

Case No. 1-CB-010882

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

DENISE AVALLON.,

Charging Party,

v.

TEAMSTERS LOCAL UNION NO. 25, a/w
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Respondent.

**CROSS-EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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Petitioner, Teamsters Local Union No. 25 (“Local 25”), pursuant to Section 102.46 of the National Labor Relations Board’s (“Board”) Rules and Regulations hereby files the following Cross-Exceptions to the February 20, 2014 Decision of the Administrative Law Judge (“ALJ”) in NLRB Case No. 1-CB-10822:

1. To the finding that the General Counsel (“GC”) satisfied the burden of showing that Avallon’s decision to resign from interim employment at Tri Town Realty was reasonable. Decision 11.
2. To the finding that Local 25 failed to carry its burden of proof that there were substantially equivalent jobs within the appropriate geographic area in 2011. Decision 10.

I. Statement of the Case

Denise Avallon (“Avallon”) is seeking back pay from Respondent Teamsters Local 25 (“Respondent”) for a three year period from March 8, 2008 to August 24, 2011.¹ Other than a position that she voluntarily quit, Ms. Avallon had no interim employment for the entire back pay period. Respondent asserted that Ms. Avallon failed to reasonably mitigate her damages under these circumstances.

Ms. Avallon testified for the GC and three additional witnesses testified for the Respondent during two days of hearing on December 5 and 6, 2013. Administrative Law Judge

¹ The National Labor Relations Board (“NLRB”), on March 1, 2012, held that Respondent failed to refer Ms. Avallon for work as a driver in the motion picture industry in accordance with its referral rules and ordered her made whole.

Michael A. Rosas issued a Supplemental Decision on back pay in this matter on February 20, 2014. (“Dec.”)

II. Statement of Facts

A.) Ms. Avallon’s Prior Work History.

Ms. Avallon testified that she has completed two and a half years of college and a high school degree (Tr. 29). Ms. Avallon testified that she worked in the movie industry for Local 25 contractors from September of 1997 to the summer of 2003. (Tr. 33). During that time, she drove 15 passenger vans and transported crew members. (Tr. 32). Ms. Avallon testified that her work schedule in the movies varied from work assignments lasting approximately four months to a project lasting 10 days. (Tr. 32). Ms. Avallon agreed that she traveled long distances to work in the movies in the past, sometimes driving up to an hour and a half from her home. (Tr. 142). She testified that she knew the length of the movie assignments could be brief from 2 weeks to perhaps 4 weeks. *Id.* When she worked in the movies, Ms. Avallon would also seek unemployment and did some part time work as a receptionist at the YMCA and as a park ranger. (Tr. 33).

A summary of pension contributions made to the Teamsters Pension Fund shows that from 1998 until 2003, Ms. Avallon worked in the movie picture and television production industry for Local 25 signed production companies. (Respondent’s Exh. 1). The contribution history shows that Ms. Avallon has never worked in a capacity that could be considered full-time in the movie industry. In 2000, approximately 1000 hours were worked by Ms. Avallon in the movie industry, which is about half a year. (Tr. 135). In 2001, the contribution history shows that Ms. Avallon worked about 484 hours, which is approximately 23% of a standard year. At

this time, she agreed she was not getting health insurance because she hadn't worked enough hours to qualify under the Teamsters Plan for health insurance. (Tr. 139).

Ms. Avallon testified that when she was not getting sufficient work in the movies in 2003, she had to leave because: "I had a home. And my son was living with me. I had to do something." (Tr. 138). In 2003, Ms. Avallon ceased working in the movie industry and went to a temporary employment agency for approximately four months until she was able to get a job at Brown University as a mail driver. (Tr. 33-34).

Employment at Brown University began in March of 2004 and she was paid approximately \$11 per hour. (Tr. 34). Ms. Avallon was married in 2005. (Tr. 149). Ms. Avallon testified that she ceased working at Brown University in August of 2006 because it was difficult for her to continually lift the bulk mail bins. (Tr. 35). She left her position at Brown University without another job to go to.

Following six to seven months of unemployment, Ms. Avallon began working at Tri Town Realty as a leasing agent. (Tr. 36, 159). At Tri Town Realty, she was also paid \$11 an hour and did not have any benefits. Ms. Avallon worked with Tri Town Realty for about a year. (Tr. 162). She quit the job and left work in the "middle" of April of 2008, allegedly in anticipation of working in the movies. (Tr. 163)². However, Ms. Avallon gave her notice to Tri Town prior to being called for any actual work in the movies. (Tr. Vol. 2, p. 167). Ms. Avallon testified that she was not able to get unemployment benefits because she voluntarily left her part-time position at Tri Town Realty. (Tr. 58).

Regarding the anticipation of work in the movies, Ms. Avallon had filed a grievance on March 6, 2008 stating that Local 25 had refused her work by not putting her name on the regular

² Records reflect that Ms. Avallon has not worked since 2008. See Exhibit #4 attached to GC Exh. 1(i) (showing only income proposed back pay).

employee list or the casual list. (Respondent's Exh. 12). Pursuant to GC's Exhibit 7, Ms. Avallon's grievance was denied and she was placed at number 145 on the casual list on March 11, 2008. Ms. Avallon appealed the denial of her grievance on March 19, 2008. (Respondent's Exh. 13). On April 24, 2008 Ms. Avallon's appeal of her grievance was denied. (Respondent's Exh. 14). Ms. Avallon signed the unfair labor practice charge in this case on April 25, 2008. (Respondent's Exh. 15).

B.) Employment Opportunities During the Back Pay Period.

Rhonda Jellenik ("Jellenik") testified for the Respondent as a vocational expert. Ms. Jellenik testified that she was familiar with Ms. Avallon, heard the testimony in the compliance case, and reviewed the transcript from the unfair labor practice proceeding regarding Ms. Avallon's qualifications. (Tr. 210). Drivers in the movie industry at the time that Ms. Avallon was working did not require a commercial driver's license ("CDL"). (Tr. 213-4). Basically they drove cast and crew members to different locations in Massachusetts and throughout New England. *Id.* The hours of a movie driving position were extremely intermittent, some assignments could be weeks including 65 or more hours per week and others were shorter in duration. *Id.* During the back pay period, the hourly rate for driving in the movies was \$22.75 an hour which included health and pension benefits. (Tr. 215).

Ms. Jellenik prepared a report which examined substantially equivalent jobs in the labor market during the back pay period. (Respondent's Exh. 17). Ms. Jellenik first examined "light truck and delivery drivers" that did not require a CDL license. (Tr. 217). Based on the state job vacancy reports, Ms. Jellenik showed there was a range of 50,000 to about 75,000 job openings in transportation and warehousing in the years of the back pay period. (Respondent's Exh. 17 p.2).

The salaries for light truck drivers and delivery services for the back pay period are broken down in Ms. Jellenik's report. (Respondent's Exh. 17, pg. 4-10). At the top of the range, delivery drivers earned over \$25 an hour. (Tr. 219). Ms. Jellenik found that a driving position in the movies was equivalent, as far as straight wages paid, to the top 20-25% range of the light truck and delivery drivers.

However, Ms. Jellenik also stated that it may not be appropriate in this case to look at the position strictly from the hourly wage standard because, as undisputed in the record, the movie position was not regular or consistent employment. It was temporary and sporadic in nature. (Tr. 220). For instance, in Exhibit 4 of the compliance specification in 2008, the GC is seeking \$24,000 a year in back pay based upon the hours of non-CDL driving in the movies. If that annual wage is converted to a full time hourly wage, it is approximately \$11 an hour. *Id.* In 2010 and 2011, if the annual salaries allegedly owed to Ms. Avallon were converted to an hourly wage, it would be so low it would not have been covered by any minimum wage job. (Tr. 221). Ms. Jellenik's report also stated that if a converted hourly wage for comparison of substantial equivalent positions was used, 70-75% of the light truck driver, delivery driver, and bus driver jobs in the areas would have been substantially equivalent for the tax years of 2008 and 2009. (Respondent's Exh. 17, p. 11).

Ms. Jellenik also did a transferrable skills analysis for Ms. Avallon's job search. She looked at Ms. Avallon's work experience and educational background and attempted to determine what other industries outside of driving may be appropriate for Ms. Avallon. (Tr. 228, Respondent's Exh. 17 pp. 11-13). Ms. Jellenik examined positions available in food preparation, sales, office and administrative support as alternative positions for Ms. Avallon. The job

openings based upon the state job vacancy records for these categories are listed in Ms. Jellenik's report and were substantial. (Respondent's Exh. 17 p. 13-15).

In summary, Ms. Jellenik testified at the high end of the pay range there were equivalent positions if the movie driving position was based only upon an hourly rate. If the annual salaries of the movie position allegedly owed to Ms. Avallon were converted to an hourly rate, most of the positions and job openings listed would have been equivalent for Ms. Avallon.

II. Statement of Issues

A.) Whether there is sufficient evidence in the record to establish that the GC satisfied their burden of showing that Avallon's decision to resign from Tri Town Realty was reasonable?

(Exception 1)

B.) Whether there is sufficient evidence in the record to establish that Local 25 carried its burden of proof that there were substantially equivalent jobs within the appropriate geographic area in 2011? (Exception 2)

III. Argument

In 1941, the Supreme Court introduced into Board law the duty to litigate, stating that deductions from back pay should be made "not only for actual earning," but also for "willfully incurred" losses. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-200 (1941). The duty to make reasonable efforts to find employment remains a requirement under the Board doctrine today. Respondents may reduce their back pay obligation by showing that a discriminatee failed to

make “a reasonably diligent effort to obtain substantially equivalent employment.” *Lorge School*, 355 NLRB No. 94 (2010), slip op. at 3.

It is now well settled that back pay liability is reduced if the discriminatee failed to make reasonable efforts to find interim work. *St. George Warehouse and Merchandise Drivers, Local No. 641, International Brotherhood of Teamsters*, 351 NLRB 961 (2007). It has been accepted by the Board and reviewing Courts that a discriminatee is not entitled to back pay to the extent that he failed to remain in a labor market, refuses to accept substantially equivalent employment, fails to diligently search for alternative work, or voluntarily quits alternative employment without good reason.

A. The General Counsel Failed to Establish That Ms. Avallon Quit Interim Employment With Good Cause.

When a discriminatee voluntarily quits interim employment, the burden shifts from the Respondent to the government to show that the decision to quit was reasonable. *See, e.g., Cable Car Advertisers*, 366 NLRB 927, 931 (2001); *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995). The GC must show that Avallon’s decision to resign from Tri Town was reasonable and does not warrant an offset to gross back pay. *First Transit Inc.*, 350 NLRB 825, 826-827 (2007). The GC will be able to carry its burden if the interim job was “unsuitable” or “threatened to become unsuitable” or if the quit was caused by “unreasonable working conditions.” *Grosvenor Resort*, 350 NLRB 1197, 1201 (2007), citing *Lundy Packing Co.*, 286 NLRB 141, 144 (1987), *enf’d.* 856 F.2d 627 (4th Cir. 1988).

Respondent asserts that the GC did not carry its burden because Ms. Avallon did not quit for any of the above cited reasons and the evidence established that her decision was not reasonable. Ms. Avallon testified that she *voluntarily* left Tri Town Realty in April of 2008 because she “anticipated” working in the movies. (Tr. 37). However, in March of 2008,

Teamsters Local 25 President Sean M. O'Brien had informed her that her name was not placed on the regular seniority list for the movies and denied her March grievance referencing such. Moreover, President O'Brien informed Ms. Avallon that she was number 145 on the casual list for obtaining work in the movies. (Tr. 38-41). This meant that in order for Ms. Avallon to be employed through Local 25 - 1.) there had to be driving work in the movies within Local 25's jurisdiction, 2.) the regular seniority list had to be exhausted, 3.) more than 144 casual drivers had to be needed for driving work at one time, and 4.) the available position did not require a commercial driver's license – all before Ms. Avallon would have an opportunity to work.

Ms. Avallon was well aware that there was no guarantee of work in the movies, as she had previously driven passenger vans on movie productions and worked on an intermittent basis. The whims of Hollywood can determine whether production companies will select Boston or the New England area as a shoot location. As a consequence, Local 25's Referral Rules clearly state, **“Placement on the Casual Employee List does not guarantee employment.”** (GC-3, p. 5). To be more clear, the updated rules state: **“Placement on the C List [Casual List] is intended for individuals who hold regular employment outside the industry and, from time to time, desire to supplement their work opportunities. Placement on the C List does not guarantee employment.”** (GC-2, p. 6.) These provisions in the Referral Rules would notify any reasonable driver on the Casual List not to quit their day job. There is certainly no evidence that anyone from Local 25 suggested that Ms. Avallon needed to quit her current position with Tri Town Realty in order to be on the Casual List.

Furthermore, when Ms. Avallon worked in the movies previously, she testified that she also would seek unemployment benefits and did some part time work as a receptionist at the YMCA and as a park ranger. (Tr. 33). There is no evidence in the record that any sporadic

driving assignments in the movies would have been incompatible with her position working approximately 32 hours a week as a leasing agent. The GC has essentially admitted this point in its back pay calculations. For the first eight weeks of the back pay period, they are seeking back pay for work on the movies when Ms. Avallon was still working at Tri Town. (GC Exh. 1(i)(exhibit 1). However, they cannot have it both ways. If the positions were actually incompatible to do at the same time, the first eight weeks of back pay in the movies would not be recoverable as back pay. Apparently, Ms. Avallon was not available to work in the movies for the first eight weeks of the back pay period because she continued to work at Tri Town Realty. Sometime in April only after she quit employment with Tri Town Realty would she be available for driving assignments in the movie industry.

It was completely unreasonable for her to quit her position as a leasing agent when she was placed at number 145 on the Casual List in this sporadic and temporary industry. She had not been contacted for any work by Local 25 at the time, nor given any indication by Local 25 that there would be work opportunities in the future. She had already filed and been denied placement on the regular seniority list for the movies, and although her testimony was found to be “vague”³ as to when she actually left Tri Town Realty, she had already filed an unfair labor practice in this matter by April 25, 2008.

In spite of all of this evidence, the ALJ found that the GC’s burden was satisfied by Judge Rubin’s previous decision that there were on going movie productions at the time. (Dec. 6, nt 25). Judge Rubin apparently relied upon the testimony of Kevin Kelleher in the previous hearing

³ Avallon only stated clearly that she left in April of 2008. (Dec. 5, nt. 19;Tr. 36).

that he called many names from the casual list in April of 2008, (GC Exh 1(a) 5-6), even though the GC did not rely upon this evidence at the backpay hearing.⁴

However, Judge Rosas makes an overly generous leap here with the conclusion that just because there were apparently ongoing movie productions that Ms. Avallon's decision to quit interim employment was reasonable. The ALJ does not address the fact that there is no evidence that the position at Tri Town Realty and driving in the movies were incompatible. Ms. Avallon's own testimony stated that she previously worked at part-time positions while driving in the movies and the Referral Rules clearly stated that placement on the causal list would not guarantee employment. There was certainly no one from Local 25 that suggested to Ms. Avallon that she needed to quit her position with Tri Town in order to sporadically drive in the movies. Moreover, the GC is seeking back pay for the period of time when Ms. Avallon was working at Tri Town Realty definitively suggests that it was possible to do both positions. All of these issues cannot be so quickly brushed aside with the conclusory statement that in the prior hearing there were ongoing movie productions at the time.

Local 25 has made it very clear by the language in its Referral Rules that placement on the casual list is intended for people who hold regular outside employment. (GC Exh. 2, 3). To hold Local 25 liable for Ms. Avallon's unilateral decision to quit her employment at Tri Town Realty is contrary to the principals of backpay established by the Board.⁵ Local 25 in no way suggested or encouraged Ms. Avallon to leave her position, it clearly stated in its Referral Rules that placement on the causal list was not a guarantee of employment, and that it had clearly informed her that she had been denied placement of the regular seniority list.

⁴ The most Avallon stated in the record was that she "heard" people were working who did not have CDLs. (Tr. 177). She never stated who she "heard" this information from, when she heard it or in what context.

⁵ See, e.g., *Cable Car Advertisers*, 366 NLRB 927, 931 (2001); *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995).

Here, since Avallon had the position with Tri Town Realty prior to seeking driving work with Local 25, she has no argument that the Tri Town Realty position was more burdensome or unsuited to her skills or experience. She voluntarily held this position prior to seeking work with Local 25, and the GC cannot assert that it was an unsuitable way for Ms. Avallon to earn a living. Local 25 asserts that Ms. Avallon's voluntary quitting of her Tri Town Realty position under the circumstances herein incurred what constitutes a willful loss for the period subsequent to her quitting. *Shell Oil Company*, 218 NLRB 87 (1975).

In *Shell Oil*, the ALJ concluded:

The total situation fails to reveal that justifiable cause existed for Weitzal to quit his employment. His voluntary cessation of gainful work in *the slender hope of securing preferred [employment]*, with the undenied overtones that leisure rather than labor would afford financial advantage, marks the actions as a willful loss of earnings deemed to reduce further back pay by the measure of nonmitigation. (citing *Mastro Plastics Corporation* 136 NLRB 1342, 1350 (1962); *Gary Aircraft Corporation*, 211 NLRB 554 (1974).

Shell Oil at 90(emphasis added).

As in *Shell Oil*, Avallon could not have had more than a "slender hope" of driving regularly in the movies when she quit her position with Tri Town Realty, and the losses from this position should reduce her back pay accordingly. If Ms. Avallon wanted to leave her position at Tri Town Realty and seek employment elsewhere, she had a right to do that. However, the loss of the Tri Town position is not a loss that was caused by any action of Local 25. Under the offset formula in *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1215 (1961), any back pay award given to Ms. Avallon should be offset by an interim earnings amount equal to that which she would have earned at Tri Town Realty from the time she quit until the end of the back pay period.⁶

B. Respondent Established That "Substantially Equivalent" Employment Existed During the Back Pay Period in 2011.

⁶ According to the GC's calculations, Ms. Avallon received \$1,207.25 in net earnings per month at Tri Town Realty.

The ALJ found that Respondent met its burden of proving that vacancies existed for substantially equivalent employment in 2008, 2009 and 2010 in the greater Boston and southeastern Massachusetts areas. (Dec. 10). However, he went on to find that Respondent did not meet its burden to show that such opportunities existed in 2011. However, statistics were only available from the state job vacancy reports for 2008 through 2010. (Tr. 221) Ms. Jellenik listed eight specific positions that were available and suitable for Ms. Avallon in her report. (Respondent's Exh. 17, p. 17). Ms. Jellenik testified that these positions were substantially equivalent to driving in the movies and were an example of actual positions available in the area. (Tr. 233). Ms. Jellenik also states in her report that she reviewed labor market survey reports to determine the available positions in 2011. (Respondent's Exh. 17, p. 15)

In *St. George Warehouse, supra, at 972*, the vocational expert testified in a similar manner as Ms. Jellenik. She conducted a labor market study of the area and relied upon established sources. The Board in that case did not require state job vacancy reports to support the expert's position. Respondents can satisfy the requirement to show substantially equivalent jobs in the relevant geographical area by calling a vocational expert as a witness to testify that there are a number of comparable jobs in the geographical area based upon BLS statistics or classified ads. *California Gas Transport, Inc. and Teamsters Local 104*, 355 NLRB No. 73 at 5, (stating the ALJ was "constrained" to find that the Respondent had satisfied its burden of showing that there were significant jobs in the geographical area). The jobs listed on page 17 of Ms. Jellenik's report were no different than classified ads that have previously been approved by the Board. Accordingly, since Respondent met its burden of establishing that substantially equivalent employment existed in 2011, no back pay should be recoverable for that year.

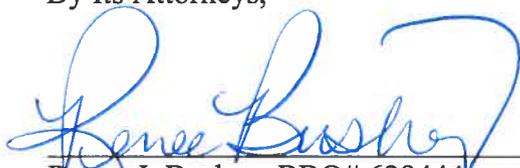
IV. Conclusion

The GC did not carry its burden of showing that Ms. Av llon's decision to voluntarily quit her interim employment at Tri Town Realty was reasonable. There was no evidence in the record that the position at Tri Town Realty was incompatible with the position of intermittent driving in the movies, and the GC sought back pay for the period while Avallon was still working at Tri Town Realty. Avallon had held part time positions previously while working on the movies, and Local 25's Referral Rules clearly notify members that placement on the Casual List does not guarantee employment. Avallon's loss of the Tri Town Realty position was a willful loss of employment not attributable to Local 25.

Based upon current Board law, Respondent met its burden of establishing that substantially equivalent employment existed in 2011 in this matter, so no back pay should be recoverable for that year.

Respectfully submitted,

For International Brotherhood of Teamsters, Local 25,
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Dated: May 15, 2014

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2014, a true and correct copy of the foregoing document was served via electronic and/or regular mail copies to the parties listed below.

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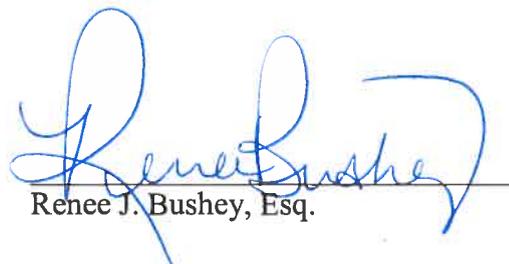
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