

**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 ANSWERING BRIEF  
TO RESPONDENT'S CROSS EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

Respectfully submitted,

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## **I. INTRODUCTION**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel (CGC) files this Answering Brief to International Brotherhood of Teamsters, Local 492's (Respondent) Cross-Exceptions to Administrative Law Judge Amita B. Tracy's (ALJ) June 24, 2019 Decision in the above-captioned case.<sup>1</sup> In its cross-exceptions, Respondent excepts to the ALJ's finding that Respondent operates a *de facto* exclusive hiring hall that refers drivers and wranglers who work on the set of shows and movies for film production companies filming in New Mexico. Respondent's exception lacks merit as the General Counsel met its burden to prove that Respondent operates its hiring hall as alleged. Accordingly, CGC respectfully requests that the National Labor Relations Board (Board) deny Respondent's cross exception and uphold the ALJ's finding that Respondent operates a *de facto* exclusive hiring hall.

## **II. THE ALJ'S FINDING THAT RESPONDENT OPERATES A *DE FACTO* EXCLUSIVE HIRING HALL IS SUPPORTED BY THE FACTS AND THE LAW**

The ALJ found that Respondent operates a *de facto* exclusive hiring hall which makes available drivers and wranglers to production companies in New Mexico. Production companies hire these individuals after the Union and the production companies enter into a Memorandum of Agreement (MOA) for each show or film. As the ALJ found, most production companies sign MOAs with Respondent when they seek to employ drivers and

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<sup>1</sup> 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. Cr. Exc." to Respondent's Cross Exceptions; "R. Br." to Respondent's Brief in Support of Cross-Exceptions to the Administrative Law Judge's Decision.

wranglers to work for productions in New Mexico. JD 6:11-15; Tr. 33. The MOAs obligate the production companies to hire available drivers and wranglers from the Union’s Industry Experience Roster and the producer retains the final decision on whom to hire. JD 6:15-17; JX 4, Tr. 59, 122.<sup>2</sup> Indeed, the MOAs state that “[a]ll drivers and wranglers . . . *will be hired* from the group 1 list on the Industry Experience Roster.” JD 6:20-25 (emphasis added). It is only after the producer exhausts all the individuals in the Union’s books can the producer “secure employees from any source.” JD 6:20-33; JX 4.

Moreover, the terms and conditions of employment of those hired by the production companies to work in New Mexico are set forth in Local 399 “Black Book.”<sup>3</sup> JD 4:5- ; JX 1; Tr. 14, 46. The Black Book provides, in relevant part, that “[i]n 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 the Producer will make the final decision.” JD 4 at fn. 7; JTX 1 at 140; Tr. 46:13-47:18. The Union has “very stringently” adhered to the 72-hour rule since at least 2015. Tr. 47:3-18.

At the hearing, Respondent’s Business Agent Melissa Malcom (Malcom) confirmed that production companies that sign MOAs with Respondent must hire through its grouping system and follow its procedures. On 611(c) examination, Malcom testified, in relevant part,

Q. And isn't it true that under the memorandums of agreement that the Union has with production companies, that production companies cannot

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<sup>2</sup> The MOAs are nearly identical. JD 6 at fn. 13.

<sup>3</sup> At the Hearing, the ALJ granted Counsel for the General Counsel’s Motion to Amend the Complaint to allege Respondent operated a de-facto exclusive hiring hall and to remove the allegation from paragraph 5(a) of the Complaint alleging that Respondent “selectively and disparately” applied its double roster rule to the Charging Party (Motion to Amend Complaint). JD 2:4-5:3; Tr. 7:6-12:1; GCX 2. Respondent has not excepted to the ALJ ruling granting the Motion to Amend Complaint. Thus, 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.”).

hire outside the grouping system unless the driver they want to hire is driving special equipment, or driving an above-the-line individual and has been requested by name?

A. Yes.

Q. And isn't it true that transportation captains can ask for people by name all they want, but if you're not into that particular grouping for that person, they can't hire that driver unless the driver falls within either special equipment or personal driver exceptions?

A. Yes.

Q. And the production companies are required to use the Union's grouping system if they sign a memorandum of agreement, correct?

A. Yes.

JD 7:4-18; Tr. 68-69.

But in direct examination by Respondent's counsel, Malcom contradicted her prior testimony by stating that production companies could hire anyone regardless of the MOAs. The ALJ correctly discredited "this portion of Malcom's testimony because it is not supported by a strict reading of the MOAs" and because her testimony was refuted by Respondent's Secretary/Treasurer Walter Maestas (Maestas) who testified that production companies must abide by the agreed upon MOAs or face a grievance from Respondent. JD 8:1, fn. 16; Tr. 133.

Despite the ALJ's well-reasoned findings which are supported by the record and by relevant Board law, Respondent denies that it operates a *de facto* exclusive hiring hall. In its cross-exception, Respondent contends that "the relevant documents do not obligate the contracting employers to utilize the roster, and where numerous examples of employees hired 'off the street' where in evidence." R. Cr. Exc. at paragraph 1. Respondent's contentions, however, are refuted by the facts and is based on a miscomprehension of the relevant Board law.

First, contrary to Respondent's contention, the "relevant documents" obligate the signatory production companies to use the Union's hiring hall for drivers and wranglers. As

the ALJ correctly found, the MOAs explicitly provide that “[a]ll drivers and wranglers . . . will be hired from the group 1 list on the Industry Experience Roster” and then producers can go down the remaining group lists. JD 6:20-25 (emphasis added); JX 4. Only after exhausting the individuals on the Union’s lists can a producer contractually hire from another source. JD 6:20-33; JX 4. This clearly gave the union hiring hall exclusivity for the initial manpower requests. *Teamsters Local 5 (Hebert & Co.)*, 272 NLRB 1375, 1377 (1984). This is sufficient to find in this case that Respondent operates an exclusive hiring hall. As the ALJ noted, the Supreme Court has held that in the hiring hall context “[h]iring is deemed to be “exclusive,” for example, if the union retains sole authority to supply workers to the employer up to a designated percentage of the work force or for some specified period of time, such as 24 or 48 hours, before the employer can hire on his own. *Breininger v. Sheet Metal Workers Int’l Ass’n Local Union No. 6*, 493 U.S. 67, 71 fn.1, (1989) citing *Carpenters, Local 608 (Various Employers)*, 279 NLRB. 747, 754 (1986), enf’d, 811 F.2d 149 (2d. Cir.), cert. denied, 484 U.S. 817 (1987).

Respondent also miscomprehends relevant Board law. Throughout its brief, Respondent argues that Respondent’s written agreements with production companies “establishes that the rules at issue operated by Respondent constitute a non-exclusive referral procedure.” R. Br. 2. For the MOAs, Respondent contends that they “require the Employer to use Petitioner’s [sic] referral system where they use persons on the rosters, but the agreement does not require the exclusive use of those employees.” Regarding the Black Book, Respondent contends that it “explicitly clarifies the non-exclusive nature of the arrangement of the referral system.” But as the ALJ correctly noted, “simply because an employer has the final decision on the selection of a worker does not render the hiring hall non-exclusive.” JD

at 14:2-5 (citing *Theatrical Wardrobe Union Local 769 (Broadway in Chicago)*, 349 NLRB 71, 72-73 (2007) (employer hired outside the union list on a few occasions when the list was exhausted). The case of *Laborers Local 334 (Kvaerner Songer, Inc.)*, 335 NLRB 597 (2001) does not compel a contrary result because, as stated by the ALJ, it lacks precedential value. JD 14:27-33. Equally important, Respondent makes no argument as to why the Board should adopt *Laborers Local 334*.

Moreover, the Board has long held that when determining whether an exclusive hiring hall exists, it examines the “totality of the circumstances.” *Teamsters Local Union No. 174 (Totem Beverages, Inc.)*, 226 NLRB 690, 690 (1976). The Board has found that unions operate exclusive hiring hall where the union is the first and primary source of employees for an employer and can be created by written agreement, oral understanding, or past practice. *Plumbers Local 198 (Stone & Webster)*, 319 NLRB 609, 612 (1995); *Teamsters Local 293 (Beverage Distributors)*, 302 NLRB 403, 404 (1991), *enfd. mem.* 959 F.2d 236 (6th Cir. 1992); *Hoisting and Portable Engineers Local 302 (West Coast Steel Works)*, 144 NLRB 1449, 1452 (1963). The Board has also found hiring halls to be exclusive where the employer has the contractual right to bring a certain number or percentage of employees onto a job, *Carpenters Local 17 (Building Contractors)*, 312 NLRB 82, 84 (1993) (exclusive hiring hall for the 50% of the employer's workforce that it committed to hire from the union), or where a union retains exclusive authority for job referrals for some specified period of time before the employer can hire on its own. *Boilermakers Local 587 (Stone & Webster Engineering)*, 233 NLRB 612, 614 (1977) (exclusive hiring hall where employer had right to hire directly if union unable to provide qualified employee within 48 hours). In this case, the ALJ correctly found that the “combined effect of the [Black Book], the MOAs . . . and the practices of the

Union and the production companies created a de facto exclusive hiring hall.” JD 14:8-36.

Thus, the “totality of the circumstances” establish that Respondent operates this type of hiring hall.

In addition, Respondent’s claims that “numerous examples of employees hired ‘off the street’ were in evidence” lack merit. In its brief, Respondent merely provided three examples that arose from many years ago (Malcom herself, an unnamed dispatcher, and the Charging Party in this case). R. Br. 3-5. This is hardly a large number of examples as purported by Respondent.<sup>4</sup> That Respondent may have hired a few of individuals “off the street” does not render Respondent’s de facto exclusive hiring hall as non-exclusive. See, e.g., *Theatrical Wardrobe Union Local 769 (Broadway in Chicago)*, above; *Morrison-Knudsen*, 291 NLRB 250, 258 (1988).

Further, Respondent’s cross-exception to the ALJ’s finding that Respondent operates a *de facto* exclusive hiring hall is essentially an exception to a credibility finding against Malcom. Respondent, however, does not explain or address Malcom’s contradiction in her testimony. Likewise, Respondent does not explain Maestas’ refutation of Malcom’s testimony. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Respondent failed to point to anything in the record that serves as a basis for reversing the ALJ’s credibility findings. Therefore, Respondent’s implicit credibility exception lacks merit.

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<sup>4</sup> See American Heritage Dictionary of the English Language, Fifth Edition (defining numerous as “amounting to a large number, many”).

In sum, the clear preponderance of all the relevant evidence supports the ALJ's factual findings, legal reasoning, and conclusion that Respondent operates a *de facto* exclusive hiring hall.

### **III. CONCLUSION**

Based on the foregoing, the General Counsel respectfully requests that the Board deny Respondent's cross-exception.

Dated at Albuquerque, New Mexico, this 4<sup>th</sup> day of October 2019.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS 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 4<sup>th</sup> day of October 2019, on the following:

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