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.