Adams and Westlake, Ltd., a wholly owned subsidiary of Midwest Management Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local Union No. 1367 and Adams and Westlake Company, Party of Interest. Case 25-CA-15316(E)

23 December 1985

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND JOHANSEN

On 20 August 1984 Administrative Law Judge Donald R. Holley 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 decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] 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 application of the Applicant, Adams and Westlake, Ltd., a wholly owned subsidiary of Midwest Management Corporation, Elkhart, Indiana, for an award under the Equal Access to Justice Act is dismissed.

Walter Steele, Esq., for the General Counsel.
Joel H. Kaplan, Esq., and *William P. Schurgin, Esq. (Seyfarth, Shaw, Fairweather & Geraldson)*, of Chicago, Illinois, for the Respondent
Richard J. Swanson, Esq. (Miles, Segal & Macey), of Indianapolis, Indiana, for the Charging Party.

SUPPLEMENTAL DECISION ON APPLICATION FOR ATTORNEY FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

DONALD R. HOLLEY, Administrative Law Judge. On April 5, 1934, I issued a decision in this case finding, in effect, and while the General Counsel had established, prima facie, that Adams and Westlake, Ltd. (the Applicant) was the successor to Adams and Westlake Company and had violated Section 8(a)(5) of the Act by refusing to recognize and bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local Union No. 1367 (the Union), the Applicant had rebutted the General Counsel's prima facie showing of violation by proving that at the time the Union made its demand, Applicant had a good-faith doubt that it enjoyed majority status. The complaint was dismissed in its entirety and no exceptions were thereafter filed with the Board. On June 22, 1984, Adams and Westlake, Ltd. filed an application for attorneys' fees with the Board pursuant to the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 (EAJA) and Section 102.143 of the Board's Rules and Regulations. At the same time, the Applicant filed a petition to amend rule on maximum rates for attorneys' fees with the Board. Thereafter, by Order dated June 26, 1984, the Board referred the application to me for "appropriate action." The petition to amend rule on maximum rates for attorneys' fees was retained by the Board for appropriate action. On August 3, 1984, the General Counsel filed an answer to the application. Both parties have briefed their positions, and in reaching my decision, I have carefully considered their briefs.

Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) (1982), as amended by Pub. L. 99-80, 99 Stat. 183 (1985), provides that an award shall be made to a prevailing party unless "the position of the agency as a party to the proceeding was substantially justified." Congress described the "substantially justified" as follows:

> The test of whether or not a government 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.[1]

[1] 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 p 9 (1985).

In affirming the judge, we do not adopt or rely on his discussion of *Sofco, Inc*, 268 NLRB 159 (1983). Nor do we rely on his finding that the Applicant failed to make General Manager Ott or other employees available to the Region's investigator to verify its position statement The General Counsel admits in its answering brief to the Board that Ott was made available and was interviewed, and there is no record evidence whether the Region ever requested interviews with the employees Nevertheless, we affirm the judge's conclusion that the General Counsel was substantially justified in issuing the complaint because the Applicant's duty to bargain turned largely on the close factual issue of whether the Applicant had a good-faith doubt based on objective evidence that the Union lacked majority status, which factual issue itself turned significantly on the credibility of Ott We note in this regard that, in her posthearing brief to the judge, the General Counsel vigorously attacked Ott's testimony that the Applicant entertained a good-faith doubt of the Union's majority status at the time of the Union's demand for recognition The General Counsel based her argument, inter alia, on the fact that the Applicant did not file its RM petition until 24 March 1983, some 3 months after the employees allegedly told Ott they were dissatisfied with the Union, 2 months after the Union's demand for recognition, and 1 month after the unfair labor practice charge was filed Although the judge ultimately credited Ott, based on his demeanor, this alone does not establish that the General Counsel's position was not substantially justified.

[1] S Rep 96-253, 96th Cong 2d Sess et seq, H R Rep 96-1418, 96th Cong 2d Sess at 10

Congress further indicated that no adverse inferences were to be drawn from the fact that the Government did not prevail:

> 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.[2]

Section 102 144(a) of the Board's Rules and Regulations likewise places the burden of proof on the General Counsel to show that he was substantially justified in issuing the complaint, and that its position in the proceeding was reasonable in law and fact The Board has further held that it is immaterial that the General Counsel may not have established a prima facie case of a violation.[3] However, for the General Counsel's position to be substantially justified within the meaning of Section 102.144(a), the General Counsel must present evidence which, if credited by the factfinder, would constitute a prima facie case of unlawful conduct [4]

The Applicant contends in its application that the following positions of the Regional Director and the General Counsel in this proceeding were not substantially justified.

> (a) The Regional Director's issuance of the Complaint in Case No. 25 CA 15163 on April 21, 1983, which was dismissed in its entirety by the Board after hearing;
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> (b) The Regional Director and General Counsel's refusal to conduct a Board-conducted election rather than litigating NLRB Case No. 25 CA 15316 at any time during the course of the proceedings;
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> (c) The Regional Director's belated, inequitable and unreasonable decision to indefinitely postpone the hearing scheduled for July 18, 1983, until September 27, 1983, by order dated July 15, 1983, and received by Respondent on July 18, 1983, without providing adequate notice to Respondent;
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> (d) The Regional Director and General Counsel's decision to proceed to hearing in Case No. 25 CA 15316 having been informed on numerous occasions by Respondent of its clear and unequivocal good faith doubt of the Union's continued majority status, including the specific named employees and conversations upon which the Administrative Judge based his decision and its willingness to abide by the results of a Board conducted election;
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> (e) General Counsel's failure to come forward with any evidence whatsoever to rebut Respondent's testimony by General Manager Leroy Ott regarding statements made to him by AWL Ltd employees clearly and unequivocably evidencing their desire not to be represented by the Union for purposes of collective bargaining despite the fact that Respondent had provided the Board with the names of the employees who had spoken to Ott and what they had said *nearly six months prior to the hearing* [see Exhibit B];
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> (f) The General Counsel's perfunctory treatment of Respondent's good faith doubt defense in its post-hearing brief to the Administrative Law Judge;
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> (g) The General Counsel's, blantantly [sic] inaccurate statement of certain facts in his post-hearing brief which required Respondent to file a Motion to Strike that was granted by the Administrative Law Judge to the extent that the Administrative Law Judge's finding were at variance with the assertions contained in General Counsel's post-hearing brief; and
>
> (h) The General Counsel's failure to file exceptions to the Administrative Law Judge's dismissal of the Complaint in its entirety to the Board as provided for under its rules.

Review of the application reveals that the Applicant bottoms its claim on a contention that it furnished the Regional Office with evidence which should have caused it to conclude that it had not violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union on January 17, 1983, because it then had a good-faith doubt that the Union enjoyed majority status. In support of its claim, the Applicant attached to its application as Exhibits A and B two letters which were prepared by legal counsel to convey the Company's position on the charge filed in Case 25-CA-15316 to the Region The first letter, dated March 23, 1983, indicates, inter alia, that the appropriate bargaining unit consisted of 21 regular and part-time maintenance employees; that 15 of the 21 employees had formerly worked for Adlake; that 6 of the 21 were individuals who had never worked for Adlake; that 7 of the 15 former Adlake employees had stated unequivocably that they were opposed to having the Union represent them at the Company; and that as the new hires who had never worked for Adlake could not be presumed to support the Union, it appeared that 13 of the 21 employees employed as production and maintenance employees did not favor union representation. The second letter, dated April 4, 1983, set forth brief summaries of conversations Plant Manager Ott allegedly had with 7 of the 15 former Adlake employees during which such employees allegedly informed Ott they did not want to be represented by the Union. Noting that Ott, in his testimony during the trial of this case, described his conversations with the same seven employees named in its April 4, 1983 letter to the Region, and that I found that Ott's unrebutted testimony justified a finding that the Company had shown sufficient objective considerations to support its contention that it had a good-faith doubt on January 17, 1983, that the Union enjoyed majority status, the Applicant contends that the Region and/or the General Counsel was not substantially justified in issuing a complaint. The Applicant contends the General Counsel was not substantially justified in proceeding to trial because the Region should have interviewed the employees named in its April 4,

[2] S Rep 96-253, supra at 7, H R. Rep 96-1418, supra at 11
[3] *Enerhaul, Inc*, 263 NLRB 890 (1982)
[4] *Jim's Big M*, 266 NLRB 665 (1983)

1983 letter between April 4 and September 27, 1983, the date the unfair labor practice hearing commenced.

The General Counsel contends the application should be dismissed for numerous reasons. With respect to the issuance of complaint, he observes that during the investigation of the charge filed in Case 25–CA–15316 the Company refused to permit Regional personnel to personally interview and obtain affidavits from company officials. He attacks the Applicant's contention that it furnished evidence during the investigation by observing that statements of position by legal counsel do not constitute evidence. In addition, he observes that the Company's counsel specifically indicated when sending the position letters under discussion to the Region that the statements contained in them were not to be treated as evidence. Thus, he observes that at footnote of the March 23, 1983 letter counsel stated:

> The statement of facts and position set forth herein is based upon the undersigned's understanding and investigation of the facts at the time of this statement of position. By submitting the instant statement of position, the Company in no way waives its right to present new or additional facts or arguments based upon subsequently acquired information or evidence. Further, this statement of position, while believed to be true and correct in all respects, does not consitute an affidavit and is not intended to be used as evidence of any kind in any Board or court proceeding in connection with the above-referenced charge.[5]

With specific regard to company counsel's April 4, 1983 letter, the General Counsel observed in his response to the application that the accounts of conversations Ott allegedly had with the seven named employees were incomplete, vague, and failed to reveal the context in which they occurred.

In addition to contending the Region could not be expected to base a dismissal of an unfair labor practice charge upon mere representations of legal counsel, the General Counsel sought to establish that the Region was substantially justified in issuing the complaint by indicating that, prior to the issuance of complaint, the Region possessed sworn testimony of union witnesses which revealed: that the Applicant was a successor to the predecessor employer, Adlake; that Adlake and the Union were signatory to a collective-bargaining contract at the time of the transfer; and that at the time the Union demanded recognition and bargaining on January 17, 1983, 15 of the 21 production and maintenance employees employed by the Applicant on January 17, 1983, had previously been employed by Adlake. Citing *Shamrock Dairy, Inc*, 119 NLRB 998 (1957), the General Counsel contends that the evidence in his possession before complaint issued compelled the Region to conclude that the investigation had revealed, prima facie, that the Applicant had violated Section 8(a)(5) of the Act by refusing to recognize the Union.

Noting that I found in my decision in the underlying unfair labor practice case that: the Applicant was the successor of Adlake; that the Union was signatory to a collective-bargaining agreement covering Adlake's production and maintenance employees at the time of the transfer and/or sale of the railroad and accessories portion of Adlake's business; that all 14 of the production and maintenance employees employed by the Applicant on January 17, 1983, the date the Union demanded recognition, were formerly employed in the bargaining unit at Adlake, and that the Applicant refused to recognize and bargain with the Union, I find that the General Counsel's decision to issue complaint in this case had a reasonable basis in law and fact.

Apparently, the Applicant bases its claim that the General Counsel was not substantially justified in litigating the issues framed by the complaint and the applicant's answer on the following contentions: (1) The General Counsel should have accepted as fact the information set forth in the position letters prepared by counsel during the investigation of the charge; and (2) between April 4, 1983, and the date of the commencement of the trial on September 27, 1983, the General Counsel should have interviewed the seven employees it named in its April 4, 1983 letter to the Region. I have found, supra, that its first contention is without merit. With respect to the second contention, I note that the General Counsel failed in his brief, which was filed with his answer to the application, to indicate whether any attempt was made by the Region to interview the employees named in the above-mentioned letter to ascertain whether the employees actually informed Ott they did not wish to be represented by the Union in their employment with the Applicant. It may well be that the General Counsel made no effort to interview such employees. Assuming that is so, it would not cause me to find that the General Counsel was not substantially justified in proceeding to trial because the basic deficiency in the investigation resulted from the Applicant's failure to establish its affirmative defense rather than the General Counsel's failure to "beat the bushes," so to speak, to exonerate the Applicant. As the Applicant failed to make Ott or the employees with whom he had the conversation available to the individual assigned to investigate the underlying unfair labor practice charge, I conclude that the General Counsel's decision to cause the Applicant to establish its affirmative defense through sworn testimony at an unfair labor practice hearing was reasonable and proper.

The Applicant contends that the General Counsel should have abandoned the unfair labor practice proceeding after Ott testified because the General Counsel did not seek to rebut his testimony and it clearly revealed that the Applicant's refusal to recognize the Union was lawful as it possessed a good-faith doubt that the Union represented a majority of its employees at the time of the demand for recognition. I find the contention to be without merit. The General Counsel argued strenuously in his posthearing brief that Frank Krok, president of the Applicant's parent company, Midwest, rather than

[5] Counsel's April 4, 1983 letter to the Region contained similar qualifications as it stated, inter alia "This letter should be considered part of our March 23, 1983 statement of position, *which is incorporated herein in its entirety*" (Emphasis added.)

Ott, made the decision to refuse to recognize the Union and conveyed that decision to the Union and, thus, the subjective evidence given by Ott was hearsay and could not be relied on by the Applicant as a basis for forming a good-faith doubt of the Union's majority status. *Terrell Machine Co.*, 173 NLRB 1480 (1969), and *White Castle System*, 224 NLRB 1089 (1976), cited by the General Counsel are supportive of his position. Additionally, the General Counsel argued in his brief that the statements attributed by Ott to eight employees were insufficient, as a matter of law, to establish that such employees did not want the Union to represent them as their bargaining agent. Significantly, I accepted his argument, in part, by finding that employee Gordon Lee had not indicated to Ott that he did not want the Union to represent him in his employment at the Applicant. Finally, the General Counsel observed, in the brief filed in this matter, that the Board changed the evidentiary standards applicable in cases involving alleged good-faith doubt of a union's majority status when it issued its decision in *Sofco, Inc.*, 268 NLRB 159 (1983), after the hearing in the instant case was closed. I agree and add that it could be argued that by according controlling weight to Ott's testimony, I went a step further than the Board went in *Sofco* as Krok rather than Ott was the Applicant official who notified the Union that the Applicant would not recognize the Union as the bargaining agent of its employees.

In sum, the Applicant's claim in this case that it had a good-faith doubt that the Union enjoyed majority status on January 17, 1983, presented a close factual issue. While I eventually resolved the issue in the Applicant's favor, it is probable that the issue would have been resolved in the General Counsel's favor but for the Board's issuance of its decision in *Sofco* between the time the hearing was closed and the date of my decision. I find that the General Counsel's position during the hearing and thereafter was substantially justified and was otherwise reasonably based in law or fact.

Remaining are the contentions concerning the Regional Director's refusal to process the petition filed in Case 25–CA–15316, and the claim that the General Counsel's posttrial actions were not substantially justified.

By complaining in its application that the Regional Director acted improperly when he chose to dismiss the petition filed in Case 25–RM–502, the Applicant is, in effect, requesting that I make findings concerning a matter which was concluded when the Board, on June 16, 1983, denied the Applicant's request for review of the Regional Director's dismissal of the RM petition. Having found the General Counsel was substantially justified in issuing a complaint in Case 25–CA–15316, I make no further findings with respect to the contention under discussion.

With respect to the Applicant's contention that the Regional Director was not substantially justified in his decision to postpone the hearing in Case 25–CA–15316 from July 18 to September 27, 1983, the General Counsel indicates in his opposition to the application that such action was taken because a new charge had been filed with the Region which alleged that the Applicant had unlawfully refused to hire certain union officers. The General Counsel asserts that to avoid a multiplicity of trials, which would subject the parties to greater expense, hearings in unfair labor practices cases are routinely postponed until the investigation of related charges is completed. Patently, the Regional Director's decision to postpone the hearing, as described, above was substantially justified.

The Applicant claims the General Counsel's posttrial position was not substantially justified because. (1) He treated the Applicant's good-faith doubt defense in "perfunctory" fashion in his posthearing brief; (2) he made "blatantly inaccurate statements(s) of certain facts in his posthearing brief; and (3) he failed to file exceptions to the dismissal of the complaint in its entirety. As noted, supra, the General Counsel made cogent and reasonable arguments in his posttrial brief and supported his contentions with logical arguments and case citations. His treatment of the Applicant's defense was not "perfunctory." When reviewing his posttrial brief, I was unable to find what I would deem to be "blatantly inaccurate statement of certain facts." Indeed, in my decision, I did not strike any specified portion of the General Counsel's posthearing brief. I merely indicated that the factual findings set forth in my decision were considered to be the facts presented in the case. Finally the General Counsel indicates in his opposition to the application that his review of the Board's decision in *Sofco, Inc.*, supra, caused him to conclude that the filing of exceptions to my decision was not warranted. As noted, supra, the General Counsel could have filed exceptions to my decision claiming that the instant case and *Sofco* are factually distinguishable. I find his decision to refrain from filing exceptions was substantially justified

In sum, for the reasons stated, I find the position of the General Counsel and/or the Regional Director throughout the pendency of the underlying unfair labor practice case was at all times substantially justified in law and fact.[6] Accordingly, I recommend that the Applicant's application for attorneys' fees and expenses be denied.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The application of Adams and Westlake, Ltd, a wholly owned subsidiary of Midwest Management Corporation, Elkhart, Indiana, for attorneys' fees and expenses under the Equal Access to Justice Act is denied.

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[6] In view of my disposition of the substantial justification issues, I deem it unnecessary to reach the additional defenses and arguments raised by the General Counsel in opposition to the application

[7] 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