INVESTIGATIONS OFFICER, Claimant, v. LYNN WELLS, Respondent.	:	DECISION OF THE INDEPENDENT ADMINISTRATOR

This matter relates to charges filed by the Investigations Officer against Lynn Wells (referred to as "Respondent"), President of Local 1111 in Houston, Texas. A hearing was held before me on these charges and post-hearing briefs were thereafter submitted by the parties.[1] Having reviewed the evidence and the post-hearing briefs, I find that the Investigations Officer has met his just cause burden in proving Charge Two. The Investigations Officer, however, has not meet his burden with respect to Charge One.

Respondent requests that I not issue a decision in this matter on the grounds that he has decided to formally resign from his position at Local 1111 and retire from the IBT.[2] Respondent's request is essentially based on the issues of mootness and lack of jurisdiction. I deny Respondent's request because his voluntary resignation, even though characterized as "irrevocable" by his

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[1] No transcript exists of the hearing as the Respondent elected not to have a court stenographer present. As is always my practice, I leave it to the Respondent to make arrangements for his own court reporter at his own expense, if he so desires.

[2] This request was presented in a letter from Respondent's counsel dated February 20, 1992. Attached to that letter was Respondent's February 22, 1992, notice of resignation to the Local 1111 Executive Board.

counsel[3], would not prevent him from returning to the IBT at some future date. See United States v. IBT, 745 F. Supp. 189, 192 (S.D.N.Y. 1990).

I. The Charges

There are two charges at issue. The Investigations Officer has first charged Wells with:

> [V]iolating [his] fiduciary duties to the Local's members, acting wrongfully and in a manner to bring reproach upon the International Brotherhood of Teamsters (IBT) and violating [his] oath in violation of Article II, section 2(a) and Article XIX, section 6(b)(1) and (2) of the IBT constitution.
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> To wit, while President and Principal Officer of Local 1111, [Wells] accepted $26,041.50 over 26 months from May 6, 1989 to June 8, 1991 from an employer of local members, Cinema Trucks of Texas. This money was paid to [him] for two make-up trailers [he] owned. These trailers were rented by various movie companies who hired Local 1111 members. Cinema Trucks took 10% of the payments and the rest was passed to [Wells].

The Investigations Officer next charged Wells with:

> [A]cting in a manner to bring reproach upon the IBT, violating [his] oath, [and] violating [his] fiduciary duties, in violation of Article XIX, section 6(b)(3) of the constitution.
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> To wit, on March 23, 1991, [Wells] caused union property Lot six (6) block five (5) of Turtle Creek, Section I, a subdivision in Montgomery County, Texas (approximately one and one-half acres) to be deeded to [him] for the sum of $10.00 (ten), when in fact it was valued in excess of $15,000.00. The transfer was made allegedly in lieu of unused vacation not taken by [him]. There are no records reflecting that [Wells] failed to take vacation. The minutes of the board meeting did not

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[3] Respondent's counsel stated in his February 25, 1992, letter to me that "Mr. Wells' decision to permanently retire is irrevocable."

> indicate how many weeks of vacation [he] failed to take and for which [he was] being compensated.

II. Constitutional Provisions

The charges against Respondent implicate two provisions of the IBT Constitution. First, Article XIX, Section 6(b), sets forth a non-exhaustive list of grounds for bringing disciplinary charges. That list includes:

> (1). Violation of any specific provision of the Constitution, Local Union Bylaws or rules of order, or failure to perform any of the duties specified thereunder.
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> (2). Violation of oath of office or of the oath of loyalty to the Local Union and the International Union.
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> (3). Embezzlement or conversion of union's funds or property.

Second, Article II, Section 2(a), is also implicated. This section, which contains the oath of office mentioned in Article XIX, Section 6(b)(2), mandates that all members shall conduct themselves "at all times, in such a manner as not to bring reproach upon the Union . . .."

III. Charge One

A. Background

Charge One results from Respondent's lease of his two "make-up" trailers[4] to Cinema Trucks of Texas ("CTT"), a company which rents production equipment, including Respondent's trailers, to the

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[4] The trailers were divided into dressing and make-up rooms for the use of actors during filming.

filmmaking industry. CTT was established in an effort to attract filmmakers to Houston, Texas. It was believed that California filmmakers would work in Houston if proper equipment was available. Thus, CTT was established to provide heavy equipment, such as Respondent's trailers, so that the production companies would not have to transport such equipment from California at high costs. Of course, CTT would profit from this arrangement. IO-2 at 47-49. Local 1111 also had an interest in Houston filmaking as it had a "movie division" which represented employees who worked at production sites. IO-5 at 17-18.[5]

Respondent has no ownership interest in CTT, IO-5 at 19, although, on behalf of the Local, he co-signed a loan for CTT to get it start up capital. IO-2 at 49-50. Respondent did this to initiate business in the movie industry because, as Respondent tells it, "we wasn't getting any movies in town and some of our people were damn near starving to death in the movie division . . .." IO-2 at 47.

IBT Local 1111 members who were employed by the various movie production companies during filming were often paid at rates below union wages and without certain benefits because no general employment contracts between the production companies and the Local existed. Id. at 18; IO-2 at 55-57. Despite the fact that it has jurisdiction over film production employees, Local 1111 has not

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[5] Citations to "IO" or "R" correspond to Investigations Officer's Exhibits and Respondent's Exhibits, respectively. Where applicable, references are cited by page number. The reference "at 17-18" corresponds to pages 17 through 18.

made a recent concerted effort to either negotiate contracts with the production companies or improve benefits for the Local's members. IO-2 at 57-58.

CTT rented Respondent's trailers to various production companies employing Local 1111 members. IO-7; IO-5 at 13-14. The $300.00 per week rental rates charged were uniform CTT prices and were occasionally reduced depending on the customer's financial condition such that smaller production companies might receive a discount. IO-5 at 22-23. The rental payments were made to CTT which then paid Respondent after deducting ten percent as an upkeep and maintenance fee. IO-6; IO-5 at 16, 21. Respondent received approximately $26,000 in rental payments from CTT between May 1989 and June 1991. IO-6.

The production companies that rented Respondent's trailers through CTT had no direct dealings with Respondent. None of the contracts between CTT and the production companies linked Respondent to CTT. IO-7. CTT's advertising implied that Respondent's trailers were part of CTT's physical inventory. R-1. A photograph presented at the hearing showed that one of Respondent's trailers had "Cinema Trucks of Texas" painted on the side. Id. Further, the production companies were not on notice that the trailers were stored on Respondent's property because the drivers assigned to pick up the trailers were usually Local 1111 members and not direct employees of the production companies. IO-5 at 16-17.

B. The Merits of Charge One

The Investigations Officer charges that Respondent's receipt of rental fees, through CTT from the film production companies, was unlawful, constituted a breach of his fiduciary duties, violated his oath of office and brought reproach upon the IBT. In support of this charge, the Investigations Officer asserts that Respondent's conduct violated section 302 of the Labor-Management Relations Act of 1959, 29 U.S.C. §186. Although I am not bound by this statute in deciding the charge against Respondent, reference to it is helpful. In light of the express exception in the statute for the purchase of commodities at prevailing market prices, §186(c)(3), I find that the Investigations Officer has not met his just cause burden in proving that Respondent's receipt of rental fees was unlawful or brought reproach upon the IBT.

Section 186 provides in relevant part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value --
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> > (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
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> > (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or who would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
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> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with an intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.
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> (b)(1) It shall be unlawful for any person to request, demand, receive, or accept or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).
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> (c) The provisions of this section shall not be applicable...(3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business . . .. [Emphasis supplied].

The Investigations Officer argues that because section 186 should be narrowly construed, equipment rentals or leases are not contemplated by the "sale or purchase" language in subsection (c)(3) and as such, the exception does not apply to the rental fees Respondent received. In support of this position the Investigations Officer relies on United States v. Ricciardi, 357 F.2d 91 (2nd Cir. 1966), cert. den., 384 U.S. 942 (1967). Ricciardi, however, involved direct payments of money by employers of union members to union's representatives in order to maintain labor peace. The case does not shed light on the validity of a lease or rental arrangement in the context of subsection (c)(3).

Respondent cites to United States v. Carlock, 806 F.2d 535, 545, n. 8 (5th Cir. 1986). There, union officials were convicted of, inter alia, extorting excessive rental payments under the threat of labor unrest for unwanted, old, and in one instance,

inoperable construction equipment. The Carlock court expressly stated that "a substantial question exists as to whether §186(c)(3) applies to rentals." The court, however, found that this was "an issue we do not decide today." Id. The defendants in Carlock were convicted pursuant to the jury's finding that the rentals were not at market rates. The Court of Appeals affirmed, finding that there was "sufficient evidence . . . to support the jury's conclusion . . .." Id. at 544.

I have previously found, in the context of charges such as these, that 29 U.S.C. §186 is best interpreted as a prohibition on extortion and shakedowns of employers by union officials and a prohibition of the receipt of direct tangible benefits, such as cash gifts, by union representatives from employers. Investigations Officer v. West, et al., Decision of the Independent Administrator, at p. 11 (February 13, 1992). With this in mind, interpreting "purchase" to include rental or lease would not frustrate this interpretation. In the context of these charges, the key to section 186(c)(3) does not lie in its "sale or purchase" language, rather, it lies in the requirement that any sale or purchase be "at the prevailing market price in the regular course of business." This ensures that a union official does not exploit his position by overcharging employers for commodities purchased from the union official or by creating new and unrelated business opportunities to do so. If the drafters of section 186 sought to prevent all business dealings between union official and labor employer they could have simply left out the exception in (c)(3).

Here, there has been no showing that the rental fees paid to Respondent were not at prevailing market rates. On the contrary, the evidence established that the rates charged were reasonable and were occasionally discounted for smaller production companies -- precisely the size of company more susceptible to labor extortion practices. Furthermore, it was not demonstrated that these production companies were even aware that the make-up trailers they were renting were owned by Respondent, a union representative, or that rental fees were forwarded to him.

I therefore find that the Investigations Officer did not meet his just cause burden of proof with respect to Charge One.

IV. Charge Two

A. Background

Respondent was appointed President of Local 1111 in 1980 and has held the position of President-Business Manager since. IO-2 at 3. Local 1111 is relatively small, having only about 650 members. Id. at 12. Respondent is the only paid employee of the Local, aside from one clerical employee, and is responsible for all operations. Id. at 13.

The organization and structure of Local 1111 could best be characterized as loose. The Local holds no general membership meetings. Id. at 18. Rather, Respondent sets up and attends separate membership meetings for the employees of each company that has a collective bargaining agreement with Local 1111. Id. Attendance at these meetings is low; "[t]en percent would be a good

meeting . . .."[6] Id. at 16. Further, the minutes from prior General Executive Board Meetings are not read verbatim to the members but are summarized. Id. at 16-17.

During the period in which Respondent acted as President he apparently took little if any vacation and allegedly accrued six or seven years' back vacation time. Id. at 23; IO-21 at 8. No records of Local 1111 were produced by either the Investigations Officer or Respondent to deny or prove this claim because the Local did not keep track of accrued vacation.[7] Respondent stated that he was entitled to four weeks of vacation per year.[8] IO-2 at 24.

On March 23, 1985, Local 1111's General Executive Board issued a Resolution authorizing Respondent, who was then President of the Local, to purchase a 1.4 acre lot[9] in the Turtle Creek subdivision

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[6] The IBT may wish to consider the propriety of this practice, especially where attendance is so low. Membership attendance and participation at meetings is vital to insure that the membership is kept informed of the Local's activities and the actions of the officers. It is only through a well informed membership that a Local is run democratically and for the benefit of its members.

[7] To avoid this problem in the future, IBT Locals should pay careful attention to record keeping duties. It would take only minimal effort to record, on a regular basis, used or unused vacation time. The IBT should formally advise its Locals on proper record keeping methods. Moreover, the IBT may also wish to develop a policy preventing the accrual of large amounts of vacation time.

[8] Respondent calculates the value of his accrued vacation to equal $28,000. This is based on Respondent's seven years of service to the Local with four weeks of vacation per year at $1,000 per week. Respondent's Memorandum at 13. Respondent stated that he had "six or seven" years of service and calculated his vacation based on seven years.

[9] This lot is described as Lot 6, Block 5, Turtle Creek, Montgomery County, Texas, and was recorded under Cabinet C, Sheet

(continued...)

of Montgomery County, Texas. IO-10. On March 29, 1985, this lot was purchased from the owners of record for ten dollars and assumption of the $11,236.08 mortgage remaining on the property. IO-8. The property was allegedly purchased as an investment by the Local. IO-21 at 7-8; IO-2 at 26, 30. The investment strategy was a failure as the real estate market in the area declined. IO-2 at 27. Recent estimates of the value of the land ranged from $7,000 to $18,500. R-2; IO-11.

Testimony evidenced that Local 1111 is not strong financially. IO-21 at 8. Consequently, there was concern that the Local could not pay Respondent in cash for Respondent's unearned vacation.[10] Id.; IO-2 at 27. It was then suggested during a November 1990 Executive Board meeting that the lot in Turtle Creek be swapped for Respondent's accrued vacation. IO-22 at 11. At that meeting the motion was voted on and approved by the Executive Board.[11] IO-21

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[9](...continued)
11, Map of Records of Montgomery County, Texas. IO-8. At the time, Respondent's son, M.L. Wells, owned adjoining property--Lot 5, Block 5. Wells' son purchased an additional lot, Lot 4, Block 5, also an adjoining lot, on May 28, 1991.

[10] This concern was highlighted by the fact that several years prior another Local 1111 officer, former Secretary-Treasurer Ralph Waymire, had accrued $57,000 of severance pay when he retired. IO-2 at 32. The Local was forced to borrow against a $100,000 bank CD in order to compensate Waymire. Id. at 34-35. Consequently, Local 1111's Executive Board desired to avoid a similar situation with Respondent. IO-22 at 11-13.

[11] It appears, however, that several board members were not made aware of either the value of the land being traded, as no appraisal had been done, or the amount and value of Respondent's unpaid vacation claim. IO-18 at 5; IO-23 at 9.

at 8. The general membership, however, was not given the opportunity to vote on the swap. IO-2 at 16-17, 31. On November 30, 1990, the Turtle Creek lot was deeded to Respondent. IO-8.

B. The Merits of Charge Two

Based on Local 1111's transfer of property to Respondent in lieu of his allegedly accrued and unused vacation time, the Investigations Officer charged Respondent with violating his oath, breaching his fiduciary duty and bringing reproach upon the IBT. In support of this charge, the Investigations Officer argues that the land transfer to Respondent "constituted arrogant theft" and violated Local 1111's by-laws. Investigations Officer's Memorandum, at 9.

Upon consideration of the evidence presented and the submissions of both parties I find that the Investigations Officer has failed to prove that Respondent embezzled from Local 1111 when the property was transferred to him in lieu of vacation pay. In support of the embezzlement allegation, the Investigations Officer relies on two factors: (1) that the property bordered another parcel owned by Respondent's son; and (2) the transfer to Respondent was not put to a vote of the general membership. Without more, I cannot find that Respondent acted with "fraudulent intent to deprive [Local 1111] of its funds." United States v. Welch, 728 F.2d 1113, 1118 (8th Cir. 1989). See also Investigations Officer v. Vitale, Decision of the Independent Administrator, at pp. 9-10 (December 18, 1990), aff'd, United

States v. IBT, 775 F. Supp. 90 (S.D.N.Y. 1991), aff'd, 948 F.2d 1278 (2d Cir. 1991).

Nonetheless, the Investigations Officer has met his just cause burden in proving that the land swap violated Local 1111's by-laws, therefore violating Article XIX, Section 6(b)(1), of the IBT Constitution.

Sections 14(A)(8) and (9) of Local 1111's by-laws empower the Executive Board to:

> (8) Lease, purchase or otherwise acquire in any lawful manner for and on behalf of the organization, any and all real estate or other property, rights and privileges, whatsoever deemed necessary for the prosecution of its affairs, and which the organization is authorized to acquire, at such price or consideration and generally on such terms and conditions as it thinks fit, and at its discretion pay therefore either wholly or partly in money or otherwise; specific authorization at a membership meeting shall be required for such expenditures, excepting for routine expenditures not of a substantial nature;
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> (9) Sell or dispose of any real or personal estate, property, rights or privileges belonging to the organization whenever in its opinion the Local Union's interests would thereby be promoted, subject to approval (except as to form) at a membership meeting. [Emphasis added].

The evidence clearly demonstrated that Local 1111's Executive Board approved the plan to give Respondent the Turtle Creek lot, owned by the Local, in lieu of his accrued vacation. However, as required by Local 1111's by-laws, the plan to transfer the lot was not submitted to the general membership for approval. Indeed, it appears that the membership was never even informed of the transfer. See IO-2 at 16-17, 31. This transgression of Local 1111's by-laws constituted a violation of Article XIX, Section

6(b)(1), of the IBT Constitution. See Investigations Officer v. Vitale, Decision of the Independent Administrator, at 20-22 (December 18, 1990), aff'd., United States v. IBT, 775 F. Supp. 90 (S.D.N.Y. 1991), aff'd, 948 F.2d 1278 (2d Cir. 1991) (union officer violated IBT and Local's by-laws, despite reliance on Executive Board resolution allowing conduct, where membership approval for conduct was required but not sought).

As the recipient of this property and by virtue of his vote in his capacity as a member of Local 1111's Executive Board to approve the trade, Respondent breached his fiduciary duty to the Union. I therefore find that the Investigations Officer has met his just cause burden with respect to Charge Two.

V. The Penalty To Be Imposed

Every Local's by-laws are intended to be read, understood and followed. Violation of the by-laws, especially where the officer is the beneficiary of a transaction involving a Local's assets, requires punishment. See Investigations Officer v. Vitale, supra, Decision of the Independent Administrator.

Several factors, however, militate against the severity of the sanctions here. As previously mentioned, there was no evidence presented that Respondent's actions were intended to embezzle from or defraud Local 1111. The accused transaction was suggested in an effort to avoid the previous financial difficulties Local 1111 had when it was forced to take out a loan to cover the $57,000 of severance pay owed to a retiring Secretary-Treasurer. See supra n.

10, at p. 11. Also, assuming Respondent has accrued a minimum of six years of vacation at four weeks per year and at $1,000 per week, Respondent would be entitled to $24,000. See supra n. 8, at p. 10. This is still $5,500 more than the highest estimated value -- $18,500 -- of the Turtle Creek lot.

Even with these mitigating factors, some period of suspension would normally be required. As noted at the outset, however, pending the issuance of this decision, Wells already resigned from Local 1111 and retired from the IBT. Accordingly, I direct that Wells cannot revoke his resignation or his retirement without my prior approval as Independent Administrator, or after my term, the prior approval of the Independent Review Board.

Furthermore, under these circumstances, I would normally direct that the previous transfer of property to Respondent in lieu of vacation time be put to the vote of the entire Local 1111 membership for ratification. By letter dated February 25, 1992, however, Respondent's counsel informed me that "Respondent took the transfer of the property, the subject of Charge 2 to his membership, and at each and every membership meeting, the vote was unanimous to transfer the property to Mr. Wells in lieu of untaken vacation for the years through 1990." With this representation in hand, I direct that documentation of the outcome of the vote in each membership meeting be supplied to the Investigations Officer and me within 10 days of this decision by way of affidavit and, if

available, by copies of the minutes from each meeting.[12] If proof of the membership's ratification is not provided, Respondent must reconvey the property back to Local 1111 and must also pay all legal fees associated with the initial conveyance to him and the legal fees associated with the reconveyance back to Local 1111. Under these circumstances only may Respondent retain his claim to accrued vacation.

Given the mitigating factors here, I will not impose sanctions on any of Respondent's IBT-related employee benefits. In addition, Respondent may seek reimbursement from Local 1111 or the IBT for one half of his legal costs[13] in defending the charges against him because the Investigations Officer did not sustain his burden of proof with respect to Charge One. Respondent must personally bear the other half of the costs as the Investigations Officer met his burden with respect to Charge Two. See Investigations Officer v. Vitale, Supplemental Opinion of the Independent Administrator, at pp. 6-8 (February 21, 1991) (union officer permitted to seek

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[12] I recognize that obtaining the minutes from each meeting may be difficult. This is based on the fact that Local 1111 does not hold general membership meetings but holds separate membership meetings with the employees of each company with a collective bargaining agreement or other employment agreements with Local 1111. If minutes are available, they are to be sent to the Investigations Officer and me within 10 days of this decision. If they are not available, an affidavit or affidavits from individuals with personal knowledge of the outcome of each membership meeting vote, and the lack of availability of any missing minutes, must be submitted within 10 days.

[13] Within 10 days of this decision, Respondent's counsel is to provide the Investigations Officer and me with an affidavit setting forth all costs and fees associated with the defense of the Investigations Officer's charges against Respondent.