



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 03
130 S Elmwood Ave Ste. 630
Buffalo, NY 14202-2465

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October 3, 2018

Joel M. Howard III, Esq.
Couch White, LLP
540 Broadway
P.O. Box 22222
Albany, NY 12207-2708

Re: International Union of Operating Engineers –
Technical Engineering Division, Local 158
03-CB-224025
Sheet Metal Workers International Association,
Local 58 - 03-CB, 224028
Road Sprinkler Fitters, Local 669 – 03-CB-224035
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers, Local
317 – 03-CB-224043
International Brotherhood of Electrical Workers,
Local 43 – 03-CB-224048
Bricklayers and Allied Craftsmen, Local 2
03-CB-224057
Boilermakers Union Local 175 – 03-CB-224063
United Association of Journeymen and Apprentices
of the Plumbing and Pipefitting Industry, Local
267 – 03-CB-224123
Northeast Regional Council of Carpenters, Local
277 - 03-CB-224127
District Council 4, Glaziers Local 677
03-CB-224133
District Council 4, Painters Local Union 31
03-CB-224134
Construction and General Laborers Local Union
No. 633 – 03-CB-224144
International Association of Bridge, Structural and
Ornamental Iron Workers, Local 60
03-CB-224148
International Union of Operating Engineers –
Technical Engineering Division, Local 158
03-CB-224158
International Union of Elevator Constructors,
Local 62 - 03-CB-224163
Millwright Local 1163 - 03-CB-224167
United Union of Roofers, Water Proofers and

Allied Workers, Local 195 - 03-CB-224168
Central and Northern New York Building
Construction Trades Council - 03-CB-224173
International Association of Heat and Frost
Insulators and Allied Workers, Local 30
03-CB-224178

Dear Mr. Howard III:

We have carefully investigated and considered your charge that the Charged Party Unions have violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge for the reasons discussed below.

Your charges allege that the Charged Party Unions violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by entering into a project labor agreement (PLA) with the New York State Thruway Authority (NYSTA) to perform work on bridges near Syracuse, New York. As a preliminary matter, I have concluded that the charges are premature because the PLA has not yet been executed by the Design-Build Contractor. Article 2, Section 2 of the PLA plainly states that the contract does not go into effect until the Design-Build Contractor signs it. Thus, any unfair labor practice arising from the agreement is not yet ripe. Similarly, I have concluded that the National Labor Relations Board ("Board") does not have jurisdiction in these matters because there is no statutory employer performing any work governed by the PLA. Charging Party withdrew from the procurement process for the PLA work and therefore it will not be an employer on the project. With no statutory employer on the project, there is no violation of Sections 8(b)(1)(A) or 8(b)(2).

Alternatively, even assuming the charges are ripe and the Board has jurisdiction, the allegations lack substantive merit for various reasons. Your charges allege that the PLA is invalid under Section 8(f) because the agreement was not entered into by an employer in the construction industry and that the PLA was not voluntarily entered into. However, the Supreme Court, in *Building and Construction Trades Council of the Metropolitan District, et al. v. Associated Builders and Contractors of Massachusetts/Rhode Island, et al.*, 507 U.S. 218, 231 (1993), explicitly permitted a state entity to choose a contractor based upon the contractor's willingness to enter into a project labor agreement and to make the agreement an enforceable part of the bid specification. In that case, as in the instant matters, the state entity was acting as an owner or market participant rather than as a regulator and was not preempted by federal law from enforcing the agreement. Likewise, the evidence does not support the conclusion that Section 8(f)'s construction industry proviso is inapplicable to this PLA. In this regard, as explained above, the Supreme Court has upheld the right of State actors to enter into PLAs in their capacity as market participants to the same extent as private actors. In these matters, the independent contractor which negotiated the PLA on behalf of the NYSTA is a construction industry employer. Assuming a Design-Build Contractor executes the PLA in the future, a construction industry employer may exist at that time further demonstrating that the PLA was negotiated in a collective-bargaining context. Thus, the facts in these matters can be plainly contrasted with those in *Glens Falls Building & Construction Trades Council (Indeck Energy Services of Corinth, Inc.)*, 350 NLRB 417 (2007) where the Board found a Section 8(e) violation where parties entered into an agreement in the absence of a collective-bargaining relationship.

Moreover, there is no evidence that the Unions engaged in any coercive acts that would compel a contractor to sign the PLA. Rather, the Charging Party, like any other employer, was free to bid on the work or not based on the terms desired by the NYSTA as set forth in the PLA. These terms included a provision that the PLA would be made available to any employer regardless of whether the employer performs work union or non-union at other sites.

Finally, there is insufficient evidence of an 8(b)(1)(A) violation where the PLA includes provisions prohibiting discrimination against non-union employees and permits employers to hire a percentage of its workforce without resorting to the Unions' hiring halls.

Accordingly, I am dismissing your charge.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. To file electronically using the Agency's e-filing system, go to our website at www.nlrb.gov and:

- 1) Click on E-File Documents;
- 2) Enter the NLRB Case Number; and,
- 3) Follow the detailed instructions.

Electronic filing is preferred, but you also may use the enclosed Appeal Form, which is also available at www.nlrb.gov. You are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect. To file an appeal by mail or delivery service, address the appeal to the **General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

The appeal MAY NOT be filed by fax or email. The Office of Appeals will not process faxed or emailed appeals.

Appeal Due Date: The appeal is due on October 17, 2018. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than October 16, 2018. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before** October 17, 2018. The request may be filed electronically through the

E-File Documents link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after October 17, 2018, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ Paul J. Murphy

PAUL J. MURPHY
Regional Director

Enclosure

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International Union of Operating Engineers, - 7 - October 3, 2018
Local 158 (Slate Hill Constructors, Inc.)
Case 03-CB-224025

Jeffrey A. Hanlon
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October 30, 2018

(b) (6), (b) (7)(C)

Re: International Union of Operating Engineers
Local 17 (Various Employers)
Case 03-CB-225647
International Union of Operating Engineers
Local 463 (Various Employers)
Case 03-CB-225649

Dear (b) (6), (b) (7)(C)

We have carefully investigated and considered your charges that International Union of Operating Engineers, Locals 17 and 463 have violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have concluded that further proceedings are not warranted, and I am dismissing your charges for the following reasons:

Your charges allege that International Union of Operating Engineers, Local 17 (Local 17) and International Union of Operating Engineers, Local 463 (Local 463) violated Section 8(b)(1)(A) of the Act by operating a hiring hall in a manner that was arbitrary, discriminatory or in bad faith, and violated Section 8(b)(2) of the Act by causing or attempting to cause an employer not to hire you because you previously filed the charge in Case 03-CB-188037. The investigation revealed insufficient evidence that either Local 17 or Local 463 violated the Act as alleged.

Regarding your claim that Local 17 and Local 463 violated Section 8(b)(1)(A) of the Act by operating a hiring hall in a manner that was arbitrary, discriminatory or in bad faith, the investigation disclosed that the unions operate a non-exclusive hiring hall under the Up-State New York Technical Engineers Agreement. The duty of fair representation does not apply to the operation of the non-exclusive hiring hall and the investigation revealed insufficient evidence that the Union failed to refer you to surveyor or that any referral decision was predicated on an unlawful motive.

With respect to the allegations that Local 17 and Local 463 violated Section by 8(b)(2) of the Act by attempting to cause an employer not to hire you, the evidence disclosed that the unions' objections to your hire as a (b) (6), (b) (7)(C) and a (b) (6), (b) (7)(C) operator, and the basis upon which you were not hired, centered on the fact that you do not possess the qualifications to operate a (b) (6), (b) (7)(C) a perfectly lawful consideration.

Accordingly, I am dismissing your charges.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. To file electronically using the Agency's e-filing system, go to our website at www.nlr.gov and:

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Appeal Due Date: The appeal is due on **November 13, 2018**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than November 12, 2018. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

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appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ Paul J. Murphy

PAUL J. MURPHY
Regional Director

Enclosure

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