

Inter-Neighborhood Housing Corp. and Service Employees International Union Local 32E, AFL-CIO. Case 2-CA-26453

May 31, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On May 5, 1995, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The General Counsel filed exceptions¹ and a supporting brief. The Applicant filed exceptions, a supporting brief, a reply to the General Counsel's exceptions, and an updated fee request. Thereafter, the General Counsel filed a motion to deny the Applicant's petition for an increase in the maximum rate for attorney's fees² and the Applicant filed an opposition.

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

The Board has considered the supplemental decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

On September 27, 1994, in the underlying unfair labor practice case, the judge issued his decision, in which he recommended dismissal of the complaint in its entirety. The complaint alleged that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to execute an agreed-upon contract with the Union. The judge found that the Respondent did not reach an agreed-upon contract with the Union and therefore did not violate the Act. No exceptions were filed to the judge's decision and by order of November 8, 1994, the Board adopted pro forma the judge's findings and recommendations and dismissed the complaint. Thereafter, the Applicant, the Respondent below, filed an application for an award of attorney's fees and expenses under the Equal Access to Justice Act (EAJA) and Section 102.143 of the Board's Rules and Regulations. In the instant decision the judge did not find

substantial justification for the General Counsel to have pursued the complaint. Accordingly, he granted the Applicant's application and awarded it the amount of \$12,834.87. The General Counsel disputes the judge's characterization of his position in the unfair labor practice case as "not substantially justified" and asserts that he was substantially justified in issuing the complaint and proceeding to trial. We find merit in the General Counsel's contentions and for the reasons stated below, reverse the judge's findings and deny the application.

EAJA, as applied through Section 102.143 of the Board's Rules and Regulations, provides that a "respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of that proceeding" and who meets certain eligibility requirements relating to net worth, corporate organization, number of employees, etc., is eligible to seek reimbursement for certain expenses incurred in connection with that proceeding. Section 102.144 states that reimbursement of such expenses will be awarded "unless the position of the General Counsel over which the applicant has prevailed was substantially justified." To meet this burden, the General Counsel must establish that he was substantially justified at each stage of the proceeding, i.e., at the time of the issuance of the complaint, taking the matter through hearing, and filing exceptions (if any) to the judge's decision. An examination of the circumstances and evidence available to the General Counsel at these junctures is required in order to determine whether the General Counsel has carried the burden.

In order to determine whether the General Counsel has satisfied this test, it is necessary first to identify what constitutes "substantial justification." The Board has stated that substantial justification does not mean substantial probability of prevailing on the merits,³ and that it is not intended to deter the Agency from bringing forward close questions or new theories of the law.⁴ The Supreme Court has defined the phrase "substantial justification" under EAJA as "justified to a degree that could satisfy a reasonable person" or "having a reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Thus, in weighing the unique circumstances of each case, a standard of reasonableness will apply.

In this case, the judge concluded that the General Counsel was not justified in issuing the complaint. In this connection the judge found that prior to the issuance of the complaint, the General Counsel had sufficient documentary evidence to demonstrate not only that the charge's allegations were not supported but that the Union's only witness to support these allega-

¹ In its exceptions, the General Counsel argues that the Applicant's Equal Access to Justice Act (EAJA) application was not timely received by the Board. We find no merit in this contention. The Board takes administrative notice of its own files which reflect that the Applicant's application was timely received on December 8, 1994.

The General Counsel requests that we strike the submission of an affidavit of Brian Clark attached to the Applicant's EAJA application because it was prepared for the sole purpose of litigation and constitutes hearsay. We find merit in the General Counsel's contention that the affidavit constitutes hearsay and grant the motion to strike.

² The Applicant filed a motion for updated fees and a motion for an increase in the maximum rate for attorney's fees. In view of our decision denying the application for attorney's fees and expenses, we find it unnecessary to rule on the Applicant's motions.

³ *Jim's Big M*, 266 NLRB 665 fn. 1 (1983).

⁴ *Laborers Fund of Northern California*, 302 NLRB 1031 (1991); *Craig & Hamilton Meat Co.*, 276 NLRB 974 (1985).

tions was not a sufficiently reliable witness. We disagree. We note that it was only through credibility resolutions adverse to the General Counsel's case that the judge found that no agreement had been reached by the parties. The General Counsel in issuing the complaint and proceeding through trial was acting without the benefit of the judge's ultimate credibility resolutions.

In the underlying case the judge identified the central issue as turning on credibility:

The critical question in this case is whether the parties reached a complete oral agreement on February 10, 1993, which thereby required the employer, (and the Union), to execute a document embodying such terms. The Union says they did and the Employer says that they did not.⁵

Having defined the issue as a conflict between the Union's version of events and that of the Applicant, the judge credited the Applicant's version. The judge found that the evidence showed that the parties at the February 10, 1993 meeting used the Applicant's draft proposal of December 29, 1992, and its February 5, 1993 letter as the basis for discussion but that the parties did not reach a final agreement. In crediting the Applicant's version of events, the judge noted that the evidence showed that Union Negotiator Rodriguez and Union Attorney Smith were present at the February 10, 1993 meeting. The judge, however, noted that he could only rely on the testimony of Union Negotiator Rodriguez because the Union's, attorney, Smith, could not recall being present at the meeting. Thus, the judge found that Rodriguez was not corroborated by the other union witness who was present or by any notes taken by either at the meeting. On the other hand, the judge found that Applicant negotiator Clark's testimony was at least to some extent corroborated by Applicant's executive director, Zoraida Sepulveda, who was present at the meeting. The judge noted that because of Sepulveda's inexperience in labor relations, she testified that she did not understand much of what was taking place at the meeting. The judge stressed, however, that Sepulveda testified that she recalled that the parties used the February 5, 1993 letter as a guide and that there were agreements on some issues but that other issues were unresolved i.e. (prior benefits clause, sale and transfer clause, and reduction in staff clause). Regarding the unresolved issues, Sepulveda testified that the applicant did not agree to the Union's proposals. Sepulveda further testified that there was no agreement at the end of the meeting. Thus, the judge found that Applicant's negotiator Clark was at least to some extent corroborated by Sepulveda, who although admitting her confusion as to the event in question, did indi-

cate the crucial topics discussed at the meeting. Therefore, the judge found that no agreement had been reached on February 10, 1993, and that the Applicant did not violate Section 8(a)(5) by terminating negotiations and withdrawing recognition after receiving employee letters indicating their desire to no longer be represented by the Union.

In pursuing the decision to issue a complaint and take the case to hearing, the General Counsel was armed with sworn affidavits from the Union. During its investigation, the General Counsel took an affidavit from Union Negotiator Rodriguez on May 18, which described his version of negotiations.⁶ In his affidavit, Rodriguez asserted that on December 22, 1992, he and Union Attorney Smith met with Applicant's negotiator Clark. According to the affidavit, Clark agreed to a "prior better conditions" clause and Rodriguez asserted that he would have to get clearance from the union president (a) to waive a sale and transfer clause, (2) to waive a clause permitting the Union to strike in the event the Company failed to make benefit fund payments, and (3) to approve the proposed modification of the prior better conditions clause. According to the affidavit, Rodriguez contacted Clark by telephone the next day and stated that they had an agreement on the three items pending and that the union president had approved the changes. Rodriguez further stated that Clark said he would submit a draft so that the contract could be in place on January 1, 1993. Earlier in his affidavit, Rodriguez noted that in a September 15, 1992 bargaining session the Applicant's negotiator Clark had indicated that the Applicant's health coverage on unit employees was prepaid through December 31, 1992. According to the affidavit, Clark expressed concern that the contract take effect by the new year so that the employees could start their new health coverage.

The next contact between Rodriguez and Clark set forth in the May 18 affidavit was a telephone call at the end of January by Rodriguez to Clark. The parties arranged to meet on February 10, 1993. According to Rodriguez' affidavit, Union Attorney Smith was present at the meeting but the affidavit does not attribute to him any comments or other participation in the meeting. According to the affidavit, Clark said he did not have the final draft of the contract and was having trouble with the "prior better conditions" clause. According to Rodriguez, the parties agreed again to a 1-year limitation on this provision, and Clark agreed to mail the agreement as soon as possible.

According to Rodriguez' May 18 affidavit, he received letters from employees on March 5, 1993, stating that they no longer wanted the Union to represent them. According to Rodriguez, he called Clark and in-

⁵ *Inter-Neighborhood Housing Corp.*, Case 2-CA-26453 (1994) (not reported in Bound volumes).

⁶ Another affidavit was taken from Rodriguez on May 24.

formed him about the letters and warned Clark that he would file an unfair labor practice charge if Clark did not send a final agreement. Clark responded that he did not know anything about the letters. On March 10, 1993, Clark sent a draft agreement, however, he stated that the Applicant would stop bargaining with the Union because of doubts concerning the Union's majority status. On April 5, 1993, according to the May 18 affidavit, Rodriguez received another letter from Clark stating that the Company would no longer bargain with the Union.

The General Counsel also interviewed Applicant's negotiator Clark. Clark did not provide an affidavit. A company letter dated July 22, 1993, was sent to the Region, summarizing the interview and enclosing certain documentary evidence. In substance, the Applicant through the letter denied that the parties reached an oral agreement in December 1992 or any time thereafter. The Applicant asserted that Clark submitted a written contract offer to Rodriguez on December 29, 1992, and that Rodriguez raised a number of issues to be resolved during a telephone call on January 28, 1993. The Applicant enclosed a letter from Clark to Rodriguez dated February 5, 1993, wherein Clark set forth his agreement to four union demands and his opposition to four other union demands. The Applicant's July 22 letter further stated that the parties met on February 10, 1993, and that although the Union made some concessions, Clark rejected the Union's insistence on a sale and transfer clause and that he did not agree to a "prior better conditions" clause. The letter further contended that Clark told Rodriguez and Smith that he would attempt to draft a "prior better conditions" clause that was consistent with the Applicant's position and that he would send the Union a revised contract. According to Applicant's letter, the February 10 meeting ended with the parties agreeing to meet in March. The letter further contended that following the February 10, 1993 meeting Clark learned that the Applicant was unable to obtain new health insurance coverage it had been seeking for nonunion employees. Consequently, the Applicant had to return to its original plan in which participation by unit employees was necessary to meet minimum participation requirements. According to Applicant's letter, on March 9, 1993, Rodriguez informed Clark by telephone that he had been notified by three employees that they no longer wanted to be represented by the Union. On March 10, 1993, Clark sent the Union a letter forwarding the proposed agreement modified pursuant to the last negotiating session on February 10, 1993, and noting the problem concerning health insurance coverage.

After receiving the Applicant's July 22, 1993 letter, the General Counsel attempted to seek additional evidence with respect to the events of the February 10, 1993 meeting by taking the affidavit of Union Attor-

ney Smith. In his affidavit, Smith recalled his participation in the December 22, 1992 bargaining session. Smith, however, did not recall participating in any negotiations with the Applicant after December 22, 1992.

In the instant case, the judge found that based on Rodriguez' affidavit, Rodriguez was claiming that a full agreement was reached no later than December 23, 1992, after he had received clearance from the union president to make the concessions to Applicant's negotiator Clark. The judge noted that this was confirmed by another statement in his May 18, 1993 affidavit where Rodriguez asserted that some time after January 1, 1993, he received a phone call from an employee asking about the contract and that he told this employee that there was an agreement although it had not been signed. In ruling on the application for attorney's fees, the judge concluded that the General Counsel after interviewing Clark and after reviewing the Applicant's February 5, 1993 letter to the Union identifying open issues, realized that there was no conceivable way that the Union's initial assertion that an agreement had been reached on December 23, 1992, could be sustained. The judge speculated that what happened was that after reviewing the evidence obtained in the investigation, the General Counsel decided to issue the complaint based *not* on the assertion that an agreement had been reached on December 23, 1992, but rather on the new theory that an agreement had been reached on February 10, 1993. The judge stressed that such a theory was never presented to the Applicant during the investigation of the case. The judge further found that such a theory was not corroborated by Union Attorney Smith despite the fact that both Rodriguez and Clark asserted that Smith was present at the February 10, 1993 meeting. Finally, the judge found that such a theory would have to assume that Rodriguez was not a reliable witness because his initial claim that an agreement had been reached in late December 1992 was demonstrably incorrect. Thus, the judge found that the General Counsel had sufficient documentary evidence to demonstrate not only that the charge's allegations were not supported, but that the Union's only witness to support these allegations was not reliable. Therefore, the judge found that the General Counsel was not substantially justified in proceeding on the complaint.

Contrary to the judge, we find merit in the General Counsel's contention that based on the investigatory evidence, including the fact that the Applicant provided letters but not sworn testimony, and the judge's finding in the unfair labor practice proceeding that the case turned on credibility, issuance of the complaint was substantially justified within the meaning of *Pierce v. Underwood*, above.

The documents that the Applicant submitted to the General Counsel included the Applicant's December 29, 1992 letter and attached contract draft; Clark's al-

legedly contemporaneous handwritten notes of his January 28, 1993 telephone conversation with Rodriguez; the Applicant's February 5, 1993 letter identifying proposals with which it did and did not agree; sample contract language allegedly provided by the Union to the Applicant during the February 10, 1993 meeting; and the Applicant's March 10, 1993 letter and proposed collective-bargaining agreement. As the General Counsel contends, these documents only contradict Rodriguez if Clark's explanations concerning them and efforts to authenticate them are credited. In evaluating the evidence and deciding whether to proceed with the case, the General Counsel weighed Rodriguez' sworn testimony against Clark's unsworn statements.⁷ Under the circumstances, we agree with the General Counsel that the Applicant's documents and the inferences that could reasonably be drawn from them do not conclusively establish that Rodriguez' testimony was so patently unreliable that the General Counsel should have administratively discredited his entire account.⁸

The judge in this case relied on the February 5 letter to conclude that it was inconceivable that, as Rodriguez' affidavit implied, the parties reached agreement in December. The General Counsel maintains, however, that because the Applicant "gave the Regional Office substantial reason to believe that it was ambivalent about reaching an agreement" after December 1992 because of uncertainty concerning health insurance arrangements, the February 5 letter, contrary to suggesting good-faith bargaining, may have instead reflected the Applicant's desire to prolong negotiations until the health insurance issue was rectified. It was also reasonable to infer, according to the General Counsel, that once the Applicant knew that certain employees no longer desired union representation, it tried to back out of its agreement. Under this view, according to the General Counsel, it was reasonable to conclude from the Applicant's March 10, 1993 letter and contract draft, which appeared to be a complete agree-

⁷See *C.I. Whitten Transfer Co.*, 312 NLRB 28, 29 (1993)(Where the applicant refused to permit the investigator to interview and take affidavits from management but instead offered self-serving letters generally denying the charge allegations, the General Counsel was not obligated to rely on the letters).

⁸We note that the judge, citing the fact that both Rodriguez and Clark placed Smith at the February 10 meeting, found that the General Counsel should have discredited Rodriguez based in part on Smith's failure to corroborate his account of the meeting. However, we note that Clark did not testify until the hearing that Smith was at the February negotiating session. Under the circumstances, we agree with the General Counsel that it was not unreasonable to rely on the representation of Attorney Smith that he did not attend the meeting, and to conclude that Rodriguez was simply mistaken on this matter.

Moreover, we find that the General Counsel was not required to administratively discredit Rodriguez' entire testimony merely because the developing evidence did not support the legal theory that the parties reached agreement in December.

ment, in conjunction with Rodriguez' affidavits, that the parties had reached full agreement on February 10, 1993. We agree with the General Counsel that because the evidence gave rise to more than one reasonable inference, depending on which witness was believed, the General Counsel was substantially justified in issuing a complaint so that the issues could be resolved at an evidentiary hearing.

In view of the fact that the judge's decision in the underlying unfair labor practice case turned on credibility and inferences from the evidence, we find that, if the testimony of the Union's negotiator Rodriguez had been credited and the testimony of the Applicant's negotiator Clark discredited, the evidence presented by the General Counsel would have been sufficient to establish a prima facie case of unlawful conduct by the applicant. Moreover, we note that resolving credibility, after hearing and observing all the witnesses and weighing the evidence in light of those findings, is precisely within the judge's purview, not that of the General Counsel. It should also be noted that once the judge's credibility centered decision was rendered, the General Counsel did not file exceptions. This demonstrates the General Counsel's understanding that once the factual parameters had reasonably been drawn in a manner contrary to the theory of the violation, and lacking a reasonable basis for disputing the judge's credibility resolutions, the General Counsel lacked substantial justification to proceed further.

Regarding the judge's speculation that the General Counsel changed its theory mid-investigation from alleging that a contract existed on December 23, 1992, to alleging that a contract existed February 10, 1993, we find no evidence to support the judge's conclusion. We also find that, even if the General Counsel came to believe that the December 23 date was incorrect and that the February 10 date was correct, the General Counsel was entitled to evaluate the evidence and revise the theory of the case to conform to the evidence produced.

In view of the above, we find that the General Counsel acted reasonably in issuing a complaint and proceeding to a hearing at which the judge could assess the credibility of the witnesses. We therefore conclude that the General Counsel's position was substantially justified throughout the proceeding. Accordingly, we will dismiss the application for attorney's fees and costs.

ORDER

The National Labor Relations Board reverses the recommended Order of the administrative law judge and orders that the application of the Applicant, Inter-Neighborhood Housing Corp., Bronx, New York, for

attorney's fees and expenses under the Equal Access to Justice Act is denied.

Leah Jaffe, Esq., for the General Counsel.

Roy W. Gerke, Esq. (Clifton, Budd & DeMaria), for the Employer.

Scott P. Trivella, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. On September 27, 1994, I issued my decision dismissing the allegations of the complaint. In pertinent part I concluded:

1. That the Company did not reach, during the course of collective bargaining, an agreed-on contract with the Union and therefore did not violate Section 8(a)(5) of the Act either by (a) failing to execute such an agreement, or (b) failing to submit such agreement to its Board of Directors for approval.

2. That the Company did not violate the Act by withdrawing recognition from the Union on March 10, 1993.

Both conclusions were wholly dependent on my finding that the parties had never reached a full agreement on the terms of a collective-bargaining agreement.

Neither the General Counsel nor the Union appealed my decision. The Board entered its Order on November 8, 1994.

On December 7, 1994, the Company filed with the Board an application for award of fees and other expenses pursuant to 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. By Order dated December 9, 1994, this matter was transferred to me by the Board in accordance with Section 102.148(b) of its Rules.

The Company asserted that the Acting Regional Director did not have "substantial justification for filing the Complaint."

By way of a separate petition, pursuant to Section 102.146 of the Board's Rules and Regulations, the Company asked the Board to increase the maximum rate for attorney's fees from \$75 per hour to \$150 per hour. This latter issue was retained by the Board and therefore is not before me for consideration.

On January 20, 1995, the General Counsel filed its answer to the EAJA application.

The Company alleges and the General Counsel admits that it is a not-for-profit service agency providing community development programs for low income families in Bronx, New York. It is further alleged and conceded that the Company is qualified as a tax exempt organization within the meaning of Section 501(3)(c) of the Internal Revenue Code, has fewer than 500 employees and has a net worth of under \$7 million. Accordingly, the Petitioner, is a qualified applicant under the provisions of EAJA.

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

An agency that conducts an adversary adjudication shall reward, 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, the Supreme Court, in describing the appropriate standard for the award of attorney's fees, stated:

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

Further where the General Counsel issues a complaint in circumstances where there is a genuine credibility issue that must be resolved by an administrative law judge, it is inappropriate to award attorney's fees. *Bouley*, 308 NLRB 653, 654 (1992). Thus, in *Temp Tech Industries v. NLRB*, 756 F.2d 586, 590 (7th Cir. 1985), the Court stated:

Moreover, we cannot find that the General Counsel's decision to litigate an issue that turned on credibility assessment was itself unreasonable; the fact that an ALJ might make an adverse finding on a credibility issue does 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.

The question therefore is whether, given the information available to the Acting Regional Director at the conclusion of the investigation, he had sufficient evidence to warrant presenting this case to an administrative law judge and the Board for resolution. If he did, it is improper to second guess the Acting Regional Director's decision to issue the complaint and initiate litigation. *Henry Bierce Co.*, 311 NLRB 63 (1993). If he did not, then the Petitioner, having been subjected to unwarranted litigation, is entitled to be recompensed for the cost of defending itself.

The Regional Office took two affidavits from Mario Rodriguez respectively on May 18 and 24 that describe his version of the negotiations that commenced on May 1, 1992. In the affidavit dated May 18, Rodriguez asserted that on December 22, 1992, he and Union Attorney Christopher Smith met with Brian Clark. Rodriguez claimed that Clark agreed to a prior better conditions clause with a 1-year limit. He also claimed that he told Clark that he would have to get clearance from the Union's president, (1) to waive a sale and transfer clause, (2) to waive a clause permitting the Union

to strike in the event that the Company failed to make benefit fund payments, and (3) to approve the proposed modification of the prior better conditions clause.

Rodriguez stated that he telephoned Clark on the following day and said, "We have an agreement on the three items pending, that Chartier okayed not including in the contract the sale or transfer clause, not including the language protecting the funds in case of nonpayment. I told Clark that Chartier also agreed to include additional language Clark wanted regarding the better conditions clause." Rodriguez further stated that Clark said that he would submit his final draft so that a contract could be in place by January 1, 1993.

Notwithstanding the assertion by Rodriguez that Union President Chartier, prior to the December 23 telephone conversation, had approved the concessions listed above, no affidavit was taken from Chartier.

It is clear to me from Rodriguez' affidavits that he was claiming that a full agreement was reached no later than December 23, 1992, after he had reached clearance from Chartier to make the concessions noted above and after he communicated those concessions to Brian Clark by telephone. This is confirmed by another statement in his May 18 affidavit where Rodriguez asserted that some time after January 1, 1993, he received a phone call from an employee asking about the contract and that he told this employee that there was an agreement although it had not yet been signed.

In his affidavit dated May 18, Rodriguez stated that there was another meeting held on February 10, 1993, where he and Union Attorney Christopher Smith met with Brian Clark. Rodriguez stated that Clark did not bring the written agreement and said that he still had to work on the language for the prior better conditions clause. He states that Clark indicated that he wanted to include a 1-year limitation on such a clause and that Rodriguez agreed to this. (According to Rodriguez, Clark had already agreed to such a clause at the December 22 meeting.) Rodriguez claimed that Clark said he would mail the agreement.

In his affidavit dated May 24, Rodriguez stated that he had a telephone conversation with Brian Clark on or about January 27, 1993, where he asked why the contract had not been mailed to him. Rodriguez stated that Clark said that he still had a problem with the prior better conditions clause and that he told Clark that it would be limited to 1 year.

The Board investigator interviewed Brian Clark on July 19, 1993. Although Clark did not give an affidavit, a letter dated July 22, 1993, was sent to the Region summarizing the interview and enclosing certain documentary evidence. In substance, the Company through this letter denied that the parties had reached an oral agreement in December 1992 or at anytime thereafter. The Company asserted that Brian Clark submitted a written contract offer to Rodriguez on December 29, and that Rodriguez raised a number of issues and objections during a telephone call on January 28, 1993. Enclosed was a letter from Brian Clark to Mario Rodriguez, dated February 5, 1993, wherein Clark set forth his agreement to four union demands and his opposition to four other demands.

The Company's letter to the Region, dated July 22, 1993, also made it plain that it was asserting that the parties met on February 10, 1993, and that although the Union made some concessions, Brian Clark rejected the Union's continued insistence on a sale and transfer clause and that he did

not agree to any kind of prior better conditions clause that would have maintained benefits not set forth in the collective-bargaining agreement. The Company contended that Brian Clark told Rodriguez and Smith that he would attempt to draft a prior better conditions clause that was consistent with his position and that he would send the Union a revised contract.

After receiving the Company's July 22 letter, the Region's investigator interviewed Christopher Smith on August 2, 1993. Smith stated that he participated at one bargaining session; that being the one held in December 1992. (He took notes of his meeting.) Smith states that at this meeting (which presumably is the meeting on December 22, 1992), the parties reached agreement on a number of issues including wages, hiring, severance pay, etc. Smith also stated that, among other things, Clark (a) rejected the Union's proposal that an employee discharged for cause would be entitled to vacation pay; (b) rejected the Union's proposed prior better working conditions clause; (c) rejected the Union's proposed clause permitting strikes or lawsuits on benefit fund delinquencies; and (d) stated that he would get back to the Union on the Union's proposed staff reduction clause.¹

Although, Rodriguez and Brian Clark both asserted that Smith was present at the meeting held on February 10, 1993, Smith's affidavit stated: "I do not think that I had any conversations with Brian Clark, or anyone else on behalf of INHOC regarding these contract negotiations after this December meeting."

In my opinion, the Regional office, after interviewing Brian Clark and after reviewing the February 5 letter, realized that there was no conceivable way that the Charging Party's initial assertion that an agreement had been reached on December 23, 1992, could be sustained. What I think happened was that after reviewing the evidence obtained in the investigation, the Region decided to issue a complaint based *not* on the assertion that an agreement had been reached on December 23, 1992, but rather on the new theory that an agreement had been reached on February 10, 1993. But in doing so, the following must be noted.

1. That such a theory, apparently was never presented to the Company during the investigation of this case.

2. That such a theory was not corroborated by Christopher Smith despite the fact that both Rodriguez and Clark asserted that Smith was present at the February 10, 1993 meeting where, under the General Counsel's hypothesis, an agreement was reached.

3. That such a theory would have to assume that Rodriguez was not a reliable witness because his initial claim that an agreement had been reached in late December 1992 was demonstrably incorrect.

The General Counsel argues that an award of attorney fees cannot be granted if there was a credibility issue at the time the complaint was issued and which would therefore justify the adjudication of such an issue by an administrative law judge. She asserts that in determining "whether the General Counsel was substantially justified in proceeding on a complaint the Board recognized that credibility resolutions are appropriately made in an adversarial hearing rather than ad-

¹Smith's affidavit was not part of the original record in the unfair labor practice case. It was furnished, pursuant to my request, in connection with the EAJA application.

ministratively, during the course of the investigation.” Although generally a correct statement of the law, I think that it is, perhaps, too broad a generalization in that if taken literally, it would remove any responsibility on the Regional Director or Acting Regional Director to resolve any factual issues.

The Board’s Casehandling Manual, at Section 10600, states, in pertinent part:

Credibility: In the event of hearing, credibility questions may be critical. In view of this, the following points should be kept in mind.

On the basis of its investigation, the Regional Office is expected to resolve factual conflicts.

Where a witness has been contradicted on a relevant fact since he/she last gave testimony, he/she should be reinterviewed. And, to the extent further reinterviews of witnesses will help to resolve the issues, they should be undertaken.

Finally, in situations where factual issues are close, it may be appropriate to have a reinterview conducted by a second Board agent (typically, an attorney assigned to the case.)

It should be kept in mind that a witness’ appearance and behavior at the time of interview, the existence or nonexistence of discrepancies in irrelevant details, and even the consistency of prior statements of the witness’ general reputation are only *indicators*. Nor does an unwillingness to sign or to swear to the truth of a statement have significance except when related to the reasons for the refusal. The best indications or truthfulness lie in the *probabilities* inherent in a given story (as opposed to another story) viewed in the light of the entire pattern of available evidence.

In the infrequent case in which (1) applying all relevant principles, the Region is unable to resolve credibility, and (2) the resolution of conflict *means the difference between dismissal and issuance of complaint*, a complaint should be issued. This is not to be construed, however, as permitting the avoidance of the making of difficult decision.

In my opinion, the information available to the Regional office should have led to the dismissal of the unfair labor

practice charge. It seems to me that prior to the issuance of the complaint, the Region had sufficient documentary evidence to demonstrate not only that the charge’s allegations were not supported by that the Union’s only witness to support these allegations was not a sufficiently reliable witness. I therefore find that the General Counsel was not substantially justified in proceeding on the complaint.

Exhibit F to the Application for Fees contains the billing statements issued by the law firm to the Company. The initials GPC stand for Peter Clark who tried the case before me. The initials BJC stand for Brian Clark who handled the negotiations for the Company and appeared before me as the principle company witness. The General Counsel’s objections are to the rate claimed (\$150/hr) and to the inclusion of 32.5 hours billed for Brian Clark in relation to his capacity as a witness in the unfair labor case.

As to those hours billed by Brian Clark in his capacity as a witness, these are disallowed. *Setterlin Co.*, 283 NLRB 810, 813, fn. 4 (1987). As to the hourly rate, the Petitioner asked the Board to increase the maximum rate for attorney fees from \$75 per hour to \$150 per hour. As noted above, this issue was retained by the Board and therefore is not before me for consideration.

There is no other dispute regarding either expenses such as telephone charges, mailing costs, etc., or the number of hours billed by the Company’s attorneys in relation to the preparation and litigation of the unfair labor practice case. I therefore conclude that the number of hours which are to be reimbursed equal 154.84. Assuming that the Board does not change the allowed hourly rate, the total for attorney fees would be \$11,613.12. Adding expenses of \$1,221.75 would give a grand total of \$12,834.87.

CONCLUSIONS OF LAW

1. The Applicant is a prevailing party with respect to the complaint and meets the eligibility standards set forth in the Equal Access to Justice Act.

2. The Applicant has established that the issuance of the complaint was not substantially justified.

3. The Applicant is entitled to be reimbursed for reasonable attorney’s fees and expenses incurred in connection with the underlying unfair labor practice proceeding.

[Recommended Order omitted from publication.]