

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS LOCAL 492  
(Fire and Ice Productions, Inc.)**

**and**

**Case 28-CB-207136**

**BILL KELMAN, an individual.**

**UNION’S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

COMES NOW the International Brotherhood of Teamsters, Local 492 (“the Union”), and pursuant to Section 102.46(c) of the Rules and Regulations of the National Labor Relations Board, and files the following brief in support of its cross-exceptions to the Administrative Law Judge Amita B. Tracy’s June 24, 2019 Decision in the above-captioned case.

**I. Introduction**

The precise question raised by the Complaint in this matter is whether Respondent restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act, by enacting and enforcing its “double-roster” rule. That rule reads as follows:

**Any person on another Teamster roster in the industry is ineligible to be placed or to maintain roster status in New Mexico.**

Petitioner claimed that the rule, enforced against Bill Kelman, does not serve any representational function and that, additionally, Respondent failed to effectively inform its members of the consequences of violating the rule. The ALJ rejected both arguments.

The Union supports the determination of the ALJ that its “double rostering” rule is non-discriminatory, serves an important representational role, and is lawful. It also supports the determination that in no other way did it violate the law. However, the ALJ made an initial error

in finding that the rostering system was a “de facto exclusive hiring hall.” The Union excepts from that finding.

## **II. Statement of the Case**

On October 24, 2018, the Regional Director for Region 28 issued a complaint and Notice of hearing in this matter. Paragraph 5(a) of the Region’s complaint alleged that, “At all relevant times Respondent has operated a *non-exclusive hiring hall* whereby Respondent referred members of Respondent and non-member hiring hall users to jobs as drivers on film productions in New Mexico.” (Emphasis added.)

The hearing was scheduled to, and did, commence on January 29, 2019. On Friday, January 25, 2019, literally the last business day prior to trial, the Region submitted a Notice to Amend its Complaint. The Notice to Amend (as granted at trial) sought to plead the opposite regarding the Union’s referral practice; instead of pleading the already admitted use of a non-exclusive hiring hall, the Region newly contended that the Union operated a “de facto exclusive hiring hall.”

The ALJ issued her decision on June 24, 2019. She found: (1) the Union’s referral roster was a de-facto exclusive hiring hall, ALJ 14:35-36; (2) the Union’s “double-roster rule” was “reasonably designed to ensure the effective operation of its hiring hall for members and nonmembers”, ALJ 15:41-42, and “reasonably designed to serve its objective of preserving work for its hiring hall users”, ALJ 16:28-29; and (3) the Union “took reasonable steps to directly notify its hiring hall users of the double-roster rule, including Kelman.” ALJ, 17:33-34.

## **III. Facts Relevant to Cross Exceptions**

The evidence at trial, both testimonial and documentary, establishes that the rules at issue operated by Respondent constitute a *non-exclusive* referral procedure. The *non-exclusive* referral

procedure operates in the context of various memorandums of agreement between Respondent and Employers. Those memorandums require the Employer to use Petitioner's referral system where they use persons on the rosters, but the agreement does not require the exclusive use of those employees. (Joint Exh. 4) Moreover, the operative memorandums of understanding incorporate the "terms, conditions and obligations of the Teamsters Local No. 399 – Studio Transportation Drivers Agreement with all corresponding wages, hours and working conditions. . ." (Joint Exh. 4, p. 1). That agreement explicitly clarifies the non-exclusive nature of the arrangement of the referral system:

When units working on distant locations in the thirteen (13) western states (. . . New Mexico . . .) rent or buy additional equipment or rent or buy animals, the Drivers of said equipment and the Wranglers shall work under condition and wages not less favorable than those stipulated above. . . In hiring personnel at the location, the Producer will use *its best efforts* to notify the business agent for the Local Union involved at least seventy-two (72) hours in advance and will consult with said business agent regarding the selection of qualified local hires, *provided that the Producer will make the final decision.*

(Emphasis added.). (Joint Exh. 1, p. 140.)

This provision negates the legal notion that the referral procedure is exclusive: "So as far as we go, we have a grouping system that we prefer them to use. But at the end of the day, if they say no, then it's their (the employer productions companies) choice, per this contract." (Malcolm, 115:9-11). In point of fact, employees working these jobs in New Mexico do not all come from the referral system:

We get 399 members that come up here and work. We get people that come from other states that pay us Dobie dues on occasion.

Q. So is it fair to say that 492 is the exclusive provider of drivers and the people in those categories for productions in New Mexico?

A. No. . .

Q. And is it in that experience, true, like yourself, that sometimes they (film production companies) hire off the street or hire not using the referral list?

A. Yes.

(Malcolm, 117:9-15; 121:22-25).

Melissa Malcolm, Respondent's business agent handling the movie production business in New Mexico, first began working on New Mexico film productions without being on the Union's referral list:

I got a phone call from one, from my dad, who's also a driver. And he was working on a production. He said that they needed some help, did I want to come and help them. And I went and helped them. And I was a Teamster. I worked in the film industry from that point forward.

Q. So you were initially hired out of the referral procedure? And by out of the referral procedure, I mean not using the referral procedure —

A. Right.

(Malcolm, 119:1-9.)

Ms. Malcolm provided other examples of the non-exclusive nature of the referral system:

We have a low-budget agreement that says they can hire — if they want to hire anybody that they want, then all that's required is that they pay us a service fee during their time of employment. They can seek employees by whatever means they choose. We had a show that came in for about two weeks, and they brought — they hired a dispatcher that was not one of my members. We charged her a service fee. I can give you — we had — there's a mechanic on a show. We didn't have any mechanics. They hired him off the street.

(Malcolm, 122:2-11.)

In terms of the interaction between the Memorandums of Agreement and the Master Agreement as relates to hires, Respondent's testimony is clear: "So our memorandums of agreement, we negotiate that they would follow our grouping system. But if they choose not to, it's — per paragraph 30, it's producer's choice. They can hire whoever they want." (Malcolm, 135:10-13.). It is ironic that the Union's final example of the non-exclusive nature of the referral

list is the petitioner, Bill Kelman. Petitioner Bill Kelman actually personally benefitted from the fact that the arrangement in question is not an exclusive hiring hall:

Mr. Kelman was hired off the street in 2014. We have — our records show that Mr. Kelman was on withdrawal when he was hired. He was not on any referral list. He couldn't be, because anybody on withdrawal doesn't get put on a referral list. So he — however, he obtained an employment on *The Condemned* he worked for three weeks before — at least 3 weeks before the Union found out about it . . . When we say hired off the street that's somebody who wasn't on a union referral list.

(Malcolm, 125:18-126:11.)

This interpretation was confirmed by legal counsel for Local 399, Joe Kaplon:

Paragraph 30 of the Local 399 Black Book is the Bible as it applies to motion picture companies traveling within the thirteen western states which includes New Mexico. . . Specifically, Paragraph 30 allows producers to come into New Mexico, notify your local of their presence and *choose who they are going to employ as local hires*. Fortunately, upon notification, Local 492 is usually able to negotiate with the producers to use most of your roster while demanding certain concessions for those individuals they wish to hire . . . *If* the producers use your roster, it must be non-discriminate, and not favor union membership.

(Emphasis added.) (Union Exh. 4.)

As Ms. Malcom explained in her testimony:

Q. If Local 492 were an exclusive hiring hall or an exclusive referral system, how would it work in contrast to what you read here?

A. I would tell them (employers) who they were going to hire. It wouldn't be their choice.

(Malcolm, 143:14-18.)

#### **IV. Argument**

The law governing a Union's duties in the operation of a non-exclusive hiring hall does not incorporate the duty of fair representation: "No duty of fair representation attaches, however, to a union operation of a non exclusive hiring hall because the union lacks the power to put jobs out of reach of workers." *Carpenters Local 537 (E.I. Du Pont)*, 303 NLRB 419, 420 (1991). "It is

therefore *only* when a union operating a non exclusive referral system ignores one of its members *because* he or she engaged in activities protected by Section 7 of the Act that there is the ‘prohibited’ interference with Section 7 rights within the meaning of Section 8(b)(1)(A) of the Act.” (Emphasis added.). *Teamsters Local 17 (Universal Studios)* 251 NLRB 1248 (1980). “. . . the case law, for this sort of violation of Section 8(b)(1)(A), requires that the General Counsel establish that the Respondent Union acted for a discriminatory motive, i.e., in retaliation for a member’s protected activity.” *Carpenter’s Local 370 (Eastern Contractor’s Assn.)*, 332 NLRB 174, 175 (2000).

Thus, without discriminatory motive (the Region withdrew, by amendment, any allegation of discriminatory motive), the Region must establish that the referral arrangement constitutes an exclusive hiring hall. For the entirety of this litigation (until two days before trial), the Region admitted that Respondent’s referral system was non-exclusive. However, at 4:11 p.m. on Friday, January 25, 2019, the Region submitted a Notice to Amend its Complaint which sought to plead the opposite regarding the Union’s referral practice; instead of pleading the already admitted use of a *non-exclusive* hiring hall, the Region newly contended that the Union operated a “*de facto exclusive hiring hall*.”

The *non-exclusive* referral system operated by Respondent requires the Petitioner establish discrimination in order to meet the prima facie elements of a violation. “It is therefore *only* when a union operating a non exclusive referral system ignores one of its members *because* he or she engaged in activities protected by Section 7 of the Act that there is the ‘prohibited’ interference with Section 7 rights within the meaning of Section 8(b)(1)(A) of the Act.” (Emphasis added.). *Teamsters Local 17 (Universal Studios)* 251 NLRB 1248 (1980). “. . . the case law, for this sort of violation of Section 8(b)(1)(A), requires that the General Counsel establish that the Respondent

Union acted for a discriminatory motive, i.e., in retaliation for a member's protected activity.” *Carpenter's Local 370 (Eastern Contractor's Assn.)*, 332 NLRB 174, 175 (2000). Petitioner made no offer of proof at trial that Respondent Union acted for a discriminatory motive and amended the Complaint before trial to remove any such allegations.

The amendment requires the proof of an important factual and legal component: Specifically, the Region must establish (and the Union must rebut), that under the “totality of the circumstances,” an exclusive hiring hall exists. *NLRB v. Laborers Local 334*, 481 F.3d 875, 881 (6<sup>th</sup> Cir. 2007). A union that operates an exclusive hiring hall arrangement may not discriminate among employees in the manner that it refers employees for employment. However, a union that operates a nonexclusive hiring hall owes no such obligation. *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 461 (1990). The existence of an exclusive hiring hall arrangement may be shown by express contractual provisions or by practice. *Teamsters Local 174 (Totem Beverage)*, 236 NLRB 690 (1976). The General Counsel bears the burden of establishing the existence of an exclusive hiring hall arrangement. *Carpenters Local 537 (E. I. du Pont)*, 303 NLRB 419, 429 (1991). The circumstances which are relevant for inquiry may include any contractual language between the union and the employer, as well as the actual hiring practices that these parties follow. *Laborers Local 334*, 335 NLRB 597, 599 (2001).

The Region has not met its burden to prove the existence of a *de facto* hiring hall. “The essence of such an arrangement is that an employer and a union agree that the union will be the sole source of referral of applicants for employment with an employer. That is, the employer gives up its right to hire employees from any source except the union.” *Laborers Local 334*, 335 NLRB 597, 599 (2001). In, *Laborers Local 334*, the Board was presented with contract language similar to the contract language in the instant case — the Union was not the exclusive source of employees:



James Montalbano  
[james@youtzvaldez.com](mailto:james@youtzvaldez.com)  
900 Gold Ave. SW  
Albuquerque, NM 87102  
(505) 244-1200

*Attorneys for Respondent  
International Brotherhood of  
Teamsters, Local 492*

