

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

Plaintiff, :

-v- :

MEMORANDUM & ORDER

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, et al., :

88 CIV. 4486 (DNE)

AMERICA, AFL-CIO, et al., :

AMERICA, AFL-CIO, et al., :

AMERICA, AFL-CIO, et al., :

Defendants. :

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IN RE: APPLICATION LII OF THE  
INDEPENDENT ADMINISTRATOR

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APPEARANCES: CHARLES M. CARBERRY, Investigations Officers of the  
International Brotherhood of Teamsters;

OTTO G. OBERMAIER, United States Attorney for the  
Southern District of New York, (Edward T. Ferguson,  
III, Assistant United States Attorney, of counsel)  
for the United States;

VAN BOURG, WEINBERG, ROGER & ROSENBERG, San  
Francisco, California (Victor J. Van Bourg, of  
counsel) for respondent Leroy Nunes.

EDELSTEIN, District Judge:

This opinion emanates from the voluntary settlement in the  
action commenced by the plaintiffs United States of America (the  
"Government") against the defendants International Brotherhood of  
Teamsters (the "IBT") and the IBT's General Executive Board (the  
"GEB") embodied in the voluntary consent order entered March 14,  
1989 (the "Consent Decree"). The Consent Decree provided for three  
Court-appointed officials, the Independent Administrator to oversee  
the remedial provisions, the Investigations Officer to bring

charges against corrupt IBT members, and the Election Officer to oversee the electoral process leading up to and including the 1991 election for International Officers (collectively, the "Court Officers"). The goal of the Consent Decree is to rid the IBT of the hideous influence of organized crime through the election and prosecution provisions.

Application LII presents for this Court's review the opinion of the Independent Administrator finding that the Investigations Officer proved one charge filed against IBT member Leroy Nunes, the Secretary-Treasurer of IBT Local Union 291, located in San Leandro, California. Mr. Nunes also served as an International Representative on behalf of the IBT.

#### I. BACKGROUND

The Investigations Officer alleges that Mr. Nunes violated Article II, section 2(a), Article V, section 1(E) and Article XIX, sections 6(b)(1)-(3) of the IBT Constitution by embezzling from the IBT approximately \$79,040. The Investigations Officer contends that Mr. Nunes obtained these funds improperly because he claimed per diem expenses under Article V, section 1(E) to which he was not entitled. Section 1(E) permits International Representatives to claim a per diem expense of \$130 from the IBT only when "working outside their home city, or when travelling in the interest of the organization." The Investigations Officer alleges that between 1986 and 1990, however, Mr. Nunes submitted per diem expense claims to the IBT for days when he knew he was not working outside his

home city of San Leandro, California.

Section 2(a) is the IBT membership oath, which provides in relevant part that every IBT member shall "conduct himself or herself in a manner so as not to bring reproach upon the Union." Section 6(b) is a non-exhaustive list of the "bases of charges against members, officers, elected Business Agents, Local Unions, Joint Councils or other subordinate entities for which he or it shall stand trial . . . ." Violating the IBT oath and embezzling union funds are two such charges that, in the instant case, are properly filed against Mr. Nunes due to his efforts to claim improper per diem expenses from the IBT.

The Independent Administrator found that the Investigations Officer had sustained his burden of showing "just cause"<sup>1</sup> for finding that Mr. Nunes embezzled IBT funds.<sup>2</sup> As a penalty for the Charge, the Independent Administrator found that Mr. Nunes should be suspended from the IBT for five years. During this period, Mr. Nunes may not hold Union office or draw money or compensation from the IBT or any IBT-affiliated entity. The Independent Administrator stated that "it is hoped that Nunes's punishment will send a clear message to Nunes and others in this Union, that financial wrongdoing, no matter under what guise, will not be

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<sup>1</sup> Paragraph F.12(C) of the Consent Decree mandates that the Independent Administrator must decide disciplinary hearings using a "just cause" standard.

<sup>2</sup> The Independent Administrator determined that Mr. Nunes had wrongfully collected \$65,910 in per diem expense payments. The Independent Administrator allowed the IBT to pursue whatever collection efforts it wished to recoup the money wrongfully taken by Nunes.

tolerated." Ind. Admin. Dec. at 24-25.

Furthermore, the Independent Administrator directed that during this five-year suspension, no further contributions from the IBT or any IBT-affiliated entity be made on Nunes's behalf to any health, pension, welfare or other employee benefit plan. The Independent Administrator, however, permitted Nunes to collect all interests vested up to and including the date of the commencement of his suspension. Mr. Nunes is also permitted to maintain whatever coverage he wishes through personal contributions. In addition, the Independent Administrator directed that no IBT-affiliated entity make any contributions to Mr. Nunes's legal expenses in connection with the matter.

Mr. Nunes appeals to this Court the opinion of the Independent Administrator. This Court finds that the opinion of the Independent Administrator is fully supported by the evidence, and that Mr. Nunes's arguments are completely without merit. Accordingly, the opinion of the Independent Administrator is affirmed in all respects.

## II. DISCUSSION

It is well settled that the findings of the Independent Administrator "are entitled to great deference." United States v. Int'l Brotherhood of Teamsters, 905 F.2d 610, 616 (2d Cir. 1990), aff'g March 13, 1990 Opinion & Order, 743 F. Supp. 155 (S.D.N.Y. 1990). This Court will overturn findings when it determines that they are, on the basis of all the evidence, "arbitrary or

capricious." United States v. Int'l Brotherhood of Teamsters, supra, 905 F.2d at 622; October 11, 1991 Memorandum & Order, slip opinion, at 3 (S.D.N.Y. 1991); October 9, 1991 Memorandum & Order, slip opinion, at 5 (S.D.N.Y. 1991); August 14, 1991 Memorandum & Order, slip opinion, at 4 (S.D.N.Y. 1991); July 31, 1991 Memorandum & Order, slip opinion at 3-4 (S.D.N.Y. 1991); July 18, 1991 Memorandum & Order, slip opinion at 3-4 (S.D.N.Y. 1991); July 16, 1991 Opinion & Order, slip opinion, at 3-4 (S.D.N.Y. 1991); June 6, 1991 Opinion & Order, slip opinion, at 4-5 (S.D.N.Y. 1991); May 13, 1991 Memorandum & Order, 764 F. Supp. 817, 820-21 (S.D.N.Y. 1991); May 9, 1991 Memorandum & Order, 764 F. Supp. 797, 800 (S.D.N.Y. 1991); May 6, 1991 Opinion & Order, 764 F. Supp. 787, 789 (S.D.N.Y. 1991); December 27, 1990 Opinion & Order, 754 F. Supp. 333, 337 (S.D.N.Y. 1990); September 18, 1990 Opinion & Order, 745 F. Supp. 189, 191-92 (S.D.N.Y. 1990); August 27, 1990 Opinion & Order, 745 F. Supp. 908, 911 (S.D.N.Y. 1990); March 13, 1990 Opinion & Order, supra, 743 F. Supp. at 159-60, aff'd, 905 F.2d at 622; January 17, 1990 Opinion & Order, 728 F. Supp. 1032, 1045-57, aff'd, 907 F.2d 277 (2d Cir. 1990); November 2, 1989 Memorandum & Order, 725 F.2d 162, 169 (S.D.N.Y. 1989).

Mr. Nunes argues that the evidence did not support the Independent Administrator's finding that Nunes's receipt of per diem expenses violated the IBT Constitution and amounted to embezzlement. It is well settled that to prove a charge of embezzlement, the Investigations Officer must establish that the charged party acted with "fraudulent intent to deprive the Union

of its funds." December 27, 1990 Opinion & Order, 754 F. Supp. 333, 338-39 (S.D.N.Y. 1990); June 6, 1991 Opinion & Order, at 19 (S.D.N.Y. 1990); see also 29 U.S.C. § 501(c); United States v. Welch, 728 F.2d 1113 (8th Cir. 1989). Nunes denies acting with fraudulent intent because he allegedly believed that Rogue River, Oregon was properly considered his home city. Therefore, he is entitled to collect per diem expenses for the time he spent at his principal place of business, Local 291, in San Leandro, California, which is outside Rogue River. Nunes asserts that Rogue River, Oregon is properly considered his home city because: (1) three separate General Presidents authorized granting per diem expenses to Nunes for his work in San Leandro, California knowing that Rogue River, Oregon was his home city; and (2) declaring Rogue River, Oregon his home city is consistent with past Union practice and the past practice of these parties.

The record is replete with evidence of Nunes's intent to embezzle Union funds. See Ind. Admin. Dec. at 7-14. For instance, Nunes cannot support his claim that past IBT General Presidents sanctioned his collection of per diem expenses. Nunes did not attempt to collect per diem payments for his work in San Leandro until four years after his appointment as an International Representative, even though he lived in Rogue River but worked in San Leandro during this period. "It belies logic to assume that Nunes had cleared the 'home city' issue with [General Presidents] Williams and Presser, knew he was entitled to significant additional compensation, and for some unexplained reason, simply

decided not to collect it." Ind. Admin. Dec. at 13. Moreover, in May, 1990, the IBT General Secretary-Treasurer informed Nunes that General President McCarthy believed that Nunes should not collect per diem expenses for his work in San Leandro. Ind. Admin. Dec. at 12. Nunes's own witness, George Rohrer, most likely did not believe that Nunes had a right to the per diem expenses.

Nor can Nunes show that receiving such payments comported with past Union practice. While Mr. Rohrer stated that he and his predecessor had commuted a long distance to work, he did not claim that they received per diem expenses in connection with their work at Local 291. Furthermore, Mr. Nunes's contention that the Independent Administrator is required to defer to the constitutional interpretations of Union officials is without merit. The Independent Administrator is not bound by unreasonable or unlawful decisions by Union officials. The Second Circuit determined that the Independent Administrator's powers include the power to interpret constitutional provisions that relate to "disciplining corrupt or dishonest IBT or IBT-affiliated officers, agents, employees or members." United States v. IBT, 905 F.2d at 619. The court added that "the Independent Administrator's comprehensive right to review disciplinary charges of [IBT officials] necessarily includes the final authority to determine what constitutes an offense subject to discipline under the IBT Constitution." Id. Therefore, even if the Independent Administrator's decision contradicts past constitutional interpretations by Union officials, the Independent Administrator

has authority to substitute his interpretations of the IBT Constitution for unreasonable interpretations by Union officials. See March 13, 1990 Opinion & Order, 743 F. Supp. 155, 160-64 (S.D.N.Y. 1990), aff'd, United States v. IBT, 905 F.2d 610, 617-20 (2d Cir. 1990). As noted previously, however, the evidence suggests that the Independent Administrator's decision actually is in accordance with past decisions by Union officials. This Court finds that the evidence supports the Independent Administrator's finding that Nunes acted with fraudulent intent when he collected per diem expenses in connection with his work at Local 291. The Independent Administrator's decision is neither arbitrary or capricious.

Mr. Nunes also contends that the Independent Administrator's conduct of the hearing denied Nunes due process. This argument is without merit. Because the United States Constitution regulates the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish the challenged conduct constitutes "state action." United States v. IBT, No. 91-6052, slip op. at 6769, 6775-76 (2d Cir. Aug. 6, 1991). In this case, the Independent Administrator acted pursuant to the IBT Constitution -- a private agreement -- and not pursuant to a right or privilege created by the State. Id. at 6776. In addition, the Independent Administrator may not fairly be said to be state actors in this case. Id. at 6777. Accordingly, because Nunes can not establish the requisite "state action," its constitutional claims must fail.

Even if the Independent Administrator's conduct did establish "state action," Nunes's due process claim is frivolous. Due process is "flexible and calls for such procedural protections as the particular situation demands." Morrisey v. Brewer, 408 U.S. 471, 481 (1972). In this case, Nunes received all the process that he was due.

For instance, Mr. Nunes argues that the Independent Administrator denied Nunes due process by refusing to provide his counsel with copies of his prior opinions. The Independent Administrator, however, directed Mr. Nunes's counsel to obtain the available published decisions of this Court, which review the entire opinion of the Independent Administrator and in many instances contain the Independent Administrator's actual decision in an appendix. Counsel refused to make any effort to obtain these decisions. While Nunes argues that the United States Constitution requires the Independent Administrator to provide copies of past decisions, he offers no support for this silly proposition. Moreover, because the Independent Administrator is not a state actor, his actions cannot violate the due process clause of the United States Constitution. See United States v. IBT, No. 91-6052, slip op. at 6769, 6777 (2d Cir. Aug. 6, 1991).

Mr. Nunes next argues that the Independent Administrator's decision and the Investigations Officer's case rested primarily upon hearsay evidence; Mr. Nunes alleges that by placing such heavy reliance on hearsay evidence, and by not calling witnesses, the Investigations Officer failed to meet his burden of showing "just

cause." The Independent Administrator's decision does consider hearsay statements contained in various documents. Ind. Admin. Dec. at 16. Nevertheless, it is beyond reasonable dispute that hearsay evidence, if reliable, is admissible in IBT disciplinary proceedings. See Aug. 27, 1990 Memorandum & Order, 745 F. Supp. 908, 914-15 (S.D.N.Y. 1990), aff'd, United States v. IBT, No. 91-6052 slip opinion, at 6780 (2d Cir. August 6, 1991). The Independent Administrator carefully considered the hearsay statements in the instant case and found them reliable because they corroborated one another and because they were supported by Nunes's own testimony. An examination of the hearsay statements supports this finding. Accordingly, this Court rejects Nunes's argument.

Nunes also contends that the Investigations Officer's charge was not sufficiently specific. This argument has been considered and rejected in several of this Court's decisions. See May 9, 1991 Memorandum & Order, 764 F. Supp. 797, 800 (S.D.N.Y. 1991); August 27, 1990 Memorandum & Order, 745 F. Supp. 908 (S.D.N.Y. 1990); September 18, 1990 Memorandum & Order, 745 F. Supp. 189 (S.D.N.Y. 1990). In the instant case, the charge lists the specific acts that Nunes committed in violation of the IBT Constitution and the time period in which these acts occurred. The charge against Nunes "was a plain, concise statement of the facts constituting the offense charged." May 9, 1991 Memorandum & Order, 764 F. Supp. at 800. The charge is sufficiently specific. Nunes's argument is rejected.

Nunes next argues that the Investigations Officer's conduct

of his investigation constituted prosecutorial misconduct because he allegedly withheld exculpatory evidence from Nunes and also failed to interview a witness who possessed exculpatory evidence. This argument is wholly without merit. The Investigations Officer is not required to provide Nunes with any pre-hearing discovery under the Consent Decree. See United States v. IBT, No. 91-6052, slip opinion (2d cir. Aug. 6, 1991); May 9, 1991 Opinion & Order, 764 F. Supp. 797, 800-01 (S.D.N.Y. 1991). Moreover, the transcript of the hearing before the Independent Administrator reveals that prior to the hearing, the Investigations Officer provided Nunes with all evidence it introduced against him at the proceeding. Accordingly, this Court rejects Mr. Nunes's argument.

Finally, Nunes contends that he was prejudiced by the Investigations Officer's refusal to articulate the "reasonable cause" for his taking Nunes's in-person sworn examination. This Court has previously rejected an identical argument. See April 9, 1990 Opinion & Order, 735 F. Supp. 519, 521 (S.D.N.Y. 1990). The Investigations Officer is not required to elaborate on his basis for "reasonable cause." "His notices of sworn statements must themselves be considered 'reasonable cause' to take sworn statements." Id. at 521.<sup>3</sup>

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<sup>3</sup> This decision attempts to address every remotely significant argument made on Nunes's behalf. Nevertheless, to the extent that this Opinion does not specifically address each and every assertion made by Nunes's counsel, it should be noted that this Court has considered all such arguments and finds them meritless.

III. CONCLUSION

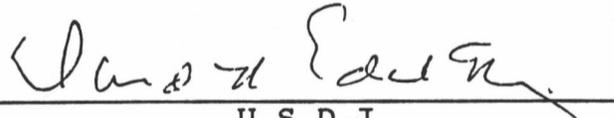
IT IS HEREBY ORDERED that Nunes's objections to the Independent Administrator's opinion are denied.

IT IS FURTHER ORDERED that the opinion of the Independent Administrator is affirmed in all respects.

IT IS FURTHER ORDERED that the stay of penalties imposed on Nunes by the Independent Administrator is dissolved, effective immediately.

SO ORDERED.

Dated: November 8, 1991  
New York, New York

  
U.S.D.J.

Following...  
likely to succeed on the merits...  
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