

Stucco Stone Products, Inc. and Western Graphic Arts Union No. 14, International Printing and Graphic Communications Union, AFL-CIO; and Teamsters Local 490, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 20-CA-16128(E), 20-CA-16257(E), 20-CA-16465(E), 20-CA-16682(E), and 20-RC-15277(E)

14 June 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 18 November 1983 Administrative Law Judge Gerald A. Wacknov issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application of Stucco Stone Products, Inc. for attorney fees and expenses under the Equal Access to Justice Act is hereby denied, and the confidential financial statement attached to and incorporated in the Respondent's application for fees shall be sealed and withheld from public disclosure, under the provisions of 29 CFR 102.147(g).

¹ In accordance with our recent decision in *W. C. McQuaide, Inc.*, 270 NLRB 1197 (1984), we agree with the judge that in determining an applicant's net worth, assets are properly valued at their acquisition cost and not at their depreciated value.

SUPPLEMENTAL DECISION

(Equal Access To Justice Act)

GERALD A. WACKNOV, Administrative Law Judge. These consolidated cases were litigated before me during 26 days between December 1, 1981, and June 3, 1982. In my decision, which issued on February 8, 1983, I found that Stucco Stone Products, Inc. (herein the Applicant), had committed certain isolated and relatively innocuous unfair labor practices. However, I dismissed the remainder of the allegations which comprised the overwhelming substance, both in terms of importance and quantity, of the consolidated complaints. I further recommended that the Board refer to the United States Department of

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Justice the Applicant's request for criminal prosecution of a key witness for the General Counsel because of purported "false testimony."

Exceptions to the decision were filed by both the General Counsel and the Charging Parties. Thereafter, on April 13, 1983, the General Counsel filed a motion to withdraw complaint, submitting that the Charging Parties requested that the charges and objections filed in the representation proceeding be withdrawn. On June 22, 1983, the Board granted, over the Applicant's objection, the General Counsel's motion to dismiss complaint.

On July 22, 1983, in an "Application for an Award of Fees and Expenses Under the Equal Access to Justice Act" (EAJA), Pub. L 96-481, 94 Stat 2325, and Section 102.143 of the Board's Rules and Regulations, the Applicant applied to the Board seeking an award of attorney's fees and expenses, and also filed a motion to withhold confidential information from public disclosure. By order dated July 26, 1983, the Board referred the matter to me for appropriate action.

Thereafter, on September 19, 1983, the General Counsel timely filed a motion to dismiss the application together with a supporting brief, and on October 18, 1983, the Applicant filed its opposition thereto.

This decision is issued pursuant to Section 102.153(a) of the Board's Rules and Regulations.

Issue

The threshold issue is whether an applicant for attorney's fees and expenses under EAJA and the applicable related Rules and Regulations of the Board may deduct accumulated depreciation in arriving at its "net worth."

I. FINDINGS

The instant case squarely presents the foregoing issue. The comparative balance sheet submitted by the Applicant shows that as of October 29, 1981, the Applicant had total net assets of \$3,441,173 (total assets minus total liabilities). However, in arriving at that figure, the Applicant used the amount of \$1,371,370 for the net value of its leasehold improvements and machinery and equipment, having arrived at this figure by deducting accumulated depreciation for such leasehold improvements and machinery and equipment in the amount of \$1,613,878. If, as the General Counsel contends, it is inappropriate to deduct accumulated depreciation, the Applicant's net worth of October 29, 1981, was \$5,055,051, thus disqualifying it from the recovery of attorney's fees and expenses under EAJA.

The identical issue has been presented in at least four decisions of administrative law judges,¹ and in each instance it was determined from a review of the legislative history of EAJA that assets, whether comprised of real property or machinery and equipment, are to be valued for purposes of EAJA at their acquisition cost rather

¹ *W. C. McQuaide, Inc.*, JD-235-83 (June 7, 1983); *Malcomb Boring Co., Inc.*, JD-(SF)-80-82; *Sentle Trucking Corporation*, JD-54-83; *Glenmar Cinestate, Inc.*, JD-171-83 (Apr. 22, 1983). Apparently the foregoing recommended orders were adopted by the Board in the absence of exceptions.

than, as the Applicant herein contends, at their fair market value, and that neither appreciation nor depreciation of property should be considered for purposes of computation of net worth under EAJA.

The rationale for such a determination is not that acquisition cost constitutes the most accurate or even an arguably realistic indication of an asset's current value, but rather is simply premised on the principle of expediency in order to preclude complex collateral litigation involving the propriety of particular accounting methods and valuations. As Judge Schlesinger summarized in *W. C. McQuaide, Inc.*, supra, in reviewing the foregoing recommended decisions:

These decisions concluded that Congress' failure to refer to depreciation was purposeful; that Congress meant what it said; that Congress opted for a simple and readily verifiable method to compute the value of an organization attempting to utilize EAJA; and that Congress did not desire that EAJA applications become bogged down either with contested appraisals of the fair market value of property or with determination of the propriety of different methods of depreciation, such as straight line, declining balance, double declining balance, or sum-of-the-year's digits.

Accordingly, in the absence of any contrary authority, I concur with the reasoning and conclusions embodied in the foregoing decisions governing the calculations of net worth.²

On the foregoing findings and conclusions and on the entire record I issue the following recommended³

ORDER

The General Counsel's motion to dismiss the application of Stucco Stone Products, Inc. for attorney's fees and expenses under the Equal Access to Justice Act is hereby granted. Further, the confidential financial statement attached to and incorporated in Respondent's application for fees shall be sealed and withheld from public disclosure, under the provisions of 29 CFR 102.147(g).

² In view of this determination, I deem it unnecessary to discuss the General Counsel's numerous additional contentions in support of the motion to dismiss. Further, I deny the Applicant's request to file an amended financial statement reflecting net worth as of the date the initial complaint here was issued, as Respondent has not contended that its net worth, as defined herein, would be less than \$5 million on that date, namely, April 29, 1981.

³ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."