

**Fantasia Fresh Juice Company and Manufacturing,
Production and Service Workers Union Local
24, I.U.A.N. & P.W., AFL-CIO.** Case 13-CA-
38526(E)

July 31, 2003

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On November 6, 2002, Administrative Law Judge Benjamin Schlesinger issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the applicant, Fantasia Fresh Fruit Company, filed an answering brief.

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 and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

Following the Board's dismissal of the complaint in the underlying unfair labor practice case, the Applicant initiated proceedings under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and Section 102.143 of the Board's Rules and Regulations, to recover \$108,888.83 in attorneys' fees, and \$2,574.46 in expenses, it incurred in defending against the complaint. The judge denied the Applicant's requests for the fees and costs it incurred prior to the issuance of the judge's decision recommending dismissal of the complaint. As to those expenses, the judge found that the General Counsel was substantially justified in prosecuting the complaint. Thus, the judge stated that, had he credited the General Counsel's witnesses, "the complaint would have stated a claim warranting all of the relief that the General Counsel requested."¹ The judge, however, did recommend awarding Applicant \$10,187.50 in legal fees and \$693.93 in expenses that the Applicant incurred following issuance of the judge's decision recommending dismissal of the complaint. In so doing, the judge first found that this was a "significant and discrete portion of the proceeding" within the meaning of § 102.143(b) of the Board's Rules and Regulations. The judge then concluded that the General Counsel was not substantially justified in filing exceptions to his decision in the unfair labor practice case. In the particular circumstances of this case, we agree.

As the judge noted in his underlying decision, which the Board affirmed at 335 NLRB 754 (2001), "[t]his [was] primarily a credibility case." *Id.* at 760. As to the

¹ As noted, the Applicant does not except to this denial of fees.

issue of witness credibility, the judge noted that: "the witnesses could agree on almost nothing"; there was "no way to reconcile the completely different and consistently antithetical recollections of the witnesses for both sides"; and the testimony of certain General Counsel witnesses was "thoroughly unreliable," "generally unreliable," and "rather astounding." Ultimately, the judge determined that that "there [were] so many problems with the testimony presented by the witnesses for the General Counsel that [he could] not believe them," and that the complaint must therefore be dismissed. [*Id.* at 761-762.] These credibility findings had the effect of rejecting testimony necessary to establish each of the alleged violations.

The General Counsel chose to file exceptions as to every alleged violation. The large majority of these exceptions either directly contested the judge's credibility findings or were premised solely on the reversal of those findings, which were the basis for dismissing virtually all of the complaint allegations. Accordingly, the General Counsel's exceptions can only be characterized, in their totality, primarily as an attempt to reverse credibility findings.

It is well established that the Board will overrule a judge's credibility findings only where "the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). This is a high standard, which must be applied not only in evaluating the merits of the General Counsel's exceptions, but also in determining whether, despite lacking merit, they were substantially justified under EAJA. Considering the nature of the judge's credibility findings here, and the record evidence as a whole, we conclude that the General Counsel was not substantially justified in challenging them. We do not suggest, of course, that there can never be substantial justification for filing unsuccessful credibility-based exceptions, only that such justification was lacking here.²

Nor do we suggest that the General Counsel should have refrained from filing any exceptions. As indicated above, not every complaint allegation dismissed by the judge was based on his underlying credibility determinations; a few were dismissed based on the judge's interpretation of legal precedent. Had the General Counsel limited his exceptions to these few conclusions by arguing, as he did, that those conclusions were not reasonably

² For this reason, our dissenting colleague's view that "[i]f the General Counsel has any 'justified' exceptions, he should not be penalized for pursuing them, even if he also pursues along with them other exceptions that may be difficult to sustain," cannot be squared with current EAJA law.

based in law, an EAJA award could possibly have been avoided. It may well be that there was substantial justification to make that argument to the Board, notwithstanding that the Board ultimately rejected it. See, e.g., *Lion Uniform*, 285 NLRB 249, 258 (1987) (“EAJA does not require the General Counsel to prevail in the unfair labor practice proceeding in order to avoid an award of fees and expenses” as long as his “actions during those proceedings were substantially justified”). Accord: *David Allen Co.*, 335 NLRB 783, 784 (2001). But we cannot credit the General Counsel with these few justified exceptions, which were insubstantial when compared with the exceptions that were wholly credibility-based. Nor can we grant the Applicant a partial EAJA award by attempting to carve out the fees incurred in addressing the few noncredibility based exceptions. Thus, “[f]ee determinations under EAJA are to be made by examining the case as ‘an inclusive whole.’” *C. Factotum, Inc.*, 337 NLRB 1 (2001), citing *Commissioner, INS. v. Jean*, 496 U.S. 154, 162 (1990).³

Because we agree with the judge that the General Counsel’s “overall position in the case,” *C. Factotum*, supra, was not substantially justified, we shall grant an EAJA award for the legal fees incurred by the Respondent with respect to all the exceptions, as recommended by the judge.⁴

³ In our dissenting colleague’s view, because the standard for refusing a credibility-based exception is strict, responding to such exceptions is “not an onerous task and does not require substantial effort.” However, the General Counsel did not contend that the Applicant’s response to his credibility exceptions in this case was not “substantial,” or that the response was unreasonably “substantial.” Moreover, while it is true that most credibility exceptions can be addressed briefly, it is not always unreasonable for opposing counsel to explain why the record supports the credibility finding at issue, rather than simply stand on a citation to *Standard Drywall*.

⁴ Member Liebman finds merit in the General Counsel’s exceptions with respect to fees in the amount of \$200.75 incurred by the Respondent as a result of its own clerical errors in preparing and serving documents. In her view, the Board should not depart from the common requirement that attorney fees awarded be reasonable and necessary, or place the burden on the General Counsel to show that a fee amount unnecessarily incurred by a respondent due to its own “inadvertence” was in fact incurred deliberately. While it is true, as the judge observed, that “people make mistakes,” this does not mean that an EAJA applicant (or its counsel) is entitled to shift the loss incurred by its own mistake onto the General Counsel. Member Liebman rejects the General Counsel’s exceptions with respect to allegedly “duplicative” fees the Respondent incurred in the amount of \$187.50 from consultation between counsel.

Chairman Battista would grant the \$200.75. But for the General Counsel’s unjustified exceptions, these moneys would not have been spent. Further, there is no evidence that Respondent was simply “piling up” expenditures. Rather, at most, these minor expenditures were the result of two inadvertent errors. In short, General Counsel’s actions were deliberate; these Respondent actions were not. Accordingly, in

ORDER

The National Labor Relations Board orders that the Applicant, Fantasia Fresh Juice Company, Rosemont, Illinois, be awarded the sum of \$10,680.68, pursuant to its application for an award under the Equal Access to Justice Act, plus additional compensable fees and expenses incurred since the period covered by the Applicant’s last EAJA application submitted on June 6, 2002.

MEMBER WALSH, dissenting.

Contrary to my colleagues, I would not award legal fees and expenses to the Applicant under the Equal Access to Justice Act (EAJA). My colleagues find that the General Counsel was substantially justified in pursuing the complaint through trial, but was not substantially justified in filing exceptions to the judge’s decision because the majority of these exceptions contested the judge’s credibility findings. I agree with my colleagues that the General Counsel was substantially justified in pursuing the complaint through trial, but I find, unlike my colleagues, that the General Counsel was also substantially justified in filing exceptions to the judge’s decision.

My colleagues concede that not every complaint allegation was dismissed based on credibility determinations, and that some of the allegations were dismissed based on the judge’s interpretation of legal precedent. My colleagues also state that had the General Counsel confined his exceptions to those issues not involving credibility resolutions, an award of EAJA fees would have been avoided. But because the General Counsel included credibility exceptions along with his legal exceptions, my colleagues find that the filing of the exceptions as a whole was not substantially justified and they award the Applicant EAJA fees. I disagree.

I find that the General Counsel’s credibility-based exceptions were intertwined with the law-based exceptions, which my colleagues agree the General Counsel was entitled to pursue. In these circumstances, the addition of the credibility-based exceptions did not appreciably increase the Applicant’s workload in defending the case. Here, the General Counsel filed arguably meritorious legal exceptions, and the Applicant would have responded to those in any event. Because, as my colleagues state, the standard for challenging credibility determinations is so strict, answering additional credibility exceptions is not an onerous task and does not require substantial effort. In my view, the award of EAJA fees in this case is a windfall to the Applicant, who was not required to expend appreciable extra time and expense in

the spirit of EAJA, i.e., to discourage unjustified Governmental prosecutions, I would award the full amount.

defending against the additional credibility-based exceptions.

EAJA was enacted in order to deter Federal agencies from disproportionately targeting small businesses that lacked the financial means to contest agency policies and lawsuits.¹ The necessity of addressing some minor additional exceptions was not the evil Congress was attempting to redress. Here, the General Counsel was found to be substantially justified in initially bringing this action, and, as conceded by my colleagues, would have been substantially justified in pursuing his legal-based exceptions alone. The General Counsel's inclusion of credibility-based exceptions did not require the Applicant to file any briefs it would not otherwise have filed, or to take any other actions it would not otherwise have taken. The filing of credibility-based exceptions that were intertwined with meritorious legal exceptions did not cause this employer to incur substantial expenses it would not have otherwise had to incur. Thus, the addition of the credibility exceptions was insufficient, in my view, to annul the General Counsel's substantial justification for filing his legal exceptions, thereby subjecting the General Counsel to the payment of EAJA fees for the entire exceptions phase of these proceedings.²

Had the General Counsel filed nonmeritorious credibility exceptions alone, I might have agreed with my colleagues that such action would not have been substantially justified. But here, where the credibility exceptions were intertwined with meritorious legal exceptions, I would find that the General Counsel was substantially justified in filing them. For these reasons, I would deny the EAJA application.³

J. Edward Castillo, Esq. and David Huffman-Gottschling, Esq.,
for the General Counsel.

Jeffrey C. Kauffman, Esq. and Alissa B. Lipson, Esq. (Seyfarth Shaw), of Chicago, Illinois, for the Respondent.

SUPPLEMENTAL DECISION AND ORDER EQUAL
ACCESS TO JUSTICE ACT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. On February 12, 2001, I issued a decision dismissing, in its en-

¹ See H.R. Rep. No. 96-1418, p. 10 (1980).

² My colleagues state that they cannot credit the General Counsel with the "few justified exceptions" because they were insubstantial when compared with the credibility-based exceptions. In my view, the relative weights of the "justified" versus the credibility exceptions should not be the test for determining whether an EAJA award is appropriate. If the General Counsel has any "justified" exceptions, he should not be penalized for pursuing them, even if he also pursues along with them other exceptions that may be difficult to sustain.

³ Assuming that I would have granted EAJA fees in this case, I would join Member Liebman in not granting fees incurred by the Respondent in correcting its own clerical errors.

tirety, the unfair labor practice complaint. The General Counsel filed exceptions to the entirety of my decision; and on August 27, 2001, the Board (335 NLRB 754) affirmed my rulings, findings, and conclusions, adopted my recommended Order, and dismissed the complaint. On September 25, 2001, Respondent Fantasia Fresh Juice Company instituted the instant proceeding pursuant to the Equal Access to Justice Act (EAJA) to recover its attorney's fees of \$108,888.83 and expenses of \$2574.46.

The underlying complaint alleged that, shortly after Manufacturing, Production and Service Workers Union Local No. 24, I.U.A.N. & P.W., AFL-CIO (the Union), began to organize the employees of Respondent, Respondent began a campaign to find out, threaten, and promise wage increases to those involved in union activities. The employees then decided to strike and did so, allegedly in protest of these unfair labor practices. Respondent permanently replaced them. When their strike failed, they sought reinstatement; but Respondent refused to do so immediately. The complaint alleged that, because Respondent's violations were so serious, a *Gissel* bargaining order was appropriate.

In my decision, I found that this was primarily a credibility case, and that there was no way to reconcile the completely different and consistently antithetical recollections of the witnesses for both sides. I further found that not one witness's testimony was wholly adequate and believable. In reviewing the testimony, I became convinced that at least one of the General Counsel's witnesses was thoroughly unreliable and that the testimony of others was improbable and lacked corroboration, or in one instance was so similar about a fact that could not have occurred on the day that both witnesses related that it should be discounted. In arriving at my conclusions, I found that there were so many problems with the testimony presented by the witnesses for the General Counsel that I could not believe them; and I accepted the more logical and not improbable testimony and the specific denials of witnesses presented by Respondent.

On November 13, 2001, the General Counsel moved to dismiss Respondent's EAJA application on the ground that he was justified in bringing the complaint. I agreed, finding that, had I credited the testimony of the General Counsel's witnesses (including employee-organizer Armando Ortiz, who could not be located to testify at the hearing), the complaint would have stated a claim warranting all the relief that the General Counsel requested. There was sufficient testimony, if believed, supporting findings of unfair labor practices prior to the strike. There was sufficient testimony, if believed, supporting a finding that the strike was caused by the commission of those unfair labor practices. There was sufficient proof that, if the strike were an unfair labor practice strike, the strikers were threatened with permanent replacement, were told that they had been permanently replaced, and were not reinstated immediately after they so requested. Thus, the acts committed by Respondent resulted in very serious consequences. A number of people lost their jobs, at least initially. That likely would have been more than enough to justify the issuance of a *Gissel* bargaining order. I, therefore, granted the General Counsel's motion to dismiss Respondent's application regarding the fees and expenses in-

curred up to the hearing before me. The General Counsel had substantial justification to bring this proceeding under Section 102.44(a) of the Board's Rules and Regulations.

However, I denied the General Counsel's motion to dismiss the fees and expenses which Respondent incurred once I issued my decision, finding that this was a credibility case and that there was hardly any law to be argued on the basis of the facts that I found, with the exception of one allegation of an illegal interrogation, as to which the Board affirmed my decision, and another, not even raised before me, Member Liebman dissenting. In addition, the Board disagreed with my finding that one witness testified inconsistently, but nonetheless sustained my ultimate findings and conclusions. The General Counsel's answer, more particularly its affirmative defense, essentially repeats the contentions he made in his motion to dismiss. My findings here are no different.

This is a credibility case; and the Board rarely upsets the decision of an administrative law judge on credibility issues. Indeed, the Board has a standard footnote, which appears at footnote 1 of the Board's decision in this proceeding, which reads:

The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The General Counsel's answer repeats its attack on my credibility resolutions. Despite its disavowal, the majority of its exceptions were based on an attack on my credibility resolutions. The General Counsel was successful on none of them. It is true that the Board took issue with my finding regarding the inconsistency of the testimony of one witness. However, the majority found that, even crediting that witness, there was still no unfair labor practice. And, assuming that it found a violation, that would have been a finding of one single interrogation, hardly enough to justify the legal work and expense that the General Counsel put Respondent through, and certainly too little to justify the extraordinary remedy of the bargaining order that the General Counsel was seeking.

The General Counsel takes issue that no credibility determinations were involved in some of its other exceptions. He minimalizes what his burden was. In order to find that the strike was an unfair labor practice, he had to cross two hurdles: first, that an initial unfair labor practice occurred, and I found none; and second, that the strike was caused because of the unfair labor practices, none of which I found. Nor did I find that the employees went on strike because of that conduct. Instead, I concluded that the employees were attempting to obtain recognition and a contract. In sum, the General Counsel had a particularly difficult case in ever reaching the issue of the nature of the strike, which led to the only significant unfair labor practice which might have justified a *Gissel* order.

All the rest of the allegations were not of the quality that a bargaining order would have been justified. In addition, the

General Counsel's contention that I drew the wrong inferences from the testimony that was presented was actually an attack that I failed to consider other testimony, which in fact I discredited, in order to reach the result the General Counsel sought. For example, he claimed that I gave "disproportionate weight" to my finding that the strike was recognitional. Of course I did. That was my finding. It was not an unfair labor practice strike. Finally, the General Counsel contends that many of its exceptions were based on law, not fact. That is not true either, at least for the most part. Where the General Counsel claims that I erred on the law are those areas where I failed to credit his witnesses and thus failed to apply the law that he was urging.

Accordingly, I conclude that the General Counsel had no substantial justification for filing exceptions, which constituted a significant and discrete portion of the proceeding within the meaning of Section 102.143(b) of the Board's Rules and Regulations. *Meaden Screw Products Co.*, 336 NLRB 298, 299-300 (2001). Respondent has shown that it meets all the eligibility requirements for relief under EAJA. I also conclude that it is entitled to the legal fees and expenses it incurred in prosecuting its EAJA application, a proposition that the General Counsel does not appear to question. *Commissioner, I.N.S. v. Jean*, 496 U.S. 154 (1990).

He does oppose¹ the granting of legal fees incurred because Respondent seeks to be reimbursed for 1 hour in connection with the supplementing of its schedules because incorrect dates were reflected on the original schedules and one-hour hour was spent answering an inquiry of mine about an e-mail that I had not received (and an expense of a facsimile that was sent to me). People make mistakes. Sometimes they are corrected before the documents are served, and sometimes they are not, requiring the preparation of additional papers. By granting an additional \$125, the Board is not, in the General Counsel's words, "reward[ing] Respondent's counsel for its carelessness," but is reimbursing Respondent for the costs that it incurred in opposing exceptions that should not have been filed. Regarding the \$62.50 that is sought because communications to me did not arrive, I find no justification in the General Counsel's opposition.

Finally, the General Counsel also opposes 1-1/4 hours spent by individual attorneys at Seyfarth Shaw conferring with their colleagues, and both billing for their time. Attorneys talk to one another and confer with one another about strategy and tactics and interpretation of the law. Often, two attorneys appear at trial, sometimes one to assist the other. That is a perfectly justifiable expense which Respondent had to absorb. I conclude that none of these individual objections have any merit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

¹ The opposition was embodied in a motion to strike, dated June 13, 2002, which is hereby disposed of.

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.

ORDER

The General Counsel shall pay to Respondent the sum of \$10,187.50 as legal fees and \$693.93 as expenses, totaling the sum of \$10,881.43, computed as of June 4, 2002, plus any addi-

tional allowable fees and expenses that Respondent incurs since then in connection with the litigation of this case.