

**Horizon Contract Glazing, Inc. and District Council of Painters No. 16 Glazier and Architectural Metal and Glassworkers Local Union No. 767, International Union of Painters and Allied Trades, AFL-CIO.** Case 20-CA-32880(E)

March 25, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On January 15, 2009, Administrative Law Judge Jay R. Pollack issued the attached supplemental decision. The Applicant filed exceptions and a supporting brief. The Charging Party filed exceptions and a response to the Applicant's exceptions. The General Counsel filed an answering brief to the Applicant's exceptions and a motion to strike the Applicant's brief.

The National Labor Relations Board<sup>1</sup> has considered the supplemental decision and the record in light of the exceptions and briefs<sup>2</sup> and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We adopt the judge's denial of the application for attorneys' fees and expenses for the following reasons. We agree with the judge that conflicting inferences about the Applicant's motivation for refusing to recall alleged discriminatee Joseph Upchurch could reasonably be drawn from testimony about statements made during his November 8, 2005 conversation with the Applicant's secretary-treasurer, Michelle Klein. In the underlying proceeding, the judge inferred that this evidence proved that animus against Upchurch's union employee status motivated the refusal to recall. In reversing the judge, the Board drew the contrary inference that the statements showed the Applicant's officials were motivated by anger about what they perceived to be unjustified personal pay demands by Upchurch. It is well established that the General Counsel's litigation position is substantially justified where it is possible to draw a set of inferences that

<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>2</sup> The General Counsel argues that the Applicant's Brief in Support of Exceptions fails to comply with Sec. 102.46(c) of the Board's Rules and Regulations, because the Applicant failed to argue in support of specific exceptions and merely repeated the Equal Access to Justice Act (EAJA) application arguments. We find that the Applicant's exceptions and brief are in substantial compliance with the Board's Rule. See *Sea Mar Community Health Centers*, 345 NLRB 947 fn. 1 (2005).

would have supported the General Counsel's position. See *Meaden Screw Products Co.*, 336 NLRB 298, 302-303 (2001); *Europlast, Ltd.*, 311 NLRB 1089 (1993), affd. 33 F.3d 16 (7th Cir. 1994).

Apart from evidence about the November 8, 2005 conversation, the General Counsel presented evidence of the Applicant's shifting defenses for refusing to recall Upchurch, as well as other circumstantial evidence that, if credited, might reasonably have established the animus element of the General Counsel's prima facie case. Although the judge failed to address this evidence, and the General Counsel did not except to his failure to do so, the evidence provides further support for finding that the General Counsel's litigation position was substantially justified. For it is also well established that "where the General Counsel is compelled by the existence of a substantial credibility issue to pursue the litigation, and therefore to present evidence, which, if credited, would constitute a prima facie case, the General Counsel's case has a reasonable basis in fact and law and is substantially justified" (citations omitted). See *Golden Stevedoring Co.*, 343 NLRB 115, 116 (2004).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge.

*Micah Berul, Esq.*, for the General Counsel.

*Brian S. Crone, Esq. (Muphy Austin Adams Schoenfeld, LLP)*, for the Respondent-Employer Applicant.

SUPPLEMENTAL DECISION AND ORDER

JAY R. POLLACK, Administrative Law Judge. This is a supplemental proceeding under the Equal Access to Justice Act (EAJA), 5 U.S.C.A. §504 (1982). On October 4, 2006, I issued my decision in the above-captioned case, finding that Horizon Contract Glazing, Inc. (the Respondent or the Applicant) had violated Section 8(a)(3) and (1) of the Act, by unlawfully refusing to recall Joseph Upchurch, a union organizer, because of his employment by the Union. On September 25, 2008, the Board issued its Decision and Order reversing my decision and dismissing the complaint in its entirety. On October 24, 2008, the Respondent filed an application for EAJA. On October 27, the Board issued an Order referring the matter to me for disposition. On December 12, counsel for the General Counsel (the General Counsel) filed its answer to the application seeking to dismiss the application in its entirety. On December 30, the Respondent filed its response.

EAJA provides for the award of attorney's fees and expenses to eligible parties who prevail in litigation before administrative agencies, unless the Government can establish that its litigation position was either "substantially justified" or that special circumstances exist which would make such an award unjust. Although the EAJA statute is silent as to the meaning of "substantially justified," the Supreme Court in *Pierce v. Underwood*, 487 U.S. 552 (1983), rejected a standard of something

more than simple reasonableness:

The statutory phrase “substantially justified” means justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person. This interpretation of the phrase . . . is equivalent to the “reasonable basis in law and fact” formulation adopted by the vast majority of Courts of Appeal.

The Board has utilized a case-by-case approach in analyzing EAJA cases. It has interpreted the reasonableness standard in such a way as to not interfere with the vigorous enforcement of the labor laws. Where there have been close questions of law and fact, no awards have been made. In cases where conflicting inferences can be drawn from the evidence, the General Counsel is entitled to resolve the conflict in favor of the violations alleged. The General Counsel’s failure to prevail raises no presumption that she was not substantially justified in asserting her position. Where credibility issues crucial to the outcome of the case cannot be resolved administratively on the basis of documentary or other objective evidence, the General Counsel is substantially justified in taking the case to trial before and administrative law judge. *Bouley, Inc.*, 308 NLRB 653, 654 (1992); *Advance Development Corp.*, 277 NLRB 1086, 1087 (1985)

In my decision I rejected Respondent’s defense that it failed to hire Upchurch because he falsified his job application. I further found that Upchurch gave Michelle Klein, Respondent’s secretary-treasurer, an NLRB lecture and demanded that he be paid properly. Klein and Pat Shurnas, the Respondent’s president, were displeased by this action. I found by this conduct Upchurch reinforced the fact that he was an employee of the Union (and Gene Massey, union business manager) and not just a union member. Thereafter, Upchurch was told that there was no work for him and Shurnas decided not to recall Upchurch unless forced to do so. Based upon a preponderance of the evidence, I found that the General Counsel had sustained the initial burden of showing that Upchurch’s employment as a

union agent was a motivating factor for the failure to recall or rehire him. The Board reversed; finding that the conversation between Upchurch and Klein did not reveal union animus. Rather, the Board found that Respondent was motivated by the fact that Upchurch had insisted on payment under circumstances where the Respondent was not at fault. The Board found that Upchurch was involved in a personal pay dispute rather than union activity.<sup>1</sup>

While I am bound by the Board’s Decision and the inferences drawn by the Board, I do not find my initial decision unreasonable. In cases where conflicting inferences can be drawn from the evidence, the General Counsel is entitled to resolve the conflict in favor of the violations alleged. Having found a violation, I cannot find that the General Counsel’s position was unreasonable.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The General Counsel’s Motion to Dismiss the Application for an award of attorney’s fees and expenses under EAJA is granted and the application is dismissed in its entirety.

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<sup>1</sup> The Board also noted, in fn. 5, that the General Counsel had not excepted to the judge’s failure to find that the Respondent raised shifting defenses that warrant the inference of pretext and union animus as the real reason for the refusal to reemploy Upchurch.

<sup>2</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 Board and all objections to them shall be deemed waived for all purposes.