

**Abell Engineering & Manufacturing, Inc. and Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO.** Cases 25-CA-25966(E) and 25-CA-26263(E)

September 12, 2003

SUPPLEMENTAL DECISION AND ORDER  
BY MEMBERS LIEBMAN, SCHAUMBER, AND  
WALSH

On January 17, 2003, Administrative Law Judge C. Richard Miserendino issued the attached supplemental decision. The Applicant filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering 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 briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

On September 13, 1999, the judge issued his decision in the underlying unfair labor practice case involving the Applicant. On October 18, 2002, the Board reversed the judge's 1999 decision and dismissed the consolidated complaint in its entirety.<sup>1</sup> On November 15, 2002, the Applicant timely filed an application for an award of attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1982). The application alleged, inter alia, that the General Counsel was not substantially justified in prosecuting the underlying unfair labor practice case, in particular the 8(a)(3) and (1) allegations involving employee Richard Gist's discharge on October 2, 1998. In his supplemental decision, the judge found substantial justification in favor of the General Counsel. For the reasons stated below, we adopt this finding and deny the application.

In *Galloway School Lines*, 315 NLRB 473 (1994), the Board summarized the principles relating to the substantial justification test:

In order to determine whether the General Counsel has satisfied this test, it is necessary first to identify what constitutes substantial justification. The Board has stated that substantial justification does not mean substantial probability of prevailing on the merits, and that it is not intended to deter the agency from bringing forward close questions or new theories of law. The Supreme Court has defined the phrase "substantial justification" under EAJA as "justified to a degree that

could satisfy a reasonable person" or having a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Thus, in weighing the unique circumstances of each case, a standard of reasonableness will apply.

*Id.* at 473 (fn. omitted). Accord: *Inter-Neighborhood Housing Corp.*, 321 NLRB 419 (1996), enf. denied 124 F.3d 115 (2d Cir. 1997).

We find the General Counsel's reliance on a *Wright Line*<sup>2</sup> legal theory to prosecute Gist's October discharge was reasonable. In the underlying unfair labor practice case, there was a dispute over what activity motivated this discharge. The General Counsel contended that Gist was fired for *all* of his protected union activity, i.e., for attempting to organize the Applicant's sheet metal shop workers throughout 1998. The Applicant contended that Gist was fired for a single act, i.e., for breaching a duty of loyalty to the Applicant when he solicited welder David Bautista to take a job with a union contractor on October 2, 1998. Because of this dispute over the Applicant's motivation for Gist's discharge, as well as over whether Gist's solicitation of Bautista was permissible, a *Wright Line* analysis was required.

We further find that the General Counsel's view—that Gist's solicitation of Bautista was protected—was reasonable. The judge thought that Gist's solicitation of Bautista supported a reasonable inference that Gist had sought to assist the Union by attempting to do indirectly, what he could not do directly, that is, obtain another member for the Union. Thus, the judge accepted the General Counsel's position and found that Gist's solicitation of Bautista was an extension of Gist's union organizing and fell within the broad protective ambit of Section 7.

The Board's reversal of the judge on this point does not mean the General Counsel's position was not substantially justified. See *Teamsters Local 741 (A.B.F. Freight)*, 321 NLRB 886, 890 (1996). The Board analyzed Gist's solicitation of Bautista differently than either the parties or the judge seemed to have fully anticipated. The Board reviewed several cases (see 338 NLRB 434, 435, and fn. 3) to explore whether Gist had lost the protection of the Act when he solicited Bautista. Critical to this review was the Board's finding, based on the credited record, that Gist's organizing activity had ceased when he attempted to recruit Bautista to work for another employer, and that he pursued Bautista with the full knowledge that if Bautista took that job the Respondent

<sup>1</sup> 338 NLRB 434 (2002).

<sup>2</sup> 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 1983 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 989 (1992).

would lose one of only three employees in the unit. Accordingly, the Board held Gist's attempts to induce Bautista to quit were unrelated to organizing the Respondent's employees or improving their conditions of employment with the Respondent. In this context, the Board ultimately found *Clinton Corn Processing*, 194 NLRB 184 (1971), to be "most analogous" in support of a dismissal in Gist's situation. Even then, the Board took *Clinton Corn Processing* a step farther and identified, for the first time, the size of the work force as an important factor to be examined in this kind of situation.

In the underlying case, the General Counsel did not attempt to distinguish *Clinton Corn Processing*. Instead, the General Counsel argued that Gist's solicitation of Bautista was comparable to the situation presented in *M.J. Mechanical Services*, 324 NLRB 812, 813 (1997). While we recognize that neither *Clinton Corn Processing* nor *M.J. Mechanical Services* is directly on point, the Board found certain features of *Clinton Corn Processing* to be more applicable to Gist's situation. However, the fact that the General Counsel sought to extend *M.J. Mechanical Services* to another factual scenario does not make his position unreasonable for EAJA purposes.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the application of Abell Engineering & Manufacturing, Inc., Indianapolis, Indiana, for attorney's fees and expenses under the Equal Access to Justice Act is denied.

*Raifael Williams, Esq.*, for the General Counsel.

*James H. Hanson, Esq.*, of Indianapolis, Indiana, for the Respondent.

#### SUPPLEMENTAL DECISION [EQUAL ACCESS TO JUSTICE ACT]

#### STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. On November 15, 2002, counsel for the Respondent, Abell Engineering & Manufacturing, Inc., filed an application for attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1982), as amended, following the entry of an Order by the National Labor Relations Board on October 18, 2002, reversing this administrative law judge's decision in the underlying unfair labor practice proceeding, thereby dismissing the complaint, and reinstating the settlement agreement in Case 25-CA-25966.<sup>1</sup> On January 10,

<sup>1</sup> In addition to its application for an award of fees and expenses, the Respondent filed an unopposed motion to withhold confidential financial information from public disclosure. On consideration of that motion, and the reasons stated therein, the motion is granted and it is recommended that the financial statements attached as Exh. A thereto shall be withheld from public disclosure.

2003, counsel for the General Counsel filed an unopposed motion to file an answer out-of-time, along with an answer opposing the application on the ground that the General Counsel's position was "substantially justified." 5 U.S.C. § 504(a). Because the General Counsel's failure to file a timely answer was not due to neglect or carelessness, and will not result in undue prejudice to the Respondent, the unopposed motion is granted and the answer out-of-time is accepted.

The Board's Rules and Regulations Section 102.152 (a) contemplate that the determination on an application for an award of fees and expenses under EAJA ordinarily will be made on the basis of the record in the underlying proceeding. I find that no further proceedings are necessary in order to make a determination in this case.

#### FINDINGS OF FACT

##### I. THE UNDERLYING CASE

The charge in Case 25-CA-25966 was filed by Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO (Union) on April 2, 1998, alleging that Abell Engineering and Manufacturing, Inc. (Respondent), violated Section 8(a)(1) and (3) of the Act by refusing to hire or consider for hire union applicants William Rogers, Dennis Wheeler, Charles Parsley, and Mark Moran and by discharging on February 17, 1998, Union Organizer Richard Gist because of his union activity. The charge was amended on June 22, 1998, to allege that the Respondent violated Section 8(a)(1) of the Act by threatening to close the business if the employees chose to be represented by a union.

On July 31, 1998, the Union and Respondent entered into a settlement agreement, which was approved by the Regional Director, whereby the Respondent agreed to offer reinstatement to Richard Gist, pay a specified amount of backpay to Mark Moran, notify William Rogers that he, along with other applicants, would be considered for employment on a non-discriminatory basis, and post a notice. Gist was reinstated on August 28, 1998, Moran was paid the gross amount of \$2520, Rogers was notified that he would be considered for employment if he applied, and a notice was posted from August 7-October 8, 1998. The Respondent filed a notice of compliance on October 14, 1998.

In the meantime, on October 2, 1998, the Respondent discharged Gist again after he urged a coworker to take a higher paying job with a unionized employer. The Union filed the charge in Case 25-CA-26263 alleging that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Richard Gist because he engaged in union activities.

On November 20, 1998, the Regional Director set aside the settlement agreement and issued a consolidated complaint essentially alleging the violations asserted in the charge, as amended, in Case 25-CA-25966, and the charge in Case 25-CA-26263.

I found that the discharge was unlawful. I also found that the Regional Director's revocation of a settlement agreement resolving allegations of earlier violations of Section 8(a)(1) and (3) (including an earlier discharge of Gist) was permissible, and that the Respondent had committed a number of the presettle-

ment violations alleged. The Board disagreed and found that, under the circumstances, Gist engaged in disloyal conduct that exceeded the protections of the Act. It therefore found that the discharge did not constitute a valid basis for the Regional Director's revocation of the settlement agreement concerning the allegations of earlier violations of the Act. Thus, the Board reinstated the settlement agreement and dismissed the consolidated complaint in its entirety.

## II. THE APPLICABLE LEGAL STANDARD

Having prevailed in the underlying case, the applicant may be entitled to an award of fees and expenses incurred in connection with the adversary adjudication, if the General Counsel cannot show that his position in the underlying litigation was substantially justified, by showing that his position in the proceeding was reasonable in law and fact, or unless special circumstances make the award sought unjust. *Pierce v. Underwood*, 487 U.S. 552 (1988); *Tyler Business Systems v. NLRB*, 695 F.2d 73 (4th Cir. 1982). The fact that the General Counsel did not prevail in this litigation does not raise a presumption that his position was not substantially justified, nor must it be established that the decision to litigate was based on a substantial probability of prevailing. *Westerman, Inc.*, 266 NLRB 799 (1983).

## III. ANALYSIS AND FINDINGS

In its application for an award of fees, the Respondent argues that the General Counsel's factual position was not substantially justified because it did not dispute the fact that Union Organizer Richard Gist solicited employee Richard Bautista to terminate his employment at the Respondent to work for a company with a unionized work force. It further argues that the General Counsel's legal position was not substantially justified because the Board found that Gist's conduct in soliciting Bautista to work for unionized employer was not protected under the Act and because the Board's conclusion was based on case law which the General Counsel did not attempt to distinguish. The arguments are unpersuasive.

In the case below, the credible evidence showed that Richard Gist was a union organizer, who was discharged for his union activity and subsequently was reinstated by the Respondent pursuant to a settlement agreement. The undisputed facts showed that on returning to work, Gist (1) unsuccessfully tried to organize the Respondent's sheet metal shop workers again, (2) solicited employee Richard Bautista to terminate his employment with the Respondent to take a job making a higher wage at a unionized company, and (3) that the Respondent had knowledge of this activity. Finally, the undisputed facts showed that the Respondent discharged Gist again.

Relying on a *Wright Line*<sup>2</sup> type theory, the General Counsel argued that Gist's termination was motivated by his union activity and that the Respondent's reason for discharge was pretextual. The Respondent argued that "Gist's discharge occurred because of his breach of duty of loyalty that he owed to Abell Engineering, and Abell Engineering therefore did not commit an unfair labor practice in discharging Gist because it would

have discharged Gist even in the absence of his union activities." (R. posthearing Br. at pp. 16-17.) The Respondent conceded that a *Wright Line* analysis was the appropriate legal standard to be applied to the case. It also conceded that the General Counsel had satisfied his initial evidentiary burden under *Wright Line*. Instead, in its posthearing brief, the Respondent elected to focus its argument entirely on its *Wright Line* defense (i.e., that it would have terminated Gist even in the absence of any union activity). (R. posthearing Br. at pp. 18, 22, and 24.)<sup>3</sup>

Based on the General Counsel's evidence, I found that the evidence showed, and the Respondent conceded, that the General Counsel had satisfied his evidentiary burden under *Wright Line*. Specifically, I found that Gist was engaged in union activity by (1) seeking to organize the Respondent's employees and (2) by encouraging Bautista to take a higher paying job with a union company. I therefore found that Gist's conduct fell within the broad protective ambit of Section 7 of the Act.

At that point, the evidentiary burden shifted to the Respondent. But because the Respondent's defense related solely to conduct that I had found (and that it had implicitly conceded) was protected under the Act, and because the protected union solicitation at least in part resulted in Gist's discharge,<sup>4</sup> I found that the Respondent failed to demonstrate that it would have discharged Gist absent his protected activity. See *Timekeeping Systems, Inc.*, 323 NLRB 244 (1997).

The Board disagreed. It found that Gist's conduct in soliciting Bautista to take a higher paying job with a union contractor exceeded the protections of the Act. Specifically, it held that the facts in the case below were most analogous to those in *Clinton Corn Processing*, 194 NLRB 184 (1971). In that case, a former employee, who was also a union official, attempted to solicit employees of his former employer to quit and work for a building trade, while he was working for a subcontractor on his former employer's premises. The Board found that the former employee's conduct was unprotected, and therefore, he was lawfully barred from the former employer's premises.<sup>5</sup>

The Respondent argues that in light of *Clinton Corn Processing*, the General Counsel's legal position was not substantially justified. However, as noted above, the Respondent did not rely on or cite *Clinton Corn Processing* in its posthearing brief or at any time in this case. Nor did it ever argue that Gist's conduct was unprotected. The fact that the Board found Gist's conduct to be unprotected and dismissed the complaint on that basis does not establish that the General Counsel's reliance on a *Wright Line* analysis was not substantially justified.

<sup>3</sup> At no time did the Respondent argue that Gist was not engaged in protected union activity or cite any case to support that position.

<sup>4</sup> The other part was the union organizing activity.

<sup>5</sup> In *Clinton Corn Processing*, there was no evidence of union hostility by the former employer toward the former employee while he was an employee/union steward nor was there any evidence of discriminatory action directed against him. The record there was free from any evidence that the former employer's action in barring him from the premises was motivated by union activity while he was an employee/union steward. 194 NLRB 184, 189, and 190 fn 16.

<sup>2</sup> 251 NLRB 1083 (1980), enfd. 662 F.2d. 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

Accordingly, I find that based on the evidence presented by the General Counsel and the legal argument that he made, his position was substantially justified.

#### CONCLUSION

Under all of these circumstances, I find that the position taken by General Counsel with respect to a key Section 8(a)(3) allegation was substantially justified and I recommend that the Respondent's application pursuant to EAJA be denied.<sup>6</sup>

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<sup>6</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

#### ORDER

The Respondent's application for an award of attorney's fees and expenses is denied.

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Board and all objections to them shall be deemed waived for all purposes.