

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

NORTHWEST COMMUNITIES EDUCATION
CENTER

and

Cases 19-CA-31777 (E)
19-CA-31983

TEAMSTERS LOCAL 760

and

Case 19-CA-31843

SAIDA M. BIRRUETA, an Individual

and

Case 19-CA-31911

JESUS SOSA, an Individual

Daniel Apoloni, Esq. and Richard C. Fiol, Esq.
Seattle, WA, for the General Counsel
Gary Lofland, Esq., Lofland & Associates,
Yakima, WA, for the Respondent

SUPPLEMENTAL DECISION AND ORDER

Gerald A. Wacknov, Administrative Law Judge. This is a Supplemental Decision and Order pursuant to the Respondent's application for an award of allowable fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. Section 504 and Section 102.143, et. seq., of the Rules and Regulations of the National Labor Relations Board (the Board).

I. PROCEDURAL HISTORY

I issued a Decision in this case on June 18, 2010, finding that the Respondent had violated the Act in certain respects and also finding that the Respondent had not violated the Act in certain other respects. No party filed exceptions to this decision, and on August 5, 2010, the Board issued an Order adopting the findings and conclusions contained therein.

On August 6, 2010, the Respondent filed an Application for Award of Attorney Fees and Costs with the Board, and by Order dated August 18, 2010, the Board referred the Respondent's application to the undersigned.

On September 10, 2010, Pursuant to an Order to Show Cause dated September 2, 2010, the General Counsel filed a response opposing the Respondent's application. The Respondent filed no reply to the General Counsel's opposition.

Neither the Respondent nor the General Counsel have requested a supplemental hearing on this application, and I find none is needed to resolve the matters presented.

II. RESPONDENT'S FINANCIAL ELIGIBILITY

5 The Respondent attached to its application the appropriate ruling by the Internal Revenue Service, dated November 8, 1994, showing that it qualifies for exempt status as an organization described in section 501(c)(3) of the Internal Revenue Code. See Section 102.147(b)(1) of the Board's Rules and Regulations. It therefore meets the eligibility requirements for an award of allowable fees and expenses pursuant to EAJA.

10 III. THE UNDERLYING CASE

15 The complaint in the underlying case contained five substantive allegations. I found that one employee, Jesus Sosa, the recognized spokesperson for the employees, was disciplined on December 22, 2008 for requesting a meeting with the Respondent's board of directors regarding employees' working conditions and other related matters, and that by this conduct the Respondent violated Section 8(a)(1) of the Act. I also found that on June 23, 2009, the Respondent unilaterally announced and changed its lunch hour policy and refused to bargain in good faith with the Union over this matter in violation of Section 8(a)(5) of the Act.

20 I dismissed three allegations of the complaint. Two of the allegations pertained to Sosa. Thus, I found that the Respondent did not violate the Act by disciplining Sosa for speaking out on behalf of employees during a staff meeting conducted by the Respondent's executive director; and that the Respondent did not violate the Act by further disciplining Sosa pursuant to its alleged progressive discipline policy. I further found that the Respondent did not violate the Act by refusing the request of employee Saida Biurrueta that she be permitted to have a co-worker present as a witness during an interview with the executive director. During the course of the hearing the General Counsel presented evidence supporting these compliant allegations, and after the close of hearing provided argument and citations of authority in support of these allegations.

30 IV. THE RESPONDENT'S CONTENTIONS

In its application the Respondent states, without further argument, as follows:

35 The position of General Counsel was not substantially justified because:

- 40 A. The testimony of Birrueta clearly and unmistakably demonstrated the purpose of the meeting of March 19, 2009 was not disciplinary in nature. Birrueta did not testify that she believed the meeting was disciplinary and also testified that she had been told discipline would not be imposed.
- 45 B. The general counsel alleged that during a staff meeting on February 7, 2009 Sosa engaged in protected activity by "complaining about the discharge of former staff members." The evidence showed Sosa did not make such statements and the employee who did was not disciplined.
- C. Sosa's verbal attack on another employee during the February 7, 2009 meeting was clearly inappropriate and uncalled for.
- 50 D. The general counsel did not contest the reasons for the suspension of Sosa on April 21st [2009], only the degree of discipline.

- E. General counsel did not consider the application of Section 10(c) to the facts alleged.

V. ANALYSIS AND FINDINGS

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The Respondent's contentions are discussed seriatim.

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The "counseling" of Birrueta took place over 2 days, and proved to be heated, confrontational, and emotional to the point of causing Birrueta to feel ill as a result. Despite assurances that the meeting was not disciplinary, Birrueta's work performance and attitude were criticized in a confrontational manner by the Respondent's executive director, even to the extent that Birrueta felt compelled to tell the executive director not to yell at her. Under these circumstances, despite what Birrueta was told about the purpose of the meeting, it was clearly reasonable for the Regional Director to include the allegation in the complaint as the interview, while nominally non-disciplinary, was certainly of a disciplinary rather than a "counseling" tenor.

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The Respondent is incorrect that Sosa, during the February 7, 2009 staff meeting, did not complain about the discharge of other staff members as alleged in the complaint. In fact, as the underlying decision points out at page 10, lines 35-40, Sosa vigorously complained to the executive director on behalf of the employees that the employees considered the discharge of their coworkers to be unfair.

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While I found that Sosa was disciplined for his criticism of a named coworker rather than for complaining about the discharge of former coworkers, it was reasonable for the Regional Director to include this allegation in the complaint. Thus, Sosa had previously been unlawfully disciplined for attempting to bring similar issues before the board of directors and, under the circumstances, the motive for this subsequent discipline of Sosa was clearly a matter to be explored through an evidentiary proceeding.

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The General Counsel made it very clear that the purpose of this complaint allegation was to resolve the issue of whether the Respondent maintained a progressive disciplinary policy; if so, even subsequent lawful discipline for an unrelated infraction would have been premised on and thereby exacerbated by the earlier unlawful discipline imposed on Sosa. Moreover, it was reasonable for the Regional Director to have relied upon the executive director's statement in an email to the General Counsel, during the course of the region's investigation, that "We did apply a progression of discipline to . . . Jesus Sosa."

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The Respondent does not explain what it means by this final contention. Although the Respondent states the General Counsel did not consider the application of Section 10(c) of the Act, it would appear the Respondent is referring to Section 8(c) of the Act, commonly referred to as the "freedom of speech" provision. I do not understand the Respondent's nonspecific contention in this regard, and therefore I find it to be without merit.

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On the basis of the foregoing it is clear that the complaint was substantially justified and, in addition, that each of the complaint allegations which I dismissed in this proceeding were substantially justified. *Glesby Wholesale, Inc.*, 340 NLRB 1059 (2003); *Golden Stevedoring Co.*, 343 NLRB 115 (2004); *C. Factotum, Inc.*, 337 NLRB 1 (2001).

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ORDER¹

The Respondent's application for an award of allowable fees and expenses is denied.

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Dated: October 22, 2010.

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Gerald A. Wacknov
Administrative Law Judge

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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.