

INVESTIGATIONS OFFICER,	:	
	:	
Claimant,	:	
	:	DECISION OF THE
v.	:	INDEPENDENT ADMINISTRATOR
	:	
LEROY NUNES,	:	
	:	
Respondent.	:	

Leroy Nunes has served as an International Representative on behalf of the International Brotherhood of Teamsters ("IBT") since 1982. Nunes has also served as the Secretary-Treasurer of Local 291 in San Leandro, California since 1983. The Investigations Officer charged Nunes with violating several provisions of the IBT Constitution. The focus of the charge, however, is on Article V, Section 1(e) of the IBT Constitution ("Section 1(e)"). That provision states, in pertinent part, that International Representatives:

[W]orking outside their home city, or when traveling in the interest of the organization, shall receive their fare . . . to and from their destination, and in addition shall receive a sum of one hundred and thirty dollars (\$130.00) per diem.
[Emphasis supplied.]

The Investigations Officer claims that since 1986 Nunes has taken over \$79,000 in per diem allowances although not entitled to them under Section 1(e). The Investigations Officer alleges that Nunes'

actions constitute: (1) a violation of the IBT's membership oath "not to bring reproach upon the Union" (IBT Constitution, Article II, Section 2(a) and Article XIX, Section 6(b)(2)); (2) a violation of the explicit per diem allowance clause found in Section 1(e); and (3) an embezzlement of Union funds (IBT Constitution, Article XIX, Section 6(b)(3)).

In addition, the Investigations Officer claims that his charge is also supported by Article XIX, Section 6(b)(1) of the IBT Constitution which allows disciplinary charges to be filed for any "[v]iolation of any specific provision of the Constitution."

BACKGROUND

In February of 1982, the then IBT General President, Roy Williams, appointed Nunes as an International Representative. Investigations Officer Ex. 1. At that time, Nunes was living in Rogue River, Oregon. Nunes had moved to Rogue River in 1978 when he retired from his position as Business Agent with Local 70 in San Francisco, California. Nunes continues to maintain his personal residence in Rogue River. Investigations Officer Ex. 16 at pp. 16-18.

When Nunes was first appointed as an International Representative he worked out of an office in San Francisco although he considered the Local 291's offices in San Leandro a place to "hang [his] hat." Investigations Officer Ex. 16 at p. 16; Investigations Officer Ex. 15 at p. 63. In approximately mid-1985, however, Nunes exclusively used Local 291's offices in San Leandro,

California as his base for his work as an International Representative. Tr.88-1 to 18.¹ See, also, pp. 10-11, infra. This made sense given that Nunes had been serving as Secretary-Treasurer of that Local since 1983. Investigations Officer Ex. 15 at p. 45.

The available monthly expense reports for Nunes date back to the end of 1983. These reports reveal that from that time until October 1986, Nunes never claimed per diem from the IBT when he was in San Leandro, rather Nunes would write "office" on his expense reports for his San Leandro time. Weekends were clearly marked "Saturday" and "Sunday." Investigations Officer Exs. 3, 4 and 5 (through p. 30).

Beginning October 23, 1986, however, Nunes began claiming and collecting his per diem from the IBT for every single weekday he was in Local 291's offices in San Leandro, California. When Nunes began collecting his per diem for his time in San Leandro, he stopped indicating "Saturday" and "Sunday" on his expense reports for weekends and began writing "Rogue River." Investigations Officer Exs. 5 (beginning at p. 30), 6, 7, 8 and 9.

In May 1990, the IBT General Secretary-Treasurer discontinued Nunes' per diem expenses for his time in San Leandro. Investigations Officer Ex. 12.

¹ "Tr.88-1 to 18" refers to the May 29, 1991, hearing transcript beginning on page 88, line 1 and continuing to line 18.

THE MEANING OF "HOME CITY"

Resolution of this charge first turns on the proper identification of Nunes' "home city" as contemplated by Section 1(e). The Investigations Officer alleges that Nunes' "home city" is San Leandro, California, the location of Nunes' base of operations -- Local 291. Nunes urges, however, that his "home city" is Rogue River, Oregon, where he maintains his personal residence. The IBT Constitution does not provide any guidance on this question. In resolving similar issues in the past Courts have looked to federal tax law for direction. See Morrissey v. Curran, 650 F.2d 1267 (2d Cir. 1981). I also find it appropriate to do so here.

29 U.S.C. §162(a)(2) permits taxpayers to deduct:

[T]raveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business.
[Emphasis supplied.]

In Commissioner v. Flowers, 326 U.S. 465 (1946), the seminal case interpreting 29 U.S.C. §162(a)(2), Flowers was a long time resident of Jackson, Mississippi. When Flowers accepted employment in Mobile, Alabama, he continued to maintain his home in Mississippi. The Supreme Court denied Flowers' deductions for traveling expenses between Jackson and Mobile and for meals and hotel accommodations while in Mobile, finding that these expenses:

[W]ere incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile, a factor irrelevant to the maintenance and prosecution of the [employer's] legal business . . .

The fact that he travelled frequently between the two cities and incurred extra living expenses in Mobile, while doing much of his work in Jackson, was occasioned solely by his personal propensities. The [employer] gained nothing from this arrangement except the personal satisfaction of the taxpayer.
[Flowers, supra, 326 U.S. at 473]

The approach set forth in Flowers has been consistently followed throughout the years. See, e.g., Wills v. Commissioner, 411 F.2d 537, 540 (9th Cir. 1969) (professional baseball player who maintained Spokane residence while playing baseball for the Los Angeles Dodgers could not deduct Los Angeles living expenses); Stemkowski v. C.I.R., 690 F.2d 40, 48-49 (2d Cir. 1982) (same result for professional hockey player who maintained Canadian residence while playing for New York Rangers). Compare Morrissey, supra, 650 F.2d 1267 (union improperly paid for official's expenses incurred in traveling between his home in Florida and the union's headquarters in New York, when official's decision to live in Florida was based on personal preference).²

The Flowers approach is a reasonable one and lends Section 1(e) the structure it is lacking. Defining "home city" simply as one's place of residence, as Nunes would have us do, would lead to the very type of abuse practiced by Nunes in this case. Union funds can not be wasted to cater to the personal whims of Union

² Deductions under 29 U.S.C. §162(a)(2) are allowed when the employment away from home is a temporary assignment. See Knight v. Commissioner (1988) TC Memo 1988-186, 55 TCM 733 (member of Sheet Metal Workers International Union permitted to deduct living expenses while "away from home" on temporary assignment that lasted 26 months). This, however, is not the case with Nunes.

officials when they choose to maintain homes far away from their official base of operations. As I have stated before, Union assets belong to the Union members. Investigations Officer v. Morris, et al., Decision of the Independent Administrator, at p. 26 (May 22, 1991). Nunes' California living expenses were incurred solely as the result of Nunes' personal choice to maintain a home in Oregon. Nunes' residence in Oregon had no relation to his duties as an International Representative in California. Like the employer in Flowers, the IBT gained no benefit from Nunes' living arrangements.

For Section 1(e) to have any meaning in cases where an IBT official elects to live far away from his Union office "home city" must be interpreted as one's base of operations for Union business, not one's residence. Any other interpretation would be unreasonable and invite waste and abuse.

Against this background it becomes clear that Nunes' collection of per diem allowances, for expenses incurred in California while he maintained his home in Oregon, constitutes a violation of Article V, Section 1(e) of the IBT Constitution. Accordingly, the Investigations Officer has sustained his just cause burden of proving that aspect of his charge. Whether Nunes' actions constitute an embezzlement requires a separate analysis.

THE EMBEZZLEMENT ISSUE

It is now well settled that for the Investigations Officer to prove a charge of embezzlement, he must establish that the charged party acted with "fraudulent intent to deprive the Union of its

funds." See, e.g., Investigations Officer v. Salvatore, Opinion of the Independent Administrator, at p. 21 (October 21, 1990), aff'd, 754 F.Supp 333, 338-339 (S.D.N.Y. 1990); Investigations Officer v. Vitale, Decision of the Independent Administrator, at p. 11 (December 18, 1990), aff'd, United States v. IBT, slip op., 88 Civ. 4486 (S.D.N.Y. June 6, 1991); Investigations Officer v. O'Brien, Decision of the Independent Administrator at pp. 26-27 (May 15, 1991); Investigations Officer v. Morris et al., Decision of the Independent Administrator at p. 13 (May 22, 1991); Investigations Officer v. Calagna et al., Decision of the Independent Administrator, at p. 30 (June 14, 1991). See, also, 29 U.S.C. §501(c) (Embezzlement of Union assets); United States v. Welch, 728 F.2d 1113 (8th Cir. 1989) ("Nevertheless, under any test, union officials violate §501(c) only when they possess fraudulent intent to deprive the Union of its funds.")

Nunes relies on several rationales to demonstrate that he was free of any fraudulent intent. First, Nunes claims that when he was first hired by General President Williams, Williams knew that Rogue River would be Nunes' "home city." Investigations Officer Ex. 11; Nunes Ex. R.

Whatever General President Williams' understanding was it is of no significance given that Nunes never claimed any per diem allowance for his time in San Leandro during Williams' tenure. Williams resigned as General President in 1983. Investigations Officer Ex. 18 at p. 192. As noted earlier, Nunes did not begin

claiming per diem allowances for his time in San Leandro until 1986. Investigations Officer Ex. 5 (beginning at p. 30).

Upon Williams' resignation, Jackie Presser was appointed as General President. Investigations Officer Ex. 18 at p. 193. Nunes claims that before he accepted the Secretary-Treasurer position with Local 291 he received permission from General President Presser. Nunes also claims that at the time General President Presser granted permission he understood that Rogue River, Oregon would still be Nunes' "home city." Investigations Officer Ex. 11; Nunes Ex. R. The significance of General President Presser's understanding of Nunes' "home city" is tenuous at best, given that Nunes did not begin to claim his per diem allowance for his time in San Leandro until over three years after he accepted the Secretary-Treasurer position with Local 291.

Moreover, given the gloss that Nunes has placed on the term "home city," it is questionable whether Williams and Presser actually understood that Nunes' "home city" would be Rogue River, Oregon for purposes of claiming per diem under Section 1(e), or whether they simply knew that Nunes maintained his residence in Rogue River. Given the record before me, the latter version appears more palpable. In fact, George Rohrer, Nunes' superior, testified at the hearing that it was not until "late '85, early '86" that Nunes even raised the issue of whether he was entitled to a per diem allowance. Tr.88-25 to 90-11. When Nunes first asked Rohrer whether he could collect a per diem for his time in San

Leandro, Rohrer himself said that: "Because he maintained his home in Oregon, I told him I didn't know whether he was entitled to it or not." Tr.89-3 to 7.

Nunes' suggestion that the "home city" issue had been settled with Williams and Presser is disingenuous, given that Nunes did not begin making inquiries regarding the per diem until "late '85, early '86" and Rohrer himself claims that at that time he did not know whether Nunes was entitled to any such allowance.³

Rohrer also testified that after Nunes raised the per diem issue the two of them travelled to Washington, D.C. to meet with Walter Shea, the Executive Assistant to General President Presser at the time to settle the per diem issue. Rohrer stated that Shea "made a remark that he thought that because Nunes had never been told to redomicile, that he was probably entitled to it" but that "he would run it by" Presser. Tr.89-4 to 95-4. Rohrer did not know whether Nunes was already collecting per diem at the time Nunes first raised the issue or at the time of the Shea meeting. Tr.102-8 to 103-6.

The timing of Nunes' meeting with Shea becomes important when determining whether Nunes relied on Shea's comments regarding the

³ A closer review of Rohrer's testimony reveals that he most likely did believe that Nunes' collection of per diem under the circumstances would be improper. As Rohrer explained, in 1961 he was appointed as the Secretary-Treasurer of Local 190 in Billings, Montana. In 1965, however, he moved his residence to Utah, "[a]nd being that far away from the local union, [he] turned the reins of that local over to a [another] man . . . [he] just didn't think it was fair to live a thousand miles away and still hold office." Tr.74-4 to 75-20.

per diem. As already noted, Rohrer was unable to pinpoint the time of the meeting saying it took place "late '85, early '86." Nunes' expense reports reveal that he did not travel to Washington, D.C. at all in 1986. Investigations Officer Ex. 5. According to the expense reports, his last trip to Washington, D.C. before 1986 was on March 15, 1985. This was 19 months before he began claiming his per diem for his time in San Leandro. Investigations Officer Ex. 4. The expense reports also show that Nunes was not in Washington, D.C. again until March 18, 1987. Investigations Officer Ex. 6. This was six months after Nunes began claiming his per diem for his time in San Leandro. Thus, neither March 1985, nor March 1987, conforms with the commencement of Nunes claiming his per diem allowance in October 1986.

Nunes' counsel fashions yet another scenario in his post-hearing submission, wherein he argues that:

In actuality, Mr. Rohrer never attempted to state an exact date for the conversation with Shea. Rather, he remembered that it took place at "about the same time as the move," i.e., the time period when Nunes was asked to begin conducting his Western Conference work out of Local 291's offices.

[Nunes Post-Hearing Brief at p. 21 (emphasis supplied)]

Unfortunately, this sequence does not "make[] perfect sense" as Nunes counsel suggests. "The move" Rohrer was referring to in his testimony was the move of the "Freight Division" (Tr.81-14 to 15) from 1150 Bay Hill Drive in San Bruno, California to 1250 Bay Hill Drive. Tr.83-18 to 21. Rohrer stated that this move took place within "four or five months" after Arnie Weinmeister, the Director

of the Western Conference, decided to move the Freight Division headquarters from Seattle, Washington to San Bruno, California. Weinmeister made that decision in "mid-January of 1985." Tr.82-14 to 83-21. Counting four or five months forward, we learn that "the move" took place in May or June of 1985. Using these dates as the point of reference for the Shea meeting, it would still be approximately 17 months prior to the time Nunes began claiming his per diem for his time in San Leandro.

That Nunes did not rely on any instructions from Shea is further supported in the record. In May 1989, General President McCarthy wrote to Nunes (at Local 291's address in San Leandro), questioning Nunes' per diem claims and asking Nunes for a "detailed statement of [his] position in this matter" Investigations Officer Ex. 10. When Nunes responded on June 9, 1989, he made no mention of the Shea meeting nor did he mention ever receiving permission from Shea to claim per diem allowances. Investigations Officer Ex. 11, Nunes Ex. R. Moreover, when Nunes testified under oath before the Investigations Officer in 1990, and was specifically asked with whom in the International he discussed his

per diem, Nunes did not mention Shea.⁴ Investigations Officer Ex. 16 at pp. 23-32.

Accordingly, I must reject Nunes' attempt to now rely on any alleged representation from Shea.

Nunes also relies on the fact that after he responded to General President McCarthy's May 1989, inquiry regarding his per diem, the IBT released per diem allowance for his San Leandro time. Thus, Nunes suggests that General President McCarthy must have been satisfied with his June 9, 1989, explanation. In advancing this argument, Nunes ignores two important factors. First, the explanation proffered by Nunes in June of 1989 was that he had settled the "home city" issue with Williams and Presser. As already established, however, the sequence of events belies this assertion. More importantly, in May 1990, General Secretary-Treasurer Mathis wrote to Nunes as follows:

With reference to our recent telephone conversation concerning your request for per diem on the days you are in Local No. 291 in San Leandro, California, of which you are Secretary-Treasurer and as I stated to you, I do not agree that you should be paid per diem on those days. I have discussed this matter with General President McCarthy and he agrees with my position.

⁴ In one of Nunes' more implausible arguments, he stated that the reason he did not testify regarding Shea was because "the Investigations Officer either interrupted the testimony or changed the subject during Mr. Nunes' answers." Nunes Post-Hearing Brief at p. 19. First, a review of the in-person sworn examination of Nunes (Investigations Officer Ex. 16) does not support Nunes' characterization of the Investigations Officer's conduct during the examination. Second, Nunes is ignoring the fact that he was represented by counsel at the examination and was cross-examined by his own counsel. While Nunes' own counsel was free to explore the Shea meeting with Nunes, he did not broach the subject.

Therefore, I am denying your request for payment of per diem on February 23 and 26, March 2, 5, 7, 8, 9, 16, 22, 23, 26, 27, 28, 29 and 30, and April 6, 9, 10, 11, 13 and 20, 1990.

In the future do not request per diem for days at Local No. 291 in San Leandro, California. [Investigations Officer Ex. 12 (emphasis supplied)].

Thus, it is clear that once General President McCarthy took a clear look at the situation, he determined that Nunes was not entitled to his per diem allowance.

Given all this, I am constrained to find that Nunes did act with fraudulent intent to deprive the IBT of its funds when he collected his per diem allowances for his time in San Leandro. See United States v. IBT, 754 F. Supp 333,339 (S.D.N.Y. 1990) ("It is permissible to infer from circumstantial evidence the existence of fraudulent intent."). Nunes' fraudulent intent is demonstrated by the following:

1. Nunes did not begin to collect per diem allowances until more than four years after his appointment as an International Representative, despite the fact that since his appointment as an International Representative he was always stationed in California and always maintained his residence in Oregon. This can only mean one thing -- during his first four years as an International Representative, Nunes knew he was not entitled to his per diem. It belies logic to assume that Nunes had cleared the "home city" issue with Williams and Presser, knew he was entitled to significant additional compensation, and for some unexplained reason, simply decided not to collect it.

2. When asked by General President McCarthy in 1989 why he was collecting per diem, Nunes represented to McCarthy that the "home city" issue had been settled with Williams and Presser. The record simply does not support such an assertion. Thus, it must be said that Nunes misrepresented the facts to McCarthy in an effort to continue collecting his per diem.

3. At the hearing, through Rohrer's testimony, Nunes attempted to rely upon Shea's alleged consent to the per diem allowances. The chronology of events, however, does not support Nunes' claimed reliance on Shea, and in fact suggests that the alleged reliance on Shea story was fabricated merely as a post-hoc rationalization to support Nunes' wrongful taking of the per diem allowances.

Accordingly, I find that the Investigations Officer has sustained his just cause burden of proving the balance of his charge.⁵

NUNES' DEFENSES

Nunes raises a host of defenses to the Investigations Officer's charge, none of which has merit. Each defense will be dealt with in short order.

The Failure To Issue Subpoenas

Nunes alleges that he was denied due process because I, in my role as Independent Administrator, denied his request to issue subpoenas to compel the attendance of witnesses at the hearing including, but not limited to, Shea. As I stated at the hearing:

Judge Edelstein is the person to see when one has subpoena issues
[Tr.23-22 to 23]

* * *

You chose not to go to [Judge Edelstein]. You had this right to go there, nobody stopped you from going there. You elected not to go there. That would have been the place to go if you disagreed with my statement that I did not have the power, then you go to Judge Edelstein. He has exclusive jurisdiction and this is

⁵ Once the embezzlement charge has been proved, it naturally follows that Nunes' conduct has also brought "reproach upon the Union." IBT Constitution, Article II, Section 2(a) and Article XIX, Section 6(b)(2).

what many lawyers have done when they disagreed with something I did or said. That is still available.
[Tr.136-25 to 137-8]

As I also stated to Nunes' counsel in my letter of April 19, 1991:

The Consent Order does not authorize me to issue subpoenas, and I have refused to do so in the past.
[Nunes Ex. L at p. 3]⁶

Past Decisions

Nunes also makes much of the fact that prior to the hearing I denied his request to supply a complete set of my prior decisions on disciplinary matters. As I stated in my April 19, 1991, letter to Nunes' counsel:

As for your request that I send you all of my prior decisions, I will not do so. My prior decisions are part of the public record in the Southern District of New York. Judge Edelstein has issued several decisions affirming my disciplinary rulings; and, where published, are reported in the Federal Supplement under the caption United States v. IBT.
[Nunes Ex. L at p. 2]

* * *

In addition, every month in The International Teamster magazine I publish a report to the membership informing them of my work and the work of my fellow

⁶ Moreover, on the issue of compelling Shea's testimony, I find it significant that while Nunes's counsel suggested that Shea was "totally unavailable" to him and did not "return his phone calls," Rohrer testified that after Nunes had been charged, he (Rohrer) talked with Shea twice to determine whether Shea's recollection was the same. The first conversation took place five or six weeks before the hearing and the second one took place two weeks before the hearing. Tr.97-6 to 22. While Rohrer seemed to suggest that Shea recalled his meeting with Nunes and his approval of Nunes' submission of his per diem for his time in San Leandro, given the inconsistencies in the record, I can not, and do not, accept Rohrer's testimony of Shea's recollection. Furthermore, while Nunes was present at the hearing and available to shed some light on the Shea story, he did not so testify.

Court-appointed officers. I suggest you obtain copies of my past reports and review those as well.
[Nunes Ex. L at pp. 3-4]

I reiterated this position at the hearing. Tr.23-8 to 16; Tr.140-10 to 14.

Apparently, Nunes' counsel made no effort to obtain copies of my prior decisions from the Clerk's office at the United States District Court for the Southern District of New York, nor did he ever ask the Investigations Officer for a copy of my prior decisions, Tr. 23-5 to 7; Tr.139-25 to 140-24. Moreover, he apparently made no effort to obtain copies of past issues of The International Teamster magazine. Tr.19-1 to 10.

The Investigations Officer's Reliance On Hearsay Documents

Nunes is also troubled by the fact that the Investigations Officer did not call any witnesses, but instead relied on "hearsay" documents. The Investigations Officer need not call witnesses to sustain his just cause burden. Hearsay, where reliable, is admissible in disciplinary hearings conducted under the Consent Order. United States v. IBT, 745 F.Supp 908, 914, aff'd, slip op., Docket No. 91-6052, at p. 11 (2d Cir. August 6, 1991).

The documents offered by the Investigations Officer and cited by me in this Decision are all clearly reliable.

Investigations Officer Ex. 1 is a February 5, 1982, letter to Nunes confirming General President Williams' hiring of Nunes as an International Representative. This document merely corroborates Nunes' own version of events.

Investigations Officer Exs. 3, 4, 5, 6, 7, 8 and 9 are Nunes' own expense reports. These were all signed by Nunes and Nunes did not challenge the accuracy of any of these exhibits.

Investigations Officer Ex. 10 (General President McCarthy's May 30, 1989, letter) and Ex. 11 (Nunes' June 9, 1989, reply) were submitted by Nunes himself as his own exhibits. See Nunes Ex. Q and R.

Nunes himself acknowledged receiving a copy of Investigations Officer Ex. 12 (General Secretary-Treasurer Mathis' letter of May 10, 1990) during his in-person sworn examination. See Investigations Officer Ex. 16 at pp. 26-27.

Investigations Officer Exs. 15 and 16 are transcripts of sworn statements of Nunes.

Investigations Officer Ex. 18 is an excerpt from the deposition transcript of Roy Williams in the underlying Civil RICO case, and was relied upon to establish the tenure of Williams' presidency and the commencement of Pressers' presidency. These dates were not disputed by Nunes.

Alleged Bad Faith Prosecution

Nunes argues that because a prior criminal indictment charging that Nunes had solicited something of value from an employer had been dismissed and that the federal judge handling that prosecution ordered the "Government to publicly apologize to Mr. Nunes for pursuing a frivolous prosecution," the "Justice Department has violated the [judge's] direct admonition and has continued to

pursue Nunes in a different jurisdiction." Nunes Post-Hearing Brief at pp. 5-6.

This argument is so twisted as to be devoid of any merit. Although the argument may be attacked on several levels, suffice it to say that the Investigations Officer is not the "Department of Justice" or the "Government." The Investigations Officer is an officer appointed by Judge Edelstein pursuant to a Consent Decree entered into between the Government and the IBT to settle a Civil RICO action. The conduct of the Court-appointed officers in disciplinary matters does not even constitute "state-action." United States v. IBT, slip op., Docket No. 91-6052 at pp. 5-8 (2d Cir. August 6, 1991).

**The Independent Administrator's Deference To
Constitutional Interpretations Of Union Officials**

Nunes also contends that I, as Independent Administrator, cannot substitute my own constitutional interpretations for those of past General Presidents. This argument is first based on the incorrect assumption that Williams, Presser and McCarthy had concluded that under Section 1(e), Nunes was entitled to his per diem for his time in San Leandro. As already explained, this is simply not the case.

Nevertheless, it has been established for some time now that I have the authority to substitute my own interpretations of the IBT Constitution when the IBT's interpretations are unreasonable. See Investigations Officer v. Friedman, et al., Opinion of the Independent Administrator, at pp. 15-33 (January 11, 1990), aff'd,

United States v. IBT, 743 F.Supp 155, 160-164 (S.D.N.Y. 1990),
aff'd, 905 F.2d 610, 617-620 (2d Cir. 1990).

Reasonable Cause For The In-Person Sworn Examination

Nunes argues that he was prejudiced by the Investigations Officer's refusal to articulate the "reasonable cause" for his taking Nunes' in-person sworn examination. Judge Edelstein has already dismissed this exact argument. 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 . . ." United States v. IBT, 735 F.Supp 519, 521 (S.D.N.Y. 1990)

Past Practice

Nunes suggests that the:

[E]vidence likewise demonstrated that the practice of having one's home located long distances from one's principal place of business is not and was not unique to Roy Nunes but, rather, that other International Representatives who maintain offices in the Bay Area while living in other locations away from the Bay Area likewise received per diem pay.

[Nunes' Post-Hearing Brief, at p. 28]

This statement is unsupported by the record. Apparently, Nunes is referring to the testimony of Rohrer. In his testimony, Rohrer stated that he lives some 400 miles away from his business office. Tr.70-6 to 16. Rohrer also stated that his predecessor had commuted a long distance to work for approximately five or six years. Tr.80-11 to 18. Rohrer never testified, however, that either he or his predecessor had ever collected a per diem expense from the International for their living expenses while away from

their residences. In fact, given that Rohrer did not know whether Nunes could collect his per diem when Nunes first asked Rohrer, it would seem that Rohrer never himself sought to collect per diem under similar circumstances. Tr.89-8 to 10 ("Because he maintained his home up in Oregon, I told him I didn't know whether he was entitled to it or not.") Moreover, Rohrer plainly testified that he "didn't think it was fair to live a thousand miles away and still hold office." Tr.75-19 to 20.⁷

In fact Nunes' counsel concedes that he was unable to "demonstrate that [Nunes'] receipt of per diem was fully consistent with past practice and the Constitutional interpretations applied to other International Representatives similarly situated," because he was not granted access to IBT records via a subpoena. Nunes Post-Hearing Brief at p. 17, n. 3.⁸

⁷ The following exchange, however, did take place during the direct examination of Rohrer:

Q. When you were up in Burlingame or San Bruno [the union office] where do you stay?

A. A motel.

Q. And you pay the daily rate in a motel?

A. Sure do.

Q. And you get three meals out, right?

A. Two and three.

[Tr.91-24 to 92-5]

If this was Nunes' attempt to establish some sort of past practice as to the payment of per diem expenses it fell far short of the mark. It is unclear from this exchange what, if any, per diem allowance Rohrer received from the International when he travelled from his home to his Union office and the circumstances surrounding any such allowance.

⁸ As for Nunes' claimed prejudice arising out of my position on the issuance of subpoenas I refer back to my earlier statements on the record. See pp. 14-15, supra. Moreover, I note that Nunes' (continued...)

Other Miscellaneous Arguments

While this decision attempts to address the significant arguments made by Nunes, to the extent it does not address each and every argument made in counsel's pre-hearing submissions, in his argument at the hearing, and in his post-hearing submissions, suffice it to say that all other arguments have been considered and are also dismissed as meritless.⁹

THE TOTAL AMOUNT OF NUNES' WRONGFUL PER DIEM PAYMENTS

The Investigations Officer's charge states that Nunes wrongfully availed himself of:

Per diem payments for days during the 1986, 1987, 1988, 1989 and 1990 when [he] knew [he was] not working outside [his] home city of San Leandro, California, where

⁸(...continued)

counsel's excuse for not contacting the IBT directly for its records is ludicrous. At the hearing, Nunes' counsel argued that since "the IBT is a party" and since Mr. Carberry "represent(s) the IBT as a real party in interest," Nunes' counsel would violate "the canons of ethics" if he communicated with the IBT directly. Such an argument only suggests a complete lack of understanding regarding the Consent Order and the disciplinary process conducted thereunder for more than two years now. As the Investigations Officer plainly stated at the hearing, "I do not consider the IBT to be my client. If he had asked me, I would have told him, I would have waived any objections to his contacting the IBT direct." Tr.23-1 to 4. Furthermore, to the extent Nunes suggests that the Investigations Officer concealed evidence that would tend to exonerate Nunes, at the hearing the Investigations Officer stated: "I saw no exculpatory material in my review of the files." Tr.59-11 to 12.

⁹ For example, at the hearing Nunes' counsel made a passing reference to "ex parte" communications between Mr. Carberry and my office. Tr.20-22 to 21-22. Such suggestion is outrageous and wholly unsupported. Painstaking efforts have been made since my appointment as Independent Administrator to maintain a "Chinese wall" between my office and Mr. Carberry's office in matters regarding disciplinary charges.

Local 291 is located, but instead [was] in or near San Leandro.
[Emphasis supplied]

The charge then goes onto itemize the total amount of wrongful per diem payments for each year -- the grand total being \$79,040. Although the Investigations Officer did not define the term "or near San Leandro" in his charge, it developed at the hearing that the Investigations Officer considered any per diem payments to Nunes while he was within 50 miles of San Leandro as improper. Tr. 44-9 to 11; Tr. 44-23 to 45-3.

Following the approach set forth in Flowers it simply cannot be said that any per diem paid to Nunes for travel within 50 miles of San Leandro, his "home city," was improper. It must be shown that the per diem payment was not necessitated by the "maintenance and prosecution of" Nunes' Union business, but rather was incurred "solely" as a result of Nunes' "personal propensities." Flowers, supra., 326 U.S. at 473. Perhaps, Nunes was involved in lengthy negotiations just 40 miles out of San Leandro. In such cases it may have been proper for Nunes to stay in a hotel at or near the sight of the negotiations and collect his per diem. Without more from the Investigations Officer it is impossible to simply categorize all trips with 50 miles of San Leandro as improper, and I will not do so here.¹⁰

¹⁰ The IBT is, of course, free to deny any per diem claims of Nunes' whether within 50 miles of San Leandro or not, if it determines Nunes is not entitled to those allowances.

Revaluating Nunes' expense reports from October 23, 1986 through May 1990, in this light and only tabulating his per diem claims for stays in San Leandro the following result is reached:

<u>Year</u>	<u>No. of Days</u>	<u>Total</u>
1986 (beginning 10/23)	36 ¹¹	\$ 4,680
1987	167 ¹²	21,710
1988	120 ¹³	15,600
1989	162 ¹⁴	21,060
1990	22 ¹⁵	2,860
		<u>\$65,910</u>

¹¹ See Investigations Officer Ex. 5A, wherein Investigations Officer itemizes days for which Nunes claimed per diem while in San Leandro during 1986.

¹² See Investigations Officer Ex. 6A, wherein Investigations Officer itemizes days, for which Nunes claimed per diem while in San Leandro during 1987. The Investigations Officer inadvertently included January 6, 1987, as a day Nunes was in San Leandro. Nunes' expense reports reveal, however, that he was in San Bruno on that day. The appropriate adjustment has been made.

¹³ See Investigations Officer Ex. 7A, wherein Investigations Officer itemizes days for which Nunes claimed per diem while in San Leandro for 1988. The Investigations Officer, however, failed to include August 7, 1988, in his schedule. As Nunes' expense report shows that he was in San Leandro on that day, the appropriate adjustment has been made.

¹⁴ See Investigations Officer Ex. 8A, wherein Investigations Officer itemizes days for which Nunes claimed per diem while in San Leandro for 1989. The Investigations Officer inadvertently included November 29, 1989, as a day Nunes was in San Leandro. Nunes' expense report reveals, however, that Nunes was in San Francisco on that day. The appropriate adjustment has been made.

¹⁵ See Investigations Officer Ex. 9A, wherein Investigations Officer itemizes days for which Nunes claimed per diem while in San Leandro for 1990.

THE PENALTY TO BE IMPOSED

Nunes' practice of collecting per diem allowances while in San Leandro was nothing more than a scam unbecoming a representative of a Union committed to ridding itself of corruption. When first approached by the IBT on his collection of the per diem, Nunes misrepresented to General President McCarthy that two past General Presidents had reached an understanding regarding the "home-city" issue. A review of the record before me, however, reveals that neither Williams nor Presser had ever addressed the issue. The recent reliance on the alleged Shea meeting also appears to be nothing more than a fabrication. If Nunes had received permission for Shea to submit his per diem claims, certainly he would have disclosed that fact to General President McCarthy in June of 1989, when McCarthy raised the issue and to the Investigations Officer when questioned under oath on the subject in 1990. Moreover, the timing of that alleged meeting simply does not comport with the commencement of Nunes' claims for his time in San Leandro.

Accordingly, I find it appropriate to suspend Nunes from the IBT for a period of five years. Nunes is to remove himself from all of his IBT-affiliated Union positions (including membership in the IBT and, of course, his position with Local 291) and draw no money or compensation therefore, or from any other IBT-affiliated source, for the period of his suspension. It is hoped that this punishment will send a clear message to Nunes and others in this

Union that financial wrongdoing, no matter what the guise, will not be tolerated.

I leave it to the IBT to pursue whatever collection efforts it wishes to undertake to recoup the monies wrongfully taken by Nunes.

NUNES' BENEFITS

As has been my practice, I asked Nunes' counsel to submit to me at the hearing a schedule of any and all benefits to which Nunes is entitled as well as a memorandum setting forth his position on my authority to impose sanctions impacting upon such benefits. In making this request, specific reference was made to my November 29, 1990, Supplemental Opinion in Investigations Officer v. Senese, et al., and Judge Edelstein's affirmance of that Opinion in United States v. IBT (Application (XVI)), 735 F.Supp 1181 (S.D.N.Y. 1990). Courtesy copies of these decisions, which set forth my approach to imposing sanctions on benefits, were forwarded to Nunes' counsel for reference. In the past, I have found it helpful to have information regarding benefits on file in the event an adverse decision is issued.

With the exception of informing me that "[n]o Teamster entities are paying for Mr. Nunes' legal defense in this matter" (June 3, 1991, letter from Nunes' counsel), no other specific information was provided regarding Nunes' benefits. By letter dated May 23, 1991, however, Nunes' counsel did write:

I do know that the only health and welfare and pension plans in which [Nunes] is a participant are governed either by the Constitution of the IBT, or are

Taft-Hartley funds to which his employers have either been signatory or subscribers.

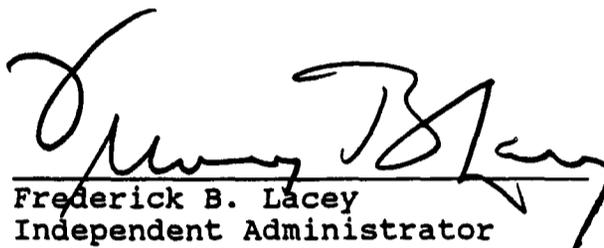
All of these funds are ERISA funds and I believe that neither [Nunes'] benefits nor the residual entitlement of his spouse or dependents can be interdicted by any decision in this matter. I do not believe that either you or the Court would have the authority to affect these benefits in any way.

Counsel is partly correct. Consistent with my decision in Senese, and consistent with the Supreme Court's prohibition on the preclusion of vested pension benefits, Guidry v. Sheet Metal Workers National Pension Fund, 110 S.Ct 680 (1990), if Nunes is a participant in any IBT-affiliated pension, health, welfare or other employee plan, he is entitled to all interest vested up to and including the date of the commencement of his suspension. Commencing with Nunes' suspension, however, and continuing throughout the period of his suspension, no further contributions are to be made on Nunes' behalf by the IBT or any IBT-affiliated source to any pension, health, welfare or other employee plan. Nunes is free, of course, to maintain whatever coverage he wishes through personal contributions.

Nunes' counsel's representations regarding attorneys fees is consistent with the well-settled principal that Union officials charged with misconduct and found to have committed misconduct may not have their legal fees paid by their Union. See, e.g., United States v. Local 1804-1, 732 F.Supp 434, 437 (S.D.N.Y. 1990).

THE VOLUNTARY STAY

I will stay the imposition of the penalties imposed herein until such time as Judge Edelstein reviews these findings and the penalties imposed, all of which I will submit to him by way of Application.


Frederick B. Lacey
Independent Administrator

Dated: September 6, 1991