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June 18, 2014

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The Honorable William H. Webster
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VIA UPS NEXT DAY

Hon. Loretta A. Preska
United States District Court
United States Courthouse
500 Pearl Street, Room 1320
New York, NY 10007

Re: APPLICATION 170 OF THE INDEPENDENT REVIEW BOARD

Dear Judge Preska:

I transmit herewith one original and one copy of Application 170 of the Independent Review Board, submitting the IRB's Opinion and Decision regarding Frank Radice to Your Honor for review, and if appropriate, to be "so ordered."

In addition to the Application, enclosed please find the original and one copy of:

- (a) the June 18, 2014, Opinion and Decision of the IRB;
- (b) an Acknowledgment of Receipt; and
- (c) an Affidavit of Service.

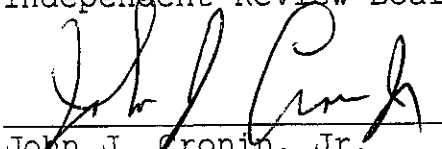
If you find it appropriate, I respectfully request that a member of Your Honor's staff file the original of the Application, Opinion

and Decision, Acknowledgment of Receipt and Affidavit of Service with the Clerk's office.

Respectfully submitted,

Members of the
Independent Review Board

By:



John J. Cronin, Jr.
Administrator

JJC:cft

Enclosures

cc: Charles M. Carberry, Esq.
Bradley T. Raymond, Esq.
Tara LaMorte, AUSA
Frank Radice

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
	:	88 CIV. 4486 (LAP)
Plaintiff,	:	
	:	APPLICATION 170 OF THE
v.	:	INDEPENDENT REVIEW BOARD
	:	-- OPINION AND DECISION OF
INTERNATIONAL BROTHERHOOD OF	:	THE INDEPENDENT REVIEW
TEAMSTERS, <u>et al.</u>	:	BOARD IN THE MATTER OF
	:	FRANK RADICE
Defendants.	:	

Pursuant to Paragraph O. of the Rules and Procedures for Operation of the Independent Review Board for the International Brotherhood of Teamsters ("IRB Rules"), Application is made by the Independent Review Board ("IRB") for ruling by the Honorable Loretta A. Preska, United States District Judge for the Southern District of New York, on the issues heard by the IRB during a hearing on March 12, 2014 and thereafter determined, on the charge filed against Frank Radice ("Radice"), a member of Local 817.

The preponderance of the evidence established that Radice brought reproach upon the IBT by continuing to be a member of the Gambino Organized Crime Family and, second, he failed to cooperate with the IRB as required under the Consent Order and thus violated the IBT Constitution.


As a penalty, Radice has been permanently barred from holding membership in or any position with the IBT or any IBT-affiliated entity. In addition, Radice is permanently barred

from seeking or accepting from the IBT or any IBT-affiliated entity any salary, severance payment, allowance, fee, payment for unused vacation, or compensation of any kind except fully vested pensions, compensation and fully vested welfare benefits; and permanently barred from the date of expulsion from having any contributions made on his behalf by any IBT entity to any pension, health and welfare, severance, or other benefit fund.

Enclosed with our June 28, 2014 Opinion and Decision is the December 20, 2013 IRB Investigative Report and Exhibits 1 to 14 (Disk Marked Exhibit A), the March 12, 2014 IRB Hearing Transcript (Exhibit B), and IRB exhibits IRB-1 to IRB-6 introduced at the hearing (Exhibit C).

It is respectfully requested that an Order be entered affirming the IRB's June 18, 2014, Opinion and Decision if Your Honor finds it appropriate.

By:



John J. Cronin, Jr.
Administrator

Dated: June 18, 2014

-----x
IN RE: : OPINION AND DECISION
 : OF THE INDEPENDENT
 Frank Radice : REVIEW BOARD
 :
-----x

The Independent Review Board (“IRB”), based on a preponderance of the evidence, finds that Frank Radice (“Radice”) committed the two offenses with which he was charged. First, while a member of the IBT, Local 817, he brought reproach upon the union by being a member of the Gambino Organized Crime family and, second, he failed to cooperate with the IRB as required under the Consent Order and the IBT Constitution.

Procedural History

On December 20, 2013, IBT General President James Hoffa filed IRB-recommended charges that Radice had violated the IBT Constitution by being a member of Organized Crime and by failing to cooperate with the IRB as required under the IBT Constitution. (IRB Ex. 4) These charges were based on an IRB investigative report and underlying evidence forwarded to the General President and to Radice. The IBT General President returned the filed charges to the IRB for adjudication. (IRB Ex. 4) By letter dated January 16, 2014, Radice was notified that the IRB would hold a hearing on the charges on March 12, 2014. (IRB Ex. 5) Radice’s counsel in a letter dated March 7, 2014, informed the IRB that Radice would not attend the hearing. (IRB Ex. 6)

The hearing was conducted on March 12, 2014. FBI Special Agent Paul Harris, who authored the affidavit containing the FBI’s expert opinion that Radice was a member of the

Gambino Organized Crime family, was available for cross examination. Radice did not attend the hearing.

At the hearing, the Chief Investigator introduced into evidence Exhibits 1-27. On March 28, 2014, the hearing transcript was sent to Radice through his attorney. The record was kept open for ten days for Radice to supplement the record if he chose to. By letter to the IRB dated April 3, 2014, Radice's counsel submitted letters dated October 10, 2013 and January 8, 2014 to supplement the record. Radice's counsel claimed that Radice's attempted resignation on October 10, 2013 prevented his being charged. For reasons discussed below, Radice's counsel was wrong.

STANDARD OF PROOF

The standard of proof for establishing a charge is proven is that it is supported by a preponderance of evidence. Rules and Procedures for Operation of the Independent Review Board, Para., J (6) (“[i]n order to be sustained, the proposed... charges... contained in the Investigative Report, must be supported by the preponderance of reliable evidence.”); United States IBT [Simpson], 931 F. Supp. 1074, 1089 (S.D.N.Y. 1996), aff'd, 120 F. 3d 341 (2d Cir. 1997).

RADICE WAS AN IBT MEMBER

Radice became a member of Local 817 in January 1999. (Ex. 1) Radice worked for Local 817 employer Show Biz Trucking. (Ex. 2) Radice had paid his dues through December 2013. (Ex. 1) He had not been issued a withdrawal card as of December 16, 2013. (Ex. 15) As of December 16, 2013, he had not submitted written notice to the Local resigning his IBT membership which was required under the IBT Constitution for his resignation to be effective by that date. (Ex. 15)

**THE PREPONDERANCE OF THE EVIDENCE ESTABLISHED THAT RADICE WAS
A MEMBER OF THE GAMBINO ORGANIZED CRIME FAMILY**

Radice was charged with bringing reproach upon the IBT in violation of Article II, Section 2(a) and Article XIX, Section 7(b)(2) of the IBT Constitution by being a member of the Gambino Organized Crime family while he was member of IBT Local 817. As discussed below, the Board concludes that this charge was proven.

Radice's Membership in Organized Crime

The Gambino Crime Family is an established organized crime family operating in the New York area. (Ex. 25 at 5; Ex. 26 at 6) In the expert opinion of the FBI, Radice is a member of the Gambino Organized Crime Family serving in the crew of Capo Anthony Gurino ("Gurino"). (Ex. 25 at 6) This expert opinion is contained in the affidavit of FBI Special Agent Paul Harris. (Ex. 25) Three confidential sources, who had previously been found to be reliable by the FBI, learned of Radice's membership from members of the Gambino Crime Family and its associates. (Ex. 25 at 5-6) These sources confirmed to the FBI that Radice is a Gambino soldier in Gurino's crew. (Ex. 25 at 5-6)

Evidence corroborating the sources included that Radice was observed repeatedly at events involving Gambino Crime Family members. In 2007, Radice was observed at the wake of Gambino Capo Giuseppe Arcuri on two different dates. (Ex. 25 at 5) In January 2009, Radice was at the wake of Gambino Capo Salvatore Scala. (Ex. 25 at 5) Later that year, he was observed on two dates at the wake of Gambino Capo John Giordano. (Ex. 25 at 5) Those at the wakes included Gurino and other Gambino Family members and associates. (Ex. 25 at 5-6)

In addition, there is other evidence corroborating that Radice is a member of organized crime. We draw an inference from Radice's failure to appear for his sworn examination and his attempted resignation from the IBT that those acts were done to avoid answering questions about his organized crime membership. (Exs. 13, 16) Cf. Salinas v. Texas, 133 S. Ct. 2174 (2013).¹ In this matter, Radice had been a Local member for over 14 years. (Ex. 1) His dues were fully paid through December 2013. (Ex.1) His sworn examination was repeatedly adjourned at his request from its initially scheduled date of September 17, 2013 until October 10, 2013. (Exs. 5, 6, 7, 10, 12) Radice knew that he was going to be questioned about his involvement with organized crime members at his scheduled sworn examination. (Ex. 8 at 1) It was only when he could not reach a settlement agreement that would have ended his obligation to testify and could not obtain additional adjournments that Radice attempted on the evening before his sworn examination to resign. (Ex. 13) His taking this drastic step to avoid giving testimony is probative conduct that Radice believed he could not testify without providing negative information against himself concerning his involvement with organized crime.

We draw an additional inference supporting that Radice was a member of organized crime from his failure to contest the evidence of his organized crime membership at the hearing. Radice had an opportunity to cross-examine the Special Agent on the FBI's expert opinion as

¹ In his January 8, 2014 letter to General President Hoffa a copy of which Radice's counsel submitted to the IRB by letter dated April 3, 2014, Radice's counsel argued that Salinas, ". . . has absolutely no bearing on the facts presently before us. To compare the circumstances of Mr. Radice's union resignation to that of a criminal defendant being questioned by the police is not only a gross misapplication of Supreme Court precedent, but it also ignores that Mr. Radice has not been silent in this matter at all, as he has been represented by counsel that was actively pursuing settlement of this matter with the IRB." (January 8, 2014 letter at 3) Radice's counsel's claim ignored that Radice did not resign from the union, either by submitting a written resignation to the Secretary-Treasurer of Local 817 or by entering into an agreement the IRB approved, prior to his sworn examination on October 11, 2013. Radice failed to appear for this examination knowing that he would be questioned about his organized crime ties. (Ex. 8 at 1) Salinas supports that an evidentiary inference can be drawn from Radice's actions to avoid answering questions about his association with organized crime members.

well as to introduce any evidence, including his own testimony, to contest it. He failed to present any challenge to the evidence. We draw the inference from his complete failure to contest the evidence that he was unable to do so because he is a member of organized crime.

Radice's Claims

In his letter of March 7, 2014 to the IRB and in the letters recently submitted to the IRB, Radice's counsel contended Radice had resigned and the IRB had no jurisdiction over him. (IRB Ex. 6)² Radice's membership in organized crime occurred while he was an IBT member and before his purported resignation in October 2013. (Ex. 25) Under Article XIX, Section 1(g) of the IBT Constitution, charges may be filed against a member who has been issued a withdrawal card for conduct committed while a member. Thus, even if Radice's resignation was effective, which for reasons explained below it was not, he could still be held accountable for violative conduct that occurred before that date. In United States v. IBT [Morris and McNeil], 782 F. Supp. 238, 241-42 (S.D.N.Y. 1992), respondents argued that the Independent Administrator had no jurisdiction over them because they had retired and withdrawn from the IBT before a decision was rendered against them. The Court held that the Supreme Court decision in NLRB v. Granite State Joint Board, 409 U.S. 213, 217 (1972) did "... not prevent a union from punishing members for pre-withdrawal conduct" and affirmed the discipline imposed upon the respondents. Id. at 242.

Summary

² The invalidity of Radice's purported resignation is more fully discussed *infra* at p. 7.

By being a member of the Gambino LCN crime family while an IBT member, Radice brought reproach upon the IBT in violation of Article II, Section 2(a) and Article XIX, Section 7(b)(2) of the IBT Constitution. Pursuant to Article XIX, Section 7(b)(2) of the IBT Constitution, charges may be preferred against a member for violation of the “. . . oath of loyalty to the Local Union and the International Union.” LCN membership violates the IBT membership oath found in Article II, Section 2(a) of the IBT Constitution, which provides that members must conduct themselves “in such a manner as not to bring reproach upon the Union.” See, e.g., Investigations Officer v. Senese, et al Independent Administrator Decision at 3-5, 26, aff'd, 745 F. Supp. 908 aff'd, United States v. IBT, 941 F. 2d 1292 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992); In Re: Vincent Federico, July 22, 2010 IRB Dec. at 7. (Ex. 27) Article XIX, Section 7 (b) (9) of the IBT Constitution provides for charges against members for “knowingly associating (as that term has been defined in prior decisions on disciplinary charges under this Article) with any member or associate of any organized crime family or any other criminal group.”

In the expert opinion of the FBI, Radice is a member of the Gambino LCN Family and a member of Gambino Capo Gurino's crew. (Ex. 25 at 5-6) Three sources, who have provided credible information regarding organized crime matters in the past, advised the FBI that Radice was a member of organized crime in Gurino's crew. (Ex. 25 at 5-6) Corroborating the FBI's expert opinion, Radice was observed on five days at three wakes for Gambino LCN Capos. (Ex. 25 at 5-6) Gurino and other organized crime members were also observed at these wakes. (Ex. 25 at 5-6) In addition, we have drawn inferences supporting Radice's involvement with organized crime from his failure to give a sworn examination when he knew he would be questioned about that involvement and from his failure to contest the evidence of his organized crime membership at the hearing. During the time Radice was a member of Local 817, he was

also a member of the Gambino Crime Family. Pre-resignation conduct is punishable by a union even if a member subsequently resigns.

**THE PREPONDERANCE OF THE EVIDENCE ESTABLISHED THAT RADICE
FAILED TO COOPERATE WITH THE IRB**

On September 3, 2013, the Chief Investigator's Office sent Radice a notice of sworn examination scheduling his sworn examination for September 17, 2013. (Ex. 3) This notice was delivered on September 4, 2013. (Ex. 4) On September 12, 2013, a representative of the law firm of Trivella and Forte informed the Chief Investigator's Office that the firm was representing Radice and requested a postponement of Radice's sworn examination. (Ex. 5) Based upon his attorney's request, Radice's sworn examination was postponed until October 2, 2013. (Ex. 5)

On September 27, 2013, Radice's attorney requested another postponement of Radice's sworn examination. (Ex. 6) Based upon this request, Radice's sworn examination was adjourned a second time to October 10, 2013. (Ex 7)

On October 7, 2013, Radice's counsel contacted the Chief Investigator's Office and discussed resolving the matter by Radice entering into an Agreement. (Ex. 24) On October 8, 2013, a form Affidavit and Agreement was sent via email to Radice's counsel. (Ex. 8) The agreement stated: "The IRB was investigating organized crime influence in the union and would have inquired into whether I was a member or associate of organized crime and whether I had any contact with individuals reported to be organized crime members and associates." (Ex. 8 at 1) Pursuant to this proposed Agreement, Radice would permanently resign from the IBT effective upon the date the IRB approved the agreement. (Ex. 8 at 2)

On October 9, 2013, Radice's counsel asked for a third adjournment of Radice's sworn examination to review the Agreement with Radice and to have him execute the Agreement. (Ex. 10) It was agreed that Radice's sworn examination would be adjourned a third time and was rescheduled for October 11, 2013, when it would proceed if Radice did not provide an executed Agreement prior to 5:00 p.m. on October 10, 2013. (Ex. 10)

On October 10, 2013, Radice's counsel submitted a modified version of the form agreement to the Chief Investigator's Office for review. (Ex. 11) Radice's counsel was told the Chief Investigator's Office would not agree to the modifications. (Ex.12) Counsel was also reminded that if Radice did not sign the Agreement without modifications he was required to appear the next day as had been agreed. (Ex. 12) If Radice failed to appear for his sworn examination, the attorney was told, failure to cooperate charges would likely be recommended against Radice. (Ex. 12)

At approximately 6:00 p.m. on October 10, 2013, Radice's counsel emailed the modified proposed Agreement signed by Radice to the Chief Investigator's Office. (Ex.13)³ As counsel had been told earlier in the day, the modifications he made were not acceptable to the IRB. (Ex. 12) The modified proposed Agreement contained the statement, "I hereby permanently resign from the IBT and Local 817 effective upon the date this Agreement is approved by the IRB..." (Ex. 13 at 2) The IRB never approved the modified proposed Agreement.⁴

³ One of the modifications counsel made was the inclusion of the following language: "This Settlement Agreement shall not prevent Frank Radice from working with any particular employer, independently of his past affiliation with Local 817. IRB Attorney's Office [sic] thus agrees not to exercise any union security clause or other provisions of the collective bargaining agreement that might affect his current or prospective employment with a union employer...." (Ex. 11 at 3; Ex. 13) Counsel had been told earlier in the day that this modification would not be agreed to by the Chief Investigator's Office. (Ex. 12)

⁴ The proposed Agreement Radice signed further stated that, "If this Agreement is not approved by the IRB..., the Agreement will be null and void." (Ex. 13 at 3)

Radice's Claims

In counsel's October 10, 2013 cover letter to the Chief Investigator, he stated,

Please be advised that even if you refuse to execute this Agreement Mr. Radice's unequivocal revocation of membership on a permanent basis and his resignation permanently from the IBT and Local 817 is effective as of today. Thus, the IBT and Local 817 no longer have any jurisdiction over Mr. Radice and cannot compel him to attend any meetings with your office or take any disciplinary action against Mr. Radice.

(Ex. 13) This claim is erroneous. The resignation was not addressed to the union which received no notice from Radice of the purported resignation. (Ex. 15) Pursuant to Article II, Section 2(i) of the IBT Constitution, "No member seeking to resign from membership in any Local Union may do so except by submitting such resignation in writing to the Secretary-Treasurer of the Local Union....." (Ex.14) By the time of his scheduled examination, Radice had not submitted any written resignation to Local 817. (Ex. 15) Even under the unagreed to proposed modified Agreement, Radice's signing of the Agreement modified by his counsel was not a resignation from the Local because, by the terms of that proposed Agreement, the resignation was only effective upon approval by the IRB. (Ex. 13 at 2) The IRB never approved it. Because Radice never informed the Local of his resignation, Radice never effectively resigned in accordance with the Union's reasonable procedures or contract law principle governing union membership. As such his purported resignation never occurred and was a nullity.

A union member may not be disciplined for conduct that occurs after the "member lawfully resigns from a union." NLRB v. Granite State Joint Board, 409 U.S. 213, 217 (1972). Membership is a contract between the member and the union. NLRB v. Allis - Chalmers v. Manufacturing Co., 388 U.S. 175, 192 (1967). Radice's counsel cited Pattern Makers' League of North America v. NLRB, 473 U.S. 95 (1985), in which union members were fined after they had

tendered resignations from their union which resignations were ineffective under the terms of the union's constitution, to support his argument that Radice's right to resign from the IBT could not be hindered. (January 8, 2014 letter at 1-2) Contrary to Radice's counsel's claims, the IBT Constitution put no restriction on the right to resign other than the lawful and neutral requirement that the member give notice to the union of his resignation. In Pattern Makers', the Supreme Court found the union procedure for resigning was unreasonable because no resignation was accepted "... during a strike or lockout, or at a time when a strike or lockout appears imminent." Id. at 97, 100.

In an attempt to overcome Radice's failure to comply with the IBT Constitution's requirement that, in order to resign, a member must tender a written resignation to the Secretary-Treasurer of the Local, Radice's counsel argued that "... the IRB unambiguously serves as an agent of Local 817, as exemplified by its investigative, disciplinary and hiring authorities over the Union. It is therefore of no legal consequence that Mr. Radice tendered his resignation directly on the IRB on October 10th, as opposed to the Secretary-Treasurer of the Union." (Trivella's January 8, 2014 letter) This claim is baseless. The IRB is an independent entity. As District Judge Edelstein found, "[t]he IRB [is] the only independent entity with the disciplinary authority to promote the purposes of the Consent Decree." United States v. IBT, 803 F. Supp. 761, 780 (S.D.N.Y. 1992) The Court also held that "... to accomplish its tasks, each IRB member must be fair and independent." United States v. IBT, 808 F. Supp. 271, 273 (S.D.N.Y. 1992) The IRB is not an agent of Local 817 as Radice's counsel claimed. No case supports respondent's position that notice of intended resignation given to a third party is equivalent to notice to the union.

IBT members can be disciplined for conduct while an IBT member even if they subsequently withdraw from the union. In United States v. IBT [Morris and McNeil], 782 F. Supp. 238, 241-42 (S.D.N.Y. 1992), respondents argued that the Independent Administrator had no jurisdiction over them because they had retired and withdrawn from the IBT before a decision was rendered against them. The Court held that the Supreme Court decision in NLRB v. Granite State Joint Board, 409 U.S. 213, 217 (1972) did "...not prevent a union from punishing members for pre-withdrawal conduct" and affirmed the discipline imposed upon the respondents. Id. at 242. At the time of his scheduled sworn examination, Radice was a union member. In addition, as discussed above, while an IBT member, Radice was a Gambino LCN member in violation of the IBT Constitution.

Summary

On October 11, 2013, the date of his sworn examination, Radice was an IBT member. (Ex. 1) He knowingly failed to appear for his sworn examination. As described above, Article II, Section 2(i) of the IBT Constitution contains a neutral and reasonable procedure for members to follow to resign from the union. (Ex. 14 at 12) Radice did not submit a written resignation to the Secretary-Treasurer of Local 817 as the IBT Constitution required in order to resign. (Exs. 14, 15) He never gave any notice to the IBT of his resignation. (Ex. 15) Accordingly, Radice continued as an IBT member. (Ex. 1) Moreover, the very terms of the Agreement he proffers as his resignation stated it would not be effective until approved by the IRB. (Ex. 13 at 2) Through his failure to appear, Radice unreasonably failed to cooperate with the IRB.

While a member of Local 817 (Ex.1), Radice failed to appear for his properly noticed IRB sworn examination on October 11, 2013. (Ex. 16) Accordingly, Radice failed to cooperate with the IRB in violation of the IBT Constitution.


Conclusion


Accordingly, Radice is permanently expelled from membership in Local 817, the IBT and IBT affiliated entities, and he is permanently barred from holding office or employment (including as an independent contractor or consultant) with Local 817, the IBT and all IBT affiliated entities. He may not receive any payments, salary, gratuities, gifts, severance payments, allowances, fees, benefit payments or contributions or any other compensation of any kind from Local 817 or other IBT affiliated entities, except that he may receive any pension, vacation or other benefits from existing plans or programs maintained by Local 817 or other IBT affiliated entities which had vested or accrued prior to his expulsion from membership.

Dated: June 18, 2014

Respectfully submitted,

Members of the
Independent Review Board


Benjamin R. Civiletti


Joseph E. diGenova


William H. Webster

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	88 Civ. 4486 (LAP)
v.	:	ACKNOWLEDGMENT OF RECEIPT
	:	OF THE OPINION AND
INTERNATIONAL BROTHERHOOD OF	:	DECISION OF THE
TEAMSTERS, <u>et al.</u>	:	INDEPENDENT REVIEW BOARD
	:	IN THE MATTER OF
Defendants.	:	FRANK RADICE

This Court hereby acknowledges that the Opinion and Decision of the IRB of Application 170 of the Independent Review Board ("IRB") for the International Brotherhood of Teamsters ("IBT") has been received by this Court, and that this Court has caused to be filed the original documents concerning the Opinion and Decision of Application 170 of the IRB with the Clerk of the Court of the Southern District of New York.

This Court further certifies that the instant Acknowledgment of Receipt ("the Acknowledgment") has been filed with the Clerk of the Court of the Southern District of New York, and that a copy of the Acknowledgment has been forwarded to the following:

John J. Cronin, Jr.
444 North Capitol Street, NW, Suite 528
Washington, DC 20001
Administrator of the Independent Review Board

Frank Radice
1144 Barnes Street
Franklin Square, NY 11010-1644

Dated: New York, New York

_____, 2014

U.S.D.J.