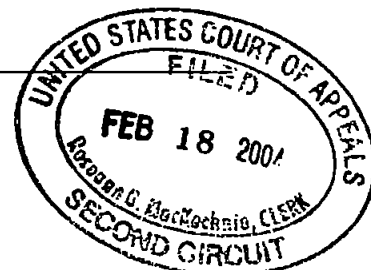


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To be argued by:
Charles M. Carberry

03-6196, -6210



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

- and -

CHARLES M. CARBERRY, INDEPENDENT REVIEW BOARD CHIEF INVESTIGATOR,

Appellee.

-against-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA; ANTHONY SALERNO, a/k/a Fat Tony; MATTHEW IANNIELLO, a/k/a Matty the Horse; ANTHONY PROVENZANO, a/k/a Tony Pro; NUNZIO PROVENZANO, a/k/a Nunzi Pro; ANTHONY CORALLO, a/k/a Tony Ducks; SALVATORE SANTORO, a/k/a Tom Mix; CHRISTOPHER FURNARI, SR., a/k/a Christie Tick; FRANK MANZO; CARMINE PERSICO, a/k/a Junior, a/k/a The Snake; GENNARO LANGELLA, a/k/a Gerry Lang; PHILLIP RASTELLI, a/k/a Rusty; NICHOLAS MARANGELLO, a/k/a Nicky Glasses; JOSEPH MASSINO, a/k/a Joey Messina; ANTHONY FICAROTTA, a/k/a Figgy; EUGENE BOFFA, SR.; FRANCIS SHEERAN; MILTON ROCKMAN, a/k/a Maishe; JOHN TRONOLONE, a/k/a Peanuts; JOSEPH JOHN AIUPPA, a/k/a Joey O'Brien, a/k/a Joe Doves, a/k/a Joey Aiuppa; JOHN PHILLIP CERONE, a/k/a Jackie the Lackie, a/k/a Jackie Cerone; JOSEPH LOMBARDO, a/k/a Joey the Clown; ANGELO LAPIETRA, a/k/a The Nutcracker; FRANK BALISTRERI, a/k/a Mr. B; CARL ANGELO DeLUNA, a/k/a Toughy; CARL CIVELLA, a/k/a Corky; ANTHONY THOMAS CIVELLA, a/k/a Tony Ripe; GENERAL EXECUTIVE BOARD, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; JACKIE PRESSER, General President; WELDON MATHIS, General Secretary-Treasurer; JOSEPH TREROTOLA, a/k/a Joe T, First Vice President; ROBERT HOLMES, SR., Second Vice President; WILLIAM J. McCARTHY, Third Vice President; JOSEPH W. MORGAN, Fourth Vice President; EDWARD M. LAWSON, Fifth Vice President; ARNOLD WEINMEISTER, Sixth Vice President; JOHN J. CLEVELAND, Seventh Vice President; MAURICE R. SCHURR, Eighth Vice President; DONALD PETERS, Ninth Vice President; WALTER J. SHEA, Tenth Vice President; HAROLD FRIEDMAN, Eleventh Vice President; JACK D. COX, Twelfth Vice President; DON L. WEST, Thirteenth Vice President; MICHAEL J. RILEY, Fourteenth Vice President; THEODORE COZZA, Fifteenth Vice President; DANIEL LIGUROTIS, Sixteenth Vice President; SALVATORE PROVENZANO, a/k/a Sammy Pro, Former Vice President,

Defendants,

- and -

WILLIAM T. HOGAN, JR., and DANE PASSO,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE INDEPENDENT REVIEW BOARD CHIEF INVESTIGATOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES	v
PRELIMINARY STATEMENT	1
STATEMENT OF THE ISSUES	3
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	7
A. Dane Passo	7
B. William Hogan	8
C. United Service Companies	9
D. Hogan's Brother: Michael P. Hogan, Sr ..	9
E. Local 631's Collective Bargaining Agreement With The Trade Show Contractors	10
F. Hogan Introduced His Brother to Local 631 Officials	14
G. Meeting Between United and Local 631 ...	15
H. Passo Intervened	16
I. Local 631 Is Placed In Trusteeship	19
J. Hogan Introduced Passo to United CEO Simon	20
K. Passo Pressured Local 631 Officials to Enter into a Special Arrangement for United	22
L. Passo Reported on Developments to Hogan	27
M. Passo and Hogan Met with a Representative of Trade Show Contractor Freeman	27
N. Simon Informed Frates That He And Passo Had Reached an Agreement	28

O.	Hogan Orchestrated A Meeting Among Passo, Simon, And Hoffa	29
P.	Hogan's and Passo's Activities in Las Vegas in August 2000	29
	1. Hogan's Contact With Passo, Simon and GES On August 15, 2000	30
	2. Passo's Telephone Calls to Simon ...	31
	3. Passo's August 29, 2000 Letter to IBT Attorney Pollard	31
	4. August 30, 2000 Telephone Conversation Between Frates and Simon	35
Q.	GES Used United Employees to Perform Teamster Work on the MAGIC Show	36
R.	Passo Orchestrated Frates' Termination .	38
S.	The September 10, 2000 Conversation Between Passo and Whitfield	40
T.	Repeated Complaints to Hoffa About Passo's Activities at Local 631	41
U.	Passo Engineered Trustee Wilkerson's Termination	43
V.	Trustee Jacobson's Conduct	46
	1. Jacobson's Meeting with Michael Hogan	47
	2. GES Used United Employees To Perform Teamster Work	48
	3. Michael Hogan Attempted to Use United Employees	49
W.	William Hogan and Las Vegas GES Representatives Met in Chicago to Discuss Local 631	49
X.	Hogan Sought to Negotiate Local 631's New Contract	50

SUMMARY OF THE ARGUMENT 51

ARGUMENT 54

POINT ONE: THE IRB'S DECISION IS SUPPORTED BY
SUBSTANTIAL EVIDENCE 54

 A. The Standard Of Review 54

 B. The IRB's Decision Was Based on
 Substantial Evidence 56

 C. The IRB's Rejection Of Hogan's and
 Passo's Claimed Justifications For
 Their Misconduct Is Supported By
 Substantial Evidence 60

 1. Hogan And Passo Took No Steps To
 Organize United's Workers 61

 2. Hogan Did Not Act Out Of A
 Professed Desire To Protect Local
 631's Jurisdiction 64

 3. Hogan's and Passo's Claims
 Regarding The Red Book Contract
 Are Not Supported By The Evidence .. 67

 4. Hogan's and Passo's Claims
 Concerning The "Most Favored
 Nations" Clause Are Not Supported
 By The Evidence 71

POINT TWO: THE IRB ACTED WITHIN ITS
JURISDICTION 73

POINT THREE: THE IRB'S SANCTION WAS NOT
ARBITRARY OR CAPRICIOUS 76

POINT FOUR: THE IRB'S ORDER DID NOT VIOLATE
THE LMRDA OR THE FIRST AMENDMENT 80

 A. Hogan And Passo Were Disciplined For
 Violating The IBT Constitution 81

 B. The IRB's Decision Does Not Violate
 Hogan's and Passo's Free-Speech Rights
 Under The LMRDA 82

C. Hogan And Passo May Not Challenge The IRB's Decision On First Amendment Grounds	85
CONCLUSION	87
CERTIFICATE OF COMPLIANCE	88
CERTIFICATE OF SERVICE	89

TABLE OF AUTHORITIES

CASES

<i>Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n</i> , 531 U.S. 288 (2001)	87, 88
<i>Chrysler Corp. v. U.S. EPA</i> , 631 F.2d 865 (D.C. Cir. 1980)	56
<i>Ferguson v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers</i> , 854 F.2d 1169 (9th Cir. 1988)	84
<i>Gorman-Bakos v. Cornell Coop. Extension</i> , 252 F.3d 545 (2d Cir. 2001)	88
<i>Lebron v. Nat'l R.R. Passenger Corp.</i> , 513 U.S. 374 (1995)	87
<i>Martin v. Garman Constr. Co.</i> , 945 F.2d 1000 (7th Cir. 1991)	65
<i>Mayle v. Laborer's Int'l Union of N. Am., Local 1015</i> , 866 F.2d 144 (6th Cir. 1988)	85
<i>Ostrowski v. Local 1-2, Utility Workers Union of Am.</i> , 530 F. Supp. 208 (S.D.N.Y. 1980)	85, 86
<i>Petramale v. Local 17 of Laborers Int'l Union</i> , 736 F.2d 13 (2d Cir. 1984)	82, 83
<i>United Steelworkers of Am. v. Sadlowski</i> , 457 U.S. 102 (1982)	84
<i>Sheet Metal Workers Int'l Ass'n v. Lynn</i> , 488 U.S. 347 (1989)	83, 85, 86
<i>Spellacy v. Airline Pilots Ass'n Int'l</i> , 156 F.3d 120 (2d Cir. 1998)	76

<i>United States v. IBT ("Adelstein")</i> , 998 F.2d 120 (2d Cir. 1993)	75
<i>United States v. IBT ("Boggia")</i> , 167 F.3d 113 (2d Cir. 1999)	79
<i>United States v. IBT ("Carey Disqualification")</i> , 156 F.3d 354 (2d Cir. 1998)	55, 56, 86, 87
<i>United States v. IBT ("Carey & Hamilton")</i> , 247 F.3d 370 (2d Cir. 2001)	<i>passim</i>
<i>United States v. IBT ("DiGiriamo")</i> , 19 F.3d 816 (2d Cir. 1994)	55, 84
<i>United States v. IBT ("Friedman & Hughes")</i> , 905 F.2d 610 (2d Cir. 1990)	74, 75
<i>United States v. IBT ("Giacambo")</i> , 170 F.3d 136 (2d Cir. 1999)	77
<i>United States v. IBT ("IRB Rules")</i> , 998 F.2d 1101 (2d Cir. 1993)	74, 75
<i>United States v. IBT ("IRB Rules")</i> , 803 F. Supp. 761 (S.D.N.Y. 1992), <i>aff'd as modified</i> 998 F.2d 1101 (2d Cir. 1993)	75
<i>United States v. IBT ("Mireles & Roa")</i> , 315 F.3d 97 (2d Cir. 2002)	75, 76
<i>United States v. IBT, ("Sansone")</i> , 981 F.2d 1362 (2d Cir. 1992)	87
<i>United States v. IBT ("Senese")</i> , 941 F.2d 1292 (2d Cir. 1991)	87
<i>United States v. IBT ("Simpson")</i> , 931 F. Supp. 1074 (S.D.N.Y. 1996), <i>aff'd</i> , 120 F.3d 341 (2d Cir. 1997)	56, 80

<i>United States v. IBT ("Star Market")</i> , 954 F.2d 801 (2d Cir. 1992)	87
<i>United States v. IBT ("Wilson")</i> , 978 F.2d 68 (2d Cir. 1992)	56, 77

STATUTES

5 U.S.C. §§ 701-706	55
5 U.S.C. § 706(2)	56
29 U.S.C. § 411(a)(2)	83, 84
29 U.S.C. § 501(a)	4

PRELIMINARY STATEMENT

William T. Hogan, Jr. and Dane Passo appeal from the District Court's order affirming a decision of the Independent Review Board ("IRB"). The IRB determined that Hogan and Passo colluded with an employer in an attempt to obtain a substandard contract for unorganized workers at the Las Vegas Convention Center, to the detriment of the members of Local 631 of the International Brotherhood of Teamsters ("IBT"). The IRB's determination was based on substantial evidence, and the District Court's order should be affirmed under the applicable "arbitrary and capricious" standard of review.

Hogan and Passo principally claim that they should not have been disciplined for their misconduct because they acted out of a professed concern to protect Local 631's jurisdiction under the governing collective bargaining agreement and because they were actually seeking to organize additional workers as Teamsters. As the District Court noted, however, the IRB expressly rejected both of these claims as incredible. The IRB

instead found that Hogan and Passo acted to assist Hogan's brother, and friend, both of whom stood to gain from using non-union workers to perform Teamster work at below Teamster wages. Hogan's and Passo's conduct was found to undercut Local 631 and to harm its members. In support of its finding, the IRB relied on substantial evidence showing that Hogan and Passo carried out their collusive scheme through lying to Local 631 officials about the terms of their agreement with an employer, deceiving Local 631 officials about high-level IBT support for the agreement, excluding Local 631 officials from discussions with the employer, orchestrating the termination of Local 631 officials who refused to enter into the agreement, and failing to disclose material facts to their supervisors.

The District Court correctly ruled that neither the IRB's findings of fact nor the sanction it imposed on Hogan and Passo was arbitrary and capricious. Hogan's and Passo's various challenges to the IRB's authority

to discipline them for their misconduct are also meritless.

STATEMENT OF THE ISSUES

This appeal presents the following four issues:

1. Whether there is "substantial evidence" in the record to support the IRB's findings that Hogan and Passo brought reproach upon the IBT and breached their fiduciary duties to IBT members, in violation of the IBT Constitution, by colluding with a labor broker to enter into a substandard contract to the detriment of Local 631 members.
2. Whether the IRB exceeded its authority when it determined that Hogan's and Passo's misconduct violated the IBT Constitution.
3. Whether the IRB acted arbitrarily and capriciously in sanctioning Hogan and Passo for their misconduct by permanently barring them from IBT membership and all IBT-affiliated positions.
4. Whether the IRB was precluded from disciplining Hogan and Passo for their violations of the IBT Constitution by Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") and the First Amendment.

STATEMENT OF THE CASE

The IRB's investigation and decision, and this appeal, arise out of the Consent Order entered in *United States v. International Brotherhood of*

Teamsters, No. 88 Civ. 4486 (S.D.N.Y.). (A391-421)¹

The Consent Order established the IRB and gave it authority to exercise all investigative and disciplinary authority that the IBT General President and IBT General Secretary-Treasurer have under the IBT Constitution, including the authority to determine what conduct violates the IBT Constitution. (A409-13)

On May 23, 2001, pursuant to the Consent Order, the IRB submitted a 192-page investigative report concerning Hogan and Passo to the IBT's General Executive Board. (A311) The IRB's report recommended that the Union file charges against Hogan and Passo for bringing reproach upon the IBT and violating their fiduciary duties to the members, in violation of the IBT Constitution and 29 U.S.C. § 501(a). (*Id.*) Specifically, the IRB charged that Hogan and Passo colluded with Richard Simon, the CEO of United Service

¹ "A" refers to the Appendix; "SPA" refers to the Special Appendix attached to Hogan's brief; and "HB" refers to Hogan's brief. "Ex." refers to exhibits introduced at the IRB hearing and made part of the District Court record, but not included in the Appendix.

Companies, to cause Local 631 to enter into a substandard contract with a United company that would have had non-union United employees perform Teamster work in the Las Vegas trade show industry at lower wages and with lesser benefit contributions than required under Local 631's then-existing collective bargaining agreement. (*Id.*)

The IBT adopted the IRB's proposed charges and, on July 26, 2001, referred the charges back to the IRB for adjudication. (A312) Shortly before the IRB hearing was scheduled to begin in October 2001, Hogan and Passo applied to the District Court for an emergency order restraining the IRB from proceeding. (SPA18) They claimed that the charges exceeded the IRB's jurisdiction and violated their free-speech rights. (*Id.*) The application was denied. (*Id.*) The District Court ruled that the IRB had broad authority to determine what conduct violated the IBT Constitution and that the IRB's charge did not violate Hogan's and Passo's free-speech rights under either the LMRDA or

the First Amendment to the United States Constitution.

(SPA18-19)

The IRB's hearing was held in Las Vegas, Nevada, on October 17-18, 2001. (A312) Seven witnesses, including Hogan and Passo, testified at the hearing.

(SPA19) The IRB also admitted into evidence over 300 exhibits, including transcripts of sworn testimony from, among others, IBT General President James Hoffa, Hogan, Passo, and many officials from Local 631. (*Id.*)

The IRB issued a 79-page decision on May 29, 2002. (A311-89) Its three members unanimously concluded that "[t]he preponderance of the evidence proved that Passo and Hogan brought reproach upon the IBT," in violation of the charged provisions of the IBT Constitution.

(A368) After observing Hogan and Passo testify, the IRB also made specific and detailed findings that Hogan's and Passo's claimed reasons for seeking an agreement with United were not credible. (A369-89) As a sanction for their misconduct, the IRB permanently

barred Hogan and Passo from membership in the IBT and from any position with IBT-affiliated entities. (A389)

On May 29, 2002, pursuant to the Consent Order, the IRB applied to the District Court for an order affirming its decision. (SPA1) The District Court affirmed the IRB's decision. (SPA40) It ruled that the IRB's findings were supported by substantial evidence and upheld the IRB's choice of sanction.

(SPA22-27, SPA34-40) The District Court also rejected for the second time Hogan's and Passo's arguments that the IRB exceeded its jurisdiction and violated their free-speech rights. (SPA27-34)

This appeal followed. (A1-4)

STATEMENT OF FACTS

The IRB based its decision on the record adduced at the October 17-18, 2001 hearing. That record fully supported the following facts.

A. Dane Passo

In March 1999, IBT General President Hoffa appointed Passo, a member of Local 705 in Chicago, as

his Special Assistant and an International Representative. (A1391; A1860; A1879-80) Hoffa's Executive Assistant, Carlow Scalf, supervised Passo. (A1476-77)

Before this, Passo's only union employment had been as a Local 705 business representative for thirteen months. (A1874-75) He had never negotiated any collective bargaining agreements. (A2145-46; A576) Passo also had no experience in the convention industry. (A1879; A563)

B. William Hogan

Hogan was President of Joint Council 25, Vice President of Local 179, and Organizing and Political Director for Local 714, all in Chicago. (A1696)² Hoffa appointed Hogan an International Representative on May 1, 2000. (A4835-37) As an International Representative, Hogan reported to Scalf. (A1476) Hogan

² In August 1996, the IBT placed Local 714 in trusteeship due to nepotism and conflicts of interest among Hogan and his relatives who had ownership interests in companies that employed Teamsters. (A313 n.6) Hogan, then the Local's principal officer, was removed.

was never given any International assignment in Las Vegas and had no official responsibilities with Local 631. (A1489)

C. United Service Companies

Richard Simon was the Chairman of United Service Companies. (A2608-12; A5402) United Temps of Nevada, Inc. ("United"), a labor broker, was incorporated in Nevada on March 1, 1999. (A2347-53; A542, A563; A1840) Simon was its President. (A2347-53) United was incorporated shortly before Simon and Hogan's brother, Michael Hogan, approached Local 631 officers to allow United to supply workers to the trade show contractors at rates below the Teamsters' contract with those contractors.

D. Hogan's Brother: Michael P. Hogan, Sr.

William Hogan's brother, Michael P. Hogan, Sr., was Vice President of United. (A1710-12; A5409, A5421; Ex. 18) He was also the CEO of Show Biz USA ("Show Biz"), a trade show contractor active in Las Vegas. (A2325; A2326-46; A1710) As a general contractor, any change

in the Teamster governing contract with the trade show contractors that allowed the use of cheaper labor, as Passo and Hogan sought, would have benefited Show Biz and Michael Hogan.

E. Local 631's Collective Bargaining Agreement With The Trade Show Contractors

During the relevant time period, Local 631, which represented approximately 2,000 members in the trade show and convention industries, had a collective bargaining agreement with trade show contractors in Las Vegas. (A712; A579-87) This agreement was referred to as the "red book agreement." (A1006) The major contractors under the red book agreement were Greyhound Exposition Services ("GES") and Freeman Decorating ("Freeman"). (A1008; A1127-28) In Las Vegas, the Teamsters had jurisdiction over the majority of work in the trade show industry. (A519; A281)

The red book agreement required the trade show contractors to contact the Local 631 dispatch office for workers. (A278) Any dues-paying Local 631 member could register for convention work for no additional

fee. (A977-78; A1193, A1211) Non-union workers paid a \$40 per month dispatch fee. (A1193-94, A1204, A1211; A1249)

The minimum hourly wage under the red book agreement was \$12.49, effective June 1, 2000. (A282) Employers were also required to make contributions for health and pension benefits of \$7.90 for each hour an employee worked. (A289-90) Accordingly, effective June 1, 2000, the minimum hourly cost to the employer for a worker dispatched through Local 631 was \$20.39. (A272-95)

Under the red book agreement, the trade show contractors were required to notify the Local of how many workers were needed. (A581) During large shows when one show was moving out and another show was moving in, the dispatch office occasionally ran out of registered workers to send. (A464, A496, A546-47; A1208; Ex. 5 at 11-12) However, once Local 631 workers finished on the exiting show, they were available to "roll over" and work on the incoming show. (A971-72,

A1136-37; A803-04; Ex. 5 at 11-12) The change from one show to another sometimes happened late at night or on weekends when the dispatch office was closed. (A3774; A2386-87; Ex. 5 at 10-12)

Before Local 631 was placed in trusteeship in April 2000, if the dispatch office had exhausted its list of registrants, the dispatcher contacted IBT Locals 14 and 995 in Las Vegas and then the Carpenters and Electricians unions to see if they had out-of-work members who wanted to work. (A482, A545; Ex. 5 at 14-15) All workers, including members of other unions, who were dispatched from Local 631 received a written dispatch form from the Local. (A464; A5324-A5401) In this way, Local 631 controlled the employees sent to work and ensured that they were paid pursuant to the contract.

Before the trusteeship, Local 631 contacted other unions approximately six to eight times a year. (A319; A482) After the trusteeship, Passo, whom Hoffa had appointed his Personal Representative and entrusted

with oversight of the Local, insisted that the dispatchers no longer contact other unions to fill the call when the dispatch office exhausted its list.

(A2549; A2001; A1284) This change furthered Hogan's and Passo's scheme.

Under the governing contract, if Local 631 could not supply the requested number of workers, the trade show contractors could hire from any source. (A2494; A797-98; A1222; A3772-73) However, any employee, even if not dispatched through Local 631, who performed bargaining unit work was to be paid contract rates. (A465, A550, A575; A3771-73; A797-98; A629-30) The contract provided that,

[i]t is the Company's intent in subcontracting any work of a substantial, major or continuous nature which is covered by this Agreement with any person, firm, corporation, partnership, or other organization to require the subcontractor to observe the applicable wage rates, hours, and working conditions set forth in this Agreement.

(A282) This contract provision eliminated the economic incentive for contractors to attempt to use lower-paid employees who were not dispatched through Local 631.

(A319) On the other hand, as the IRB found, the contract that Hogan and Passo sought to enter into with Simon would have provided contractors an incentive to use lower-paid employees dispatched through United.

(A351)

F. Hogan Introduced His Brother to Local 631 Officials

Timothy Murphy was elected Local 631's Secretary-Treasurer in 1998 and took office in January 1999.

(A2358) Murphy rehired David Breyman as dispatcher.

(Ex. 5 at 6)

Before Murphy's administration took office, Simon had tried to secure an agreement between United and Local 631, but that Local administration refused.

(A1716; A525, 1542) Hogan's brother Michael thereafter asked Hogan to introduce Michael to the new Local 631 administration to again propose an arrangement between Local 631 and United. (A1714-16) Hogan agreed and,

during an IBT meeting in June 1999 in Las Vegas, introduced his brother to Murphy and Breyman, the new Local 631 dispatcher. (A546; A1717-18; A5436-49; Ex. 5 at 22, 25) This was approximately three months after United Temps was incorporated in Nevada. (A2347-63) During this meeting, Hogan asked Murphy if he would meet with certain unidentified people and Murphy agreed. (A482; A526; A2370-72; A2378-81; A2394-96)

G. Meeting Between United and Local 631

In the summer or early fall of 1999, Local 631's Murphy and Breyman met with United's Michael Hogan and Simon. (A482, A545) Simon and Michael Hogan proposed that Local 631 enter into an agreement with United whereby United would supply workers to the trade show companies after the Local 631 dispatch list was exhausted. (A546, A550; A2386-88) United sought to take over the dispatch function from Local 631. (A550) It also proposed to pay Local 631 a fee of only \$7 or \$8 for each person dispatched, rather than the \$40

dispatch fee non-members paid to Local 631 under the red book agreement. (A483, A2381)

Murphy and Breyman refused United's proposal. (A483-84; A525, A542, A547; A2388) Breyman told Michael Hogan and Simon that United would have to pay the wage rates under the red book contract. (A550) The Local 631 officers also refused to surrender control of dispatching, which was secured under the then-existing red book contract. (A550; A282) Such control was necessary to ensure that the workers were paid contract wages and to monitor their hours so that their pay would be increased at the required intervals. (*Id.*)

H. Passo Intervened

After Murphy rejected Simon's proposal in the summer or early fall 1999, there was a focused effort to oust Murphy from Local 631. Local 631 member Vito Locascio, a former member of Hogan's Local in Chicago and Passo's friend, became active in soliciting member complaints about Murphy. (A2413)

Passo brought the Local 631 complaints to Hoffa's attention. (A1968-69; A2111-15) On Friday, November 5, 1999, Hoffa appointed Passo his Personal Representative to Local 631. (A1390) Hoffa also appointed International Vice President and Joint Council 42 President James Santangelo as a Personal Representative to Local 631. The next business day, Monday, November 8, 1999, Passo promptly checked in with Hogan. (A3405-19; Ex. 40 at 23)

In January 2000, Santangelo forwarded a report to Hoffa recommending that Local 631 be placed in trusteeship. (A887-A900) As events progressed regarding Local 631, Passo and Hogan kept in contact. For example, there were at least fifty-five cellular telephone calls between Passo and Hogan between January and March 2000. (A3405-3419; Exs. 42-45, 54, 65-68)

On February 28, 2000, Hogan arrived in Las Vegas for a meeting. (A526; A1775-76; Exs. 265-66) Passo arrived there the next day (Exs. 118-19) and went to Local 631 with Hogan, Santangelo, and Robert Turner,

another Personal Representative, to confront Murphy.

(A484; A2418-19; A1971; A1792; A2625) Passo and Hogan also met privately to discuss Local 631. (A1983; Exs. 118-19) At this time, Hogan did not have any International position. (Ex. 143) Nor did he have any assigned role with respect to Local 631. (A1489)

During the March 1, 2000 meeting, Passo, Hogan, Santangelo, and Turner told Murphy that Hoffa recommended that Murphy terminate one individual and rehire two others. (A484-85; A1971; A1792; A2625; A2418-19) Murphy was told to respond by March 3. (A485)

The next day, March 2, 2000, Passo, Hogan, Locascio, who had been a Local 714 member when Hogan was the Local's principal officer, Locascio's brother, and a steward in the convention industry met to discuss Local 631. (A4884, A4986-87; A1984-86; Exs. 118-19) Hoffa's other Personal Representatives to the Local, Santangelo and Turner, were absent from this meeting.

On the morning of March 3, Passo called Murphy to demand his response to Hoffa's recommendations. (A485) Later that day, Murphy faxed Hoffa a letter explaining why he would not comply with his requests. (A5525-30; A2419; A485) That day, Hogan called Passo and spoke to him for ten minutes. (Ex. 67)

I. Local 631 Is Placed In Trusteeship

On April 5, 2000, Hoffa placed Local 631 in trusteeship. (A302-304)³ Hoffa appointed James Wilkerson as Trustee. (Ex. 198) Hoffa also appointed Marty Frates as Assistant Trustee. (A3735-3738, A3740, A3794; Ex. 198)

Passo was part of the group that went to the Local to put it into trusteeship. (A2119-20) Murphy and Breyman, along with the rest of the Local's officers and several employees, were fired. (A485, A547, A550; A2485; Ex. 5 at 55-56) Passo selected Local 631 member

³ Between the March 1, 2000 meeting at Local 631 and the date of the trusteeship, there were 32 calls between Hogan's and Passo's cellular telephones. (A3405-19; Exs. 44-45, 54, 67, 68)

Roberta Whitfield to be one of the business agents for the convention industry. (A570; A2511-12; A905)

Passo continued his practice of immediately informing Hogan of all events regarding Local 631. The two called each other seven times on the day the Local was put in trusteeship. (A3405-3419; A528-29; Exs. 45, 55, 69) Passo also remained in Las Vegas for long periods thereafter. Of the 229 days between April 4 and November 19, 2000, Passo was in Las Vegas for 156 days. (Ex. 201) Hogan and Passo were also simultaneously in Las Vegas six times in 2000 and had at least ten meals together there at union expense during that period. (A5321-22, A5323)

J. Hogan Introduced Passo to United CEO Simon

Shortly after the trusteeship, Hogan introduced Passo to Simon. (A525; A1716-17) Simon then renewed for a third time his effort to make an arrangement with Local 631. Hogan knew that both Murphy and the Local 631 administration before Murphy's had been unwilling to enter into Simon's proposed agreement. (A525-26,

A529, A542) Hogan did not introduce Simon to Wilkerson, the newly appointed trustee of Local 631. (A464)

Passo and Simon began discussing an arrangement for United. (A561; A1929-30) Passo knew that, at that time, trade show contractor GES had been "scabbing" by using United employees at rates significantly lower than the red book contract. (A566, A571-72) Passo and Hogan discussed GES's "scabbing." (A571-72) According to Passo, United employees were paid \$5.00 per hour. (A572) This was \$7.49 per hour less than the minimum hourly rate under the red book contract. (A577; A282) In addition, the red book contract provided for benefit fund contributions totaling \$7.90 per hour per employee. (A282, A289-90) Passo knew the United employees had no health or pension benefits. (A577) Neither Passo nor Hogan took any steps to stop United's scabbing. (A381) Instead, they joined with Simon and attempted to bind the union to accept the substandard pay. (*Id.*)

Passo gave Simon a copy of the Local's red book contract. (A1931) Simon instructed Passo that he wanted concessions from that agreement. (A1931-33) Local 631 officials did not participate in any of the discussions between Passo and Simon over terms. (A1907, A2017-19)

K. Passo Pressured Local 631 Officials to Enter into a Special Arrangement for United

In late April or early May 2000, Passo told Whitfield that he and Simon were working on an agreement under which Simon's company would provide employees to the convention industry. (A493; A989-93) Passo later asked Whitfield to attend a dinner with Simon in Las Vegas. (A493)

Whitfield asked Assistant Trustee Frates to attend this dinner. (A993-95; A3779) Passo scolded Whitfield for inviting Frates. (A495) Attempting to justify why he did not want Frates at the meeting, Passo lied, telling Whitfield that "he knew more about doing a contract than Marty [Frates] did." (A495) In fact, Passo had no experience negotiating collective

bargaining agreements. (A2145-46; A576) Nor did he have any experience in the convention industry. (A563; A1879, A1935)

Whitfield and Frates met Passo and Simon over dinner in Las Vegas. (A996; A3779; A1945-46) Passo and Simon presented an agreement under which the Local would make substantial concessions from the governing contract to Simon. (A3783-84, A3802-03; A994-A1004; A494) The wage scale under the Passo-Simon agreement was \$8.00 per hour. (A463, A464, A494, A563) At that time, the lowest wage scale under the red book contract was \$12.49 per hour. (A494) As in his earlier rejected proposal, the Passo-Simon agreement was that United, not Local 631, would dispatch the workers to the trade show contractors. (A494; A1000-01; A2016-17)

Passo urged Frates, Whitfield, and Wilkerson to approve Simon's terms. (A463, A464, A517-18; A2515-16; A3802) All three refused. (A463, A494; A2515-21; A3784) Wilkerson immediately recognized that the agreement Passo sought for Simon was substandard.

(A463; A2515-21) Wilkerson told Passo, "'You're wasting your time with me. You are not going to get anywhere with that piece of crap with me.'" (A2517)

Frates opposed the agreement because, among other things, contract negotiations with the trade show contractors were coming up in 2001 and "it would have been asinine to go in and negotiate something less right before negotiations." (A3785) Frates and Wilkerson agreed that, "if Mr. Simon wanted to sign a contract, he could sign the same contract that GES and all the other employers signed, dollar for dollar, penny for penny." (A3784)

Both Wilkerson and Frates also strongly opposed Passo's proposal to give significant economic concessions to Simon because these concessions would trigger the "most favored nations clause" in the red book contract to the disadvantage of Local 631's members. (A463; A2519; A3784, A3800) The red book contract's "most favored nations" clause provided:

In the event the Union enters into any agreement with any General Contractor,

Independent Contractor or Contractors Association engaged in convention services work, which has terms more favorable to that Employer than the terms of this Agreement, the Union shall immediately submit to the Employer signatory herein, a copy of such Agreement, and if the Employer signatory herein deems said Contract or Agreement more favorable to the Employer signatory herein, the Employer may replace this Agreement with the more favorable Article or Section and said Article or Section shall immediately be in full force and effect.

(A292)

After Wilkerson, Frates and Whitfield each refused to accept Passo's agreement with United, Passo said he would try to come up with a better agreement. (A471, A495; A3786) Passo involved no one from the Local in his continued efforts with Simon. He and Simon made only minor revisions to their agreement in their attempt to obtain Local 631 approval. (A463-64, A495; A3783-86, A3802-03; A2519, A2524-25, A2542; A1932-34)

Despite cosmetic variations, the core of the agreement Passo and Simon structured always benefitted United to the detriment of Local 631 members. (A2524-

25) Wilkerson repeatedly told Passo that he would only enter in an agreement with United that was the same as the current governing contract. (A479; A2515-25)

Undeterred, Passo asked the Local's attorney, Joseph Kaplon, to persuade Wilkerson to approve the agreement.

(A463; A2517) When the terms of the agreement were explained to Kaplon, however, he also refused to support it. (A463; A2517; A1951)

Thereafter, Passo, cloaked with his special relationship with Hoffa, resorted to lying to Wilkerson. Passo falsely represented that high-ranking International officials, Santangelo and Scalf, wanted Wilkerson to enter into Passo's arrangement. (A465, A471; A2559, A2563)⁴ Wilkerson told Passo that if Scalf wanted the agreement with Simon's company, Scalf should sign it himself. (A2563)

⁴ That Passo named Scalf as a supporter of the contract was corroborated by the transcript of a September 10, 2000 conversation between Passo and Whitfield. (A5775)

L. Passo Reported on Developments to Hogan

Throughout the trusteeship, Passo frequently reported to Hogan on his efforts for United. (A1935) Hogan and Passo also met in Las Vegas at least three times during May 2000 to discuss Local 631. (A5323) Passo did not, however, disclose the details of his arrangement with Simon to his superior Scalf. (A1494, A1526-27, A1529, A1536; A1923-24, A1936-37) Scalf was also not aware that Hogan, who also reported to Scalf, was involved in trying to work out an arrangement between Local 631 and United. (A1536)

M. Passo and Hogan Met with a Representative of Trade Show Contractor Freeman

In approximately May 2000, Hogan and Passo met with the head of the employer, Freeman, in Las Vegas. They discussed the arrangement with United. (A337-38; A530-32; A575; A1744; A2054-59) Hogan and Passo did not invite the Local 631 trustee or inform him of the meeting. (A1977-78; A463, A544) Neither Hogan nor Passo told Scalf, their superior at the IBT, about the meeting. (A1575-76; A556-57)

At the meeting, Passo admitted to Freeman that he had acceded to Simon's request that United employees be paid less than the Teamster contract required. (A2058-59) The employer then explained to Passo the obvious: that the concessions were a bad idea for Local 631 because contract negotiations were coming up in 2001 and Passo's arrangement with Simon would undermine the Local's bargaining position. (A575; A2058-59; A2128) The IRB found that "Hogan was unconcerned with any impact the arrangement for Simon would have on IBT members or United employees. He did not contradict Freeman's analysis that Passo and Hogan were damaging the Local's bargaining position." (A339)

N. Simon Informed Frates That He And Passo Had Reached an Agreement

In approximately late July 2000, Simon described to Frates an agreement he had reached with Passo. (A3786-87, A3798-99) Simon asked Frates for a list of upcoming shows. Frates refused to give it to him.

(A3798) This conversation took place shortly before a major show, the MAGIC Show, would be held in Las Vegas.

O. Hogan Orchestrated A Meeting Among Passo, Simon, And Hoffa

In late July or early August 2000, Hogan arranged to meet with Hoffa, Passo, and Simon in Chicago.

(A2020-21; A1758-63; A3444-48) According to Hogan, he, Passo and Simon gave Hoffa "a general overview . . . that we were trying to do something with [Simon]."

(A533; A1761) Suspiciously, however, Passo never disclosed to Hoffa that he was involved in negotiating an agreement between Local 631 and Simon's company.

(A3448)

P. Hogan's and Passo's Activities in Las Vegas in August 2000

Shortly before the MAGIC Show, held between August 24 and September 3, 2000 (A5726-5742), the activity among Passo, Hogan, Simon and GES heightened. On August 3, 2000, Passo arrived in Las Vegas. (Exs. 128-29) Hogan arrived there on August 13 and left on August 17, 2000. (Ex. 278) During that time Passo and Hogan had at least two meals together, one on August 13 and the other on August 15. (Ex. 129) In August 2000,

there were also at least thirty-one calls between Hogan's and Passo's cellular telephones. (A3405-3419; Exs. 49, 72-73)

**1. Hogan's Contact With Passo, Simon and GES
On August 15, 2000**

On August 15, 2000, when Hogan and Passo were both in Las Vegas, Hogan made a series of calls concerning the arrangement between Local 631 and United to Simon, Passo, and GES, the contractor pushing to use Simon's company in Las Vegas. (Exs. 73, 128-29, 275-77) The MAGIC show was scheduled to begin nine days after these calls, on August 24, 2000. (A5178-82) Hogan acknowledged that he "probably" spoke to Passo and Simon about the United agreement during these calls. (A1799-03) That night, Hogan and Passo had dinner together. (Ex. 129)

Also on August 15, 2000, Simon requested to purchase a ticket to the James R. Hoffa Memorial Scholarship Fund golf outing in Las Vegas. (A3863-64) Hogan was on the committee for this outing. (A1783) By check dated September 8, 2000, Simon's company made a

donation of \$5,100 for Simon's ticket and golf fees of \$1,200 each for Hogan's son and three others. (A3863-64; A3965-66; A1790)

2. Passo's Telephone Calls to Simon

On August 23, 2000, one day before the MAGIC show began, Hogan called Passo from Chicago. (Ex. 73) Shortly after this call, Passo called Simon. (A342; Ex. 49 at 57) Passo was in Las Vegas that day. (Exs. 49, 128-29) The next day, Passo returned to Chicago. (Ex. 128-29)⁵ While in Chicago, Passo kept in contact with Simon and Local 631. (Ex. 49 at 58, 62)

3. Passo's August 29, 2000 Letter to IBT Attorney Pollard

On August 29, 2000, Passo sent the agreement he and Simon drafted to Nicole Pollard, an attorney in the IBT's General Counsel's office, which would amend the GES contract to benefit United. (A305-310) In his cover letter, Passo wrote:

⁵ Passo apparently left Las Vegas because Wilkerson complained to Scalf about Passo's interference in the Local. (A2557-59)

[t]he language on the enclosed paperwork is the amended language to the contract. Everything else will remain the same as in the GES Exposition contract. Look at the "Most Favored Nations" clause in the contract on page 32.

(A306) Passo did not disclose to Pollard that, at this point, every Local 631 official, including the Trustee, Assistant Trustee, the convention industry business agent and the Local's attorney, had rejected Passo's agreement with United. (A463, A471-72, A494, A494, A495; A6242-45) On the same day Passo sent this agreement to Pollard, there was a fifteen minute call from Hogan's telephone to Passo. (A3405-19)

The agreement with United that Passo submitted to the IBT provided that all workers hired after August 1, 2000 would become "D" list workers, a new class of employees under the red book contract. (A305-310)⁶ These D list workers, who were to make less than the hourly minimum wage under the governing red-book

⁶ The red book contract had A workers and Supplemental workers, also referred to as C workers. (A272-295)

contract, would be employed and dispatched by United.

(*Id.*)

Workers who had less than 250 hours in the industry were "D1" workers. (A305-10)⁷ Simon's "D1" workers would be paid \$10.00 per hour with no benefit fund contributions made on their behalf. (*Id.*) By contrast, under the red book agreement, Supplemental Workers with less than 150 hours experience in the industry were paid \$12.49 per hour with benefit fund contributions of \$7.90 per hour paid from the first hour worked. (A282, A289-90)⁸ The minimum hourly cost to the trade show employer under the Passo-Simon agreement was \$10.39 lower than it had been under the governing red book agreement.

⁷ "D2" workers were those with between 250 and 1,000 hours in the industry and would be paid \$11.00 per hour with benefit fund contributions. (A305-10) This hourly wage was \$2.69 less than the red book agreement required for C workers with more than 150 hours in the industry. (A272-95)

⁸ Given that Simon, not the Local 631 dispatch office, would control which of his employees worked, the IRB found that Simon could benefit by ensuring that none of his employees worked more than 250 hours in the industry, thereby avoiding making any benefit fund contributions for his employees. (A345; Ex. 207)

Furthermore, under the red book agreement, Local 631 dispatched all individuals referred to work and the Local 631 Security Fund recorded benefit fund contributions for every hour worked. (A278, A289-90; A4107) By contrast, under Passo's agreement, Simon would control the dispatch of United employees and benefit fund contributions would not be immediately required for them. (A305-10) Passo's agreement undercut the Local's ability to ensure that the United employees received required pay increases and that United made the benefit fund contributions the agreement required.

Passo also eliminated time and one half pay for "D" list work performed between the hours of 10:00 p.m. and 6:00 a.m. (A305-10; A283) This was particularly significant because United employees usually performed Teamster work at night. (A1136-37; A4044) Passo's agreement allowed United to pay its employees who worked more than 150 hours in the industry at least \$9.53 per hour less than the red book agreement

required for work performed between the hours of 10:00 p.m. and 6:00 a.m. (A345; A282-83; A305-10; Ex. 207)

The IRB found that, through this agreement, Passo sought to eliminate "the protection for the Local against general contractors hiring labor at less than contract rates from subcontractors such as United." (A343; A305-10)

4. August 30, 2000 Telephone Conversation Between Frates and Simon

On August 30, 2000, the day after Passo submitted his agreement with Simon to IBT attorney Pollard, Frates had a fourteen minute telephone conversation with Simon. (A3786, A3794-95; A5723-25) During this call, made while the MAGIC Show was in Las Vegas, Simon informed Frates that he and Passo had reached an agreement. (A3786-87) Consistent with Passo's false statements to Wilkerson, Simon misleadingly told Frates that Santangelo and Scalf also had approved the agreement with United. (A3786, A3793; A464; A2559) Santangelo and Scalf both denied approving the agreement with Simon's company. (A2653-55; A1526-27)

Frates told Simon that Local 631 was not interested "and that if he was going to drop names of people that supposedly endorse the concept, then I basically told him to go and get them to sign it, get them to tell us to sign it." (A3786-87) Only the Local 631 trustee or his delegate could have signed the contract at this time.

During this conversation, Frates also raised the most favored nations clause in the governing contract with Simon. (A3800) In response, Simon represented to Frates that Simon had "talked to the GES and it was not a problem." Frates also recalled that Simon "indicated GES would sign a waiver on the favored nations clause." (A3800) Frates told Simon "to go pound salt." (A3787) On the day of Frates' conversation with Simon, Passo called Hogan. (A3405-19)

Q. GES Used United Employees to Perform Teamster Work on the MAGIC Show

During the MAGIC show, GES, the general contractor, used United employees to perform Teamster work. (A3804-10; A2531-34; A998-99; A5251, A5271, A5317; A5133-36;

A2446; A6320-21; Ex. 203 at 19) This was done even though there were IBT members available to be dispatched through Local 631. (A497; A2534; A3806; A972-74; A5133-34) Indeed, GES refused to use the members Local 631 dispatched. (A973-74; A497-99)⁹

Wilkerson and Frates each saw United employees performing Teamster work. (A465; A3804-05; A2531-34) Wilkerson also knew Local 631 members were available to do this work. (A2534) This blatant violation of the existing red book agreement occurred shortly after Simon had informed Frates that he and Passo had reached a deal and after Passo had submitted the agreement to the IBT. The Local 631 officials made the connection. According to Wilkerson, "we speculated that Dane Passo and Simons [sic] or whoever they talked with at GES, they worked a deal." (A2534) Based on their observations, Wilkerson and Frates directed the Local's business agents to file grievances against GES for

⁹ Local members were in an uproar over the contract violations. One Local 631 business agent received approximately

using employees of Simon's company to perform bargaining unit work. (A465; A2534-40; A3810; A5178-82)

Passo, who had left Las Vegas on August 24, returned on September 5. (Exs. 130-31) Wilkerson told him that the Local was going to go after United and that a grievance had been filed against GES. (A2536, A2539) Frates was terminated by Hoffa three days later at Passo's urging. (A3738) This was ten days after Frates refused to honor Simon's claim that an agreement for the use of United employees had been reached with Passo and approved by Scalf and Santangelo. (A305-10; A3786-87)

R. Passo Orchestrated Frates' Termination

As the IRB found, "[w]hen his charades didn't work, Passo used false reasons to cause Frates, and then Wilkerson, to be terminated." (A375)

(continued...)

thirty telephone calls from members complaining about the United employees performing Teamster work. (A5135-36; A826)

Frates was terminated while Wilkerson was out of town. (A2580-81; A3738) Hoffa made the decision to remove Frates solely on information Passo provided. (A1577-80, A3480, A5723-25; Ex. 13 at 148-51) Passo had concealed from Hoffa and Scalf his involvement with Simon and Hogan to secure a concession-laden arrangement for Simon with Local 631. (A3448; A1527) Passo also did not disclose to his superiors that he was meeting with Hogan and trade show industry employers without the Local 631 trustee or any Local employee being present. (A1574-75; A2062)

Frates was purportedly removed because Passo accused Frates of putting together a "political machine" at the Local, disrupting the Local, failing to process grievances that Passo thought had merit, and not spending enough time at Local 631. (A3480; A1577) Hoffa also admitted that, based on his sole source of information, Passo, Frates was removed because Frates and Passo conflicted on the approach to handling problems at the Las Vegas Convention Center. (A3480)

That was true. Frates opposed Simon and Hogan's brother's company paying workers below the governing Teamster contract rate; Passo supported it.

The timing of Frates' removal and Hoffa's sole reliance on Passo supported the IRB's finding that the reasons Passo crafted for Frates' removal were pretextual, designed to conceal that the actual motivation was Frates' opposition to the arrangement for Simon. (A375)

S. The September 10, 2000 Conversation Between Passo and Whitfield

Two days after Passo arranged for Frates to be fired, he continued to lobby Whitfield to support his arrangement with Simon. (A5775-76) Whitfield taped this conversation. (A498-99, A500, A508, A567; A1057-58; Ex. 131)

In this conversation, Passo acknowledged to Whitfield that he caused Frates to be fired. Passo also pressed Whitfield to support his agreement with Simon. He repeatedly promised Whitfield an International position if she listened to him. (A5750,

A5752, A5776, A5779; A499) Passo told Whitfield the IBT's legal department had the United agreement.

(A5775-76; A563-64) He then misrepresented to her that the contract with United would be the same as with GES, except for a brief delay in making benefits payments.

(A5775) That, as the agreement he had actually submitted to the IBT showed, was a lie. (A308)¹⁰ Passo further claimed Scalf reviewed the contract. (A5775) That too was a deception. (A1527) These lies to Whitfield were consistent with Passo's strategy with Wilkerson of falsely claiming high-ranking IBT officials favored his agreement with Simon. (A2559-60, A2563)

T. Repeated Complaints to Hoffa About Passo's Activities at Local 631

At approximately the end of August, Wilkerson complained to Scalf that Passo was interfering in Local 631. (A2557-58) Wilkerson had called Scalf to complain about Passo on other occasions, including to object to

¹⁰ Whitfield never saw the agreement Passo sent to Pollard (A508), so she could not have known Passo was lying.

Passo's proffered arrangement for Simon. (A465, A466, A468; A2557-59, A2570-71; A1563-64) Wilkerson also complained to Santangelo about the agreement Passo was pressuring him to grant United. (A2558-63; A465) Both Wilkerson and Santangelo thought it was inappropriate for the IBT to enter into Passo's arrangement with a labor broker. (A2559-62; A2639-40, A2642-43) Santangelo concluded, "This would be crazy, you'd kill this whole industry." (A2643)

After Wilkerson contacted Santangelo about Passo's arrangement with United, Santangelo recognized the agreement was suspicious and asked the IBT's own investigators to look into Simon. (A2642-43; A2656-58) Santangelo was informed that Simon has "all kinds of baggage" and was directed "to stay away from him and to tell the Teamsters to stay away from him." (A2658) After this warning, based upon conversations Scalf had with Hoffa and the IBT's General Counsel, Scalf directed Passo to stop dealing with Simon. (A1543; A2073-74)

Later, in September 2000, Wilkerson met twice with Hoffa and Scalf during an IBT conference in Las Vegas and told them that Passo continued to interfere with his ability to run the Local. (A2586) Also during this conference, IBT Vice President Santangelo and four other International Vice Presidents met with Hoffa regarding the problems Passo was causing at Local 631. (A2645-46) The International officers told Hoffa and Scalf that Wilkerson and Frates had frequent arguments with Passo about running the Local. (A2645)

U. Passo Engineered Trustee Wilkerson's Termination

After Passo was instructed to no longer deal with Simon, Hogan and Passo "altered course." (A356)¹¹ As the IRB found,

[a]n arrangement beneficial to Simon could not be reached as long as Wilkerson was Trustee. Moreover, it

¹¹ In October 2000, there were twenty-one calls between Passo's and Hogan's cellular telephones. (A3405-19; Exs. 50, 51, 75) After Passo returned to Las Vegas on October 20, 2000, the next day there was a fifteen minute call between Passo and Hogan. (A3405-19; Exs. 50, 132-33) Hogan arrived in Las Vegas on October 23 (Ex. 280) and that day reported to Simon in an eight minute call. (Ex. 50) Later that day, Passo called Hogan. (A3405-19; Ex. 50)

could no longer be a direct arrangement with Simon. Changes would have to be made in the Local management and in the Local 631 contract with the trade show contractors to indirectly assist Simon. Hogan needed to thrust himself into the negotiations for the new Local 631 contract to be negotiated.

(A356)

Passo then caused Wilkerson to be fired. (A1580-81; A2097-98; A3476) As with the termination of Frates, Passo was the only person to recommend to Hoffa that Wilkerson be terminated. (A1581; A3476-78) Passo recommended that Wilkerson be terminated because he "was getting political." (A2097) This was the same pretextual charge he had used against Frates.

Hoffa, whose only information came from Passo, testified, "I had a feeling that Mr. Wilkerson was trying to take over the Local for himself." (A3476) However, although Local 631 employees had asked Wilkerson to run for office, he told them he would not unless Hoffa approved. (A479-80) Indeed, under the IBT Constitution, absent a waiver from Hoffa, Wilkerson

would not have been eligible to run for office at Local 631 until he had been a Local member for twenty-four consecutive months. (A5896-97)

Passo also claimed that Wilkerson's purchase of new cars for the Local was another reason for his recommendation that Wilkerson be fired. (A2097-98) At the IRB hearing, however, Passo admitted what was obvious from the cars' age and considerable mileage, that the Local's cars "probably" needed to be replaced. (A569; A5177)¹² Strongly exposing the pretextual nature of the car purchases as a reason for firing Wilkerson was that at no point in the five month process of purchasing cars did Passo, Scalf or Hoffa instruct Wilkerson to stop. Moreover, the IBT was involved in the purchase decisions and the cars were purchased

¹² The mileage and years for the four vehicles Wilkerson replaced were: 128,117 miles on a 1994 car; 120,242 miles on a 1996 truck; 93,234 miles on a 1995 truck; and 84,063 miles on a 1995 car. (A5177)

months before the decision was made to fire Wilkerson.

(A474; A5177)¹³

V. Trustee Jacobson's Conduct

On October 31, 2000, Scalf contacted Ed Jacobson, the Secretary-Treasurer of Local 252 in Centralia, Washington and an International Representative in the Building Trades Division, and asked him to report to Las Vegas to replace Wilkerson as Local 631 Trustee.

(A4072) The day before Scalf made this call to Jacobson, there were six calls between Hogan and Passo.

(A3405-19; Exs. 51, 75)

On or about November 3, 2000, three days after Scalf told Jacobson he would replace Wilkerson, GES again used United employees to perform Teamster work while there were Teamsters available to do the work.

(A2445-46; A4033-37; Ex. 203 at 20-22) The next day, Local 631 steward Michael Robertson filed a grievance

¹³ Another reason given for Wilkerson's termination was his supposed failure to communicate with the IBT. (A1513-14) Scalf himself acknowledged that Wilkerson often contacted the IBT and that Wilkerson alerted him about Passo's agreement with United. (A1531-32, A1563)

against GES for the use of fifty-eight United employees. (A5183)

On November 6, 2000, Jacobson became Trustee.

(A4069; A5071-74) As the IRB found,

Local 631 was now being supervised by a part-time Trustee who continued both to be the principal officer of his own Local and an International Representative with other responsibilities. Jacobson was not given an Assistant Trustee. He had no convention industry experience. Under these altered circumstances Hogan could readily solicit, in due course, a role in negotiating Local 631's contract with the convention industry.

(A361)

1. Jacobson's Meeting with Michael Hogan

On or about December 18, 2000, Jacobson met alone with Michael Hogan, who in addition to being the Vice President of Simon's company was also the CEO of Show Biz, the general contractor for the Super Show to be held in January 2001 in Las Vegas. (A1113-16; A4121; A5111-12; A5943-50) Jacobson excluded the trade show business agents from this meeting. (A4120-21) Later

that day, another meeting was held which Jacobson permitted the agents to attend. (A4121-22)

Michael Hogan faxed Jacobson a letter regarding the meeting that the business agents did not attend. Hogan wrote, "I would like to confirm with you that . . . if the Teamsters Local 631 cannot supply me with the total amount of manpower needed . . ., I will be able to supplement the workforce with a labor service, namely United Temporaries." (A5185) The use of United employees on the Super Show was not discussed at the meeting. Jacobson permitted the business agents to attend. (A5112-14; A1113-29)

2. GES Used United Employees To Perform Teamster Work

Almost contemporaneously with Michael Hogan's letter to Jacobson, GES again used United employees to perform Teamster work while there were workers available to be dispatched from Local 631. (A5874-76; A5194-96; A5184; Ex. 203 at 26-25; Ex. 204 at 7-9; Ex. 205 at 23) On January 9, 2001, steward Robertson filed a grievance against GES. (A5184) The next day,

there were two calls from Passo to Hogan. (A3405-19; Ex. 283)

3. Michael Hogan Attempted to Use United Employees

On the Super Show, Michael Hogan's company, Show Biz, also tried to use the cheaper United employees to perform Teamster work when workers were available through Local 631. (A5206; A4043-45; A5265-66) The Local 631 stewards prevented United employees from working on the Super Show. (A5266)

W. William Hogan and Las Vegas GES Representatives Met in Chicago to Discuss Local 631

During the week of January 29, 2001, Hogan, who had no union role in Local 631, met in Chicago with GES representatives from Las Vegas. (A1817-19) No one from Local 631 was present at this meeting.

At this meeting, GES complained to Hogan about the grievances Local 631 had filed concerning its use of United employees. (A1818; A3975-82)¹⁴ The upcoming Las

¹⁴ Shortly before this meeting, Passo discussed with Locascio the grievances Local 631 filed against GES concerning United. (A2047; A2132) There were six calls from Passo to Hogan between January 19 and January 29. (Exs. 283-84)

Vegas convention contract negotiations were also discussed. (A3975-82; A1819-20; A541) Hogan had not been involved in those negotiations. (A1624-25; A3454, A3517-18) Indeed, he even claimed he had never read the red book contract that was up for re-negotiation. (A530, A531, A535, A541)

The IRB found that

[a]s with his earlier meeting in Las Vegas with the Freeman representative, Hogan never told the Local 631 Trustee or any Local 631 employee or Scalf, his supervisor at the IBT, about his discussions with GES representatives from Las Vegas who traveled to Chicago to seek Hogan's guidance over grievances and a contract with a Local he had no role in and which had been under the International Trusteeship for 10 months.

(A365-66 (citations omitted))

X. Hogan Sought to Negotiate Local 631's New Contract

In approximately March 2001, Hogan asked Hoffa and Scalf to allow him to negotiate the collective bargaining agreement with the trade show contractors in

Las Vegas. (A3517-18)¹⁵ Hoffa refused Hogan's request.
(A3517-18)

Hogan also asked Scalf to let him negotiate Local 631's new contract with the trade show contractors. (A1573) Scalf refused. (A1573) Hogan did not disclose to either Hoffa or Scalf his brother's role as both a general contractor active in Las Vegas and an officer of United. (A3449-50; A1490-91, A1526)

SUMMARY OF THE ARGUMENT

I. The IRB's determination that Hogan and Passo brought reproach on the IBT and breached their fiduciary duties by colluding with Simon to enter into a substandard contract with United, to the detriment of Local 631, was supported by substantial evidence. On appeal, Hogan and Passo reiterate their claim before the IRB that they acted in the interests of Local 631 and that they intended to organize United's employees as Teamsters. As the District Court noted, however, the IRB expressly found these claims to be incredible

¹⁵ The red book contract expired on May 31, 2001. (A272-

and made detailed findings in support of its credibility determinations. Hogan and Passo also claim that, on their views of the red book agreement, their conduct did not harm Local 631. The IRB made contrary findings, however, and the District Court properly held that these findings were supported by substantial evidence.

II. The District Court properly ruled that, under the Consent Order, the IRB has express authority to interpret the IBT Constitution and that it acted within the scope of that authority in determining that Hogan's and Passo's conduct brought reproach upon the Union and breached their fiduciary duties to IBT members, in violation of the IBT Constitution.

III. The District Court properly held that the IRB's sanction was not arbitrary and capricious. The IRB's findings upholding the charges against Hogan and Passo are justified in fact, and a lifetime ban from IBT membership is a permissible sanction in an IRB

(continued...)

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disciplinary proceeding. Moreover, as this Court has previously held, misconduct by high-level IBT officials, such as Hogan and Passo, is properly regarded as more serious and warrants the most severe sanction.

IV. The District Court properly held that Hogan's and Passo's misconduct was not mere "advocacy" protected by section 101(a)(2) of the LMRDA or the First Amendment. The LMRDA expressly permits unions to discipline members for conduct, such as the misconduct at issue here, that threatens the institutional integrity of a union or interferes with its contractual obligations. The First Amendment also does not apply to the IRB because, as this Court has repeatedly held, it is not a state actor.

ARGUMENT

POINT ONE

THE IRB'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Standard Of Review

Hogan and Passo challenge various findings made by the IRB in support of its determination that Hogan and Passo violated the charged provisions of the IBT Constitution.

The IRB's findings are entitled to "great deference" on appeal. *United States v. IBT* ("Carey"), 247 F.3d 370, 379 (2d Cir. 2001) (quoting *United States v. IBT* ("Carey Disqualification"), 156 F.3d 354, 364 (2d Cir. 1998)). The Consent Order specifies "an extremely deferential standard of review": the standard for review of agency decisions set forth in the Administrative Procedures Act, 5 U.S.C. §§ 701-706. *Id.* at 379 (quoting *United States v. IBT* ("DiGiriamo"), 19 F.3d 816, 819-20 (2d Cir. 1994)). Under this standard, the IRB's fact finding is upheld as long as "substantial evidence" supports it (5 U.S.C. §

706(2)(e)), that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 380 (quoting *Chrysler Corp. v. EPA*, 631 F.2d 865, 890 (D.C. Cir. 1980)). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent a . . . finding from being supported by substantial evidence." *United States v. IBT ("Wilson")*, 978 F.2d 68, 72 (2d Cir. 1992). Moreover, if the IRB's fact finding is supported by substantial evidence, then inferences it draws based on those findings must stand unless they are "arbitrary and capricious." *Carey Disqualification*, 156 F.3d at 379-80.

In addition to the deference it affords to the IRB's fact finding, this Court "will not substitute its assessment of a witness's credibility for that of the IRB" because "the Consent Decree officers closest to an investigation are 'best equipped to evaluate the demeanor, credibility, and ultimately the culpability of those who appear before them.'" *Id.* (quoting *United*

States v. IBT ("Simpson"), 931 F. Supp. 1074, 1096 (S.D.N.Y. 1996), *aff'd*, 120 F.3d 341 (2d Cir. 1997), and *Carey Disqualification*, 156 F.3d at 365).

B. The IRB's Decision Was Based on Substantial Evidence

The IRB found that Hogan and Passo brought reproach upon the IBT and violated their duties to the IBT by colluding with Simon, an employer, to the detriment of Local 631 and its members. (A389) The hearing evidence, including the live testimony of Hogan and Passo and more than 300 exhibits, provided substantial evidence in support of this finding.

Hogan knew that two prior Local 631 administrations had rejected Simon's proposal. (A525) After the trusteeship, Hogan introduced Simon to Passo to facilitate Simon's third attempt to secure an arrangement with Local 631. (A525; A1716-17) Once the introductions were made, Passo and Simon both continued to discuss developments with Hogan. (A1785, A1794-95; A3405-19)

Passo also repeatedly pressured Local 631 officials Wilkerson, Frates, and Whitfield to support his agreement for United. (A463, A494-95; A2515-21; A3780-85) Each of these officials recognized that Passo's proposal was substandard. The Local's attorney also refused Passo's urging to persuade Wilkerson that Local 631 should enter into the agreement. (A472) Even more strikingly, trade show contractor Freeman informed Hogan and Passo that the Passo-Simon agreement would harm Local 631's bargaining position. (A575)

After the Local 631 officials objected to his agreement with Simon, Passo did not involve any of those officials in his discussions with Simon. (A471-72; A2515-21) Instead, Passo conferred solely with Hogan about the United agreement. (A530, A531, A540, A541, A542) Passo and Simon then tinkered with the agreement to try to win the support of the Local's officials. (A2524, A2542) The essence of the agreement always remained the same: Simon would take over the dispatch function for his workers and they would be

paid substantially less than the red book contract required. (A2516-19; A994-1004; A494)

To persuade others to approve his substandard agreement with Simon, Passo then resorted to deceiving Local 631 officials by falsely claiming that high-ranking International employees favored the contract. (A464, A2559, A2563; A2653-55; A1527-30; A5775) Passo and Hogan also failed to disclose to their superiors at the IBT their activities concerning United and Local 631. (A3448; A1527; A1574-75; A2062) Scalf did not know Hogan was trying to obtain an agreement for United. (A1536)

After Passo could not convince Local 631 officials to support his agreement with United, he arranged for Frates and Wilkerson to be fired. Both the timing of the terminations and the pretextual reasons Passo manufactured made it evident that Frates and Wilkerson were terminated because they opposed Passo's agreement with Simon.

Further evidencing Hogan's collusion with Simon and Passo, Hogan met with the two major Las Vegas show contractors, GES and Freeman, to discuss Local 631, even though he had no union role in Local 631. (A530-31, A542; A1811, A1815-19) Hogan failed to disclose these meetings to his superior at the IBT and to anyone at Local 631. (A1574-75; A2062; A1814-15; A544) After Passo was barred from dealing with Simon, Hogan emerged from the shadows and maneuvered to be appointed to negotiate Local 631's new contract. (A3517-18; A1573-74) He did not disclose that his brother, the Show Biz CEO and an officer of United, would be impacted by these negotiations, and that his brother had tried to persuade Local 631 officials to give economic concessions to United. (A3449-50; A1490-91, A1526, A1625)

Of all the IBT personnel of many different Teamster backgrounds, including the two prior Local 631 administrations, Trustee Wilkerson, Assistant Trustee Frates, business agent Whitfield, International Vice

President Santangelo and Local attorney Kaplon, only Passo and Hogan claimed to have seen the illusory benefits to the Local in agreeing to a special relationship with United, where Hogan's brother was an officer, which would allow the company to pay its workers less than the contractual pay required for bargaining unit work. The IRB's determination that Hogan's and Passo's attempt to cause Local 631 to enter into such a substandard agreement brought reproach upon the union and violated their fiduciary duties to IBT members was supported by substantial evidence.

C. The IRB's Rejection Of Hogan's and Passo's Claimed Justifications For Their Misconduct Is Supported By Substantial Evidence

In their brief on appeal, Hogan and Passo re-argue the evidence and claim that their efforts to enter into a substandard contract with Simon were not collusive because they actually intended to organize United's workers as Teamsters and they wanted to enter into an agreement with United to protect Local 631's jurisdiction. (HB32-39) They also claim that they did

not undermine Local 631's position under the red book agreement. (HB39-44) The IRB rejected each of Hogan's and Passo's claimed justifications for their misconduct. As the District Court properly ruled, these findings and credibility determinations are all supported by substantial evidence.

1. Hogan And Passo Took No Steps To Organize United's Workers

Contrary to Hogan's and Passo's claims, the IRB found that Passo and Hogan took no steps to organize the United employees. (A369-72) As the District Court held, "[t]he IRB's conclusion that Hogan and Passo had no intent to organize United is amply supported by the facts." (SPA24-25)

Passo and Hogan never spoke to any United employee. (A2062; A1753; Ex. 293) Indeed, Passo testified that, in his conversations with Simon, "I wasn't representing anybody." (A577) In addition, the Local's main organizer, who was involved in all organizing efforts since the trusteeship, and the Local's two other organizers never tried to organize United. (A3576-78,

A3581-84; A3621; A3705; A573) Nor did Passo ever request any organizing help from the International.

(A3705-06; A1906-07; A472-73; A1752) Indeed, most of the United employees spoke Spanish, but Passo never requested assistance from the International which could have made Spanish-speaking organizers available.

(A472-73)

Contrary to the IBT's organizing procedures and the Local 631 bylaws, neither Passo nor Hogan asked any United employee about their concerns before attempting to enter into an agreement with their employer, United.

(A572; A1965-66; A1752; A6206) Instead, Passo and Hogan effectively permitted Simon, an employer, to choose his employees' would-be collective bargaining agent for them. As the IRB found, "[t]he employer's choosing his employees' bargaining representative is an indicia of a prohibited sweetheart deal between an employer and a union." (A370) The IRB thus concluded that "[t]here is no credible evidence that Passo and Hogan took any steps to organize the United workers in

any way for their regular cleaning work or for Teamsters work." (A373-74; A369 ("Passo's claims that [his efforts were] the first stage of organizing United are not credible."); A372 (rejecting Passo's claim that he relied on Simon to organize United's workers as "not credible"))

Hogan and Passo nevertheless argue on appeal that they were engaging in so-called "top-down" organizing by attempting to "organize" the employer, United, instead of its employees. (HB37-38) After observing Hogan and Passo testify and reviewing all of the evidence, however, the IRB found, "There was no credible evidence to support these contentions."

(A372) Moreover, in an affidavit submitted to the District Court in support of his TRO application, Hogan described the arrangement with Simon's company as a "contract for services," not a collective bargaining agreement. (Ex. 311 at 4) In any event, "top-down" organizing is explicitly limited to the construction industry and is not permitted in the trade show

industry at issue here. See *Martin v. Garman Constr. Co.*, 945 F.2d 1000, 1001 n.3 (7th Cir. 1991).

**2. Hogan Did Not Act Out Of A Professed
Desire To Protect Local 631's Jurisdiction**

After observing Hogan testify, the IRB also rejected as incredible Hogan's claim that he acted out of a concern to protect Local 631's jurisdiction.

(A382) Instead, Hogan's "real interest," the IRB found, "was in obtaining an agreement to benefit his brother, an officer of Simon's company and a trade show contractor, and Simon, his Chicago business friend."

(A374) The IRB further found, "Passo and Hogan did not and could not explain how it would be beneficial to allow trade show contractors to use United's non-union low paid workers totally under United's control."

(A381) In support of its credibility determination, the IRB pointed to the fact that Hogan did not tell Trustee Wilkerson, Trustee Jacobson, or anyone else at the Local, about his purported jurisdictional concern.

(A374, A382) On the basis of these credibility determinations alone, this Court should reject Hogan's

and Passo's argument on appeal that their conduct was motivated by a concern for Local 631's jurisdiction.

See Carey, 247 F.3d at 379-80.

In addition, the IRB found that, contrary to Hogan's and Passo's claims, the agreement they sought with Simon would not have protected, but would have ceded Local 631's jurisdiction. (A381) Substantial evidence supports these findings.

Before the trusteeship, Local 631 met large calls for workers by using members of the Carpenters and other unions after the Local's dispatch list was exhausted. (A2401-04; A2552-53) When members of the non-IBT unions were dispatched from Local 631, they had clearance from the Teamsters to work; were paid, at least, red book contract rates; and were, in effect, acting as Teamsters. (A464, A477, A480, A498, A502) After the trusteeship was imposed, however, Passo insisted that Local 631 not dispatch workers from other unions, thereby making it more likely that Local 631 would not be able to meet the call. (A2549; A2001;

A1284) In addition, Passo, artificially erecting another obstacle, objected to Whitfield directly dispatching workers to meet the call when the dispatch office was closed. (A496; A2005-11; A3774-75)

Under the Passo-Simon agreement, Local 631 would have ceded the dispatch function to United who would then use non-union United employees to perform bargaining unit work. (A305-10) United employees would also have been paid wages that were substantially below the wages under the red book contract. (A282, A289-90; A305-10) Under the Passo-Simon agreement, trade show contractors would have had a powerful financial incentive to try to arrange for United to dispatch its employees instead of looking to Local 631 to meet the call. As Santangelo and Frates put it, it would be "asinine" and "crazy" for Local 631 to enter into such a detrimental arrangement with United.

(A3785) Accordingly, substantial evidence supported the IRB's finding that "[o]nly Simon and GES, who could

use United's cheaper labor, benefited from Passo's position. Local 631 was harmed." (A382)¹⁶

3. Hogan's and Passo's Claims Regarding The Red Book Contract Are Not Supported By The Evidence

Hogan and Passo argue that they cannot be deemed to have colluded with Simon to enter into a substandard contract because the red book contract "was not a governing contract and imposed no financial obligations whatsoever on United." (HB39) This argument is a red herring in two respects.

First, as the District Court properly ruled, the issue before the IRB did not require it to interpret the red book contract to determine whether it was a "governing contract" to United. (SPA23) Rather, the

¹⁶ Hogan and Passo also claim that Local 631's current contract has ceded Local 631's jurisdiction. (HB36) This argument is irrelevant and misleading. Local 631's new contract, which was ratified by its members, has nothing to do with whether Hogan and Passo colluded with Simon to the detriment of Local 631 members. In any event, Local 631's jurisdiction has remained the same under the new agreement. (A215; A281) The non-IBT unions are called only after Local 631's hiring hall is exhausted, and the hourly wages under the non-IBT union contracts are higher than the wages Passo agreed to for the United employees. (A580; A253, A257; A258-271; A305-310)

issue before the IRB was purely factual: whether Hogan and Passo colluded with a non-union employer with the intent to benefit Hogan's friend and brother and to the detriment of Local 631, as Hogan and Passo were charged, or whether Hogan and Passo acted with the intent to benefit Local 631, as they claimed. (SPA23) This question of intent did not turn on the legal issue of whether the red book contract governed United, but on Hogan's and Passo's conduct from which their intent could be inferred. (SPA23)¹⁷

Second, that United was not a party to the red book contract is irrelevant to the misconduct for which Passo and Hogan were charged. Rather, the pertinent point, as the IRB found, is that "under the red book contract, any employee, even if not dispatched through Local 631, who performed bargaining unit work should have been paid the contract rates." (A319) The IRB further found that Simon's agreement with Passo would

¹⁷ Accordingly, the District Court did not err, as Hogan and Passo argue (HB39), by declining to review *de novo* any of

have undercut Local 631 because it would have given trade show contractors an incentive to use United to do bargaining unit work at wages that were dramatically less than the contractors were required to pay under the then-existing red book contract. (A319-20) The red book contract thus "governed" the bargaining unit work that Simon sought to have United's employees perform for the trade show contractors, even though United was not a party to the red book contract itself.

The record fully supported the IRB's findings. The red book contract provided that the trade show contractors would require any subcontractor to pay its employees in accordance with the red book contract:

It is the Company's intent in subcontracting any work of a substantial, major, or continuous nature which is covered by the Agreement with any person, firm, corporation, partnership or other organization to require the subcontractor to observe the applicable wage rates, hours, and

(continued...)

the IRB's findings concerning Hogan's and Passo's views of the red book agreement.

working conditions set forth in this Agreement.

(A283 (emphasis added))

The IRB's findings were also supported by the understanding of experienced IBT officials in Las Vegas in charge of enforcing the red book contract, including former Secretary-Treasurer Murphy, former dispatcher Breyman, Trustee Wilkerson, Assistant Trustee Frates, business agent Chuck Benboe, former business agent William Christian, and Trustee Jacobson. (A465, A476-77, A550; A3771-73; A2534; A797-98; A629-30; Ex. 5 at 19; Ex. 203 at 27) Indeed, even Passo understood that the red book contract required that all bargaining unit work be compensated at the contract rate. (A575)

The IRB's finding that bargaining unit work was to be compensated at the wage rates set forth in the red book contract, regardless of who performed it, was supported by substantial evidence.

4. Hogan's and Passo's Claims Concerning The "Most Favored Nations" Clause Are Not Supported By The Evidence

Hogan and Passo argue that the red book contract's "most favored nations" clause was not implicated by their agreement with Simon and, therefore, the Simon-Passo agreement would not have harmed Local 631 members. (HB45-46) The most favored nations clause permitted the trade show contractors to obtain the terms of any more favorable agreement between Local 631 and "any General Contractor, Independent Contractor or Contractors Association engaged in convention services work." (A292)

The evidence does not support Hogan's and Passo's argument. First, the officials at Local 631 responsible for enforcing the contract understood that the Simon-Passo agreement implicated the most favored nations clause. (A2519; A3784, A3800; A463, A472, A477-78, A479) Indeed, as the IRB found, even Simon understood that the clause would have been implicated. (A384) He represented to Frates that he had discussed

it with GES and that employer would waive its rights under the most favored nations clause. (A346; A3800)

Second, neither Hogan nor Passo ever voiced their view to any Local 631 official that the most favored nations clause would not be implicated by the Simon-Passo agreement. (A384) To the contrary, on the contract Passo sent to the IBT legal department he noted the clause as an issue. (A306)

Finally, Hogan's and Passo's argument is, like their argument that United was not a signatory to the red book contract, a red herring. In any dispute over the most favored nations clause, the sub-contracting clause, or any provision of the red book agreement, the IBT would take the position most favorable to the Local and its members, not the position least favorable to the union that Passo and Hogan have now adopted. The IRB's findings rejecting Hogan's and Passo's views of the red book agreement are supported by substantial evidence.

POINT TWO

THE IRB ACTED WITHIN ITS JURISDICTION

Hogan and Passo argue that the IRB exceeded its authority by determining that their misconduct brought reproach upon the IBT, in violation of the IBT Constitution. (HB50) The IRB acted well within the scope of its authority.

As the District Court properly ruled, "The IRB's authority to interpret the IBT Constitution and discipline IBT members is now beyond serious dispute." (SPA28) See also *United States v. IBT* ("IRB Rules"), 998 F.2d 1101 (2d Cir. 1993); *United States v. IBT* ("Friedman & Hughes"), 905 F.2d 610, 613 (2d Cir. 1990). The Consent Order confers upon the IRB the same disciplinary authority that the IBT Constitution confers on the General President.¹⁸ (A409 ¶ G(b)). The

¹⁸ Hogan and Passo suggest that the full extent of the IRB's jurisdiction is set forth in Paragraph G(a) of the Consent Order. (HB50) That provision deals with the IRB's authority to hire staff and to conduct certain investigations. (A409 ¶ G(a)). Section G(b) of the Consent Order is clear that the IRB has the full scope of investigative authority that the IBT Constitution vests in the General President and General Secretary-Treasurer. (A409)

IBT Constitution, in turn, authorizes the General President to "interpret and apply" the IBT Constitution and "to decide all questions of law thereunder." See IBT Const. Art. VI, § 2(a).¹⁹

Accordingly, the IRB's disciplinary authority "necessarily includes the final authority to decide what constitutes an offense subject to discipline under the IBT Constitution." *Friedman & Hughes*, 905 F.2d at 619. The IRB Rules also expressly authorize the IRB to investigate "conduct that in the IRB's view brings reproach upon the Union." *United States v. IBT* ("IRB Rules"), 803 F. Supp. 761, 802 (S.D.N.Y. 1992), *aff'd as modified*, 998 F.2d 1102 (2d Cir. 1993); see also *United States v. IBT* ("Mireles & Roa"), 315 F.3d 97, 99 (2d Cir. 2002) (IRB has authority to determine what conduct brings "reproach upon the IBT").

¹⁹ Hogan and Passo suggest that the IRB has no authority over them under the Consent Order. (HB50) As this Court has made clear, an IBT member is "bound by the terms of the disciplinary mechanism set in place by the Consent Decree." *United States v. IBT* ("Adelstein"), 998 F.2d 120, 124 (2d Cir. 1993) (internal quotation marks and alterations omitted).

The IRB did not exceed its jurisdiction here. The IBT Constitution expressly provides that each IBT member must "conduct himself or herself at all times in such a manner as not to bring reproach upon the Union" (IBT Const. Art. II, § 2(a)) and that officers may face charges for violating "any specific provision of the Constitution" (*id.* Art. XIX, § 7(b)(1)) or their "oath of loyalty" (*id.* § 7(b)(2)). Applying these provisions, the IRB determined that Hogan's and Passo's misconduct in colluding with a labor broker to enter into a substandard contract to the detriment of Local 631 brought "reproach upon the Union" and violated their fiduciary duties under the IBT Constitution, as charged. (A389) In making this determination, the IRB acted well within the scope of its authority to interpret and apply the IBT Constitution. See *Mireles & Roa*, 315 F.3d at 99; *cf. Spellacy v. Airline Pilots Ass'n Int'l*, 156 F.3d 120, 128 (2d Cir. 1998) (union's construction of its own constitution is upheld if "reasonable").

POINT THREE

THE IRB'S SANCTION WAS NOT ARBITRARY OR CAPRICIOUS

Hogan and Passo argue that their misconduct did not warrant the sanction the IRB imposed. (HB51-52) As the District Court properly held, "[T]he IRB acted well within its broad discretion" in permanently banning Hogan and Passo from IBT membership and IBT-affiliated positions. (SPA35)

The IRB is vested with "wide discretion" to set appropriate sanctions. *United States v. IBT* ("Giacumbo"), 170 F.3d 136, 144 (2d Cir. 1999). On review, this Court asks only whether the sanction imposed represents an "allowable judgment." *United States v. IBT* ("Wilson"), 978 F.2d at 73. The Court will uphold the IRB's sanction "unless it finds the penalty unwarranted in law or without justification in fact." See *Carey*, 247 F.3d at 389 (quoting *United States v. IBT* ("Simpson"), 120 F.3d 341, 348 (2d Cir. 1997)).

The IRB's decision to permanently ban Hogan and Passo was both justified in fact and warranted in law. The District Court aptly summarized the evidence showing that the IRB's sanction was warranted in fact:

By engaging in their collusive scheme with United, a non-Union labor broker, Hogan and Passo betrayed the IBT membership at Local 631 in an effort to benefit Hogan's brother and his business friend. Their misuse of their union authority resulted in the termination of innocent local officers, threatened to undermine Local 631's bargaining position with trade show contractors and amounted to an unfair labor practice.

(SPA35-36)

Hogan and Passo nevertheless argue that a lifetime ban was not warranted because their "conduct caused no actual harm to the IBT." (HB51) Hogan and Passo have ignored the IRB's express findings, which were supported by substantial evidence, that IBT members "were repeatedly harmed" (A368) and that "the jurisdiction of Local 631 and the IBT was eroded by" Hogan's and Passo's misconduct (A379). Indeed, the evidence showed that Hogan and Passo lied to Teamster

officials, caused Frates and Wilkerson to lose their jobs for pretextual reasons, interfered in Local 631 matters, and undermined Local 631's bargaining position. After Passo reached an agreement with Simon's company, GES also aggressively used non-union, lower-paid United employees to do Teamster work. In these circumstances, the IRB made an "allowable judgment" in determining that a permanent ban was an appropriate sanction for Hogan and Passo.

The IRB's sanction was also justified in law. The IRB Rules expressly provide "the IRB shall have the authority to impose any discipline . . . authorized by the IBT Constitution." (A435) The IBT Constitution provides expulsion from the Union is a permissible sanction in an IRB disciplinary proceeding. See IBT Const. Art. XIX, § 10(a); see also *United States v. IBT* ("Boggia"), 167 F.3d 113, 120 (2d Cir. 1999); *Carey*, 247 F.3d at 390.

The IRB also acted within its discretion to permanently ban Hogan and Passo "precisely because

[they were] trusted, high-level official[s] in the IBT." *Simpson*, 120 F.3d at 348-49 (misconduct by high-level officials is "more culpable"); *see also Carey*, 247 F.3d at 389-90. Hogan held multiple high-level offices. He was an International Representative, the head of Joint Council 25, Vice President of Local 719, and the Organizing and Political Director for Local 714 in Chicago. Passo was the Special Assistant to the General President, an International Representative, and the General President's Personal Representative to Local 631. In these circumstances, as the District Court ruled, "[a] permanent bar sends precisely the right message to the IBT membership: that corruption by high-ranking IBT officials will not be tolerated -- no matter how longstanding their memberships and no matter how many of their relatives are also members."

(SPA37) The sanction the IRB imposed on Passo and Hogan was warranted in law and not arbitrary and capricious.

Finally, Hogan and Passo suggest that the IRB sanction is arbitrary and capricious because, under Paragraph E(10) of the Consent Order, IBT members are now prohibited from knowingly associating with them.

(HB52) This Court has held, however, that the associational ban has a "basis in the IBT rules and the Consent Decree" and is not arbitrary and capricious. *Carey*, 247 F.3d at 390-91.

POINT FOUR

THE IRB'S ORDER DID NOT VIOLATE THE LMRDA OR THE FIRST AMENDMENT

Hogan and Passo argue that their misconduct was merely "advocacy" that should be protected by both the LMRDA and the First Amendment. (HB27-32) As the District Court properly held, Hogan's and Passo's misconduct was not mere "advocacy" and, even if it were, it was not protected by the LMRDA. (SPA31-34) It is also well-settled that the IRB is not a "state actor" bound by the First Amendment.

**A. Hogan And Passo Were Disciplined For Violating
The IBT Constitution**

Hogan and Passo were not disciplined for advocating their views. As the IRB made clear, they were disciplined for engaging in a pattern of concerted activity to benefit Simon and Michael Hogan to the detriment of Local 631. (A382) This conduct constituted a breach of Hogan's and Passo's fiduciary duties and brought reproach upon the IBT, in violation of their obligations under the IBT Constitution. (*Id.*) It was not mere advocacy.²⁰ The District Court thus properly held that neither the LMRDA nor the First Amendment insulate Hogan and Passo from being disciplined for their misconduct. (SPA31)

Indeed, Hogan's and Passo's argument ignores the IRB's express findings. As set forth in Point One, the IRB rejected their claim that their conduct reflected a supposed concern that other unions would infringe on

²⁰ In support of this argument, Hogan and Passo characterize Passo's agreement with Simon as "inchoate" and non-final. (HB26) The IRB expressly found, however, that Passo and Simon had reached a final agreement. (A375-78)

Local 631's jurisdiction. (A378) It also rejected their claim that they were seeking to contract with United as a way to bring more members into Local 631.

(A372)

B. The IRB's Decision Does Not Violate Hogan's and Passo's Free-Speech Rights Under The LMRDA

Even assuming that Hogan's and Passo's conduct could be deemed mere "advocacy," the IRB's decision was fully consistent with the LMRDA.

The LMRDA protects the right of all union members to "express views, arguments or opinions." 29 U.S.C. § 411(a)(2). This free-speech right is expressly subject to a union's right to "enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with the performance of [the union's] legal or contractual obligations." *Id.*

Hogan and Passo were subject to discipline under the LMRDA. As the District Court properly concluded, "Hogan and Passo engaged in conduct that betrayed the

IBT as an institution and interfered with the collective bargaining obligations of Local 631."

(SPA34) This misconduct violated the IBT's reasonable rules against bringing reproach upon the IBT and breaching fiduciary duties to IBT members.

The LMRDA expressly permits unions to discipline members for engaging in such conduct. See 29 U.S.C. § 411(a)(2); see also *DiGirlando*, 19 F.3d at 823 (sanction to rid IBT of "corrupt influence conforms with § 101(a)(2) of the LMRDA"); see also *United Steelworkers of Am. v. Sadlowski*, 457 U.S. 102, 115 (1982) (union has a "legitimate interest" in enforcing rules "to ensure that nonmembers do not unduly influence union affairs"); *Ferguson v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 854 F.2d 1169, 1174 (9th Cir. 1988) (union may enforce rules that "threaten the union as an institution and interfere[s] with the union's duties as a collective bargaining agent"); *Mayle v. Laborer's Int'l Union of N. Am., Local 1015*, 866 F.2d 144, 147 (6th Cir. 1988)

("[E]xpulsions are permissible where the actions of a union member interfere with the union's institutional integrity.").

Hogan and Passo cite three decisions as purported support for their argument. (HB28-30 & n.4 citing *Sheet Metal Workers' Int'l Ass'n v. Lynn*, 488 U.S. 347, 358 (1989); *Petramale v. Local 17 of Laborers Int'l Union*, 736 F.2d 13 (2d Cir. 1984); and *Ostrowski v. Local 1-2, Utility Workers Union of Am.*, 530 F. Supp. 208 (S.D.N.Y. 1980)) These decisions all addressed the propriety of disciplining a union member for speech at internal union meetings that in no way threatened the union's institutional integrity or subverted any collective bargaining agreement. See *Lynn*, 488 U.S. at 349-50; *Petramale*, 736 F.2d at 18; *Ostrowski*, 530 F. Supp. at 208.²¹ Here, the IRB found that Hogan and Passo engaged in collusive conduct with a labor broker that subverted Local 631's bargaining position with

²¹ Indeed, *Lynn* addressed only the narrow (and here inapposite) question of whether an elected business agent of a

trade show contractors and harmed Local 631's members while benefiting Hogan's brother and business associate. The LMRDA poses no bar to disciplining a member for such misconduct.

C. Hogan And Passo May Not Challenge The IRB's Decision On First Amendment Grounds

Hogan and Passo also argue that the IRB's sanction violated their First Amendment rights. (HB31-32) This Court has held, however, that the IRB is not a "state actor." See, e.g., *Carey Disqualification*, 156 F.3d at 359 ("[O]fficials appointed pursuant to the IBT Consent Decree are not state actors."); *United States v. IBT*, ("Sansone"), 981 F.2d 1362, 1371 (2d Cir. 1992); *United States v. IBT* ("Star Market"), 954 F.2d 801, 806 (2d Cir. 1992); *United States v. IBT* ("Senese"), 941 F.2d 1292, 1296 (2d Cir. 1991). The First Amendment is a bar only to state actors. See *id.*

Hogan and Passo invite the Court to reconsider this precedent in light of *Lebron v. National Railroad*

(continued...)

union may invoke the free-speech protections of the LMRDA. See

Passenger Corp., 513 U.S. 374 (1995), and *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). (HB32) Neither decision supports their position.

Lebron set out a three-part test for determining whether a government-created corporation can be deemed a state actor. See 513 U.S. at 398. The IRB is not a government-created corporation. It was created pursuant to a private agreement. See *Carey Disqualification*, 156 F.3d at 359 (IRB officials "derive their powers from and act pursuant to a private agreement -- namely, the IBT Constitution"). *Brentwood* held that a high school athletic association was a state actor because it was predominantly "an organization of public schools acting in their official capacity." 531 U.S. at 299-300. The IRB's three members are not public officials. They are appointed pursuant to a private agreement; exercise authority

(continued...)

488 U.S. at 352-55.

delegated to them by the IBT Constitution; and their salaries and expenses are paid by the IBT. (A409-13)²²

CONCLUSION

The District Court's order should be affirmed.

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Respectfully submitted,



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²² Hogan and Passo also cite *Gorman-Bakos v. Cornell Cooperative Extension*, 252 F.3d 545 (2d Cir. 2001). (HB32) In *Gorman-Bakos*, this Court expressly stated that it did not reach the question of whether a "subordinate government agency" should be deemed a state actor. *Id.* at 551. *Gorman-Bakos* is inapposite, in any event, because the IRB is not a subordinate government agency.