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INVESTIGATIONS OFFICER,

Claimant,

-v-

WALTER CALDWELL, HENRY MARTINELLI,  
CARL PURPURA, GREG RASCZYK and  
GARY RICHARDSON,

Respondents.

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DECISION OF THE  
INDEPENDENT  
ADMINISTRATOR

This matter concerns charges filed by the Investigations Officer, Charles M. Carberry, against Walter Caldwell ("Caldwell"), Henry Martinelli ("Martinelli"), Carl Purpura ("Purpura"), Greg Rasczyk ("Rasczyk") and Gary Richardson ("Richardson") (collectively referred to as "Respondents"). Respondents are Executive Board members of IBT Local Union 945 in Wayne, New Jersey. A hearing on these charges was held before me at which Respondents appeared with counsel. Having reviewed the evidence and the post-hearing submissions, I find that the Investigations Officer has satisfied his just cause burden of proving the charges against Respondents. United States v. IBT, 754 F. Supp. 333, 337 (S.D.N.Y. 1990) ("[T]he Investigations Officer must establish just cause at disciplinary hearings by a fair preponderance of the evidence.").

#### I. THE CHARGES

The Investigations Officer charged each individual Respondent as follows:

While [an officer] of Local 945 [Respondent] brought reproach upon the IBT in violation of Article II, Section 2(a) and Article XIX, Section 7(b)(1)(2) and (3) of the IBT Constitution, and breached their fiduciary duties to the members by embezzling and unlawfully converting to the benefit of others the funds of Local 945, to wit:

On June 23, 1992, [Respondent] authorized the use of Local 945's funds to pay for legal fees incurred in connection with the representation of Anthony Rizzo and Joseph Abbate by the law firm of Newman & Schwartz. Pursuant to this authorization, on or about June 26, 1992, [Respondents] caused Local 945 to pay Newman & Schwartz \$3,231.00. At the time [Respondent] authorized payment of these legal fees [Respondent] knew that Messrs. Rizzo and Abbate had refused to answer questions, on grounds of self-incrimination, among other grounds, at sworn in-person examinations before the Investigations Officer. [Respondents] knew that Rizzo and Abbate, at these examinations conducted pursuant to Paragraph 12(C)(i)(c) of the Consent Order, refused to answer questions concerning their involvement with La Cosa Nostra; whether they accepted money from the employers of Local 945 members; and other areas concerning their performance of their fiduciary obligations as union officers. Their refusal to testify obstructed and interfered with the duties of the court-appointed officers and their failure to cooperate was unreasonable. Payment of these legal fees was not in the interest of the members of Local 945 and were solely for the personal benefit of Rizzo and Abbate.

In addition, payment of the legal fees was not approved by the majority of members present and voting at a regular membership meeting, in violation of Article IX, Section 9(c) of the IBT Constitution.

## II. THE CONSTITUTIONAL PROVISIONS

The charge against Respondents implicates three provisions of the IBT Constitution. The first is Article XIX, Section 7(b) which sets forth a non-exhaustive list of grounds for bringing disciplinary charges against Union members. That list includes:

- (1) Violation of any specific provision of the Constitution, Local Union Bylaws or rules of order, or failure to perform any of the duties specified thereunder.
- (2) Violation of oath of office or of the oath of loyalty to the Local Union and the International Union.
- (3) Breaching a fiduciary obligation owed to any labor organization by any act of embezzlement or conversion of union's funds or property.

Article II, Section 2(a) and Article IX, Section 9(c) are also implicated. Section 2(a), which contains the oath of office mentioned in Article XIX Section 7(b)(2), mandates that all members conduct themselves "at all times in such a manner as not to bring reproach upon the Union. . . ." Section 9(c) prohibits the Local Union Executive Board from authorizing payment of legal fees without the approval of "a majority of the members present and voting at a regular meeting (or a majority of all the members present and voting at all the regular, craft or divisional monthly meetings held in lieu of a single monthly regular meeting) . . . ."

### **III. FINDINGS OF FACT**

#### **A. Abbate**

On June 12, 1992, Joseph Abbate ("Abbate"), then Local 945's President, refused to answer certain questions posed to him by the Investigations Officer during his sworn in-person examination invoking his Fifth Amendment privilege against self-incrimination.

IO-1 at 44-61.<sup>1</sup> On June 15, 1992, the Investigations Officer wrote to each Respondent informing them that Abbate had refused to answer questions involving, among other things, his association with alleged members of organized crime and whether he received money from Local 945 employers. The Investigations Officer's letter also stated that Abbate was now formally charged as a result.<sup>2</sup> R-A.<sup>3</sup> The June 15 letter also advised Respondents of their fiduciary obligations to investigate Abbate's conduct and alerted Respondents that using the Local's funds to pay Abbate's legal fees "may well be in violation of the IBT's [C]onstitution's prohibition on embezzlement and its restriction on the payment of legal fees." Id.

**B. Rizzo**

On June 19, 1992, Anthony Rizzo ("Rizzo"), then Local 945's Secretary-Treasurer, refused to answer any questions put to him by

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<sup>1</sup> The Investigations Officer's exhibits are referred to as "IO," followed by the exhibit number and page reference, if appropriate.

<sup>2</sup> For failing to answer such questions during his examination, Abbate was charged by the Investigations Officer on June 15, 1992, with bringing reproach upon the IBT. To resolve the charge, Abbate entered into an Agreement with the Investigations Officer, whereby he permanently resigned from the IBT and from all of his IBT-affiliated positions. This Agreement was approved by me, as Independent Administrator, and entered as an Order by United States District Judge David N. Edelstein on August 13, 1992.

<sup>3</sup> Respondents' exhibits are referred to as "R" followed by the alpha character identifying the exhibit. Where appropriate the page number of the exhibit is also referenced.

the Investigations Officer during his sworn in-person examination, invoking his Fifth Amendment privilege against self-incrimination. IO-2 at 4-7.

On June 19, 1992, the Investigations Officer wrote to each Respondent informing them that during his sworn in-person examination Rizzo had invoked his Fifth Amendment privilege and refused to answer any of the questions posed, including those regarding organized crime contacts and receiving money from employers of Local 945. As with Abbate, the Investigations Officer also reminded Respondents of their fiduciary obligation to investigate such conduct and warned that payment of Rizzo's legal fees may violate the IBT Constitution. IO-3.

For failing to answer the Investigations Officer's questions, Rizzo was charged on July 1, 1992, with bringing reproach upon the IBT.<sup>4</sup>

### **C. The Board Meeting**

On June 23, 1992, Local 945's Executive Board held a meeting at which Respondents, the Local's counsel, Abbate, Rizzo and others were present. IO-5 (Minutes from the June 23, 1992, Board

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<sup>4</sup> To resolve the charge, Rizzo entered into a compromise agreement with the Investigations Officer whereby he permanently resigned from the IBT and from all of his IBT-affiliated positions. This agreement was approved by me, as Independent Administrator, and entered as an Order by United States District Judge David N. Edelstein on August 13, 1992.

meeting).<sup>5</sup> At the meeting, Rizzo read aloud a written statement that he had placed into the record at his in-person sworn examination. Rizzo also informed the Respondents that he would either be removed by "Administrator Lacey" or resign, as a result of his refusal to answer the Investigations Officer's questions. IO-5 at 2. Both Abbate and Rizzo refused to answer questions put to them by Respondents at the meeting. IO-5 at 5-6; IO-8 at 32-39 (Richardson in-person sworn examination); IO-9 at 28-36 (Purpura in-person sworn examination); IO-10 at 11-13 (Caldwell in-person sworn examination); IO-11 at 13-16 (Martinelli in-person sworn examination); and IO-12 at 12-20 (Rasczyk in-person sworn examination).

After some discussion, the Respondents agreed that the Executive Board should file charges against Rizzo and Abbate under the Local Union's By-Laws and Constitution based on their refusal to answer questions posed by Respondents at the Executive Board meeting. IO-5 at 6. The Local's counsel was then directed to draft charges for review by the Executive Board. Id.

Despite Respondents' knowledge that Abbate and Rizzo had refused to answer the Investigations Officer's questions, despite Abbate's and Rizzo's refusal to answer any of Respondents' questions regarding their actions, and despite Respondents'

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<sup>5</sup> On June 18, 1992, Respondent Richardson, Vice President of Local 945, wrote to the Investigations Officer confirming receipt of the Investigations Officer's June 15 letter regarding Abbate and informing him that a special meeting of the Local's Executive Board had been scheduled to discuss the Abbate charge. R-B.

recognition that internal Union charges would need to be filed against Abbate and Rizzo, Respondents approved the Local's payment of the legal fees incurred by Abbate and Rizzo in connection with their appearances before the Investigations Officer. The amount totalled \$3,231.25. Id. at 5.

The minutes of the June 23 meeting reflect that prior to approving the payment of legal fees the Local's counsel announced his opinion that the fees could be paid. Id. at 5.

On June 26, 1992, pursuant to the Executive Board's approval a \$3,231.25 Local Union check was issued to pay Abbate's and Rizzo's fees. See IO-14.<sup>6</sup>

#### IV. THE MERITS

It is now settled that to sustain a charge of embezzlement, the Investigations Officer must show that a respondent acted with "fraudulent intent to deprive the Union of its funds." United States v. Welch, 728 F.2d 1113, 1118 (8th Cir. 1989). See also Investigations Officer v. Vitale, Decision of the Independent Administrator, at pp. 9-10 (December 18, 1990), aff'd, United States v. IBT, 775 F. Supp. 90 (S.D.N.Y. 1991), aff'd, in relevant part, No. 91-6154, slip op. at 4 (2d Cir. October 31, 1991). It is also settled that it is permissible to infer, from circumstantial evidence, the existence of intent. Vitale, Decision of the

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<sup>6</sup> On July 15, 1992, approximately one month after the fees were paid, the Local's counsel issued a letter affirming his opinion on the payment of the fees. R-E.

Independent Administrator at p. 11, citing, United States v. Local 560, 780 F.2d 267, 284 (3d Cir. 1985).

**A. Respondents' Fraudulent Intent**

Respondents' fraudulent intent to deprive their Local of its funds is evidenced by several factors.

**1. Improper Reliance On An Oral Legal Opinion**

At the hearing before me, Respondents's counsel suggested that the approval of the payment of Abbate's and Rizzo's legal fees was based upon good faith reliance on the oral advice of counsel at the Executive Board meeting on June 23, 1992. See T52-10 to 53-6.<sup>7</sup> See also IO-5 at 4.

First, none of the Respondents ever testified that they relied on the advice of counsel, or even that they believed the advice to be reasonable or competent. Indeed, the opinion given by counsel at the meeting was unreasonable on its face. Counsel advised "that the Union could pay reasonable attorneys fees which had been incurred prior to either [Abbate or Rizzo] being charged with a fiduciary breach." IO-5 at 4. As the minutes of the June 23 meeting reflect:

[Counsel] went on to point out that Mr. Rizzo had still not been charged with any violations of the Union's By-Laws or Constitution, and, Mr. Abbate was charged with

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<sup>7</sup> All transcript references are to the October 5, 1992, hearing before me. The citation refers to the transcript page number followed by the line number. In this case, "T52-10 to 53-6" refers to transcript page 52, line 10 through page 53, line 6.



violations, only after his June 12th deposition hearing. [Counsel] stated that it was his opinion that the Union could not pay any legal fees for Mr. Abbate incurred after the point that the Union learned that Mr. Abbate had been charged. With regard to Mr. Rizzo, even though he has not been charged, the Executive Board has today been made aware of the fact that Mr. Rizzo has asserted his Constitutional privilege at his deposition and that assertion has been held, in other cases to constitute a violation of the International Constitution. [Counsel] stated, therefore, with regard to Mr. Rizzo, even though he has not yet been formally charged, that it would be improper for the Executive Board to pay any legal fees if the services rendered took place after this meeting learned of his deposition conduct.  
[Id. at 4-5]

Counsel's advice leads first to the absurd conclusion that even though a Local Union officer has been charged by the Investigations Officer with violating his fiduciary duty to the IBT, the Local may pay for the legal expenses incurred by that officer prior to the filing of the actual charge. In other words, counsel suggests that the Local can pay for the costs incurred in committing the wrong, but cannot pay for the defense of the wrong.

Counsel's second conclusion is even more tortured than the first. Counsel's advice also suggests that regardless of whether a charge has been filed, a Local may pay for those legal expenses incurred prior to the Local having learned of an officer's wrongdoing, but not for any expenses which may follow the revelation.

According to counsel, both conclusions remain valid even where, as here, the Local recognizes and agrees that it should bring its own internal disciplinary charges against the officer. Such a result defies any sound reasoning.

As recognized in Investigations Officer v. Sansone, Decision of the Independent Administrator at 15 (March 30, 1992), aff'd, United States v. IBT, 792 F.Supp. 1346 (S.D.N.Y. 1992), aff'd, slip op. (2d Cir. May 15, 1992), in certain instances (and this case presents a classic example), "no expertise, legal or otherwise, is required to understand" that certain conduct by a Local Union officer is simply wrong and may not be supported or condoned by the Local. It has been settled for some time that the invocation of the Fifth Amendment privilege in the face of legitimate inquiries by the Investigations Officer will be viewed as a reproachful effort "to block the Investigations Officer's proper scrutiny into corrupt influence in the IBT." Investigations Officer v. Calagna, Decision of the Independent Administrator at 15 (May 7, 1991), aff'd, United States v. IBT, slip op., 88 Civ. 4486 (DNE) (S.D.N.Y. 1991) ("While Calagna has the right, as does any other IBT member, to invoke the Fifth Amendment privilege in any proceeding, the invocation of his Fifth Amendment may, under circumstances such as those present here, have an impact on his tenure as a Union member and officer.")

Accordingly, Respondents' reliance on counsel's advice regarding payment of Abbate's and Rizzo's legal fees was misplaced.

## 2. Violation of the Local's By-Laws

Article X, Section 10.02(C) of the Local's By-laws provides that, in proceedings which are civil in nature the Local may pay or reimburse an officer's "reasonable" attorneys' fees where the

proceedings have "finally terminated without an adjudication or admission of wrongdoing." IO-13 at 14-15.<sup>8</sup>

The Local's By-Laws are in line with the well established principle that Union officials charged with misconduct can only have their attorneys' fees paid by their Union "if they successfully exonerate themselves from liability." United States v. Local 1804-1, 732 F. Supp. 434, 436 (S.D.N.Y. 1990). Indeed, the standard governing reimbursement of attorneys' fees contemplates a "full determination on the merits." Morrissey v. Segal, 526 F.2d 121, 127 (2d Cir. 1975).

At the time the Local approved the payment of Abbate's and Rizzo's attorneys fees, the Investigations Officer had already charged Abbate and the Respondents had authorized internal charges to be filed against both Abbate and Rizzo.<sup>9</sup>

It is clear that the Local was not authorized to approve the payment of the legal fees until such time as these charges were finally and favorably resolved in Abbate's and Rizzo's favor. There could have been no confusion among the Respondents on this point as the Investigations Officer had written to them just one week prior to their June 23 meeting alerting them that Abbate had

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<sup>8</sup> In proceedings which are criminal in nature the By-Laws provide that "reasonable" attorneys' fees may be paid or reimbursed only if the proceedings "have finally terminated without a conviction, a plea of guilty, or a plea of nolo contendere." IO-13 at 14-15.

<sup>9</sup> The resolution approving the payment of the legal fees came just before the Executive Board authorized the charges against Abbate and Rizzo.

been charged for failing to testify and that payment of his legal fees "may well be in violation of the IBT's Constitution's prohibition on embezzlement and its restriction of the payment of legal fees." R-A. The same warning as to Rizzo was also given by the Investigations Officer prior to the meeting. R-C.

That Respondents failed to abide by their own By-Laws restrictions on the payment of legal fees suggests an intent to defraud on their behalf. See Investigations Officer v. Wilson, Decision of the Independent Administrator at 17 (December 23, 1991), aff'd, United States v. IBT, 787 F.Supp. 345, 352 (S.D.N.Y. 1992), aff'd in relevant part, 978 F.2d 68 (2d Cir. 1992) (the failure to abide by Local By-Laws suggests an intent to defraud).

### **3. Lack Of General Membership Approval**

Article IX, Section 9(c) of the IBT Constitution provides that a Local Union can only pay legal expenses, such as Abbate's and Rizzo's, with "the approval of a majority of the members present and voting at a regular meeting." This was not done. See Investigations Officer v. Vitale, Decision of the Independent Administrator at 20-22 (December 18, 1990), aff'd, United States v. IBT, 775 F.Supp. 90 (S.D.N.Y. 1991), aff'd in relevant part, 948 F.2d 1278 (2d Cir. 1991) (Union officer violated IBT Constitution, despite reliance on Executive Board resolution allowing conduct, where membership approval was required but not sought).

At the hearing before me, Respondents' attorney suggested that general membership approval was impossible because general

membership meetings are not normally conducted during the summer months. See T84-9 to 21. This argument carries no weight. There was no urgency for the payment of the legal fees and approval of those fees could have waited until the next membership meeting. That membership approval was not sought further suggests an intent to defraud.

Respondents' attorney also suggests that general membership approval is now not necessary because Abbate and Rizzo have reimbursed the Local's General Fund. T87-4 to 23. This argument also fails as it suggests that Local Union officers can avoid culpability for embezzlement by simply seeing to it that the Local's funds are returned after their embezzlement is discovered. This "wait and see" defense flies in the face of the fiduciary obligations of Union officers. See Investigations Officer v. Baccaro, Decision of the Independent Administrator at p. 6 (June 23, 1992), aff'd, United States v. IBT, 88 Civ. 4486 (DNE), slip op. (S.D.N.Y. August 27, 1992) (Local Union officer did not escape sanctions by having reimbursed his Local only after the Investigations Officer had filed embezzlement charges against him).

#### 4. Conclusion

Because Respondents ignored all notions of common sense, their fiduciary duty, the Investigations Officer's warnings, their Local's By-Laws, and the IBT Constitution, an inference that they intended to defraud their Local of its funds when they approved the payment of Abbate's and Rizzo's legal fees must be, and is, drawn.

Accordingly, I find that Respondents embezzled the funds of their Local.

**V. THE PENALTY TO BE IMPOSED**

All Union officers are placed in a delicate position of trust, vesting them with the responsibility of acting as caretakers for the rank-and-file's funds. Respondents' actions here constitute a gross breach of that trust. I find it quite telling that in the face of all that confronted them that not a single Respondent protested the payment of the legal fees. Instead, they blindly approved the expenditure. Respondents' actions constitute an utter disregard of their fiduciary responsibilities to the members of Local 945 in favor of Abbate and Rizzo. By such action, Respondents have proved that they are unfit to hold any officer or representative positions in the IBT or any of its affiliates.

Accordingly, as a penalty, I order that Respondents are to remove themselves from all of their IBT-affiliated officer positions and draw no money or compensation therefrom. As part of the penalty imposed, Respondents are permanently barred from ever holding any such positions in the future. As an additional safeguard, Respondents may never again obtain employment, consulting or other work with the IBT, or any IBT-affiliated entity.

By virtue of this decision, Respondents may retain their IBT membership so that they may, if they wish, secure employment as

rank-and-file members, with non-IBT-affiliated entities that have collective bargaining agreements with the IBT.<sup>10</sup>

#### VI. RESPONDENTS' BENEFITS

My authority to impose sanctions on a Respondent's employee benefits is now well settled. See Investigations Officer v. Senese, et al., Supplemental Decision of the Independent Administrator (November 29, 1990), aff'd United States v. IBT, 941 F.2d 1292 (2d Cir. 1991).

The first category of benefits to address are those that are administered by both IBT-affiliated persons and entities, on the one hand, and non-IBT-affiliated persons and entities, on the other. In the past, I have characterized such benefits as "Third-Party Plans." If Respondents participate in any Third-Party Plan by virtue of their serving, or having served, as an officer of the IBT or any IBT-affiliate, I direct that the IBT and any affiliate that may contemplate making payments, not make, or discontinue making, payment of Union funds to such Third-Party Plans on Respondents' behalf. This ruling does not interfere with Respondents' right to receive any benefits that may have already vested in such plans. See, e.g., Guidry v. Sheet Metal Workers National Pension Fund, 1210 S. Ct. 680 (1990).

The second category of benefits to address are those that are under the exclusive control of the IBT or IBT-affiliated entities

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<sup>10</sup> However, Respondents shall not be permitted to hold any position such as job steward, shop steward or the like.

(such as bonuses and Local-controlled severance plans). To the extent the IBT or any IBT-affiliated entity contemplates making the payment of any such benefits to Respondents, which benefits are based upon Respondents' service as officers of the IBT or any IBT-affiliated entity, they are hereby directed not to make such payments.

Finally, I direct that Respondents not have any portion of their legal fees and costs paid by the IBT or any IBT-affiliated entity. See United States v. Local 1804-1, 732 F.Supp. 434, 436 (S.D.N.Y. 1990).

#### VII. MY VOLUNTARY STAY

I will stay this decision and the penalty imposed pending Judge Edelstein's review of my decision, which will be submitted to him for consideration by way of application.



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Frederick B. Lacey  
Independent Administrator

Dated: February 9, 1993