

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF
AMERICA, AFL-CIO, et al.

Defendants.

:
: 88 Civ. 4486 (DNE)
:

: APPLICATION CX BY THE
: INDEPENDENT ADMINISTRATOR UNDER
: THE CONSENT ORDER DATED MARCH
: 14, 1989 -- DECISION OF THE
: INDEPENDENT ADMINISTRATOR IN
: THE MATTER OF THE HEARING OF
: ARNOLD ROSS
:
:
:

Application is made by the undersigned as Independent Administrator for ruling by the Honorable David N. Edelstein, United States District Judge for the Southern District of New York, on the issues raised by the Investigations Officer during a hearing before me on the charges filed against Arnold Ross ("Ross"). I have decided these issues in a Decision dated March 1, 1993, a copy of which is enclosed herewith.

Ross was charged with bringing reproach upon the IBT for failing to investigate and act with regard to the criminal activity and allegations concerning improper conduct by John Agathos ("Agathos"), an organizer and Trustee for Local 97, including Agathos' 1987 criminal conviction and subsequent incarceration, the Department of Labor investigation from May 1988 through June 1990

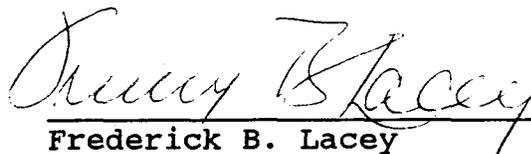
into Agathos' employment with IBT Local 97 and Local 69 of the Hotel and Restaurant Employees Union, and the federal Grand Jury investigation of Agathos in or about June 1988.

Ross was further charged with improperly causing Local 97 to pay the legal fees incurred by both Agathos and himself in connection with the Department of Labor investigation.

Having reviewed the evidence and the Post-Hearing submissions, I found that the Investigations Officer satisfied his just cause burden of proving the charges against Ross by a preponderance of the evidence. As a penalty, I ordered Ross to remove himself from his officer position. As such, he is barred from holding any officer position with the IBT or any IBT-affiliated entity in the future. In addition, Ross may not obtain employment, consulting or other work with the IBT, or any IBT-affiliated entity. He may, however, retain his IBT membership so that he can secure work as a rank-and-file member with non-IBT affiliated entities that have collective bargaining agreements with the IBT.

In addition, I directed that, consistent with my opinion in Investigations Officer v. Senese, et al., Supplemental Decision of the Independent Administrator (November 29, 1990), aff'd, United States v. IBT (Application XVI), 753 F.Supp. 1181 (S.D.N.Y. 1990), aff'd, 941 F.2d 1292 (2d. Cir. 1991), that sanctions be imposed upon Respondent's employee benefits. I also prohibited Ross from having any portion of his legal fees and costs paid by the IBT or any IBT-affiliated entity.

I will stay my Decision of the penalties imposed pending review by Your Honor. It is respectfully requested that an order be entered affirming my March 1, 1993, Decision, if Your Honor finds it appropriate.



Frederick B. Lacey
Independent Administrator

Dated: March 1, 1993

INVESTIGATIONS OFFICER,

 Claimant,

 v.

ARNOLD ROSS,

 Respondent.

DECISION OF
THE INDEPENDENT
ADMINISTRATOR

This matter concerns charges filed by the Investigations Officer, Charles M. Carberry, against Arnold Ross ("Ross"), President and principal officer of IBT Local 97 in Newark, New Jersey. A hearing was held before me on these charges and post-hearing submissions were received. Ross was represented by counsel at the hearing. 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 Ross by a preponderance of the evidence. See United States v. IBT, 754 F. Supp. 333, 337-38 (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 AGAINST ROSS

The Investigations Officer charged Ross as follows:

CHARGE ONE

While an officer of IBT Local 97, [Ross] brought reproach upon the IBT and violated [his] oath, in violation of Article II, Section 2(a) and Article XIX, Section 7(b)(1) and (2) of the IBT Constitution and violated [his] fiduciary duties to the members, to wit:

While an officer of Local 97, [he] failed to investigate and act with regard to the criminal activity and allegations concerning improper conduct by John Agathos ("Agathos"), an organizer and Trustee for Local 97, including, but not limited to, Agathos' 1987 criminal conviction and subsequent incarceration, the Department of Labor investigation from May 1988 through June 1990 into Agathos' employment with Local 97 and Local 69 of the Hotel and Restaurant Employees Union, and the federal Grand Jury investigation of Agathos which began in or about June 1988.

CHARGE TWO

While an officer of Local 97 [he] improperly caused Local 97 to pay legal fees incurred during a Department of Labor investigation in violation of Article IX, Section 9(c) and Article XIX, Section 7(b)(1), (2) and (3) of the IBT Constitution and Article 13(A)(e) of Local 97's Bylaws, to wit:

In or about June 1988 during [his] appearance before a federal Grand Jury in Newark, New Jersey, [he] refused, on the grounds of [his] privilege against self-incrimination, to answer any questions regarding [his] relationship with Agathos. On or about February 28, 1990, [he] caused Local 97 to pay [his] legal fees in the approximate amount of \$3,500 for this Grand Jury appearance. [He] failed to disclose to the Local 97 Executive Board and the Local 97 membership that [he] invoked [his] Fifth Amendment privilege during [his] Grand Jury appearance and [he] did not inform the Local 97 Executive Board and the Local 97 membership that [he was] a target of this Grand Jury investigation.

In or about July 1990, [he] called a special meeting of Local 97's Executive Board for the purpose of approving Local 97's payment of Agathos' legal fees incurred during the DOL investigation from May 1988 through June 1990. During this meeting, [he] agreed to have Local 97 pay half of Agathos' legal fees incurred during the investigation and to reimburse Agathos for the legal fees he paid during the course of the investigation. Between August 1990 and February 1991, Local 97 paid a total of approximately \$11,188.00 directly to Agathos' attorney. Between October 1990 and December 1990, IBT Local 97 paid a total of \$5,500.00 directly to Agathos. [He] did not disclose that, as a result of the Department of Labor investigation, Agathos was required to repay approximately \$3,500 to Local 69 of

the Hotel and Restaurant Employees Union. Furthermore, the Local 97 membership was not informed of the payment of Agathos' legal fees and the direct payment to Agathos until after these payments were made.

II. THE IBT CONSTITUTIONAL PROVISIONS

The charges against Ross implicate 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. That list includes in relevant part:

(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.

Second, Article II, Section 2(a) is implicated. This section, which contains the oath of office mentioned in Article XIX, Section 7(b)(2), mandates that all members shall conduct themselves "at all time in such a manner as not to bring reproach upon the Union"

The third provision implicated, Article IX, Section 9(c), authorizes, in certain circumstances, a Local Union to pay its officers' legal expenses provided a majority of the Local's Executive Board members determines that payment should be made and a majority of those voting at a general membership meeting must approve the Executive Board's decision.

III. BACKGROUND

Ross has been a member of IBT Local 97 since approximately September of 1965. Ex. T at 7-12 to 14.¹ Ross joined the Local as a Business Representative/Organizer. Id. Ross served for three months as the Local's Secretary-Treasurer before becoming Local 97's President in June 1973. Id. at 6-20 to 7-4.

John "John the Greek" Agathos ("Agathos") is the President of Local 69 of the Hotel and Restaurant Employees Union ("HREU Local 69"). At the time of the hearing before me, he also served as an Organizer for IBT Local 97. Id. at 12-17 to 19.²

Ross and Agathos first met in the late 1970's at an IBT Joint Council meeting. At the time, Agathos was the Secretary-Treasurer of IBT Local 966 in New York City. Over the years, Agathos and Ross interacted on several Union related matters including the 1983 merger of Local 97 with another IBT Local. Id. at 23-24 to 26-20.

At a 1983 meeting, Agathos asked Ross for a position as an organizer with Local 97. Id. at 26-20 to 30-10. Ross explained to Agathos that he could not, at that time, hire him because Local 97, as a result of the merger, had an outstanding \$90,000 obligation

¹ Unless otherwise indicated, exhibit references are to the Investigations Officer's binder marked at the hearing as IA-5. The exhibit letter is provided and, where necessary, page and line numbers are also given. In this case, "Ex. T at 7-12 to 14" refers to Exhibit T of exhibit binder IA-5, at page 7, lines 12 through 14.

² It has come to my attention that since Ross' September 22, 1992, hearing, Local 97 has initiated an investigation into Agathos' activities, has suspended his employment at Local 97 and has stopped payment of his medical benefit premiums.

and was already committed to hire two people from the merged local.
Id.

In early 1984, Agathos again asked Ross for a position with Local 97. Id. at 32-17 to 33-10. This time Ross agreed to hire Agathos as an Organizer and he began working in February of 1984. Id. at 33-3 to 13. At the time Agathos was hired, Ross did not know whether Agathos was still with Local 966 (and did not ask him), but Agathos did tell Ross that he (Agathos) was serving as the President of HREU Local 69. Id. at 27-7 to 29-3, and 32-17 to 33-10. Since that time, Agathos has reported directly to Ross "ninety-nine percent of the time." Id. at 17-14 to 20.

On the same day that the Investigations Officer filed charges against Ross, he also charged Agathos with "knowingly associating" with members of La Cosa Nostra ("LCN") and engaging in dual-unionism.³

IV. CHARGE ONE -- ROSS' FAILURE TO INVESTIGATE

The Investigations Officer charges that Ross, while President of Local 97, violated the IBT Constitution and his fiduciary duty as a Union officer by failing to investigate and act with respect to allegations of "criminal activity" and "improper conduct" by Agathos.

³ The hearing against Agathos has been postponed due to his claimed ill-health.

It is settled that an officer of the IBT or an IBT-affiliate has a fiduciary obligation to investigate and remedy corruption within his Union. Investigations Officer v. Sansone, Decision of the Independent Administrator (Mar. 30, 1992), aff'd, United States v. IBT, 792 F. Supp. 1346 (S.D.N.Y.), aff'd, No. 92-6140, slip op. at 13 (2d Cir. Dec. 22, 1992) ("Every IBT 'officer is a fiduciary with respect to the Union members,' and has 'a duty to disclose and remedy wrongdoing by the IBT.'"). See also Investigations Officer v. Alfieri, Decision of the Independent Administrator at 9 (Oct. 27, 1992) (Union officers have a duty to pursue reasonable means of investigation when faced with allegations of corruption in their midst), aff'd, United States v. IBT, 88 Civ. 4486 (DNE), slip op. (S.D.N.Y. Dec. 1, 1992); Investigations Officer v. Calagna, Decision of the Independent Administrator at 23 (Jun. 14, 1991) (IBT officers have a "duty to investigate allegations of corruption in their midst"), aff'd, United States v. IBT, 88 Civ. 4486 (DNE), slip op. at 2 (S.D.N.Y. Nov. 8, 1991); Investigations Officer v. Morris, Decision of the Independent Administrator at 24 (May 22, 1991) (Union officers have "an affirmative duty to investigate . . . various allegations and suspicious activities" of their fellow Union officers), aff'd, United States v. IBT, 777 F. Supp. 1123 (S.D.N.Y. 1991), aff'd, Nos. 92-6056, 92-6058, 92-6089, slip op. (2d Cir. Sept. 15, 1992).

Moreover, Section 13(B) of the Local 97's Bylaws imposes upon the Local's President, as a member of the Local's Executive Board,

a duty to "investigate any alleged breach of fiduciary duty when circumstances so warrant and . . . take appropriate action if the investigation so merits." Ex. A. Section 7(D) demands that the Local's President "supervise, conduct and control all of the business and affairs of [the] organization, its officers and employees" Id. Finally, Section 7(F) requires the President to have "general charge and supervision of all the officers and employees" of Local 97. Id.

A. Agathos' Indictment, Conviction and Incarceration

In September of 1984, Agathos was indicted in the United States District Court for the Southern District of Florida for assaulting and beating a man while aboard an airplane leaving from Florida. Ex. C at 1. Ross acknowledged that he read about the incident in the newspapers. Ex. T at 22-9 to 21. One newspaper account reported the incident as follows:

A 76-year-old man strapped into his seat was severely beaten Monday by a father and son angered in a dispute over their reclining chair backs just after their Delta Air Lines jet took off on a flight to New Jersey, according to the FBI.

Witnesses said Harry Klinghoffer of Fort Lauderdale, a newspaper distributor, was struck more than 20 times by John N. Agathos, 42, and his son, John R. Agathos, 20, both New Jersey local union officials, Knight Ridder newspapers reported.

The incident apparently was touched off when Klinghoffer, described as short and slightly built, complained to the elder Agathos, seated just ahead of him, that his seat should remain upright during takeoff. FBI agent Thomas Myers said Agathos reportedly had pushed his seat back into the reclining position.

Klinghoffer also apparently pushed or kicked the back of the Agathos' seats to make his point. Then, according to FBI spokesman Joe del Campo, the elder Agathos got up and began punching Klinghoffer in the face.

Agathos' son joined in hitting Klinghoffer, who remained seated during the assault.

"I'm going to kill him," Myers quoted the elder Agathos as saying during a hearing in federal court here Monday. The father and son, both of Secaucus, N.J., were charged with the federal crime of assault and battery in the air, then released on bond with a warning to make no contact with Klinghoffer.

The fight was broken up by crew members, including the copilot, who ordered the father and son to the rear of the plane while the pilot returned the Boeing 727 jetliner to Fort Lauderdale-Hollywood International Airport, where the pair was arrested by waiting FBI agents.

FBI spokesman Del Campo said Klinghoffer "had to have at least 20 stitches . . . He was beaten severely." Klinghoffer was treated at Broward General Medical Center and released. He refused to comment on the assault.

The father was released on a \$100,000 bond and his son was released on a \$50,000 bond. They were ordered to appear Aug. 10 in magistrate's court for a preliminary hearing. Each could be sentenced to 25 years in prison if convicted.

It could get worse for the Agathos. The two will face additional felony assault and battery charges filed by the state, a Broward County sheriff's spokesman said. There may be more federal charges, too.

"I'm researching that now," Assistant U.S. Attorney Neil Karadbil said. "I'm still considering charges of battery with intent to commit murder, which carries a penalty of 20 years in prison, and interfering with a flight crew, which carries 10 . . . Any time a 76-year-old man gets beaten up for no good reason -- while still strapped in a seat -- well, that's pretty outrageous."

Broward sheriff's spokesman Jim Leljedal said: "Witnesses said it started over nothing more than the seat being struck. The plane was taking off, one of these fellows let his seat back and perhaps the elderly man didn't appreciate it and kicked or rapped the seat. We still don't know if it was an accident or deliberate."

Monday's scrap was not the Agathos' first brush with the law. The elder Agathos said he was arrested twice on assault charges, but they were dismissed in each case. His son said he had been arrested five months ago in New Jersey for possession of a small amount of cocaine. Those charges are pending.

The father, who resides at times in Miami Beach, said in court that he is an executive of the Hotel and Motel Employees Union, Local 69, and Teamsters Local 97, both based in Newark. The son is a business representative for Local 69.

Ex. B (July 25, 1984, Washington Post).⁴

On January 20, 1987, Agathos was convicted of "assault by beating" (18 U.S.C. § 113(d)), and sentenced to six months of incarceration. Ex. D. Despite knowing that Agathos would be incarcerated for the beating incident, Ross kept Agathos' job with Local 97 open in anticipation of his return. Ex. T at 21-19 to 22. Upon Agathos' release, Ross allowed Agathos to return to work at Local 97. See id. at 21-16 to 22.

Ross never conducted any investigation into the beating incident, relying instead on what he had read in the newspapers. Id. at 20-3 to 6. Ross did not even see fit to ask Agathos "what he had done." Id. at 22-9 to 17. Moreover, no internal disciplinary proceeding was initiated within Local 97. Id. at 19-

⁴ While Ross did not read this particular article, he testified that the newspaper accounts reported "basically . . . the same thing." Ex. T at 22-19 to 21.

24 to 25-3. Ross testified that he was "pretty sure" that he received a verbal opinion from the Local's attorney regarding the impact of the conviction on Agathos' employment. Id. at 19-14 to 23. See also T140-11 to 141-5.⁵ Accordingly to Ross, the Local's attorney told him that Agathos could return to work if he was convicted of a misdemeanor, but that he could not return to work if he was convicted of a felony. Id. Ross also consulted with his personal attorney (who coincidentally happened to represent the business interests of the man Agathos had assaulted), about the "nature of the charges" confronting Agathos. T139-23 to 140-8.

Members of Local 97's Executive Board confirmed that there was no inquiry as to the circumstances surrounding Agathos' arrest and conviction. See Exs. U at 31-4 to 7; V at 11-10 to 18. Moreover, the Board members testified that they never addressed whether, under Local 97's Bylaws, Agathos' conviction barred his employment at the Local. Exs. U at 30-6 to 13; V at 12-6 to 10; W at 11-23 to 24-3; X at 32-5 to 33-7; Y at 20-23 to 21-9.

Notwithstanding Ross' argument that he "took appropriate action based on what he knew" (Respondent's Post-Hearing Memorandum at 13), I find that Ross' reaction to Agathos' indictment, conviction and incarceration fell far short of his fiduciary obligation to remedy wrongdoing within his Local. While Ross may

⁵ Citations to the transcript of the hearing before me are referred to as "T" followed by the page and line references. In this case, the citation "T140-11 to 141-5" refers to transcript page 140, line 11 through transcript page 141, line 5.

have received a legal opinion that a misdemeanor conviction would not act as a bar to Agathos' return to the Local, the issues raised by Agathos' beating of 74-year-old man strapped to his seat on an airplane demanded further inquiry by Ross.

The IBT's Constitution mandates that all members conduct themselves "at all times in such a manner as not to bring reproach upon the Union . . ." Article XIX, Section 7(b)(2). The Local's Bylaws requires an investigation of a breach of a fiduciary duty "when circumstances so warrant." Section 13(B). Certainly, the circumstances surrounding Agathos' conduct warranted further inquiry by Ross to determine, at the very least, whether "reproach" had been brought upon the IBT and Local 97. See United States v. IBT, 88 Civ. 4486 (DNE), slip op. at 40 (Feb. 9, 1993) (It is "clear ... that conduct that is not itself criminal can constitute a violation of the IBT Constitution."). Ross failed to conduct even the most rudimentary inquiry, neglecting even to ask Agathos about what he had done. Cf. Sansone, Decision of the Independent Administrator, supra, at 17 (Union officer's cursory interview of fellow Union officer deemed inadequate investigation when questions posed "were vague and minimal and produced the denials that anyone would have expected them to produce.").

Ignoring his fiduciary obligation, Ross welcomed Agathos back to Local 97 with open arms upon his return from incarceration, foreclosing any further inquiry into the beating.

B. The Government's Investigations

Ross testified that "very close to" but before May 23, 1988, he became aware that the Department of Labor ("DOL") was investigating Agathos. Ex. T at 23-9 to 19, and 34-4 to 12. While Ross originally understood that the DOL investigation concerned whether Agathos was a "no-show" employee of Local 97 (T142-1 to 2), he subsequently learned, at the conclusion of the DOL's investigation, that the investigation had also focused on Agathos' relationship with HREU Local 69. Ex. T at 44-21 to 45-7. On May 23, 1988, Ross suggested to the Local 97 Executive Board that outside counsel should be hired to "represent [the Local's] interest, during [the] investigation." Ex. J at 2.

Ross, having been told that he was also a target of the DOL investigation, was then subpoenaed to testify before a Grand Jury on June 16, 1988. Ex. K. Before the Grand Jury, Ross refused to testify, invoking his constitutional privilege against self-incrimination. Ex. T at 37 - 18 to 38 - 19. Ross did, however, submit to an interview with the DOL and he supplied the Government with documents. R. Exs. 6 through 13⁶; T142-4 to 143-19.

Despite knowing of the DOL's investigation into Agathos' employment with IBT Local 97 and despite having learned that the DOL was also investigating Agathos' employment with HREU Local 69, Ross never made any independent inquiry as to whether Agathos "had engaged in any wrongdoing." Ex. T at 34-13 to 24, and 48-8 to 49-

⁶ Respondents exhibits are referred to as "R. Ex."

49. Members of Local 97's Executive Board confirmed that there was no discussion among the Board as to the DOL investigation or whether the Local's Executive Board should independently investigate Agathos. See Exs. V at 14-14 to 15-10; X at 24-8 to 13; Y at 19-6 to 10.

Ross argues that since he knew the scope of the DOL investigation, and since he also knew that the allegations of Agathos' "impropriety were without substance or merit, it is incomprehensible to insist that [Ross] should have been required to duplicate the efforts [of] the federal government and grand jury to attain the same result." Ross Post-Hearing Memorandum at pp. 15-16. Ross' defense fails for several important reasons.

While Ross originally assumed that the focus of the DOL investigation was whether Agathos was a "no-show" employee of Local 97, it is clear that the investigation was broader, and also contemplated allegations of improper activity in connection with HREU Local 69. See Ex. O. Contrary to Ross' position, what clearly emerges from the record is the fact that Ross made absolutely no effort to uncover the reach of the DOL investigation of Agathos. When asked during his in-person sworn examination by the Investigations Officer whether he conducted "any independent inquiry on the part of Local 97 into why the Federal Government was interested in [Agathos'] Local 69 activities," Ross plainly answered that he did not. Ex. T at 45-3 to 7.

Ross' refusal to uncover the nature of the DOL investigation is all the more egregious given that he learned that Agathos paid Local 69 \$3,500 to resolve a claim made by the DOL that Agathos had certain personal expenses improperly paid by that Local. Ex. T at 42-14 to 19; Ex. O.

Ross' suggestion that he was simply faced with the proposition of "duplicat[ing] the efforts [of] the federal government and grand jury," is also disingenuous. Since Ross did not even attempt to learn what the scope of those efforts were, he was in no position to make a determination as to whether his own investigation would be duplicative.

As President of Local 97, Ross had an obligation to make an independent inquiry into the nature and scope of the DOL investigations. It is inconceivable that he did not do so.⁷

C. Conclusion

I find that the Investigations Officer has proved that Ross "breached his fiduciary duty to the Union by failing to act in response to the allegations regarding" Agathos. "The extent of the duty to investigate and act on allegations of corruption must be measured by the magnitude of the evidence and the importance of the allegations of corruption." United States v. Sansone, No. 92-6140,

⁷ Not only did Ross fail to initiate an investigation of Agathos on the Local's behalf, he did not cooperate in the DOL's investigation, refusing to answer questions posed to him during the Grand Jury proceeding such as "Do you know John Agathos?" Ex. T at 37-18 to 38-19.

slip op. at 16 (2d Cir. Dec. 22, 1992). By that scale, Ross' responses to the beating incident and the DOL's investigation of Agathos were "seriously wanting." Id.⁸

V. CHARGE TWO -- ROSS IMPROPERLY CAUSED LOCAL 97 TO PAY LEGAL FEES

The second charge against Ross results from Ross having caused Local 97 to pay legal expenses incurred by both Agathos and Ross in connection with the DOL investigations.

Under Article IX, Section 9(c) of the IBT Constitution, a Local Union may pay the legal expenses of "an officer, representative, employee [or] agent." That provision mandates, however, that the payment be approved by a majority of the Local's Executive Board and a majority of those voting at a general membership meeting.

Under Local 97's Bylaws (Section 13(A)(e)), the Executive Board may pay legal expenses on behalf of the "Local Union, its officers, employees or members" when it is in the Local's interest to do so. The Bylaws authorize payment of such expenses when, in the Board's judgment, payment is "necessary or desirable to

⁸ Both during the hearing and in his post-hearing submission, Ross objected to many of the Investigations Officer's exhibits offered in connection with the "failure to investigate" charge, in particular those offered along with the Declaration of FBI Special Agent Hoyt Marion Peavy. Many of the exhibits which were objected to relate to the alleged underworld ties of Agathos. Since there was no need to consider those exhibits to decide the "failure to investigate" charge against Ross, there is no need to resolve Ross' objections.

protect, preserve, or advance the interests of the organization .
... " Id.

After reviewing the record and considering the evidence presented, I find that when Ross caused Local 97 to pay his own and Agathos' legal fees, he violated both the IBT Constitution and his Local's By-Laws.

A. Ross' Legal Fees

As a result of the DOL's investigation, Ross was subpoenaed to testify before a federal Grand Jury on June 16, 1988. Ex. K. Ross retained an attorney to represent him before the Grand Jury. Ex. T at 39-17 to 21. Before the Grand Jury, Ross asserted his Fifth Amendment privilege against self-incrimination. T143-9 to 19; Ex. T at 37-18 to 38-19.

On February 28, 1990, Local 97 issued a check to Ross' attorney in the amount of \$3,500, in satisfaction of his attorney's bill pertaining to Ross' involvement in the DOL investigation. Ex. T at 39-25 to 40-2.

1. The Failure To Obtain General Membership Approval

The Local's general membership did not approve the payment of Ross' attorney fees before the expenditure was made, as mandated by Article IX, Section 9(c) of the IBT Constitution.⁹ Ross does not

⁹ The only reasonable interpretation of Article IX, Section 9(c) of the IBT Constitution is that the membership give its prior approval of any expenditure of legal expenses.

dispute this, but argues instead that there was no opportunity to get prior general membership approval since the Local only holds annual general membership meetings in March of each year. Respondent's Post-Hearing Memorandum at p. 29, n. 16; T158-24 to 159-3. This does not justify violating the IBT Constitution.

There was no urgency for the payment of Ross' legal fees and approval should have waited until the next membership meeting.¹⁰ In this case, that was just a matter of two weeks. The check to Ross' attorney was dated February 20, 1990. Ex. R. The Local's annual membership meetings take place the second week in March. T158-24 to 159-3.

At the hearing and in his post-hearing submission, Ross also argued that the "members approve all our billings" and the Local has always followed the procedure of getting membership approval "after the fact." See T159-7 to 21. In making this argument, Ross misses the point. The Local's custom of seeking approval of its bills after they are paid does not excuse Ross' violation of a specific provision of the IBT Constitution which requires prior approval. Cf. IBT Constitution, Article XXIII (authorizing Local Union Secretary-Treasurer to pay the bills of the Local).

What makes Ross' violation of the IBT Constitution all the more egregious is the fact that even once the membership meeting was held, the membership was never told that Ross had refused to

¹⁰ This is not to suggest that urgency would constitute a per se excuse for violating the IBT Constitution.

testify before the Grand Jury. As Ross stated, "I wasn't proud about that, I didn't have to have the whole world know about it."¹¹ Ex. T at 41-22 to 23. See Investigations Officer v. Morris, supra, Decision of the Independent Administrator at 13 (May 22, 1991) ("The fact that the raises and the termination of the severance plan were approved by the membership is insignificant in this case, where respondents have engaged in a pattern of egregious non-disclosure to the membership."); United States v. Butler, 954 F.2d 114, 119 (2d Cir. 1992) ("An authorization without full disclosure of material information is obviously a nullity").

2. Violation Of The Local's By-Laws

Local 97's Bylaws provide that the Local Executive Board may approve payment of its officer's legal expenses if it is "necessary or desirable to protect, preserve, or advance the interests of the" Local. Ex. A at 13(A)(e).¹² Following this standard, Ross' attorney fees should not have been paid because the interests of the Local were not served by Ross' refusal to testify before the Grand Jury. See Investigations Officer v. Parise, Decision of the Independent Administrator (July 29, 1991), aff'd, 777 F. Supp. 1133

¹¹ Although Ross initially stated that he was "sure" that his refusal to testify "was revealed to the general membership at [the Local's] annual meeting" (Ex. T at 40-14 to 17), when pressed, he testified that "it was not told to the members." Id. at 41-8 to 12.

¹² Pursuant to the IBT Constitution, this Executive Board approval is subject to General Membership approval. IBT Constitution, Article IX, Section 9(c).

(S.D.N.Y. 1991), aff'd, 970 F.2d 1132, 1138 (2d Cir. 1992) ("A Union official may obtain reimbursement of his legal expenses only when his actions inure to the benefit of the Union.").

By invoking his Fifth Amendment privilege before the Grand Jury, Ross was protecting his personal interests; he was not furthering the interests of the Local. The interests of the Local demanded full and complete cooperation by Ross with the DOL investigation. See Investigations Officer v. Senese, Decision of the Independent Administrator at 30 (July 12, 1990), aff'd, United States v. IBT, 745 F. Supp. 908 (S.D.N.Y. 1990), aff'd, 941 F.2d 1292 (2d Cir. 1991) (IBT Local Union officer's refusal to testify before Grand Jury investigating wrongdoing in Union found to have brought reproach upon IBT because refusal served "as a shield against proper scrutiny into corrupt influences in the labor management.").¹³

3. Embezzlement and Conversion

Article XIX, Section 7(b)(3) of the IBT Constitution prohibits the embezzlement or conversion of Union funds. See also 29 U.S.C. § 501(c). To sustain a charge of embezzlement in connection with the payment of Ross' legal fees, the Investigations Officer must

¹³ There is a dispute as to whether Ross even advised the Executive Board that he had refused to testify before the Grand Jury. I need not resolve that dispute given that, under these circumstances, even if the Executive Board was told, Ross' receipt of the payment of his attorneys fees would still be improper.

prove that Ross acted with fraudulent intent to deprive Local 97 of its funds. See Investigations Officer v. Salvatore, supra, Decision of the Independent Administrator at 21 (Oct. 12, 1990) ("Guided by 29 U.S.C. § 501(c) with regard to the allegations of embezzlement and conversion, I find that the Investigations Officer must prove that [a respondent] acted with 'fraudulent intent to deprive the Union of its funds.'"), aff'd, United States v. IBT, 754 F. Supp. 333 (S.D.N.Y. 1990). "It is permissible to infer from circumstantial evidence the existence of intent." United States v. IBT Local 560, 780 F.2d 267, 284 (D.N.J. 1985).

Given Ross' failure to obtain the approval of the general membership in violation of the IBT Constitution, his failure to even disclose to the membership the fact that he refused to testify before the Grand Jury, and his violation of the Local's By-Laws, an inference that Ross intended to defraud Local 97 in connection with the payment of his legal fees must be, and is, drawn. Accordingly, I find that Ross has also violated Article XIX, Section 7(b)(3) of the IBT Constitution when he caused his legal fees to be paid by the Local. See, e.g., Investigations Officer v. Wilson, Decision of the Independent Administrator at 17 (Dec. 23, 1991), aff'd, United States v. IBT, 787 F. Supp. 345, 352 (S.D.N.Y.), 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).

B. Agathos' Legal Fees

Agathos incurred \$33,377.50 in legal fees in connection with the DOL investigation. R. Ex. 4. On June 22, 1990, Agathos' attorney sent a letter to both HREU Local 69 and IBT Local 97 explaining that Agathos had already paid \$11,000 towards his legal bill. The letter went on to state that:

Accordingly, Local 97, IB of T, owes one half of \$33,377.50 or \$16,688.75 and they should issue a check to me in the amount of \$11,188.75 and a check to John Agathos for \$5,500 and Local 69, H.E.R.E., is responsible for \$16,688.75 and they should issue a check to me for \$11,188.75 and a check to John Agathos for \$5,500.

Upon receiving this letter, a special Local 97 Executive Board meeting¹⁴ was called for July 16, 1990. Ex. T at 43-3 to 17. At the meeting, Ross explained that "the purpose of the meeting was to approve or reject" payment of Agathos' legal expenses. Ex. M at 1. After Ross made a motion that the Local should pay Agathos' legal expenses, the Executive Board unanimously approved payment. Id.¹⁵

Ross explained that Local 97 paid Agathos' legal expenses because "nothing came out of the investigation and we thought it was the proper thing to do." Ex. T at 42-8 to 13. Ross also testified that, prior to the special meeting, he received an oral opinion from the Local's counsel regarding the propriety of its

¹⁴ A "special" Executive Board meeting refers to a meeting that is not regularly scheduled. Ex. T at 43-8 to 11.

¹⁵ Payment to Agathos' attorney was made in four installments (August 1990; September 1990; October 1990; and February 1991). Ex. P. Payment to Agathos was made in two installments (October 1990; December 1990). Ex. Q.

paying Agathos' legal expenses. Ex. T at 43-24 to 44-2. In a letter dated September 11, 1992, the Local's counsel confirmed that he advised Ross that such legal expenses could be paid provided that no criminal charges ensued, and as long as the "approval and payment was made in accordance with the Union's constitution and bylaws." R. Ex. 2. The special Executive Board meeting minutes of July 16, 1990, do not reflect any discussion concerning the Local counsel's legal opinion. Ex. M.

The special meeting minutes do reflect, however, that a July 3, 1990, letter from another attorney directed to Agathos was read at the meeting. Ex. M. That letter offers the opinion that HREU Local 69 and IBT Local 97 may reimburse Agathos for the legal fees he expended because the DOL investigation never resulted in an indictment and because Agathos never admitted any wrongdoing. Ex. O.

1. The Failure To Obtain General Membership Approval

As he did when his own legal fees were paid, Ross violated Article IX, Section 9(c) of the IBT Constitution by causing Local 97 to pay Agathos' legal expenses without the general membership approval.¹⁶

¹⁶ The Executive Board approved payment on July 16, 1990. Ex. M. The next general membership meeting was not held until March 10, 1991. Ex. N. Local 97 completed payment of Agathos' legal fees before the general membership's March 10, 1991, meeting.

Ross again argues that general membership approval was not possible given that only one general membership meeting is held each year. Respondent's Post-Hearing Memorandum at 29 n.16. Although the delay between the Executive Board decision to pay Agathos' legal fees and the next general membership meeting was a matter of some months (as opposed to two weeks in the case of Ross), there was still no urgency for the payment of those fees and approval should have waited until the next membership meeting as mandated by the IBT Constitution.

2. Violation Of The Local's Bylaws

As already discussed, under Local 97's Bylaws, the Executive Board has discretion to pay legal expenses when payment is in the Local's interest. Ex. A at Section 13(A)(e). This provision is consistent with the settled principle that a Union may not pay the legal expenses of an officer when the expenses were incurred solely to protect the officer's personal interests and did not "inure to the benefit of the Union." United States v. IBT, supra, 970 F.2d at 1138.

Local 97's payment of Agathos' legal expenses was not in the interest of Local 97 and thus should not have been paid. This is especially so given the fact that the legal fees were paid without a complete understanding of the circumstances surrounding the DOL's investigation or, for that matter, without even an attempt to inquire into the nature and scope of the DOL investigation. See

A Bylaws violation etc it was substantively improper

pp. 12 to 14, supra. See also United States v. Local 560, 581 F. Supp. 279, 335 (D.N.J. 1984) (Because officers hold "positions of trust," they have a duty to administer labor organization's money and property with "highest standards of responsibility and ethical conduct . . ."), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986); Investigations Officer v. Morris, supra, Decision of the Independent Administrator at 26 (May 22, 1991) ("The Local's assets belong to the Local's members. The Local's officers are mere trustees of those assets.").

Ross argues that the Local's payment of Agathos' legal fees was proper because it occurred after the DOL closed its investigation without bringing charges against Agathos. Respondent's Post-Hearing Memorandum at 30-31. I disagree. Ross failed to conduct any inquiry into the DOL investigation and thus was in no position to judge the merits of the DOL's case. It is "clear . . . that conduct that is not itself criminal can constitute a violation of the IBT Constitution." United States v. IBT, 88 Civ. 4486 (DNE), slip op. at 40 (Feb. 9, 1993). In fact, wrongdoing in connection with a non-IBT labor union has resulted in a finding that an officer of an IBT local brought reproach upon the IBT. Investigations Officer v. Friedman and Hughes, Decision of the Independent Administrator (Jan. 11, 1990), aff'd, United States v. IBT, 743 F. Supp. 155 (S.D.N.Y.), aff'd, 905 F.2d 610, 623 (2d Cir. 1990) ("Although the disciplinary charges against [Respondent] are based upon his conviction for wrongdoing in relation to a non-

IBT labor union, the Administrator could reasonably have concluded that the conviction of [Respondent], an officer of an IBT Local, in connection with a scheme to embezzle the funds of a non-IBT labor union, brought reproach upon the IBT."). This principle is especially relevant here, given that Agathos agreed to reimburse HERU Local 69 \$3,500 to resolve a claim that that Local had improperly paid Agathos' personal expenses.¹⁷

3. Reliance On The Advice Of Counsel

Ross suggests that his reliance on the advice of counsel justifies the payment of Agathos' legal fees. See Respondents Post-Hearing Memoranda at pp. 33-34. The only legal advice Ross solicited was from the Local's counsel who advised that payment of Agathos' legal fees would be proper so long as the "approval and payment was made in accordance with the Union's Constitution and bylaws." R. Ex. 2. That advice was not followed.

The other advice came in the form of a letter from an attorney to Agathos; as such it was suspect on its face. Compare Investigations Officer v. Calagna, Decision of the Independent Administrator at 12 (Apr. 9, 1991) (legal advice deemed suspect when, in order to convince the Executive Board and the members of his Local that his legal fees should be paid, Respondent obtained

¹⁷ Agathos' reimbursement did not constitute an admission of wrongdoing. Ex. O. Nonetheless, Ross should have investigated DOL's claim that Agathos had had personal expenses paid by HERU Local 69.

the advice of his own counsel), aff'd, United States v. IBT, 88 Civ. 4486 (DNE), slip op. (S.D.N.Y. Aug. 14, 1991). Moreover, as discussed earlier, the advice that Agathos' fees could be paid because the DOL closed its investigation without bringing charges against him ignored two obvious points: (1) Ross was in no position to judge the merits of the DOL's case having failed to make any probe of his own; and (2) even without a charge by the DOL, Agathos' conduct could still have violated the IBT Constitution. See Sansone, Decision of the Independent Administrator, supra (Sometimes "no expertise, legal or otherwise, is required to understand one's fiduciary obligations as an officer of a Local union.").

Accordingly, Ross' defense that he relied on the advice of counsel also fails.

4. Embezzlement and Conversion

As with the payment of Ross' own legal fees, the payment of Agathos' legal fees also constitutes an embezzlement and conversion of Union funds in violation of Article XIX, Section 7(b)(3) of the IBT Constitution. Ross' intent to deprive Local 97 of its funds in connection with the payment of Agathos' legal fees is inferred from the fact that Ross failed to obtain general membership approval for the payment, violated the Local's By-Laws in making the payment, and ignored the advice of the Local's counsel regarding the payment.

VI. ROSS' SUGGESTION THAT HE HAS BEEN SINGLED OUT

Ross suggests that he should not be "singled out" because if he is guilty of wrongdoing, so is the entire Local 97 Executive Board. See, e.g., Respondent's Post-Hearing Memorandum at 31. That others may, or may not, be culpable can not excuse Ross' conduct. Moreover, as the principal officer of Local 97, Ross should have been especially sensitive to his obligations, especially when it came to Agathos since Ross hired Agathos and Agathos reported directly to Ross "ninety-nine percent of the time." Ex. T at 17 - 14 to 20. See Investigations Officer v. Salvatore, supra, Decision of the Independent Administrator at 12-13 (Contention "that one who participates in . . . wrongdoing with others cannot be charged unless each and every wrongdoer is similarly charged . . . lacks merit and is accordingly rejected.").

VII. THE PENALTIES TO BE IMPOSED

Ross completely abdicated his fiduciary duty as the principal officer of Local 97 by failing to look into the beating incident, by failing to inquire into the nature and scope of the DOL investigation, and by violating the IBT Constitution and the Local 97 Bylaws in connection with the payment of Agathos' and his legal expenses.

Ross has proven that he is not fit to serve in any position of trust or responsibility within the IBT or any of its affiliates. Accordingly, Ross is to remove himself as President of Local 97,

and draw no money or compensation therefrom. Moreover, Ross is permanently barred from holding any officer position with the IBT, or any IBT-affiliated entity in the future. As an additional safeguard, Ross may not obtain employment, consulting or other work with the IBT, or any IBT affiliated entity. I will permit Ross to retain his IBT membership so that if he chooses, he can secure work as a rank-and-file member with non-IBT affiliated entities that have collective bargaining agreements with the IBT.¹⁸

VIII. SANCTIONS ON BENEFITS

At my request, Ross' attorney wrote to me on September 22, 1992, indicating that Ross is a participant in the following plans, funds and benefit programs:

Pension Benefits

Central States Pension
Teamsters Joint Council #73 Pension
Affiliates Pension Plan

Health and Welfare Benefits

Blue Cross/Blue Shield (Secondary Coverage)
(\$261.01 monthly)
HCFA Medicare Insurance (Primary Insurance)
(\$96.40 quarterly)
Teamsters 97 Welfare Fund (Dental/Vision)
(\$27 monthly)
Teamsters 97 Prescription Plan (\$43.30 monthly)

¹⁸ Ross shall not, however, be permitted to hold any position such as job steward, shop steward or the like.

Life Insurance

Capital American Life Insurance (Cancer Policy)
(\$38 monthly)

McCabees Life Insurance (Term Policy) (\$96.40 quarterly)

My authority to impose sanctions on Ross' employee benefits is now well settled. See Investigations Officer v. Senese et al., Supplemental Decision of the Independent Administrator (Nov. 29, 1990), aff'd, United States v. IBT, 753 F. Supp. 1181 (S.D.N.Y. 1990), aff'd, 941 F.2d 1292 (2d Cir. 1991), cert. denied, 112 S. Ct. 1161 (1992).

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."¹⁹ If any of the benefits Ross enjoys, by virtue of his serving, or having served, as an officer of the IBT or any IBT-affiliate, are Third-Party Plans, I direct that the IBT and any affiliates that may contemplate making payments, not make, or discontinue making, payment of Union funds to such Third-Party Plans on Ross' behalf. This ruling does not interfere with Ross' right to receive any benefits that may have already vested in such Third-Party Plans. See Guidry v. Sheet Metal Workers National Pension Fund, 110 S. Ct. 680 (1990). Ross may, if he wishes, use his personal funds to continue any particular benefit.

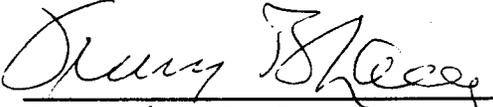
¹⁹ Ross' pension plans would appear to be Third-Party Plans.

The second category of benefits to address are those that are under the exclusive control of the IBT or IBT-affiliated entities (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 Ross, which benefits are based upon Ross' service as an officer of the IBT or any IBT-affiliated entity, they are hereby directed not to make such payments. Ross may continue his health and welfare benefits by contributing his own personal funds.

Finally, given my findings here, Ross is not entitled to have any portion of legal fees resulting from this disciplinary action paid by the Local or any other IBT affiliated entity. See, e.g., United States v. Local 1804-1, 732 F. Supp. 434, 437 (S.D.N.Y. 1990).

IX. VOLUNTARY STAY

I will stay the imposition of penalties pending Judge Edelstein's review of this Decision, which I will submit to him by way of Application.


Frederick B. Lacey
Independent Administrator

Dated: March 1, 1993