

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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

Respondent,

Case No. 2-CB-63648

-against-

BIAGIO NICCHIA,

An individual.

-----X

**RESPONDENT INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 14-14B, AFL-CIO'S EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION AND BRIEF IN SUPPORT OF ITS PETITION TO
REVERSE THE DECISION AND DISMISS THE COMPLAINT**

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Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 14-14B, AFL-CIO ("LOCAL 14") files the following exceptions to the Decision of Administrative Law Judge Steven Davis dated March 20, 2012 and submits this brief in support of its petition to reverse the decision and dismiss the Complaint in its entirety.

EXCEPTIONS

1. To the Finding of Fact that referred LOCAL 14 members are only met on a job site by: (a) a member of LOCAL 14 who is employed on the job site as a master mechanic; or (b) in the event that a master mechanic is not employed on the job site, then by another LOCAL 14 member who is employed on the job site. (ALJD 2:40-45.)¹

¹ "ALJD" refers to the decision issued by ALJ Davis dated March 20, 2012 and the citations refer to the pages and line numbers referenced from the decision.

2. To the Finding of Fact that BIAGIO NICCHIA (“NICCHIA”) was only replaced because he was expelled from LOCAL 14. (ALJD 3:15-20.)
3. To rejecting LOCAL14’s argument that the Hearing Officer’s decision was the intervening event which necessarily caused the union to replace NICCHIA at the job site. (ALJD 4:15-20; 5:20-25.)
4. To the finding that LOCAL 14’s actual motivation for replacing NICCHIA at the job site was that he was expelled from union membership. (ALJD 4:20-25.)
5. To the conclusion that NICCHIA’s employer, Skanska USA (“Skanska”), delegated its authority to hire and replace LOCAL 14 represented employees to the union which is a typical arrangement in hiring hall situations. (ALJD 5:40-45.)
6. To the conclusion that LOCAL 14 independently violated its duty of fair representation toward NICCHIA by replacing him as the locomotive operator in violation of Section 8(b)(1)(A) of the Act. (ALJD 6:40-45; 7:15.)
7. To the conclusion that LOCAL 14 caused the employer, Skanska, to discriminate against its employee, NICCHIA, in violation of Section 8(a)(3) of the Act.
8. To the conclusion that LOCAL14 caused the employer, Skanska, to discriminate against its employee, NICCHIA, in violation of Section 8(b)(2) of the Act.
9. To the remedy that NICCHIA is entitled to reinstatement and to be made whole for any loss of earnings and other benefits. (ALJD 7:25-40.)

STATEMENT OF THE CASE

On January 30, 2012, the hearing on this matter was held before Administrative Law Judge Steven Davis based upon a charge filed by NICCHIA against LOCAL14. The essence of the underlying Complaint claimed that LOCAL 14 violated Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act (the “Act”) when it caused NICCHIA’s discharge from employment because of his non-membership in the union. Tr. 11:9-12.² At the conclusion of the hearing and after the submission of post-hearing briefs, ALJ Davis issued his decision in which he held that LOCAL 14 had violated the aforementioned Sections of the Act by causing NICCHIA’s discharge because he was not a member of the union. (ALJD 7:15.) These Exceptions and Brief in Support of LOCAL 14’s Petition to Reverse the Decision of ALJ Davis and Dismiss the Complaint in its Entirety is submitted in furtherance of the Order Transferring Proceeding to the National Labor Relations Board dated March 20, 2012.

STATEMENT OF FACTS

LOCAL 14 is a labor organization which represents heavy construction equipment operators throughout the five (5) boroughs of New York City. LOCAL 14 is a party to various collective bargaining agreements including an agreement with the General Contractors Association of New York, Inc. which is known as the “G.C.A. - Heavy Construction Agreement” (hereinafter referred to as the “Agreement”). See Joint Exhibit 1.³ The Agreement covers the work being performed by operating engineers employed by Skanska USA on the Second Avenue Subway construction project in New York City (the “Project”) which is the job site where NICCHIA was employed. Tr. 16:4-17.

² “Tr.” refers to the hearing transcript prepared in connection with the hearing held on January 30, 2012.

³ “Joint Exhibit” refers to the exhibits submitted by the parties during the hearing held on January 30, 2012.

Fundamental to determining this case is the understanding that LOCAL 14 does not operate an exclusive hiring hall. Instead, LOCAL 14 provides nonexclusive referral services to its members. See United Brotherhood of Carpenters & Joiners of America (E.I. Dupont), 303 NLRB 419, 420 (1991). As such, LOCAL 14 members who are in good standing: (1) may be referred to employment when a request is received from a signatory contractor such as Skanska; (2) may solicit their own employment from a signatory contractor; or (3) be specifically requested by a signatory contractor. Tr. 51:23-52:5. The testimony of Business Agent Christopher Confrey was uncontroverted on this issue and is further supported by the text of the applicable Agreement which provides that: (1) employees are at liberty to work for whomsoever they see fit; (2) employers are at liberty to employ and discharge whomsoever they see fit; and (3) the union shall provide, when requested, qualified and skilled men to each jobsite. See Joint Exhibit 1 at Article I, Sections 2(e), (f) and (h); Tr. 50:21-51:7.

In July of 2010, NICCHIA was referred by LOCAL 14 to Skanska to operate a locomotive on the Project's grave yard shift pursuant to the first of the three (3) ways that a LOCAL 14 member may obtain employment (*via* a request by Skanska to LOCAL 14 to refer an available operating engineer). Tr. 8:11-16; 26:3-5; 32:3-6. Some time after his original employment with Skanska, NICCHIA was laid off by Skanska but then referred back to the Project to continue as the grave yard shift's locomotive operator on April 6, 2011. See Joint Exhibit 2. NICCHIA continued to be employed on the locomotive until he was replaced on August 3, 2011 as a result of a decision issued by Hearing Officer Steven Bennett who was appointed in accordance with the Consent Decree entered into by LOCAL 14 and the U.S. Attorney's Office for the Eastern District of New York. Tr. 18:2-5; 20:12-18.

This Consent Decree was so ordered by United States District Court Judge Sterling Johnson on July 25, 2008 in order to settle a contemporaneously filed Civil RICO action filed against LOCAL 14. See Joint Exhibit 6. The Consent Decree identifies its purpose to include:

[Eradicating] Corruption (as defined herein) and any organized crime influence within Local 14 while preserving the Local's strength and autonomy as the bargaining agent and representative of its membership; and

[Delegating] authority to the court-appointed officers (as referenced infra) to conduct disciplinary proceedings and take disciplinary action [including] the full extent of authority that Local 14 has under the IUOE Constitution, including but not limited to Article XXIV of the IUOE Constitution and Local 14's By-Laws, including but not limited to Articles II and VIII of the By-Laws, including the authority that Local 14 has to conduct disciplinary proceedings and take disciplinary action against members of Local 14, . . .

See Joint Exhibit 6 at pp. 2-3.

The underlying Civil RICO action was filed as a result of the indictment and conviction of twenty-six (26) officers, representatives and members of LOCAL 14 who engaged in labor racketeering activities involving members and associates of two (2) organized crime families. See United States v. Joel J. Cacace, Sr., Cr. No. 03-191 (E.D.N.Y.) and United States v. Muscarella, Cr. No. 03-229 (S.D.N.Y.). NICCHIA was a defendant in the Muscarella case and charged with being an associate of the Genovese Crime Family and conspiring with other members and associates of the Genovese Crime Family to extort union positions and wages. See Joint Exhibit 7. On September 29, 2004, NICCHIA pled guilty to conspiracy to extort LOCAL 14 and in his plea allocution admitted that from 1997 through 2003, he illegally "agreed with others to place LOCAL 14 in fear of economic harm in order to ensure individuals were given preferential union jobs." See Joint Exhibit 7. As a result of his plea, NICCHIA was sentenced to eighteen (18) months in prison, supervised release for three (3) years and a \$4,000.00 fine. See Joint Exhibit 7.

Pursuant to Article IV, Section B.6 of the Consent Decree, the Ethical Practices Attorney (the “EPA”) who was appointed by Judge Johnson has the authority to commence disciplinary proceedings and bring charges against any member of LOCAL 14 for acts of corruption as defined in the Consent Decree. See Joint Exhibit 6 at p. 11. Pursuant to this authority, the EPA may request relief, including but not limited to, the permanent expulsion of any individual from union membership.

In accordance with his authority, the EPA filed disciplinary charges against NICCHIA on April 29, 2011 which sought his permanent expulsion from LOCAL 14 as a result of the corrupt conduct he had engaged in and plead guilty to. See Joint Exhibit 7. After affording NICCHIA the due process provided for under the Consent Decree, which included the right to a hearing (which NICCHIA and his counsel waived), the Hearing Officer rendered his written decision on August 1, 2011. See Joint Exhibit 9. This decision provided that NICCHIA’s membership in LOCAL 14 was permanently revoked, effective immediately, as a result of his violations of Section III of the Consent Decree and Article XIII(11) of the Ethical Practices Code. See Joint Exhibit 9. Particularly, the Hearing Officer held:

Based on these facts, a preponderance of the evidence shows that Respondent violated Section III of the Consent Decree as well as Article XIII(11) of Local 14’s By-Laws and Ethical Practices Code. Specifically, Section III of the Consent Decree and Article XIII(11) of the Ethical Practices Code, entitled Prohibited Conduct, both prohibit current and future members of Local 14 from engaging in Corruption, even if such activities predate the Consent Decree. Respondent’s conduct amounts to the kind of Corruption the Consent Decree is designed to eradicate.

In light of the foregoing, the EPA’s requested relief, seeking permanent revocation of Respondent’s Local 14 membership, and expulsion from the union, is appropriate. . . .

. . . As a result, pursuant to Sections V.B.1.a and V.B.3 of the Consent Decree, the EPA’s requested relief, seeking permanent revocation of Respondent’s Local 14 membership, is hereby granted, effective immediately.

Id. at pp. 10-11.⁴

Once the Hearing Officer rendered his decision, LOCAL 14 Business Agent Confrey contacted NICCHIA after having been advised by union counsel that NICCHIA had been expelled for having engaged in corruption. Tr. 16:21-17:4. Business Agent Confrey informed NICCHIA that since he had been permanently expelled from LOCAL 14, the union would be replacing him as the grave yard shift's locomotive operator on the Project. Id. NICCHIA did not object to being replaced and he stated to Business Agent Confrey that he "understood". Tr. 20:12-22.

As explained hereafter, ALJ Davis' failure to acknowledge that LOCAL 14's action was motivated by Hearing Officer Bennett's decision to expel NICCHIA from the union for having engaged in corrupt conduct and not the fact that NICCHIA was no longer a member of the union should serve as the basis for the Board reversing the March 20th decision and dismissing the Complaint.

ARGUMENT

In support of these Exceptions and this Application, LOCAL 14 submits that the union did not violate Sections 8(b)(1)(A) and 8(b)(2) of the Act because:

1. the intervening event was the decision of the Hearing Officer to permanently expel NICCHIA for having engaged in corrupt conduct;
2. the conduct for which NICCHIA was expelled -- having engaged in corruption -- and not the expulsion itself was the operative factor in LOCAL 14's action and thereby not protected by Section 7 of the Act; and
3. the action taken by LOCAL 14 neither caused nor attempted to cause the employer, Skanska, to discriminate against NICCHIA in violation of Subsection (a)(3) since (a) the employer was never contacted to facilitate the termination of

⁴ Pursuant to Article VIII, Section C of the Consent Decree, NICCHIA had fourteen (14) days from the date of the rendered decision to appeal same to the District Court. He did not file such an appeal and his time to do so has expired.

NICCHIA and (b) NICCHIA acquiesced to the union's request that he be replaced on the Project.

POINT I

THE ALJ FAILED TO PROPERLY APPLY THE FACTS IN THIS CASE

With regard to his decision, ALJ Davis failed to properly apply three (3) facts which were uncontroverted by the testimony provided at the hearing on January 30, 2012 and are material to the underlying claim. Particularly, despite having received testimony to the contrary, the decision cites NLRB case law that is applicable to exclusive hiring halls which LOCAL 14 does not operate. (Exception No. 5) In addition, ALJ Davis found that NICCHIA's employer, Skanska, relinquished its authority to hire and fire employees (such as NICCHIA) to LOCAL 14. However, this finding contravenes the terms of the applicable collective bargaining agreement between Skanska and LOCAL 14 as well as the testimony proffered by Business Agent Confrey. (Exception No. 5.) Finally, in his decision, ALJ Davis erroneously found that LOCAL 14 members employed by signatory contractors, such as Skanska, only have contact with another LOCAL 14 member at the time their employment commences. (Exception No. 1.) The evidence submitted at the hearing on this point was to the contrary.

A. LOCAL 14 Operates a Non-Exclusive Hiring Hall

The most significant and erroneous finding made by ALJ Davis rests upon his determination that LOCAL 14 operated "a typical hiring hall arrangement" and therefore Skanska delegated its authority to hire and fire its employees to the union. (ALJD 5:4-45.) In support of this finding, ALJ Davis relied upon Grason Electric Co., 296 NLRB 872 (1989) in which the Board stated:

Usually in the construction industry, employers delegate the hiring process to the union through the operation of *an exclusive nondiscriminatory hiring hall*.

Grason, 296 NLRB at 887. (Emphasis added.) However, the exact opposite employment process is followed by LOCAL 14 and employers, such as Skanska, may seek referrals of union members from the non-exclusive referral system operated by LOCAL 14. See United Brotherhood of Carpenters and Joiners (E.I. Dupont), 303 NLRB 419, 420 (1991) (“No duty of fair representation attaches, however, to a union’s operation of a nonexclusive hiring hall because that union lacks the power to put jobs out of the reach of workers.”); see also Teamsters Local 460 (Superior Asphalt Co.), 300 NLRB 441 (1990). Business Agent Confrey testified to this fact as a result of an inquiry originally made by ALJ Davis towards the end of the hearing:

- Q: Good morning, Mr. Confrey. Does Local 14 operate an exclusive hiring hall?
- A: No.
- Q: What are the [manners] in which a member may seek employment as a Local 14 member?
- A: As a member in good standing he may be referred from the Union Hall, or solicit his own work, or be requested by a contractor.

Tr. 51:23-52:5.

Business Agent Confrey’s testimony was explicit and clear. LOCAL 14 members have three (3) ways in which they can obtain employment: (1) they may be referred by LOCAL 14 upon receipt of a request from a signatory contractor; (2) they may solicit their own employment; and (3) they may be specifically requested by a signatory contractor. The Agreement between Skanska and LOCAL 14 reiterates the employer’s ultimate authority over its work force:

Section 2 - Declaration of Principals

Both parties to this Agreement acknowledge that this Agreement is the uniform agreement for the Heavy Construction Industry and its execution will further the interest of said Industry. This Agreement will be interpreted under the following principals:

- (a) that there shall be no limitations as to the amount of work an Employee shall perform during his working day, it being understood that said Employee shall perform a fair and honest day’s work, within the limits of safety;
- (b) that there shall be no restriction on the use of machinery, tools or appliances, within the limits of safety;

- (c) that there shall be no restriction on the use of any raw or manufactured materials, except prison-made;
- (d) that no person shall have the right to interfere with Employees or workmen during the working hours;
- (e) ***that Employees are at liberty to work for whomsoever they see fit, and they are entitled to and shall receive the wages agreed upon as hereinafter set forth in this agreement;***
- (f) ***that Employers are at liberty to employ and discharge whomsoever they see fit, and the Employer shall at all times be the sole judge as to the work to be performed and whether such work performed by an Employee is, or is not, satisfactory;***
- (g) that the G.C.A., the Employer and the Union agree that they will not refuse to hire or employ any individual, nor will they bar or discharge from employment any individual, nor will they discriminate against any individual, . . .
- (h) ***the Union shall provide, when requested, qualified and skilled men to each jobsite;***
- (i) that changes in work rules as delineated in this Agreement shall not be used to displace any currently employed engineers. . . .
- (j) when required by a public agency . . . , employees will sign in and out on the job as required, . . .

See Joint Exhibit 1 at pp. 2-3. (Emphasis added.) Those subsections emphasized above explicitly provide for the rights that employers have in hiring employees and operating their job sites; that employees have the right to find their own employment without assistance from LOCAL 14's referral hall; and that LOCAL 14 will provide qualified and skilled operating engineers, when so requested by employers such as Skanska.

These provisions of the applicable Agreement along with Business Agent Confrey's testimony are instrumental to an accurate decision in this case because ALJ Davis relied upon a misnomer -- that LOCAL 14 operates an exclusive hiring hall -- in fashioning a decision that rests upon the union having stepped into the shoes of NICCHIA's employer, Skanska, when the union sought and NICCHIA agreed to step down. (ALJD 5:50-52.) By not properly identifying the type of hiring hall operated by LOCAL 14 along with the underlying principals of the employer/employee/union relationship as established by the Agreement, the decision in this matter is flawed and must be reversed.

B. LOCAL 14 Members Referred to a Job Site Are Employed by Signatory Contractors and the Union Does Not Maintain Any Control Over the Employer/Employee Relationship

ALJ Davis also incorrectly found that LOCAL 14 members referred to work (after being requested by an employer such as Skanska) only maintain contact with another LOCAL 14 member at a job site, such as the Project where NICCHIA was employed. (ALJD 2:40-45.)

Business Agent Confrey's testimony was to the contrary:

Q: And the referrals that you make the Employer accepts isn't that true?

A: Correct.

Q: And the employees that you refer don't necessarily have to meet with a company representative isn't that true?

A: ***Initially when they sign up they, they interact some, in some way, shape or form with somebody from the company.***

Q: And isn't it true --

Judge Davis: When they sign up meaning when they report to the job?

A: Yeah, when they, if they not, if they're not already signed within their, you know, W-4, I-9, all that type of material.

Judge Davis: In other words, do they have to go to the Employer's offices to complete this paperwork or do they do that on the job?

A: No, they can do it on the job. The Master Mechanic ***could*** handle it.

Q: It's true it's the Master Mechanic who normally handles it correct?

Judge Davis: Answer?

A: ***No, not always.***

Q: How often does it, is it somebody else?

A: Not every job has a master mechanic.

Q: Or another Union representative?

A: ***I used, quite often use direct labor as a contact. Like if somebody else on the job that going for an operator, whether it's a member of Local 79, 731, Local 15, somebody who's currently employed I could use them as a contact.***

Judge Davis: And do the paperwork, et cetera, have the employee fill it out?

A: They can furnish, yeah, yeah.

Tr. 23:22-25:5. (Emphasis added.) With his testimony, Business Agent Confrey confirmed that:

- (1) referred union members do interact with a corporate representative when they arrive at the job site;
- (2) a Master Mechanic does not "usually" handle this sign up process, but he may; and
- (3) another union representative (not just another member from LOCAL 14) may serve as the

initial contact at the job site. These facts as presented by Business Agent Confrey are significantly different from the conclusion reached by ALJ Davis in his decision. Since the union's purported role as having stepped into the shoes of the employer, Skanska, is a repeated theme of the decision, ALJ Davis's failure to properly apply these facts creates a fatal flaw in his rationale and should serve as a basis to reverse the decision.

POINT II

THE EVIDENCE IN THE RECORD SUPPORTS LOCAL 14'S POSITION THAT NICCHIA WAS REPLACED ON THE JOBSITE AS A RESULT OF THE HEARING OFFICER'S DECISION

ALJ Davis found that LOCAL 14's sole motivation for replacing NICCHIA on the Project was the fact that he had been expelled from membership. (ALJD 3:15-20; 4:20-25.) In reaching this conclusion, he rejected LOCAL 14's explanation that the intervening event resulting in NICCHIA's replacement as the locomotive operator on the graveyard shift was the Hearing Officer's decision. (ALJD 4:15-20; 5:20-25.) LOCAL 14 respectfully submits that ALJ Davis' decision is not supported by the relevant facts nor the applicable Board case law.

In support of his decision, ALJ Davis relies almost entirely on the content of an email forwarded to Business Agent Confrey by the union's attorney. The email read:

Mr. Nicchia has been permanently expelled from the union by decision of the hearing officer.

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 you will be replacing him on the job starting tomorrow.

See Joint Exhibit 10. Further, as cited by ALJ Davis in his decision, labor organizations have the power "to affect the employees' livelihood in so dramatic a way as to encourage union membership among the employees." Acklin Stamping Co., 351 NLRB 1263, 1263 (2007).

While this power is not disputed, the application of this principal to the instant matter is misplaced by ALJ Davis in his decision.

LOCAL 14 was motivated by the underlying purpose of the Consent Decree it entered into with the U.S. Attorney's Office to ensure the integrity of its membership and that the union remain corruption free. In furtherance of applying this principal, LOCAL 14 replaced NICCHIA only after the Hearing Officer had found him guilty of corruption and permanently expelled him from the union. See Joint Exhibit 9. Despite ALJ Davis' finding to the contrary, LOCAL 14 submits that the holding in Philadelphia Typographical Union No. 2, 189 NLRB 829 (1971) can be applied to the facts herein to support the action taken by the union.

ALJ Davis held that Philadelphia Typographical was "easily distinguishable" from the instant case because the Board found that the union's expulsion of the petitioner from membership played no role in the union's request that he be discharged. (ALJD 5:5-10.) In contrast to the Board's decision, ALJ Davis stated that the "sole reason for [LOCAL 14's] replacement of NICCHIA was his expulsion from the union and not his conviction or the Hearing Officer's decision expelling him from membership." (ALJD 5:10-15.) With regard with this later statement, LOCAL 14 respectfully submits that ALJ Davis made the wrong conclusion. While ALJ Davis states that Hearing Officer Bennett's decision was not an intervening event (ALJD 4:15-20), he acknowledges that LOCAL 14 did not move to replace NICCHIA until after the Hearing Officer's decision was issued. (ALJD 4:5-15.) Therefore, since it would have been impossible for LOCAL 14 to undertaken the action it did without Hearing Officer Bennett first issuing his decision, the decision itself was a necessary first step and thereby an intervening event. For without the Hearing Officer's decision, LOCAL 14 would not have moved to replace NICCHIA on the Project.

With regard to the first statement, Philadelphia Typographical should be applied to support the action taken by LOCAL 14 and which may serve as the basis to reverse the underlying decision and dismiss the Complaint:

1. As embezzlement was found to be action not protected by Section 7 of the Act, an individual who loses his union membership because of having engaged in corrupt conduct involving organized crime has engaged in conduct that is also not protected by Section 7 of the Act.
2. Similar to embezzlement, engaging in corruption with organized crime figures is not activity protected by the first part of Section 8(b)(2) of the Act.
3. LOCAL 14 did violate the second part of Section 8(b)(2) because unlike in the Philadelphia Typographical case, no LOCAL 14 representative had NICCHIA's employer, Skanska, terminate him.

A. ALJ Davis Failed to Determine if the Action Engaged in By NICCHIA was Protected Activity Under Section 7 of the Act

As the Board knows, Section 8(b)(1)(A) of the Act provides that:

- (b) It shall be an unfair labor practice for a labor organization or its agents --
- (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided* that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

The Board in Philadelphia Typographical found that the union did not violate Section 8(b)(1)(A) of the Act because the former member's expulsion from the union for dishonesty in embezzling union funds was not action protected by Section 7. 189 NLRB at 835. As discussed herein, NICCHIA was expelled from LOCAL 14 by decision of the Hearing Officer as a result of having engaged in corrupt conduct. ALJ Davis, however, failed to address this point in his decision which is an integral element of finding a violation of Section 8(b)(1)(A). Instead, ALJ Davis relied upon cursory conclusions in finding that LOCAL 14 did not fulfill its duty of fair representation. However, for such a conclusion to be reached, ALJ Davis was required to

address whether the action in question -- NICCHIA's corrupt conduct -- was protected under Section 7 of the Act.

As the Board stated in the Philadelphia Typographical case, "protected" union or concerted activities under Section 7 do not include embezzling union funds and therefore the complainant had no expectation of protection under the Act. Similarly, NICCHIA's corrupt conduct which he acknowledged during the course of the hearing, along with his guilty plea in the Muscarella criminal case and his incarceration in a federal prison (Tr. 31:4-12.) do not represent actions protected under Section 7 of the Act. Since ALJ Davis failed to address this point in his decision, the holding is flawed and a basis exists for its reversal.

B. LOCAL 14 Did Not Cause or Attempt to Cause Skanska to Discriminate Against NICCHIA in Violation of Section 8(a)(3) of the Act

ALJ Davis found that since LOCAL 14 engaged in "a typical hiring all arrangement," the employer, Skanska, delegated its authority to hire and replace employees, such as NICCHIA, to the union. (ALJD 5:40-45.) As detailed above, this determination and the facts from which it was reached are flawed. Particularly, LOCAL 14 does not operate an exclusive hiring hall as was the case in the Grason case. Instead, this submission provides in great detail the testimony of Business Agent Confrey which identified that LOCAL 14 operates a non-exclusive hiring hall and employees/members such as NICCHIA enjoy the right to be requested by a signatory contractor and to find their own employment. Such factors prove that LOCAL 14 did not in fact have the authority to hire and replace employees. Instead, the action taken to replace NICCHIA was only effectuated after NICCHIA was contacted by the Business Agent and acquiesced to his replacement.

In addition, ALJ Davis misapplied the facts garnered from the testimony of Business Agent Confrey with regard to the process undertaken by a LOCAL 14 member after he or she

has been referred to a job site. While the ALJ's decision states that referred members, such as NICCHIA, would be met by a fellow LOCAL 14 member to be "processed" (ALJD 5:45-50), Business Agent Confrey's testimony provided further insight. As stated above, in Point I, Section B, when a LOCAL 14 member referred to a job is "signed up", "they interact some, in some way, shape or form with somebody from the company." Tr. 24:2-3. This testimony negates ALJ Davis' conclusion that "the Union stepped into the shoes of the Employer in deciding to replace NICCHIA and it is liable for its action in doing so." (ALJD 5:50-52.)

Instead, in order for ALJ Davis to have found that LOCAL 14 forced Skanska to fire NICCHIA, proof would have been required to show that the union demanded or requested that Skanska terminate NICCHIA. See Heavy & Highway Construction Workers, 123 LRRM 1042 (charging party must establish that union demanded or requested employer to take adverse actions against member); see also Radio Officers' Union v. NLRB, 347 U.S. 17 (1954) (violation occurs where union induces employer to discharge employee). On cross-examination, Business Agent Confrey confirmed that he never contacted nor conversed with any Skanska representative in connection with the action taken:

Q: Okay. Mr. Confrey, did you ever call anyone at Skanska to advise them that Mr. Nicchia had been expelled from Local 14?

A: No.

Q: Did you ever instruct anyone from Skanska to terminate Mr. Nicchia since he had been expelled from Local 14?

A: No.

Q: Did you ever contact anyone from Skanska to advise the company that Mr. Nicchia was being replaced on the project?

A: No.

Q: Did anyone from Skanska ever call you to inquire as to why Mr. Nicchia was replaced on the project?

A: No.

Tr. 22:8-23.

Further, even if such a connection could be established, LOCAL 14's decision to replace NICCHIA is not the type of action that the prohibition against discrimination applies. This again was a determination that ALJ Davis was required to make as part of his decision, but for which he did not. In Philadelphia Typographical, the Board explained that seeking to have an employer remove a former member from employment for having embezzled union funds was not activity protected under subsection 8(a)(3) since the union's motivation was not to encourage or discourage union membership. 189 NLRB at 835. In the instant action, NICCHIA was only replaced after the Hearing Officer rendered a decision to expel him from the union for having engaged in corruption. See Joint Exhibit 9. As testified to by Business Agent Confrey, NICCHIA was neither contacted nor replaced until after he was forwarded notice by the union's counsel that the Hearing Officer had rendered his decision. Business Agent Confrey testified on cross-examination:

Q: What was your understanding as to what the hearing officer had found Mr. Nicchia guilty of?

A: I believe it was corruption related due to a plea earlier, and, earlier.

Tr. 21:13-16. Therefore, LOCAL 14 was motivated not by the fact that NICCHIA was no longer a member of the union, but instead that the Hearing Officer had found him guilty of engaging in corrupt conduct. Since replacing NICCHIA on the Project for having engaged in corruption neither encourages nor discourages union membership or activities, a Section 8(b)(2) violation is not established. See Philadelphia Typographical, 189 NLRB at 835 ("Employees expect that dishonest employees will be discharged whether they are union or nonunion so that there can be neither encouragement nor discouragement as far as the union is concerned.").

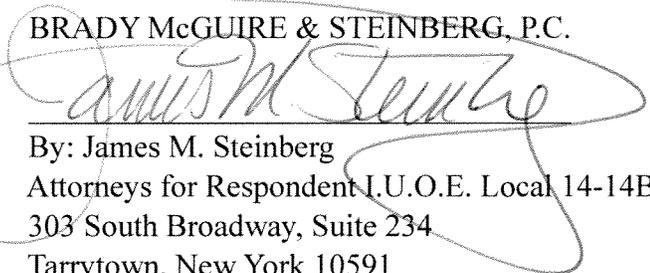
CONCLUSION

For all of the above reasons, LOCAL 14 respectfully requests that ALJ Davis' decision dated March 20, 2012 be reversed, the relief granted therein denied and the Complaint dismissed in its entirety.

Dated: Tarrytown, New York
April 13, 2012

Respectfully submitted,

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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

Case No. 2-CB-63648

Respondent,

-and-

BIAGIO NICCHIA,

An individual.

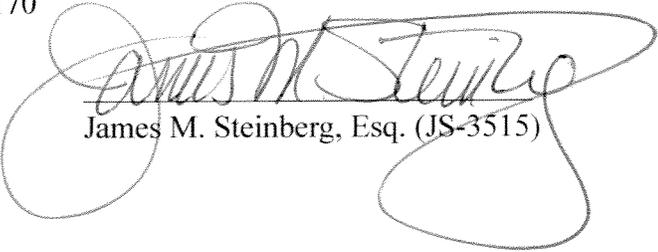
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CERTIFICATE OF SERVICE

I, James M. Steinberg, hereby certify under penalty of perjury that on April 13, 2012, I served *via* regular U.S. Mail the individuals whose addresses appear below, with a copy of the enclosed Exceptions and Brief in Support of Local 14's Petition to Reverse the ALJ's Decision and Dismiss the Complaint in its entirety:

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