UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC 20001

RUTH BADER GINSBURG
UNITED STATES CIRCUIT JUDGE

July 28, 1993

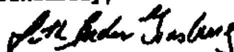
Senator Larry Pressler
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Pressler:

The questions attached to your July 23, 1993 letter were forwarded to me yesterday. I enclose responses which I hope you will find satisfactory. If you wish me to supply, in writing, the answers I gave to the questions you asked on the second day of the Hearings, please tell me, and I will be glad to do so.

With appreciation for your interest.

Sincerely,



Ruth Bader Ginsburg

Enclosures

Responses by Ruth Bader Ginsburg to Written Questions by Senator Larry Pressler on Employer v. Union Rights received July 26, 1993

In *Microimage Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245 (D.C. Cir. 1991), a unanimous panel (Judges Henderson, Wald and R.B. Ginsburg), in an opinion by Judge Henderson, agreed to enforce an NLRB order in full in the face of cross-petitions for review by the employer and the union. The opinion is highly fact-specific and turns on the panel's statutorily-guided deference to the Board's decision.

The NLRB determined that the employer's threat to transfer work from its union to its non-union facility (which would have entailed laying off over twenty workers at the union plant) contravened section 8(a)(1) of the NLRA. That section declares it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under [the NLRA to engage in concerted activity for purpose of collective bargaining or other mutual aid or protection]."

Evidence in the record indicated that prior to the threatened transfer, a company manager had declared his intent to develop a strategy to rid the company of the union. Following the threat, employees, with some employer encouragement, circulated a union decertification petition. The record indicated that after circulation of the decertification petition, the company reversed its plan to move work away from the union facility. Just over a month later, the employer terminated recognition of the union, and actually transferred in work from its other, non-union plant.

Based on a full review of the record, the panel accepted the Board's finding that the employer's threat was motivated by antiunion animus. Given that adequately-supported finding, it was incumbent on the employer to demonstrate that it would have planned the work change even absent antiunion sentiment. Again, the panel deferred to the NLRB's finding that the employer had not made the necessary showing, i.e., had not carried the proof burden cast on it. Accordingly, the court enforced the Board's order regarding the 8(a)(1) violation.

Your first question concerns my understanding of *NLRB v. Brown*, 380 U.S. 278 (1965). In that case, the Supreme Court indicated that the NLRB need not inquire into employer motivation to support an unfair labor practice finding where the employer's conduct is inherently destructive of employees' rights and is not justified as serving significantly a legitimate business end. The Court's opinion in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), is illustrative. There, the employer offered twenty years of superseniority to any striking worker who crossed the picket line and returned to work. Blatant conduct of that order is "inherently discriminatory or destructive," *Erie Resistor*, 373 U.S. at 228, and obviates the need for independent evidence of antiunion animus.

But where the conduct is not so blatant and is designed on its face to achieve legitimate business ends, then, according to *Brown*, the Board can find antiunion motivation only when independent evidence so demonstrates. In the *Xidex* case, as Judge Henderson's opinion explained, the Board pointed to independent evidence sufficient to support a finding that antiunion animus motivated the employer's threat to transfer work

to its nonunion plant. In sum, after reviewing the record, we were satisfied that the Board's unfair labor practice finding had the requisite evidentiary support.

Your second question concerns the standard courts use to review decisions of the NLRB. The NLRA directs the court to defer to NLRB findings of fact and sets out the standard for such deference. Section 10(e) provides that the "findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." The word "substantial" was added to section 10(e) of the NLRA by the Taft-Hartley Act of 1947. This standard for review of agency fact-finding is consistent with the standard generally applicable under the Administrative Procedure Act.

In his opinion for the Court in 1951 in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), Justice Frankfurter discussed the meaning of the word "substantial." Quoting from earlier Supreme Court decisions, Justice Frankfurter noted that "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept to support a conclusion." In the *Xidex* case, the panel adhered to the statutory instruction and the long-held precedent in this area. The decision is consistent with the views I expressed in the Hearings that a court considering an agency's decision should respect that decision but not to the point of abdicating the reviewing court's responsibility to canvass the record carefully.

You next ask about evidentiary standards and antiunion animus. I note first that the union bears no evidentiary standard in these cases because the General Counsel of the NLRB, not the union, presents the cases on behalf of workers. The evidentiary standard NLRB's General Counsel must meet to show "antiunion animus" was set out by Justice White in his opinion for a unanimous Supreme Court in 1983 in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In that decision, Justice White indicated that the General Counsel must persuade the Board that antiunion animus has contributed to the employer's adverse action. He noted that, consistent with the statutory requirement in section 10(c) of the NLRA, the Board must rest its unfair labor practice determination on a "preponderance of the testimony."

If the General Counsel has demonstrated antiunion animus motivating the employer's action, the employer may show, as an affirmative defense to the unfair labor charge, that the conduct in question would have occurred in any event. *Transportation Management Corp.*, 462 U.S. at 395. Applying this rule in the *Xidex* case, it was incumbent on the employer to show that the plan to transfer work, and lay off employees, would have occurred regardless of the divergent union status of each facility. As Judge Henderson's opinion developed after carefully reviewing the record, we deferred to the Board's reasonable determination that the employer did not make the requisite showing.

Responses by Ruth Bader Ginsburg to Written Questions by Senator Larry Pressler on Minority Set-Aside Programs, received July 26, 1993

You asked several related questions about the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Joining a unanimous panel and briefly concurring, I applied the teachings of *Croson* in *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992). I hope you will find in the following discussion adequate answers to your inquiries.

As you state, *Croson* dealt with "*remedial* minority set-aside programs" for the award of government construction contracts -- i.e., with a local government's adoption of a program for the purpose of remedying past discrimination. In that context, *Croson* made clear, the past discrimination to be remedied need not be the local government's *own* discrimination; it may be private discrimination (by the construction industry) in which the government had "become a 'passive participant'" through financial support, 488 U.S. at 491-92, thus "exacerbating [the private discrimination] pattern," 488 U.S. at 504. That is what I meant in *O'Donnell* when I wrote "minority preference programs" need not "be confined solely to the redress of state-sponsored discrimination." 963 F.2d at 429.

Croson also made clear that a local government, in establishing the basis for its remedial program, cannot rely on a "generalized assertion" of nationwide discrimination in an industry as a whole, 488 U.S. at 498, but "must identify [the] discrimination, public or private, with some specificity." 488 U.S. at 504. Furthermore, the program must be "narrowly tailored to remedy [the] prior discrimination." 488 U.S. at 507.

With respect to its essential, practical meaning, *Croson* explicitly stated: "Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction." 488 U.S. at 509. The Court thus contemplated that its "specificity" and "narrow tailoring" standards were not impossibly restrictive, but could be met by proper showings and proper programs. My concurrence in *O'Donnell* cited an instance in which a court of appeals found, on the particular facts, that the *Croson* standards likely would be met. 963 F.2d at 429 (citing *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992)).

Finally, because *Croson* involved a city program designed as a remedy for past discrimination, the holding of the case did not address whether a race-based classification, in other contexts, can be justified on a non-"remedial" ground. In *O'Donnell*, I commented that "remedy for past wrong is not the exclusive basis upon which racial classification may be justified." 963 F.2d at 429. I cited as support for the comment Justice Stevens' concurrence in *Croson*. Although Justice Stevens ruled out any non-remedial justification for Richmond's race-based restriction on contractors' access to the construction market, 488 U.S. at 512-13, he added that he would not "totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits" in, for example, an education setting. 488 U.S. at 511 n.1, 512 & n.2. Justice Powell's opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 311-19 (1978), elaborated on such a non-remedial justification in a school setting. Future cases, as you know, could well present questions about the kinds of "narrow tailoring" or other requirements one might appropriately apply to a justification of the kind Justice Powell described, and it would not be appropriate for me to address -- without a record, briefs, and arguments -- what those uses might be.

Responses by Ruth Bader Ginsburg to Written Questions by Senator Larry Pressler on the Supreme Court's Decision in *Commissioner v. Soliman*, 113 S. Ct. 701 (1993), received July 26, 1993

Federal courts should interpret statutes, first and foremost, by examining the statute's text. If the text is clear -- and as I have said, it is always the hope of federal judges that enactments will clearly reveal what the legislature meant -- the text itself should resolve the matter. When the legislature's meaning is not apparent from the statute's language, it is appropriate to take into account traditional aides to interpretation, notably, the overall statutory and historical contexts of the provision at issue, including similar and prior statutes, and the legislative history. While these additional materials should be relied on cautiously, they sometimes prove helpful guides.

In addition, applicable regulations authorized by the statute should be accorded reasonable deference by courts. This is particularly important in tax cases because the IRS has adopted a comprehensive (often interrelated) set of regulations that Congress and the country depend upon to foster evenhanded administration of our complex tax laws.

Regarding the *Soliman* case in particular, it would not be appropriate for me to comment on the Court's holding, especially without the benefit of briefing and argument. I might note, however, that the Court's endeavor in that case was to interpret the provision of the Internal Revenue Code, 26 U.S.C. § 280A(c)(1)(A), that allowed a deduction for a home office when the office was used as "the principal place of business for any trade or business of the taxpayer." All the Justices agreed that the case turned on the meaning of this phrase.