Blaylock Electric *and* International Brotherhood of Electrical Workers, Local No. 684, AFL–CIO. Case 32–CA–14078(E)

December 11, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On July 21, 1995, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

[1] The Respondent in its exceptions contends that the judge erred in finding that the alleged discriminatees, who were openly declared union organizers, were employees within the meaning of Sec. 2(3) of the Act. The Supreme Court recently rejected the Respondent's contention. *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995). The Respondent further argues that the alleged discriminatees were not bona fide applicants for employment. In this regard, the Respondent asserts that many of the applicants were currently employed at higher wage rates and admitted that they would not have accepted employment at the Respondent's wage scale. We find no merit in this contention. Several applicants testified that, at the time they applied for work with the Respondent, they expected to be laid off soon. To the extent that applicants Pacheco and Smith testified that they would not accept jobs with the Respondent, it is clear from their testimony that they were referring only to short-term jobs and not long-term jobs. As the applicants were applying for what the Respondent anticipated to be two comparatively long jobs, we agree with the judge that they were bona fide job seekers.

The Respondent also argues that the judge erred in finding that the General Counsel was substantially justified in taking until the day before posthearing briefs were due to seek permission to withdraw the complaint. Citing in particular the judge's reliance on what he termed ''the absence of standards or criteria, established by the Board,'' the Respondent contends that the judge applied a presumption in favor of the General Counsel. We find no merit in this argument. The judge expressly placed the burden of proof on this issue on the General Counsel. We read the judge's finding that under all the circumstances, including the absence of time standards or criteria set by the Board, ''there is no basis for concluding that, as a matter of law, the General Counsel was not substantially justified in taking 34 days to decide that its legal position was without merit,'' as stating that the General Counsel had carried his burden of demonstrating substantial justification. Our review of the factors considered by the judge leads us to the same conclusion.

We also reject the Respondent's untimely argument that the judge should not have credited anything in the General Counsel's answer to its petition unless the Regional Office's entire investigatory file was produced. As the General Counsel notes, the Respondent failed to raise this issue in its reply to the General Counsel's answer.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the application for an award of attorney's fees and expenses under the Equal Access to Justice Act be denied.[2]

Kenneth Ko and *Elaine Climpson, Esqs.*, for the General Counsel.

Mark Thierman and *Matthew Ruggles, Esqs.*, of San Francisco, California, for the Respondent-Applicant.

[2] In view of our agreement with the judge's finding that the Respondent is not entitled to recover fees and expenses under the Equal Access to Justice Act, we need not address its petition for an increase in the amount of fees recoverable.

DECISION

(Equal Access to Justice Act)

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in the above-captioned matter was filed by International Brotherhood of Electrical Workers, Local No. 684, AFL–CIO (the Union), on July 18, 1994, and, based on the unfair labor practice charge, on October 4, 1994, the Regional Director of Region 32 of the National Labor Relations Board (the Board) issued a complaint alleging that Blaylock Electric (Respondent-Applicant) engaged in acts and conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent-Applicant timely filed an answer denying the commission of any unfair labor practices. As scheduled, the above-mentioned matter came to trial before me on January 26 and 27 and February 8, 1995, in Modesto, California, and on February 9, 1995, in San Francisco, California. At the trial, all parties were afforded the right to offer into the record any and all relevant evidence, to examine and cross-examine any witnesses, to argue their legal positions orally, and to file posthearing briefs, which documents were to be filed no later than the close of business on Thursday, March 16, 1995. On March 15, counsel for the General Counsel filed a motion to approve requests to withdraw the above-described unfair labor practice charge and the instant complaint; 2 days later, on March 17, I issued an Order to Show Cause why the General Counsel's motion should be granted; and, after receipt of replies from both counsel, I issued an order granting the motion to withdraw the complaint and remanding the matter to the Regional Director of Region 32 to approve the withdrawal of the underlying unfair labor practice charge. Then, on April 13, 1995, counsel for Respondent-Applicant filed an application for fees and expenses pursuant to the Equal Access to Justice Act (EAJA), and, on April 14, the Board remanded the matter to me. Thereafter, on May 31, 1995, counsel for the General Counsel filed an answer to the aforementioned application for fees and expenses, and, on June 21, counsel for Respondent-Applicant filed a reply to the answer.

I. FACTS ESTABLISHED BY THE PLEADINGS

Initially, the pleadings establish that at the time of the issuance of the instant complaint by the Regional Director of Region 32, Respondent-Applicant, a sole proprietorship, was engaged in the building and construction industry in Modesto, California, as an electrical contractor; that, based upon Respondent-Applicant's own assets and liabilities, its net worth was substantially less than $7 million; and that it was not affiliated with any other businesses. The pleadings further establish that since January 1, 1994, Respondent-Applicant has employed no more than two office clerical workers and eight full-time or regular part-time electricians. The General Counsel does not contend that Respondent-Applicant does not meet the EAJA eligibility standards, and, in the above circumstances, I find that Respondent-Applicant does, in fact, meet the standards. Moreover, the General Counsel concedes that Respondent-Applicant was the prevailing party, within the meaning of EAJA, in the underlying unfair labor practice proceeding insofar as the complaint alleged that Respondent failed and refused to consider for hire and/or failed and refused to employ 11 individuals in violation of Section 8(a)(1) and (3) of the Act.

II. SUBSTANTIAL JUSTIFICATION

Pursuant to Section 504(a)(1) of EAJA, a party, which has prevailed in litigation before a Federal Government agency is entitled to an award of attorney's fees and expenses incurred in connection with that litigation unless the government can establish that its position was ''substantially justified.'' In *Pierce v. Underwood*, 108 S.Ct. 2541, 2550 at fn. 2 (1988), the Supreme Court defined the phrase as meaning ''justified to a degree that could satisfy a reasonable person'' or ''justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact,'' and, in *Jansen Distributing Co*., 291 NLRB 801 at fn. 2 (1988), the Board adopted this definition for the above phrase. Here, counsel for Respondent-Applicant contend that the General Counsel was not substantially justified in issuing the instant complaint and proceeding to trial against Respondent-Applicant; that, assuming arguendo, the General Counsel was substantially justified in proceeding to trial, counsel for the General Counsel was not substantially justified in pursuing its case against Respondent-Applicant upon becoming aware that her legal theories were not supported by the record evidence; and that, subsequent to the close of the hearing, the General Counsel was not substantially justified in delaying until the day before the posthearing briefs were due before submitting its motion to withdraw the instant complaint. Assuming a contrary position, counsel for the General Counsel argues that the General Counsel was substantially justified in proceeding to trial, in continuing to prosecute the matter at trial and that, as the withdrawal of a complaint after hearing necessarily involves careful consideration of many factors, the General Counsel was substantially justified in taking the amount of time, at issue here, before deciding to seek permission to withdraw the instant complaint.

Regarding whether the General Counsel was substantially justified in proceeding to trial in the underlying unfair labor practice case, the pleadings establish that the evidence the General Counsel obtained during the investigation of the Union's unfair labor practice charge, disclosed that, pursuant to an early June 1994 newspaper advertisement of jobs for journeyman and apprentice electricians, eight alleged discriminatees together went to Respondent-Applicant's office in Modesto in order to apply for the advertised jobs; that, based on their attire, oral statements, or written comments on the application forms, each job applicant made Respondent-Applicant aware of his affiliation with the Union; and that none of the eight individuals was hired by Respondent-Applicant. Further, during the investigation, while its counsel asserted, in a short-position letter, that none of the alleged discriminatees were hired as Respondent-Applicant lost on a bid for a large electrical project, scheduled to commence in June, at the Campbell Soup Company plant, located in Modesto, which work Respondent-Applicant had expected to receive and in anticipation of which the aforementioned advertisement had been placed, a representative of Campbell Soup Company informed the General Counsel that, in fact, Respondent-Applicant had been awarded the work on no less than six electrical projects at its Modesto plant during the summer of 1994, and Labor Connection, a temporary employment agency, provided information that, in order to staff the above jobs at the Campbell Soup factory, within 5 weeks of the alleged discriminatees' unsuccessful applications for jobs, during the time period July 14–23, Respondent-Applicant placed work orders for 18 journeyman, semiskilled, and apprentice electricians, who eventually performed a total of 155.5 hours of work for Respondent-Applicant at the Campbell Soup factory. Based on the foregoing, the General Counsel concluded that Respondent-Applicant made a decision not to hire the union job applicants and that, instead, it utilized the services of a temporary agency to supply manpower for its electrical projects at the Campbell Soup Company plant, and, as Respondent-Applicant presented only a minimal amount of exculpatory evidence,[1] which was deemed insufficient to counter its apparent discriminatory motivation for refusing to employ the eight alleged discriminatees, the General Counsel issued the instant complaint, alleging that Respondent-Applicant had unlawfully failed and refused to hire the eight alleged discriminatees.

Moreover, buttressing the General Counsel's view that Respondent-Applicant had acted in violation of Section 8(a)(1) and (3) of the Act, during the pretrial investigation, counsel for the General Counsel uncovered evidence that Tina McKee, Respondent-Applicant's receptionist and office manager, told one of the alleged discriminatees that had she known he was union she would have informed him that Respondent-Applicant was not accepting applications for work. The new evidence established that McKee's duties included dispensing employment applications to potential employees, collecting the documents, and answering applicants' questions, and, in the circumstances, counsel for the General Counsel concluded that McKee acted as Respondent-Appli-

[1] Beyond telephone calls from its attorney, a two-paragraph position letter from its attorney, and its payroll records for the time period June 4 through August 20, 1994, which neither set forth the employees' job classifications nor their hire dates, Respondent-Applicant failed to cooperate during the precomplaint investigation. This is critical inasmuch as much of the exculpatory evidence, including information pertaining to the prior use of the Labor Connection in April 1994 and other employment applications, offered at trial was not made available to the General Counsel during the precomplaint investigation.

cant's agent within the meaning of Section 2(13) of the Act when she uttered the above comments. Accordingly, as the General Counsel's evidence disclosed that Respondent-Applicant had knowledge of the alleged discriminatees' union affiliations and harbored unlawful animus and that Respondent-Applicant had available jobs for which the alleged discriminatees were not hired, and as counsel for Respondent-Applicant concede that the above-described evidence, which was adduced during the investigatory stage of this matter, was uncontroverted, I conclude that the General Counsel was substantially justified in proceeding to trial in this matter.

Next, Respondent-Applicant contends that the General Counsel was not substantially justified in prosecuting the above-captioned matter to the conclusion of the trial. In this regard, counsel for the General Counsel sought and was granted permission to amend the complaint to allege that Tina McKee acted as Respondent-Applicant's agent within the meaning of Section 2(13) of the Act, to allege that Respondent-Applicant also failed and refused to consider the alleged discriminatees for employment, and to list three additional individuals as alleged discriminatees. Counsel for Respondent-Applicant initially argues that the General Counsel had no basis in fact or law for alleging that Tina McKee was Respondent-Applicant's agent within the meaning of the Act so as to have bound Respondent-Applicant by her above-described comment. However, contrary to Respondent-Applicant, the General Counsel's pretrial evidence established that McKee was the individual who, on Respondent-Applicant's behalf, distributed employment application forms to prospective employees and collected them and was the individual, on behalf of Respondent-Applicant, who answered telephone inquiries about jobs and informed individuals about the status of their employment applications. In *House Calls, Inc*., 304 NLRB 311 (1991), the Board stated that ''the test for agency is whether, under all the circumstances, an employee would reasonably believe that the alleged agent was speaking for management and reflecting company policy.'' Id. at 311. In accord with such reasoning, in *Diehl Equipment Co*., 297 NLRB 504 (1989), finding that an individual was an agent within the meaning of the Act, the Board relied on evidence, as here, ''that her job routinely involved handing job applications to individuals and receiving the completed applications from them'' and concluded that the respondent ''had placed [her] in a position in which she had the apparent authority to provide information and to answer questions relative to the application forms she handled.'' Id. at 504 fn. 2. Based on the foregoing, I conclude that, while the extent of McKee's actual authority may have been limited, based on the record as a whole, there was a reasonable basis in law and in fact for the General Counsel to have alleged and argued that McKee acted as Respondent-Applicant's agent, thereby binding Respondent-Applicant by her comments, indicating that the former harbored unlawful animus toward applicants, who were members of the Union.

Next, citing the Eighth Circuit Court of Appeals decision in *Town & Country Electric v. NLRB*, 34 F.3d 625 (8th Cir. 1994), cert. granted *NLRB v. Town & Country Electric, Inc*., 115 S.Ct. 933 (1995), and decisions of the Fourth Circuit Court of Appeals, including *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), counsel for Respondent-Applicant contend that the General Counsel was not substantially justified in proceeding to trial inasmuch as the alleged discriminatees were not employees within the meaning of Section 2(3) of the Act. Initially, in this regard, I note that there was no evidence adduced during the pretrial investigation that any of the alleged discriminatees was a paid employee of the Union or that any were not bona fide job applicants. Further, I note, of course, that, while *Town & Country* is now before the Supreme Court, which has not yet ruled on its merits, both the Board's General Counsel and its administrative law judges are bound to adhere to Board-case precedent rather than decisions of the various circuit courts of appeals, and, to date, the Board has not subscribed to the same view of the law, with regard to the employee status of paid employees of labor organizations and of individual union members who apply for jobs with the intent of aiding their labor organization in organizing the prospective employer, as that of the Fourth and Eighth Circuit Courts of Appeals. Rather, the Board has consistently held that the definition of ''employee,'' set forth in Section 2(3) of the Act, encompasses paid union organizers (*Casey Electric*, 313 NLRB 774 (1994); *Sunland Construction Co*., 309 NLRB 1224 (1992)) and that, notwithstanding that job applicants may be involved in a ''salting campaign'' and may be applying for available jobs with the intent of organizing for their union, the individuals are bona fide employees under Section 2(3) of the Act. *Waco, Inc*., 316 NLRB 73 (1995). Accordingly, until the Board has ruled and in the absence of a Supreme Court decision on the matter, I believe that the General Counsel was substantially justified in contending that the alleged discriminatees were employees within the meaning of Section 2(3) of the Act.

As set forth in its application for fees and expenses, the crux of Respondent-Applicant's contentions, with regard to the trial stage of the unfair labor practice proceeding, is that counsel for the General Counsel was not substantially justified in litigating the matter through the close of the hearing ''. . . when its theories became insupportable after presentation of the merits of the case.'' Thereafter, in their reply brief to the General Counsel's answer, counsel for Respondent-Applicant assert that ''the Board completely failed to prove a prima facie case at trial'' and that, as it failed to do so, ''prosecution of this case at trial was not substantially justified.'' At the outset, contrary to counsel, I note that it is immaterial that the General Counsel may not have established a prima facie case of a violation. *Enerhaul, Inc*., 263 NLRB 890 (1982), enf. denied on other grounds 710 F.2d 748 (11th Cir. 1983). Rather, the General Counsel's position will be deemed substantially justified if ''the General Counsel presents evidence which, if credited by the factfinder, would constitute a prima facie case of unlawful conduct.'' *Barrett's Interiors*, 272 NLRB 527, 528 (1984); *Jim's Big M*, 266 NLRB 665 (1983), enfd. mem. sub nom. *Wolf Street Supermarkets v. NLRB*, 742 F.2d 1446 (2d Cir. 1984). Here, the determination of the legality of Respondent's alleged acts and conduct was governed by the traditional precepts of Board law in alleged union animus discharge cases, as modified by the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp*., 462 U.S. 393 (1983). Specifically, while the instant matters involved alleged unlawful failures and refusals to either consider for hire or to hire and not alleged unlawful dis-

charges, counsel for the General Counsel's burden of proof was a virtually identical one. Thus, in order to prove prima facie violations of Section 8(a)(1) and (3) of the Act, counsel for the General Counsel had the burden of establishing that the alleged discriminatees filed employment applications during hiring stages; that Respondent-Applicant was aware of their source; that Respondent-Applicant harbored unlawful animus; and that it acted on that animus in failing and refusing to hire any from this group. *J. E. Merit Constructors*, 302 NLRB 301, 303–304 (1991). Although the alleged failures and refusals to consider for employment and the alleged failures to hire constituted separate and distinct alleged unfair labor practices, the only difference in counsel for the General Counsel's burden of proof for establishing prima facie violations of the Act was that, unlike the latter allegation, the alleged unlawful failures and refusals to consider for employment ''[did] not depend on the availability of . . . job[s] at the time [the] application[s] for employment [were] made.'' *Shawnee Industries*, 140 NLRB 1451, 1453 (1963). Moreover, if counsel for the General Counsel made the required prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in Respondent-Applicant's decision, the burden shifted to the latter to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, supra at 1089. Finally, in determining whether counsel for the General Counsel established a prima facie showing of unlawful animus, the Board would not have ''quantitatively analyze[d] the effect of the unlawful motive. The existence of such [would have been] sufficient to make a . . . violation of the Act.'' Id. at 1089 fn. 4.

On the third day of the trial, while expressing skepticism about what seemed to be the General Counsel's only plausible theory for the alleged unfair labor practices, I averred that counsel for the General Counsel may well have presented sufficient evidence to establish prima facie violations of Section 8(a)(1) and (3) of the Act with regard to the failure to consider and failure to hire complaint allegations. Thus, the record evidence established that, on or about June 7, 1994, Respondent-Applicant placed an advertisement in the local Modesto newspaper, seeking qualified electricians; that, according to alleged discriminatee Michael Flood, he telephoned Respondent-Applicant's office and was told by a woman that the advertisement was for ''a few steady electricians'' for an ''ongoing'' job and that the company would take applications for the remainder of the week; that Respondent-Applicant placed the advertisement in anticipation of being victorious in bidding for various electrical jobs at the Campbell Soup Company plant in June and during a scheduled shutdown in July; and that Jim Blaylock's intent was to hire a journeyman electrician and an apprentice electrician. The record evidence further established tha, on June 8 the 11 alleged discriminatees visited Respondent-Applicant's office and requested employment applications; that Tina McKee gave an application form to each alleged discriminatee; that each either wore clothing identifying him as a member of the Union or mentioned his union affiliation on his application; and that each alleged discriminatee returned his completed job application to McKee. Further, according to Flood, McKee asked how he knew about the job, and he replied that he had seen the advertisement and telephoned the office; McKee asked if he had mentioned that he was a union member; and that, after he said no, McKee said, ''if you'd told me that, I would have told you that we weren't accepting applications.'' In addition, the record evidence disclosed that Respondent-Applicant was victorious on 6 of 10 job bids, which were submitted to Campbell Soup Company; that the electrical work was to be performed during that company's July plant shutdown; and that, while not one of the alleged discriminatees was hired to work on the projects, Respondent-Applicant hired two full-time employees in July and paid for the services of several temporary electricians, who were referred to it by the Labor Connection for work at the Campbell Soup factory.

Based on the above facts, and the record as a whole, I continue to adhere to the view that, if entirely credited by me, the evidence, presented by counsel for the General Counsel, would have been sufficient to establish a prima facie showing that Respondent-Applicant engaged in conduct, violative of Section 8(a)(1) and (3) of the Act.[2] I recognize that, at the trial, I voiced skepticism with what I suspected would have been the General Counsel's theory for finding a violation in Respondent-Applicant's failure to consider for hire or to hire any of the alleged discriminatees—that it failed to hire any of the individuals, who had applied for jobs, in order to mask its unlawful refusal to hire union members. Although it remains an unlikely scenario, I can not find that the state of the record evidence would have precluded such a finding. Moreover, while the above-described exculpatory evidence obviously weakened the General Counsel's case and may have been sufficient for Respondent-Applicant to have ultimately prevailed on the merits, I note that such would have been dependent, in no insignificant part, on my determination as to the respective credibility of Jim Blaylock and Tina McKee.[3] As my approval of the General Counsel's withdrawal of the complaint precluded the necessity for any rulings on the merits of the complaint allega-

[2] I recognize that much exculpatory evidence, which was not proffered during the pretrial stage of the proceeding and which was clearly relevant for a *Wright Line* analysis of the record, was presented during the trial. Thus, the record evidence established that Respondent-Applicant had utilized the Labor Connection for temporary electricians in April 1994. Also, several other individuals, who were not union members, filed job applications prior to and in response to the June advertisement and were not hired for any of Respondent-Applicant's Campbell Soup Company projects in July. In addition, one other union member, who was not part of the group who filed job applications on June 8 and who did not disclose his membership in the Union, applied for a job in response to Respondent-Applicant's advertisement but was not hired. Further, Jim Blaylock testified that his company did not receive the anticipated contract from Campbell Soup Company for work in June; that he utilized the services of temporary employees, referred from the Labor Connection, rather than hiring from his pool of applicants because of economic considerations; that he has hired members of the Union on previous occasions; and that one of the temporary electricians, who was referred by the Labor Connection was the Union's business agent and who worked for Respondent-Applicant without incident. Finally, on the last day of the hearing, Tina McKee testified, by telephone, on behalf of Respondent-Applicant and denied the animus statements, attributed to her.

[3] Of course, McKee did not testify until the last day of trial, and counsel for the General Counsel could not have known the content of her testimony until that point. Consequently, to argue that counsel should have been able to evaluate the merits of the complaint allegations before McKee testified would be specious and unfair.

tions, including credibility resolutions, I need not, and do not, make such determinations now. In the above circumstances, I believe that counsel for the General Counsel was substantially justified in continuing to prosecute this matter through to the conclusion of the trial.

I turn now to the final aspect of Respondent-Applicant's contention that it should be awarded fees and expenses in the above-captioned matter—that the General Counsel was not substantially justified in delaying until the day before the briefs were due before filing its motion, seeking permission to withdraw the underlying complaint, during which time, counsel for Respondent-Applicant prepared, at considerable expense, a posthearing brief. The record establishes that, from the close of the hearing, the parties had 35 days in which to file their posthearing briefs; that the transcript of the last day of trial was not received by counsel for the General Counsel until on or about February 21; that, during the posttrial period, the parties were attempting to arrive at a stipulation with regard to the testimony, which would have been offered by a Campbell Soup Company engineer regarding jobs for which Respondent-Applicant bid but did not receive; and that, on March 14, counsel for Respondent-Applicant provided to counsel for the General Counsel a written statement from a competitor of Respondent-Applicant, which statement corroborated Jim Blaylock's testimony that his June advertisement was placed in connection with a ''large'' job for which he bid but the competitor submitted the winning bid. In addition, counsel for the General Counsel argues that 34 days ''is not an inordinately long period of time for the General Counsel to reconsider a difficult case in its entirety, to review all of the evidence presented during the trial, . . . and to consider the weight of the evidence of animus in light of the totality of the evidence.'' The issue presented is a dual one—was the General Counsel substantially justified in taking time after the close of the hearing before deciding to seek withdrawal of the complaint and, if so, did there come a point when the ''protective mantle'' of substantial justification was lost. I have not been able to locate any Board cases, which concern the precise issue involved here. However, in a similar case, *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143 (D.C. Cir. 1988), the court concluded that, while the General Counsel may have been substantially justified in proceeding to the conclusion of an unfair labor practice hearing, as it should have been evident to the General Counsel that its case had been wrecked, ''the matter should have gone no farther, and certainly not to the point of preparing . . . elaborate post-trial briefs.'' Id. at 1149. Here, as I believe that the General Counsel presented a prima facie case sufficient to establish that Respondent-Applicant engaged in conduct violative of Section 8(a)(1) and (3) of the Act and as the animus evidence was at issue and some of Jim Blaylock's exculpatory testimony was uncorroborated, one may not justifiably postulate that the General Counsel's case was so insubstantial that a loss was certain and that a decision to move to withdraw the complaint required little, if any, contemplation, and, as conceded by counsel for Respondent in their reply brief, ''some period of time may have been necessary to consider the case after trial.'' As to the amount of time taken by the General Counsel before submitting its motion to withdraw the complaint, while the burden of proving that such was necessary was that of the General Counsel and while, at first blush, it might appear that the time taken was excessive, in the absence of standards or criteria, established by the Board, given the fact and legal issues involved in the case, the policy questions, and the posttrial evidentiary problems, I find that there is no basis for concluding that, as a matter of law, the General Counsel was not substantially justified in taking 34 days to decide that its legal position was without merit and that it should seek permission to withdraw the instant complaint.

III. SUMMARY AND CONCLUSION

Having considered the entire record here, including the record of the unfair labor practice proceeding and the arguments of counsel for both parties, I have found that the General Counsel was substantially justified within the meaning of the Equal Access to Justice Act and the Board's Rules and Regulations in issuing the instant complaint and proceeding to trial, prosecuting the case through the conclusion of the trial, and waiting until the day before the posthearing briefs were due to file its motion for permission to withdraw the complaint. Accordingly, I further find that Respondent-Applicant is not entitled to any award in the present action and that the application should be dismissed.

On the foregoing findings and conclusions, the entire record, and pursuant to Section 102.153 of the Board's Rules and Regulations, I issue the following recommended[4]

ORDER

IT IS ORDERED that the application of Blaylock Electric for an award under the Equal Access to Justice Act be, and the same is, dismissed.

[4] In the event no exceptions are filed as provided in Sec. 102.154 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in the Board's Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections thereto shall be deemed waived for all purposes.