



**United States Government**  
**NATIONAL LABOR RELATIONS BOARD**  
Region 2  
26 Federal Plaza – Room 3614  
New York, New York 10278-0104

Telephone: (212) 264-0300  
Facsimile: (212) 264-2450

May 1, 2012

**By E-Filing**

Lester A. Heltzer, Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW  
Washington, DC 20570

Re: Case No. 2-CB-063648

Dear Mr. Heltzer:

Counsel for the Acting General Counsel is today e-filing the enclosed Answering Brief to Respondent's Exceptions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Alejandro A. Ortiz".

Alejandro A. Ortiz  
Board Attorney

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2

**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 14-14B  
(SKANSKA, USA)**

**Respondent**

**and**

**Case No. 2-CB-063648**

**BIAGIO NICCHIA,**

**Charging Party**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Alejandro A. Ortiz  
Counsel for the Acting  
General Counsel  
National Labor Relations Board  
Region 2  
26 Federal Plaza, Room 3614  
New York, NY 10278

Dated at New York, New York  
May 1, 2012

## I. STATEMENT OF THE CASE

On August 30, 2011, Biagio Nicchia (Nicchia) filed a charge alleging that the International Union of Operating Engineers, Local 14-14B (Union or Respondent) violated Sections 8(b)(1)(A) and (2) of the National Labor Relations Act. (G.C. Ex. 1(a).)<sup>1</sup> On November 15, 2011, a Complaint issued alleging the Union violated the above-sections of the Act. (G.C. Ex. 1 (c)). Pursuant to the Complaint, a hearing was held before Administrative Law Judge Steven Davis (“ALJ”) on January 30, 2012.

On March 20, 2012, the ALJ issued a Decision (“ALJD”) finding that the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act as alleged in the Complaint. In essence, the ALJ found that the Union violated the Act by causing Nicchia’s discharge because of Nicchia’s non-membership in the Union. (ALJD 2:5-15).<sup>2</sup>

On April 13, 2012, the Union filed Exceptions to the ALJD and a Brief in Support of its Exceptions (“Respondent’s Brief”). Pursuant to Section 102.46(d) of the Rules and Regulations of the National Labor Relations Board (“Board’s Rules and Regulations”), the General Counsel submits this answering brief to Respondent’s Exceptions. As shown below, Respondent’s Exceptions are without basis in the record, contrary to law, and should be dismissed in their entirety.

## II. STATEMENT OF FACTS

Unless noted otherwise in this brief, the General Counsel supports the ALJ’s findings of fact.

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<sup>1</sup> All references herein to General Counsel’s Exhibits will be identified as “G.C. Ex. \_\_\_”; references to Joint Exhibits as “Joint Ex. \_\_\_”, and references to the hearing transcript as “Tr., \_\_\_”.

<sup>2</sup> Citations to the ALJD refer to the pages and line numbers referenced in the ALJD.

### III. ARGUMENT

#### **POINT I. The ALJ properly applied the facts in this case.**

In its first point of contention, Respondent argues the ALJ failed to properly apply facts which it claims are material to the case. This point appears to encompass Respondent's Exceptions 1, 5, 7, and 8. As shown below, Respondent is mistaken and accordingly its first point should be rejected.

Respondent asserts the ALJ erred when he determined that Skanska delegated its hiring and firing authority to the Union because, according to Respondent, the ALJ based this finding on his determination that Respondent operated an exclusive hiring hall. This is incorrect. While the ALJ did conclude that Skanska delegated its hiring/firing authority to the Union, that conclusion was not based on a finding that Respondent operated an exclusive hiring hall. The ALJ made no such finding. Nor was such a finding necessary for the ALJ to conclude that Skanska had delegated its hiring/firing authority to the Union.

The ALJ's conclusion that Skanska delegated its hiring/firing authority to the Union was based on the following facts, which are expressly discussed in the ALJ's decision: first, that Nicchia never met an Employer representative when he reported for work pursuant to the Union's referral, second, that the Union used its own members at the jobsite to process newly hired workers whom it had referred, and, finally, as testified by Confrey, that the Employer left the hiring and replacement decisions to the Union as long as the jobsite was operating properly. (ALJD 5:38-50). The Union does not dispute these findings of fact. Accordingly, any exception to these findings of facts should be deemed waived pursuant to Section 102.46(b)(2) of the Board's Rules and Regulations.

Instead of addressing these facts, the Union pretends the ALJ relied on a finding he did not make regarding what type of hiring hall the Union operates. To support its theory, the Union selectively quotes the ALJ's decision and, in so doing, distorts the ALJ's actual findings. The Union, for example, accurately quotes the ALJ's phrasing, "a typical hiring hall arrangement." The ALJ did in fact write that phrase. The full sentence, however, was "Here, it is clear that the Respondent delegated its authority to hire and replace employees to the Union which is a typical arrangement in hiring hall situations." (ALJD 5:42-45). The ALJ followed that sentence with citations to two cases involving what he apparently deemed "typical hiring hall situations." (*Id.*) His conclusion regarding Skanska's delegation, however, is unrelated to that recitation of case law. The Union writes in its brief that the ALJ found the Union "operated a 'typical hiring hall arrangement' and *therefore* Skanska delegates its authority to hire and fire its employees to the union." (Emphasis added). The Union's inclusion of the word "therefore" is misleading because it suggests the ALJ based his conclusion regarding delegation on a finding that the Union operates a certain type of hiring hall. As stated, the ALJ made no such finding.

In further support of its argument, the Union highlights portions of Confrey's testimony and language from the CBA between the Union and Skanska. Both are highlighted to draw the reader's attention to what should have been the hiring/firing practice at the Second Avenue Subway Construction Project. However, neither the CBA nor Confrey's testimony touch on what actually happened there. The excerpted testimony, for example, is limited to a discussion of what the referral/hiring process generally looks like. The CBA does the same. Again, however, this evidence does not bear on what actually happened. Moreover, the ALJ was not tasked with determining what *should* happen. He was tasked with finding what *did* happen. Here, the ALJ found that there was a delegation of authority. That finding, as stated, is unrelated

to the contractual language or what should have happened. It was based on uncontroverted testimony by Nicchia and Confrey. (See ALJD 2:33-45; 5:38-50).

Finally, Confrey was not at the jobsite when Nicchia began working for Skanska. Accordingly, he was not in a position to testify (nor did he testify) as to what happened when Nicchia began working for Skanska. He does not know to whom Nicchia spoke nor from whom Nicchia received employment forms. Nevertheless, even assuming for the sake of argument that Nicchia did meet with a Skanska representative before working for Skanska, that fact would not negate the conclusion that Skanska delegated its hiring/firing authority to the Union. It would mean only that Nicchia met with a Skanska representative to complete paperwork. The act of completing employment forms does not necessarily bear on the decision to hire. Indeed, experience suggests that certain employment forms are completed *after* an applicant is hired. In any event, no evidence exists here showing that Nicchia met with a Skanska representative prior to beginning work with Skanska; more to the point, however, the evidence does show that the Union had the power to replace Nicchia on the jobsite, which is of course the essence of this case. The General Counsel here is not interested in how Nicchia was hired; it is how he was fired that violated the Act. Because the Union's first point of contention misconstrues the ALJ's decision, it should be disregarded.

**POINT II. The evidence in this case supports the ALJ's finding that the Union unlawfully replaced Nicchia on the jobsite.**

In its second point of contention, the Union argues the ALJ erred by rejecting its assertion that its actions were motivated by the "underlying purpose of the Consent Decree" and that, given this lawful motive, the ALJ should have found the Union's actions lawful. This point appears to encompass Respondent's Exceptions 2, 3, 4, 6-8.

Despite the Union's assertions that it was motivated by lawful considerations, i.e., the Consent Decree or the HO's finding of corruption, the evidence shows otherwise. The General Counsel presented overwhelming evidence that the Union's true motivation in replacing Nicchia on the job was Nicchia's expulsion from the Union.

It bears repeating that the HO's finding that Nicchia was "corrupt" revealed nothing new to the Union. The Union had long been aware of, and tolerated, the conduct on which that finding was based. The HO's 2011 decision simply recast as "corrupt" conduct which Nicchia's 2004 plea had deemed "criminal." This conduct, however reprehensible, never prevented the Union from referring Nicchia to jobs. Indeed, from the time he was released from prison, in April 2005, until he was expelled from the Union, in August 2011, Nicchia worked consistently and each job on which he worked was covered by a Local 14-14B contract. Because the corruption finding was based on conduct the Union had been aware of for years, the Union cannot compare itself to the union in *Philadelphia Typographical Union No. 2 (Triangle Publications)*, 189 NLRB 829, 830 (1971), as it now urges.

The Board in that case found that the charging party's criminal behavior was a legitimate reason to interfere with the charging party's employment. The charging party, Kelley, was a former union treasurer who was expelled from the union for having embezzled approximately \$39,000. The union caused Kelley to be selected for lay off by removing Kelley's priority status. Despite the Union's interference with Kelley's employment, the Board exonerated the Union because it found that "Kelley's expulsion from the union was not the cause of the interference, but that the removal of his seniority and ultimate layoff were occasioned solely because of the embezzlement." *Id.* at 829. However, unlike the facts present here, in *Philadelphia Typographical* the timing of events supported the finding that the Union's actions were

motivated by Kelley's criminal conduct. Kelley was indicted in June 1967, expelled from the union in October 1967, and laid off in mid-December 1967. Accordingly, the union there acted to have Kelley discharged within months of his conviction.

Here, in contrast, the facts demonstrate that the Union was not disturbed by Nicchia's criminal conviction. The facts establish that Nicchia pleaded guilty in 2004. From 2004 until the day of his replacement, in 2011, the Union took no action against Nicchia. It interfered neither with his Union membership nor his job prospects. To the contrary, during this period the Union continually referred Nicchia to jobs—despite knowing he was a convicted felon. (Tr. 16, 31, 37-38.) Accordingly, instead of evidence of a compelling and overriding character that the Union was motivated by lawful considerations like the Nicchia's criminal history or HO's finding of corruption, the evidence here suggests just the opposite--that Nicchia's discharge was occasioned by unlawful considerations, i.e., his expulsion from the union.

The Union also cites generally the purpose of the Consent Decree as influencing its decision to cause Nicchia's discharge. Here, again, the Union fails to persuade. The Consent Decree contains no provision requiring that the Union interfere with a member's employment if that member is expelled from the Union. Furthermore, the email written by the Union's counsel to Confrey lays bare the Union's true reason for its behavior. It provides in pertinent part:

Business Agents, if Mr. Nicchia is working in your jurisdiction, . . . you are to contact him immediately and advise him that: (1) you have been advised by the hearing officer that he has been permanently expelled effective immediately from Local 14-14B and (2) *accordingly*<sup>3</sup> you will be replacing him on the job starting tomorrow.

Steinberg's failure to mention the Consent Decree shows that the Consent Decree was not a motivating factor in the Union's decision. Indeed, the email reveals a very different, and

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<sup>3</sup> Accordingly is defined as "(1): in accordance: correspondingly; 2) consequently, so". Webster's New Collegiate Dictionary, page 8. (1977).

unlawful, rationale—that Nicchia had been expelled from the Union and, accordingly, he was to be replaced on the job.

Finally, because the Union interfered with Nicchia’s employment, the law presumes an unlawful motive, i.e., that the Union sought to encourage Union membership by discriminating against the employee because of his or her loss of membership. *See Radio Officers v. NLRB*, 347 U.S. 17, 53 (1954); *Carpenters Local 1102 (Planet Corp.)*, 144 NLRB 798, 800 (1963). Accordingly, the Union had the burden of rebutting that presumption. *Carpenters Local 1102 (Planet Corp.)*, 144 NLRB 798, 800 (1963). It could have done so by presenting “evidence of a compelling and overriding character showing that the conduct complained of was referable to other considerations, lawful in themselves, and wholly unrelated to the exercise of protected employee rights or to other matters with which the Act is concerned.” *Id.*, *see also Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681, 681 (1973), *remanded* 496 F.2d 1308 (6th Cir. 1974), *enf. denied on other grounds* 555 F.2d 552 (6th Cir. 1977).

The Union failed to do so. Instead, as discussed above, the evidence presented showed that the Union tolerated Nicchia’s criminal conviction for years and only moved to have him discharged once he was the expelled from the Union. It is true, as the Union asserts, that Nicchia was expelled from the Union as a result of the HO’s finding of corruption. However, both events (the corruption finding and the expulsion) occurred simultaneously. That is, they were both wrapped up in the same HO decision. Given the presumption of unlawful motive, it was incumbent on the Union to show that its actions were motivated by lawful considerations, e.g., the finding of corruption, as opposed to Nicchia’s expulsion from the Union. It did not.

In summary, the Union's contention that it was acting to further the purpose of the Consent Decree or that it was motivated by Nicchia's corrupt conduct must be rejected in light of the evidence showing that the Union's true motivation was Nicchia's expulsion from the Union.

#### **IV. CONCLUSION**

General Counsel submits that on the basis of the entire record and for the reasons set forth above, a preponderance of the evidence supports the ALJ's findings of facts and conclusions of law. General Counsel therefore respectfully urges the Board to find that Respondent's exceptions have no merit and to adopt the ALJ's findings and conclusions of law to which Respondent excepts.

Dated at New York, New York  
May 1, 2012

Respectfully submitted,



Alejandro A. Ortiz  
Counsel for the Acting General Counsel  
National Labor Relations Board – Region 2  
26 Federal Plaza, Room 3614  
New York, New York 10278  
Telephone: 212.264.0300  
Email: [alejandro.ortiz@nlrb.gov](mailto:alejandro.ortiz@nlrb.gov)

**AFFIDAVIT OF SERVICE**

I hereby certify that a copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions was served on the 1<sup>st</sup> day of May, 2012, on the following parties:

**E-File:**

Lester A. Heltzer, Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW  
Washington, DC 20570

**E-mail:**

James Steinberg, Esq.  
Brady McGuire & Steinberg, P.C.  
303 South Broadway, Suite 234  
Tarrytown, New York 10591  
james@bradymcguiresteinberg.com

**Overnight Mail:**

Biagio Nicchia  
3177 Tierney Place  
Bronx, NY 10465

Steven S. Goodman, Esq.  
Jackson Lewis, LLP  
58 S Service Road, Suite 410  
Melville, NY 11747-2346

Seth Ptasiewicz, Esq.  
Trivella & Forte, LLP  
1311 Mamaroneck Avenue  
Suite 170  
White Plains, NY 10605

Clay Haden, Esq  
Skanska UAS Building, Inc.  
55 Ivan Allen Jr., Blvd, B,W, Suite 600  
Atlanta, GA 30308

  
\_\_\_\_\_  
NATIONAL LABOR RELATIONS BOARD

Subscribed and sworn to by me this:  
1<sup>st</sup> day of May, 2012

  
\_\_\_\_\_  
Designated Agent