea as to what categories, what specific emails within each categories, that we can do, we would be glad to do that.

Following on a discussion of withholding of emails involving UPS negotiations, which IIO diGenova expressly had permitted, Mr. Dinh and Mr. Raymond then explained to IIO diGenova their reluctance to produce emails concerning contract negotiations with other employers of Teamster members. Mr. Dinh said, "as you know, we deal with thousands of employers. And so I can ask you and your staff to think about the same principles, because UPS is especially sensitive because of their competitor position ... but every single employer we negotiate with can claim special sensitivity. And we're a union, Joe, we have 1.3 million members." IIO diGenova replied that "I understand the sensitivities" but stated that "I can't say I am going to give you a blanket exemption for something that has absolutely no reason to be withheld." Mr. Dinh then made a proposal: "Why don't we do this? We will give you a list of employers, a full list of employers and at the very least, you can identify which ones you want." IIO diGenova replied:

> You do whatever you want – let me just say this. I am not interested in a fight. I am interested in production. Whatever I can do to make it easier for you to comply with the lawful order for document requests, I will do. If you want to give me a list of employers, that's fine. ... We will work with you to ensure that the things that you care about, which are the confidential negotiations or discussions, between an employer and the union, are protected. We could care less about legitimate negotiations and discussions. We will go out of our way to do anything we can to assuage your concerns. So believe me, do what you think will be helpful. ... You guys do whatever you have to do to figure out how to produce what's required, which is what was requested in the March 4 and March 11 [notices], produce privilege logs, explain why things are being withheld in vast categories for individuals, whatever, and then what we will do is at that point, we will get together and discuss it with you, as I indicated in my April 12 letter.

Mr. Dinh summarized the understanding as follows: "[W]ith respect to the contract negotiations, we will give you a list of all the employers that we have, same thing with contracts administration, we will give you a list of all those contracts that are being administered so you can tell us which ones you want and which ones you don't want." IIO diGenova replied, "That's a good start."

Mr. Dinh then turned to emails involving legislative and policy strategy. He said, "I know that you have questions about and concerns about our political director [Brener-Schmitz], and in no ways that we're stepping into that. [But] we've withheld documents related to legislative strategy and by legislative strategy, we mean things like how we're going to deal with TPP, which Congressional offices are we talking to and who will we support in the election, the

legislative and political strategy that would be, that is, at the core, what we do as an advocacy organization." IIO diGenova assured Mr. Dinh that "we will work with you, and we will respect the zones of privacy that you have outlined, TPP, legislative strategies, particular offices." IIO diGenova, however, reserved the right to obtain documents falling in those categories when necessary to an investigation of misconduct, stating, "remember, at a certain point, as a result of third party informants, it may be necessary to say this office, this legislative discussion, this XYZ, cannot be within that penumbra." Mr. Dinh stated he agreed.

The meeting also focused on using the Relativity software, with IIO diGenova committing to license it to the IIO office so that it could have the capabilities, most notably a robust search function, that the software provided.

The meeting concluded on the document production issue with IIO diGenova instructing the IBT to "just continue to produce." He went on to state: "My hope is that by Labor Day, we'll be in a good place. ... We will be able to see what you produced. During that process, we'll have conversations. We can try to figure out what we need, be more specific if it's possible to do so without compromising the investigation. It should not be a problem. We don't have to be at loggerheads over this."

During the meeting, IIO diGenova acknowledged the difference of opinion between the IBT and the IIO concerning the latter's authority under the Final Order. He suggested that the issue may ultimately be resolved by the Court, but cautioned the IBT against going that route. He stated:

> I understand that you believe that our claim that we have the authority to ask and receive any document under the Consent Decree, now the Final Order agreement, is suspect. You do not believe that that's the case. I categorically believe that it is the case and I understand from your discussions with the US Attorney's office over the last 24 hours that you are contemplating some form of litigation ultimately about my authority. That's fine.
> ***
> You have every right – let me finish, because this is important. You have every right in the world and so does the union to challenge a specific action, a series of actions, even the authority of the Independent Investigations Officers and the disciplinary officers if you deem it appropriate. I would never say that the union can't go to court.
>
> I would only say this: If you intend to do that, I think the consequences of that for the union would be dire and a big mistake, but I absolutely recognize that the union may feel at a certain point that it has to do something for whatever reason to do that. I would just ask people to be really thoughtful about how –

Mr. Dinh replied to IIO diGenova, stating in part the following:

> We do not deny your authority to get information to do your job right. ... I appreciate that beyond measure, because I do not want to go to court on this

> anymore than you do. ... I would much rather appreciate this process you laid out in the April 12th letter, which is essentially a way in order to take the two respective positions and whittle them down, and hopefully by the end of this process you will see us as your partner in solving this chicken and-egg problem that we can see in the specifics.

During the July 20 meeting, Mr. Dinh also addressed the potential impact of the pending election with respect to public disclosures concerning the document production in which the IBT was engaged:

> The second thing that I take from this meeting is your appreciation of the intense political situation we're in here.
>
> ***
>
> Part of my concern regarding the – regarding the electoral process is that the – and I don't mean this to be obnoxious or to walk back old things – is that a threat of a charge of noncooperation or violation in this kind of environment is akin to threatening to indict Hillary Clinton, because it can be spun badly. It has been used badly, because – because we are in a political – we are in political season. And that is one of the – as you know from the spike of cases, that is a common political refrain that somebody is being charged or somebody is not cooperating, you know, that we're going back to the Teamsters of 1980s.
>
> I understand that we may have legal differences, we may have operational differences amongst – amongst counsel, and I consider that to be professional legal differences and we have worked out ways in order to resolve. I only ask for your consideration, as you have with the deadline, that the -- that – to use that threat of a non[-cooperation] violation, especially in writing, carefully, because it will be used. It has been used for the purpose beyond what you intend it to be, which is – ... We may have a difference as to what the Order requires, you and I may have a difference as to process under paragraph 32, 33, and 34 [of the Final Order], but there is absolutely no intention, no – any contemplation of us violating or not cooperating under the Final Order. Period. Full stop.

Later in the meeting, Mr. Dinh added:

> The only thing I want to make clear is that – and I think it is clear, because I just don't want for us to be following the Fin – precisely the dictate, the Final Order, and be accused of noncooperation or violation of Final Order with the same electoral sensitivities that you appreciate.

IIO diGenova replied:

> Believe me, I am so glad. See, we don't think about this election cycle for the union. I didn't even know when the damn convention was until it became

> obvious that people were out of town and nobody was around. I didn't even know there was an election in November. I mean, in the back of my mind, I knew there was an election coming up. Now that I know that, believe me, we're on due notice. We will be subtracted from this process. We will be so invisible, the union members are going to think we're not around anymore. This is – this is not a problem. Believe me, you are – I agree with you a hundred percent. I think it's – it would look bad and I think it's unnecessary. We can do our job without the union members having any idea what we're doing, that's not important.

The Election Supervisor found that the IBT did not request that the IIO refrain from referring charges during the electoral period.

ESD 387 at 38.

In a follow-up letter, IIO diGenova acknowledged that "in light of the time demands of the recent IBT convention, it was reasonable to further extend the IBT's deadline for production beyond July 26, 2016." Accordingly, he set a new deadline for production of September 6, 2016.

Following the meeting, IIO diGenova sent a July 27, 2016 letter stating that he believed "our conversation was productive" and he was "confident that we now have forged a workable plan for * * * full compliance with the March 4 and March 11 examination notices." The Election Supervisor found, however, that additional points of the letter "differed from or added to what had been discussed at the July 20 meeting. For example, while IIO diGenova repeated that the IBT could withhold documents it deemed privileged, the July 27 letter for the first time stated that the privilege log must meet the requirements of SDNY Local Rule 26.2(a). In no previous records production we learned about from any witness was the privilege log ordered to meet the standard of this court rule. Indeed, the September 11, 2015 production stated that emails to or from attorneys were withheld as privileged because they *may* include privileged communications." ESD 387 at 18. The Election Supervisor further observed that "IIO diGenova's July 27 letter asserted that he did not "agree to blanket exceptions of entire categories of documents, but that the transcript of the July 20 meeting shows that he "agreed to permit the IBT to withhold emails bearing on contract negotiations and contract administration with all employers, and legislative and policy strategy emails, subject to follow-up by the IIO directing that particular emails or categories of emails be produced." ESD 387 at 18.

Following the July 20 meeting, the IBT continued its review of Mr. Slatery's emails, shifting from key word search to email-by-email review, and made further productions of them on September 2, 2016. The September 2 production included emails for Mr. Hall, Ms. Brener-Schmitz, and Mr. Slatery and was intended "to supersede all prior productions responding to the March 4 and 11" notices. The Election Supervisor found that the production for each individual was accompanied by two logs, one of which identified emails withheld because of legal privilege, the other detailing emails withheld on other grounds. Each log identified sender, recipients, date and time sent, subject matter, and reason for withholding. ESD 387 at 18.

The letter explained the non-privileged grounds for withholding emails as follows:

> The IBT has, at present, withheld documents in the following categories. The first category consists of documents pertaining to the IBT's legislative and political efforts. As explained at the July 20 meeting, these documents underlie the core of the IBT's purpose as an advocacy organization. There are 13,176 such documents, and they are largely confined to Nicole Brener-Schmitz and John Slatery. The second category consists of documents pertaining to the IBT's negotiation and administration of contracts with third party employers. There are 184 such documents, and they are confined to Ken Hall. During the July 20 meeting, you agreed that the IBT could provide a list of companies with whom Mr. Hall negotiates and administers contracts, such that you could then inform the IBT "which ones you want and which ones you don't want." Further to that discussion, and to aid in your determination whether any of these particular documents should be produced, the IBT herewith provides the following list of companies:
>
> | | | |
> |---|---|---|
> | UPS | Sysco | USF Reddaway |
> | Republic | Rite Aid | Anheuser Busch/InBev |
> | Waste | YRCW | |
> | Cummins | ABF | |
> | Engines | Kroger | |
>
> Finally, as to these three custodians, the IBT has withheld 1,167 highly personal documents, that is, documents of both a personal and extremely sensitive nature. As with the two other categories, information regarding such documents is provided in the included logs to enable you to inquire further about them.

Mr. Dinh stated that the logs "should amply permit you to identify any documents you believe should be disclosed in a subsequent production pursuant to the iterative process discussed on July 20."

Additional productions were made on September 7 and September 9, 2016 and were limited to Smith emails. The IBT withheld some emails because of legal privilege and others as Mr. Dinh explained in his September 7 cover letter:

> The IBT is also withholding ... documents concerning (1) negotiation and administration of contracts with third-party employers; (2) personnel decisions made by the General Executive Board following deliberative process; or (3) personal and highly sensitive matters. Mr. Smith is involved in the negotiation and administration of contracts with the following third-party employers: YRCW, ABF, Red Cross, and Republic Air.

According to Mr. Dinh's September 9 letter, the logs for Mr. Smith's emails, delivered to the IIO with the September 9 production, "should amply permit you to identify any further documents you believe should be disclosed."

Mr. Hicks (Mr. Dinh's law partner) in an internal email to Mr. Dinh, Mr. Raymond, Ms. Ford, and Mr. Witlen on September 9, 2016, stated the IBT's understanding that the production just completed on the March 4 and 11 notices of examination was subject to further requests and directives from the IIO:

> All—we have made the second, and last, production of WC Smith documents to Joe diGenova; see below and the attached letter. * * * For all intents and purposes, * * * the IBT's "first round" of production in response to the March 4 and 11 requests is complete. The ball is now in Joe's court to tell us what additional documents he wants or (more likely) what gripes he has with the production. Thanks to all for their efforts throughout this process.

The September productions, combined with previous productions, withheld 17,334 emails it claimed were "unresponsive" to the notices to produce and a further 15,278 emails it claimed were privileged.

The record on appeal reflects that on September 14, 2016 the IIO asked that the IBT provide more detailed privilege logs, which the IBT declined to do.

The Election Supervisor observed that "unlike the experience in September 2015, where Chief Investigator Carberry contacted Mr. Raymond five days after receipt of the Slatery emails at issue in that notice of examination to request that specific categories of emails be produced, there was no correspondence or contact from the IIO to the IBT following the final September 2016 production of the Hall, Brener-Schmitz, Smith, and Slatery emails," noting that "the IIO had earlier indicated to the IBT that discussion of any documents withheld from production in response to the 2016 notices would follow after the IBT had made its production" (citing the IIO April 12, 2016 letter and July 20, 2016 transcript). ESD 387 at 20.

On October 31, 2016, the IIO issued a report to IBT General President James Hoffa recommending that a charge be filed against General Secretary-Treasurer Ken Hall "for bringing reproach upon the IBT and violating its and his legal obligations by engaging in conduct that violated the permanent injunction" in *United States v. International Brotherhood of Teamsters*. Specifically the IIO asserted that Mr. Hall had obstructed and otherwise interfered with work of the IIO by failing or refusing over an extended period to produce IBT documents the IIO had requested pursuant to its investigative authority under the Final Order. The report stated the IIO's view that Hall's failure to comply with the notices was "permeated with evidence of bad faith," relied on "frivolous claims of unspecified privileges to shield documents from the IIO's examination," and constituted an "unjustified defiance of his legal obligations" under the Final Order to comply with the notices to produce. Pursuant to its procedures, the IIO made his October 31 report public.

The IBT responded on November 3, 2016, with a motion to enjoin the charge, arguing that the IIO's charge was politically motivated and in bad faith, that "on October 31, in the middle of the voting period, the IIO dropped its bombshell: It charged GST Ken Hall, heretofore absent from the dispute save being the recipient of the IIO's unilateral demands, with 'bringing reproach upon the IBT and violating its and his legal obligations' by 'obstruct[ing] and otherwise

interfer[ing] with work of the IIO,' to wit, 'fail[ing] to provide the IIO with all the IBT documents the IIO informed Hall that he had deemed necessary to examine.'" The IBT's filing concluded with the plea: "We need your help, your Honor, to stop this nonsense, to resolve the underlying discovery dispute, and to forestall further damage to the IBT's electoral integrity—and, more precisely, to the IIO and the Final Order under which the IIO operates—inflicted by the misguided actions of his office."

The Government refuted the IBT's contention that the charge against Mr. Hall was intended to interfere with the election, writing the following:

> First, the IIO's actions in issuing the Hall charge are fully in accordance with the Final Order and how the IRB operated in the past under the Consent Decree, thus belying the Union's claim that the IIO engaged in "a deliberate attempt to undermine the IBT and the integrity of its elections." (IBT Ltr. at 1). As relevant here, the Final Order provides that upon concluding an investigation, the IIO must decide if Union action is necessary; if so, the IIO must prepare a written investigation report detailing proposed charges and recommendations, and refer that report to the appropriate Union entity. (Final Order ¶¶ 31-32; Declaration of Joseph E. diGenova dated November 7, 2016. ("diGenova Decl.") ¶¶ 3, 4). That is precisely what occurred here. The IIO examined Hall's conduct in responding to notices of examinations that the IIO issued in connection with ongoing investigations into high-level Union members (including Hall himself), and concluded that Hall had acted willfully and deliberately with the intent to impede the IIO's work. Upon reaching that conclusion, the IIO prepared and issued a written report and charge recommendation recommending that the General President charge Hall with bringing reproach upon the Union and violating the Final Order's permanent injunction against obstructing the work of the IIO. (diGenova Decl. ¶¶ 5-7 & Ex. 1 (w/o attachments)).

The Government further argued that the election and disciplinary processes under the Final Order, and the Consent Decree previously, are separate, and one does not wait for the other.

> That the charges against Hall happened to ripen during an election season, such that the IIO issued his written charge report during that time, has no bearing on the legitimacy of the IIO's performance of his duties in this matter. The Final Order does not treat charges that ripen during an election season any differently than other charges, and does not provide that the issuance of charge reports should be delayed during an election season. Nor does the Final Order provide that written charge reports issued during an election season be kept concealed from members. (*See* Final Order ¶¶ 31-35; diGenova Decl. ¶¶ 7, 9).

On November 15, 2016, the Court denied the IBT's letter motion to enjoin the charge recommended against Mr. Hall, writing:

> [T]he Court notes that the IIO has taken no action that contravenes the Final Order. The Final Order provides that upon conclusion of an investigation, the IIO must decide if the investigation warrants instituting an action. Final Order ¶¶ 31-32. If such is the case, as the Government notes, then "the IIO must prepare a written investigation report detailing proposed charges and recommendations, and refer that report to the appropriate Union entity." (Letter from Tara M. La Morte, Nov. 8, 2016, ECF No. 4356) (citing Final Order ¶¶ 31-32; Declaration of Joseph E. diGenova, Nov. 7, 2016 ¶¶ 3, 4.)
>
> Here, the IIO conducted just such an investigation and determined that, in responding to the IIO's notices of examination, Ken Hall had acted willfully and deliberately to impede the IIO's investigation. (Letter from Tara M. La Morte, Nov. 8, 2016, ECF No. 4356.) When the IIO reached this determination, it issued a written report detailing the charges against Hall and recommending that the General President take action against him. (See id.) That the IIO issued the report in the middle of an election is irrelevant, and the IBT does not claim that the Final Order directs otherwise.
>
> The Court also notes that the 2016 Election Rules do not impede or constrain the Independent Disciplinary Officers ("IDO") in the exercise of their powers pursuant to the Final Order. (See Letter from Richard W. Mark, Nov. 10, 2016, ECF No. 4541.) Furthermore, the Court of Appeals has instructed that the election and disciplinary processes are separate. United States v. IBT (Carey), 156 F.3d 354, 361-62 (2d Cir. 1998). The IBT's request that the Court interfere with a disciplinary process duly instituted by the IIO on the basis that it coincides with a Union election is therefore without basis.

The same day the IBT filed its letter motion to enjoin the charge against Hall, November 3, 2016, the United States Attorney moved to enforce the Final Order, stating that "consistent with the authority exercised by the IRB under the Consent Decree, the IIO [under the Final Order] has the unfettered right to examine any and all records of the Union in his discretion." The filing further argued: "Nor does anything in the Final Order suggest that the Union can unilaterally deem broad swaths of documents encompassed by the IIOs examination notices as 'Non Responsive.' Indeed, the exact opposite is true. In the context of addressing changes to the independent disciplinary mechanism during the Transition Period, the Final Order states that a mechanism 'without ultimate and unfettered authority to investigate' and discipline Union members or entities 'shall presumptively undermine the independent and effectiveness of the disciplinary mechanism, and therefore be impermissible.'" The Government described "the IIO's investigatory powers [as] undeniably broad. This is deliberately so. As the Final Order explicitly recognizes, a robust ability to investigate is the primary guarantee of an effective and independent disciplinary system." The Government concluded that: "If the Union can stonewall the IIO's investigation into its officials and employees, the IIO cannot be as independent as the Final Order requires; rather, he or she will only be as effective as the Union and those in power allow."

After receiving the IBT's response to the motion and the Government's reply, the Court on December 27, 2016 granted the Government's motion to enforce the Final Order and compel compliance with the notices to produce. The Court held that "the Final Order does not authorize the IBT to withhold the tens of thousands of emails at issue from the IIO," reaffirming "the Final Order's sweeping grant of authority to the IIO," and that "the IBT may not *sua sponte* elect to withhold whatever documents it deems unresponsive to the IIO's requests." Judge Preska further found that "the plain text of the Final Order authorizes the IIO to require the IBT to produce privileged documents." Judge Preska specifically found that the IBT's privilege log "made only a perfunctory attempt to describe the content of the withheld emails and in numerous instances declined to identify the basis for the claim of privilege." She further stated:

> To the extent that the IBT's withholding privileged documents from the IIO has become "practice" under the Final Order, the Court finds that the IBT's privilege logs are wholly inadequate for failure to identify either the privilege asserted or the subject matter of the documents and therefore holds that the IBT has waived attorney-client privilege."

With respect to the IBT's contention that the IIO issued contradictory and confusing instructions to the IBT, Judge Preska concluded that "[e]ven if the Court were inclined to agree that the IIO's instructions have been unduly contradictory, the Court finds the IIO's documents request to be perfectly clear at this stage of the dispute and consistent with the Final Order's broad grant of authority to the IIO." The Court ordered the IBT to produce within two weeks of the Court's order all documents requested in the March 4 and March 11 notices, "excluding those documents concerning Ken hall's negotiations with UPS that the IIO does not seek."

No further applications relating to the IIO request have been docketed with the court. It was reported to the Election Supervisor that the IBT produced documents to the IIO on January 10, 2017.

By letter to Mr. Raymond dated February 17, 2017, the IIO withdrew the October 31, 2016 recommended charge against Mr. Hall, having been "persuaded that Mr. Hall did not play a personal role in the International Brotherhood of Teamsters' ('IBT') noncompliance with my March 4 and 11, 2016 document requests." The IIO accepted that Mr. Hall "'did not participate in the IBT's legal strategy, did not review any documents, and did not decide whether to withhold any documents or categories of documents.'" The withdrawal of the charge was expressly conditioned on the IBT designating "an individual officer at the IBT [to be] personally responsible for ensuring document requests of the Independent Disciplinary Officers ('IDOs') for International Union records under the Final Agreement and Order and fully complied with."

IIO diGenova and Chief Investigator Carberry told the Election Supervisor that the investigations for which the March 4 and 11, 2016 notices of examination were issued are ongoing. Chief Investigator Carberry stated that further investigative work is required, including third-party subpoenas, before any decision can be made about referring charges. Chief Investigator Carberry also stated that because of the complexity of issues presented in the investigation, he believed that, even had the IBT produced all requested emails promptly following issuance of the March 4 and 11, 2016 examination notices, no charging decisions

would have been reached before the conclusion of the International officers election in November 2016. ESD 387 at 20.

Decision of the Election Appeals Master

Standard of Review

It is well established that the Election Supervisor's factual findings, including his credibility determinations, are entitled to deference absent a manifest abuse of discretion. *See, e.g., Taylor & Fabiano*, 2011 EAM 34 (April 13, 2011); *Eligibility of Swain*, 2011 EAM 20 (February 22, 2011); *Hailstone & Martinez*, 2010 EAM 7 (September 14, 2010). An abuse of discretion occurs when the facts found are "clearly erroneous." *Arista Records, LLC v. Doe*, 604 F.3d 110, 117 (2d Cir. 2010).

Article I

Certain protestors contend that the IBT's delays in conducting the Aloise hearing and producing documentary evidence to the IIO denied Teamster members the right to "fair, honest, open, and informed elections," citing *Rules*, Article I and Article XII.

Article I of the *Rules*, "Role and Authority of Election Supervisor," provides in pertinent part:

> The Election Supervisor has the authority to take all necessary actions, consistent with these Rules, to ensure fair, honest, open, and informed elections.

Article XII of the *Rules* incorporates into the *Rules* certain sections of the Labor-Management Reporting & Disclosure Act of 1959, as amended ("LMRDA"), which includes the LMRDA's equal voting rights provision, Section 101(a)(1), 29 U.S.C. Section 411(a)(1).

For substantially the reasons set forth by the Election Supervisor in ESD 378, I find that the Election Supervisor's obligation to ensure an "informed" election under the *Rules* is limited to enforcing candidate access and campaign literature distribution rights specifically identified in the *Rules*, and that the equal voting rights provision of the LMRDA cannot be read to include a right to a "meaningful vote," as asserted by the protestors.

Article IV

Certain protestors contend that the IBT's delays in conducting the Aloise hearing and producing documentary evidence to the IIO violated Article IV, Section 12 of the *Rules*, "Prohibition on Interference with Voting," which provides in pertinent part:

> No person or entity shall limit or interfere with the right of any IBT member to vote, including, but not necessarily limited to, the right independently to determine how to cast

his/her vote, the right to mark his/her vote in secret and the right to mail the ballot himself/herself. No person or entity may encourage or require an IBT member to mark his/her ballot in the presence of another person or to give his/her ballot to any person or entity for marking or mailing.

For substantially the reasons set forth by the Election Supervisor in ESD 378, I find that the provision of the *Rules* prohibiting interference with voting "concerns matters such as ballot collection or coercion of members in the exercise of their independent decision to cast a secret ballot in an election," and does not apply to the alleged delays in the disciplinary process or withholding of information at issue in these protests. As the Election Supervisor found, "[m]embers, with or without the information the protestors claim is critical, retained the right to vote, the right independently to determine how to cast their ballots, the right to mark their ballots in secret, and the right to mail the ballots themselves. Nothing the IBT or Hall did or failed to do, as recited in this decision, interfered with or limited those rights."

Article XI

The protestors assert violations of Article XI of the *Rules* by the IBT, its retained counsel, and members of the Hoffa-Hall slate.

The primary focus of the protests is Article XI, Section (1)(b)(3) of the *Rules*,[11] which provides:

> No labor organization, including but not limited to the International Union, Local Unions and all other subordinate Union bodies, whether or not an employer, may contribute, or shall be permitted to contribute, directly or indirectly, anything of value, where the purpose, object or foreseeable effect of the contribution is to influence, positively or negatively, the election of a candidate * * *. No candidate may accept or use any such contribution. These prohibitions extend beyond strictly monetary contributions made by a labor organization and include contributions and use of the organization's stationery, equipment, facilities, and personnel.

Based upon the facts set forth in ESD 378 and 387, the Election Supervisor concluded that "the actions of the IBT in responding to the notices of examination and postponing the Aloise hearing did not have the purpose, object, or foreseeable effect of influencing, positively or negatively, the election of candidates in the International officers election, as those terms are used in Article XI, Section 1(b)(3) of the *Rules*."[12]

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[11]As noted above, the protestors assert related violations of Section (1)(b)(2) and Sections 2(a)(1) and 2(a)(2), based upon the same asserted misconduct. The Election Supervisor noted that the arguments of the protestors also implicate Article VII, Section 12(c) of the *Rules*, which prohibits use of "[u]nion funds [and] personnel to assist in campaigning unless the Union is reimbursed at fair market value for such assistance, and unless all candidates are provided equal access to such assistance and are notified in advance, in writing, of the availability of such assistance."

[12]The Election Supervisor also concluded that the IBT's actions did not constitute union "assist[ance] in campaigning" prohibited by Article VII, Section 12(c) of the *Rules*.

Aloise Proceeding

As reflected in the above statement of facts, the Election Supervisor conducted an extensive investigation and analysis of the external and internal communications pertaining to the IBT's request for an indefinite postponement of the hearing, the IRO's rejection of the IBT's request and the IBT's decision not to proceed with the hearing, recognizing that the IRO could then schedule and conduct a hearing on the charges. These communications do not support the protestors' contention that the IBT sought to delay the adjudication of the Aloise charges in order influence the election of Mr. Aloise and other Hoffa-Hall slate members. Notably, notwithstanding the upcoming election, the IBT was fully prepared to proceed with and had scheduled the Aloise hearing prior to notification of the grand jury investigation. Moreover, the IBT later rejected the suggestion of one of its outside attorneys that the IBT consider reversing its position and conduct the hearing in order to eat "up more of the clock in the meantime (if that is one of the goals here—to get past the election season)." The IBT also rejected a request by Mr. Aloise's counsel that the IBT bring or join a suit to bar the IRO from proceeding with a hearing while the grand jury continued to investigate Mr. Aloise. I find that the evidence of record substantially supports the Election Supervisor's determination that the purpose or object of the IBT's actions was to promote and comply with what it considered a principled interpretation of Article XIX, Section 7(a) of the IBT constitution, which it concluded barred the union from holding a hearing on internal union charges that arose from the same facts and circumstances that were being investigated by a grand jury, and to avoid potential liability under the LMRDA, 29 USC 411(a)(5), which bars disciplinary action by a labor organization against a member "unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." The IBT's actions were designed to protect the union and to assert what the IBT believed to be the due process rights of union members generally, not just those asserted by Mr. Aloise. Accordingly, I find that the Election Supervisor properly concluded that the IBT's actions with respect to Mr. Aloise did not have the purpose, object, or foreseeable effect of influencing, positively or negatively, the election of candidates in the International officers election, and did not constitute union assistance in campaigning.

IIO Document Requests

The protestors contend that the IBT improperly expended resources to resist or limit production of documents to the IIO for the purpose of delaying or impeding an ongoing investigation in order to prevent the disclosure of information during the election cycle that would be damaging to the Hoffa-Hall slate.

With respect to Article XI, the Election Supervisor had to determine whether the IBT's contribution of resources, including expenditures for retained counsel, in responding to the IIO's document requests had the "purpose, object or foreseeable effect" of influencing, positively or negatively, the election of a candidate.[13]

[13] At the outset of his decision, the Election Supervisor states that "the IBT's conduct during the period it was responding to the document requests was broadly directed at defining its

The Election Supervisor chose to address "purpose and object" separately from "foreseeable effect," identifying a number of purposes or objects for limiting the production of documents that he found were unrelated to the election of any candidate.

The Election Supervisor first found that a purpose or object of the IBT's use of legal services was "to review the requested documents for privilege and to withhold those documents it considered protected by privilege," noting that "the IBT and IRB had "developed an extensive history by which the IBT withheld from production documents it claimed were privileged," and that based on that history "the IIO invited the IBT to withhold privileged documents and to provide a log of the withholdings that would permit the IIO to assess whether production was necessary or desired notwithstanding the privilege claim." ESD 387 at 43-44.

The Election Supervisor found that a second purpose or object of the IBT's use of legal services in responding to the document requests was "to maintain collective bargaining relationships with employers of its members by withholding from production to the IIO documents related to contract negotiations." The Election Supervisor found that "[t]his action guarded against the possibility that information sensitive to an employer's industry-competitive position would appear in charges that might result from the investigation, making the employer less willing to offer benefits or concessions to the IBT in future negotiations that the employer's industry competitors had not already granted." The Election Supervisor noted that "the IBT had express permission from the IIO to withhold such documents that concerned UPS negotiations, and it withheld similar documents concerning nine additional employers," with the understanding that "it may be required to produce the withheld documents concerning contract negotiations if the IIO demanded them." ESD 387 at 44.

A third purpose or object of the IBT's use of legal counsel to review documents before producing them identified by the Election Supervisor was "to withhold from production information protected by HIPAA, thereby protecting the medical privacy of benefit plan participants concerning medical benefits those individuals sought under the plans," which was "consistent with what it had done in its September 2015 responses to notices of examination." ESD 387 at 44.

The Election Supervisor identified as a fourth purpose or object of the IBT's use of legal counsel to review documents before producing them as withholding "documents that were unrelated to any known investigation or were irrelevant to any possible investigation." According to the Election Supervisor, "[t]he purpose or object of this action was two-fold, first

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relationship with the Independent Investigations Officer within the new structure created by the Final Order, which the IBT believed would be materially different than what existed under the Consent Order, and the document requests were the IBT's first opportunity to test that belief." ESD 387 at 2. The Election Supervisor's decision, however, does not present or analyze redefining the relationship with the IIO as a purpose or object of the IBT's response to the IIO's document requests or as a legitimate institutional interest for limiting its document production. See ESD 387 at 42-52. I have therefore not considered this asserted motivation in my review of the Election Supervisor's decision.

to reduce the expense charged back to the IBT by IIO lawyers and investigators that would be incurred in reviewing irrelevant documents, and second, to establish a precedent for such withholdings with respect to future notices of examination." According to the Election Supervisor, "[d]ocuments the IBT deemed unrelated to any possible investigation consisted principally of mass emails and listservs," and "[t] hese withholdings complied with the IIO's instructions in his April 12, 2016 letter, as reaffirmed at the July 20, 2016 meeting." ESD 387 at 44-45.

The Election Supervisor specifically rejected the contention of certain protestors that the use of litigation software and search terms was designed to obstruct the investigation.

The Election Supervisor found that:

> The purpose or object of the IBT's use of search terms in its initial review of Slatery's emails was to produce more promptly the emails from that massive body of documents that were relevant to the known investigation of the awarding of the pharmacy benefits manager contract under the VEBA. The volume of Slatery's emails and the press of other IBT business, particularly the convention, meant that the review of Slatery's emails would be a lengthy process. As a result, the IBT culled documents with the standard methodology of applying search terms selected in light of the investigations it understood the IIO to be conducting.

ESD 387 at 45.

The Election Supervisor further found that:

> The purpose or object for using litigation software to review the requested documents was to save the time spent by staff in the review process. The software permitted documents to be categorized; it also created a log of the withheld documents. The principal result of the use of this software was that documents were reviewed and produced more quickly than they would have been otherwise. A second important purpose for using the software was that it minimized the likelihood that the email server would crash from the strain of the document production, thereby minimizing the possibility that work at IBT headquarters would be disrupted as a result.

ESD 387 at 45.

The Election Supervisor concluded that the IBT's actions in responding to the IIO document requests were motivated by the foregoing purposes or objects and that the contribution of legal resources did not have the purpose or object of influencing the election of a candidate. ESD 387 at 45.

The Election Supervisor separately analyzed whether the IBT's contributions had the "foreseeable effect" of influencing the election of a candidate. The Election Supervisor reviewed a number of his prior decisions, including *Halstead*, 2016 ESD 245 (June 16, 2016) and *Bucalo*, 2016 ESD 190 (May 4, 2016), concluding that "[t]he import of these decisions is that Section 1(b) of Article XI is not violated if the action of the institution, whether union or employer, is motivated by its institutional interests and is not undertaken for an expressly partisan rationale, even if the foreseeable effect may be to influence the election of a candidate in an election." ESD 387 at 48-50.

The Election Supervisor found that the IBT's actions in responding to the notices of examination were motivated by and promoted "numerous" legitimate institutional interests.

The Election Supervisor observed that:

> Throughout the production process, the IBT sought to narrow the scope of the notices of examination so as to reduce the time and work burden at the IBT of producing irrelevant documents and reduce the time, work, and expense at the IIO of doing the same. The IBT had an institutional interest in deploying its workforce efficiently and promoted that interest by urging the IIO to tailor its requests to issues in which the IIO had an investigative interest.

ESD 387 at 52.

The Election Supervisor found that the IBT had an

> institutional interest in reviewing the documents for privilege and withholding those documents it considered protected by the privilege. Attorney-client privilege barring disclosure of testimonial and documentary evidence is generally recognized where a confidential communication is made between privileged persons for the purpose of seeking, obtaining, or providing legal assistance to the client. While Judge Preska's December 2016 declared that the IBT had no right to assert any privilege when responding to the IIO's document requests, that rule had not been regularly enforced by the IIO or the IRB over the time since the entry of the Consent Order. Accordingly, at the time the IBT made the decision to review documents before producing them, it and the IRB had developed an extensive history by which the IBT withheld from production documents it claimed were privileged. That history was accompanied by the IRB's right, expressly acknowledged by the IBT, to demand that withheld documents be produced notwithstanding the claimed privilege, and if such demand was made, the IBT well understood its obligation to satisfy the demand. It was based on that history that the IIO invited the IBT to withhold privileged documents and to provide a log of the withholdings that would permit the IIO to assess whether production was necessary or desired. As recently as the September 2015 production of Slatery's emails, the IRB's chief investigator had not demanded production of assertedly privileged documents that were otherwise responsive to the notice of examination. We conclude that withholding of documents based on privilege, subject to later production on specific request, was therefore consistent with the IBT's institutional interest.

ESD 387 at 50-51.

The Election Supervisor further concluded that the IBT had a legitimate institutional interest in

> developing and maintaining collective bargaining relationships with employers of its members by withholding documents related to contract negotiations. It had express permission from the IIO to withhold such documents that concerned UPS negotiations, and it withheld similar documents concerning nine additional employers. The reason for making these withholdings was to guard against a disclosure of bargaining history in a charging document that might put an employer at a competitive disadvantage with an industry rival and in the future or tend to make the employer reluctant to grant any benefit or concession to the union that its industry competitors had not already granted. As with documents the IBT claimed were privileged, the IBT provided logs identifying the documents and understood that it may be required to produce the withheld documents concerning contract negotiations if the IIO demanded them. We conclude that these withholdings, subject to later production on specific request, promoted the IBT's institutional interest in obtaining favorable terms and conditions of employment for its members.

ESD 387 at 51.

The Election Supervisor also identified as a legitimate institutional interest "protecting the medical privacy of benefit plan participants concerning medical benefits those individuals sought under the plans," and complying with HIPAA. ESD 387 at 51.

The Election Supervisor further found that the IBT had a legitimate institutional interest in withholding from production "non-responsive" documents that were unrelated to any known investigation or irrelevant to any possible investigation, which the IBT asserts consisted principally of mass emails and listservs, in order to "reduce the expense charged back to the IBT by IIO lawyers and investigators that would be incurred in reviewing irrelevant documents. In addition, establishing a precedent for such withholdings might have the positive effect of permitting similar withholdings in response to future notices of examination." ESD 387 at 51-52.

The Election Supervisor found that

> the IBT's use of search terms in its initial review of Slatery's emails promoted its institutional interest in producing more promptly documents relative to the known investigation of the awarding of the pharmacy benefits manager contract under the VEBA. The process of applying the search terms and the resulting productions has been described previously. We conclude that the IBT's use of search terms promoted its institutional interest of expediting the production of relevant documents in response to the notices of examination.

ESD 387 at 52.

The Election Supervisor further found that

> the IBT's use of litigation software to review the requested documents saved time to be expended by its staff that was engaged in that process. The software permitted documents to be categorized and created a log of the withheld documents. The principal result of the use of this software was that documents were reviewed and produced more quickly than they would have been otherwise. This promoted the twin institutional interests of reviewing documents before producing them while producing them as quickly as possible under the circumstances. A further institutional interest the IBT had in using the software was that it minimized the likelihood that the email server would crash associated with the document production and that the work performed at IBT headquarters would be disrupted as a result.

ESD 387 at 52.

In sum, the Election Supervisor concluded that the IBT's actions in responding to the IIO's document requests did not have the foreseeable effect of influencing the election because they were motivated by legitimate institutional interests of the IBT and did not take a partisan position or advocate on behalf of a candidate." ESD 387 at 53.

The protestors urge the Election Appeals Master to reject the findings and conclusions of the Election Supervisor on several grounds.

First, certain protestors argue that based upon Judge Preska's decision, the IBT is estopped or precluded from asserting in this proceeding any legitimate institutional interest in challenging the IIO's document requests. This argument overstates the scope of Judge Preska's ruling, which was limited to an interpretation of the IBT's rights under the Final Order. Judge Preska was not presented with the question of whether the IBT's conduct constituted a violation of the *Rules*. At the point Judge Preska made her decision, the sole question was the IIO's right under the Final Order to what she found "at this stage of the dispute" to be a clear demand for all requested documents, not whether the IBT had reasonably relied on instructions from the IIO.[14]

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[14] The Election Supervisor found that "Judge Preska's December 2016 pronouncement does not, in our view, change the fact that the IBT relied on the repeated statements of the IIO, or make that reliance illegitimate, that permitted the IBT to review documents before producing them, to withhold documents it asserted were privileged, and to withhold non-privileged documents 'that the IBT believes are voluminous and not relevant'." The Election Supervisor observed that "[w]e would be presented with a different issue had the IIO responded to the IBT's objections, first presented in March 2016, by demanding that all documents be produced without exception, the result the Government eventually obtained from the Court. But the IIO did not make this demand. Instead, it agreed that the IBT could withhold broad categories of documents, subject to further request from the IIO that specific documents or categories of documents be produced." ESD 387 at 46.

Second, the protestors argue that the Election Supervisor improperly ignored or failed to defer to Judge Preska's findings with respect to the adequacy of the IBT's privilege logs. Here again, Judge Preska's ruling appears to reflect the application of a legal standard, whereas the Election Supervisor's findings focused on whether the logs comported with past accepted practice. The protestors have not shown that the Election supervisor's findings are clearly erroneous.

Third, the protestors contend that the Election Supervisor ignored evidence that the IBT deliberately obstructed the IIO's investigation by producing documents in a format that was unsearchable and therefore essentially unusable. On appeal, the protestors submitted evidence that the IBT could have produced documents in their native Outlook format using Relativity, but intentionally chose to convert the files from native to image format in their production to the IIO. It is well established that it is not the role of the Election Appeals Master to receive evidence or to conduct an evidentiary hearing. Based on the facts available to the Election Supervisor, I cannot say that his conclusion that Relativity was industry standard and that a Relativity license was necessary to review documents in native Outlook format was clearly erroneous.

Fourth, the protestors contend that the Election Supervisor erred in rejecting their contention that Mr. Dinh's invocation of the pending election, first to the US Attorney's office and the next day to IIO diGenova directly, was an improper "contribution" of a "thing of value" made for the purpose or object of assisting the incumbent candidates in the election.

The Election Supervisor found that

> Dinh's statements were aimed at the conflicting statements emanating from the IIO's office. On one hand, those statements permitted the IBT to withhold privileged documents and those it believed were voluminous and irrelevant. Other statements, however, threatened a charge of obstruction for failing to produce more documents. Dinh asserted that the IBT was complying with the IIO's instructions with respect to withholding documents, and he cautioned that, were the IIO to follow through on its threat of an obstruction charge despite the IBT's compliance with the IIO's instructions, not only would such a charge be unfair, it also would tend to inject the IIO into the election process by accusing a candidate of conduct the IIO had otherwise permitted. Dinh promised the IBT would complete production by Labor Day 2016, which it did, and diGenova promised in return both to consult with the IBT about its withholding and to steer clear of an obstruction charge that potentially would have consequences for the election, which he did not.

ESD 387 at 46-47. The Election Supervisor specifically found "no evidence to suggest that the IBT sought or the IIO agreed that no charges of any kind issue during the electoral period." ESD 387 at 47 n.27. The protestors have not shown that these findings are clearly erroneous.

Finally, the protestors complain that in a number of respects the Election Supervisor "uncritically" accepted the IBT's version of events and the IBT's stated reasons for its response to the IIO document requests, which they contend are contradicted by the actions taken by the

IBT. This complaint is fundamentally a challenge to the Election Supervisor's credibility determinations, which are entitled to deference and may be overturned only for abuse of discretion. The protestors have not met this standard.

For all of the above reasons, I find that the Election Supervisor's determination that the IBT's response to the IIO document requests did not violate Article XI or Article VII of the *Rules* was neither an abuse of discretion nor contrary to law.

CONCLUSION

The appeals of ESD 378 and ESD 387 are denied and the decisions of the Election Supervisor are affirmed.

SO ORDERED.

/s/ Kathleen A. Roberts
KATHLEEN A. ROBERTS
ELECTION APPEALS MASTER

DATED: October 31, 2017