

Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation, a Single Employer and International Ladies' Garment Workers' Union, AFL-CIO and Local 99, International Ladies' Garment Workers' Union, AFL-CIO. Case 29-CA-14548

March 10, 1998

ORDER DENYING APPEAL

BY CHAIRMAN GOULD AND MEMBERS FOX,
LIEBMAN, HURTGEN, AND BRAME

The issue raised on this interlocutory appeal is whether the administrative law judge erred in ordering the Respondent to pay for the cost of interpreting the testimony of its non-English speaking witnesses at the backpay hearing in the above case.

The relevant facts are as follows. In the underlying unfair labor practice proceeding, the National Labor Relations Board found, *inter alia*, that the Respondent violated Section 8(a)(3) of the Act by failing to reinstate approximately 200 unfair labor practice strikers. The Board ordered the Respondent to offer reinstatement to the discriminatees and to make them whole for any loss of earnings they may have suffered by reason of the discrimination against them. *Domsey Trading Corp.*, 310 NLRB 777 (1993), *enfd.* 16 F.3d 517 (2d Cir. 1994).

The backpay hearing opened on October 27, 1997, before Administrative Law Judge Michael Marcionese.¹ Over the first few days of hearing, counsel for the General Counsel called several² of the 200 discriminatees and asked them a number of background and other preliminary questions before turning them over to the Respondent's counsel for questioning about their interim earnings and whether they met their obligation to mitigate their losses.

Early in the hearing, Judge Marcionese questioned whether this procedure was unduly prolonging the hearing. The judge noted that no issue had been raised in the backpay proceeding about the General Counsel's gross backpay figures, and the Respondent had the burden to establish interim earnings or failure to mitigate. Thus, the judge noted, although it was the General Counsel's decision how to proceed, the General Counsel had no obligation to ask the discriminatees any questions. In these circumstances, and noting in addition that the Respondent had offered to stipulate to matters addressed in the General Counsel's initial questioning, the judge suggested that the General Counsel allow the Respondent to begin the questioning and, if anything needed to be clarified, the General Counsel could do that on "redirect." Counsel for the

General Counsel declined the judge's suggestion, however, asserting that, in light of the discriminatees' inexperience at testifying and their backgrounds and language difficulties,³ it would be prejudicial to allow the Respondent to begin the questioning.

On the 7th day of hearing, however, the judge decided that he could no longer allow the General Counsel to proceed in this manner. Noting that they had "barely scratched the surface with the 200 discriminatees" over the 7-day period, and that it would take "seven years" to complete the hearing at that pace, the judge ruled that, in order to expedite the hearing, the Respondent would thereafter begin the questioning of the discriminatees, and the General Counsel could subsequently ask any relevant questions on "cross/redirect," even if not related to Respondent's questioning.

In light of the judge's ruling, counsel for the General Counsel subsequently announced that, although the General Counsel was willing to have the discriminatees available, the General Counsel would no longer be calling them as witnesses. In addition, counsel for the General Counsel stated that the Respondent would have to assume the obligation of paying the expense of any interpreters for the witnesses. Counsel for the General Counsel asserted that the General Counsel had no obligation under the rules and regulations to call the discriminatees, and that the discriminatees are normally called by the respondent and are the respondent's witnesses in a backpay proceeding. Although counsel for the General Counsel acknowledged that the General Counsel had intended at the beginning of the hearing to call "two-thirds or so" of the 200 discriminatees,⁴ counsel asserted that, in light of the judge's ruling that the Respondent would start the questioning of the discriminatees, they would now really be the Respondent's witnesses. Counsel for the General Counsel argued that, consistent with the General Counsel's policy, the Respondent should therefore have to pay for interpreting the witnesses' testimony. Counsel for the General Counsel noted in this regard that, although the Agency had been paying for interpretation up to that point when the General Counsel called the witnesses, counsel had been advised that too much money was being spent on interpreters and that the Agency could not bear the continued expense of the interpreters.⁵

The Respondent objected to the General Counsel's position as being "punitive." The judge, however, upheld the General Counsel's position on the grounds

³The record indicates that most of the discriminatees are non-English speaking (Creole and Spanish).

⁴The General Counsel's opposition states that the General Counsel later changed strategies and decided to call only about 75 of the discriminatees.

⁵The General Counsel's opposition states that 1 day of interpreting services for Creole-speaking witnesses costs \$440.

¹The following summary of the hearing is based on the transcript pages provided by the Respondent and the General Counsel.

²The precise number is not made clear in the record or briefs.

that the only issue in the hearing was interim earnings/mitigation; it was the Respondent's burden to show that backpay should be reduced and thus the General Counsel was not obligated to call the discriminatees; the discriminatees would in fact now be the Respondent's witnesses in view of the General Counsel's determination not to call any more witnesses; and the Respondent should bear the cost of its defense. The judge further added that

. . . at this point, I think, to require the General Counsel to pay the cost of interpreters, when the General Counsel has no control over the length of questioning by the Respondent's attorney, would, in essence, give the Respondent a blank check to spend the government's money to defend itself in this proceeding.⁶

On January 5, 1998, the Respondent filed the instant request for special permission to appeal the judge's ruling pursuant to Section 102.26 of the Board's rules. On January 9, 1998, the General Counsel filed a response to the Respondent's request, and on January 15, 1998, the Respondent filed a reply thereto.

Having considered the matter, we deny the Respondent's appeal.⁷ This is the second recent case to come before the Board on the issue of whether the Agency should pay for the cost of interpreting a respondent's non-English speaking witnesses. In the first case, *George Joseph Orchard Siding, Inc.*, 325 NLRB No. 34 (Jan. 9, 1998), the issue was whether the Agency should pay for the cost of an interpreter for the respondent's witnesses at the unfair labor practice hearing. The administrative law judge held that the Agency should provide and pay for the cost of an interpreter for the respondent's witnesses in light of the fact that an interpreter was required for most of the General Counsel's numerous witnesses. The Board majority denied the General Counsel's request for special permission to appeal the judge's ruling, holding that administrative law judges have the discretionary authority under the Administrative Procedure Act, the National Labor Relations Act, and the Board's Rules and Regulations to appoint interpreters in unfair labor practice proceedings, and that the General Counsel had failed to establish that the judge had abused his discretion by ordering the Agency to provide and pay for an interpreter for the respondent's witnesses in that case.

⁶As indicated by our dissenting colleagues, the judge also noted the fact that the Respondent had already been found guilty of violating the Act. We, however, do not rely on this fact in reaching our conclusion that the judge properly required the Respondent to pay for interpreting the testimony of any witnesses it called to testify.

⁷By unpublished order dated January 16, 1998, the Board (Chairman Gould and Members Fox and Liebman; Members Hurtgen and Brame dissenting) denied the Respondent's appeal, stating that a fully articulated decision would follow.

We dissented in *George Joseph*, noting: (1) the absence of any specific Board precedent or authority for an order requiring the Agency to provide and pay for interpreting services for a respondent's witnesses; and (2) the lack of any clear standards for identifying cases that would warrant such an order. In agreement with the General Counsel, we stated that upholding the judge's order in such circumstances could set a harmful precedent and impose significant additional costs on the Agency, thereby further straining the Agency's limited budgetary resources.

Consistent with our position in *George Joseph*, we find that the judge here properly required the Respondent to pay for the cost of interpreting the testimony of the remaining discriminatee-witnesses at the backpay hearing. Initially, we agree with the judge that the remaining discriminatees are properly considered the Respondent's witnesses rather than the General Counsel's witnesses. As indicated by the judge, it was the Respondent's burden to establish interim earnings and/or failure to mitigate,⁸ and the General Counsel therefore had no obligation to call or question the discriminatees.⁹ Although the General Counsel nevertheless *chose* to call several of the 200 discriminatees

⁸See, e.g., *Fugazy Continental Corp.*, 276 NLRB 1334 (1985), *enfd.* 817 F.2d 979 (2d Cir. 1987). See also NLRB Casehandling Manual (Compliance Proceedings), Sec. 10621.4 and cases cited there.

⁹See *Fugazy*, *supra*. As noted by the Respondent, the Second Circuit in *NLRB v. Mastro Plastics*, 354 F.2d 170, 177-178 (2d Cir. 1965), *cert. denied* 384 U.S. 972 (1966), held, contrary to the Board and other circuits, that the General Counsel has the burden of producing the discriminatees at the hearing to testify regarding mitigation, since the Region presumably had some contact with the discriminatees when it computed the net backpay due in the specification and is more likely to know their whereabouts. However, the court did not hold that the General Counsel carries the ultimate burden of proof regarding mitigation, and the court's opinion could be interpreted as requiring only that the General Counsel make the discriminatees "available" to testify at the hearing (*id.* at 177), not that the General Counsel actually call them to the stand.

Here, it appears that the General Counsel intends to comply with the Second Circuit's requirement and produce the discriminatees at the hearing. As indicated above, counsel for the General Counsel stated that, although the General Counsel would not call any more witnesses, the General Counsel would make the remaining discriminatees "available." Further, the judge specifically advised the General Counsel that, in view of the large number of discriminatees, the General Counsel should do more than just "cooperate" with the Respondent as set forth in Sec. 10629.4 of the Casehandling Manual and should actually arrange their appearance at the hearing. Although the judge subsequently stated that the Respondent could subpoena the discriminatees if the General Counsel was unwilling to contact them, as indicated above, the record indicates that the General Counsel has every intention of making the discriminatees available for the Respondent at the hearing. However, the fact that the General Counsel may make the discriminatees "available" at the hearing for questioning by the Respondent, does not make them the General Counsel's witnesses. Nor, contrary to our dissenting colleagues, does it impose an obligation on the General Counsel to provide and pay for the cost of interpreting their testimony.

to testify during the initial days of the hearing, the General Counsel subsequently decided not to call any more of the discriminatees in light of the judge's ruling that the Respondent would begin the questioning of the remaining discriminatee-witnesses. It is therefore clear that the Respondent, rather than the General Counsel, will be calling the remaining discriminatee-witnesses to the stand to testify.¹⁰

Further, as in *George Joseph*, there is no claim or evidence here that the Respondent is financially unable to pay for the cost of interpreting services for the remaining discriminatee-witnesses it calls to testify, or that paying for such interpreting services would impose a serious financial burden on the Respondent. Nor has the Respondent articulated any other justification for shifting the interpreting costs to the Agency. The Respondent asserts only that imposing such costs on it would be inequitable and unfair—an assertion which, as discussed above, we find the judge properly rejected.

In their dissent, our colleagues also cite the Court Interpreters Act, 28 U.S.C. § 1827, as support for requiring the Agency to pay for interpreting the Respondent's witnesses. However, as they acknowledge, that statute provides only that the Government shall provide for interpreting services in civil and criminal cases brought by the Government in court proceedings, and does not apply to administrative proceedings. Further, section 1827(g) of the statute specifically authorizes the appropriation of funds necessary to carry out its provisions, and specifically states that its application is contingent on the availability of appropriated funds. Unlike with court proceedings, Congress has not seen fit either to direct the NLRB to provide interpreters in its proceedings, or to specifically authorize the necessary appropriated funds for that purpose.

Accordingly, for the reasons stated in our dissent in *George Joseph*, we believe that the judge in this case properly refused to require the Agency to provide and pay for the cost of interpreting the testimony of the remaining discriminatee witnesses called by the Respondent. In taking this position, we do not presume to be deciding the issue for all time. Indeed, we agree with our colleagues in the *George Joseph* majority that it is desirable to address the subject in the future through a rulemaking proceeding, in which we could

receive “input from the labor-management community” and other interested members of the public. In such a process, we could not only determine whether countervailing factors weigh for or against a policy of having the Agency pay the fees for interpreting testimony of the witnesses of private parties in our proceedings; we could also—assuming a policy of paying fees in certain circumstances is shown to be desirable—develop standards for determining when payment of such fees is reasonable. Until such standards are developed, however, judges have no authoritative guidance to help them avoid what the judge in this proceeding reasonably feared—giving a blank check to the party requesting payment for interpretation of all testimony of non-English speaking witnesses it chose to call.

CHAIRMAN GOULD, concurring.

I agree that Respondent's request for special appeal should be denied. However, I would do so on the grounds that the judge did not abuse his discretion. *George Joseph Orchard Siding, Inc.*, 325 NLRB No. 34 (Jan. 9, 1998) (Chairman Gould and Members Hurtgen and Brame, Members Fox and Liebman dissenting).

The judge fully sets forth his reasons for denying Respondent's request. Thus, he notes that this is a backpay hearing with the only issue being interim earnings/mitigation and it is Respondent's burden to show that backpay should be reduced. Therefore, the discriminatees would be Respondent's witnesses. He concluded that Respondent should bear the cost of its defense. Then, as noted by my colleagues, he reasoned that,

. . . at this point, I think, to require the General Counsel to pay the cost of interpreters, when the General Counsel has no control over the length of questioning by the Respondent's attorney, would, in essence, give the Respondent a blank check to spend the government's money to defend itself in this proceeding where it has already been—and as you indicated this is all one proceeding—Respondent has already been determined by both the NLRB and the Second Circuit Court of Appeals to have violated, rather egregiously, the National Labor Relations Act. And I'm certainly not prepared at this point to require the government, in times of limited resources, to write a blank check to a defendant who has already been found guilty of violating federal law.

I recognize that the judge here reached a conclusion which is different from the conclusion reached by the judge in *George Joseph*. The exercise of discretion, by its very nature, can lead to differing results. The mere fact that the results are different, obviously, is insuffi-

¹⁰It is true that the General Counsel only stopped calling discriminatees after the judge ruled that the General Counsel could only examine them after the Respondent had examined them and that the General Counsel could examine them on “redirect/cross” on any relevant matter, even if not raised by the Respondent. However, it is not clear that the General Counsel intends to continue asking the same type of questions of the remaining discriminatees that had been asked of the earlier discriminatees, particularly since it appears that the primary reason the General Counsel asked those questions was to make the witnesses more comfortable and relaxed before they were required to respond to the Respondent's questions.

cient to demonstrate that the judge has abused his discretion.

MEMBERS HURTGEN AND BRAME, dissenting.

We would require the Government to pay for the interpreter services that are necessary to the presentation of Respondent's case. In this regard, we note that the federal courts impose this requirement in cases where the Government is bringing an action (civil or criminal) against a defendant.¹ We recognize that this statutory provision is not necessarily binding in administrative proceedings. However, the rationale for requiring payment in court proceedings applies equally to administrative proceedings. That is, in both situations, the U.S. Government is bringing a legal action against a citizen, and the citizen must defend itself through non-English speaking witnesses.

The judge relied on the fact that Respondent has been found to have committed unfair labor practices. As even the majority apparently agrees, such reliance is improper. The finding of an unfair labor practice does not preclude Respondent from defending itself in the "damages" phase of the proceeding. To deny Respondent its claim for interpreter services, simply because it was found to have committed unfair labor practices, would be to punish Respondent for that conduct. It is axiomatic that the Board cannot punish persons for such conduct.

We recognize that Respondent has the burden of proof with respect to the issues of mitigation and interim earnings. However, inasmuch as the discriminatees are the ones who have the knowledge of the relevant facts, it is the Board's duty to produce those discriminatees and have them testify.² Since it is the

¹ See Title 28, U.S.C. § 1827.

² The Second Circuit (in which this case arises) held in *NLRB v. Mastro Plastics*, 354 F.2d 170, 177-178 (2d Cir. 1965):

We conclude that a rule requiring a discriminatee to testify before his award becomes final is not an undue burden on the

Board's duty to produce the testimony of these witnesses, it would seem that it is the Board's duty to make that testimony intelligible to the trier of fact.

Further, and quite apart from the issue of which party bears the burden of proof, it is a judicial function, rather than a partisan one, to provide the necessities for the presentation of testimony. It is, after all, the judiciary which must gather the evidence and decide the case. Where, as here, a substantial amount of testimony is in a foreign language, it seems to us that a part of that judicial function is to assure that the testimony is in a form that can be useful to the judicial body.³

Concededly, there are limited financial resources available to the Government. For this reason, Section 1827(g)(2) of the Code provides that implementation is "contingent upon the availability of funds." Similarly, if our position leads to a situation where the Government cannot afford to pay for interpretation services, we would reconsider our position. However, absent a showing that this is the case, we would apply the provisions of Section 1827 to Board proceedings.⁴

For all of the above reasons, we would require the Government to pay for the interpreter services that are necessary to the presentation of Respondent's case.⁵

Board and would not undermine the efficacy of the back pay remedy.

³ See *George Joseph Orchard Siding, Inc.*, 325 NLRB at 252-253.

⁴ We do not agree that Respondent would be issued a "blank check" to pay for as many witnesses as it chose to call. The judge and the Board would limit Respondent under the traditional principles of relevance and cumulativeness.

⁵ To the extent that a judge has discretion in these matters, we note that the judge in this case erred in exercising that discretion. As noted above, it was improper and punitive for the judge to consider the fact that Respondent has been found to have committed unfair labor practices. Our colleagues agree that the judge should not have considered that factor. However, they then proceed to substitute their own discretion for that of the judge.