

**Wright-Bernet, Inc. and Coopers' International
Union of North America, Local 41, AFL-CIO,
Case 9-CA-15203(E)**

27 April 1984

**SUPPLEMENTAL DECISION AND
ORDER**

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

On 29 April 1983 Administrative Law Judge David S. Davidson issued the attached supplemental decision. The Respondent filed 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 supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent's application is denied.

¹ In view of our decision to affirm the judge's denial of the Respondent's application for award of fees and expenses under the Equal Access to Justice Act, we find it unnecessary in this case to pass on the retroactivity of that Act.

SUPPLEMENTAL DECISION

[Equal Access to Justice Act]

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Administrative Law Judge. On October 19, 1981, Administrative Law Judge Charles M. Williamson issued his decision in this proceeding recommending dismissal of the complaint in its entirety. No exceptions were filed, and on November 25, 1981, the Board entered its order dismissing the complaint. On December 22, 1981, Respondent filed an "Application for Award of Fees and Expenses" under the Equal Access to Justice Act (EAJA). Thereafter, counsel for the General Counsel filed a motion to dismiss the application, and Respondent filed a reply thereto. Respondent also filed a motion to withhold "Confidential Financial Information" from public disclosure under Section 102.147 of the Board's Rules and Regulations. By order of April 2, 1982, the motion to dismiss was denied and the motion to withhold "Confidential Financial Information" from public disclosure was granted. Thereafter, counsel for the General Counsel filed an answer to application for an award of fees and expenses under the Equal Access to

Justice Act and a memorandum in support thereof. Respondent filed a reply memorandum thereto.

In deciding this case I have reviewed the transcripts and exhibits and various briefs and pleadings filed by the parties since the issuance of the complaint. The application and the answer raise three disputed issues.

1. Whether Respondent's net worth statement is sufficient to establish that its net worth was less than \$5 million as of May 30, 1980, the date of issuance of the complaint in this case.

2. Whether the General Counsel was substantially justified in issuing the complaint and not deferring to an arbitrator's award that later issued on January 9, 1981.

3. Whether fees and expenses incurred by Respondent before October 1, 1981, the effective date of EAJA, are recoverable.

FINDINGS AND CONCLUSIONS

I. THE ELIGIBILITY OF RESPONDENT

Respondent's application alleges that Respondent is a privately held Ohio corporation engaged in the manufacture and sale of industrial brushes, that it has no affiliates, that it has 85 employees, that its work force has never exceeded 100, and that its net worth at no time has reached \$5 million.

These facts would establish Respondent's financial eligibility for reimbursement for attorney's fees under EAJA. The General Counsel contends, however, that the financial statements furnished by Respondent to support its application fail to establish that its net worth was less than \$5 million on May 30, 1980, when the complaint issued¹ because it furnished statements only for the calendar years 1979 and 1980 and no statement of its financial status as of May 30, 1980. The General Counsel further contends that depreciation shown on the financial statements should not be considered in determining Respondent's net worth, that without deduction of depreciation, Respondent's net worth exceeded \$4.1 million at the end of 1980, and that its net worth was sufficiently close to \$5 million to require greater proof than interpolation to establish its net worth on the critical date. The General Counsel contends that Respondent should be required under Section 102.147(f) of the Board's Rules and Regulations to furnish a May 30, 1980 net worth statement or in the alternative other evidence demonstrating that there was no significant change in Respondent's net worth between January 1 and May 30, 1980.

Respondent contends that the depreciation should be considered under accepted accounting principles but that in any event, even if it were disallowed, the sworn affidavit of David Evans that Respondent's December 31, 1980 net worth was higher than its May 30, 1980 net worth is sufficient on which to base a finding that Respondent's net worth did not exceed \$5 million on May 30, 1980. Respondent has appended to its reply memorandum a further statement from its accountants stating that in the accountants' opinion the 1979 and 1980 state-

¹ See Sec. 102.143(d) of the Board's Rules and Regulations.

ments fairly present Respondent's financial position as of the end of each of those years.

In its memorandum, counsel for the General Counsel concedes that where end of year net worth statements before and after issuance of the complaint both show net worth "substantially below \$5 million," it may be reasonable to infer that net worth during the interim remained below \$5 million, but that this is not such a case. While I am inclined to agree, as Judge Taplitz held in *Malcolm Boring Co.*, Case 31-CB-3586(E), that depreciation should not be subtracted from acquisition cost in determining value of assets,² I cannot agree that the resultant \$4,118,000 net worth as of December 31, 1980, is not also substantially below \$5 million. Respondent's net worth as of May 30, 1980, would have reached \$5 million only if net assets over liabilities increased by almost \$1.3 million during the first 5 months of the year and then decreased by almost \$900,000 during the last 7 months of the year. In my view, such dramatic fluctuation is very unlikely, and I find that the application, Evans' affidavit, and the balance sheets are sufficient to show Respondent's financial eligibility.

II. SUBSTANTIAL JUSTIFICATION

A. The Issues

The complaint in this case issued on May 30, 1980, alleging that Respondent violated Section 8(a)(1) and (3) of the Act by discharging John Martin on April 11, 1980, because of his union activities and/or because he engaged in protected concerted activities, specifically giving testimony at an arbitration hearing known as the Glenn-Jackson arbitration. The complaint also alleges that Respondent independently violated Section 8(a)(1) on April 18, 1980, when Respondent Chairman Frank Bernet threatened Martin that his fellow employees would be discharged if they gave testimony concerning matters raised by Martin at the Glenn-Jackson arbitration hearing. A hearing was initially set for January 15, 1981.

Martin had also filed a grievance over his discharge, which Respondent had denied. When the Union failed to seek arbitration of his grievance, Respondent sued to compel arbitration of the grievance, and an order was entered pursuant to which an arbitration hearing was held on November 20, 1980. On January 9, 1981, the arbitrator issued his award denying the grievance, and on January 13, 1981, the Regional Director postponed the hearing in this case in order to consider what effect, if any, to give the arbitrator's award.

Thereafter, the Region notified Respondent that it intended to proceed, and on March 13, 1981, Respondent filed a Motion for Summary Judgment with the Board in which it contended that the Board should defer to the arbitrator's award and dismiss the allegation that Martin was unlawfully discharged. On April 2, 1981, the Board denied the Motion for Summary Judgment without prejudice to its renewal before the administrative law judge assigned to hear the case. At the hearing, which began on April 3, 1981, Respondent renewed the Motion for

Summary Judgment. The administrative law judge reserved decision and took evidence.

In his written decision the administrative law judge found that the Board should defer to the arbitrator's decision under the policy established in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). He found further that Martin had willfully given false testimony at the Glenn-Jackson arbitration hearing and that he thereby lost the protection of the Act he would otherwise have enjoyed in giving testimony at an arbitration proceeding. In addition, he discredited Martin's testimony that Bernet threatened potential witnesses with discharge and credited Bernet's denial that he made such threats. Finally, he found no probative evidence to sustain the General Counsel's contention that the stated cause for Martin's discharge was a pretext designed to conceal the fact that Martin's union activities were the true cause of the discharge. Thus, he concluded that Respondent had not violated the Act.

In its application Respondent has alleged that the General Counsel had no substantial justification (1) for proceeding to trial in this case after an arbitrator had determined that Respondent had just cause to discharge Martin; (2) for alleging that Bernet threatened reprisals against any witness who supported Martin's version of the incident described by him at the Glenn-Jackson arbitration; (3) for alleging that the reason given for Martin's discharge was a pretext; and (4) for alleging that Martin was engaged in protected concerted activity when he testified in the Glenn-Jackson arbitration.

EAJA provides that the burden of establishing substantial justification rests with the Government. As the Board stated in *Enerhaul, Inc.*, 263 NLRB 890 (1982):

The legislative history of EAJA characterized "substantially justified" as a test of reasonableness, and further clarified that, "[w]here the Government can show that its case had a reasonable basis both in law and fact, no award will be made."

B. The Reasonableness of the General Counsel's Issuance of the Complaint

The first question to be determined in this case is whether the General Counsel was substantially justified in issuing the complaint on May 30, 1980. At that time arbitration of Martin's discharge had not yet occurred or been sought. Martin had concededly been discharged because of testimony he had given in the Glenn-Jackson arbitration proceeding. While the arbitrator was later to conclude otherwise, there was clear precedent for finding that Martin had engaged in concerted activity within the meaning of Section 7 when he testified in the Glenn-Jackson arbitration proceeding.³ There was also a substantial question under *Big Three Industrial Gas Co.*, 212 NLRB 800 (1974), as to whether or not that activity had lost its protection because Martin had lied in his testimony.

Big Three concerned the discharge of an employee for the stated reason that he gave false testimony at a repre-

² JD-SF-80-82. See also *Sentle Trucking Corp.*, 6-CA-12501(E), JD-54-83.

³ *Ebasco Services*, 181 NLRB 768 (1970).

sentation proceeding. The Board concluded that the employer's charges that the employee testified falsely were not made in good faith and were used as a pretext to discharge him because of his union activities. In his decision discussing the principles to apply in such cases, the administrative law judge, whose findings and conclusions were affirmed by the Board, rejected the contention that an employer may never discharge an employee for giving testimony in a Board proceeding. However, he cautioned that the burden was "on the employer to show affirmatively not only that the testimony was false, but also that it was willingly and knowingly false, that it was uttered with intent to deceive, and that it related to a substantial issue."⁴ As he found that the individual at issue in that case had not knowingly and willfully given false testimony, it was not necessary for him to decide at what point the line between protected and unprotected testimony would have been crossed, or for the Board to consider that question. The issue has not come before the Board since *Big Three*.⁵

Whether Martin's testimony was false in whole or in part and, if false, was willfully and knowingly false presented clear credibility issues appropriate for resolution after hearing before an administrative law judge. Bernet's alleged threat to Martin shortly after Martin's discharge similarly raised a credibility issue. Thus, I have little difficulty concluding that as of May 30, 1980, when the complaint issued, the General Counsel had a reasonable basis both in law and in fact for issuing the complaint and therefore was substantially justified in doing so.

C. The Effect of the Arbitrator's Award

1. Spielberg

A closer question is whether the General Counsel remained substantially justified in continuing to prosecute the complaint following the issuance of the arbitrator's award on January 9, 1981, denying the grievance over Martin's discharge, and Respondent's request that the General Counsel defer to the award under *Spielberg Mfg. Co.*, supra.

The General Counsel contends that he reasonably concluded that the arbitrator's award was repugnant to the purposes and policies of the Act and that it therefore should not be deferred to (1) because the arbitrator wrongly held that when Martin testified in the arbitration proceedings, he was not engaged in concerted activity; (2) because the arbitrator failed to apply the correct standard in finding that Martin's testimony in the Glenn-Jackson arbitration was "deliberately false" and therefore unprotected; and (3) because the arbitrator did not rule on the pretext issue raised by the complaint.

The arbitrator's finding that Martin's testimony was not concerted activity, while incorrect, was not material if he properly found that it was unprotected; and it would not have been reasonable to pursue the complaint on this basis alone. As for the second ground advanced

by the General Counsel, a full reading of the arbitrator's decision does not support the General Counsel's contention that the arbitrator's finding that Martin's testimony was "deliberately false," was "confined to a finding that Martin deliberately exaggerated as to some aspects of his testimony." Rather, it appears that he was aware of the *Big Three* standard and concluded that, from his vantage point, Martin's testimony had lost its protection under that standard.

However, as set forth above, the Board had not previously determined at what point the line between protected and unprotected testimony is crossed. Therefore, it was reasonable for the General Counsel to contend that the arbitrator's application of *Big Three* was repugnant to the policies of the Act and that the Board should find Martin's testimony protected, particularly in light of the fact that Martin was a union officer engaged in the grievance process when he testified.⁶

In any event, there is no question that the arbitrator's decision did not deal with the "pretext" issue raised in the unfair labor practice proceeding. Although the arbitrator expressed the view in his decision that it was his duty to dispose of all circumstances relating to Martin's discharge including the unfair labor practice allegations of the complaint, the Union took the position that it did not intend to produce any evidence relating to the allegations of the complaint. All the evidence supporting the pretext allegation was not presented to the arbitrator, and the arbitrator made no findings as to whether Martin's union activities were the cause or a cause of his discharge. Under prevailing Board policy at the time this case was pending, the fact that the arbitrator did not have such evidence before him and made no such findings gave the General Counsel a reasonable basis to take the position that *Spielberg* was inapplicable and that the Board should therefore not defer to the arbitrator's decision.⁷

2. The effect of the arbitration record on the reasonableness of the decision to proceed

A further question to be decided is whether apart from *Spielberg*, as a result of what developed at the arbitration hearing, it became unreasonable for the General Counsel to continue to prosecute his complaint.

In the Glenn-Jackson arbitration, Martin had testified as to two incidents in which misconduct had occurred and for which no discipline had been imposed. His testimony was in support of grievances of Glenn and Jackson who had been discharged for fighting. One of the incidents occupied most of Martin's testimony. The second incident was described by Martin toward the end of his testimony. He was asked if he had seen any other pushing and shoving by anyone and replied that he had once seen Betty Williams grab Foreman Isaacs by "the privates . . . and had him in her grasp and was giving him hell over something or other. And she led him around the shop by grabbing him by his balls." He continued to

⁴ 212 NLRB at 804.

⁵ While *Big Three* concerned a discharge for testimony given at a representation hearing, the protection afforded participation in grievance proceedings to vindicate employees' contractual rights appears to be the same. *Ebasco Services*, 181 NLRB 768.

⁶ See *Clara Barton Convalescent Center*, 225 NLRB 1028, 1029 (1976).

⁷ *Caterpillar Tractor Co.*, 257 NLRB 392, 397-398 (1981); *Consolidated Freightways Corp. of Delaware*, 257 NLRB 1281, 1287 (1981). *United Parcel Service*, 252 NLRB 1015 (1980).

state that Isaacs did not reprimand her or write her up, and testified further, "And she was determined to hurt him if he didn't go along with what she had to say. And she had him literally in a squeeze and had him in a position that he couldn't say too much." On cross-examination when asked for details, Martin testified that the incident happened about a year and a half or 2 years earlier, that they were arguing as they were walking from the old building into the new building and that Williams grabbed Isaacs when they were directly in front of Martin. He testified that several people saw it and that, when other employees heard what was happening, everyone was curious. He identified Patty Johnson, Pauline Deisbach, and Geneva Fields as having been in the packing department, near where the incident occurred, but testified that he was not certain about that. He estimated that 20 to 30 employees saw it. He testified that while Williams had Isaacs in her grasp she led him out on the production floor and that she could take him anywhere she wanted, that it went on probably for about 10 minutes, and that Isaacs did not do very much to try to escape other than to ask Williams to calm down and talk about their complaint. He testified that Williams moved him around from place to place and had him "here one minute and here one minute," and that Martin followed and watched for from 5 to 10 minutes, "his best estimate." Isaacs denied that any such incident took place. It was this testimony for which Martin was discharged.

At the arbitration hearing on Martin's discharge, Respondent called its vice president David Evans to testify as to Respondent's investigation and decision to discharge Martin and called three supervisors responsible for the areas of the plant in which the incident had allegedly taken place to testify that they had neither seen nor heard of such an incident before Martin testified at the Glenn-Jackson arbitration. Respondent also called Isaacs, Geneva Fields, Vivian Owens, and Patricia Johnson as witnesses.

Isaacs denied that there was any truth to Martin's testimony at the Glenn-Jackson arbitration. Owens, with whom Williams had been arguing at the time of the incident,⁸ testified that she saw no contact between Williams and Isaacs but that immediately after her argument with Williams she heard rumors that Williams had grabbed Isaacs and that everyone was laughing and joking about it. Deisbach testified that she did not see Williams grab Isaacs, but that she heard about the incident at lunch on the day it happened and that there was giggling and snickering about it. Johnson similarly testified that she did not see the incident but also heard about it and that it was the talk of the plant. Geneva Fields testified that she witnessed the incident and saw Williams reach around and pinch Isaacs on the leg a few times midway up from the knee. She testified that she was not sure if it was his leg that Williams pinched but that, as far as she saw, it was.

The Union called Lucy Fields, Carol Wooten, Edna Massey, Betty Williams, and Martin in support of its po-

⁸ During Respondent's investigation, Martin stated that Williams had been arguing with Owens when Isaacs interceded and tried to induce Williams to return to her work station precipitating the incident.

sition that Martin had been wrongfully discharged. Fields testified that she observed Williams reach toward Isaacs, that Isaacs backed up and yelled, that someone told her that Williams had grabbed Isaacs by the testicles, but that she did not see it. She testified that there was a lot of talk about it right after that. Carol Wooten testified that she heard Isaacs yell and make a loud noise but that she did not see much. According to Wooten, it was the talk of the plant that Williams had grabbed Isaacs by the testicles. Edna Massey testified that she saw Williams reach out and she heard Isaacs holler. She testified that she believed that Williams had grabbed Isaacs by the testicles and that after the incident everyone laughed and talked about it. Betty Williams testified that she had grabbed Isaacs between the legs, that he hollered, and that she let go. She testified that there was a lot of talk about it in the plant that day. After Martin's discharge she went to her lawyer and he prepared an affidavit for her in which she stated that she "pinched him between the legs." She testified in explanation that she told her lawyer what had happened but was embarrassed about it and that he suggested the wording used in her affidavit.

All these witnesses placed the time of the incident about 2 years earlier than Martin had at the Glenn-Jackson arbitration, and Martin testified that his original testimony was wrong in that respect. He testified that he saw Williams grab Isaacs by the testicles, that Isaacs started jumping around and carrying on, that she held on to Isaacs who tried to get away, and that she finally let go and returned to her machine. In his testimony at the arbitration hearing on his discharge he stated that it was 5 to 10 minutes from the time he first saw Williams and Owens arguing until he saw Williams return to her machine. He also testified that while Williams was holding on to Isaacs she could do what she wanted with him. He stated that he testified about this incident in the Glenn-Jackson arbitration proceeding because he wanted to show that people had done things in the past and had gotten by with them without being disciplined. He denied that he testified about the incident out of malice or that he had ever admitted that any of his testimony in the Glenn-Jackson arbitration was untrue. He reaffirmed that all of it was true to the best of his recollection and belief.

On cross-examination Martin conceded that he might have exaggerated in his testimony about Williams leading Isaacs around the plant but that Williams did in fact have Isaacs in her grasp, did take steps with him while pulling on him, and could do what she wanted with him. He testified Isaacs was jumping up and down and was trying to talk to her and get away. He testified that he could not see them at all times when he was following them around.

In addition to the testimony, the arbitration record contained a transcript of an interview of Martin by Respondent's attorney and other officials before Martin's discharge. In that interview Martin maintained that Williams had grabbed Isaacs by the testicles but did not answer directly questions about details he had described in his Glenn-Jackson testimony, particularly as to Wil-

liams' leading Isaacs around the plant. At one point, when being pressed for answers he replied that Isaacs had "lied . . . too," although he otherwise denied a number of times that he had lied about the incident. He conceded that he could not tell how long the incident had lasted. The arbitration record also showed that Williams had refused to answer questions about the incident during Respondent's investigation which led to Martin's discharge.

Along with the witnesses who had testified at the Martin discharge arbitration, the General Counsel had two additional witnesses available to testify in this proceeding. One was a former employee, Ann Rose, and the other was the attorney who had prepared Williams' affidavit after Martin's discharge which had been used to impeach Williams' testimony at the arbitration hearing. At the unfair labor practice proceeding, Rose testified that she saw Williams grab Isaacs in the genital area, that he doubled over, turned in circles, and hopped around the packing department. She testified that, after he turned in circles a couple of times, Williams let go of him. She testified that Williams could not have held on to him very long, perhaps a minute or so, but that she had a good grab on him between the legs. She also testified that the whole incident lasted 5 to 10 minutes. She testified that Isaacs made a joke of it and there was a lot of laughter about it. Williams' lawyer testified that he drew up the affidavit at Williams' request. He testified that Williams told him she had grabbed Isaacs "in the crotch" or words to that effect which made it very clear what she had done. He testified that he used the words "pinched him between the legs" because he did not think it was necessary to use more graphic language to convey what had happened.

Based on the arbitration record alone, and certainly with the additional testimony available to corroborate Martin and Williams, I find that the General Counsel had a reasonable basis for taking the position that Williams had grabbed Isaacs by the testicles and to that extent that Martin had testified truthfully at the Glenn-Jackson arbitration and Isaacs had not. As for Martin's testimony as to when the incident occurred, who else witnessed it, and how long it lasted, while considerable doubt was cast on the accuracy of his Glenn-Jackson testimony, I find further that the General Counsel had a reasonable basis for the position that Martin's testimony was not the product of willful and knowing falsification, but rather the product of the typical errors of observation, perception, recollection, and articulation that so often impair credibility of testimony, particularly in proceedings of a less formal nature like arbitration.

However, in the light of the arbitration record, and indeed Martin's own testimony, there was little basis left for the position that he had truthfully testified that Williams led Isaacs around the shop, that she took him out on the production floor, and that she could take him anywhere she wanted. The General Counsel did not take the position that Martin had testified truthfully in these respects but argued that, to the extent that his testimony departed from the truth, it was not deliberate or willful

exaggeration of any material fact which would cause his testimony to lose its protection under *Big Three*, supra.⁹

I find that it was not reasonable to take the position that these aspects of Martin's testimony were not material to the proceeding in which he testified. The misconduct for which Jackson and Glenn were disciplined was serious. Martin stated that he testified about the incident in the Glenn-Jackson arbitration because he wanted to show that people had done things in the past and had gotten by with them. It is apparent that the more aggravated the things people had gotten away with, the more weight they would have in persuading an arbitrator to mitigate the discipline for the misconduct at issue before him.

I find further, however, that whether or not Martin willfully and deliberately added the details concerning Williams' leading of Isaacs around the plant presented close questions in fact and in law, and that the General Counsel continued to have a reasonable basis for his position in prosecuting the allegation that Martin's testimony was protected. As set forth above the Board had not been required since *Big Three* to decide at what point the line between protected and unprotected testimony was crossed, and it is Board policy to give special protection to employees' access to the grievance and arbitration process. In the light of the latter policy and the lack of any sequel to *Big Three*, it was reasonable for the General Counsel to test the meaning of the dicta of *Big Three* and its application to this case. In the light of the availability of corroboration of Williams' testimony concerning her affidavit which had been damaging in the arbitration proceeding as well as Rose's additional testimony available to corroborate Martin, it was reasonable for the General Counsel to take the position that Williams and Martin would be given greater credit in the unfair labor practice proceeding than in the arbitration of Martin's discharge and that to the extent that Martin was found to have been untruthful in his Glenn-Jackson testimony his untruths were not willful and knowing, but rather the product of a mixture of faulty recollection and the exaggeration of a partisan who persuades himself after the passage of time that this was the way it really happened. I find therefore that the General Counsel continued to have a reasonable basis in law and in fact after receipt of the arbitrator's award and the arbitration transcript for continuing to pursue his position that Martin had been discharged for engaging in protected concerted activity.

Finally, I find that in any event the arbitrator's award and the arbitration transcript had no effect on the reasonableness of the General Counsel's position with respect to the allegations of the complaint that Bernet threatened employees with reprisal and that Martin's discharge was caused by his union activities. The former was not dealt with at all in the arbitration proceeding. The issue raised by the allegation was primarily one of credibility, and

⁹ In his brief on the merits to the administrative law judge, counsel for the General Counsel contended that Martin's total direct testimony at the Glenn-Jackson hearing was limited to the statement that Williams grabbed Isaacs by the testicles and that all other details were supplied on cross-examination. As the facts set forth above show, the record does not support that contention.

Martin's testimony at the arbitration of his discharge was not so discredited as to make it unreasonable for the General Counsel to place the credibility issue over Bernet's threat before an administrative law judge for resolution. With respect to the pretext allegation of the complaint, again much of the evidence relied on by the General Counsel was not presented to the arbitrator, and credibility was, of course, central to the pretext contention as well as to the contention that Martin's testimony was protected. While it would have been unreasonable, following the arbitration, to expect any trier of the facts to find that Martin's testimony in the Glenn-Jackson arbitration was completely credible, in one important respect the arbitration proceeding if anything strengthened the reasonableness of the General Counsel's position that, with respect to their testimony as to whether or not Williams had ever grabbed Isaacs, Martin was more truthful than Isaacs. The arbitration proceeding gave support to the General Counsel's argument that in its investigation before Martin's discharge Respondent ignored leads which might have led to contradiction of Isaacs and at least partial corroboration of Martin and that Respondent demonstrated a determination to find a reason for Martin's discharge while ignoring possible grounds to discipline Isaacs. While the administrative law judge discounted this evidence and concluded that there was no evidence that Isaacs willfully gave false testimony, just as the arbitration proceeding left a close question as to whether Martin had crossed the line in his testimony, so also did it leave a close question as to whether Isaacs in denying that the incident occurred at the arbitration proceeding and at the investigating interview before Martin's discharge willfully and falsely denied the incident. In sum, I find that there was a reasonable basis both in fact and in law for the position of the General Counsel in this case and therefore that the action of the General Counsel in proceeding to trial on Martin's discharge was substantially justified.

III. RETROACTIVITY

Having found that the actions of the General Counsel were substantially justified, I will recommend that the application for fees be denied in its entirety. However, should the Board disagree with that conclusion, the issue of retroactivity would then have to be decided. As the itemized description of services rendered shows, all but 1-1/4 of the total of 68-3/4 hours of services rendered by Respondent's attorneys in this case fell in the period before October 1, 1981, the effective date of EAJA. The

General Counsel contends that all fees and expenses incurred before the effective date of EAJA are not recoverable. Respondent contends that such fees and expenses are recoverable and further that in view of my order denying the General Counsel's motion to dismiss it is the law of this case that such fees are recoverable.

There is one significant difference between the argument now being made by the General Counsel and that made in its motion to dismiss. Thus, here the General Counsel argues that EAJA is a waiver of sovereign immunity which must be unequivocally expressed and that no explicit waiver appears from the statute or its history. The sovereign immunity argument was not advanced in the General Counsel's motion to dismiss.

The issue has been raised in a number of other cases arising in a number of forums. Most recently the United States Court of Appeals for the Fourth Circuit in *Tyler Business Services v. NLRB*, 680 F.2d 338 (1982), rejected this contention with respect to a fee application under EAJA for fees before the court. The same result was reached in *Nunes-Correia v. Haig*, 543 F.Supp. 812 (D.D.C. 1982), in what may be the most comprehensive analysis of the issue to appear in an opinion to date. While there are decisions to the contrary,¹⁰ the prevailing view is that expressed in *Tyler* and *Nunes-Correia*. Although not free from doubt, I find the reasoning expressed in *Nunes-Correia* most persuasive and therefore would adhere to the position taken in my Order denying the General Counsel's motion to dismiss and find that fees and expenses itemized by Respondent incurred before October 1, 1981, do not fall outside the coverage of the Act.

As I have found above that the General Counsel had substantial justification for issuing the complaint in this case and for prosecuting it through the hearing stage, I issue the following recommended¹¹

ORDER

The application for award of fees and expenses under the Equal Access to Justice Act of Respondent Wright-Bernet, Inc. is denied.

¹⁰ E.g., *Allen v. United States*, 547 F.Supp. 357 (N.D. Ill.) (1982); *Commodities Futures Trading Commission v. Rosenthal*, 537 F.Supp. 1094 (N.D. Ill. 1982).

¹¹ 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.