

Woodview Rehabilitation Center and 1199 Indiana of the National Union of Hospital and Health Care Employees, Division of Retail, Wholesale and Department Store Union, AFL-CIO. Cases 25-CA-13618(E) and 25-CA-13826(E)

28 February 1989

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 29 March 1983 Administrative Law Judge Robert W. Leiner issued the attached Supplemental Decision. The Applicant filed exceptions and a supporting brief and the General Counsel filed limited cross-exceptions and a brief in support of both its cross-exceptions and in support of the Supplemental Decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board¹ has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

It is hereby ordered that the application of the Applicant, Woodview Rehabilitation Center, Michigan City, Indiana, for an award under the Equal Access to Justice Act be dismissed.

¹ Chairman Dotson did not participate in the underlying proceeding.

SUPPLEMENTAL DECISION AND ORDER

[Equal Access to Justice Act]

ROBERT W. LEINER, Administrative Law Judge: This is a supplemental proceeding under the Equal Access to Justice Act (EAJA) (P.L. 96-481; 94 Stat. 2325) and Section 102.143 et seq. of the Board's Rules and Regulations.

Woodview Rehabilitation Center (herein called the applicant) filed a timely application, dated January 11, 1983, for an award of fees and expenses under EAJA, totaling \$9,575.69.

On February 8, 1983, the General Counsel pursuant to Section 102.150(a), filed a motion to dismiss the application, inter alia, on the grounds that (1) the application failed to demonstrate eligibility under Section 102.147(f) (i.e., failure to disclose net worth of applicant's affiliates); and (2) pursuant to Section 102.144(a) of the Board Rules and Regulations, the General Counsel's issuance of complaint, trial of the case, and exceptions to my Decision and recommended Order demonstrated the General

Counsel's actions were "substantially justified" notwithstanding applicant, in part, prevailed.¹

On March 16, 1983, applicant filed a reply to the General Counsel's motion to dismiss, inter alia, reasserting that the Respondent at all material times offered to settle the case on terms more favorable to the General Counsel than the Board disposition; provided the General Counsel with evidence contrary to the General Counsel's case during the General Counsel's investigation; pursuant to Section 102.144(a) of the Board's Rules and Regulations, prevailed "in a significant and discrete substantive portion of [the] proceeding"; and that the Board's Decision and Order demonstrated that applicant's further offer to settle following the Administrative Law Judge's Decision and prior to the General Counsel's filing exceptions, showed the General Counsel's continued bad faith in continuing to litigate and required applicant to incur needless further expenses.

My recommended Decision and the Board's Order found, consistent with the consolidated complaint, that the applicant engaged in a widespread and deliberate course of unlawful conduct designed to restrain and discourage, and thereby blunt and thwart, its employees' statutory right to be represented by a labor organization (threats of loss of beneficial working conditions, the futility of union representation, maintaining unlawful surveillance over its employees' union activities, and promulgation and maintenance of unlawful rules concerning its employees' rights to engage in lawful union activities). The Board nevertheless agreed with my further conclusions that, contrary to the allegations of the complaint, the General Counsel failed to support its burden of proving under Section 8(a)(1) and (3) of the Act by a preponderance of the evidence that the applicant unlawfully reduced the working hours of, and unlawfully terminated the employment of, applicant's employee, Kenneth R. Osborne.

With regard to Osborne, however, and any suggestion by the General Counsel to the contrary notwithstanding, the applicant, under Section 102.144(a) of the Rules and Regulations, prevailed in a "significant and discrete substantive portion" of the proceeding by the dismissal of these latter 8(a)(1) and (3) allegations.

On the other hand, the evidence showed that, by its surveillance and other unlawful conduct directed toward Osborne,² the Respondent was attempting to single him out. The evidence of record also showed, and I particularly noted, that the Osborne discharge was a supremely close matter; that the General Counsel had proved a prima facie case of a discharge in violation of Section 8(a)(3); and that if there was any evidentiary basis, whether by applicant's records, demeanor of witnesses, or otherwise to cause me to disbelieve applicant's defense (i.e., if there was evidence of applicant's condonation, a pretext, etc.), I would have entertained a different view of applicant's treatment of Osborne.

¹ Administrative Law Judge's Decision and recommended Order issued March 24, 1982; the Board Order is dated December 13, 1982.

² While other employees, as applicant observes, were also engaged in union activities, applicant, on the record in the underlying proceeding, failed to keep their activities under unlawful surveillance: only Osborne's.

In view therefore of Osborne being the direct object of applicant's unlawful attention, the prima facie unlawfulness of the discharge, and in view of my findings of applicant's other unlawful conduct and the Board's concurrence, I conclude under Section 102.144(a) that, although applicant prevailed in a "significant and discrete substantive portion" of the proceeding, the General Counsel was nevertheless "substantially justified," at all stages of the proceeding, in seeking to vindicate what it quite reasonably could believe were violations of Section 8(a)(1) and (3) of the Act in applicant's conduct toward Osborne.³ That the road was difficult and the General Counsel was unsuccessful is not the test. The General Counsel was not unreasonable in seeking relief from the Board in excepting to my findings and conclusions on the alleged discrimination against Osborne. *Tyler Business Service v. NLRB*, 111 LRRM 3001 (4th Cir. 1982).

Certainly, the General Counsel during the investigatory and trial stages, in view of the above findings and

³ To the extent that applicant argues (reply br., p. 9) that the General Counsel's conduct constitutes an admission of *lack of substantial justification* because the General Counsel failed to petition the "Court of Appeals [sic]" to set aside the Board's decision, the argument is legally baseless. Cf. NLRA, Sec. 10(e)(f). The General Counsel is not "aggrieved" by the Board's Order dismissing the 8(a)(3) allegations within the meaning of Sec. 10(f).

conclusions, could not have relied on applicant's previous submission of its rebutting witnesses' unsworn statements because the applicant had blacked out the names of such witnesses. The General Counsel could not reasonably rely on such unidentified, unsworn statements. He could not interview unknown witnesses.

I do not suggest that the existence of a prima facie case constitutes "substantial justification." I conclude only that the General Counsel met that statutory burden on the facts of this case within the meaning of Section 102.144(a).⁴ Accordingly, the application must be dismissed.

ORDER⁵

It is ordered that the application be dismissed.

⁴ I therefore need not treat with the General Counsel's other defenses, including eligibility. In passing, it should be noted that even *failure* to prove a prima facie case does not preclude a showing of "substantial justification," *Enerhaul, Inc.*, 263 NLRB 890 (1982).

⁵ If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.