

C. I. Whitten Transfer Co. and James LaFountain and Michael E. Fowler. Cases 3-CA-16034(E) and 3-CA-16052(E)

August 31, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On March 12, 1993, Administrative Law Judge William F. Jacobs issued the attached supplemental decision. The Applicant filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application is denied.

¹We adopt the judge's conclusion that the General Counsel's position in the underlying unfair labor practice proceeding was substantially justified. In so doing, we additionally note that, contrary to the Applicant's contention, certain of the judge's findings in the proceeding involved credibility resolutions.

SUPPLEMENTAL DECISION

Equal Access to Justice Act

WILLIAM F. JACOBS, Administrative Law Judge. My decision in the above consolidated cases issued on May 29, 1992. In this decision, I found that Respondent had violated Section 8(a)(1) of the Act, as alleged in the complaint, on several occasions but not on other occasions, and had not violated Section 8(a)(1) and (3) of the Act by unlawfully terminating employees James LaFountain and Michael E. Fowler, reducing Fowler's work hours prior to his termination and refusing to employ Fowler's wife, Debra. I further found that Respondent had not violated Section 8(a)(1) of the Act by having its counsel threaten LaFountain on June 22, 1990, as alleged.

On November 27, 1992, the Board adopted my recommended Order in its entirety, notwithstanding the filing of exceptions, supporting briefs, and answering briefs by General Counsel and Respondent. Pursuant to the Equal Access to Justice Act (EAJA), Public Law 96-481, 94 Stat. 2325 and Section 102.143ff of the Board's Rules and Regulations, Respondent on December 23, 1992, filed with the Board in Washington, D.C., an Application for Attorney's Fees with Exhibits attached in support thereof. On January 7, 1993, the Board referred this matter to me for appropriate action. On January 20, 1993, General Counsel moved to dismiss the application and thereafter Applicant filed its Response to Gen-

eral Counsel's motion to dismiss; motion to amend application and require filing of answer by General Counsel.

General Counsel's motion to dismiss is based on several grounds including the argument that the position taken by General Counsel on the record was "substantially justified."¹ On this point, I agree with General Counsel.

At issue is whether General Counsel was substantially justified in alleging in the complaint that Respondent violated Section 8(a)(1) and (3) by unlawfully terminating James LaFountain and Michael Fowler, by reducing Fowler's work hours prior to his termination and by refusing to employ Fowler's wife, Debra. Also at issue is whether General Counsel was substantially justified in proceeding to trial on these issues and then, after the hearing, filing cross-exceptions to the judge's findings and conclusions regarding these allegations. Finally, at issue is whether General Counsel was substantially justified in alleging in the complaint that Respondent's counsel had threatened LaFountain on or about June 22, 1990.

The record evidence on which the decision in this case was grounded reflects that LaFountain and Fowler were involved in early 1990 in various union activities including the distribution of union representation cards, the making of arrangements for a meeting at the union hall, and solicitation of Respondent's employees to attend that meeting.

After the filing of the petition for an election, members of Respondent's management engaged in interrogations and threats, clearly indicating Respondent's animus toward prounion activists. Some of these threats were directed at LaFountain and Fowler and it is clear that management was aware of LaFountain's and Fowler's involvement with the Union.

The election was held on June 22 and the Union lost. Following the tally of ballots, according to LaFountain's testimony Landes said to him, "I wish you luck, Jim, but you won't be here long." Landes denied making this statement.

Following the Union's defeat, during the weeks that followed, members of management engaged in further interrogating and threats toward Respondent's employees thus indicating continued hostility toward union activists and sympathizers. LaFountain, on his part, continued to openly espouse interest in the Union, even if only for obtaining union insurance.

On the day of LaFountain's discharge, management refused, albeit for good reasons, to tell him the reason for his discharge. On December 6, he filed his charge.

With regard to the allegation concerning the reduction in Michael Fowler's hours, the record reflects that he was promised as close to a 60-hour week as possible, and through July that promise was kept. Records made available at trial supported Respondent's position that Fowler suffered no discriminatorily motivated reduction in wages. Had the wage records been made available to General Counsel during the initial stages of the investigation, the allegation concerning the reduction in Fowler's hours might not have been included in the complaint. With regard to Fowler's discharge on September 21 and his charge filed December 21, if Respondent

¹Sec. 203(a)(1) of the EAJA provides that only prevailing parties are entitled to awards and that, even if the applicant prevailed, it may not be awarded fees and expenses if the Government's position was substantially justified.

had produced witnesses to provide reasons for Fowler's discharge during the investigation, it might not have been the subject of the allegation, included in the complaint.²

With regard to the allegation concerning Respondent's failure to employ Debra Fowler, the record indicates that Ms. Fowler was not hired as an independent employee but to accompany her husband on his trips to Canada. When her husband left the employ of Respondent, under circumstances which were found to be, in my decision, not in violation of the Act, there is no way I could find any violation with regard to Respondent's failure to employ Debra Fowler. However, if I had found that her husband was terminated for discriminatory reasons, I might also have found that failure to employ her was, likewise, in violation of the Act. I find that General Counsel was substantially justified in alleging Debra Fowler as a discriminatee.

Following the filing of the charges by LaFountain and Fowler, during the investigation by the field examiner placed in charge thereof, he requested that Respondent make available its witnesses to substantiate its position. Respondent, in essence, refused to permit the investigator to interview and take affidavits from members of management but, instead, offered two self-serving letters, generally denying the allegations contained in the charges. General Counsel was not obligated to rely on these letters.³

If Respondent had made its witnesses available during the investigation, as it did during the hearing, and if it had supplied the investigator with the records it made available later, it is quite reasonable to believe that the complaint might never have issued.⁴ Respondent cannot now rely on its own

² *Lion Uniform*, 285 NLRB 249 (1987).

³ *Laborers Funds Administrative Office of Northern California*, 302 NLRB 1031 (1991).

⁴ However, it is equally possible that had Respondent made its witnesses available during the investigation, it might well have resulted

lack of cooperation to support its application for attorney's fees pursuant to Equal Access to Justice Act.⁵

For the reasons stated, I find that General Counsel was substantially justified in issuing complaint in this matter.

With regard to the filing of cross-exceptions, I find that General Counsel was substantially justified in taking this action. My interpretation of the facts and evidence and application of the law thereto was not the only interpretation and application possible. Indeed, I found this case to be a close one where, if heavier weight were given to one aspect thereof, rather than another, my decision might well have been reversed. It was reasonable for General Counsel to attempt to convince the Board that the position he took, contrary to my own, was the more correct.⁶

Inasmuch as I have found the position of the General Counsel, throughout all stages of the underlying unfair labor practice case, to be substantially justified in law and fact,⁷ I shall recommend the application for attorney's fees and expenses be dismissed.

ORDER

It is ordered that the application be dismissed.

in conflicts of credibility which would have had to be resolved by an administrative law judge at hearing. *Advance Development Corp.*, 277 NLRB 1086 (1985); *Ellison Bakery*, 304 NLRB 1131 (1991).

⁵ *Lion Uniform*, supra; *Leeward Auto Wreckers*, 283 NLRB 574 (1987).

⁶ *Budget Rent-A-Car*, 277 NLRB 1153 (1985); *Bosk Paint & Sandblast Co.*, 270 NLRB 514 (1984); *Lion Uniform*, supra; *Leeward Auto Wreckers*, supra.

⁷ My disposition of the substantial justification issue obviates the necessity of reaching the other issues raised by General Counsel in the motion to dismiss the application.