Western Newspaper Publishing Co., Inc. *and* Printing and Graphic Communications Union No. 17, International Printing and Graphic Communications Union, AFL-CIO. Cases 25-CA-13309(E) and 25-CA-13621(E)

29 October 1985

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND JOHANSEN

On 18 September 1984 Administrative Law Judge Thomas A. Ricci issued the attached supplemental decision. The Applicant filed exceptions and a supporting brief, and 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,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application of the Respondent, Western Newspaper Publishing Co., Inc., Indianapolis, Indiana, for attorney's fees and expenses under the Equal Access to Justice Act is denied.

[1] The Applicant has excepted to the judge's suggestion that the General Counsel was substantially justified in issuing the complaint in this case because the issues involved required credibility resolutions. In finding the complaint was substantially justified, however, the judge did not rely on the existence of credibility disputes. Rather, the judge found that the decision in this case turned on certain factual inferences which he was only able to draw after hearing lengthy testimony subject to cross-examination. Further, we note that the Board did resolve a credibility dispute as to a crucial issue when it credited the Respondent's assertion that its inclusion of a proposal to delete bindery work from the contract with its March 1981 proposals was merely an oversight.

The Applicant has also excepted to the judge's finding that the General Counsel was substantially justified in issuing this complaint because the Board decision took a different view of the facts than the judge did. The Board did not reverse the judge's findings or conclusions, however; it merely amplified his findings. Therefore, we do not rely on this finding in adopting the judge's supplemental decision.

[2] We believe that Congress, in revising the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), as amended by Pub. L. 99-80, 99 Stat. 183 (1985), did not alter but merely clarified the definition of "substantially justified." "Substantially justified" means more than "mere reasonableness" H.R. Rep. 99-120 at 9 (1985).

Sharon Ballin, Esq., for the General Counsel.
Herbert C. Snyder, Jr., Esq. (Barnes, Hickam, Pantzer & Boyd), of Indianapolis, Indiana, for the Respondent.
Frederick W. Dennerline, Esq. (Fillenwarth, Dennerline, Graoth & McCracken), of Indianapolis, Indiana, for the Charging Party.

SUPPLEMENTAL DECISION

Application for Attorney's Fees and Expenses Under the Equal Access to Justice Act

THOMAS A. RICCI, Administrative Law Judge. On September 14, 1983, I issued a decision in which I found that the record as a whole did not suffice to prove that the Respondent, Western Newspaper Publishing Co., Inc., had violated Section 8(a)(5) of the National Labor Relations Act, as alleged in the complaint, and I also found that the Respondent had committed an unfair labor practice in violation of Section 8(a)(1), but because that was a relatively minor offense, I recommended dismissal of the complaint in its entirety. Exceptions having been filed, the case was considered by a three-member panel of the Board. On March 26, 1984, the Board issued its Decision and Order, in which it agreed with the conclusion that the 8(a)(5) allegation had not been proved, but issued a remedial order with respect to the 8(a)(1) violation found to have been committed. While agreeing with my recommendation to dismiss the 8(a)(5) aspect of the case, a majority of the Board panel took a different view of the case, saw the facts in a different light, and explicated its view in an extended statement of facts and rationale. One Board member, while also agreeing with the ultimate conclusion, found it "unnecessary" to adopt his colleagues' decision "in its entirety."

On April 25, 1984, the Respondent filed an application for an award of attorney's fees and expenses, with supporting documents, pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C § 504 et seq. (1982), which was referred to me for appropriate action by order of the Board dated April 26, 1984.[1]

The General Counsel filed an answer to the application of the Respondent on May 24, 1984, also with a supporting memorandum, in which she moved for dismissal of the entire request for attorney's fees and expenses. The General Counsel urges dismissal of the application on a number of grounds, the principal one of which is that prosecution of the alleged unfair labor practice in this case was "substantially justified." Therefore, she argues, pursuant to Section 504(a)(2) of the EAJA and Section 102.44(a) of the Board's Rules and Regulations, the Respondent is not entitled to recover fees or expenses. Because I find merit in that contention, I deem it unnecessary to consider the merits of other contentions made in the motion to dismiss.

However it be phrased, the test of whether a respondent is entitled to counsel fees after a Board proceeding is whether or not the General Counsel acted reasonably in issuing the complaint, and whether or not there was substantial justification for going ahead with the case.[2]

[1] The Respondent also filed a simultaneous motion, also referred to me by the Board, to withhold information from public disclosure. That motion is granted.

[2] From Sec. 102.144(a) of the Board's Rules with respect to the EAJA:
Continued

These are not tests that can be made with mathematical precision, when the answer is dictated by objective considerations in all cases. When potential witnesses are interviewed separately and by diverse investigators, a certain impression is formed. If the statements are not self-contradicting, or otherwise inherently incredible, it is not unreasonable for the General Counsel to rely on them. When, later, at a formal hearing, the various witnesses are questioned and cross-examined exhaustively, the outsider who hears the case may form a different opinion of what really happened, or what was said by the participants. Experience has demonstrated that the most reliable way to learn the true facts surrounding an event is from live testimony subject to cross-examination.

It must also be remembered that when the administrative law judge decides which way he or she will decide the case, he or she sets out reporting the facts in the most persuasive way possible, in order to assure affirmance in case of appeal. This does not mean that the other view, which the judge rejects, lacks a reasonable basis. In fact, this very case well illustrates the point, because the two members of the Board panel, which ultimately considered the record, took still a third view of the facts, not only different from that of the General Counsel when issuing the complaint, but also different from that of the judge. If there can be three views of the same case, it can hardly be said that any one of them was "unreasonable," or not "substantially justified."

What in my opinion most clearly justified the General Counsel's decision to go ahead with this case is the second part of her legal appraisal of the question presented. The first was that because there was no impasse reached in the bargaining process, the Respondent was not justified in taking unilateral action by changing conditions of employment without agreement by the Union. The second is that even if the parties were at an impasse, it was because the Respondent was insisting on a contract provision outside the proper scope of collective bargaining. Were she correct on this latter contention, the complaint would have been sustained. And it is precisely on this point that I believe the record in its entirety warrants the conclusion that she was "substantially justified" in issuing the complaint.

In their testimony the witnesses played with words and were ambiguous and confused in their conflicting contentions. The problem started with the wording of the contract in effect when the bargaining began. Unlike the usual collective-bargaining agreement, this one did not describe the bargaining unit in conventional terms—by listing precise occupations. Instead, it set out countless functions in the greatest variety of machines used in the printing industry. Where the contract recognized the Union as bargaining agent for "all employees working in the classifications covered by this contract," it embodied all the functions previously described elsewhere in the contract. The Company's proposal to change the contract—the demand in which it insisted upon to impasse—was to give it freedom to use any other employees it chose to do part of the work listed in the contract. The Union called this a change in the "jurisdiction" of the Union; the General Counsel called it a change in the "bargaining unit." If the General Counsel's position had prevailed after all the testimony was appraised, she would have won the case.

Apart from this confusion which could only be resolved by a formal hearing and careful analysis of the facts as given by both sides, there is another relevant reality which, in my judgment, absolutely justified the General Counsel in proceeding. As reported in my decision: "At the time of the events, the second half of 1980, the Company had 28 employees, 7 represented under contract by Local 17 of the International Printing and Graphic Communications Union (previously known as the Pressmen's Union), the Charging Party here, 4 represented by the International Typographical Union (ITU), which did not participate in the hearing, 12 shop workers not represented by any union, 2 office clericals and 1 janitor."

A critical proposal by the Company was removal from the contract coverage of all bindery work as detailed among many other operations, in article 43 of the expiring contract. On the Union's objections, this was a major issue leading to the impasse. With 15 of the total of 28 employees not represented by any union, can the General Counsel be faulted for believing that the Respondent was insisting on altering the bargaining unit, or being free to use employees outside the contract bargaining unit to do the work—however described—covered by the union contract? She produced witnesses who quoted the management agents as stating unequivocally that the Company wished to be free, when necessary, to have some of the work falling within the scope of the Local 17 contract, by its employees who were covered by the ITU contract. It is true that other testimony received at the hearing tended to explain away this direct evidence, but the General Counsel had a right to believe her witnesses in the circumstances. Restated, in terms of the new law, was she acting "reasonably," was she "substantially justified" in issuing the complaint? I think yes.

As it happened, and is often the case, when the total record was considered, including many other related facts that came to light with the detailed examination and cross-examination of witnesses, I saw reason for dismissing this major allegation. But, again to quote authority:

> The standard, however, should not be read to raise a presumption that the government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the government to establish that its decision to litigate was based on a substantial probability of prevailing.[3]

An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof . . . is on the General Counsel, who may avoid an award by showing that his position was reasonable in law and fact.

Again, sec. 504(a)(2) of the EAJA reads that recovery is allowed "where the adjudicative officer finds that the position of the agency as the party to the proceeding was substantially justified . . . .

[3] S. Rep. 96-253 at 7; H.R. Rep. 96-1418 at 11.

ORDER[4]

It is ordered that the Application for Attorney's Fees and Expenses filed by the Respondent pursuant to the Equal Access to Justice Act and Section 102.143 et seq. of the Board's Rules and Regulations is denied.

[4] 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.