

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 25

and

DENISE AVALLON, An Individual

CASE 01-CB-010882

**REPLY TO RESPONDENT'S OPPOSITION TO THE EXCEPTIONS
OF COUNSEL FOR THE GENERAL COUNSEL**

Respectfully submitted by,

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A. LOCAL 25 FAILED TO CARRY ITS BURDEN OF ESTABLISHING THE EXISTENCE OF SUBSTANTIALLY EQUIVALENT EMPLOYMENT

At trial, Local 25 unquestionably bore the burden of proving the existence of substantially equivalent employment; and to carry that burden, Local 25 relied exclusively on the testimony of Jellenik. In its Opposition, Local 25 consistently seeks to downplay this burden and distract attention away from the evidentiary gaps left by Jellenik's testimony. Local 25 even argues that these gaps in the record are the fault of the General Counsel, who should have more vigorously cross-examined Jellenik. Opp. at 10-11. But it was not General Counsel's burden to elicit testimony relevant to Local 25's burden or to disprove the existence of substantially equivalent employment. Local 25 unlawfully denied Avallon work, and the uncertainty created by that unfair labor practice – including the many contingencies attending Avallon's job search – should be borne by Local 25, not Avallon, its victim.¹

Initially, Local 25 misinterprets the Board's holding in *St. George Warehouse*. In that case, the employer's expert presented additional evidence not to be found in the record here. Jellenik only presented two sets of statistics: one set that reflects the total number of job postings in certain areas of Massachusetts, and another set that reflects the wage distributions of existing jobs in certain other areas of Massachusetts. (RX-17 at 2, 4-10.) But the expert in *St. George* also presented classified ads from a local newspaper, published during the backpay period.² This additional quantum of evidence is not insignificant.

¹ *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973).

² *See St. George Warehouse*, 353 NLRB No. 50 (2008), slip. op. at pp. 13-14, *aff'd*, 355 NLRB 474 (2010), *enf'd*, 645 F.3d 666 (3d Cir. 2011).

Like other classified ads, these ads would have stated the basic terms of remuneration, described the basic job requirements, been reasonably discoverable for the discriminatee, and been limited to the discriminatee's geographical area. The expert in *St. George* therefore presented evidence that, while not overwhelming, provided specific information about actual job openings – something that Jellenik could not and did not do, relying as she was solely upon broad-gauge statistics.

It would therefore constitute an abrupt departure from precedent if the Board were to find that Jellenik's proffered statistics sufficed to show the existence of substantially equivalent employment. Jellenik possessed no training in econometrics or statistics and therefore could not elaborate upon or accurately apply the statistics contained in her report.³ In other words, Jellenik's report more or less accurately summarized the two sets of statistics but did not add anything to those statistics;⁴ and when taken on their own, those two sets of statistics left unanswered a series of questions that the Board has consistently found to be crucial to the substantially-equivalent-employment inquiry: were there jobs available during the backpay period that would have paid a comparable

³ Jellenik mistakenly switched the occupational category of "Transportation and Material Moving" with the industry category of "Transportation and Warehousing" but would not admit her mistake since she believed the two categories to be "predominantly the same thing." (Tr. 243-47.) In fact, the two categories differ from one another by a factor of two. Compare <http://www.bls.gov/OES/current/oes530000.htm> with <http://www.bls.gov/iag/tgs/iag48-49.htm>.

⁴ Jellenik also prepared her report well in advance of the compliance hearing, before she had heard testimony concerning Avallon's work capabilities and limitations. Jellenik's conclusions proved strikingly indifferent to these facts – she testified that even after hearing Avallon testify during the compliance hearing, she saw no need to change the analysis contained in her report. (Tr. 272-73.)

wage, that would have provided comparable benefits, that would not have required heavy lifting (i.e., that Avallon would have been qualified for), that would have been within a reasonable commuting distance of Avallon's home, that Avallon would have naturally discovered during the course of her search, or that Avallon would have succeeded in applying to? Statistics like the ones that Jellenik cited will always show *some* annual job turnover in every local industry. Unless respondents with backpay obligations are required to prove the availability of substantially equivalent employment with more specificity, they will be able to carry their burden by simply citing to those statistics. And their burden will effectively disappear.

Local 25 additionally misstates its burden. Opp. at 10 n.7. As the *St. George* Board reiterated, a respondent has the ultimate burden of persuading the fact finder (1) that there existed substantially equivalent employment, *and* (2) that the discriminatee unreasonably failed to apply for these jobs.⁵ Except in extreme situations, an employer cannot prove the second element without proving the first, since “[t]o satisfy her duty to mitigate, an employee is required to accept only substantially equivalent employment.”⁶

American Bottling Company represents one of those extreme situations. In *American Bottling Company*, the discriminatee engaged in absolutely no job search.⁷ Under those special circumstances, the Board held that the respondent carried its burden of showing a failure to mitigate despite not having proven the

⁵ *St. George Warehouse*, 351 NLRB at 961.

⁶ *The Lorge School*, 355 NLRB 558, 562 n.10 (2010).

⁷ 116 NLRB 1303, 1307 (1956) (“Alvarez made no application for work to any private employer.”).

existence of substantially equivalent employment. In *Arlington Hotel Company*, the Board recognized the limited holding of *American Bottling Company*: “we would view *American Bottling Company*, when read in light of its facts, as holding that job availability and likelihood of selection for available positions is irrelevant only when a discriminatee makes *no* application for work with any private employer in the face of numerous, substantially equivalent job opportunities.”⁸ *American Bottling Company* is therefore inapplicable to this case and does not relieve Local 25 of its burden of proving the existence of substantially equivalent employment. Here, although the ALJ disregarded thirteen job applications made by Avallon (owing to lack of documentation and her failure to fully comply with a subpoena), he still found Avallon to have made 17 job applications during the backpay period, readily distinguishing her from the discriminatee in *American Bottling Company*. See ALJD at pp. 6-8.

Local 25 also unduly disregards the length of Avallon’s commute to Boston. Opp. at 12-13. Avallon does not live in the Greater Boston area: a round-trip from North Attleboro to Boston and back is 86.4 miles. (Joint Stipulation Regarding Driving Distances.) Avallon was willing to occasionally undertake this commute while being paid at Local 25 wage rates and receiving Local 25 benefits. (Tr. 142.) But this does not mean she would have been willing to make this commute daily for equal or lesser compensation; nor does it render jobs in the Greater Boston area substantially equivalent.⁹

⁸ 287 NLRB 851, 852-53 (1987).

⁹ While it is not perfectly clear on this point, Avallon’s testimony is fairly interpreted as indicating that she confined her job search to northern Rhode Island and southeastern

B. THE EVIDENCE SHOWS THAT AVALLON CONDUCTED A REASONABLY DILIGENT JOB SEARCH UNDER THE CIRCUMSTANCES

1. Local 25 Misrepresents the Evidence in the Record Regarding Avallon's Job Search

Among other misrepresentations of the record, Local 25 incorrectly states that "Avallon had no interim employment for the entire back pay period." Opp. at 1. In fact, Avallon began the back pay period as an employee of Tri Town Realty and earned \$2,414.50 during the first two months of the backpay period, which the compliance officer deducted from her gross backpay. (GCX-1(i) at Amended Exh. 1.) Furthermore, Avallon would have indefinitely continued as an employee of Tri Town Realty, were it not for Local 25's March 2008 letter indicating that she had been added to the referral list. In reliance on that letter, Avallon left her position at Tri Town Realty, since she knew that the movie industry in New England was booming at the time. (ALJD at p.6 & n.25; Tr. 41, 175-77; ALJD at 6 n.25.) Avallon cannot be blamed for this good-faith reliance on Local 25's letter.

Local 25 additionally claims that Avallon knowingly applied to jobs at Brown University when a hiring freeze rendered her applications futile. Opp. at 4, 16. This is not the case. Avallon first learned of the hiring freeze after she submitted an application for a job in the Brown University mail room. Since Avallon had worked in the mail room before, she followed up on her application by calling the manager there. The manager was the first person to inform her that a hiring freeze had been implemented. (Tr. 186-88.) The hiring freeze was not absolute, however. Even after the hiring freeze was implemented, Brown continued to

Massachusetts because of a desire to commute fewer than 50 miles. (Tr. 57, 203-04.) *See also* ALJD at p. 6 n.28.

authorize job openings on a case-by-case basis, until September 2010. (Tr. 111, GCX-33.) Avallon's applications to Brown University during this period were therefore valid and made in good faith.

Local 25 also makes the unsupported claim that "Avallon's failure to find work after 2008 is occasioned not by the lack of substantially equivalent positions, but by the fact that she was being supported by her husband." Opp. at 14. In fact, there is no evidence in the record indicating that Avallon was not in true and actual need of an income to support herself and her husband. Only coarse prejudice supports Local 25's claim that Avallon ceased looking for work because she was content to rely upon her husband as breadwinner.

While paying excessive and unjustified attention to Avallon's marriage, Local 25 overlooks the impact of changed economic conditions upon Avallon's job search. Avallon had success in finding employment prior to 2008, as Local 25 acknowledges. Opp. at 14. Prior to 2008, Avallon successfully applied to a number of jobs. (Tr. 33-36.) Furthermore, prior to 2008 she successfully applied for work in Brown's mail room (ALJD at p.5; Tr. 34, 185); whereas after 2008, her applications were denied (GCX-32). The reason for this change of fortune is not Avallon's marriage, which in any event occurred in 2005 and therefore cannot explain Avallon's employment with Brown University and Tri Town Realty from 2006 through 2008. See ALJD at p. 6. The reason for this is the strong downturn in economic conditions in southeastern Massachusetts where Avallon lived – a downturn that not even Local 25's expert could deny. (Tr. 256-58.)¹⁰ Local 25's

¹⁰ In 2009, there were 5.7 unemployed persons in Massachusetts for every job opening. (GCX-34-38.)

misguided emphasis on Avallon's marriage seeks to divert the Board's attention away from this crucial reality of the backpay period.

Finally, Local 25 asserts that Avallon "has not worked since 2008 until the present." Opp. at 14 n.11. This assertion is utterly unsupported by the evidence in the record.

2. Avallon's Registration with Local 25's Hiring Hall Was in Keeping with the Usual Pattern of Seeking Employment in the Movie Industry

Local 25's discussion of *Seafarers International Union*,¹¹ Opp. at 17-19, overlooks the striking similarity between the work of seamen and drivers in the movie industry. Owing to the collective bargaining agreements it negotiates, Local 25 wholly controls access to the movie industry for drivers in Massachusetts. For individuals, like Avallon, who seek employment in this lucrative industry, there is no alternative but to sign up with Local 25's hiring hall and wait for a call to go to work. Signing up for the Local 25 hiring hall is thus the standard and indeed exclusive means for drivers to seek work in the movie industry. And, like the discriminatee in *Seafarers International Union*, Avallon acted "in accord with the habits of [Local 25] members"¹² when she resigned from her position with Tri-Town Realty, registered for the hiring hall, and waited to be referred for work. This was "the usual pattern of . . . seeking employment" among seamen, and it is therefore irrelevant that Avallon's chances of being referred for work were obviously "minuscule."¹³

¹¹ 220 NLRB 698 (1975).

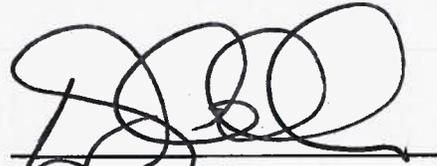
¹² *Id.* at 699.

¹³ *Id.* at 698, 699.

Local 25 complains that it “should not be disproportionately penalized just because they are operating a hiring hall,” Opp. at 18, when it is in fact Local 25 that seeks to disproportionately penalize Avallon, the victim of Local 25’s unfair labor practices. Local 25’s hiring hall offers extraordinarily high-paying and unique employment to its members, who – once they are registered with the hiring hall – only have to answer their phones in order to be referred for work. Local 25 unlawfully shut Avallon out of its hiring hall during an economic recession, and now it disingenuously faults Avallon for not having found employment substantially equivalent to the kind of employment that Local 25 exclusively controls. As its members’ exclusive bargaining representative, Local 25 is granted by the Act the significant right to assign this unique and valuable work among its members. Along with such power comes the equally significant responsibility not to abuse it.

It should also be noted that the General Counsel’s backpay formula does not compensate Avallon more than the average Local 25 member who was intermittently referred from the “casual list” during the backpay period. (GCX-1(d), (i).) The General Counsel therefore does not seek any more wages for Avallon than what she would have made had she received the referrals she was owed, and there is no danger of windfall.

Respectfully submitted by,

A handwritten signature in black ink, consisting of several large, overlapping loops and a long horizontal stroke at the bottom.

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