

**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

**COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF
TO RESPONDENT'S RESPONSE TO THE EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

Respectfully submitted,

Rodolfo Martinez
Counsel for the General Counsel
National Labor Relations Board
Region 28 – Albuquerque Resident Office
421 Gold Avenue SW Suite 310
Albuquerque, NM 87102
Telephone: (505) 313-7222
Facsimile: (505) 206-5695
E-mail: rodolfo.martinez@nlrb.gov

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the General Counsel (CGC) submits this Reply Brief to Respondent's Response to the Exceptions to the Administrative Law Judge's Decision (Answering Brief).¹

I. RESPONDENT'S WAIVED DUE PROCESS ARGUMENT

On October 24, 2018, the Regional Director for Region 28 issued a Complaint and Notice of Hearing in this matter (Complaint). On January 29, 2019 a hearing was held before Administrative Law Judge Amita B. Tracy (ALJ). At the hearing, the ALJ granted CGC's Motion to Amend the Complaint to allege Respondent operated a de-facto exclusive hiring hall (Motion to Amend Complaint). JD 2:4-5:3; Tr. 7:6-12:1; GCX 2. The ALJ correctly determined that Respondent received enough notice of the General Counsel's intention to amend the Complaint and granted additional time for Respondent to prepare its response to the amendment. Respondent, however, did not request any additional time. JD 2. Moreover, Respondent has not specifically excepted to the ALJ ruling granting the Motion to Amend Complaint. Thus, by its actions, Respondent has waived this exception. Sec. 102.46 (a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived."). Therefore, Respondent's procedural protestations lack merit.

¹ As used in this brief, "JD" refers to the ALJ decision, *International Brotherhood of Teamsters Local 492 (Fire and Ice Productions, Inc)*, JD(SF)-17-19 (June 24, 2019); "Tr." to the transcript of the hearing before the ALJ; "JX" to Joint Exhibits; "GCX" to General Counsel Exhibits; "UEX" to Respondent's Exhibits; and "Exc." to the General Counsel's Exceptions; "R. Ans. Br." means Respondent's Response to the Exceptions to the Administrative Law Judge's Decision.

II. THE ALJ'S FINDING THAT RESPONDENT'S DOUBLE ROSTER RULES SERVES A VALID REPRESENTATIONAL PURPOSE WAS ERRONEOUS

Respondent first argues that its double-roster rule “was recommended by Teamster’s counsel in Los Angeles as a mechanism for its representational function in New Mexico” and that counsel recommended the rule as it “demonstrates the individual’s commitment to work exclusively in New Mexico.” R. Ans. Br. 7; UEX 4. Respondent adds that its witnesses “aptly demonstrated the representational purpose (purposes which are confirmed by the Board’s decision in *IBEW Local 6*, 318 NLRB 109 (1995)).”

Given the ALJ’s undisputed finding that Respondent’s rule interferes with employees’ employment, *Ohio Contractors*, 204 NLRB 681 (1973), enf. denied on other grounds, 555 F.2d 552 (6th Cir. 1977), it is Respondent’s “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.” *Int’l All. of Theatrical Stage Employees, Local No. 151 (Freeman Decorating Servs., Inc.)*, 364 NLRB No. 89, at *1 (2016) citing *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1170 (2006), enf. 315 Fed. Appx. 318 (2009). Respondent has failed to do so.

Respondent’s stated objective for the rules, that it demonstrates an individual’s commitment to work exclusively in New Mexico, falls flat since Respondent admittedly permits members to work in other states by paying “dobie dues” rather than rostering with another Teamsters hiring hall. Thus, the rule is arbitrary because it patently fails to serve its stated end of exclusivity. Also, there is no evidentiary support for finding that the double-roster rule, as opposed to the stricter residency requirements Respondent imposed, was responsible for halting out-of-state residents from taking jobs from Respondent’s members. As Respondent’s interference with employees’ employment demonstrates its “influence over

the employee and its power to affect his livelihood in so dramatic a way,” *Ohio Contractors Ass’n*, above at 681, the least that should be required is that Respondent attempt to achieve its objectives through a narrower means before using such a sweeping brush.

Respondent also misconstrues Board law by stating that “it is of obvious significance that this explicit rule has been approved by the Board.” R. Ans. Br. 7-8. Respondent’s reliance upon *IBEW Local 6*, 318 NLRB 109 (1995), however, is misplaced. Respondent argues that its double-roster rule “has been previously approved by the Board” in that case and that “the Board did not take issue with the rule which prohibited registrants from simultaneously being registered with two locals.” R. Ans. Br. 7-8. As the validity of the rostering rule in that case was not before the Board, *IBEW Local 6* lacks precedential value for Respondent’s contention that the Board has explicitly approved the rule presented in this one.

III. THE RULE’S VAGUENESS CREATES ARBITRARY POWER

Respondent also argues that “[t]he General Counsel makes the bizarre argument that the Union’s notice was invalid because it did not specify the consequences of violating the rule.” Respondent contends that “the rule itself is a flat prohibition” that “an employee rostered elsewhere cannot be rostered with the Union” and thus “[t]here is no need to specify a particular consequence, because the rule itself operates to automatically remove an employee rostered elsewhere.” R. Ans. Br. 9-10.

There is nothing bizarre about informing workers about matters critical to their employment status which is their livelihood. Notably, the rule is vague as it fails to explain the consequences of violating the rule and there is nothing indicating how a member can reestablish their previous priority position after a double-rostering offense. Due to this vagueness, the punishment for violating the rules rests at the whim of the enforcing business

agent. This would result in unwarranted enhancement of subjective power. See *Local 394, Laborers' International Union of North America*, 247 NLRB 97, 103 (1980).

IV. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests the Board to grant General Counsel's exceptions.

Dated at Albuquerque, New Mexico, this 4th day of October 2019.

Respectfully submitted,

/s/ Rodolfo Martinez

Rodolfo Martinez
Counsel for the General Counsel
National Labor Relations Board
Region 28 – Albuquerque Resident Office
421 Gold Avenue SW Suite 310
Albuquerque, NM 87102
Telephone: (505) 313-7222
Facsimile: (505) 206-5695
E-mail: rodolfo.martinez@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that the **COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S RESPONSE TO THE EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** in Case 28-CB-207136 was served via E-Gov, E-Filing, and E-Mail, on this 4th day of October 2019, on the following:

Via E-Gov, E-Filing:

Roxanne L. Rothschild, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE, Room 5100
Washington, DC 20570

Via Electronic Mail:

Walter Maestas, Secretary-Treasurer
International Brotherhood of Teamsters,
Local 492
4269 Balloon Park Road NE
Albuquerque, NM 87109-5827
Email: wmaestas@teamsters492.org

Shane Youtz, Attorney at Law
James A. Montalbano, Attorney at Law
Stephen Curtice, Attorney at Law
Youtz & Valdez, PC
900 Gold Avenue, SW
Albuquerque, NM 87102
Email: shane@youtzvaldez.com
Email: james@youtzvaldez.com
Email: stephen@youtzvaldez.com

Bill Kelman
7105 Casa Elena Drive NE
Albuquerque, NM 87113-1157
Email: bill.kelman@gmail.com



Dawn M. Moore
Administrative Assistant
National Labor Relations Board
Region 28 - Las Vegas Resident Office
Foley Federal Building
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, Nevada 89101
Telephone: (702) 820-7466
Facsimile: (702) 388-6248
E-Mail: Dawn.Moore@nlrb.gov