Allied Lettercraft Co., Inc. *and* Local One, Amalgamated Lithographers of America, affiliated with International Typographical Union, AFL-CIO. Case 2-CA-17724(E)

24 June 1986

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND BABSON

On 27 September 1985 Administrative Law Judge D. Barry Morris issued the attached supplemental decision under the Equal Access to Justice Act (EAJA). The Applicant and the General Counsel each filed exceptions and a supporting brief. The Applicant filed a brief in opposition to the General Counsel's exceptions.

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[1] only to the extent consistent with this Decision and Order.

In the unfair labor practice proceeding[2] underlying this EAJA application, the Board, inter alia, adopted the judge's finding that in December 1980 following the advent of a union organizing campaign the Applicant violated Section 8(a)(1) by interrogating an employee and Section 8(a)(3) by unlawfully granting wage increases to certain employees and by laying off two other employees.[3]

As stated by the judge in his supplemental decision, on the sixth day of the 9-day hearing[4] he granted the General Counsel's motion to withdraw an 8(a)(5) allegation that the Applicant had failed to recognize and bargain with the Union and an 8(a)(3) allegation that the Applicant unlawfully discharged employee David Calandra on 10 December 1980. We agree with the judge's finding, for the reasons set forth by him, that the General Counsel's position with respect to the 8(a)(5) allegation was substantially justified from the time the complaint was so amended on 16 March 1981 until the withdrawal of this allegation on 16 December 1981. However, we disagree with his finding that the General Counsel was not similarly substantially justified with respect to the prosecution of the 8(a)(3) allegation during the same time period.[5]

The General Counsel's answer to the EAJA application set forth the basis for the allegation that Calandra was unlawfully discharged. The General Counsel's theory of a prima facie case was based on facts uncovered during the investigation of the 17 December 1980 charge. Calandra was a known union activist discharged during a period in which the Applicant demonstrated its antiunion animus by the acts later found to be unfair labor practices as set forth above. The General Counsel emphasized that Calandra himself was discharged only 2 days after the Applicant learned of the Union's organizing campaign.

The investigation disclosed that the Applicant claimed that the discharge was for cause—Calandra had used the supplies and equipment in the Applicant's print shop to conduct his own personal lithographic business. The General Counsel, however, concluded that this reason was pretextual based on two alternative theories. First, on 3 February 1981 Calandra provided an affidavit in which he denied the Applicant's assertion that he had engaged in any "theft of services." Second, the General Counsel reasoned that even if Calandra had done so, there was evidence of disparate treatment in that other employees had routinely done similar personal work on company time using company equipment without penalty. This evidence consisted of an affidavit from employee Paul Giaime who stated that he had on one occasion without permission used the Applicant's lithographic equipment to prepare promotional material for a company not a client of the Applicant. Giaime stated that he was never disciplined or criticized in any way for having done that personal work. Giaime further stated that to his personal knowledge no other employee who had engaged in personal work on company time had ever been disciplined or discharged.

Thus the General Counsel in issuing the complaint was prepared at trial to rely not only on Calandra's testimony but also on a disparate treatment theory if she could not sustain her contention that no misconduct had, in fact, ever occurred.

As discussed by the judge, Calandra did testify, consistent with his affidavit, that the lithographic

[1] We believe that Congress, in revising the Equal Access to Justice Act, 5 U S C § 504 (1982), as amended by Pub L 99-80, 99 Stat 183 (1985), did not alter but merely clarified the definition of "substantially justified" "Substantially justified" means more than "mere reasonableness." H R Rep 99-120 at 9 (1985)

[2] 272 NLRB 612 (1984)

[3] Member Babson notes that he was not on the Board when the decision in the underlying unfair labor practice case issued

[4] The hearing was held on various dates from 5 October 1981 through 12 January 1982

[5] The proof of the 8(a)(5) allegation depended on the General Counsel's ability to demonstrate that the Union possessed a card majority on 2 December 1980 Under the judge's analysis, the General Counsel could have done so up until 16 December 1981 even without Calandra's card or testimony about the grounds for excluding employee Braverman

Because we find substantial justification for the General Counsel's maintaining until 16 December both the 8(a)(3) and (5) allegations, we find it unnecessary to pass on the judge's findings concerning the reasonableness of the fees sought by the Applicant

jobs which the Applicant claimed had been done without permission on its presses had, in fact, been run at the facility of another company, Merit Kleer. Before the next hearing date, the General Counsel called Merit Kleer's owner, hoping to obtain a witness to corroborate Calandra's testimony. However, that official stated that Calandra had never done any lithographic work in his facility. The following day, 15 December, the General Counsel confronted Calandra with what she had just learned. Calandra then confessed to the General Counsel that he had lied both in his affidavit and at trial. When the hearing resumed on 16 December, the General Counsel moved to withdraw the complaint allegation.

The judge found that the General Counsel was not substantially justified in prosecuting the Calandra allegation. However, he relied only on the General Counsel's inability to sustain the first prong of her theory of a violation—Calandra's innocence. In effect the judge faulted the thoroughness of both the General Counsel's precomplaint investigation and her trial preparation. The judge read the General Counsel's answer to the EAJA application as in effect admitting to having issued a complaint in March and proceeding to trial 7 months later without seeking corroboration for Calandra's February statement until 2 months after the hearing had began.

We do not find it necessary to pass on the judge's implicit finding that the General Counsel investigation and trial preparation was inadequate with respect to the argument that Calandra had not committed the misconduct of which he had been accused by the Applicant. We find that the General Counsel would still have been substantially justified in pursuing her disparate treatment theory. We stress that the General Counsel withdrew the complaint allegation in question not only because Calandra had just been revealed to be not credible, but also because on 16 December the General Counsel was aware that Giaime had not yet been located and was therefore unavailable to testify. We find that the General Counsel responded appropriately by withdrawing the Calandra allegation as soon as she knew that the witnesses necessary to sustain her alternate 8(a)(3) theories were either not credible or not available. Thus, we conclude that the General Counsel was substantially justified in alleging and prosecuting the allegation from March until 16 December 1981. Accordingly, we shall deny the Applicant's EAJA application.

ORDER

It is ordered that the application of the Applicant, Allied Lettercraft Co., Inc., New York, New York, for an award under the Equal Access to Justice Act is denied.

James A. Wasserman, Esq., for the General Counsel.
Samuel D. Rosen, Esq. (Milgrim, Thomajan, Jacobs & Lee P.C.), of New York, New York, for the Applicant.

SUPPLEMENTAL DECISION ON APPLICATION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES

D. BARRY MORRIS, Administrative Law Judge. On 27 February 1981[1] the Regional Director for Region 2 issued a complaint, and on 16 March an amended complaint, alleging that Allied Lettercraft Co., Inc. (Applicant) violated Section 8(a)(1) of the National Labor Relations Act by interrogating its employees concerning their membership in Local One, Amalgamated Lithographers of America, affiliated with International Typographical Union, AFL–CIO (the Union) by creating the impression that the employees' union activities were under surveillance and by engaging in surveillance of the employees' union activities. The amended complaint also alleges that the Applicant violated Section 8(a)(1) and (3) of the Act by granting wage increases to several employees, by laying off five employees, and by discharging employee David Calandra. In addition, the amended complaint alleges that a majority of the lithographic production employees selected the Union as their representative for the purpose of collective bargaining, that the Applicant refused to recognize and bargain collectively with the Union, and that through the alleged unfair labor practices the Applicant engaged in a course of conduct precluding the holding of a fair election, in violation of Section 8(a)(5) of the Act.

A hearing was held before me on 5, 6, 26, 28, and 29 October, 16 and 17 December, and 11 and 12 January 1982. On 16 December the General Counsel moved to further amend the complaint by withdrawing the 8(a)(3) allegation involving Calandra and the 8(a)(5) allegation involving the failure to recognize and bargain with the Union. I granted the General Counsel's motion at the outset of the hearing on 16 December.

On 27 May 1982 I issued a decision in which I concluded that the Applicant violated Section 8(a)(1) of the Act by interrogating employee Hawkins concerning his union activities; violated Section 8(a)(1) and (3) by granting wage increases to Bartnik, Prentice, and Hawkins; and violated Section 8(a)(1) and (3) by laying off Giaime and Ramos. I dismissed the allegations involving surveillance and involving the layoffs of Banks, Gonzalez, and Roberts. On 28 September 1984 the Board issued its Decision and Order affirming my findings but modifying my recommended Order by permitting the Applicant to litigate in the compliance stage of the proceeding the appropriateness of Giaime's reinstatement and backpay.

On 11 January 1982 the Applicant filed an application for an award of attorneys' fees and expenses pursuant to the Equal Access to Justice Act (EAJA), Pub L. 96–481, 94 Stat. 2325 and § 102.143 of the Board's Rules and

[1] All dates refer to 1981 unless otherwise specified

Regulations. On 29 January 1982 the Board referred the application to me for appropriate action. The application sought an award of fees and expenses relating to the allegations, which were withdrawn by the General Counsel on 16 December.

On 12 February 1982 the General Counsel filed a motion to dismiss the application. The Applicant filed its opposition to the motion on 19 February 1982. On 23 April 1982 I issued an order deferring further consideration of the motion to dismiss until 30 days after the entry of the Board's final order in the underlying proceeding. On 12 August 1982 Applicant moved that I recuse myself from conducting any further proceedings in this matter. The Applicant's motion was denied on 23 September 1982.

Following the Board's Decision and Order on 28 September 1984, I issued an order on 5 November 1984 granting the parties an opportunity to file supplemental pleadings. On 21 December 1984 the General Counsel filed an amendment to her motion to dismiss. On 10 January 1985 I issued an order denying the General Counsel's motion to dismiss and allowing the Applicant 30 days to file an amended application to conform to Section 102.147(h) of the Board's Rules. On 7 February 1985 the Applicant filed an amendment to its application. On 7 March 1985 the General Counsel filed its answer and on 21 March 1985 Applicant filed a reply.

Pursuant to an Order to Show Cause issued on 31 July 1985 Applicant filed an affidavit of Samuel D. Rosen, dated 12 August 1985; the General Counsel filed a response dated 14 August 1985 together with the affidavit of Joel E. Cohen, dated 13 August 1985; and the Applicant filed a further affidavit of Samuel D. Rosen, dated 15 August 1985.

Findings of Fact and Conclusions of Law

I. DISCHARGE OF CALANDRA

Section 102.44 of the Board's Rules provides that an applicant may receive an award for fees and expenses incurred in connection with a significant and discrete substantive portion of a proceeding, unless the position of the General Counsel was substantially justified. The burden of proof that an award should not be made is on the General Counsel who may avoid an award by showing that her position was "reasonable in law and fact."

In the affidavit of Samuel D. Rosen sworn to 12 August 1985, Rosen states that prior to the issuance of the complaint, Board Attorney Joel Cohen visited the Applicant's premises to interview its representative. The affidavit states:

> During that interview and in my presence, Mr. Ray Conroy, Allied's Vice-President, played for Mr. Cohen a tape recording of a conversation he had with Mr. Calandra on the date the latter was discharged. On that tape, Mr. Conroy confronted Mr. Calandra with his misconduct, at which point Mr. Calandra admitted same. There is no question that Mr. Calandra admitted the theft, whereupon he was discharged. . . .

In the affidavit of Joel E. Cohen, sworn to 13 August 1985, Cohen states that he went to the Applicant's office on 22 January 1981 to listen to the above-described tape. The affidavit states:

> The tape recorded conversation which I heard was difficult to understand. Many of the sentences spoken by Mr. Conroy and Mr. Calandra were inaudible. The parts of the conversation that were audible seemed to support the Company's contention regarding the exit interview, however it was difficult to accurately assess due to the inaudible nature of much, if not most, of the conversation.

In its answer, the General Counsel states that during the hearing Calandra testified that the work for the jobs in question had been done outside of Applicant's premises, at Merit Kleer Company in Patterson, New Jersey. In seeking to call a witness to corroborate Calandra's testimony, the General Counsel contacted Bill Franklin, the owner of Merit Kleer. In a telephone conversation on 14 December Franklin informed the General Counsel that Calandra had never run any lithographic jobs at Merit Kleer. On 15 December the General Counsel confronted Calandra with this information, whereupon Calandra admitted that he had testified untruthfully and that he had in fact used the Applicant's equipment and supplies for his own commercial business. It was then that the General Counsel sought to withdraw the 8(a)(3) allegation involving Calandra.

The General Counsel maintains that parts of the tape recording were inaudible and that on 3 February Calandra provided the Board with an affidavit concerning his interview with Conroy on the day of his discharge in which Calandra denied using the Applicant's supplies and equipment to perform outside work. Even were such affidavit worthy of belief, an examination of its shows that Calandra stated, "I did the 'outside' work at Merit Kleer in Patterson." Thus, the General Counsel was not first made aware of Calandra's contention that the outside work was performed at Merit Kleer at the hearing on 29 October, but instead was made aware of that contention as early as 3 February.

Inasmuch as the Cohen affidavit states that "the parts of the conversation that were audible seemed to support the Company's contention regarding the exit interview," I find that on 22 January the Board agent heard a tape in which Calandra admitted the theft of the Applicant's supplies and services. In view of Calandra's affidavit of 3 February there was nothing that the General Counsel learned at the hearing that she did not already know or should have known by early February. Accordingly, I conclude that the General Counsel's position that Calandra's discharge was a violation of Section 8(a)(3) of the Act was not "reasonable in law and fact."

I find that the General Counsel's position with respect to the discharge of Calandra was not substantially justified. The Applicant, having prevailed in a significant and discrete substantive portion of an adversary adjudication, and having met the eligibility requirements of the Board's Rules, I conclude that the Applicant is entitled

to an award of attorneys' fees and expenses pursuant to EAJA.

II. THE 8(A)(5) ALLEGATIONS

For the following reasons I conclude that as of the date the amended complaint was issued, and until 15 December, the General Counsel's position that the Applicant violated Section 8(a)(5) of the Act because a majority of the employees in the appropriate unit designated the Union as their representative for the purpose of collective bargaining because Respondent refused to recognize and bargain with the Union; and because the alleged unfair labor practices precluded the holding of a fair election; was substantially justified within the meaning of Section 102.44 of the Board's Rules.

The Union had sought recognition in a craft unit of lithographic production employees. On 2 December 1980 Applicant employed 23 employees. The General Counsel's answer states that there was probable cause to believe that five of these employees should be excluded from the unit. I find that the General Counsel's position was reasonable in law and fact. The affidavits of Giaime and Calandra stated that Vincente Lenon was a messenger, who did not perform any work involving lithographic skills. See *D. V. Copying & Printing*, 240 NLRB 1276, 1286 (1979). Similarly, the affidavits of Giaime and Calandra stated that Sol Braverman did not perform any work involving lithographic skills, but instead he operated either a letterpress or a folding machine. In addition, the Giaime affidavit stated that Frollo and Giarusso were part-time employees who were retired foremen and continued to exercise supervisory authority. See *NLRB v. Publishers Printing Co.*, 625 F.2d 746, 749 (6th Cir. 1980). Furthermore, Robert Cantelmo was the son of Daniel Cantelmo, Applicant's president. In this connection the Board's policy of excluding close relatives of managers of closely held corporations was recently upheld by the United States Supreme Court. *NLRB v. Action Automotive*, 118 LRRM 2577 (Feb. 19, 1985).

The Union had obtained 11 valid authorization cards, including Calandra's. The General Counsel moved to withdraw the 8(a)(5) allegation as soon as it ascertained that the available credible evidence was insufficient to establish the Union's majority status. Because Calandra's authorization card could no longer be counted toward the Union's majority, only 10 valid authorization cards remained in evidence.

Calandra and Giaime, the two witnesses through whom the General Counsel had intended to elicit testimony to prove that Braverman should be excluded from the unit, were either incredible or unavailable. In addition, during the hearing Hawking testified that Braveman spent approximately two-thirds of the year working alongside the unit employees performing lithographic work. With respect to Lenon, Ramos' testimony indicated that Lenon should be included as part of the unit because he was a helper who performed tasks similar to those performed by Banks, whose inclusion had been stipulated by the parties. In regard to Frollo and Giarusso, the witness through whom the General Counsel had intended to establish their exclusion, namely, Giaime, was unavailable.

With Frollo, Giarusso, Braveman, and Lenon included in the unit, and with Cantelmo and Calandra excluded, the unit would thus have contained 21 employees. Inasmuch as the Union had received only 10 valid authorization cards, excluding Calandra's, the General Counsel concluded that the Union had received an insufficient number of authorization cards to establish majority status. Accordingly, the General Counsel moved to withdraw the 8(a)(5) allegations as soon as the hearing resumed on 16 December.

I have previously found that as of early February the General Counsel did not have a reasonable basis on which to assume that Calandra was discharged in violation of the Act. Accordingly, I find that as of that date it was reasonable for the General Counsel to have assumed that the Union received valid authorization cards from 10 employees. For the reasons stated above, I find that the General Counsel was justified in maintaining that Lenon, Braveman, Frollo, Giarusso, and Robert Cantelmo should be excluded from the unit. With those five individuals excluded, and with Calandra also excluded, the number of employees included in the unit totals 17. Inasumuch as the Union had valid authorization cards from 10 employees, the General Counsel was substantially justified in her position that the Union had received a sufficient number of authorization cards to establish majority status.

Accordingly, I find that the General Counsel's position with respect to the 8(a)(5) allegations was reasonable in law and fact and was therefore substantially justified. The application for an award of fees and expenses with respect to the 8(a)(5) allegations is therefore denied.

III. REASONABLENESS OF FEES

The Applicant has requested an award of $15,488 in fees and $2692 in expenses, totaling $18,140. Section 102.44 of the Board's Rules provides that an award will be reduced or denied if the applicant has unduly or unreasonably protracted the adjudication or if special circumstances make the award sought unjust. Section 102.145(c) lists several factors to be considered in determining the reasonableness of the fee sought. One such factor is the "time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudicative proceeding."

The application does not specify that services were performed solely in connection with the allegation concerning the Calandra discharge. Indeed, it would appear that the fees requested for services performed prior to 16 December include fees for the entire proceeding, even those parts of the proceeding not covered by the application. Thus, for example, the Applicant seeks reimbursement for services performed in attending each day of the hearing.

Calandra was called as a witness of 29 October at 822 of the transcript and was excused at 899. Thus, his testimony accounted for 77 pages of the transcript. The next day of hearing was 16 December. At the outset of that hearing the General Counsel moved to withdraw the allegation concerning Calandra's discharge. Until that time there had been 796 pages of testimony. The pages of tes-

timony relating to Calandra's discharge thus represent 9.6 percent of the total amount of testimony. I believe it is reasonable to award Applicant 10 percent of the fees requested for the period beginning the date of the amended complaint and ending 16 December, when the allegation concerning the Calandra discharge was withdrawn.[2]

For the period 17 March through 15 December Applicant requests fees for 85 hours. I am awarding 10 percent of that, or fees for 8.5 hours. The issue concerning Calandra's discharge was not complex. The Applicant's counsel was fully aware of the circumstances surrounding the discharge as early as January and therefore needed little time to prepare for Calandra's cross-examination. I believe that an award of fees for 8.5 hours of attorneys' time is reasonable under the circumstances.

For the period 18 December through 23 April 1982 the Applicant seeks fees for 89 hours. Included are 8.6 hours for legal research and related matters concerning "disqualification of ALJ." The Applicant's motion for my recusal was subsequently denied. Accordingly, the fee request for this matter is disallowed. In addition, the Applicant has requested fees for 6 hours of services on 27 January 1982 for "digesting depo[sition]." There is no indication that this relates to the fee application and accordingly this fee is disallowed. The remaining times comes to 74.4 hours, which includes not less than 34.6 hours for "legal research re counsel fees." Although I have no doubt that the Applicant's submissions required time and deligence to prepare, I believe that the hours devoted to the matter were excessive. I find that a total of 40 hours is reasonable under the circumstances for the time spent during the period 18 December through 23 April 1982. See *Ceglia v. Schweiker*, 566 F.Supp. 118, 125 (E.D.N.Y. 1983). Again, however, the Applicant has not specified which services were directly related to the allegation concerning the Calandra discharge. From my reading of the application and the subsequent submissions, it appears to me that less than 25 percent was reasonably related to the withdrawal of the allegation concerning Calandra's discharge. I believe, therefore, that under the circumstances an award for 25 percent of the allowable services is reasonable. Accordingly, I am awarding Applicant fees for 10 hours of services for the period 18 December through 23 April 1982.

The Applicant has requested an award for 6.1 hours of services performed during the period 9 June through 20 September 1982. On 23 April 1982 I issued an order deferring consideration of the General Counsel's motion to dismiss until 30 days after entry of the Board's final order in the underlying proceeding. Accordingly, I am disallowing fees for services performed subsequent to 23 April 1982.

The Applicant lists 11.6 hours of services for the period 22 October 1984 through 6 February 1985. This appears to me to be a reasonable amount of time spent for the submissions involved. Again, however, inasmuch as the Applicant has not specified which of the services related to Calandra's discharge, as previously explained, I am allowing 25 percent of the fees requested. I am thus awarding fees for 2.9 hours for services performed from 22 October 1984 through 6 February 1985.

I find that the Applicant is entitled to compensation for 21.4 hours of attorneys' time, as follows:

Dates	*Attorneys Time (hours)*
3/17/81–12/15/81	8.5
10/18/81–4/23/82	10.0
10/22/84–2/6/85	2.9
Total	21.4

I find that an award for 21.4 hours of attorneys' time is adequate and reasonable in light of the issues involved in this proceeding and should be compensated at the rate of $75 per hour, totaling $1605.

IV. EXPENSES

The Applicant has requested $2692 in expenses, including $854 for photostating, postage, and related expenses through 16 December and $1838 for transcripts. Inasmuch as the Applicant has not specified which expenses are related to the allegation concerning the Calandra discharge, as explained above, I am allowing 10 percent of the photostating and related expenses, or $85. With respect to the transcripts, I am allowing $75, which is the cost of the transcript of the 77 pages of Calandra's testimony.[3] Accordingly, I am awarding expenses in the amount of $160.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Applicant is awarded $1605 in attorneys' fees and $160 in expenses, pursuant to its EAJA application, as amended.

[2] The Applicant's request for a fee on 4 March is disallowed inasmuch as it occurred prior to the date of the amended complaint In addition, Applicant's request for fees for 13 7 hours for attendance at trial on 16 and 17 December is disallowed since this took place after the withdrawal of the allegation

[3] The invoices indicate that the reporting company charges 98 cents per page.

[4] 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.