

**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 RESPONSE TO THE 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(b) of the Rules and Regulations of the National Labor Relations Board, and files the following response to the exceptions filed by the General Counsel and Bill Kelman 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 Union has filed cross-exceptions from the ALJ’s determination that its roster system was a de facto exclusive hiring hall. However, even if Respondent’s referral system qualified,

under some legal theory, as an exclusive hiring hall, Respondent established at trial that the rule in question serves a legitimate representative function. The ALJ's determination on those issues is correct.

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 Exceptions

The precise question raised by the Complaint in this matter was 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. (Compl., para. 6). More specifically, the question was whether Respondent's referral hall "double-roster" rule violated the Act. The Union adopted modified roster referral rules on January 1, 2016. (Joint Exh. 2). Those modified rules newly included the rule which is at issue in these proceedings: "Any person on another Teamster roster in the industry is ineligible to be placed or to maintain roster status in New Mexico."

The addition of the rule in question was recommended by counsel for Teamster's Local 399 in Los Angeles, California, Mr. Joe Kaplon. Specifically, Mr. Kaplon recommended this rule: "We would require that individuals be rostered and remain rostered as long as they are not on another Teamster roster in the industry. This requirement demonstrates the individual's commitment to work exclusively in New Mexico." (Union Exh. 4.)

These rules were mailed to Bill Kelman (along with all other members) on or about November 15, 2015. (Union, Exh. 2, Malcolm, 137:6-11.) These rules were also personally delivered to Mr. Kelman on or about June 29, 2017, at the Union hall. On that date Mr. Kelman signed a document which states: "I have received the Teamsters Local 492 industry experience roster and out-of-work list registration procedures for drivers and wranglers in the movie industry in New Mexico." Mr. Kelman signed the document and noted his acknowledgement of receipt of the procedures separately with his initials. (Union Exh. 5.)

Just a few weeks later on July 18, 2017, Mr. Kelman completed a registration for employment with "Teamsters Local 222 Movie Industry," in the state of Utah. (Union Exh. 1.). On July 18, 2017, when Mr. Kelman completed this registration, he was concurrently registered

on the New Mexico roster, a fact which he had confirmed in person on June 29, 2017 at the New Mexico Union hall. (Malcolm, 153:5-10.) The Utah, Local 222 registration form asks the applicant the following question: “Are you Registered elsewhere?” (Union Exh. 1). In response to the question, Mr. Kelman wrote, in his own hand, “No.” Mr. Kelman’s response to the question was false, as he was already registered on the New Mexico roster. Had Mr. Kelman answered the question truthfully, he would not have qualified to register in Utah.

His registration in Utah allowed him preferential roster status in both New Mexico and Utah. (Malcolm, 152:10-153:14.). This intentional, and false, act by Mr. Kelman placed him in explicit violation of the New Mexico roster rules and made him ineligible to remain on the New Mexico roster as explicitly stated in the rules: he made himself, “ineligible to be placed or to maintain roster status in New Mexico.” Mr. Kelman was aware that his acts violated the rules and demonstrated that awareness by claiming, in his appeal to the Union’s Executive Board, that he was never rostered in Utah, but was a legal traveler paying Dobie dues. (Union Exh. 7). “Dobie dues” is a process by which a member rostered in one state may work in another state without losing his roster position in his home state. In fact, Mr. Kelman never paid Dobie dues in Utah. (Malcolm, 156:21-158:2.). His defense to the Union’s Executive Board confirms his advance knowledge of the rule at issue and his attempt to circumvent the rule by making a false statement to the Executive Board.

Melissa Malcolm explained the representational purpose of the double-rostering prohibition:

Q. In the absence of a double-rostering rule, what would expect to happen with regard to 399 (California Local) members working in New Mexico?

A. I would expect that we would be flooded by them coming here and taking jobs from our locals, because the producers know them and want to get them here.

Q. How would that affect your local?

A. It would put most of my members out of work. . .

Q. You've testified about other people coming in to work here, but he's (Kelman) seeking work elsewhere, so what's the representational purpose of that?

A. Because if we allow him to go elsewhere, we have to allow others to come here. If there's no double-roster rule, we can't stop them from coming here. It's a double — you know, it's a two-way street. If we allow ours to go, then we have to allow everybody else to come in here, and be on a roster with us also.

(Malcolm, 161:20-163:14.)

The genesis for the rule was for purely representational purposes, as explained by Teamster representative, Trey White:

Our people . . . native New Mexicans . . . They didn't think it was fair that there were people from Texas, and Arizona . . . Coming in and taking jobs from them, and also being able to work where they live, in Arizona or Texas or whatever. . . And they felt like it was, they were getting two bites of the apple. And so that was one of the things that they wanted fixed. . . If this rule is, if this rule gets taken out of our rules, it's going to create massive chaos in the movie industry . . . Because all — any individual will be able to get on any roster they want, anywhere in America, as many as the want . . . And they'll be able to go from state to state to state, cherry-picking where they want to work, when they want to work and what positions they want to work.

(White 188:19-191:7.)

And finally, Local 492's Secretary-Treasurer, Walter Maestas, summarized the very real damage the elimination of such a rule would work on the members of his local and the film industry in New Mexico:

I believe the inability for people to be rostered on more than one roster is we represent the people in New Mexico. And there's all kinds of reasons for that. There's incentive for people that are — that live in New Mexico, are New Mexico residents. And so we're protecting the people who are 492 members, as far as being able to work.

Q. If this local and other locals, other Teamster locals didn't maintain the double-rostering rules and allowed people to get on the rosters of every local, how would

that help or hurt the ability of Local 492 to develop a full-time committed industry here in New Mexico?

A. You'd probably flood the grouping systems. And to protect the people from your own state, that's where our local jurisdiction applies. And we don't have the jurisdiction from others. We don't own the jurisdiction of other states.

(Maestas, 49: 5-51:16.)

IV. Argument

In its contemporaneously-filed cross-exceptions, the Union argues that the General Counsel failed to meet its burden on the threshold issue of whether the Union operated a *de facto* exclusive hiring hall. For, 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). If the first element were established (that the Union operates a *de facto* exclusive hiring hall), the Union would have to rebut the presumption that the Union's interference with Kelman's employment operated unlawfully to discourage union membership — whether the Union's actions here were necessary to the effective performance of its function in representing employees. *International Union of Operating Engineers, Local 18*, 204 NLRB 681 (1973).

A union is subject to the duty of fair representation in its operation of an exclusive hiring hall and must exercise its hiring authority “in a non-arbitrary and non-discriminatory fashion.” *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988). The Board considers a union to have violated its duty of fair representation (and Section 8(b)(1)(A) of the Act), “if it administers an exclusive hiring hall arbitrarily or without reference to objective criteria.” *Stagehands Referral Serv.*, 347 NLRB 1167, 1170 (2006). In other words, in the Board's view an exclusive hiring-hall must utilize job referral criteria that are both objective and consistently

applied. Thus, a union bears the burden of establishing that referrals are made pursuant to a valid hiring-hall provision, or that its conduct was necessary for effective performance of its representational function. *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985), enfd. mem. 843 F.2d 1392 (6th Cir. 1988); *Boilermakers Local 433 (Riley Stoker Corp.)*, 266 NLRB 596 (1983).

To prevail, the General Counsel was required to show that Union acted “so far outside a ‘wide range of reasonableness’ as to be irrational.” *Air Line Pilots Assn. v. O’Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). On this question, the Board gives a union deference when deciding what conduct is reasonable to ensure the effective performance of its representative role. See *United Brotherhood of Painters, Local Union No. 487*, 226 NLRB 299, 301 (1976) (citing *Ford Motor 20 Co. v. Huffman*, 345 U.S. 330, 338 (1953) (statutory bargaining representative must be able to exercise a “wide range of reasonableness and discretion, subject to good faith, when serving its unit)). Furthermore, the Board does not require the union to show that it was “the best or only means available.” *IATSE Local 838 (Freeman Decorating Co.)*, supra at slip op. 5 (citing *Millwrights’ Local 1102 (Planet Corp.)*, 144 NLRB 798, 801-802 (1963)); *United Brotherhood 25 of Painters, Decorators & Paperhangers of America, Local Union No. 487 (American Coatings, Inc.)*, 226 NLRB 299, 301 (1976).

In this case, the Union easily met this burden. First, the rule at issue was recommended by Teamster’s counsel in Los Angeles as a mechanism for effective performance of its representational function in New Mexico. Specifically, Mr. Kaplon recommended this rule: “We would require that individuals be rostered and remain rostered as long as they are not on another Teamster roster in the industry. This requirement demonstrates the individual’s commitment to work exclusively in New Mexico.” (Union Exh. 4.). Secondly it is of obvious significance that

this explicit rule has previously been approved by the Board. *IBEW Local 6*, 318 NLRB 109 (1995). In that case, “Local 6’s eligibility rule denies a Local 6 hiring hall registrant the right to sign Local 6’s book I, if the registrant is eligible to sign book I in any other IBEW Local.” *Id.*, at 127. In that case the Board took issue with the fact that the rule precluded registrants from signing the book if they were eligible to sign another book, but did not take issue with the rule which prohibited registrants from simultaneously being registered with two locals:

Respondent notes the General Counsel is not attacking Local 6’s rule that a registrant may not be registered on book I in any other local and simultaneously register on Local 6’s book I. . . Thus counsel for the General Counsel emphasizes she is not attacking the validity of the registration rule maintained by Local 6 which explicitly limits Local 6 group I registrants to those who are not registered on any other group I out-of-work list.

Id., at 127.

Third, and finally, the Union’s witness aptly demonstrated the representational purpose (purposes which are confirmed by the Board’s decision in, *IBEW Local 6*, 318 NLRB 109 (1995)).

Melissa Malcolm explained the representational purpose of the double-rostering prohibition:

Q. In the absence of a double-rostering rule, what would expect to happen with regard to 399 (California Local) members working in New Mexico?

A. I would expect that we would be flooded by them coming here and taking jobs from our locals, because the producers know them and want to get them here.

Q. How would that affect your local?

A. It would put most of my members out of work. . .

Q. You’ve testified about other people coming in to work here, but he’s (Kelman) seeking work elsewhere, so what’s the representational purpose of that?

A. Because if we allow him to go elsewhere, we have to allow others to come here. If there’s no double-roster rule, we can’t stop them from coming here. It’s a double — you know, it’s a two-way street. If we allow ours to go, then we have to allow everybody else to come in here, and be on a roster with us also.

(Malcolm, 161:20-163:14.)

The genesis for the rule was for purely representational purposes, as explained by Teamster representative, Trey White:

Our people . . . native New Mexicans . . . They didn't think it was fair that there were people from Texas, and Arizona . . . Coming in and taking jobs from them, and also being able to work where they live, in Arizona or Texas or whatever. . . And they felt like it was, they were getting two bites of the apple. And so that was one of the things that they wanted fixed. . . If this rule is, if this rule gets taken out of our rules, it's going to create massive chaos in the movie industry . . . Because all — any individual will be able to get on any roster they want, anywhere in America, as many as the want . . . And they'll be able to go from state to state to state, cherry-picking where they want to work, when they want to work and what positions they want to work.

(White 188:19-191:7.)

And finally, Local 492's Secretary-Treasurer, Walter Maestas, summarized the very real damage the elimination of such a rule would work on the members of his local and the film industry in New Mexico:

I believe the inability for people to be rostered on more than one roster is we represent the people in New Mexico. And there's all kinds of reasons for that. There's incentive for people that are — that live in New Mexico, are New Mexico residents. And so we're protecting the people who are 492 members, as far as being able to work.

Q. If this local and other locals, other Teamster locals didn't maintain the double-rostering rules and allowed people to get on the rosters of every local, how would that help or hurt the ability of Local 492 to develop a full-time committed industry here in New Mexico?

A. You'd probably flood the grouping systems. And to protect the people from your own state, that's where our local jurisdiction applies. And we don't have the jurisdiction from others. We don't own the jurisdiction of other states.

(Maestas, 49: 5-51:16.)

The representational purpose identified is legitimate, and has previously been confirmed by the Board. As the ALJ noted, the only remaining question is whether the Union provided adequate notice of the double-roster rule. The ALJ correctly determined:

The Union sent notice of the double-roster rule via the procedures for the Industry Experience Roster to all active members of the hiring hall in November 2015. Thereafter, the Union again provided Kelman with a copy of the double-roster rule in June 2017 when he sought to move from group 3 to group 2. There was no evidence presented at the hearing that the Union was negligent in ensuring all users of the hiring hall were informed of the hiring hall's double-roster rule.

ALJ 17:34-39. The General Counsel makes the bizarre argument that the Union's notice was invalid because it did not specify the consequences of violating the rule. However, the rule itself is a flat prohibition: an employee rostered elsewhere cannot be rostered with the Union. There is no need to specify a particular consequence, because the rule itself operates to automatically remove an employee rostered elsewhere.

Dated: September 20, 2019

Respectfully submitted,

YOUTZ AND VALDEZ, P.C.

/s/ Shane Youtz

Shane Youtz

Shane@youtzvaldez.com

Stephen Curtice

stephen@youtzvaldez.com

James Montalbano

james@youtzvaldez.com

900 Gold Ave. SW

Albuquerque, NM 87102

(505) 244-1200

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

