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 REPLY 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 Reply 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. The General Counsel Ignores the Burden of Proof.

The General Counsel argues that the record supports the finding of the Administrative Law Judge that the Union operates a *de facto* exclusive hiring hall. Thus, the GC argues, the Board should ignore the fact that 100% of the individuals who testified bout their direct experience with hiring in the movie industry in New Mexico—***including the charging party***—were hired off the street. That is, 100% of those employees testifying to their direct experience with the hall were hired ***outside of the allegedly exclusive hiring hall.*** The Board should not so reject the evidence at the hearing.

As noted in the Union's opening brief, up until the last business day before the hearing, it was an established fact—based on the GC's allegation in the complaint, and the Union's answer to that allegation—that the Union operated a non-exclusive hiring hall. At almost literally the last moment, the GC changed the allegation to claim that it was, in fact, an exclusive hiring hall. There

is no dispute at all that the relevant agreements do not require the employer to utilize the Union's referrals. There is no compulsion that animates the Board's traditional concern with such halls and their effects on non-member's employment. As such, the GC was required to show that, despite that lack of contractual compulsion, the Union and the employers operated a *de facto* hiring hall.

On this question, the GC bears the burden of proof. 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:

> I turn first to address whether the General Counsel has established the existence of an exclusive hiring referral arrangement by contract. The contract provisions set forth above provide only that Respondent is given an opportunity to supply additional employees. It does not provide that Respondent will be the sole source of applicants or that the Employer must accept all qualified referrals. To the contrary, the contract provides that the Employer retains the right to hire from among all applicants. These contract provisions fall short of establishing an exclusive hiring referral system.

Laborers Local 334, 335 NLRB 597, 599 (2001).

Neither did the Region identify the existence of an arrangement by the practice of the parties. Similarly in *Laborers Local 334,* failed to meet its burden of proof:

> I next address whether the General Counsel has established the existence of such an arrangement by the practice of the parties. The facts described above clearly show that the Employer did not rely on Respondent as the sole source of hiring referrals. Indeed, Respondent only referred a small fraction of employees for employment. The Employer was free to, and did, hire employees who walked in from the street and who were referred to it by other employees. The fact that the overwhelming number of employees may have been members of Respondent may be evidence of an unlawful closed-shop arrangement, but it does not show the existence of an exclusive hiring referral arrangement.

Laborers Local 334, 335 NLRB 597, 599 (2001). The GC ignores this burden to argue that the two witnesses' testimony that they were hired outside the hiring hall does not prevent a finding of *de facto* exclusivity. However, the GC had the burden of proving that *de facto* exclusivity. The fact that the only two witnesses who provided direct testimony regarding their own personal experience—including the charging party—testified that they were hired outside the referral system is thus fatal to the GC's case.

II. The General Counsel Should Not Be Able To Insulate a Factual Finding Based on an Alleged Credibility Finding.

The GC makes the strange argument that the Board should not review the ALJ's determination that the Union operated a *de facto* exclusive hiring hall because that finding was based on a credibility determination of Melissa Malcom, who testified that the Union did not operate an exclusive hiring hall. This is an odd, and illogical, argument. Absent Melissa Malcom's testimony, the GC still has the burden of establishing the fact that, despite the absence of any contractual compulsion to hire through the referral system, the Union operated a *de facto* exclusive hiring hall. That testimony to the contrary was not adjudged credible does not, as a matter of logic, mean that the GC has met its burden. As noted above, the facts do not support a finding of a *de facto* hiring hall, when 100% of those testifying to their personal experience with hiring were hired

outside of the hiring hall. If the GC's argument were correct, all factual findings of an ALJ are not subject to review if the ALJ mentions credibility as part of the reason for so finding. Surely the GC does not actually want that rule—in this case, in dismissing the Complaint on other grounds, the ALJ generally found Melissa Malcom (and the Union's witnesses) credible and the charging party on whose behalf the GC brings this case non-credible. *See* ALJ Decision, at 4 n.9 (Malcom generally credible); 8 n.18 (same for Union witness, called as a hostile witness by the GC, Walter Maestas); 9 n.20 (same for Union witness Warren (Trey) E. White III); 9 n.21 (not crediting charging party William Kellman's testimony); 10 n.22 & 23 (same).

Dated: October 18, 2019

Respectfully submitted,

YOUTZ AND VALDEZ, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2019, I caused the foregoing pleading to be electronically filed at NLRB.gov and served on the following parties via e-mail and/or regular US mail:

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