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November 14, 2016

Office of the Independent Review Officer
c/o John J. Cronin, Jr., Administrator
444 North Capitol Street, N.W., Suite 528
Washington, D.C. 20001

Re: Charges Against Charles A. Bertucio

Dear Sir or Madam:

We write in response to the October 26, 2016 letter submitted on behalf of the former Independent Review Officer (IRO) Benjamin Civiletti, finding that the General President's decision of August 30, 2016 dismissing charges referred by the former Independent Review Board (IRB) against Charles A. Bertucio was "inadequate under the circumstances." While we realize you may not have the same concerns once you have had the opportunity to conduct an independent review of the General President's determination, and the underlying evidence and charge report, we are addressing the issues raised by Mr. Civiletti. Copies of the initial charge report from the Independent Review Board and of the General President's decision on the charges are attached for your convenience. We have also attached an annotated version of the Report and Recommendation of the Hearing Panel, although the IRB/IDO has never required annotations to the panel hearing reports previously.

Briefly, the IRB referred charges on February 11, 2016, alleging that Mr. Bertucio, a medical insurance broker who was not a member of any Teamsters Local Union on that date, had previously brought reproach upon the Union by maintaining a "sham" contract with Teamsters Local 853 and a "sham membership" in that local. The essence of the allegations was that GrandFund, of which Mr. Bertucio was President, had an invalid collective bargaining agreement with Local 853 and, by virtue of Mr. Bertucio's status as an employer, he was ineligible for Teamster membership. The latter assertion was based upon the IRB's interpretation of Article XIV, Section 3 of the International Constitution, an

interpretation that was predicated on antiquated language that has not been in the IBT Constitution since 2001.[1]

A panel was appointed to hear the charges and legal counsel was retained to present the evidence that IRB had marshalled when it issued its initial charge recommendation. Counsel introduced and explained the charges and all of the documentary support provided by the IRB. Consistent with all other hearings involving matters referred to the Union by the IRB, no witnesses were called to supplement the documents. Mr. Bertucio was permitted to present his defense, testified on his own behalf and also called two witnesses who had personal knowledge of the events at issue. Counsel for the IBT cross-examined the witnesses, something that Mr. Bertucio's counsel did not have the opportunity to do during the depositions submitted in support of the IRB's referral. The panel members had the opportunity to observe the witnesses and evaluate their demeanor and credibility. Each party took advantage of the opportunity to file a post-hearing brief. The entire record has been provided to your office and is available for your review.

Thereafter, the panel members produced a thorough twenty page report setting forth their findings and recommendations to the General President. A review of that report will clearly confirm that the panel members considered all of the allegations in the referral and, based upon their overall impression of the credibility of the witnesses and the credible facts developed from the documents and testimony, concluded that the actions of Mr. Bertucio did not bring "reproach" upon the IBT under the International Union's Constitution, nor was such a finding compelled by prior decisions of the IRB. Accordingly, the panel recommended that the charges be dismissed, albeit with a finding that Mr. Bertucio should not have been admitted to membership in Local 853. That recommendation was adopted by the General President and provided to the IRO for review, consistent with the Final Agreement and Order in *United States v. Teamsters,* 88 Civ. 4486 (LAP).

The IRO's letter of October 26, 2016 dissects the General President's decision and suggests that his refusal merely to adopt the allegations in the IRB's

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[1] The International Union has repeatedly disputed the IRB's interpretation of the pre-2001 language and the Constitution was amended in 2001 explicitly to confirm the Union's view. Nonetheless, the IRB has ignored the amendment and has continued to rely upon its decisions issued based on the pre-2001 language. (See, General President's Decision [hereinafter "GP"] at 15-19)

referral renders his conclusions "inadequate." Thus, and with all due respect, we read the letter as mandating that the Union accept the allegations as the IRB presented them, and reach the predetermined and desired conclusion that Mr. Bertucio brought reproach upon the Union and should be permanently banished from the Union. We refuse to waive the Union's right to evaluate the evidence developed during the entire process, not just the IRB's documentary submissions, and to reach an independent conclusion as to whether the preponderance of reliable evidence supports IRB's claims. Indeed, if the Union entity to which a matter has been referred is required uncritically to adopt the IRB's allegations, regardless of the evidence and other circumstances presented in the record, in order for a decision to be deemed "adequate," then the disciplinary process incorporated in the Consent Decree and the Final Agreement and Order is nothing more than a costly exercise with no purpose, rather than a system intended to afford the Union a means of strengthening its responsible self-governance. It would reduce the Union's hearing and review to little more than a "sham." We believe the Union's independent evaluation of the evidence is entitled to deference, particularly where, as here, the Union's conclusions are amply supported by the record.

We address the IRO's concerns as follows:

1. **The Decision failed to follow the interpretations of Article II, Section 2(a) of the IBT Constitution adopted in judicial decisions**

Our understanding of prior IRB decisions is that conduct does not constitute "reproach" unless there is some violation of the Constitution or law. Here, the panel concluded that Mr. Bertucio did not commit any violation of any Union regulation or applicable law with which he was obligated to comply.

Mr. Civiletti's letter refers us to two cases that purportedly define "reproach."[2] We read *U.S. v. Teamsters* [Ligurotis], 814 F. Supp. 1165, 1181

[2] *U.S. v. Teamsters* [Friedman and Hughes], 905 F.2d 610 (2nd Cir. 1990), affirms the authority of the Independent Administrator (the predecessor to the IRB) to reject the IBT's attempt to interpret "reproach" as requiring a specific violation of the IBT Constitution and confirms the Independent Administrator's authority to include unlawful activities unrelated to the Union as a basis for finding "reproach." Respectfully, we do not see the relevance to the decision here, or how it would mandate a finding of "reproach" where there are no allegations supported by a preponderance of reliable evidence that Mr. Bertucio committed illegal activities, either within or outside the Union. We do not equate the GrandFund's recognition of Local 853 as the bargaining representative of its employees, an act the IRB *alleged* to violate the National Labor Relations Act, with Hughes' *conviction* for embezzling union funds. Moreover, we note that a

(S.D.N.Y. 1993) as standing for the proposition that "reproach" could be established without citing "one single element [that] constituted a violation of the IBT Constitution..." However, where there is no "smoking gun" violation, the "pattern of conduct" must have "rewarded corruption and allowed unlawful activity to flourish" and "fester" in a local union. In that case, the court found that the local union's principal officer had committed three independent actions that demonstrated "a disregard for the rule of law" and "a willingness not to allow legitimate rules to interfere with his desired course of conduct."[3] Here, at worse, the referral pertains to the actions of an employer who maintained a collective bargaining agreement with Local 853 covering, at most, two union members. The IRB referral did not allege that the collective bargaining agreement or Mr. Bertucio's brief period of union membership corrupted the entire operation of Local 853 or permitted "unlawful activity to flourish." Indeed, unlike principal officer Ligurotis, Mr. Bertucio, an outside businessman, was hardly in a position to influence, much less corrupt, the administrative operations of Local 853.

Accordingly, the General President found that Mr. Bertucio neither committed a single action that would bring "reproach" nor engaged in a "pattern of conduct" that "allowed unlawful activity to flourish" in Local 853. To the extent the General President's decision did not explicitly confirm that the appropriate standards were properly applied, we trust this clarifies the bases for his determination that Mr. Bertucio did not bring reproach.

2. The Decision failed to consider that there was no basis for Mr. Bertucio's membership in the Union and that he obtained membership fraudulently by making a false representation

The uncontroverted facts are that Mr. Bertucio mistakenly was told that he had to become a member of Local 853 in order to retain his medical insurance

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person charged with bringing reproach can rebut the charge with credible testimony, even where the person had previously entered a *nolo contendere* plea in a civil court proceeding involving an incident in which a Teamster member had been killed and others wounded. See, Decision of the Independent Administrator [Daniel Darrow]. The General President's decision was based upon undisputed evidence that Mr. Bertucio's and GrandFund's recognition of Local 853 did not violate the NLRA, but, rather, was motivated by the employees' request for union representation. GP at 3-4.

[3] In Ligurotis, this included hiring individuals with criminal backgrounds as local union employees, bringing a loaded gun to the local union, and refusing to acknowledge and comply with orders of the District Court under the Consent Decree. 814 F. Supp. at 1181. Nothing in the present matter even remotely approaches such conduct.

coverage under the Teamsters Benefit Trust. GP at 8, 15. (IRB Ex. 24) That occurred several years after the initial contract was negotiated between GrandFund and Local 853 and several years after he obtained medical insurance from the Teamsters Benefit Trust.

His application for membership clearly reflected that he was the President of GrandFund. While there were erroneous entries in the participation agreements between GrandFund and the Teamsters Benefit Trust, those documents are separate from, and unrelated to, Mr. Bertucio's application for membership in Local 853. (IRB Ex. 35, 37, 54) As an employer which had a contract with Local 853, Mr. Bertucio had the right to obtain medical coverage through the Teamsters Benefit Trust. The administrative errors contained in the participation agreements with the Fund did not affect his eligibility for benefits, his company's premiums or the amount of coverage he received. And none of those errors affected his eligibility for membership in the Union. Thus, we fail to understand the thrust of the question or any suggestion that the participation agreement entries constituted fraud or brought "reproach."

At the time of the hearing, it was conceded that Mr. Bertucio should not have become a member of Local 853. He had already severed that relationship. But, based on our review of the record, we do not find any basis for concluding that his attaining membership was based on any fraud or had a nefarious purpose, for the reasons stated in the Decision. GP at 8-9, 19-20.

3. The Decision failed to consider an email dated December 14, 2014 or that the 2012 labor contract apparently still has not been renegotiated

The General President's decision addressed the December 14, 2014 email from Rome Aloise in footnote 13 on page 10. As noted, since Mr. Bertucio was not the author of the email, the Union is unwilling to ascribe motivation to him from a document in which he was not expressing his views. It may be entirely appropriate for the IRO to pursue any inquiries as to the intent of the email's author when the hearing on the charges against Mr. Aloise is conducted.

As to the status of the collective bargaining agreement between GrandFund and Local 853, the General President's decision notes that negotiations were initiated before the 2012 contract was scheduled to expire on February 28, 2015 but that a new agreement was not consummated. GP at 10. There is nothing in the referral that suggests that the parties' failure to reach a successor to the 2012

collective bargaining agreement has brought "reproach" or is otherwise an appropriate subject for examination.

The record does not reflect the current status of the collective bargaining agreement, and neither party presented evidence as to that matter. Were we to engage in the kind of unsupported supposition contained in the IRB referral, we would be inclined to conclude that Mr. Bertucio had justification for not engaging in further negotiations with Local 853 when it became apparent that the relationship between GrandFund and Local 853, as well as between Mr. Aloise and himself, were the subjects of an IRB investigation. Indeed, we conclude there was justification for all parties to wait to renegotiate the contract until the pending charges were resolved. We have no evidence that Local 853 or the members of the bargaining unit have demanded negotiations or that Mr. Bertucio has refused to meet. Indeed that testimony from Mr. Bertucio's two employees was that they were satisfied with the terms and conditions set forth in the 2012 agreement, which GrandFund is required to maintain unless and until an agreement to modify them is reached or the parties reach a good faith bargaining impasse. *NLRB v. Katz*, 369 U.S. 736 (1962); see also *Bryant & Stratton Business Institute, Inc. v. NLRB*, 140 F.3d 169 (2nd Cir. 1998).

In short, we do not view the question of the current status of the collective bargaining agreement to have been within the scope of the original charges or a basis for the IRO to make a determination of the adequacy of the General President's decision. If the IIO or IRO have new information as to the current status of the contract, or is suggesting that some development in the negotiations forms an independent basis for "reproach," they have not shared their concerns with the Union.

4. The Decision failed to consider the implications of statements made by both Mr. Bertucio and Mr. Aloise that Mr. Bertucio should never have been a member of Local 853

The Decision acknowledged that both Mr. Bertucio and Mr. Aloise have conceded that Mr. Bertucio should not have been a member of Local 853, however briefly. GP at 16, 19-20. Given the undisputed fact that Mr. Bertucio did not use his membership to actually participate in the internal affairs of Local 853, to gain entry to meetings that were only open to union members or to promote his business (GP at 8-9), the extension of membership to him did not endanger the union or foster corruption. The Decision acknowledged that Mr. Bertucio had resigned

from membership prior to the filing of the IRB referral. Thus, we fail to discern any "implications" that need be considered.

The circumstances of Mr. Bertucio's membership have been discussed in the General President's decision and this letter. There is nothing to be gained from further discourse over a mistake that caused no harm to anyone and was corrected prior to the filing of the IRB's referral.

5. The Decision failed to consider the allegation that under the applicable contract Mr. Bertucio was prohibited from being covered by the GrandFund collective bargaining agreement

We are left to ponder how this observation detracts from the adequacy of the decision and what supplementary explanation is being sought. Mr. Bertucio obtained nothing from the collective bargaining agreement, as the IIO referral correctly notes. He was entitled to receive health insurance as an employer under the terms of the participation agreement with the Teamsters Benefit Trust. The collective bargaining agreement did not establish his terms and conditions of employment as President of GrandFund. He did not vote on acceptance or rejection of the collective bargaining agreement or participate in the formation of bargaining demands along with the two bona fide employees who constituted the bargaining unit. We are simply at a loss to determine why the lack of a specific finding that Mr. Bertucio was improperly included in the bargaining unit according to the erroneous participation agreement renders the General President's decision "inadequate."[4] But if it is necessary to acknowledge that the Mr. Bertucio was misclassified as a bargaining unit member on the participation agreement in order to render the General President's determination "adequate," then consider this as such acknowledgement. Mr. Bertucio was not covered by the GrandFund collective bargaining agreement. We find no nefarious objective to his having claimed such coverage on the participation agreement when this would not have made any difference in his eligibility as an employer to receive benefits from the Fund. We further find that neither the erroneous entry on that form nor his two-year union membership brought reproach.

[4] We are further mystified as to why anyone considers this meaningful given the fact that membership in the union is distinct from coverage by the contract. In short, an employee in a collective bargaining unit covered by a contract does not have to join the union and become a union member, even where there is a union security clause in the agreement. A worker can satisfy his/her obligation and retain employment merely by paying a fee for representational services without joining the union. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

6. The Decision failed to consider evidence that GrandFund selected the bargaining agent for its employees in violation of 29 U.S.C. Section 158 (a) (1) and (2), as well as allegations that employees were not consulted about bargaining demands and did not vote on Local 853's contracts

Each of these issues was dealt with in the General President's decision. GP at 3-5. For the stated reasons, and based upon the testimony of the witnesses, we believe the preponderance of reliable evidence shows that employees of GrandFund initiated the effort – in 2004 – to obtain union representation. The testimony from the employees who were unquestionably members of the bargaining unit establishes that the organizing effort was led by Ed Logue, who was suffering with cancer and desirous of securing medical benefits under a union plan. There is no evidentiary basis upon which to dispute this fact. The IRB's alternate explanation is based on nothing other than cynical speculation as to the "real" motives of Bertucio and Aloise. (IRB Referral at 6; GP at 3, n.1) The General President correctly based his decision on the preponderance of the evidence, not speculation. There is no reason to belabor the point; the record is devoid of even a scintilla of evidence that Mr. Bertucio orchestrated the recognition of Local 853 or foisted the union upon unwilling employees.

As for whether GrandFund's actions in 2004 violated Section 8 (a) (1) and (2) of the National Labor Relations Act, the only entity competent to make such an assessment, the National Labor Relations Board, has not done so. Nor could the NLRB pursue the matter, twelve years after the fact, under well established and controlling labor law precedent established decades ago. *Local Lodge No. 1424 v. NLRB (Bryan Manufacturing)*, 362 U.S. 411 (1960).

As to whether Mr. Bertucio was responsible as an employer for ensuring that the procedures mandated by the IBT Constitution and/or Local 853 Bylaws for the negotiation and ratification of collective bargaining agreements were observed, the General President found that he was not. GP at 15. Certainly, prior to his becoming a member of the Union in March 2012, Mr, Bertucio, as an employer, had no responsibility to ensure that the Union enforced its internal rules. It is nonsensical to suggest that an employer can be penalized under the Consent Decree or Final Agreement and Order for a Union's failure to apply its rules and regulations. If there was a violation, Mr. Bertucio cannot be held responsible for it.

The IBT Constitution provides procedures for members to assert their rights if they believe they have been violated. No member complained that Local 853 failed to afford them their rights under the IBT Constitution or the Local Bylaws. One might just as well charge the two union member employees, Lisa Ramsey and Vicki Lanini for not asserting their rights and insisting that Local 853 conduct meetings and votes in a different manner than it utilized.

If the IRO believes that some person or entity should be held responsible for what he considers violations of the IBT Constitution or the Local 853 Bylaws, then Mr. Bertucio is not the appropriate target.

7. The Decision failed to consider the evidence of negotiations of prior contracts between GrandFund and Local 853 in considering the validity of the allegation that the 2012 agreement was not the result of arms'-length [sic] negotiations

We are, frankly, uncertain of the focus of this critique. If the IRO contends that the General President should have considered the prior negotiations as establishing a "habit" that would have probative value in determining Mr. Bertucio's behavior during 2012 negotiations, then we find that there were not a sufficient number of prior negotiations, and Mr. Bertucio's conduct during those negotiations was not sufficiently consistent, as to constitute evidence upon which to predict his behavior in 2012. As a legal proposition, we do not believe that his past behavior "occurred with sufficient regularity to make it more probable than not that it would have been carried out in every instance." See, Federal Rules of Evidence 406; *Weil v. Seltzer,* 873 F.2d 1453, 1460 (D.C. Cir. 1989) (habit is a *consistent* method or manner of responding to a particular stimulus; habits have a reflexive, almost instinctive quality.). The behavior alleged to be habitual rests on analysis of instances "numerous enough to [support] an inference of systematic conduct" and establish "one's regular response to a specific situation." *Wilson v. Volkswagen of America, Inc.,* 561 F.2d 494 (4th Cir. 1977), *cert. denied,* 434 U.S. 1020 (1978), citing *Strauss v. Douglas Aircraft Co.,* 404 F.2d 1152, 1158 (2nd Cir. 1968); *United States v. Newman,* 982 F.2d 665, 668 (1st Cir. 1992), *cert. denied,* 510 U.S. 812 (1993)(insufficient basis to conclude that district court abused its discretion in excluding evidence that police officer had handcuffed 75 to 100 prisoners to third cell bar, as opposed to first cell bar); *Loussier v. Universal Music Group, Inc.,* 2005 WL 5644420 (S.D.N.Y. 2005)(eight complaints of copyright infringement insufficient to establish habit).

This is not intended to be a treatise on evidence. If the IRO contends that the two prior negotiations are a sufficient sample upon which to establish Mr. Bertucio's habitual behavior and provide a reliable indication of what he did during the 2012 negotiations, we respectfully disagree. If there is some other purpose of the inquiry, then we would welcome a clarification and will attempt to respond.

8. The Decision failed to consider the sham nature of the pre-2012 contracts and did not properly invoke the 5-year statute of limitations

First, it is specifically noted that the charge referred by the IRB and adopted by the General President concerned activity during and after 2012. The IBT was not asked to consider the propriety of the pre-2012 contracts or Mr. Bertucio's role in their negotiation, formation or ratification.

More importantly, the IRO overlooks or misconstrues the General President's determination that he could not impose a penalty upon Mr. Bertucio based on conduct that occurred prior to the time he (Bertucio) became a member of the Union in March 2012. Thus, even if the General President concluded that the pre-2012 contracts were "shams," the IBT could not impose discipline on Bertucio for having violated any union rule or regulation.

Quite simply, while the NLRA permits a union to "prescribe its own rules with respect to the acquisition or retention of membership"[5] and to impose discipline for violations of such rules, that right is limited to enforcement against *members*.[6] Even without a five-year statute of limitations issue, the IBT has no legal basis for imposing discipline upon Mr. Bertucio for conduct he committed when he was not a member of any Teamsters affiliate.

Moreover, and even more fundamentally, it is settled law that a union may not lawfully impose internal union discipline against a union member for actions taken as a supervisor, whether those actions occurred before he became a union member or during the period of his membership.[7] Were the Union to impose

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[5] Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(B).
[6] *Scofield v. NLRB,* 394 U.S. 423, 430 (1969).
[7] The IRB referral seeks a penalty that permanently expels Mr. Bertucio from membership and prohibits him from associating with union members because in 2012 and thereafter he had a "sham contract between your company, the Grand Fund, and Local 853," and he signed "a

internal discipline for such action, it would violate Section 8(b)(1)(B) of the Labor Management Relations Act,[8] which makes it unlawful for a union to "restrain or coerce...an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." A union engages in illegal restraint and coercion prohibited by the statute if it imposes or seeks to impose internal union discipline against a member who is also a supervisor based on the member's performance of his supervisory duties. E.g., *Typographical Union No.18 (Northwest Publications, Inc.)*, 172 NLRB 2173 (1968) (statute violated when union expelled from membership three union member supervisors who the union claimed had assigned bargaining unit work in violation of the applicable collective bargaining agreement). The application of this provision is not confined to obscure administrative interpretations by the NLRB. On a number of occasions, the Supreme Court has expressly considered and enforced the statute's clear prohibition against the use of internal union discipline to punish supervisor members over disagreements arising from the performance of their supervisory duties. E.g., *American Broadcasting Cos. v. Writers Guild of America, West, Inc.*, 437 U.S. 411 (1978) (statute violated when union imposed discipline on supervisor members for performing supervisory duties during a strike.) Not only is there no basis for a conclusion here that Bertucio or his company violated the NLRA when he recognized Local 853 as the exclusive bargaining agent for his employees in 2004 when he was not a Union member, but imposing internal discipline against Bertucio for any actions he has taken as a supervisor, whether or not he was a member of the Union, such as his alleged maintenance of a "sham contract" or the signing of a contact that excluded his compensation from IBT control, would be unlawful under decades of controlling precedent.

Given the fact that the IBT had no ability to sanction Mr. Bertucio for pre-membership conduct, either as an employer or based on his subsequent union membership, it serves no purpose to engage in a lengthy discourse about the statute of limitations or whether the period should be stayed because the IRB had an excuse for not bringing the charges within the applicable five-year period. We only note that the usual rule is that the statute begins to run when the underlying event occurs, or when the complainant reasonably should have been aware of the event. *Kavowras v. New York Times Co.*, 328 F.3d 50, 54-56 (2nd Cir. 2003); *Demchik v. General Motors Corp.*, 821 F.2d 102 (2nd Cir. 1987). In any event, it was the IRB's burden to assert that some fraudulent misconduct of the parties,

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contract as owner that excluded your compensation from IBT control," actions he allegedly undertook as the President of GrandFund, not a member of Local 853.

[8] 29 U.S.C. §158(b).

upon which the IRB relied and was the basis for its delay in filing a complaint based on 2003-2004 misconduct. It has failed to make that representation, and has no basis for asserting such a claim.

But, as stated, this statute of limitations discussion should not divert the focus from the legal proposition that the IBT lacked authority to discipline Mr. Bertucio for pre-membership misconduct or for any actions Mr. Bertucio took as an employer. The General President's decision dealt with the behavior within his jurisdiction, and based on the established facts.

In sum, in the event these issues are of concern as you review the record and the General President's decision, we hope these further explanations will be of assistance. Of course, if other matters of concern occur to you, we are available to respond to those questions. However, we believe the General President's decision is entirely reasonable and "adequate" and urge you to accept his findings as an appropriate resolution of this matter.

Respectfully submitted,

Gary S. Witlen

cc: James P. Hoffa, General President
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