

**Bouley, Inc., d/b/a Bouley and Hotel Employees and Restaurant Union, Local 100, of New York, New York and Vicinity, AFL-CIO.** Case 2-CA-23851(E)

August 31, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On June 4, 1992, Administrative Law Judge Raymond P. Green issued his supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the supplemental decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the application is denied.

*Margit Reiner, Esq.*, for the General Counsel.  
*Jerrold Goldberg, Esq. (Epstein, Becker & Green, P.C.)*, for the Respondent.  
*Harold Ickes, Esq. (Meyer, Suozzi, English & Klein, P.C.)*, for the Union.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. On August 29, 1990, I issued my decision in this case and held:

1. That the Respondent did not, as alleged in the complaint, violate Section 8(a)(3) of the Act by discharging or issuing a warning to David McGrath because of his union activities.

2. That the Respondent, nevertheless violated Section 8(a)(4) of the Act by discharging McGrath because it believed that he would file an unfair labor practice charge with the National Labor Relations Board (Board).

3. That the Respondent, violated Section 8(a)(1) of the Act by interrogating employees about their union activities and by threatening to close the facility.

4. That the Respondent, did not solicit grievances and impliedly promised to remedy them.

On February 26, 1992, the Board issued its Decision and Order which, although sustaining the 8(a)(1) and (3) findings described above, dismissed the 8(a)(4) finding. The Board's majority concluded that as the complaint did not allege an 8(a)(4) theory and as such a theory was not advanced at the trial, the Respondent did not have notice of this allegation and therefore had no opportunity to prepare and present a de-

fense to it. Chairman Stephens, however, would have remanded the case for further proceedings on the 8(a)(4) issue.

On March 25, 1992, the Respondent filed an application for attorney's fees pursuant to the Equal Access to Justice Act and the Board's Rules and Regulations, Section 102.143 et seq.<sup>1</sup> The Respondent asserted that it was a qualifying prevailing party in the unfair labor practice proceeding<sup>2</sup> and asked for attorney fees as to the allegations concerning the warning and discharge of McGrath and the alleged solicitation of grievances. It also asked for attorney fees concerning the appeal of the 8(a)(4) allegation, asserting that the General Counsel was not substantially justified in seeking affirmance of the 8(a)(4) finding by the administrative law judge.<sup>3</sup>

The Equal Access to Justice Act (EAJA) at 5 U.S.C. § 504(a)(1), provides in pertinent part:

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative . . . position of the agency as party to the proceeding was substantially justified or that special circumstances make an award unjust.

In *Carpenters Local 2848 (Dallas Corp.)*, 291 NLRB 787 fn. 2 (1988), the Board stated:

In finding that the General Counsel was substantially justified, the judge cites the Board's standard for substantial justification as "something more than mere reasonableness as to both law and fact." Under the Supreme Court's elucidation of this standard in *Pierce v. Underwood*, 108 S.Ct 2541 (1988), the Government is substantially justified if its position was reasonable in both law and fact.

In *Pierce v. Underwood*, 487 U.S. 552 (1988), the Supreme Court, in describing the appropriate standard for the award of attorney fees, stated:

We are of the the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main"—that is, justified to a degree that could satisfy a reasonable person. . . . To be "substantially justified" means, of course, more than merely undeserving of sanctions from frivolousness; that is assuredly not

<sup>1</sup>The application was timely filed. Sec. 102.148 requires that an application must be filed no later than 30 days after the entry of the Board's final order in the proceeding.

<sup>2</sup>The Respondent, a corporation which operates a restaurant, has fewer than 500 employees. It attached to its application, an accountant's statement indicating that its net worth was far below the \$7 million standard set forth in Sec. 102.143(c)(5) of the Board's Rules and Regulations.

<sup>3</sup>In its application, the Respondent seeks attorney's fees in the amount of \$29,058.95 which represents the amount of time spent multiplied by a rate of \$237.21. Sec. 102.145 of the Board's Rules and Regulations sets the allowable rate at no more than \$75 per hour.

the standard for Government litigation of which a reasonable person would approve.

The Respondent contends that the General Counsel was not substantially justified in issuing and pursuing the allegations regarding the warning to McGrath on September 12, and his discharge on September 14, 1989. I do not agree.

As noted in my earlier decision, McGrath contacted the Union in August 1989 and solicited union membership from other employees in August and September of that year. The evidence showed that the Respondent contemporaneously engaged in illegal interrogation (on September 17, 1989) and in October 1989, threatened to close the restaurant if the employees selected a union. This coupled with evidence that the Respondent was aware of union activity prior to McGrath's discharge, establishes a reasonable basis for issuing a complaint. Nor is that diminished by the fact that the Respondent asserted, during the investigation, defenses for its actions.

The Respondent contended that the warning to McGrath was justified based on his insubordination to management's criticism on September 11, 1989. While I concluded in the underlying case that this warning was justified based on the credited testimony of Daubresse, the fact is that McGrath denied the assertion that he cursed at Daubresse and this presented to the General Counsel, prior to issuance of the complaint, a credibility issue that was best resolved by a hearing. As stated by the court in *Temp Tech Industries v. NLRB*, 756 F.2d 586, 590 (7th Cir. 1985):

Moreover, we cannot find that the General Counsel's decision to litigate an issue that turned on a credibility assessment was itself unreasonable; the fact that an ALJ might make an adverse finding on a credibility issue dose [sic] not, in and of itself, deprive the General Counsel's position of a basis in fact. Thus, we find that the Board did not abuse its discretion in finding the decision to litigate substantially justified.

By the same token, it is my opinion that the General Counsel had sufficient evidence to establish, prima facie, that the discharge of McGrath on September 14, 1989, was motivated by union considerations and therefore violative of Section 8(a)(3) of the Act. In this instance, the Respondent asserts that the General Counsel was well aware, prior to the issuance of the complaint, that the Respondent was asserting that it discharged McGrath because he wrote and transmitted the letter dated September 13, 1989. Although this is correct, that does not mean that the General Counsel was required to accept the Respondent's assertion at face value. That is, although the General Counsel was aware of McGrath's September 13 letter and the Respondent's assertion that this was the only reason that it discharged McGrath, it was not unreasonable for the General Counsel to contend, in light of the other evidence of knowledge, timing, and antiunion animus, that the Respondent's defense was pretextual in nature.

While I concluded that McGrath's letter was the only reason motivating his discharge, this does not mean that another judge hearing the same facts, might not have reached a different conclusion. These types of cases, requiring a determination of another person's motivation, i.e., state of mind,

are not susceptible to a scientific and quantifiable evaluation. The administrative law judge, like anyone else must use his own experience, knowledge, and to some degree intuition, to evaluate the record evidence in order to attempt to ascertain someone else's state of mind. It is my opinion that in this case, the General Counsel had reasonable justification when issuing the complaint to allege that the Respondent discharged McGrath in violation of Section 8(a)(3) of the Act, notwithstanding my conclusion, after the trial, that the Respondent had shown that it was not motivated by union considerations. *Morris Mechanical Enterprises v. U.S.*, 728 F.2d 497 (1984).

The Respondent contends that the General Counsel was not substantially justified in pursuing affirmance of the 8(a)(4) finding. In this regard, Chairman Stephens, although concluding that the hearing should have been reopened, also concluded that absent any other relevant information that the Respondent might have offered, the General Counsel had established a violation of Section 8(a)(4). I concur, in hindsight, that I should not have agreed with the General Counsel's argument that the hearing should not have been reopened. But that does not, in the circumstances of this case, translate into a conclusion that the General Counsel had no substantial justification in arguing that a motivation of Respondent in discharging McGrath, was its belief (whether correct or not), that McGrath was threatening to file an unfair labor practice charge.

The allegation that the Respondent solicited grievances and impliedly promised benefits was, at most, a very minor aspect of this proceeding. Again, notwithstanding my conclusion that this allegation lacked merit, the test here is whether the General Counsel had substantial justification in making the allegation and attempting to prove it at the trial. In support of its position, with which I agree, the General Counsel furnished an affidavit given by Jay Cohen during an investigation. In this affidavit, dated December 11, 1989, Cohen averred that in late September or early October 1989, David Bouley told employees that a union was not a panacea; that he would work with the staff and iron out problems; that one of the waiters said that maybe the kitchen staff, like the dining room staff, could have a representative who should come up with a list of grievances; and that Bouley said that "that was fine if that's what it took."

#### CONCLUSION OF LAW

The General Counsel's position in litigating the underlying proceeding was substantially justified.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The application is dismissed.

<sup>4</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.