

Charles H. McCauley Associates, Inc. and Richard L. Beck. Case 10-CA-14423(E)

30 March 1984

SECOND SUPPLEMENTAL DECISION  
AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
HUNTER AND DENNIS

On 3 November 1983 Administrative Law Judge Michael O. Miller issued the attached decision. Thereafter, Applicant Charles H. McCauley Associates, Inc. (McCauley) 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 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.

The judge found, and we agree, that McCauley's application for an award of fees under the Equal Access to Justice Act<sup>1</sup> should be dismissed because the General Counsel's case was reasonably grounded in fact and law and was substantially justified. In support of his finding, the judge relied, *inter alia*, on the Board's decision in *Enerhaul Inc.*, 263 NLRB 890 (1982). The decision was reversed by the Court of Appeals for the Eleventh Circuit. *Enerhaul Inc. v. NLRB*, 710 F.2d 748 (1983). We need not, however, directly address here the court's decision in *Enerhaul*, for the criteria relied on by the court as the basis for reversing *Enerhaul* are not present in the instant case. Thus, in *Enerhaul*, the court found that the Board's legal theory for the underlying unfair labor practice was inconsistent with the case law of the Fifth Circuit, as formally adopted by the Eleventh Circuit. For this reason, the court found that the Board's position was unreasonable, and reversed.

By contrast, in the instant case, the Fifth Circuit agreed with the legal theory of the underlying unfair labor practice found here and further agreed that McCauley violated Section 8(a)(1) and (3) by discharging employee Beck. *NLRB v. McCauley Associates*, 657 F.2d 685 (5th Cir. 1981). Nevertheless, the court remanded this case to the Board for further factual findings relating to the remedy given for the violation. Thus, the court directed the Board to ascertain whether McCauley had made and Beck had refused an unconditional offer of reinstatement. A second hearing was then held

to resolve the credibility questions bearing on this issue. The judge discredited employee Beck and found that, contrary to the General Counsel's contention, McCauley had offered Beck unconditional reinstatement. While the General Counsel's position at the second hearing was rejected, we agree with the judge that the General Counsel properly pursued this matter to a second hearing because the General Counsel cannot himself resolve credibility issues. In these circumstances, we agree that the General Counsel's position both at the initial and the supplemental hearing was reasonably grounded in fact and law and was substantially justified. We note, moreover, that the proceedings in this case are consistent with the circuit court's case law and with its remand. Accordingly, we hereby adopt the judge's recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and hereby orders that the application of the applicant, Charles H. McCauley Associates, Inc., Birmingham, Alabama, for an award under the Equal Access To Justice Act is dismissed.

SECOND SUPPLEMENTAL DECISION

[EQUAL ACCESS TO JUSTICE ACT]

MICHAEL O. MILLER, Administrative Law Judge. On April 25, 1983, the National Labor Relations Board, herein called the Board, issued a Supplemental Decision and Order<sup>1</sup> in this proceeding, affirming the rulings, findings, and conclusions of this administrative law judge as set forth in my Supplemental Decision of October 28, 1982. The Board held that Charging Party Beck had rejected Applicant's unconditional offer of reinstatement and modified its original order and notice accordingly. On May 22, 1983, Charles H. McCauley Associates, Inc., herein called the Applicant, the prevailing party in that aspect of the case, filed an application for attorney's fees under the Equal Access to Justice Act, herein called EAJA,<sup>2</sup> and Section 102.143 of the Board's Rules and Regulations.

The application states that the Applicant is a corporation whose net worth was less than \$1 million and that it had but 22 employees. It asserts that the allegations of the General Counsel's complaint and subsequent litigation, to the extent that they alleged that Beck had never been offered reinstatement, were without substantial justification and that it is entitled to \$14,782.04 in fees and expenses incurred in defending against those allegations.

On June 23, 1983, the General Counsel filed a motion to dismiss the application, contending that: (1) Applicant's fees and expenses incurred prior to October 1, 1981, the effective date of EAJA, are not compensable;

<sup>1</sup> The judge's citation of this statute in fn. 2 of his decision is incorrect. The correct citation is P.L. 96-481, 94 Stat. 2325.

<sup>1</sup> 266 NLRB 649.

<sup>2</sup> P.L. 96-481, 94 Stat. 325.

(2) its fees and expenses incurred in pursuing the EAJA application are not compensable; (3) its fees and expenses incurred during the investigatory stage of the unfair labor practice proceeding are not compensable; (4) the application is deficient because it fails to state whether there are any affiliates or subsidiaries of the Applicant; (5) the application is deficient because it fails to specify the categories of Applicant's employees; (6) the application is deficient in that it fails to establish the net worth of the Applicant on the date the complaint issued; and that (7) the General Counsel's position in the underlying unfair labor practice hearings was substantially justified.

On June 30, 1983, the Applicant filed a reply to the General Counsel's motion to dismiss. In that reply *inter alia*, the Applicant established by affidavit that it had but one associate, with no employees and a net worth which did not exceed \$1,000 during any relevant time, that the 22 employees listed in the application included all its employees of every category, and that there was no substantial change in Applicant's financial condition between February 28, 1979, the date of Applicant's balance sheet appended to its initial application, and April 9, 1979, the date on which the initial complaint herein issued. Accordingly, to the extent that the General Counsel's motion to dismiss is based on alleged deficiencies arising from the failure to plead the absence of affiliates, to designate the categories in which its employees were employed, or to establish the net worth of the Applicant on the date the complaints were issued,<sup>3</sup> it is denied.<sup>4</sup>

Section 504(a)(1) of EAJA provides that an award shall be made unless "the position of the agency as a party to the proceeding was substantially justified or . . . special circumstances make an award unjust." The burden of establishing substantial justification is on the Government and the test of whether or not governmental action is substantially justified is one of reasonableness. The Government, to defeat an award, must establish that its position had a reasonable basis in fact and law.<sup>5</sup> The fact that the Government lost its case, however, does not give rise to any presumption that its position was unreasonable.<sup>6</sup> In this case, the General Counsel prevailed on the question of whether or not the Applicant had discriminatorily discharged Richard L. Beck. However, as the Applicant had offered to settle and thereby make litigation unnecessary, and the General Counsel had rejected that settlement offer, contending that the offer of reinstatement to Beck was conditional, which question became the subject of the supplemental litigation, the General Counsel's victory on the question

of discrimination does not necessarily establish substantial justification for continuation of the litigation.<sup>7</sup>

In the initial litigation, the Applicant sought to adduce evidence that it had tendered an unconditional offer of reinstatement to Beck subsequent to his filing of the charge. The General Counsel objected and I sustained that objection, concluding that the issue of whether an unconditional offer of reinstatement has been made was appropriately left to the compliance stage of the proceeding, if any. The Board, in affirming that ruling, held<sup>8</sup> that "The Administrative Law Judge properly ruled that the issue of an offer of reinstatement is a matter best raised at the compliance stage of the proceeding." Subsequently, the United States Court of Appeals for the Fifth Circuit, while affirming the Board's substantive determinations, held that the Board should have determined whether Beck had been offered unconditional reinstatement before proceeding with its remedy. It remanded that aspect of the case to the Board.<sup>9</sup> The Board accepted the court's remand and further remanded the proceeding to me for hearing.<sup>10</sup>

At issue in the supplemental proceeding was but one question, whether the Applicant's offers required Beck's withdrawal of his unfair labor practice charge. The General Counsel contended that they did and that, pursuant to *Tri-State Truck Service*, 241 NLRB 225 (1979), such offers were conditional. In agreeing with Respondent, I found that the language of Applicant's offers was clear and unambiguous and met, in all particulars, Beck's demands. I found that Beck did not, at any time, insist on the posting of an NLRB notice such as might result from either a Board-approved settlement or from successful prosecution of his unfair labor practice charge. However, in reaching that conclusion, I discredited testimony of Beck which, if credited, would have established that Beck was insisting on such a Board-furnished remedy, including a notice. It further would have established the Applicant's insistence on Beck's withdrawal of his charge as a condition of returning to work. Thus, Beck testified that "he called both David Hand, [Applicant's] vice-president and Markstein [its counsel] to ask them whether he would be required to withdraw his charge in order to return to work. . . . Both told him he would have to do so." Hand and Markstein denied having any such conversations with him and I credited their testimony. Had Beck sought, and had Respondent refused to provide, such a remedy the Applicant's offer would have been conditional pursuant to the relevant case law cited

<sup>3</sup> It is immaterial, in this case, that Applicant's balance sheet reduced the value of its fixed assets by "accumulated depreciations." Even absent this depreciation, the Applicant's net worth is clearly less than \$5 million, the cutoff point for eligibility under EAJA.

<sup>4</sup> In view of my resolution of the substantial justification question, *infra*, I need not reach the additional questions raised by the General Counsel's motion. I would note, however, that the General Counsel incorrectly asserted that a fee incurred with respect to a September 20, 1982 "hearing at NLRB and at hospital" was unrelated to the unfair labor practice complaint matter. In fact, as the transcript of the September 20, 1982 hearing reveals, a portion of that hearing was conducted at the hospital bedside of Applicant's counsel, D.H. Markstein, Jr.

<sup>5</sup> S.Rep. No. 96-253, 96 Cong., 1st Sess. 6-7, 14-15 (1979); H.R. Rep. No. 96-1418, 96 Cong., 2d Sess. 10-11 (1980).

<sup>6</sup> H.R. Rep. No. 96-1005 (Part 1) 96 Cong. 2d Sess.

<sup>7</sup> See *Tyler Business Services v. NLRB*, 695 F.2d 73, 75 (4th Cir. 1982), wherein the court concluded that the fact that "the Government's preliminary decision to institute an administrative proceeding may not justify an award of attorney fees . . . would not preclude an award, if at subsequent stages of the administrative process . . . it appears that the Government's position at these levels of litigation was not substantially justified." See also *Estate of Curry v. U.S.*, 549 F.Supp. 47 (D.C. Ind. 1982).

<sup>8</sup> At 248 NLRB 346, fn. 2.

<sup>9</sup> 657 F.2d 685 (5th Cir. 1981).

<sup>10</sup> Notwithstanding its earlier statement concerning the propriety of referring to the compliance stage the question of the employer's offer of reinstatement, the Board subsequently stated, on review of my supplemental decision, that it had "long held that the 'better practice' is for an Administrative Law Judge hearing alleged unfair labor practices to admit testimony concerning offers of reinstatement." 266 NLRB 649 (1983).

by the General Counsel, *supra*. See also *P & F Industries*, 267 NLRB 650 (1983).

Thus, the General Counsel presented evidence which, *prima facie*,<sup>11</sup> established the merits of the contentions it was making. 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

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<sup>11</sup> See *Hillside Bus Corp.*, 262 NLRB 1254 (1982), Member Jenkins dissenting on other grounds, where the Board noted that "in assessing whether a *prima facie* case has been presented, an Administrative Law Judge must view the General Counsel's evidence in isolation, apart from the respondent's proffered defense." See also *SME Cement*, 267 NLRB 763 fn. 1 (1983), where the Board stated:

... it is immaterial [to the question of substantial justification] that the General Counsel may not have established a *prima facie* case of violation. We note, however, that for the General Counsel's position to be substantially justified within the meaning of Section 102.1044(a) of the Board's Rules and Regulations, Series 8, as amended, the General Counsel must present evidence which, if credited by the fact finder, would constitute a *prima facie* case.

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 factfinding process of litigation. Accordingly, as the General Counsel was compelled by the existence of a substantial subjective credibility issue to pursue this litigation, and presented a *prima facie* case, I must conclude the General Counsel's case had a reasonable basis in fact and law and was substantially justified.<sup>12</sup> I therefore issue the following recommended

#### ORDER

The General Counsel's motion to dismiss this application is granted and the application of Charles H. McCauley Associates, Inc., for a fee award under the Equal Access to Justice Act is dismissed.

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<sup>12</sup> *Enerhaul Inc.*, 263 NLRB 890 (1982).