Abbott House, Inc. *and* District Council 1707, Community and Social Agency Employees Union, AFSCME, AFL-CIO. Case 2-CA-19743(E)

31 October 1985

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND JOHANSEN

On 25 March 1985 Administrative Law Judge Steven Davis issued the attached supplemental decision. The Applicant 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 conclusions[1] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application of the Applicant, Abbott House, Inc., Irvington, New York, for attorney's fees and expenses under the Equal Access to Justice Act is denied.

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

SUPPLEMENTAL DECISION

(Equal Access to Justice Act)

STEVEN DAVIS, Administrative Law Judge. On April 9, 1984, I issued a decision in which I recommended that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed with the Board exceptions and a supporting brief, and Respondent filed limited cross-exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions.

On September 18, 1984, the Board issued its Decision and Order, 272 NLRB 78, adopting my recommended Order and dismissing the complaint.

Abbott House, Inc. (the Applicant) filed an application for the award of legal fees and expenses pursuant to the Equal Access to Justice Act (EAJA), dated October 16, 1984.[1]

On November 20, the General Counsel filed a motion to dismiss the application and, on November 28, the Applicant filed a response to the motion to dismiss. On December 10, I issued an order denying the motion with leave for the General Counsel to file an answer to the application.

On January 11, 1985, the General Counsel filed an answer to the application and a memorandum in support of the answer and, on January 24, the Applicant filed a memorandum in response to the General Counsel's answer and memorandum.

The major issue is whether the General Counsel's position in the underlying case was substantially justified.

The underlying case turned on an interpretation of several documents. The complete facts are set forth in my initial decision, but essentially the Applicant and the Union executed a successor agreement (a stipulation of settlement) in September 1982, setting forth in some detail the terms of their agreement. The stipulation, which was to expire on June 30, 1983, stated that "the existing collective bargaining agreement shall be extended for an additional term as expressly hereinafter modified." The stipulation did not on its face contain an automatic renewal clause. However, the prior collective-bargaining agreement did have such a provision which required 60 days' notice of an intent to amend or terminate the contract.

The Union notified the Applicant that it wished to negotiate a new agreement and the Applicant rejected the notice as untimely pursuant to the prior agreement's automatic renewal clause requiring 60 days' notice, and refused to bargain with the Union inasmuch as it regarded the contract as being automatically renewed for 1 year.

The General Counsel correctly argued that the stipulation of settlement on its face did not contain an automatic renewal clause and was for a definite 2-year term. The General Counsel further argued that paragraph 1 of the stipulation of settlement completely replaced article XXII of the prior agreement which contained an automatic renewal clause, and that an automatic renewal clause may not be inferred where none exists. The General Counsel noted, in support of this theory, that the parties did not discuss an automatic renewal clause during their negotiations leading up to the execution of the stipulation of settlement.

The Applicant's main point is that the General Counsel was not substantially justified in issuing the complaint.

The main thrust of this agreement is that the complaint was issued notwithstanding "clear and unequivocal Board precedent which was factually and legally dispositive and adverse to [the General Counsel's] case."[2] The General Counsel admits that, if the stipulation of settlement was found to have contained an automatic renewal clause, then the Union had not provided the Applicant

[1] The Applicant also filed with the Board a petition requesting the Board to increase the maximum rate for attorney fees On November 16, 1984, the Board denied that petition 272 NLRB 78

[2] It is noted that, prior to the issuance of the complaint, the Applicant cooperated fully in the investigation of the matter by providing extensive written statements of facts, its position, legal authority in support of its case, arguments why the Union's authorities should not be accepted, and an affidavit from its official

with timely notice of its intention to modify or terminate the agreement.

It was, of course, the General Counsel's position that the stipulation of settlement did not contain such a clause. Inasmuch as that document did not, on its face, include an automatic renewal clause, the case turned on an *interpretation* of the relevant documents, and a careful analysis of the facts relied on by the General Counsel to support her theory.

In this respect, the Applicant's heavy reliance on *DeBolt Transfer*, 271 NLRB 299 (1984), is misplaced. In that case, the judge, affirmed by the Board, found that there were no genuine issues of contract interpretation and no credibility issues (id. at 302). On the contrary, in the instant case, I was required to (a) make a credibility determination, (b) decide whether certain disputed testimony should be resolved, and (c) interpret the relevant documents to determine whether the stipulation of settlement incorporated the automatic renewal clause contained in the prior agreement.[3]

I discredited Union Agent Kennedy's testimony (fn. 9) regarding the reason for giving 10 days' notice under the prior agreement, and found that he provided such notice in order to conform with the requirements of article XXII of that contract which contained the automatic renewal clause. If I credited his testimony, additional weight would have thus been given for the General Counsel's theory, along with other undisputed facts, which would have supported a finding that the automatic renewal clause was not incorporated by reference in the stipulation of settlement.

I found it unnecessary to resolve two other credibility conflicts, in view of my interpretation of the stipulation of settlement to include the automatic renewal clause. Both of those disputes, if resolved in the General Counsel's favor, would have given considerable weight to the General Counsel's theory. They involved testimony that (a) the Applicant agreed to, but did not in fact prepare a complete collective-bargaining agreement after the execution of the stipulation of settlement and (b) Union Official Kennedy told the Applicant's official prior to the execution of the stipulation of settlement that 60 days' notice was not required.

> The General Counsel's case failed, at least in part, because of the adverse credibility resolution. Such credibility issues, which are not subject to resolution by the General Counsel in the investigative stage of a proceeding on the basis of documents or other objective evidence, are, in the first instance, the exclusive province of the administrative law judge; they require submission of a case to the fact-finding process of litigation.

Charles H. McCauley Associates, 269 NLRB 791, 793 (1984).

It must be found that the General Counsel's position that the stipulation of settlement did not contain an automatic renewal clause was substantially justified and was reasonable in law and in fact.

> The test of whether or not the General Counsel's action is "substantially justified" is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and in fact, no award will be made. This standard, however, should not be read to raise a presumption that the Government's 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. See H.R. Rep., No. 1418, 96th Cong. and Ad. News 4984, 4989. *Enerhaul, Inc.*, 263 NLRB 890 (1982). Further, it is immaterial that the General Counsel, in supporting his substantial justification, may not have established a prima facie case of violation. *Enerhaul Inc.*, supra. To be "substantially justified," however, the General Counsel must present evidence which, if credited by the factfinder, would constitute a prima facie case of unlawful conduct by the applicant. *S.M.E. Cement, Inc.*, 267 NLRB 763 (1983).

Bosk Paint & Sandblast Co., 270 NLRB 514 (1984).

It is clear that, if I credited the General Counsel's theory, supported by testimony from her witnesses that the stipulation of settlement did not incorporate the automatic renewal clause of the prior contract, she would have set forth a prima facie case that the Applicant unlawfully refused to bargain with the Union. Thus the General Counsel, in deciding to issue the complaint, was faced with the following (a) undisputed facts that (i) the stipulation of settlement did not contain, on its face, an automatic renewal clause, (ii) the stipulation of settlement provided for a fixed term of 2 years, (iii) there was no discussion concerning an automatic renewal clause in the negotiations leading up to the signing of the stipulation, (iv) no effective 60-day notice was sent by either party prior to any previous bargaining effort, and (v) before the start of the prior negotiations, the applicant continued to bargain notwithstanding the Union failed to give timely 60-day notice; and the following (b) disputed facts that (i) Union Official Kennedy told the Applicant's official that 60 days' notice was not required, (ii) the Applicant agreed to prepare a complete contract after the execution of the stipulation of settlement, and (iii) Union Official Kennedy provided 10 days' notice although not pursuant to the terms of the automatic renewal clause.

The General Counsel argues that, pursuant to the Board's clear authority to interpret collective-bargaining agreements in the course of deciding unfair labor practice cases, *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428 (1967); *Electrical Workers IBEW Local 11 (Los Angeles NECA)*, 270 NLRB 424, 426 fn. 9 (1984), she properly construed the stipulation of settlement as not containing an automatic renewal clause. The General Counsel also relies on the theory that the Union cannot be found to have waived its right to bargain because no clear and unequivocal waiver can be found here. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 603 (1983). Although I

[3] I stated in my decision that "this case turns upon the interpretation to be given the stipulation of settlement" 272 NLRB at 79

found the waiver theory to be inapplicable to the instant matter, the General Counsel was substantially justified in raising and relying upon it as a possible basis upon which the Union's conduct could be viewed.

Inasmuch as this case involved a close question of the interpretation to be given the stipulation of settlement and the prior collective-bargaining agreements and, in part, a determination of the credibility of witnesses for both parties, I must conclude, based on the foregoing, that the General Counsel's case had a reasonable basis in fact and in law and was substantially justified. I therefore issue the following recommended[4]

ORDER

IT IS ORDERED that the application of the Applicant, Abbott House, Inc., for an award under the Equal Access to Justice Act is dismissed.

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[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.