UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al*.,

Defendants.

88 Civ. 4486 (LAP)

United States of America's Memorandum of Law in Support of Motion to Enforce the Final Order of February 17, 2015

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TABLE OF CONTENTS

Pursuant to paragraphs 6, 8, and 9 of the Final Order dated February 17, 2015, (Dkt Nos. 4414, 4409), Plaintiff United States of America (the "Government") hereby moves for an order compelling the International Brotherhood of Teamsters (the "Union") to comply with document requests propounded by the Independent Investigations Officer ("IIO") in connection with ongoing investigations into high-ranking Union officials and employees. As described below, contrary to the plain language of the Final Order, the Union is unilaterally deciding what it will and will not allow the IIO to examine, and has additionally intentionally failed to justify the withholding of supposedly privileged documents. To date the Union's conduct has substantially interfered with the IIO's ability to perform his duties; if allowed to stand, it threatens to vitiate the effectiveness and independence of the Final Order's Independent Disciplinary Mechanism.

BACKGROUND

I. The IIO's Investigations and the Union's Response

The IIO is investigating the conduct of a number of high-ranking Union officials and employees, including Ken Hall, General Secretary-Treasurer of the Union, William C. Smith III, Executive Assistant to the General President, Nicole Brener-Schmitz, formerly the IBT's Political Director, and John Slatery, the IBT Benefits Department Director. (*See* Declaration of Charles S. Carberry dated November 2, 2016 ("Carberry Decl.") ¶¶ 9).[1] Generally, these investigations concern broad practices of Union officers and employees receiving payments and gifts from employers, vendors, and others doing business with the Union. (*Id.* ¶ 20). This includes the awarding of contracts for a Union fund in 2013, on which Hall, Smith, and other high ranking Union officials were Trustees, to a company represented by a facilitator, Charles Bertucio, who

[1] All citations to paragraphs contained in the Carberry Declaration include the exhibits cited therein.

had close personal relationships with several high ranking Union officials; payments and the giving of things of value to high ranking Union officials, by vendors, their agents, employers and others doing business with the Union or its funds, and allegations of widespread financial wrongdoing by Brener-Schmitz that was known within the Union and tolerated by senior officials. (*Id.* ¶ 9; *see also id.* ¶ 20 (providing additional specific information regarding investigations)).[2]

In furtherance of these varied investigations, the IIO propounded notices of examination, two of which are at issue here. First, on March 4, 2016, the IIO requested production of the emails of three high-level Union officials: (a) Ken Hall, General Secretary-Treasurer, for the period from March 1, 2013-June 30, 2013, and from May 1, 2014-June 30, 2014; (b) William C. Smith, Executive Assistant to the General President, for the period January 1, 2013, through the date of service; and (c) Nicole Brener-Schmitz, Political Director, also for the period January 1, 2013, through the date of service. (*See* Carberry Decl. ¶ 4). Second, on March 11, 2016, the IIO requested the emails of John Slatery, Benefits Administration Department Director, for the period June 30, 2014, to the date of service. (*See id.* ¶ 5).[3]

The IIO and the Union have exchanged numerous letters concerning the nature of the requests, the deadlines for production, and the form of production, and they had at least one in-person meeting on July 20, 2016, in an effort to productively discuss the disputes between them regarding

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[2] If the Court would like further information on the nature of the IIO's investigations beyond what is contained in this submission, the Government is happy to submit a supplemental declaration from the IIO *ex parte* for *in camera* review, so as to not compromise the investigations.

[3] The Union's General Secretary-Treasurer (at this time Ken Hall) is the recipient of the IIO's examination notices and responsible for compliance.

the document requests. (*Id.* ¶¶ 6, 10, 18). In that regard, at the Union's request, the IIO agreed that emails pertaining to Hall's contract negotiations with UPS need not be produced. (*Id.* ¶¶ 19, 20; *see also id.* ¶¶ 14, 15). Consistent with past practice under the Consent Decree, the Union was also permitted to withhold responsive privileged records, so long as it provided an adequate privilege log. (*Id.* ¶¶ 10, 24 n.5). The IIO granted several extensions of the production deadline. (*Id.* ¶ 6). During the July 20 in-person meeting, the IIO granted the Union a last extension, until September 6, to comply with his document requests. (*Id.* ¶ 10). The Union made its last production of documents on September 9 (*id.* ¶ 11), but remains in substantial noncompliance with all of the document requests, which has substantially hindered the work of the IIO (*id.* ¶¶ 6-8, 12, 30; *see also* ¶¶ 11, 16, 19, 20, 21-28).

Most significantly, the Union decided not to produce all documents responsive to the IIO's requests. Rather, the Union elected to withhold a substantial number of emails, unilaterally deciding that they were not relevant to the IIOs investigations, notwithstanding having been told repeatedly that this was not permissible under the Final Order. (*See id.* ¶¶ 11-16, 19-20). While the IIO did agree, at the Union's request, to allow the Union to withhold documents pertaining to Hall's UPS contract negotiations, the Union went far beyond that, withholding documents on numerous topics of its choosing. (*See id.* ¶¶ 19-20; *see also id.* ¶¶ 21-23). In the end, the Union unilaterally withheld as "Non Responsive" approximately 17,334 emails. (*Id.* ¶¶ 6, 16). Of course, while the Union may not be privy to the depth or details of these investigations, it has general knowledge about the subject matters of these investigations. (*Id.* ¶¶ 9, 20).

The Union also produced a skeletal "privilege log" to justify the withholding of an additional 15,278 emails. (*Id.* ¶¶ 7, 24). As even a cursory review of the log shows, however, it is devoid of detail, making it impossible in numerous instances to determine the basis for the claim of privilege, notwithstanding the IIO's request for a privilege log that comports with Local Civil Rule 26.2(a). Remarkably (and tellingly), it fails to identify even the privilege being asserted. (*See id.* ¶¶ 7, 24; *see also id.* ¶¶ 25-28 (describing examples of documents withheld by the Union that appear not to be privileged)).

The Union's conduct in this regard is unprecedented (and dangerous). As Carberry states:

> Since the disciplinary process began under the Consent Order in 1989, I have been involved with every examination notice sent to the IBT requiring it to produce documents for examination to the court-appointed Investigations Officer, the IRB, and the IIO. Before its response to the March 4 and 11 notices, the IBT has not refused to identify the particular privilege it asserted allowed it not to produce a document for examination. Before the March 4 and 11 notices, it also had never overtly refused to allow the examination of documents that were within the scope of an examination notice received from the IRB or the independent officers under the Consent Order.

(Carberry Decl. ¶ 29).

As described further below, allowing the Union to decide what is and is not relevant to IIO investigations, the scope and depth of which it is unaware, improperly subjects the effectiveness of the independent disciplinary mechanism to the whim of the Union leadership.

ARGUMENT

I. The Union's Unilateral Decision to Withhold What It Deems to Be "Non Responsive" and Its Failure to Provide an Adequate Privilege Log Violates the Plain Language of the Final Order

The Final Order is explicit: consistent with the authority exercised by the IRB under the Consent Decree, the IIO has the unfettered right to examine any and all records of the Union in his discretion. Specifically, paragraph 30 of the Final Order provides that the IIO

> shall exercise such investigative and disciplinary authority as previously exercised by the IRB, as set forth in the Consent Decree and the rules and procedures governing the Independent Disciplinary Officers and their authorities … attached as Exhibit D to this Final Order, as well as 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 . . . .

(Final Order ¶ 30). This Court and the Second Circuit have adjudicated the investigatory authority of the IRB under the Consent Decree, and ruled that it is virtually unlimited. *See United States v. IBT*, 803 F. Supp. 761, 791-92 (S.D.N.Y. 1992), *aff'd in relevant part*, 998 F.2d 1101 (2d Cir. 1993). Like the investigatory authority of the IIO, the IRB's investigatory authority expressly encompassed the authority of the Union's General President, General Secretary-Treasurer, and General Executive Board. (Consent Decree § G ¶ (b) (Exhibit 1 to the Final Order)). This Court interpreted that investigatory authority as "a sweeping grant of authority that defies enumeration," 803 F. Supp. at 791-792, and the Second Circuit agreed, *see* 998 F.2d at 1106 ("broad grants of authority"). As paragraph 30 of the Final Order reflects, the parties intended to vest the IIO with that same exact sweeping authority. (*See also* Final Order ¶ 49 (all matters of construction and

interpretation of the Consent Decree and obligations thereunder continue to be governed by decisional law established in this action)).

Paragraph 30 of the Final Order also defines the IIO's authority by reference to the rules and procedures governing the Independent Disciplinary Officers. Those rules, incorporated as Exhibit D to the Final Order, broadly mandate that the IIO's investigative authority "shall include, but not be limited to, the authority to cause the audit or examination of the books of the IBT or any affiliated IBT body at any time to the extent that the [IIO] may determine necessary." (*See* Final Order Ex. D at ¶ B.2.a.). References to this broad investigatory authority are repeated throughout the Disciplinary Rules. (*See, e.g.*, Final Order Ex. D. at ¶¶ 4.b, 4.c, 5.a.). There are no limitations on this language. Notably, the Second Circuit largely approved the rules governing the IRB, which included the same rule governing the examination of records that it at issue here. *United States v. IBT*, 998 F.2d at 1111; (*Compare* Final Order Ex. D at ¶ B.2.a. to Ex. B at Rule H3(a)).

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." (Final Order ¶ 38). Yet the Union's conduct is achieving exactly that result. Consistent with past practice under the Consent Decree, while the IIO may agree that

the Union need not produce a certain category of responsive document, nothing permits the Union to make that choice sua sponte.

As the Union has previously acknowledged (*see* Dkt. No. 4501), the provisions of the Final Order must be strictly construed basically as a contract. *See United States v. IBT*, 998 F.2d at 1106 ("Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms, and therefore the scope of a consent decree must be discerned within its four corners, and not be reference to what might satisfy the purposes of one of the parties to it."). But because consent decrees implicate judicial interests beyond those of the litigants, courts have broad discretionary power to secure compliance. *CBS Broad, Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 101 (2d Cir. 2016).

The Final Order leaves no room for the Union to withhold responsive documents of its choosing, or otherwise delimit the scope of what the IIO may examine.[4] The sole requirement under the Final Order regarding the validity of an IIO examination request is that the IIO determine that a review of the records requested is necessary to perform his or her duties. (Final Order Ex. D at ¶ B.2.a.). That is met here. (Carberry Decl. ¶ 12; *see also id.* ¶¶ 4-5, 8). Accordingly, the Union's failure to produce all documents responsive to the IIO's March 4 and March 11 requests,

[4] The Final Order contains no carve-out for privileged documents either. However, consistent with practices developed under the Consent Decree, the IIO's practice is to permit the withholding of privileged documents, so long as the assertion of privilege is adequately justified. As stated herein, the Union has not made that showing. (*See* Carberry Decl. ¶¶ 24 & n.5, 29).

aside from documents the IIO has agreed need not be produced, violates the Final Order and should be rectified.[5]

II. The Independent Disciplinary Mechanism Will Neither Be Independent Nor Effective if the IIO's Ability to Examine Documents Is Curtailed

As described above, the IIO's investigatory powers are 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. (Final Order ¶ 38 (any disciplinary system that does not include an "unfettered" authority to investigate presumptively undermines the independence and effectiveness of the disciplinary mechanism and is impermissible)). 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.

Yet that is exactly what the Union seeks to achieve here by unilaterally deciding what documents the IIO is entitled to examine. Here, the IIO is in the process of investigating. The Union's shielding of documents – at least some of which the IIO has learned from other sources are highly relevant to the investigations (Carberry Decl. ¶¶ 20-23)– has hindered his ability to gather evidence on which to make any final decisions.

As the IIO's chief counsel declares,

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[5] The Union cannot credibly claim surprise at this result. The Union was never permitted to unilaterally withhold information under the Consent Decree which, as noted above vested the IRB with the same authority as the Independent Disciplinary Officers have under the Final Order. Rather, the Union was permitted to withhold categories of documents, and privileged documents, with the IRB's consent. (Carberry Decl. ¶¶ 24 & n.5, 29).

> The IBT's interference and hindrance of the IIO's work for the past six months has substantially interfered with his ability to perform his duties. It has occurred when the administration was on notice that the conduct of its top officers and employees were under investigation. It has also occurred during an election year. The IBT's conduct has already hindered the IIO in his work for a substantial period of tieme he has to perform his duties during the transition period.

(Carberry Decl. ¶ 30).

III. Relief Requested

Accordingly, the Government respectfully requests an order:

(1) reaffirming that the Final Order does not provide the Union with authority to unilaterally withhold documents responsive to notices of examination issued by the IIO (Final Order ¶¶ 6, 9, 30); and

(2) compelling the Union to produce all records requested by the IIO's March 4 and March 11 requests, *including* all documents the Union has claimed are privileged, but excluding documents reflecting Ken Hall's negotiations with UPS, within three business days of the order. (*Id.*). With respect to privileged documents, as described above, the Union has failed to even identify the privilege it claims protects the documents withheld. This is egregious and a stark break from practice under the Consent Decree. Given that the Final Order vests the IIO with authority to examine privileged documents (*id.* ¶ 30 & Ex. D), and in light of the Union's contumacious conduct, the Court should hold that all privileges are waived, as numerous courts have done in less egregious circumstances. *See SEC v. Yorkville Advisors, LLC*, 300 F.R.D. 152, 167-68 & n.7 (S.D.N.Y. 2014) (collecting cases and noting that imposing waiver, rather than some lesser penalty, is the appropriate remedy when a party has failed to provide timely privilege logs); *see also Micillo v. Liddle & Robinson LLP*, No. 15-6141 (JMF), 2016 WL 2997507, at *3 (S.D.N.Y.

May 23, 2016) (same and citing additional authority). In the alternative, the Court should order that all documents the Union contends are privileged be reviewed by a third party *in camera* for a determination of privilege. (Final Order ¶¶ 6, 9, 30).

CONCLUSION

This dispute raises a fundamental issue impacting the future independence and effectiveness of the Independent Disciplinary Officers. To allow the Union and its employees under investigation to determine what records the IIO can examine is to guarantee an ineffective, Union-controlled IIO, in direct contravention to the spirit and terms of the Final Order, which contemplate a robust and effective independent disciplinary mechanism in exchange for reduced Government oversight. (Final Order ¶ 8). Accordingly, the Government requests entry of an order enforcing the Final Order, as detailed above.

Dated: New York, New York
November 3, 2016

Respectfully submitted,

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