

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

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S CROSS-EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Respectfully submitted by,

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Counsel for the General Counsel respectfully submits the following two points in answer to Respondent Local 25's Cross-Exceptions.

I. AVALLON QUIT HER INTERIM EMPLOYMENT AT TRI TOWN REALTY IN JUSTIFIABLE RELIANCE UPON LOCAL 25 PLACING HER ON THE REFERRAL LIST, AS THE ALJ ACCURATELY FOUND

Contrary to Local 25's claims, Avallon was entirely justified in leaving her interim employment at Tri Town Realty, as the ALJ accurately concluded. (ALJD at p. 11.) Avallon left her low-paying position as a lease agent at Tri Town Realty in order to return to her work as a driver in the movie industry. As a practical matter, as well as under Board law, this decision of Avallon's cannot be faulted.

"[A] discriminatee does not incur a willful loss of earnings by quitting an interim job for justifiable reason."¹ Here, Avallon left her job at Tri Town in justifiable reliance on Local 25's assertion that it would refer her for work in the movie industry. On March 11, 2008, Avallon received a letter from Local 25 informing her that her name had once more been placed on the referral list. (ALJD at p. 5; GCX-7, Tr. 166-67.) Avallon knew that the movie industry was booming at the time in New England, both from word of mouth and from a call she made to the Massachusetts Film Office. (ALJD at pp. 6 n.25, 11; Tr. 37, 41, 175, 177.) In anticipation of being referred, Avallon secured her medical clearance to drive from the Department of Transportation. (ALJD at p. 6; Tr. 41.) She also began to train her replacement at Tri Town, since she knew she had to be ready to work in the movies at "a moment's notice." (Tr. 37, 162-63, 174-75, 180-

¹ *KSM Indus., Inc.*, 353 NLRB 1124, 1166 (2009), aff'd 355 NLRB 1344 (2010), enf'd 682 F.3d 537 (7th Cir. 2012).

81.) By late April, the training was complete, and Avallon left Tri Town. (ALJD at p. 6; Tr. 37, 180-81.)

Avallon therefore left her job at Tri Town Realty in reasonable reliance upon her expectation that she would be referred for work from Local 25's hiring hall. (ALJD at p. 6, 11; Tr. 41-42.) The fact that Local 25 then unlawfully refused to refer Avallon for work (GCX-1(a) at pp. 1-2) is Local 25's fault, not Avallon's. A respondent's unlawful conduct does not toll a discriminatee's backpay; it entitles her to it.

Contrary to the record evidence, Local 25 strenuously argues that Avallon would not have been referred for work during the backpay period because of her low position on the referral list and that Avallon should have known as much. Cross-Exceptions at pp. 7-10. In fact, the availability of work for Avallon during the backpay period is an established and conceded point in this compliance proceeding. The Board specifically rejected Local 25's lack-of-work defense in the underlying unfair labor practice case (GCX-1(a) at pp. 6, 13-14)² – a finding the correctness of which Local 25 stipulated to (GCX-1(c)).³ Moreover, General Counsel introduced at trial a compliance specification showing that Avallon's

² The Board found that, during the backpay period, Local 25 exhausted the referral list and began to call drivers who were not on the referral list and were not even members of Local 25. *See Int'l Bhd. of Teamsters, Local 25*, 358 NLRB No. 15, Slip Op. at pp. 13-14 (2012) (“[T]he Union’s implied and stated arguments that there were insufficient jobs available to which Avallon could be referred is unpersuasive. I found that drivers without CDL licenses were referred to jobs, and that some drivers who were referred did not even appear on the Union’s lists.”).

³ *See* GCX-1(c) at p. 1 (“Respondent hereby waives its right under Section 10(e) and (f) of the Act . . . to contest either the propriety of the Board’s Order issued on March 1, 2012, or the findings of fact and conclusions of law underlying that Order.”).

backpay had been calculated on the basis of the work that similarly situated Local 25 drivers lacking a CDL had performed during the backpay period. Local 25 conceded the correctness of these calculations as well (ALJD at p. 2; Tr. 7-9), which showed substantial work for such drivers in 2008 and 2009 (GCX-1(i) at Am. Exh. 1 at pp. 1-3). Finally, Avallon's testimony to the same effect is un rebutted. (ALJD at pp. 6, 11; Tr. 37, 41, 175, 177.)

In similar disregard of the record evidence, Local 25 argues that Avallon could have continued to work at Tri Town Realty while she was on the Local 25 referral list. Cross-Exceptions at pp. 8-10. Although it is possible to hold down another job when work in the movie industry is slow, as Avallon had previously done (Tr. 33), this is not an option when work in the movie industry is busy, as it was in 2008 and 2009 (ALJD at p. 11; GCX-1(a) at pp. 6, 13-14; -1(i) at Am. Exh. 1 at pp. 1-3). The record evidence shows that when Local 25 members were referred for driving jobs, they would be required to immediately decamp for far-flung parts of Massachusetts for weeks or months at a time, where they would work 13-hour days with the opportunity for overtime (ALJD at p. 4; Tr. 32-33, 37, 139-40, 142-43). Consequently, given the plentiful available work in the movie industry in 2008 and 2009, Avallon could not have held down a steady job while simultaneously fielding referrals from Local 25's hiring hall. Avallon was therefore justified in voluntarily quitting her job, which afforded her the opportunity to train her replacement so as not to leave her interim employer in the lurch. (Tr. 37, 162-63.)

In this respect, Local 25 also misconstrues the General Counsel's backpay calculations, incorrectly arguing that they contradict the General Counsel's position here. Cross-Exceptions at pp. 9, 10. The General Counsel subtracted

Avallon's interim earnings at Tri Town Realty from her backpay because that job served as an interim substitute for Local 25 referral work. (GCX-1(i) at Am. Exh. 1 at p. 1.) If the General Counsel believed that Avallon could work at Tri Town Realty while simultaneously fielding calls from Local 25's hiring hall, the General Counsel would not have subtracted the Tri-Town Realty earnings from Avallon's gross backpay.

In any event, since Tri Town Realty was not substantially equivalent to her work through Local 25, Avallon was under no obligation to continue her employment there. "A [backpay] claimant is not required to continue employment which is not suitable or not substantially equivalent to the position from which [s]he was discriminatorily discharged."⁴ There can be no serious argument that Tri Town Realty constituted substantially equivalent work. Tri Town Realty paid \$11/hour and provided no benefits (ALJD at p. 5; Tr. 36), compared to Local 25's wage rate of \$22.75/hour and generous benefit package (Tr. 32, GCX-1(d) at p. 2). The Board has never found two jobs substantially equivalent to one another when separated by such a large disparity in wages and benefits.⁵

⁴ *Ryder Sys., Inc.*, 302 NLRB 608, 609 (1991) (citing *Alamo Express*, 217 NLRB 402, 406 n. 17 (1975)). See also *Glover Bottled Gas Corp.*, 313 NLRB 43, 43 (1993) ("A discriminatee . . . is under no obligation to retain nonequivalent employment."), enf'd 47 F.3d 1230 (D.C. Cir. 1995).

⁵ Cf. *First Transit*, 350 NLRB 825, 826 (2007) (finding that discriminatee was not justified in leaving interim employment paying \$8/hour when her job with respondent had paid \$8.75/hour), enf'd 22 Fed. App'x 3 (D.C. Cir. 2001).

II. THE ALJ CORRECTLY CONCLUDED THAT LOCAL 25 FAILED TO INTRODUCE RELIABLE EVIDENCE OF SUBSTANTIALLY EQUIVALENT JOBS IN 2011 AND THEREFORE FAILED TO CARRY ITS BURDEN

The ALJ correctly concluded that Local 25 failed to carry its burden of proving the availability of “substantially equivalent jobs within the appropriate geographic areas in 2011.” (ALJD at pp. 10-11.) Unlike the years 2009-2010, Local 25 did not produce statistics or any “reliable evidence” that showed such jobs were available to Avallon in 2011. The ALJ therefore properly awarded backpay to Avallon for 2011. *Id.*

In arriving at this conclusion, the ALJ astutely disregarded the unsupported assertions included on page 17 of Jellenik’s report, upon which Local 25 presently relies. Cross-Exceptions at p. 12. Local 25 failed to provide any supporting documentation for the putative job openings mentioned on page 17 of the report, even though such documentation was clearly comprised within the General Counsel’s subpoena. (Tr. 252-55.) Local 25 justified this failure to comply with the subpoena by arguing that the alleged openings included on page 17 were not “significant” and did not alter Jellenik’s conclusions one way or the other.⁶

⁶ Tr. 256 (“I don't believe [sic] the portions on Page 3 and 16 and 17 are, sort of, just background information to the report. Most of the -- well, I just didn't consider them significant enough that they needed to be, you know, brought from her – brought from the expert. So I mean, I'm willing to even to strike those charts if that would satisfy your problem with the report.”) (Counsel for Local 25);

Without this supporting documentation, page 17 of Jellenik's report does not constitute reliable evidence of the availability of substantially equivalent jobs in the relevant geographical area. Assuming these job openings did in fact exist, no geographical information is included that would indicate whether they were within Avallon's commuting radius or within any reasonable job search radius. None of the job openings listed on page 17 of the report are in the driving industry. And none pay a wage comparable to Local 25 work.

Moreover, page 17 of Jellenik's report falls short of proving the existence of substantially equivalent employment for many of the same reasons that the statistics cited elsewhere in Jellenik's report fall short. Nowhere in Jellenik's testimony or report does she indicate how or where these openings were advertised. The benefits offered by the positions are omitted as are the number of hours of work available per week. Jellenik possessed no idea as to how many individuals applied for these openings. (Tr. 261.) And Jellenik did not contact a single employer to inquire whether they would have hired someone like Avallon. (Tr. 261-62.)

Tr. 272 ("[Q:] Ms. Jellenik, the charts we talked about on Page 3 and 16 and 17, that involve specific examples of job titles that you believe to be available, without those charts and those examples would any of your opinions that you stated on direct, would any of your opinions change? [A:] No. Not at all.") (Re-direct Examination of Jellenik by Counsel for Local 25).

The respondent in *St. George Warehouse* presented more and better evidence of substantially equivalent jobs. The respondent in that case presented an expert who relied upon BLS statistics as well as contemporaneous newspaper job postings that were targeted at the relevant geographical area and that advertised jobs offering a comparable wage rate.⁷ In contrast, the job openings on page 17 of Jellenik's report are unverified, offer lower wages, and leave important questions unanswered, such as if and where they were advertised and where they were located. The ALJ correctly found that page 17 of the report did not constitute "reliable evidence" and that Local 25 had failed to carry its burden of showing the existence of substantially equivalent jobs in the relevant geographical area in 2011.

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⁷ See *St. George Warehouse*, 351 NLRB 961, 962 (2007). There was, at least, no dispute that the wage rate offered in the advertisements was substantially equivalent to that offered by the respondent.

CERTIFICATE OF SERVICE

I, Douglas Callahan, do certify that I have this day served by electronic mail copies of Counsel for the General Counsel's Answering Brief to Respondent's Cross-Exceptions to the Decision of the Administrative Law Judge to the parties listed below:

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