

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

CALIFORNIA GAS TRANSPORT, INC.

and

**Cases 28-CA-19645
28-CA-19666
28-CA-20014
28-CA-20082
28-CA-20177**

**GENERAL TEAMSTERS (EXCLUDING
MAILERS), STATE OF ARIZONA, LOCAL 104,
AN AFFILIATE OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO**

GENERAL COUNSEL'S ANSWERING BRIEF

Mara-Louise Anzalone
Counsel for the General Counsel
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2160
Facsimile: (602) 640-2178

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I. OVERVIEW

Respondent's Exceptions to the supplemental decision of Administrative Law Judge John J. McCarrack (ALJ) dated April 23, 2009 (ALJD)¹ are limited to disputing the calculation of net backpay² for seven of the eleven discriminatees: Jacinto Hernandez, Gonzalo Muñoz, Efren Muñoz, Jose Raul Almeraz, Alonso Alonso, Ramon Hernandez, and Rosario Gastelum.³ As discussed in more detail below, the ALJ's findings are appropriate, proper, and amply and fully supported by the credible record evidence. Accordingly, the

¹ On June 1, 2009, Respondent filed numerous exceptions which were not specifically identified by number, which did not refer to specific portions of the transcript testimony as required by § 102.46(b)(1) of the Board's Rules and Regulations. While it appears that the Board has accepted Respondent's Exceptions, GC notes that Respondent's filing does not conform to the Board's Rules and Regulations and moves that it be stricken.

² At hearing, the parties stipulated as to the gross backpay due each of the discriminatees, as set forth in the Amended Compliance Specification. No expenses were alleged. (Tr. 9-11, 13; GC 1(r), 2, 3)

³ At hearing, the parties stipulated as to the net backpay due two of the discriminatees: Rogelio Delgadillo and Raul Almaraz. (Tr. 12-13) Respondent's Exceptions raise no issue with respect to two other discriminatees: Lorenzo Medina and Robert Ryburn.

Board should dismiss Respondent's Exceptions, and sustain the ALJ's findings of fact, conclusions of law, proposed remedy, and recommended order.

II. PROCEDURAL BACKGROUND

On August 31, 2006, the Board issued a Decision and Order in this matter, in which it found that Respondent fired eleven of its employees because they dared to engage in concerted activity. The Board ordered Respondent to make whole these employees:

for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharges to the date the Respondent makes proper offers of reinstatement to them, less any net interim earnings as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(GC 1(a)) The Board's Order was enforced by the Fifth Circuit Court of Appeals on November 7, 2007. (GC 4) Based on an Amended Compliance Specification and Notice of Hearing issued on December 5, 2008 (GC 1(r)), a two-day hearing was held on February 10-11, 2009, before the ALJ, at which each of the discriminatees appeared and testified (other than those whose net backpay was stipulated at hearing).

III. THE RECORD EVIDENCE

At hearing, each of the seven employees whose backpay is at issue testified that he applied for driver positions within the El Paso area. They did so in accordance with local, industry practices. As Respondent's own expert testified, this is an informal process involving networking with friends and applying in person with employers. (Tr. 188-93) In its Exceptions, Respondent concedes that the process of obtaining employment as a driver takes time, because it involves submitting paperwork, ensuring the candidate's Department of Transportation paperwork is up to date, and undergoing drug testing. (Tr. 59, 168) As one discriminatee testified, "no company is going to hire you within a week or two." (Tr. 59)

It is undisputed that the unemployment rate in El Paso, during the backpay period, was approximately eight percent. (Tr. 181)

Every discriminatee called by Respondent testified about their efforts to seek employment, and the ALJ credited each of them in that regard. Respondent offered no testimony to dispute that of any of these witnesses.

IV. ANALYSIS

With one exception, Respondent failed at hearing to justify reducing its backpay liability in this matter.⁴ In its post-hearing brief, Respondent urged the ALJ to adopt legal theories with no basis in Board law, and make factual determinations on the basis of no record evidence whatsoever. The ALJ correctly declined. Now Respondent would have the Board second-guess the ALJ's credibility determinations *en masse* and rewrite the law to reduce Respondent's backpay liability. Granting Respondent's Exceptions would require no less.

A. The ALJ's Credibility Determinations Were Correct. (Resp. Exceptions 1-5, 9-11, 21-22, 24)

Having failed to adduce any actual testimony that would support a reduction in its backpay liability, Respondent has resorted to ignoring and/or mischaracterizing the discriminatees' testimony regarding their job searches. Respondent's Exceptions essentially criticize the ALJ for not doing the same. Under the circumstances, granting such Exceptions would amount to the Board substituting its judgment on credibility resolutions for that of the ALJ; this the Board should firmly decline to do. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951) (Board's established policy is not to overrule

⁴ General Counsel concedes that one of Respondent's exceptions accurately identifies a mathematical error in the ALJ's computation of backpay liability. With respect to discriminatee Efren Muñoz, General Counsel amended its Compliance Specification on the second day of hearing to correct a computation that was based on the Muñoz' own testimony (which clarified the import of his tax records). As such, the ALJ's Supplemental Order should reflect that Muñoz is entitled to backpay in the amount of \$3,164.88, plus interest.

an administrative law judge's credibility resolutions unless clear preponderance of evidence dictates they are incorrect).

An example of Respondent's attempts to have the Board reverse the ALJ's credibility determinations involves driver Jose Almeraz, who initially testified that he received no "per diem" payments from his interim employer. When he was shown a summary of his per diem payments, he immediately revised his answer, explaining that these amounts were "for my expenses" when he drove into Mexico for the employer. (Tr. 78-79) The ALJ, who witnessed this Spanish-language assisted testimony, concluded that that Almeraz had not intended to be untruthful, but simply had misunderstood that Respondent's counsel's legalese – i.e., that "per diem" referred to payments for his expenses. (ALJD at 8, n.7, ll. 45-51) This is precisely the type of credibility determination the Board should refrain from second guessing.

Indeed, on several occasions during the hearing, Respondent's efforts to extract desired answers from sincere and truthful witnesses yielded nothing more than confusion. For example, Respondent claims the ALJ improperly failed to recognize that former driver Jose Gonzalo Muñoz "testified that he did not apply for work for a month to a month and a half following his termination." (Exceptions at 14) A reading of the record, however, reveals that Muñoz explicitly *denied* this and corrected Respondent's counsel's own admitted confusion on this point:

Q: So, if I am following your testimony correctly, a month went by after your termination from California Gas Transport, before you began a search for employment?

A: No.

Q: And what were you doing during that time?

A: I was submitting the paperwork that the company was asking me for.

Q: Well, I guess that is the source of my confusion...
The company -- what company was asking you for paperwork?

A: MTS.

JUDGE MCCARRICK: That is what we have been trying to understand, sir. When did you begin submitting this paperwork? How long before you started working?

THE WITNESS: Well, I submitted the paperwork before the month, and then I got to go to orientation about a month and a half later.

(Tr. 58-60) Thus, Respondent's suggestion that the ALJ should have concluded that Muñoz waited a month and a half before beginning his job search is baseless and should be rejected.

In another example, Respondent demands that the Board reject the ALJ's credibility determination regarding the date on which former driver Rosario Gastelum began his job search. The ALJ found that Gastelum began looking for work with several trucking companies within seven to ten days of his discharge by Respondent. (ALJD at 10) This conclusion was well in keeping with the testimonial evidence. Indeed, Gastelum initially testified that, within two weeks of his discharge, he applied for work at a "bunch" of employers. When the ALJ questioned him further, Gastelum clarified that he applied for work at least once every seven to ten days. (Tr. 151) Despite this testimony, Respondent urges the Board to find that Gastelum's job search was "lackluster" and limited to "submitting a few applications early on following his termination." (Exceptions at 25) Here again, Respondent's Exceptions appear to be based on "phantom" testimony its counsel did not elicit. As such, these Exceptions should be rejected.

Similarly, Respondent asks the Board to second guess the ALJ's determination that discriminatee Hernandez received workers' compensation for three months. (ALJD at 9) Instead, Respondent insists that Hernandez' backpay be tolled for *five* months. Respondent's argument appears based on transcript testimony by Hernandez that he spent five months recovering from a work injury. (Tr. 122) The witness was equally clear, however, that he only received workers' compensation insurance for "three to four months." *Id.* Under the circumstances, the ALJ's determination to toll Hernandez' backpay for three months was imminently reasonable, and Respondent has offered no convincing basis for the Board to reverse it.⁵

Respondent additionally asks the Board to revisit the ALJ's conclusion that discriminatee Gastelum incurred voluntary gaps in his interim employment. (ALJD at 10) Respondent cites no record testimony to support this argument, which is not surprising, as none exists. In fact, the record is clear that, contrary to Respondent's assertions, the gaps in Gastelum's work history were the result of his *forced* resignations from employers which, due to rising fuel costs, went out of business and stopped paying him. (Tr. 137-38, 149)

B. The Board Should Reject Respondent's Efforts to Resuscitate Arguments Waived Before the ALJ. (Resp. Exceptions 8, 15, 16, 19, 24)

Respondent presents several arguments to the Board that were not properly raised before the ALJ for a simple reason: there is no record evidence to support them. For example, Respondent now argues that discriminatee Ramon Hernandez should have his backpay reduced because he was discharged from an interim employment position for "gross

⁵ Respondent similarly attacks the ALJ's finding that discriminatee Jacinto Hernandez lost his car due to Respondent's firing him. (ALJD at 7) Contrary to Respondent's assertion that this conclusion was not supported by the record evidence, Hernandez clearly testified that he lost his car for financial reasons after months of unemployment. (Tr. 44-45)

misconduct.” (Exceptions at 23-24) While Hernandez testified that he was discharged from an interim employer after a truck accident, the ALJ correctly refused to toll Hernandez’ backpay, because Respondent failed to adduce any evidence of the circumstances of this accident. (ALJD at 9) The ALJ ruled correctly. See, e.g., *KSM Industries, Inc.*, 353 NLRB No. 117, slip op. at 68 (2009) (refusing to deny backpay where “there has been no showing that their discharges were the result of deliberate or gross misconduct or conduct so outrageous as to suggest a deliberate courting of discharge”). Because Respondent offered no evidence to support such a finding, Respondent’s Exceptions in this regard should be rejected.

Likewise, Respondent has waived any argument relating to the veracity of discriminatees’ tax deductions. It is undisputed that certain of the discharged drivers embarked upon self-employment as a means of sustaining themselves. Respondent now claims that it was prevented by the ALJ from questioning such employees about the basis for specific deductions and expenses. But the record reflects that Respondent was permitted to do exactly that, and furthermore that the ALJ offered to allow Respondent to submit documentary evidence in this regard. (Tr. 17-19) In fact, Respondent’s counsel examined former driver Gastelum exhaustively regarding the amounts he had deducted as business expenses from his self-employment income. (Tr. 139-41) The fact that other of the self-employed discriminatees were not similarly questioned is simply not the basis for an Exception at this late stage.

Finally, Respondent claims that the ALJ erred by not reducing discriminatee Almaraz’ backpay to reflect the per diem payments he received from an interim employer. But Respondent did not establish when, and how often, and in what amount these payments were made. The record reflects only that *when* Almaraz was required to cross into Mexico for this

employer, he was paid \$45 for his expenses. (Tr. 79) Respondent had ample opportunity to ask Almarez the follow-up questions to determine the actual amount of such payments, but failed to do so. To ask the Board to conjure a number out of thin air is not, however, an appropriate remedy for this omission.

C. The ALJ Correctly Relied on the Board Law of Interim Earnings, and Respondent's Efforts to Rewrite this Law Should Be Rejected. (Resp. Exceptions 12 - 14, 17, 18, 24)

Having adduced scant relevant testimony bearing on the reasonableness of the discriminatees' actions following their discharge, Respondent attempts to argue that essentially *nothing* they did was reasonable. In this regard, Respondent devotes a substantial portion of its brief in support of its Exceptions to arguing that the ALJ erred by rejecting Respondent's argument that two discriminatees – Gonzalo Muñoz and Alonso Alonso – willfully removed themselves from the labor market when each of them left the service of interim employer and started his own trucking business. (ALJD at 7-9)

Not unsurprisingly, Respondent cites absolutely no case law to support this proposition. Indeed, and as the ALJ noted, the Board law is clear that commencing a course of self-employment does not constitute a willful loss of earnings. See ALJD at 7-9 and case cited therein; see also *Midwestern Personnel Services, Inc.*, 346 NLRB 624 (2006) (citing *Cassis Management Corp.*, 336 NLRB 961 (2001); *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Fugazy Continental Corp.*, 276 NLRB 1334 (1985), *enfd.* 817 F.2d 979 (2d Cir. 1987)). Moreover, Board law is equally clear that a discriminatee does not incur a willful loss of earnings by leaving an interim employer in order to pursue self employment, even if it is less lucrative. See *Fugazy Continental Corp.*, 276 NLRB 1334 at 1338 (discrimitee did not incur willful loss of earnings by leaving employment with an interim employer to engage in

self-employment that was less lucrative). There is simply no Board law to support Respondent's continued assertions that the discriminatees in this – or any Board case – are forbidden or limited from seeking self employment.

D. The ALJ's Rulings Did Not Violate Respondent's Due Process Rights. (Resp. Exceptions 6-8, 24)

Several of Respondent's Exceptions relate to its claim that the ALJ violated its due process rights by denying it the right to present an expert witness at hearing. Respondent's proposed witness, Certified Public Accountant Kevin Jensen, was offered to testify about the methodology used by the Region in computing the Discriminatees' backpay. Asked to present an offer of proof regarding Jensen's testimony, Respondent's counsel informed the ALJ that Jensen would testify consistently with Respondent's "fervent belief" that the only valid method of computing backpay calculations for individuals who engaged in self employment following their discharge was to subtract their *gross* income (i.e., the gross receipts of their business) from their gross backpay during the backpay period. (Tr. 194-95) Contrary to Respondent's argument in its Exceptions, Jensen was *not* offered as a witness for any other purpose, including challenging the validity of individual deductions.

As such, Jensen was offered to do no more than verbally present a *legal theory* which Respondent has been permitted to present in its brief. As the ALJ correctly noted, there was simply no need for testimonial evidence on this issue. Therefore, there is no colorable argument that disallowing Jensen's testimony prejudiced Respondent in any way.

**E. Respondent's Arguments Regarding the ALJ's Interim Earnings Calculations are Without Merit.
(Resp. Exceptions 15, 20, 23, 24)**

Citing no authority whatsoever, Respondent asks the Board to reverse the ALJ's backpay determinations of two discriminatees – Jose Raul Almeraz and Ramon Hernandez – based on nothing more than Respondent's own speculation and conjecture.

Discriminatee Almeraz, according to the ALJ, is entitled to \$6,026.54. (ALJD at 11) This calculation was based on the interim earnings data provided by the Region in its Amended Compliance Specification, which Respondent failed to challenge at hearing. Respondent argues that, because Almeraz provided only annual tax returns evidencing his interim earnings, he should be denied backpay altogether. (Exceptions at 19) This nonsensical argument ignores basic Board compliance law and practice and should be rejected. Likewise, Respondent's argument that Discriminatee Ramon Hernandez should be denied an unspecified amount of net backpay because of an allegedly suspect deduction on one of his tax returns is wholly without basis and should be rejected. (Exceptions at 24) Respondent's counsel had a full and fair opportunity to elicit evidence from Hernandez regarding the basis for this deduction and failed to do so. Respondent cannot now simply claim that Hernandez' backpay should be reduced based on Respondent's unfounded suspicion that the deduction is illegitimate.

V. CONCLUSION

The ALJ's decision was wholly correct and in accord with current law. Based upon the foregoing, it is respectfully submitted that the Board should reject Respondent's Exceptions, and adopt the ALJ's findings of fact and conclusions of law that Respondent is

liable to the named discriminatees in the amounts set forth in his Supplemental Order,
amended as described above.

Dated at Phoenix, Arizona, this 15th day of June 2009.

Respectfully submitted,

/s/ Mara-Louise Anzalone _____
Mara-Louise Anzalone
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 N. Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Telephone: (602) 640-2134
Facsimile: (602) 640-2178

CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION in California Gas Transport, Inc., Cases 28-CA-19645, et al, was served via E-Gov, E-Filing and E-mail on this 15th day of June 2009, on the following:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street NW, Room 11602
Washington, DC 20570-0001

Via E-Mail:

Thomas J. Kennedy, Attorney at Law
Sherman & Howard, LLC
2800 North Central Avenue, Suite 1100
Phoenix, AZ 85004-1043
E-Mail: tkennedy@sah.com

General Teamsters (Excluding Mailers), State of Arizona

Local Union No. 104
1450 South 27th Avenue
Phoenix, AZ 85009
E-Mail: Loneibt104@yahoo.com
Team104az@aol.com

/s/ Mara-Louise Anzalone _____

Mara-Louise Anzalone
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004
Telephone: (602) 640-2134