

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

C. Factotum, Inc. and David Kulczycki and Ronald Carter. Cases 7–CA–42352(1)(E) and 7–CA–42352(2)(E).

December 19, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND WALSH

On September 7, 2001, Administrative Law Judge C. Richard Miserendino issued the attached supplemental decision. The Applicant, C. Factotum, Inc., filed exceptions and a supporting brief. The General Counsel filed a reply brief.

The Board has considered the supplemental decision and the record 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.

The Applicant contends that it is entitled to fees because, in the underlying case, 334 NLRB No. 23 (2001), the judge recommended dismissing the allegations of paragraph 8 of the complaint, for lack of evidence. Fee determinations under EAJA are to be made by examining the case as “an inclusive whole.” See *Commissioner, INS v. Jean*, 496 U.S. 154, 162 (1990). We agree with the judge that the General Counsel’s overall position in the case was substantially justified, regardless of any deficiencies involving paragraph 8.

Paragraph 8 alleged unlawful threats of job loss made in late June 1999. Evidence of threats at that point in time may have been lacking. But even so, the allegations of paragraph 8 are essentially the same as those of paragraph 9(a), which alleged threats of job loss in mid-July 1999. There was evidence supporting the General Counsel’s view that threats were made then, although the judge ultimately found that, considered in context, the statements were not unlawful.

The Applicant’s reliance on *Hess Mechanical Corp. v. NLRB*, 112 F.3d 146 (4th Cir. 1997), awarding EAJA fees, is misplaced. There, the court concluded that the General Counsel was not substantially justified in proceeding to issue a complaint without further investigation. The only precomplaint evidence supporting the General Counsel’s position was the charging party’s affidavit, and there was substantial uncontroverted evidence supporting the respondent’s defense. Here, the Applicant does not contend that the precomplaint evidence raised a serious question about the complaint’s viability.

ORDER

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

Dated, Washington, D.C. December 19, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Richard F. Czubaj, Esq., for the General Counsel.
John C. Dickinson, Esq., of Detroit, Michigan, for the Respondent.

SUPPLEMENTAL DECISION

EQUAL ACCESS TO JUSTICE ACT

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. On June 27, 2001, Counsel for the Respondent, C. Factotum, Inc., filed an application for attorneys fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1982), as amended, following the entry of an Order by the National Labor Relations Board on May 30, 2001, adopting the findings, conclusions, and recommended Order of this Administrative Law Judge in the underlying unfair labor practice proceeding. On July 23, 2001, Counsel for the General Counsel filed a motion to dismiss the application on the ground that the General Counsel’s position was “substantially justified.” 5 U.S.C. § 504(a). The Respondent/applicant’s counsel did not file a response to the motion to dismiss. The General Counsel’s argument in support of its contention that its position in the underlying litigation was substantially justified is fully stated in the motion to dismiss. I find that nothing would be served by requiring the filing of an answer restating that argument.

The Board’s Rules and Regulations § 102.152(a) contemplate that the determination on an application for an award of fees and expenses under EAJA ordinarily will be made on the basis of the record in the underlying proceeding. I find that no further proceedings are necessary in order to make a determination in this case.

FINDINGS OF FACT

I. THE UNDERLYING CASE

The consolidated complaint in the underlying case alleged that in June and July 1999, the Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of employment if they did not stop complaining about wages and benefits; by threatening employees with loss of employment if they questioned the Respondent or complained to the media about their concerns regarding wages and benefits; by orally promulgating an overly broad no-talking rule restricting employees from discussing the Union, or their wages and benefits, while allowing them to discuss other subjects; and by enforcing the oral no-talking rule. The consolidated complaint further alleged that the Respondent violated Section 8(a)(3) of the Act on or about August 6, 1999, by laying off and discharging

Charging Parties David Kulczycki and Ronald Carter. In my decision, dated September 20, 2000, I found that the Act had not been violated in any manner alleged in the complaint and I recommended that the complaint be dismissed. On May 30, 2001, the Board entered an order adopting my findings, conclusions, and recommended order.

II. THE APPLICABLE LEGAL STANDARD

Having prevailed in the underlying case, the applicant may be entitled to an award of fees and expenses incurred in connection with the adversary adjudication, if the General Counsel cannot show that his position in the underlying litigation was substantially justified, by showing that his position in the proceeding was reasonable in law and fact, or unless special circumstances make the award sought unjust. *Pierce v. Underwood*, 487 U.S. 552 (1988); *Tyler Business Systems v. NLRB*, 695 F.2d 73 (4th Cir. 1982). The fact that the General Counsel did not prevail in this litigation does not raise a presumption that its position was not substantially justified, nor must it be established that the decision to litigate was based upon a substantial probability of prevailing. *Westerman, Inc.*, 266 NLRB 799 (1983). Likewise, the fact that the General Counsel failed to establish a prima facie case is not determinative for purposes of an EAJA award. *Jim's Big M*, 266 NLRB 665 (1983).

III. ANALYSIS AND FINDINGS

Paragraphs 9(a)–(c) of the complaint essentially are the heart and soul of the General Counsel's case. There, it is alleged that the Respondent orally promulgated an unlawful no-talking rule that restricted the employees from discussing the Union, wages, benefits or other terms and conditions of employment while permitting employees to discuss other subjects. It further alleges that in accordance with the no-talking rule, employees were told to stop talking about benefits, and they were threatened with loss of employment if they questioned the Respondent or complained to the media about their concerns regarding benefits.

The evidence showed that in mid-July, the employees were anxious to join the Union and to begin receiving union benefits. The Union refused to accept the paycheck deductions for union benefits, unless the Respondent signed a 5-year collective-bargaining agreement. The Respondent was willing to sign a 1-year contract. The stalemate delayed the receipt of benefits,¹ which prompted the employees to question what was happening to the paycheck deductions. In this connection, I found that Charging Party Kulczycki had circulated rumors that the Respondent's owner was an embezzler and that he had diverted the paycheck deductions for his own use. In making that finding, I credited the testimony of two witnesses, employees Kathie Patterson and Michael Mantyk, over Kulczycki. The evidence showed that with increasing frequency, the employees stopped working for 10–15 minute intervals to discuss these issues, even though Respondent's owner had held ongoing meetings with the employees to keep them apprised of what was occurring. The evidence also showed that because the em-

¹ The evidence showed that the Respondent's owner eventually paid the paycheck deductions to the Union in November 1999.

ployees frequently stopped working for prolonged time periods to talk about the status of their union benefits, production was disrupted. I therefore found that it was the frequent work stoppages, and not the talking, that prompted the Respondent's owner to impose the no-talking rule. *Brigadier Industries Corp.*, 271 NLRB 656, 657 (1984).

In addition, I credited the testimony of the Respondent's owner that he told the employees "I don't want to hear this talk anymore," referring to all of the questions—"I don't want to hear this talk anymore. I answered every question you had dozens of time . . . talk on your own time, work on my time." I also found that in the context of telling them to talk on their own time, the Respondent's owner did not restrain or inhibit the employees from discussing the Union or benefits during non-working time. Thus, I found that the no-talking rule was presumptively valid.

The fact that I found certain testimony to be convincing, and based on demeanor and the totality of the evidence, accepted it as establishing a legitimate reason for imposing a no-talking rule, does not mean that the General Counsel's position was not justified or unreasonable in law or fact. Absent that credited testimony, and given the nature of the discussion among the employees, it was not unreasonable for the General Counsel to argue that it could be inferred from the evidence that the no-talking rule was implemented to interfere with the employees' union and protected concerted activities.

Further, and concerning the alleged discharges, my finding that the no-talking rule was presumptively valid and that it did not impose a blanket restriction on the employees discussing the Union and/or union benefits, necessarily hindered the General Counsel in proving animus as a part of his initial evidentiary burden under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Had I found the no-talking rule to be unlawful, evidence of animus would have been present. I therefore find that because the General Counsel was unable to satisfy his initial evidentiary burden as a result of a series of my findings does not mean that his position at the outset was not justified.

CONCLUSION

Under all of these circumstances, I find that the position taken by General Counsel with respect to a key 8(a)(1) allegation, as well as the 8(a)(3) allegations, was substantially justified and I recommend that the Respondent's application pursuant to EAJA be denied.²

ORDER

The Respondent's application for an award of attorney's fees and expenses is denied.

Dated, Washington, D.C. September 7, 2001

² 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.