

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA**

**TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS LOCAL 631, affiliated with
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO
(GES Exposition Services, Inc.),
Respondent**

and

Case 28-CB-5899

**BRUCE SWEARINGEN,
An Individual,
Charging Party**

Steve Wamser, Esq.,
for the General Counsel
Amanda Lively, Esq.,
for the Respondent

DECISION¹

Albert A. Metz, Administrative Law Judge. This case involves the issue of whether the Respondent Union unlawfully refused to register employee Bruce Swearingen for employment in violation of Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act (Act).² On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' oral arguments and Counsel for the General Counsel's brief, I make the following findings of fact.

¹ This case was heard at Las Vegas, Nevada on July 15, 2003. All dates in this decision refer to the year 2003 unless otherwise stated.

² 29 U.S.C. § 158 (b)(1)(A) and 8(b)(2).

I. JURISDICTION AND LABOR ORGANIZATION

5 The Respondent admits, and I find, that GES Exposition Services (GES) is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

10 On or about June 1, 2001, the Respondent and GES entered into an agreement that the Respondent would be the exclusive source of referrals of employees for employment with GES. That agreement has remained in effect at all times material to this proceeding.

15 Jim Frye is the Respondent’s steward and an admitted agent of the Respondent. Frye works at convention sites in the Las Vegas area and deals with employees that work for employers under contract with the Respondent.

20 The Respondent’s exclusive hiring hall arrangement with convention employers permits union members who are paid up in their dues, within the terms set forth in the International Brotherhood of Teamsters constitution, to be referred to employment with signatory employers. The referral system also makes provision for referring employees who are not members of the Union for employment. The nonmember provisions of the arrangement are not in dispute in this proceeding.

25 There are frequent occasions when employers may need employees in addition to those referred through the hiring hall. In order to meet this need, the Union and employers have agreed that the Union can establish at job sites a “bull list” of employees from which employers may choose any needed extra help. Employees may choose to go to a convention job site and sign the list in hopes of obtaining employment. A Union’s steward at a job site maintains the bull list and is responsible for checking to assure that members signing the bull list present their dues card to demonstrate they are “current” in their dues and thus eligible to sign the list. A union member can be three months in arrears in the payment of his dues and still be eligible to sign the bull list. If a union employee does not possess a valid dues card he is not allowed to sign the list.

III. EVENTS OF JANUARY 26

35 Charging Party Swearingen was at all material times a member of the Respondent Union. Swearingen and fellow union worker, Jane King, wanted to work at the Las Vegas Convention Center on January 26. They had not been referred to work there by the Union but showed up in order to sign the bull list. Frye was at this location as show steward and was responsible for administering the list.

40 The parties agree that Swearingen, despite being delinquent in his dues payments, was within the 90-day grace period and thus eligible for employment through bull list registration on January 26. The record evidence shows, however, that he would have to show an appropriate

dues receipt to the Union's show steward at the time of registration in order to prove his eligibility.

5 There are conflicting versions of what happened when Swearingen attempted to sign the list on January 26. According to Swearingen's testimony he approached Frye who asked to see his dues card. Swearingen states he presented his most recent card that showed he had last paid his dues in October 2002. Despite showing his dues receipt, Swearingen recalled that Frye told him he was not eligible to sign the bull list. Swearingen testified that when Frye rejected the receipt as valid for registration he handed it to King. Swearingen states that he did not have his glasses with him and wanted King to verify that the receipt showed an appropriate date to permit his registration. According to Swearingen King confirmed that the receipt was current for registration purposes.

15 Swearingen testified that King was a friend of his and they had car pooled to the work site on January 26 to register for bull list work. King was originally alleged in the complaint in this case to have been unlawfully denied registration on the same occasion. The Government withdrew the allegations concerning King and she did not testify at the hearing.

20 Frye testified that Swearingen and King, along with seven other employees, were denied registration on the bull list because they did not produce dues receipts that qualified them for such priority. It is undisputed that Frye told these nine individuals to wait around as the employer would need additional help beyond the names on the bull list. They all waited and all but Swearingen and King were selected to fill out the employer's hiring needs.

25 The record shows that Frye was not aware who Swearingen was at the time of these events and that there was no animosity or ill will between the men. The record likewise does not offer any reason why Frye was motivated to deny Swearingen registration, other than Frye's recollection that those employees without receipts were rejected for registration. As Swearingen was a member of the Respondent Union and continues in that capacity it has not been shown that there was any motivation to encourage union membership on the part of the Respondent when he was denied registration.

IV. ANALYSIS

35 A union that operates an exclusive hiring hall has a duty of fair representation to applicants using its hall. *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989). The union's duty encompasses the obligation to operate its exclusive hiring hall in a manner that is not "arbitrary or unfair." *Miranda Fuel Co.*, 140 NLRB 181, 184 (1962). The Supreme Court stated in *Air Line Pilots v. O'Neill*, 499 U.S. 65; 67 (1991):

40 [T]he rule announced in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)--that a union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith'--applies to all union activity ... [A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions; the union's behavior is so far outside a 'wide range of reasonableness' ... as to be irrational."

5 A union is permitted a “wide range of reasonableness” in operating its hiring hall; "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). A union may exclude applicants from its referral system based on legitimate business considerations and absent proof of a statutorily proscribed objective. *Longshoremen ILA Local 341 (West Gulf Maritime Assn.)*, 254 NLRB 334 (1981).

10 The decision in this case hinges on credibility. Swearingen was certain that he showed a valid dues receipt to Frye on January 26. Swearingen’s friend, Jane King, a corroborating witness to his recollection, did not testify. I find that King was a witness “favorably disposed” to the General Counsel’s case. *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987), *enfd.* 863 F.2d 964 (D.C. Cir. 1988). Under the adverse inference rule when a party has relevant evidence within its control which is not produced, that failure gives rise to an inference that the evidence would be unfavorable to the party. *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972).
 15 Such an adverse inference is appropriate here concerning the failure of King to testify in support of Swearingen as to what occurred on January 26. I find that had King testified her testimony would have been contrary to the Swearingen’s assertion that he showed a valid dues receipt to Frye on that date. *International Automated Machines*, 285 NLRB 1122-1123 (1987).

20 Considering the record as a whole, including the demeanor of the witnesses, I credit Frye’s testimony that he denied Swearingen and the other eight employees the right to sign the bull list solely because they had failed to show him valid dues receipts. I find that this was a proper exercise of the Respondent’s obligations under its hiring hall arrangement and that the Respondent did not act arbitrarily, and therefore did not violate the duty of fair representation owed to those who sought to use its hiring hall. I conclude that the Respondent did not violate the
 25 Act by not allowing Swearingen to sign the bull list on January 26, 2003.

The complaint is dismissed in its entirety.

Dated: December 31, 2003

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Albert A. Metz
 Administrative Law Judge