

**United Union of Roofers, Waterproofers, and Allied Workers, Local Union No. 135, AFL-CIO and Advanced Coatings and Insulation of Arizona, Inc. Case 28-CC-733-3(E)**

18 April 1984

**SUPPLEMENTAL DECISION AND ORDER**

**BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS**

On 20 October 1983 Administrative Law Judge Jerrold H. Shapiro issued the attached supplemental decision. The Applicant, United Union of Roofers, Waterproofers, and Allied Workers, Local Union No. 135, AFL-CIO, filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief.

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

The Board 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**

The recommended Order of the administrative law judge is adopted, and the application of the Applicant, United Union of Roofers, Waterproofers, and Allied Workers, Local Union No. 135, AFL-CIO, for an award under the Equal Access to Justice Act is dismissed.

**DECISION**

(Equal Access to Justice Act)

JERROLD H. SHAPIRO, Administrative Law Judge. This supplemental proceeding is before the National Labor Relations Board, herein called the Board, for consideration of the Application for Award of Attorneys' Fees and Expenses, herein called the Application, submitted by the Respondent, United Union of Roofers, Waterproofers, and Allied Workers, Local Union No. 135, AFL-CIO, herein called the Applicant, pursuant to the provisions of the Equal Access to Justice Act, herein called the EAJA, Pub. L. 96-481, Stat. 2325 and Section 102.143, et seq., of the Board's Rules and Regulations.

On March 4, 1983, the Board issued a Decision and Order in the above-entitled proceeding, dismissing the General Counsel's complaint in its entirety.<sup>1</sup>

On April 4, 1983, the Applicant filed with the Board the Application herein and by its Order dated April 12, 1983, the Board referred the Application to me.

On April 19, 1983, the General Counsel filed a Motion to Dismiss the Application. The Applicant filed a re-

sponse on May 9, 1983. I issued an order on May 11, 1983, denying the General Counsel's motion to dismiss, but without prejudice to the right of the General Counsel to include in its answer to the Application the defenses raised in that motion. I also ordered the Applicant to file an affidavit in support of its assertion that the Applicant was not under trusteeship when the complaint issued in the underlying unfair labor practice proceeding. On May 24, 1983, the Applicant, in response to my order of May 11, 1983, filed the affidavit and also requested that certain additional fees and costs incurred in connection with the prosecution of the Application be allowed.

On May 27, 1983, the General Counsel filed an answer to the Application and a memorandum in support thereof and, on June 2, 1983, filed a supplemental answer. The Applicant on June 10, 1983, filed a response to the General Counsel's answer and supplemental answer and also requested that certain additional fees and costs incurred in connection with the prosecution of the Application be allowed.

Based on the record in this supplemental proceeding, described supra,<sup>2</sup> and the record in the underlying unfair labor practice proceeding, and having considered the arguments advanced by the parties, I make the following

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

*A. The Underlying Unfair Labor Practice Proceeding*

On May 6, 1982, the General Counsel, pursuant to an unfair labor practice charge filed April 30, 1982, against the Applicant by Advanced Coatings and Insulation of Arizona, Inc., herein called ACI, issued the complaint in this case alleging that the Applicant engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, by picketing on April 22, 1982, at the Hassayampa Pumping Plant, herein called the Project, in furtherance of its labor dispute with ACI, at a gate reserved for neutral employers, with an object of forcing and requiring the Project's general contractor, the Guy F. Atkinson Construction Company, to stop doing business with ACI, which was one of Atkinson's subcontractors. On June 9, 1982, I conducted a hearing in this matter and on October 5, 1982, I issued my decision recommending that the complaint be dismissed. On March 4, 1983, the Board, after considering the General Counsel's exceptions and supporting brief and the Applicant's response, issued its Decision and Order affirming my decision.<sup>3</sup>

*B. Discussion and Ultimate Conclusions*

I am of the opinion, as contended by the General Counsel, that the Application should be dismissed because the Applicant has failed to establish that it meets

<sup>1</sup> I have considered and rejected General Counsel's motion that I strike "all the supplemental factual submissions" included in the Applicant's May 9, 1983, response to the General Counsel's motion to dismiss, because said information was untimely filed. Likewise, I have considered and rejected the Applicant's request that I strike the General Counsel's June 2, 1983, supplemental answer because it was allegedly untimely filed.

<sup>2</sup> 266 NLRB 321 (1983).

<sup>1</sup> 266 NLRB 321.

any one of the EAJA eligibility requirements.<sup>4</sup> My reasons for reaching this conclusion are as follows.

Section 102.143(c) (1) through (5) of the Board's Rules and Regulations, in relevant part, enumerate the applicants eligible to receive an EAJA award. Applicants eligible to receive an award are, among others: "(3) A charitable or other tax-exempt organizations described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees"; or, "(5) Any . . . organization with a net worth of not more than \$5 million and not more than 500 employees."

Section 102.147(b) of the Board's Rules and Regulations states in relevant part:

The application shall include a statement that the Applicant's net worth does not exceed . . . \$5 million . . . . However, an applicant may omit this statement if: (1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in Section 501(c)(3) of the Internal Revenue Code . . . .

Section 102.147(e) of the Board's Rules and Regulations in relevant part provides that the application shall "contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true."

Section 102.147(f) of the Board's Rules and Regulations provides in relevant part that "[e]ach applicant, except a qualified tax exempt organization . . . must provide with its application a detailed exhibit showing the net worth of the applicant . . . . The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's . . . assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part."

The Application in this case alleges that the Applicant is eligible to receive an award because it is a tax-exempt labor organization, as described in section 501(c)(5) of the Internal Revenue Code,<sup>5</sup> which employs less than 500 employees.<sup>6</sup> This does not, however, establish the Applicant's eligibility. As described supra, Section 102.143(c)(3) of the Board's Rules provides that it is only "[a] charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code," not section 501(c)(5), which is eligible to receive an EAJA award.<sup>7</sup>

<sup>4</sup> In view of this conclusion I have not considered the General Counsel's further contentions that the Application should be dismissed because it was untimely filed and because, in any event, the General Counsel has proven that the General Counsel's position in the underlying unfair labor practice proceeding was substantially justified.

<sup>5</sup> Due to a typographical error the Application inadvertently referred to sec. 501(c)(3) rather than sec. 501(c)(5) of the Internal Revenue Code. This typographical error was corrected by the Applicant in its May 9, 1983, response to the General Counsel's Motion to Dismiss Application.

<sup>6</sup> I have considered and rejected the General Counsel's contention that the copy of the IRS ruling attached by the Applicant to the Application, in support of its assertion that it is a tax-exempt labor organization as described in sec. 501(c)(5) of the IRC, is obsolete and inadequate.

<sup>7</sup> Sec. 501(c)(3) and (5) of the Internal Revenue Code provides in relevant part that the following organizations are tax exempt:

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or education purposes, or for

Likewise the record fails to establish that the Applicant is an organization with a net worth of not more than \$5 million. The Application fails to include a statement that the Applicant's net worth does not exceed \$5 million, as required by Section 102.147(b) of the Board's Rules,<sup>8</sup> and fails to include a detailed exhibit showing the Applicant's net worth, as required by Section 102.147(f) of the Board's Rules.<sup>9</sup>

Based on the foregoing I find that the Applicant has failed to establish that it is either a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code or an organization with a net worth of less than \$5 million or that it otherwise qualifies as an applicant eligible to receive an EAJA award.<sup>10</sup> I therefore shall recommend that the Application be dismissed for the reason that the Applicant has failed to establish its eligibility to receive an award.

On the foregoing findings and conclusions and on the entire record, and pursuant to Section 102.153 of the

the prevention of cruelty to children or animals; no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office. . . .

(5) Labor, Agricultural, or horticultural organization.

<sup>8</sup> The Applicant in its May 9, 1983, response to the General Counsel's motion to dismiss the Application states that "in order to comply with Section 102.147(b) of the Rules, a statement of net worth is attached hereto." The statement referred to is a letter dated November 18, 1982, addressed to the Applicant's lawyer from Kinsey M. Robinson, the Applicant's principal official, which in relevant part states, "[p]lease be advised that the total net worth of [the Applicant] is less than \$5 million dollars." This letter is not signed by Robinson, rather it is signed on his behalf by the clerical who typed it. Considering that the Board's Rules, supra, require that the Application include a statement that the Applicant's net worth does not exceed \$5 million and that the Application must include a written verification under oath that this information is true, Robinson's unsworn letter which is not attached to the Application and which is not signed by Robinson, but by an unidentified clerical on his behalf, does not meet the requirements of Sec. 102.147(b) of the Board's Rules.

<sup>9</sup> The Applicant contends that since it is tax-exempt labor organization as described in sec. 501(c)(5) of the Internal Revenue Code that under the portion of Sec. 102.147(f) of the Board's Rules which exempts "a qualified tax exempt organization" from filing a detailed net worth exhibit, that the Applicant was privileged to omit filing a detailed net worth statement. I disagree. It is plain from a reading of Sec. 102.143(c)(3) and Sec. 102.147(b) of the Board's Rules that the reference to "a qualified tax exempt organization" in Sec. 102.147(f) refers only to a tax-exempt organization described in sec. 501(c)(3) of the Internal Revenue Code. Thus Sec. 102.143(c) limits eligibility of tax-exempt organizations only to those described in sec. 501(c)(3) of the Internal Revenue Code, and Section 102.147(b), consistent with this, permits an applicant to omit stating in its application that it attaches an Internal Revenue Service ruling showing "that it qualifies as an organization described in Section 501(c)(3) of the Internal Revenue Code." Under the circumstances it is abundantly clear that by using the phrase "a qualified tax-exempt organization" in Sec. 102.147(f) the Board Rules was referring to an organization that qualifies as a tax-exempt organization as described in sec. 501(c)(3) of the Internal Revenue Code.

<sup>10</sup> In view of this conclusion I have not considered the General Counsel's further contention that the Applicant has not established its eligibility inasmuch as it failed to provide the number, category, and work location of the employees or the net worth of its alleged affiliate, the United Union of Roofers, Waterproofers, and Allied Workers, the Applicant's parent organization.

Board's Rules and Regulations, I issue the following recommended<sup>11</sup>

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<sup>11</sup> If no exceptions are filed as provided by 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.

**ORDER**

It is hereby ordered that the Application of the Applicant United Union of Roofers, Waterproofers, and Allied Workers, Local Union No. 135, AFL-CIO, Phoenix, Arizona, for an award under the Equal Access to Justice Act is denied.