

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	88 Civ. 4486 (DNE)
	:	
Plaintiff,	:	APPLICATION L OF THE
	:	INDEPENDENT REVIEW BOARD
v.	:	--OPINION AND DECISION OF
	:	THE INDEPENDENT REVIEW BOARD
INTERNATIONAL BROTHERHOOD	:	ON SECOND REMAND IN THE
OF TEAMSTERS, <u>et al.</u> ,	:	MATTER OF THE CHARGES
	:	AGAINST GENE GIACUMBO
Defendant.	:	
	:	

Pursuant to Paragraph O. of the Rules and Procedures for Operation of the Independent Review Board ("IRB") for the International Brotherhood of Teamsters ("IRB Rules"), Application is made by the IRB for ruling by the Honorable David N. Edelstein, United States District Judge for the Southern District of New York, on "the proper level of sanctions" to be imposed on former Local 843 member and former international Vice President Gene Giacumbo ("Giacumbo"). On October 31, 1995, the IRB rendered an Opinion and Decision filed by way of Application XXV. The original penalty imposed upon Giacumbo was remanded by Your Honor in your January 11, 1996, Order to the IRB for further consideration. On May 1, 1996, the IRB rendered its Opinion and Decision on Remand by way of Application XXX. This Application was remanded to the IRB by Your Honor in your January 9, 1997, Order.

Considering the severity of the charges proven and the record made on remand, the IRB has found that a permanent expulsion from

membership, including a permanent ineligibility from holding any office, is warranted.

It is respectfully requested that an Order be entered affirming the IRB's May 15, 1997, Opinion, if Your Honor finds it appropriate.

Dated: May 28, 1997

By: Frederick B. Lacey
Frederick B. Lacey
Member of the
Independent Review Board

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IN RE: GENE GIACUMBO : OPINION AND DECISION
International Vice President: OF THE INDEPENDENT
: REVIEW BOARD ON
: SECOND REMAND
-----X

I. INTRODUCTION

Pursuant to the Order issued January 9, 1997, by United States District Judge David N. Edelstein, the question before the Independent Review Board ("IRB") is "the proper level of sanctions" to be imposed on former Local 843 member and former International Vice President Gene Giacumbo ("Giacumbo").¹ The findings against Giacumbo made in our² Decision of October 31, 1995 ("Original Decision") and "Opinion and Decision of the Independent Review Board on Remand" of May 1, 1996 ("Remand Decision") have been, except as noted,³ affirmed.

II. ADDITIONAL RECORD MADE FOLLOWING REMAND

Following receipt of the January 9, 1997, Opinion and Order, the Chief Investigator by letter of February 3, 1997, recommended that "in determining the appropriate sanction to be impose[d]," we should consider, "Giacumbo's refusal to abide by his suspension

¹U.S. v. International Brotherhood of Teamsters (Application XXX of the IRB in re Giacumbo), Opinion and Order, January 9, 1997 at pp. 114 and 121, 951 F.Supp. 1113, 1158, 1160 (S.D.N.Y. 1997).

²IRB Member William H. Webster recused himself from consideration of this case and has not participated throughout these proceedings.

³The reversal of our conclusion concerning the testimony of Clarence Sam Theodus does not lessen the misconduct in question.

order including his presence in Philadelphia during the IBT convention in July 1996 when he met with at least one Teamster official" and his ongoing contacts with an IBT official. In support of that allegation the Chief Investigator proffered a transcript ("Tr.") of the sworn examination of Clarence Sam Theodus ("Theodus") conducted in Cleveland, Ohio, on December 23, 1996, by the Chief Investigator's office.

In his sworn examination, Theodus, a former Vice President of the International Union, testified that he and Giacumbo became acquainted in Orlando, Florida, at the 1991 IBT Convention in connection with Giacumbo's candidacy for International Vice President from the Eastern region and apparently became friends. At about the time of our Original Decision, Theodus was aware that Giacumbo had been suspended by us for initially six months. Tr. 14-15. Theodus became aware of our Remand Decision but thought the amended suspension was for two years. Theodus had been in contact with Giacumbo at least once a month from May 1, 1996, until the date of his sworn examination on December 23, 1996. The frequency of these contacts ranged from "twice in one day" to once during "a couple of weeks." Tr. 18-21. During some of those phone conversations Giacumbo and Theodus discussed local and international Teamsters business including the issue of the candidacy of Theodus for both local and international office. Tr. 31-33.

Theodus testified that Giacumbo was present in Philadelphia during the 1996 IBT Convention. Theodus recalled two specific

meetings with Giacumbo while the convention was in progress and that there was discussion of matters pertaining to the IBT election. Tr. 23-26.

The Chief Investigator concluded his letter of February 3, 1997, with the request that we consider that "Giacumbo has continued to willfully disregard the suspension the IRB imposed on him by attempting to remain involved in IBT affairs." Through his counsel, Giacumbo argued that the testimony of Theodus "does not support the view [of the Chief Investigator] that Mr. Giacumbo has engaged in any substantive involvement in IBT business." No objection to our use of the transcript nor a request for any hearing was made on behalf of Giacumbo⁴.

By letter dated February 26, 1997, we invited counsel for Giacumbo to submit any further response to the January 9, 1997, Order by March 10, 1997. We also inquired of Giacumbo's counsel as to whether or not the fine has been paid. We have been advised that it has not been paid.⁵

We accept the Theodus testimony offered by the Chief Investigator. We find that, following our May 1, 1996, Decision on Remand, Giacumbo has continued to willfully disregard the suspension we imposed on him, first, by attempting to remain involved in IBT affairs and, second, by, prior to the filing of his

⁴Letter of February 14, 1997, from Frederick Cohn.

⁵Letter of March 10, 1997, from Mr. Cohn.

bankruptcy,⁶ his continued failure to pay the \$1,600 fine imposed on him.

As the Independent Administrator found in his Decision of June 21, 1993, concerning Harold Friedman ("Friedman Decision"):⁷

In order for a suspension from the IBT to have any effect whatsoever, it must be implemented in both substance and form. In other words, Union power must be relinquished through all channels -- de jure and de facto; legitimate and illegitimate; denotative and connotative. To comply with a suspension order, it is not merely enough for a Union leader to simply stop using his title. Rather, he must not seek to exert any measure of authority over the Union. He must not put any pressure, no matter how subtle, upon those who have learned to follow his lead. He must not seek to give direction of any type to any IBT body, no matter what the means. In short, he must not in any way attempt to give the impression, either to the Union leadership or membership that he still retains any power of any sort.⁸

⁶The first assertion that Mr. Giacumbo had filed a bankruptcy petition is found in the letter of March 10 from his counsel. Based on this record and because Giacumbo has provided no evidence or other assertion that he was unable to pay the fine, we cannot find that the bankruptcy prevented Giacumbo from paying the fine during the substantial period of time following its imposition in our Original Decision and reimposition in our Decision on Remand.

⁷Decision of Independent Administrator, submitted with Application CXVII by the Independent Administrator, affirmed by Judge Edelstein in U.S. v. IBT ("Friedman") 838 F.Supp 800, aff'd on appeal by the U.S. Court of Appeals for the Second Circuit in an unpublished decision in cases 94-6004, 94-6006 by Order filed July 28, 1994. Although the June 21, 1993, decision referred to is captioned as "Gerald Yontek, et al.", because we refer only to Friedman's conduct, we refer to the Independent Administrator's decision as Friedman, not Yontek.

Harold Friedman had previously been disciplined. See, Investigations Officer v. Friedman and Hughes, Decision of Independent Administrator (January 11, 1990) aff'd, United States v. IBT, 735 F.Supp. 506 (S.D.N.Y. 1990), aff'd, 905 F.2d 610 (2nd Cir. 1990).

⁸Friedman Decision at pp. 9-10.

When affirming the Independent Administrator's Decision, Judge Edelstein held:

Suspension is one of the most useful penalty options available under the Consent Decree. Properly enforced, it allows the removal of individuals from office or trusteeship positions in the Union where they may be dis-serving the membership and undermining the IBT Constitution and, indeed, the Union itself. The availability of suspension as a sanction in IBT disciplinary matters lends to the Consent Decree credibility and respect, and sends to the membership the message that its Union is under the direction of honest officials that respect the IBT Constitution. By contrast the suspension that is enforced only in form undermines the Consent Decree and sends the message to the membership that dishonest IBT officials are immune from the law. Moreover, the spectacle of a suspension that has become a caricature of itself deflates the morale and dampens the zeal of those who attempt to live within the law and work within the rules.

The suspended IBT official must approach his suspension with a grave sense of respect. He must accept its provisions not only in form but also in substance and spirit.

838 F.Supp. at 810-11.

The Independent Administrator's Friedman Decision concludes:

Further, on a practical level, suspension orders must be vigorously enforced, lest the penalties imposed become meaningless exercises in futility; and once the penalties are rendered meaningless so too will a violation of the rules become meaningless. As such it is necessary that an individual's violation of his suspension be met with substantial penalties.

Friedman Decision, p. 27. In affirming the imposition of expulsion by the Independent Administrator in the Friedman case, Judge Edelstein ruled:

By violating the terms of his suspension, Friedman undermined the very means by which the Independent Administrator enforces the Consent Decree. . . . His actions represented a methodical attempt to by-pass the obligations placed on him by the IBT Constitution and a

cavalier disregard for the seriousness of his original sanctions. As a former President of IBT Local 507 and figure of prominence within his local union community, Friedman, through his various violations, communicated a devastating message to the IBT Local 507 membership -- that disciplinary sanctions imposed pursuant to the Consent Decree may be disregarded when they conflict with the personal ambitions of a Union officer. Such a message corrodes the morale and zeal of those members of the IBT that attempt to live within the law and work within the rules. This message is wrong and will not be countenanced by this Court.

838 F.Supp. at 816. Friedman's actions created the appearance, if not the reality, that he and his wife continued as the shadow leaders of the Local Union and the surrounding community. Even if those actions be seen as more harmful to the Local Union and to the IBT as an institution than Giacumbo's efforts to run for office, to continue to play a role in IBT politics and to flaunt the payment of a relatively small fine, the injury to the integrity of the Consent Decree is just as great. We find that Giacumbo's actions communicated the "devastating message ... that disciplinary sanctions imposed pursuant to the Consent Decree may be disregarded when they conflict with the personal ambitions of a Union officer ...". Either type of misconduct is just as "corros[ive] to the morale and zeal of those members of the IBT that attempt to live within the law and work within the rules."

We find that Giacumbo has failed to "approach his suspension with [the] grave sense of respect" as is instructed by Judge Edelstein in the Friedman Decision.⁹ As was found in Friedman, we

⁹The facts of the Friedman case vary somewhat from the facts of this case; however, the principles of strict adherence to disciplinary sanctions apply to this record. Giacumbo had the benefit of both the Friedman ruling and our Decision on Remand

now also find as to Giacumbo that "[b]y violating the terms of his suspension, he undermined the very means by which . . . the Consent Decree . . ." is enforced. As in Friedman, he has shown "a cavalier disregard for the seriousness of his original sanctions . . ." as well as of his modified sanctions.

In finding our three-year suspension from membership and office to be "so lenient as to be arbitrary and capricious", Judge Edelstein stated:

By repeatedly attempting to minimize the severity of his misconduct and by steadfastly asserting that the IRB and this Court should turn a blind eye to his 'minor' infractions, Giacumbo has manifest a continuing disdain towards a rule of law and a lack of respect for the rank and file Union members that he purports to represent. This Court finds these characteristics intolerable in a Teamster leader, and thus, cautions all Teamsters against holding oneself out as beyond the law's reach and failing to turn square corners in the stewardship of their Union. Doing so is the surest route to harsh, enduring penalties.

951 F.Supp. 1158, 1160.

By his conduct in violating the terms of his suspension initially and through his political activity described in our Decision on Remand and more recently in connection with the 1996 IBT convention, which occurred three months after our Decision on Remand was issued, Giacumbo violated the proscriptions by which the Consent Decree is enforced. The Independent Administrator stated in the Friedman Decision, discussed at p. 4 above, that:

... He must not seek to exert any measure of authority

which, by any standard, informed him that, if he had not previously realized, the serious nature of his suspension and that the pendency of appeals had no effect in staying his suspensions.

over the Union. He must not put any pressure, no matter how subtle, upon those who have learned to follow his lead. He must not seek to give direction of any type to any IBT body, no matter what the means

Friedman Decision at p. 22.

Unlike the almost limitless protections of speech and association of the First Amendment to the U.S. Constitution against governmental intrusion, the internal union political rights recognized and protected by Title I of LMRDA, Sections 101-105, 29 U.S.C. 411-415, are "subject to reasonable rules and regulations in [the labor] organization's constitution and bylaws." Section 101(a)(1) of LMRDA, 29 U.S.C. 411(a)(1), including discipline imposed consistent with the procedural safeguards of Section 101(a)(5) of LMRDA, 29 U.S.C. 411(a)(5). The Courts have rejected arguments that these disciplinary proceedings are "state action" and have rejected the position that internal union political practices enjoy broad First Amendment protections. When rejecting the same argument, Judge Edelstein held in the Friedman Decision:

The Independent Administrator, acting within his authority to impose sanctions upon violators of the IBT Constitution, is not a state actor. ... Moreover, even if the Independent Administrator were a state actor, his decision would not violate Friedman's First Amendment rights. Clearly, Friedman was not free to speak or associate in a manner that violated his one-year suspension and the statutory debarment anymore than he was free to embezzle funds or engage in racketeering activity, the types of conduct that resulted in his suspension and debarment in the first place. Nothing in the First Amendment releases Friedman from the terms of his suspension or his statutory debarment and to the extent that Friedman's words and patterns of association were more restricted than those of his fellow IBT members, such restrictions were an inherent aspect of his suspension and his debarment and can hardly be cast as a violation of his constitutional rights.

U.S. v. Teamsters (Friedman), 838 F.Supp. 800, 811-12 (S.D.N.Y. 1993), affirmed by unreported opinion, n. 4 supra.; U.S. v. IBT ("Giacumbo"), 951 F.Supp. 113, 1155-56 (S.D.N.Y. 1997).

"Expulsion ..." and "denial to hold any office permanently ..." are among the remedies which may be imposed in a disciplinary proceeding under Article XIX, Section 10(a) of the IBT Constitution. "Suspension" or "expulsion" are also forms of union discipline recognized in Section 10(a)(5) of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. 411(a)(5).

Under the Consent Decree, expulsion is not limited to organized crime cases nor are persons who claim to be, or are, reformers immune from the obligations of the Consent Decree. Lifetime expulsion has been imposed on members whose conduct is inherently contrary to the interest of the membership such as nepotism or favoritism,¹⁰ dual unionism,¹¹ use of a local to obtain benefits for the individual officer,¹² violence¹³ and

¹⁰In Re Article XIX Charges Against Clarence Lark, Jr. and John Taylor, Decision of the General President dated July 1, 1996, as modified by letter from the General President of September 16, 1996, appeal to IRB denied November 13, 1996.

¹¹In Re Article XIX Charges Against Local 813 Member Pasquale Sottile, letter from General President dated June 6, 1995 and Hearing Panel, Finding and Recommendations dated April 24, 1995 (use of local union for own benefit, not affording other members of the Local opportunity to obtain contractual benefits); In Re Article XIX Charges Against Vincent Sombrotto and Edwin Gonzalez, Local Union 966, Findings and Recommendation of Hearing Panel dated April 7, 1995, and Decision of the General President dated May 16, 1995.

¹²In Re Article XIX Charges Against Theodore J. Brovarski; Application XL of the Independent Review Board to Judge Edelstein concerning Carmine Fusco, Local 1205, Brooklyn, NY, dated November 7, 1996, so ordered by Judge Edelstein November 18,

embezzlement.¹⁴ Violation of discipline imposed pursuant to the Consent Decree has already been recognized as a ground for permanent ban from holding office in Friedman.

Giacumbo has flaunted his disregard for our discipline. First, when he was suspended from office and membership by our Original Decision,¹⁵ he participated in the nominations for the 1996 Convention. Even when his hand was called, he continued to flaunt our disciplinary process by asserting in the appeals procedure under the Consent Decree that, by some unexplained means, he remained eligible to run for office. Even after the initial remand from Judge Edelstein and our decision on remand, Giacumbo

1996. In Re Article XIX Proceedings Against Daniel Zenga and Andy Bellemare, Decision of Executive Board of Joint Council 10 dated April 5, 1993 as modified and approved by the IRB July 21, 1993 (also dual unionism); Application XXVII of the Independent Review Board to Judge Edelstein (September 11, 1996), so ordered by Judge Edelstein September 12, 1996, concerning Nicholas Parise, Jr. and Nicholas Parise, Sr. (operating local for personal benefit and not for benefit of members); Application XXXVI of the Independent Review Board to Judge Edelstein dated September 4, 1996, so ordered by Judge Edelstein September 9, 1996 (providing false information to obtain membership); In Re Article XIX Proceedings Against Larry D. Parker, Decision dated December 19, 1995, appeal denied and sanction approved by the IRB April 4, 1996, and Application XLII of the Independent Review Board to Judge Edelstein dated December 18, 1996, so ordered December 20, 1996, concerning Josef Ross of Local 813.

¹³U.S. v. IBT (Cherilla), 782 F.Supp. 256, 261 (S.D.N.Y. 1992) ("those who consider violence an acceptable form of political expression have no place in this Union.")

¹⁴In Re Article XIX Charges Against David Morris, Decision of the General President dated March 6, 1996.

¹⁵Giacumbo nominated others and allowed himself to be nominated for the position of Convention Delegate at the meeting of his Local Union held on February 4, 1996. That local meeting occurred after the January 11, 1996, Remand Order entered by Judge Edelstein but before our Remand Decision of May 1, 1996.

displayed his continuing disregard for the discipline imposed on him by participating in union affairs and the union political processes. Finally, at least prior to his recent filing of his bankruptcy petition, he had not paid the fine imposed upon him, as is required by the IBT Constitution, Article XIX, Section 10(a), nor did he deposit the amount of the fine pending his appeal with the treasury of the IBT or any subsidiary body as required by Article XIX, Section 10(a) or (b) of the IBT Constitution. The fine represents the same amount of money which he, before being fined, repeatedly promised, but failed, to repay to the IBT.

By ignoring our discipline, Giacumbo has flaunted the Consent Decree. The remand order instructs, and experience has taught us, that leniency is not appropriate when it comes to enforcing the discipline under the Consent Decree under circumstances such as these. The directive of Judge Edelstein for Union officers and members to "cut square corners" can best be achieved by strict adherence to sanctions imposed under the Consent Decree.

We caution that violation of disciplinary sanctions imposed under the Consent Decree will be considered for the "harsh, enduring penalties," prescribed by Judge Edelstein.

CONCLUSION

Upon reconsideration of the sanctions imposed in light of the severity of the charges proven and in light of the record made on remand, we find that a permanent expulsion from membership, which necessarily includes a permanent ineligibility from the holding of

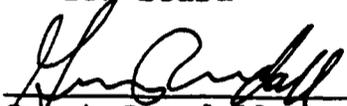
any office, is warranted. Therefore, the following sanctions are imposed:

1. Giacumbo is suspended from membership permanently.¹⁶

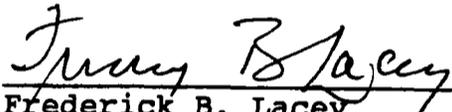
2. Any IBT-affiliated entity is barred from paying Giacumbo any benefits, gratuities, attorney fees, severance payments or gifts from Local 843 or any other IBT-affiliated entity, except that he may receive any that are presently vested and any benefit provided the union members pursuant to a collective bargaining agreement with his employer.

¹⁶So long as the Consent Decree remains in force, this expulsion is permanent unless modified by the U.S. District Court for the Southern District of New York. Article XIX, Section 10(e) of the IBT Constitution, allows for a reinstatement to membership only by the action of the General Executive Board, subject to review of the Ethical Practices Committee. Under the terms of the Consent Decree, such reinstatement actions would have to be approved by the Court.

Members of the Independent
Review Board



Grant Crandall



Frederick B. Lacey

Dated: May 15, 1997

United States District Court
Southern District of New York

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United States of America, :

Plaintiff, :

vs. :

International Brotherhood
of Teamsters, et al., :

Defendants. :

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IN RE: APPLICATION L OF THE
INDEPENDENT REVIEW
BOARD

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ORDER
88 Civ. 4486

EDELSTEIN, Senior District Judge:

WHEREAS in an Opinion and Order dated May 15, 1997 ("the May 1997 Opinion"), this Court affirmed the findings of the Independent Review Board ("IRB") in Application XXX of the IRB regarding Gene Giacumbo; and

WHEREAS also in the May 1997 Opinion, this Court rejected the IRB's proposed sanctions against Giacumbo, and remanded Application XXX to the IRB for further consideration of the proper level of sanctions to be imposed on Giacumbo; and

WHEREAS on May 28, 1997, the IRB transmitted to this Court Application L of the IRB regarding the proper level of sanctions to be imposed on Giacumbo (Opinion and Decision of the Independent Review Board on Second Remand (Gene Giacumbo), United States v. International Bhd. of Teamsters, 88 Civ. 4486 (May 15, 1997)); and

WHEREAS in Application L, the IRB informs this Court that it "invited counsel for Giacumbo to submit any further response" regarding the appropriate level of Giacumbo's sanctions, id. at 3; and

WHEREAS also in Application L, the IRB informs this Court that Giacumbo has not paid the fine imposed on him by the IRB, and that following the IRB's earlier Opinion and Decision regarding Giacumbo, that "Giacumbo has continued to willfully disregard the suspension [the IRB] imposed on him, first, by attempting to remain involved in IET affairs and, second, by, . . . his continued failure to pay the \$1,600 fine imposed on him," id. at 3-4"; and

WHEREAS as a result, the IRB found "that Giacumbo has failed to 'approach his suspension with [the] grave sense of respect' as is instructed" by this Court in Teamster-related caselaw, and that Giacumbo "[b]y violating the terms of his suspension, he undermined the very means by which . . . the Consent Decree . . . is enforced," id. at 6-7; and

WHEREAS accordingly, the IRB found "that a permanent expulsion from membership, which necessarily includes a permanent ineligibility from the holding of any office is warranted," and imposed the following sanctions:

1. Giacumbo is suspended from membership permanently.
2. Any IBT-affiliated entity is barred from paying Giacumbo any benefits, gratuities, attorney fees, severance payments or gifts from Local 843 or any other IBT-affiliated entity, except that he may receive any that are permanently vested and any benefit provided union members pursuant to a collective bargaining agreement with his employer.

Id. at 11-12; and

WHEREAS in a letter dated June 13, 1997, Frederick H. Cohen, counsel for Giacumbo, informs this Court that he "respectfully rel[ies] on the earlier submissions regarding disproportionality of the sanctions imposed," (Letter from Frederick H. Cohen to Judge David N. Edelstein (June 13, 1997)); and

WHEREAS in a letter dated June 24, 1997, the office of the Chief Investigator of the IRB submits to this Court that "the IRB's decision should be affirmed," (Letter from Celia A. Zahner to Judge David N. Edelstein (June 24, 1997)); and

WHEREAS in a letter dated July 3, 1997, the United States Attorney for the Southern District of New York "asks the Court to affirm the IRB's . . . decision permanently barring Giacumbo from the [IBT]," (Letter from Assistant United States Attorney Beth E. Goldman to Judge David N. Edelstein (July 3, 1997)); and

id. at 11-12; and

WHEREAS having reviewed all submissions regarding the appropriate level of sanctions to be imposed on Giacumbo, this Court finds the IRB's recommended sanctions are proportionate to the severity of the misconduct with which he was charged and which this Court found had been proven; and

WHEREAS this Court further finds that the IRB's recommended sanctions are appropriate because Giacumbo's continued and blatant disregard for the sanctions previously imposed upon him by the IRB manifest a willful disrespect for the authority of

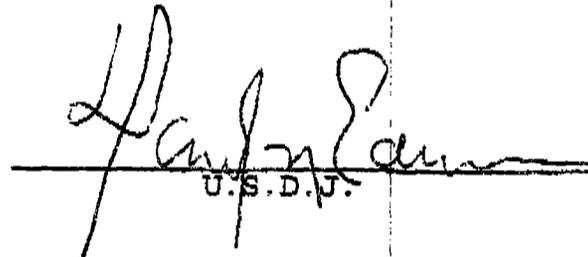
both the IRB and this Court; and

WHEREAS accordingly, this Court finds that Application L of the IRB should be granted;

IT IS HEREBY ORDERED THAT Application L of the Independent Review Board regarding the proper level of sanctions to be imposed on Gene Giacumbo is GRANTED.

SO ORDERED.

Dated: New York, New York
July 28, 1997


U.S.D.J.