

Albert T Ledford Trucking Company and Laborers' International Union of North America, Local 513, AFL-CIO Cases 9-CA-24125(E) and 9-CA-24247(E)

May 4, 1989

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND CRACRAFT

On February 15, 1989, Administrative Law Judge Robert T Wallace issued the attached Supplemental Decision denying an award under the Equal Access to Justice Act. The Applicant filed exceptions with supporting argument, 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 brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application of the Applicant, Albert T Ledford Trucking Company, Hamilton, Ohio, for attorney's fees and expenses under the Equal Access to Justice Act is denied.

Jack V Baker Esq for the General Counsel
Daniel C McCarthy Esq of Indianapolis Indiana for the Respondent

SUPPLEMENTAL DECISION

Equal Access to Justice Act

ROBERT T WALLACE Administrative Law Judge No exceptions were taken to my decision, served on March 11, 1988 in which I recommended that the complaints be dismissed, and the Board adopted that recommendation by order dated April 27.

On May 23 1988, Respondent Applicant (Ledford) filed an application for attorney's fees and costs pursuant to the Equal Access to Justice Act (EAJA), Public Law 96-481, 94 Stat 2325 5 USC § 504 and Section 102.143 of the Board's Rules and Regulations. The matter was referred to me for appropriate action on May 31 1988. On July 13, I denied a motion to dismiss filed by the General Counsel, and the latter filed an answer on September 13. Thereafter, Applicant responded in a motion for judgment on the pleadings, and it later (on January 5 1989) sought to amend the motion apparently for the main purpose of calling my attention to a Board decision in *Lion Uniform* 285 NLRB 249 (1987).

There were two allegations in the complaint (1) that Applicant laid off certain employees so as to lend credence to its threats to go out of business if employees continued to support the Union, and (2) that Applicant circulated an antiunion petition among its employees. The question presented under EAJA is whether the General Counsel had substantial justification for issuing and pursuing the complaint. See *Lion Uniform*, supra. I find affirmatively.

Regarding the first charge, the key is whether Applicant laid off the named employees pursuant to a firm intent to withdraw from the trucking business. Although I found it had such intent, I did so only after its principal official (Albert Ledford) testified at the very end of the trial that he had just entered into a contract of sale for his last remaining dump trailers. Up to that point Applicant indisputably was still in business, and I was not inclined to credit his claim that he would soon terminate all operations, particularly in view of unopposed finding of Judge Evans in the earlier case that Applicant had engaged in numerous unfair labor practices including repeated predictions that it would close down. Accordingly, I find that there was substantial justification for the charge through the time of trial and until the General Counsel had an opportunity to ascertain that the Company indeed went out of business, and had not resumed operations under another name. Apparently she was satisfied in that regard by the time a decision had to be made on filing exceptions to my initial decision since none were filed. In the circumstances the elapsed period of about 9 months between the trial and her opting not to pursue the case further was reasonable.

Also presenting a very close question was the issue of whether Ledford had approved the antiunion letter written by his secretary and ultimately I credited her account that she acted alone only after accepting Ledford's 11th hour statement that he was out of business. As stated in the initial decision there would have been no point in his sanctioning the letter if he had an unwavering intent permanently to shut down.

Conclusions

Accordingly I find that there were substantial justifications for instituting and pursuing with the case through trial and the briefing stages and accordingly that the application for fees and expenses should be denied.

On the foregoing findings and conclusions the record in the unfair labor practice case the pleadings, and pursuant to Section 102.153 of the Board's Rules and Regulations I hereby issue the following recommended¹

ORDER

The instant application for an award under the Equal Access to Justice Act is denied.

¹ 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.