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Raley's and Independent Drug Clerks Assn.

Raley's (United Wholesalers & Retailers Union, Party to the Contract) and United Food and Commercial Workers Union, Local 588, United Food and Commercial Workers International Union

United Wholesalers & Retailers Union (Raley's) and Chris Zicarelli and United Food and Commercial Workers Union, Local 588, United Food and Commercial Workers International Union and Thomas Moore. Cases 20-CA-24973, 20-CA-25354, 20-CA-25649, 20-CA-26294, 20-CB-9623, 20-CB-9742, and 20-CB-9932

August 26, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

On October 10, 2007, Administrative Law Judge William L. Schmidt (the EAJA judge) issued the attached supplemental decision. The Applicant, United Wholesalers and Retailers Union (UWRU), filed exceptions and a supporting brief, the General Counsel filed a brief in response, and UWRU filed a reply.¹

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 findings and conclusions only to the extent consistent with this Decision and Order, for the reasons explained below. The judge denied UWRU's request for fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, finding that the General Counsel's overall position with respect to UWRU in the underlying case, *Raley's*, 348 NLRB 382 (2006), was substantially justified as an inclusive whole. We agree with the judge that the General Counsel's position was substantially justified until he finished presenting his case-in-chief at trial. At that point—as we find, contrary to the judge—the General Counsel was no longer substantially justified in pursuing the case against

¹ The General Counsel filed a limited cross-exception pertaining to the single allegation on which the judge found UWRU not to be the prevailing party in the underlying case, contending in addition that the allegation was substantially justified. On September 8, 2008, the Board severed and granted the General Counsel's other cross-exception (which UWRU did not oppose) to include all the parties' posthearing briefs from the underlying case in the record.

UWRU. We therefore find that the Applicant is entitled to an EAJA award for fees that it incurred after that point, subject to further reduction by additional amounts to be determined by the judge on remand.

The EAJA judge accurately set forth the factual background and procedural posture of the case in the attached decision, and we shall assume familiarity with it. It suffices to note that, in the underlying unfair labor practices case, the Board, upholding the decision of Judge Timothy D. Nelson, dismissed all of the complaint allegations against UWRU and all but a few relatively minor allegations against Raley's. The relevant allegations are discussed below.

I

Under EAJA and the Board's implementing regulations, the Board shall award to an eligible respondent who prevailed in an adversarial proceeding the fees and other expenses incurred by the respondent unless the General Counsel's position was "substantially justified" or special circumstances make an award unjust. 5 U.S.C. § 504(a)(1); Section 102.144(a) of the Board's Rules and Regulations. For the purpose of deciding whether litigation was substantially justified, "EAJA . . . favors treating a case as an inclusive whole rather than as atomized line-items." *Commissioner, INS v. Jean*, 496 U.S. 154, 161–162 (1990); *C. Factotum*, 337 NLRB 1, 1 (2001). Further, the Board must determine whether the allegations involving UWRU in this case, as "an inclusive whole," were substantially justified at each phase of the litigation. *Glesby Wholesale*, 340 NLRB 1059, 1060 (2003).

Under *Pierce v. Underwood*, 487 U.S. 552, 563–566 (1988), an agency's position is "substantially justified" where the evidence is "what a reasonable mind might accept as adequate to support a conclusion"—i.e., where it has a reasonable basis in fact and law. An agency's position is substantially justified when "reasonable people could differ" on whether the action should go forward. *Id.*; see also *Teamsters Local 741*, 321 NLRB 886, 889 (1996). The mere fact that the General Counsel lost or advanced a position contrary to prior precedent does not mean the litigation lacked substantial justification. *Alpha-Omega Electric*, 312 NLRB 292, 293 (1993).

As the EAJA judge also noted, the applicable standard is not intended to deter the General Counsel from bringing forward close questions of fact or new theories of law. *Meaden Screw Products, Co.*, 336 NLRB 298, 300 (2001). Finally, the clarity of the governing legal principles, or lack thereof, must be taken into account. *Abell Engineering & Mfg.*, 340 NLRB 133, 133–134 (2003).

II.

As UWRU points out, the complaint allegations pertaining to Raley's interaction with the Independent Drug Clerks Association (IDCA), UWRU's predecessor—i.e., those allegations originating before UWRU was founded—should not be treated as part of the “inclusive whole” for the purpose of UWRU's EAJA application. However, as the EAJA judge recognized, the 8(a)(1) and (2) allegations that Raley's unlawfully assisted and recognized UWRU placed UWRU's status as the lawful representative of Raley's drug clerks directly at issue. We therefore consider those allegations as part of the inclusive whole as well as the 8(b) allegations pertaining to postrecognition dues collection and the related late fee.

Although we agree with the EAJA judge that the complaint allegations comprising the “inclusive whole” of the case against UWRU should be divided into three categories for the purpose of analysis, we define those categories differently. In our view, the first and by far the predominant category included the allegations that Raley's unlawfully recognized and entered into a collective-bargaining agreement with UWRU, based on the alleged unlawful assistance it gave UWRU in gathering petition signatures prior to the recognition. The second category consists of the allegations that Raley's unlawfully assisted UWRU after granting it recognition by providing it with legal representation through attorney Henry Telfeian. The third category consists of the allegations that UWRU unlawfully attempted to enforce the union-security clause in its collective-bargaining agreement with Raley's as well as the late fee in UWRU's constitution to compel the payment of union dues by Raley's employees.

III.

Under the above-cited EAJA authority, in order to determine whether the General Counsel's case as a whole was substantially justified, we must determine whether he was substantially justified in pursuing each of these categories of allegations. For the following reasons, we agree with the EAJA judge that the General Counsel was substantially justified in pursuing the case against UWRU up to the point where he rested his case-in-chief. Contrary to the EAJA judge, however, we find that, thereafter, the General Counsel lacked a substantial justification for continuing to prosecute the case against UWRU.

A.

On March 29, 1996, the complaint in the case was first amended to allege that Raley's recognition of UWRU was unlawful and that Raley's had unlawfully assisted UWRU at its Benicia store. Additional charges were

filed and the investigation continued. By the opening of the trial on August 19, 1996, the complaint alleged unit-wide and specific misconduct at a large number of Raley's stores in a 51-store unit and misconduct by Raley's over a period of more than 2 years, along with misconduct by UWRU. The General Counsel's investigation was complicated and delayed by a number of discovery disputes over UWRU's majority showing and other issues.²

When he took the case to trial, the General Counsel had a reasonable basis in fact and law for pursuing the complaint's central allegation that Raley's recognition of the UWRU violated Section 8(a)(2) and 8(b)(1) of the Act. His primary theory was that UWRU's showing of majority support was tainted by numerous instances of unlawful assistance to UWRU. The alleged unlawful assistance included disregarding Raley's written rules against nonbusiness use of its phones and fax machines to permit supporters of UWRU to solicit coworkers to sign petitions and to transmit those petitions. Additionally, the alleged unlawful assistance included permitting employees who supported UWRU to campaign on its premises (in some instances during worktime) while excluding from Raley's property nonemployees who sought to campaign for Local 588.

At the outset of trial, it was clear that even if UWRU had presented a majority of unit-employee signatures to Raley's at the time it received recognition, this showing could be undermined if the General Counsel prevailed in some of his allegations relating to the count and unit size. The total number of eligible employee signatures the judge ultimately found to support UWRU's majority was 355 out of a unit of 673. If 19 fewer signatures had been found valid (or fewer than 19 if the bargaining unit had been found to be larger), Raley's recognition of UWRU would have been unlawful under *Ladies' Garment Workers v. NLRB (Bernhard-Altman)*, 366 U.S. 731 (1961). And in fact, the General Counsel ultimately did prove some acts of unlawful assistance to UWRU or interference with employees' support of Local 588.

In addition, while he ultimately failed to establish that Raley's unlawfully assisted and recognized UWRU, the General Counsel had reasonable grounds for believing that such misconduct could be established at trial. There is no dispute that from the moment UWRU was formed in the immediate wake of a prior union's disclaimer of interest, Raley's repeatedly broadcast its preference that

² On August 6, 1996, 2 weeks before the trial began, the General Counsel moved to continue the trial date indefinitely for the purpose of continuing his investigation. The Respondents, however, opposed the motion and it was in concession to them that the trial began on August 19.

UWRU, rather than its rival union (United Food and Commercial Workers Union, Local 588, the charging party), take over the representation of its drug clerks. In fact, Raley's had previously violated the Act in helping the prior union resist an earlier attempt by Local 588 to become the drug clerks' representative. *Raley's, Inc.*, 256 NLRB 946 (1981), *enfd.* in relevant part 728 F.2d 1274 (en banc) (9th Cir. 1984).³ There had been admitted direct communication between UWRU's leader, employee Edwin Wright, and Raley's management the same day UWRU was founded. Moreover, Wright and his supporters had—within the space of the next 9 days—founded a new union, prepared and carried out a unit-wide campaign for signatures, and submitted an apparent majority of over 350 signatures to Raley's management for a unit consisting of 51 separate stores spread across northern California. This campaign was conducted using Raley's store phones and fax machines in violation of an express prohibition on such personal use of store property. Finally, immediately after Raley's granted recognition to UWRU, a lawyer who had been representing the employer began representing the union. This rapid success in a large and dispersed unit, Raley's' history, its express preference for UWRU, and UWRU's highly unusual retention of the employer's counsel, gave the General Counsel reason to suspect that unlawful conduct had occurred again.⁴

The Board has never attempted to establish a bright-line rule defining how far an employer may lawfully go in supporting a union during an organizing campaign. As with many issues under the Act, each case must be assessed according to its particular facts. See, e.g., *Duane Reade, Inc.*, 338 NLRB 943, 944 (2003), *enfd.* 99 Fed. Appx. 240 (D.C. Cir. 2004). As the judge noted, quoting *SMI of Worcester*, 271 NLRB 1508, 1523 (1984), with respect to defining unlawful employer assistance, “[t]he problem lies in determining that shadowy point at which employer assistance goes ‘beyond legally protected cooperation into the proscribed domain of interference with the freedom of choice of the employees.’” See also *Longchamps, Inc.*, 205 NLRB 1025, 1031 (1973) (“The quantum of employer cooperation

³ As the judge here noted, the Board found in the earlier case that “while an employer may lawfully state its preference between competing unions in a representation election [citation omitted], [Raley's] clearly went beyond indicating its preference by according the incumbent Union privileges and favored treatment so as to enhance that Union's position to the detriment of the petitioning Union.” 256 NLRB at fn.2.

⁴ Although it is not determinative, we find it significant in this connection that the judge who heard the evidence and who was sharply critical of the General Counsel in his decision, substantially denied a motion to dismiss at the close of the General Counsel's case.

which surpasses the line and becomes unlawful support is not susceptible to precise measurement.”)

Given the paucity of bright lines in this area of the law, we find that the General Counsel posited a reasonable (though ultimately unmeritorious) legal theory when he alleged that Raley's' disregard of its published rule prohibiting nonbusiness use of phones and fax machines constituted unlawful assistance to the UWRU, at least where there was a rival union attempting to organize Raley's employees. While, ordinarily, an employer does not unlawfully discriminate, for example, in granting access to one union's agents, but not another's, unless the disfavored union requests the privilege and is refused,⁵ the General Counsel's implicit theory plausibly suggested that no such request should be required when the alleged unlawful assistance was rendered in violation of an express rule (when the rival would have no reason to believe a request would be granted). In *Duane Reade*, 338 NLRB at 944, the Board held that an employer, in a rival union situation, violated Section 8(a)(2) when it disregarded its own no-solicitation policy and permitted one of two rival unions to access its property, directed employees to meet with union agents on paid worktime, stated that that union was the only union with whom the company was affiliated, and said the employees had to sign authorizations cards and that they could not sign with another union. Although the employer's assistance in *Duane Reade* was more extensive than Raley's' assistance to UWRU, and although the Board's decision there issued after the hearing here, we think it supports a conclusion that the General Counsel acted reasonably, though ultimately unsuccessfully, in pressing the claim that Raley's had provided unlawful assistance by disregarding its written rule in a rival union context where Raley's had expressed its preference for UWRU over Local 588.

A significant number of complaint allegations concerning unlawful assistance and disparate enforcement had to be resolved by factual and credibility determinations. The ultimate allegation of unlawful recognition was based in large part on allegations of specific events at particular stores. The judge found it necessary to make many credibility determinations in the course of his decision. These factors, too, support a finding that the General Counsel's position was substantially justified.⁶

⁵ See, e.g., *Davis Supermarkets*, 306 NLRB 426 (1992), *affd.* 2 F.3d 1162 (D.C. Cir. 1993), *cert. denied* 511 U.S. 1003 (1994).

⁶ UWRU is correct, however, that the complaint allegation that Raley's imposed a discriminatory prohibition “around September 15” on store campaign activity by Local 588 grocery clerks but not by UWRU supporters was based on the terms of the September 15 memo to Raley's store managers, not on credibility.

In the view of our dissenting colleague, the General Counsel should have established through his own investigation what the judge ultimately found: that Raley's actual practice with respect to employee use of store fax and phone equipment for nonwork purposes was highly permissive. However, there is no dispute that Raley's published rules categorically forbade the personal use of fax and phone equipment. With respect to fax machines, the written prohibition in the rules had been reinforced on at least two occasions with written, unit-wide reminders to employees. The written prohibitions alone arguably precluded an easy determination of the issue.⁷ Moreover, what the judge ultimately found—that Raley's actual practice with respect to employees' personal use of store equipment was highly permissive—is highly unusual.⁸ And although the judge ultimately found to the contrary, it was not unreasonable for the General Counsel to contend that Raley's management's knowledge and approval of more-than-normal use of store equipment by UWRU supporters could be reasonably inferred simply from the extent of that unit-wide activity.

Finally, even assuming that Raley's permissive practice with respect to the personal use of store equipment in normal circumstances was clear to all employees, it could not have been clear to all employees what Raley's practice would be in the setting of a rival-union competition in which management was publicly preferring one union over the other.

Nevertheless, the factual basis for the General Counsel's case collapsed at trial. The Respondents' attorneys cross-examined the General Counsel's witnesses and established conclusively that the written rule was a dead letter and that Raley's had an actual practice of permitting employees to use its equipment for nonbusiness purposes, provided they did not abuse the privilege. None of those witnesses provided an evidentiary basis for inferring that Raley's changed that practice during UWRU's campaign. Under those circumstances, we are unable to find that the General Counsel retained a substantial justification for pursuing his allegation of unlawful assistance with respect to the use of store equipment, much less that such assistance tainted UWRU's showing

⁷ The Board has always recognized that written workplace rules have a significant impact on employee activity. It is well established, for example, that a written rule that impairs Sec. 7 rights constitutes an independent violation of Sec. 8(a)(1), regardless of the employer's actual practices. E.g., *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999).

⁸ In fact, although the EAJA judge did not question this fact finding in making his own analysis, he expressed clear skepticism that this "remarkable practice" had in fact been Raley's policy.

of majority support.⁹ Nor did the General Counsel succeed in establishing, during his affirmative case, through calling adverse witnesses from Raley's management or introduction of any documents, that Raley's adopted a corporate-wide strategy or any particular means of facilitating UWRU's collection of petition signatures.

Further, contrary to the judge, we cannot find that the General Counsel had a reasonable basis in law for alleging that Raley's unlawfully assisted UWRU by permitting Raley's employees to organize for UWRU on company premises while at the same time preventing *non-employee* union organizers from accessing its property to campaign for Local 588.¹⁰ Under *Lechmere, Inc., v. NLRB*, 502 U.S. 527 (1992), there is a clear distinction between the respective rights of employees and nonemployees to access an employer's property. The General Counsel advanced no authority or persuasive argument for the proposition that the access rights of employees and nonemployees change in a context where two unions compete to represent the same group of workers. Once he had failed to establish that Raley's discriminated between its pro- and anti-UWRU employees with respect to store access, the General Counsel lacked a substantial justification for pursuing this unlawful assistance allegation and pressing his claim that UWRU's showing of majority support was tainted by such assistance.¹¹

Furthermore, we find that the General Counsel was not substantially justified in continuing to pursue (after he

⁹ The General Counsel pursued a second, independent theory of liability until shortly before resting his case. That second theory was that, regardless of any taint, UWRU had not garnered a numerical majority of authentic signatures in the appropriate bargaining unit. That theory was advanced, in part, because the General Counsel misplaced three sheets of employee signatures. Shortly before resting his case, the General Counsel conceded that, even accepting all of his arguments on unit scope and signature validity, UWRU had obtained signatures from a majority of unit employees. While the lack-of-numerical-majority theory lacked a reasonable basis in fact, the critical point here is that the General Counsel had another substantially justified basis for pursuing his complaint allegation. Moreover, the General Counsel's arguments about the scope of the unit and the validity of certain signatures were also relevant to his tainted-majority theory, because the resolution of those issues in the General Counsel's favor may have lessened the extent of taint necessary to invalidate the majority showing.

¹⁰ As explained above, however, we treat this allegation as part of the category of allegations supporting the charge that Raley's unlawfully recognized UWRU. We thus do not analyze it separately for purposes of liability under EAJA.

¹¹ In finding to the contrary, the EAJA judge incorrectly relied on *Ernst Home Centers*, 308 NLRB 848 (1992), a case distinguishable on the ground that it involved the access rights of an incumbent union with a contractual right to enter the employer's property. The Board there found that the respondent violated Sec. 8(a)(5) and (1) by unilaterally revoking the union's contractual right of access while knowingly permitting an employee leader of a decertification campaign extensive access of its premises. Here, in contrast, Local 588 had no contractual right to access the areas in which they sought to campaign.

rested his case-in-chief) his theory that instances of alleged coercion or assistance by Raley's at individual stores tainted UWRU's showing of majority support and thereby rendered Raley's extension of recognition unlawful. As explained in our underlying decision on the merits of the unfair labor practices, some of the alleged coercion occurred at stores at which UWRU did not gather any signatures, 348 NLRB at 384–386, and the General Counsel failed during his case-in-chief to adduce evidence that would permit the judge to reasonably conclude that a determinative number of employees had been coerced into signing the UWRU's authorization petition.

B.

We turn now to the second category of allegations, which includes allegations that Raley's unlawfully assisted UWRU when Henry Telfeian, an attorney in private practice, ceased representing Raley's shortly after its recognition of UWRU and immediately began representing UWRU. The evidence revealed that Telfeian, who had represented Raley's before and after the signature drive, offered his services to UWRU and that he eventually provided services at a deeply discounted rate. Importantly, UWRU and Telfeian refused to cooperate with the General Counsel's investigation of this allegation. Until Telfeian testified at the hearing, the General Counsel had evidence suggesting (erroneously) that Telfeian had in fact simultaneously represented both Raley's and UWRU for some limited period and that he had provided his legal services to UWRU at a deeply discounted hourly rate. Given Telfeian's unusual switching of sides, we find substantial justification for pursuing this allegation until the close of the General Counsel's case. Importantly, Telfeian's testimony at the hearing established that Raley's had in no way subsidized his services to UWRU and that there had been no actual temporal overlap in substantive legal representation of the two parties. Hence, at the time his case concluded, the General Counsel lacked a reasonable basis in fact and law for pursuing the Telfeian allegations. Moreover, UWRU's showing of majority support could not have been tainted by Telfeian's representation of UWRU because the showing predated the representation.

C.

The final category of allegations includes the claims that UWRU unlawfully sought to enforce the union-security clause in its collective-bargaining agreement with Raley's as well as the late fee established in its constitution. Whether UWRU could lawfully seek enforcement of its union-security clause depended on whether Raley's recognition of UWRU was lawful. Because, as

we have found, a substantial justification existed for pursuing the recognition allegation only until the General Counsel rested his case-in-chief, we conclude likewise for the union-security allegation.

In contrast, we find that the General Counsel had a substantial justification for prosecuting the late-fee allegation through to Board adjudication. In particular, we find that *The Great Atlantic & Pacific Tea Co. (Baker Workers, Local 12)*, 110 NLRB 918 (1954), a case that has never been expressly overruled, provided plausible support for the General Counsel's ultimately unavailing argument regarding the late fee. In *The Great Atlantic & Pacific Tea Co.*, the Board found that a union violated Section 8(b) by imposing a \$1 "assessment" on members who were late paying their monthly dues. The Board reasoned that the assessment was, by its nature, intermittent and not periodic, and hence it did not constitute "periodic dues," the nonpayment of which can be a lawful basis for discharge under the proviso to Section 8(a)(3). *Id.* at 922. We conclude that the General Counsel had a reasonable basis for analogizing UWRU's late fee to the assessment found unlawful in that precedent.¹²

IV.

In sum, we have found that the General Counsel had a reasonable basis in fact and law for pursuing most of the relevant complaint allegations, including his central allegation challenging the recognition, to the point where he rested his case-in-chief, but not thereafter. Though he continued to have a substantial justification in pursuing the late-fee issue through to Board adjudication, that allegation was comparatively minor and must consequently be given much less weight.

Accordingly, viewing the case as an inclusive whole, we conclude that the General Counsel was not substantially justified in litigating his case against UWRU after he rested his case on March 10, 1997. UWRU is therefore entitled to an EAJA award for fees it accrued in defending the case after that date.

Because the EAJA judge found that UWRU was not entitled to an award, he declined to reach a number of issues raised by the General Counsel specifically relating to fee eligibility. UWRU did not respond on these issues in its briefs. Given our grant of a partial award, it becomes necessary to resolve those issues, and we remand

¹² We assume *arguendo* that the General Counsel was substantially justified in pursuing his allegation that Raley's unlawfully assisted UWRU by allegedly making two payments to employee Wright. The General Counsel withdrew that allegation during trial, and it was a relatively minor allegation that does not affect our assessment of the case as whole.

the case to the EAJA judge for that purpose.¹³ This award is without prejudice to the Applicant's right to submit additional or amended claims with respect to the litigation of this proceeding.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge William L. Schmidt for the purpose of reopening the record and, if necessary, conducting a hearing to receive further evidence and to resolve any material factual disputes relating to the amounts to be excluded and deducted from the award of fees and expenses under EAJA to which the Applicant, United Wholesalers and Retailers Union, is entitled under this decision.

IT IS FURTHER ORDERED that the judge prepare and serve on the parties a second supplemental decision containing any necessary credibility resolutions, findings of fact upon the evidence received pursuant to the provisions of this Order, conclusions of law, and recommendations; and that, following service of the second supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. August 26, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, concurring in part and dissenting in part.

I concur with the majority's finding that the General Counsel lacked a substantial basis for prosecuting his case, taken as an inclusive whole, against UWRU and that an award of fees and other expenses is appropriate under EAJA. My colleagues limit the UWRU's EAJA award to the period after the General Counsel rested his case-in-chief, reasoning that he was substantially justified in pursuing his case to that point in the litigation. In my view, the award should run from the date on which the General Counsel issued the second amended complaint, when UWRU was added as a respondent in this matter. From its inception, the General Counsel's case

¹³ UWRU, in its application, petitions the Board to amend its rules to raise the hourly rate of compensation for an EAJA award from \$75 to \$125. As the current rate is established in a regulation, we do not believe it would be appropriate to amend it via adjudication.

against UWRU lacked a reasonable basis in fact and law. Anything short of a full award does a disservice to the animating principles of EAJA and fails to deter the General Counsel from similarly misguided litigation in the future.

In evaluating the General Counsel's case, my colleagues have divided the relevant allegations into three categories: the unlawful assistance and recognition allegations, the Telfeian allegations, and the union-security and late-fee allegations. As my colleagues recognize, the first is the predominant category, and it contains the central allegation that Raley's unlawfully recognized the UWRU as the exclusive collective-bargaining representative of nearly 700 drug clerks employed in 51 separate Raley's stores.

I disagree with my colleagues' conclusion that there was a reasonable basis, either in fact or law, for pursuing the unlawful assistance and recognition category of claims through to the close of the General Counsel's case-in-chief. First, as the majority recognizes, the General Counsel's legal theory that Raley's unlawfully assisted UWRU and tainted its majority showing by permitting Raley's employees to access its property to campaign for UWRU while excluding nonemployees who wished to campaign for Local 588 conflicts with controlling Supreme Court precedent, *Lechmere, Inc., v. NLRB*, 502 U.S. 527 (1992), which was apparent from the outset.

Second, as to the General Counsel's allegation that Raley's disregard of its published rule prohibiting non-business use of telephones and fax machines constituted unlawful assistance to the UWRU, my colleagues contend that the General Counsel was substantially justified in pursuing this theory until, during cross-examination, the Respondents' attorneys elicited testimony that Raley's had an actual practice of permitting nonbusiness use of such equipment. I disagree. Any reasonably diligent investigation by the General Counsel would have entailed at least some pretrial inquiry into whether the written policy on equipment use was ever enforced.¹

¹ I note that the General Counsel routinely brings charges against employers alleging that their actual practices differ from written policies. Indeed, perhaps nowhere are such allegations more common than in cases involving charges of disparate access to company equipment and bulletin boards. See, e.g., *Bon Harbor Nursing & Rehabilitation Center*, 348 NLRB 1062, 1062 fn.4 (2006) (employer with written rule requiring management authorization before posting on bulletin board violated Sec. 8(a)(1) by enforcing it against employees' union postings where employer had not enforced written policy before advent of union campaign); *Benteler Industries*, 323 NLRB 712, 713-714 (1997) (employer with written policy restricting bulletin board postings to company information violated Sec. 8(a)(1) by barring employees from posting union literature because employer had actual practice permitting postings unrelated to work).

Because the General Counsel did not bother to conduct even a cursory factual investigation, I disagree that he was substantially justified in prosecuting this allegation at any phase. Cf. *American Pacific Concrete Pipe Co.*, 290 NLRB 134, 134 (1988) (General Counsel's failure to investigate was unreasonable and resulted in her taking a position that was not substantially justified).

In reaching a contrary conclusion, my colleagues assert that the General Counsel had reasons to "suspect" that Raley's had unlawfully assisted UWRU. Specifically, they note that Raley's had expressed a preference for UWRU over Local 588, that UWRU's leader had communicated with Raley's, that UWRU had been extremely successful in quickly gathering signatures from employees working throughout Northern California, and that Raley's had unlawfully assisted UWRU's predecessor union over 30 years ago.² None of those circumstances, whether considered alone or together, establish a substantial justification for the General Counsel's litigation. As my colleagues concede, there was nothing unlawful in Raley's expressions of preference for UWRU or in its communications with UWRU leadership. Moreover, neither UWRU's success gathering signatures nor Raley's 30-year-old violations provide a reasonable factual basis for the specific allegations of unlawful assistance here and are irrelevant to the General Counsel's legal theories. If the General Counsel's suspicions were raised, the proper course was to investigate further, not to issue a complaint and proceed to trial.

Finally, the General Counsel's alternative theory that, regardless of taint, UWRU lacked a numerical majority of signatures, was factually erroneous and premised on his negligent mishandling of three pages of employee signatures in his possession at the time he issued the second amended complaint. While, to his credit, the General Counsel subsequently disclaimed the lack-of-numerical-majority theory after discovering the error in the midst of trial, that does not change the fact that he never had a reasonable basis for pursuing this allegation in the first place. For these reasons, the major components in the first category of complaint allegations were never substantially justified.³

Regarding the second category of allegations, I agree with my colleagues that the General Counsel was substantially justified in pressing to the close of his case, but

² See *Raley's, Inc.*, 256 NLRB 946 (1981), enfd. in relevant part 728 F.2d 1274 (en banc) (9th Cir. 1984).

³ Though some of the minor allegations of unlawful assistance or coercion at individual stores may have turned on credibility issues, the General Counsel lacked a reasonable basis in fact and law for arguing that any such alleged misconduct could possibly have invalidated UWRU's showing of majority support.

not thereafter, the comparatively narrow claims that Raley's unlawfully assisted UWRU by allegedly providing it with the legal services of attorney Telfeian.

As for the third category, I would find, as do my colleagues, that the allegation that UWRU violated Section 8(b)(1) by seeking to enforce its union-security clause hinged on whether the recognition was lawful. As explained above, I would find that the recognition allegation was unjustified from its inception. Hence, I would reach the same conclusion as to the union-security allegation. Finally, I assume arguing that the General Counsel had a reasonable basis in fact and law for pressing through to Board adjudication his relatively minor claim that UWRU violated Section 8(b)(1) by seeking to enforce the late-fee provision in its union constitution.

Thus, the bulk of the General Counsel's case, including his central allegations, lacked a substantial justification from the start. Viewing the case as an inclusive whole, as the Board must, leads to the conclusion that the EAJA award should commence from the date on which the second amended complaint issued. In this case, the General Counsel brought the vast litigation resources of the federal government to bear on a small organization without having conducted a reasonably thorough investigation or having formulated a reasonable legal theory based on the results of such an investigation. EAJA was enacted to deter precisely such conduct as well as to make whole a respondent harmed by such unjustified government prosecution. For these reasons, I concur in part and dissent in part.

Dated, Washington, D.C. August 26, 2011

Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD

Paula R. Katz and Kathleen Schneider, Attys., for the General Counsel.

Henry F. Telfeian, Atty., for the Applicant.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. On September 29, 2006, the National Labor Relations Board (the Board) issued its decision in this matter affirming the findings and conclusions of Administrative Law Judge Timothy D. Nelson (the ALJ), and adopting his recommended Order with minor modifications. After 63 days of hearing between August 19, 1996, to August 25, 1997, the ALJ concluded that Respondent Raley's violated the Act in a few minor respects, comparatively speaking, and that Respondent United Wholesalers &

Retailers Union (the Union or UWRU) had not violated the Act, as alleged, and had not benefited from any unlawful assistance by Raley's when it pursued recognition as the exclusive collective-bargaining representative of Raley's pharmacy clerks throughout northern California in 1993.¹

On October 26, 2006, UWRU filed a verified application for attorney's fees and costs under the Equal Access to Justice Act (EAJA) and under the implementing portion of the Board's Rules and Regulations, §§ 102.143–102.155. It seeks reimbursement in the amount of “not less than \$175,793.16” plus as yet unknown amounts of added fees and expenses required to prosecute the application. The General Counsel submitted an answer to the application and the UWRU submitted a reply to that answer. The application, the answer, and the reply have been referred to me for consideration and ruling because the ALJ retired shortly after his decision issued, and, therefore, is unavailable within the meaning NLRB Rules and Regulations, § 102.26.

In pertinent part, EAJA provides: “An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.” 5 U.S.C. § 504(a)(1).

The General Counsel concedes that the Applicant has established that it meets the basic EAJA eligibility requirements, i.e., that it is an association with a net worth of less than \$7 million, and 500 or fewer employees. However, the General Counsel avers that the Applicant does not qualify as a “prevailing party” with respect to one allegation, and that its litigation of the remaining allegations was substantially justified. The General Counsel also asserts that certain fees and costs are not reimbursable under EAJA. The General Counsel makes no claims about special circumstances that would make an award “unjust” within the meaning of EAJA.

The Applicant's reply asserts that the General Counsel's “legal theories lacked substantial justification thereby making the existence of ‘supporting facts’ irrelevant,” and that certain facts relevant to “viable theories based on extant Board law, were clearly legally insufficient to support the complaint and fail to establish that the General Counsel was substantially justified.”

Based on my findings, analysis, and conclusions below, I will recommend that the application be dismissed in its entirety.

FINDINGS OF FACT

A. Factual Overview

Raley's, the Respondent-Employer in the underlying case, operates 51 supermarkets with “Drug Centers” (pharmacies) throughout northern California and maintains a headquarters in Sacramento. United Food and Commercial Workers Local 588 (Local 588) represents the grocery employees at most of Raley's supermarkets. However, Raley's drug center employees have historically been represented by unaffiliated labor

organizations. In the 30-year period before 1993, the Independent Drug Clerks Association (IDCA) represented the drug center employees in two separate units, one for the pharmacists and the other for the drug clerks. The last collective-bargain agreement applicable to the drug clerks expired in the latter part of 1992.

Over the years, Raley's maintained written rules barring employees from using its phone and fax equipment for any purpose other than official company business except in emergency situations. In addition, the Company also maintained written rules barring solicitation and distribution during worktime. However, local managers enforced the phone/fax systems rule only when they felt an employee abused the systems by tying up the transmission lines. And usually, the local managers allowed on-duty employees to visit with off-duty, or even off-site, employees either on the sales floor or in back room areas, including the break rooms.

For the first 28 years of IDCA's existence, Kay Sordillo served as the IDCA's chief executive. She and the IDCA officers aligned with her always viewed Local 588, the grocery clerks' representative, as a “representational rival.” Shortly before October 1992, Gilbert (Gil) Eidam and a group of his allies gained control of the IDCA executive offices and soon aligned themselves with Local 588. Early on Eidam appointed a few Local 588 officials to IDCA's negotiating team when it began bargaining with Raley's for a new drug clerks' agreement. Eidam and his Local 588 allies set wage and benefit parity with the grocery clerks as a high priority in these negotiations. Later, Eidam appointed or “deputized” 30 or so Local 588 business agents to administer the IDCA's day-to-day affairs with Raley's despite the fact that the IDCA had maintained a steward in virtually every drug center for years.

Raley's strongly disapproved IDCA's informal alliance with Local 588 under Eidam's leadership. Around the same time, Raley's became locked in a bitter dispute with Local 588 over that union's demands for card-check recognition of grocery clerk units not already covered by Local 588's multiemployer agreement. On October 23, 1992, Raley's chief labor negotiator sent a memo to every drug center employee decrying the emerging IDCA-Local 588 ties. He charged that the IDCA executive committee had effectively turned the Association's reins over to Local 588. His memo alludes to the fact that Eidam designated Local 588 business agents to serve as IDCA agents in servicing the collective-bargaining agreement. The memo declared that Raley's would continue to deal with IDCA's store stewards but it would not allow the Local 588 agents to “interrupt your work or hold you hostage during store hours.” until the Company received a satisfactory explanation for their involvement in IDCA's business.²

A series of confrontations between local managers and the deputized Local 588 agents occurred when the latter began visiting Raley's drug centers insisting they had a right to visit

¹ The ALJ's decision is a colossus. As originally formatted, it ran approximately 300 single-spaced pages. As reformatted for attachment to the Board's decision, it is 174 pages long.

² This memo was also posted at the drug centers and formed the basis of one complaint allegation that Raley's violated Sec. 8(a)(1). The Board and the ALJ found no merit to the memo allegation. However, this matter occurred well before the UDCEA came into existence and, hence, it did not implicate any interest of that organization.

with the drug clerks, and to enter the employee break rooms to look at work schedules and other similar documents typically posted there. In a couple of instances the local managers caused the arrest of business agents for an unlawful trespass.

These developments soon caused a rift within IDCA membership ranks. Edwin (Ed) Wright, a clerk at Raley's Grass Valley, California drug center, and others opposed to representation of any kind by Local 588 aggressively criticized the actions taken by the IDCA executives. This early opposition reached its zenith in the Spring of 1993 when the dissidents held a 4-hour meeting on April 25 in Roseville, California, attended by nearly 200 drug clerks including about 20 IDCA stewards. The meeting produced two resolutions, one demanding that Eidam appoint a new negotiating committee that excluded the Local 588 executives, and the other demanding that he rescind the letter purporting to appoint Local 588 agents to act as IDCA representatives. Eidam declined to act on either demand.

Complaint paragraphs 9 through 17 allege conduct attributed to Raley's agents between October 1992 and May 1993, prior to UDCEA's existence. Similarly, paragraphs 31 (a May 1993 warning to Eidam) and 34 (involving IDCA's use of Local 588 agents to service its agreement) have no direct bearing on this application. For this reason, those events serve only to provide a context for later events that are relevant.³

For whatever reason, active opposition to the Eidam regime petered out for the next few months. In addition, Wright suffered a work-related injury (a herniated disk) and began a leave of absence on May 13, 1993, that lasted for a year, well beyond any of the critical events in this proceeding. Early in his disability period, however, Wright again became the outspoken leader of a faction opposing the IDCA leadership. Ultimately, his activities led to the formation of a new labor organization initially called the United Drug Center Employees Association (UDCEA) and later renamed the United Wholesalers & Retailers Union (UWRU).⁴ As described more fully below, the UDCEA/UWRU succeeded the IDCA as the representative of Raley's drug clerks and effectively thwarted the efforts by Eidam and his allies to facilitate a successful organizing drive among the drug clerks by Local 588.

By mid-July 1993 Raley's and the IDCA still had not concluded a new drug clerks' agreement. Around this time, Raley's presented its "best and final" offer to the IDCA negotiators and, in anticipation of a ratification vote, its labor relations chief explained its terms in a memo to the drug clerks. Following the best and final offer, IDCA officials held a series of meetings with the drug clerks around northern California to describe the offer's terms, and to conduct a ratification vote. The IDCA officials recommended rejection of the best and final offer.

³ Raley's did not file an application. Its size and scope undoubtedly would preclude it from qualifying for a reimbursement under EAJA.

⁴ UDCEA's formation occurred in mid-September 1993. Its name change to UWRU occurred a month later after Local 588 asserted ownership of the UDCEA name, threatened to sue Wright for using it, and demanded that Raley's cease dealing with him on behalf of UDCEA.

After Wright and other like-minded clerks became aware of the final-offer meetings, they began to attend them and actively campaigned for acceptance of the offer. In one instance, Wright and five of his coworker from the Grass Valley store made a 100-mile trip to the meeting in Red Bluff, California, where he argued for an affirmative vote on Raley's offer. Following a lengthy and heated exchange at the Red Bluff meeting, those in attendance voted and their ballots were mingled with ballots cast at other similar meetings and counted. A narrow majority voted against accepting Raley's best and final offer.

Following its rejection in the IDCA-conducted polling, Raley's implemented its best and final offer on September 1. Two weeks later, on September 14, Eidam faxed a letter to Raley's management disclaiming IDCA's interest in representing the drug clerks' unit effective immediately.⁵ Eidam also notified the IDCA members in the clerks' unit by letter that IDCA, in effect, no longer represented them and explained his reasons for taking this action. In effect, he charged that Raley's had taken advantage of the drug clerks over the years because the prior IDCA leadership had been unwilling or too weak to confront management for better contract terms. Eidam recommended that the drug clerks look to Local 588 for future representation. Eidam's explanation caused the ALJ to conclude that Eidam deliberately withdrew as the drug clerks' representative so that Local 588 could organize them.

While opposing Eidam's IDCA regime during the earlier negotiation period, Wright built a network of Raley's drug clerks opposed to Local 588. When Wright became aware of IDCA's disclaimer on September 15, he promptly consulted with several allies and, together, they agreed to organize a new independent clerks' union, the UDCEA. Almost immediately, Wright telephoned Raley's new labor relations manager, Daniel Abfalter, to advise that his group intended to organize the drug clerks and would be forwarding signed petitions to the Company.

Meanwhile, James Teel, the cochair of Raley's board of directors, replied to Eidam's disclaimer in a memo dated September 15. Teel arranged for a copy of his memo to be sent to each drug center and to the drug clerks individually. His memo acknowledged Eidam's disclaimer, criticized Local 588's recent involvement in IDCA's affairs, and accused Eidam of attempting to turn IDCA over to Local 588. He also assured the clerks that their recent pay increases would remain secure. In addition, Teel informed the clerks that they might be solicited to sign a petition for a new independent union organized by a group of their "fellow employees." Teel assured employees that the Company would recognize "any union that you wish" but that a union seeking recognition "must prove to us that over 50 percent of you want them."

The next day, Abfalter addressed the fallout from the disclaimer and the clerk's lack of representation in two memos to the drug center managers. The first memo directed the managers to bar IDCA officers from using company time for union business. It also advised that the "Grocery Clerks Local #588 members and agents" had no right "to interfere" with drug cen-

⁵ However, IDCA continued to represent the pharmacists' unit.

ter employees while on duty. Further, Abfalter's first memo stated that that Local 588 business agents and organizers "have no right to visit with our Drug Center employees" and that they had "no right of access to our break rooms or back room." The memo then turned to the Wright's home-grown organizing effort. About this subject, Abfalter's memo reported that the company had been approached "by a group of Raley's Drug employees who want to represent the Drug Center employees in their own union." It added that this group had "the right to demand recognition from Raley's" but the Company would have to be convinced that they represented a majority of the Drug Center employees before we recognize them." In conclusion, the memo advised the drug center managers that "[a]s you are presented with someone claiming that they have cards or a petition to present to you, IMMEDIATELY CALL YOUR SUPERVISOR OR DAN ABFALTER . . . for instructions on what to do."

In his second memo of the day to the drug center managers, Abfalter directed them to post Eidam's disclaimer letter and Teel's reply. It also instructed managers to reassure clerks that the processing of retroactive pay continued and "[t]he October (pay) increase will happen."⁶

Brenda Peterson, a clerk at the Rancho Cordova drug center and a Local 588 supporter, claimed that she saw the first Abfalter memo posted in the break room at her store. Based on that, the General Counsel argued the restrictions detailed in the memo against potential organizing activities by Local 588, their grocery-clerk members, and their other supporters when coupled with the failure to state similar restrictions for UDCEA organizers and supporters conveyed a coercive message company executives planned to assist the unaffiliated organization. However, the ALJ discredited Peterson's recollection about the posting of Abfalter's memo (and nearly everything else), and rejected inferences sought by the General Counsel grounded on employee knowledge of Abfalter's key directions to the local managers.⁷ Regardless, the ALJ and the Board found that Raley's expressed a strong preference for an in-house union, if any at all.

The Board, apparently thinking that the ALJ had concluded that the reference "Grocery Clerks Local #588 members and agents" did not include Raley's employees, adopted that conclusion and agreed that Abfalter's memo did not convey an unlawful instruction to assist the UDCEA organizing drive. Actually, the ALJ explicitly acknowledged that the phrase "Local #588 members and agents" in Abfalter's memo would include Raley's employees. Thus, he stated: "And insofar as the memo obliquely addressed what Local 588's 'grocery'-employee 'members' could do, it stated only that they could not 'interfere with drug clerks while on duty.'" 348 NLRB 382, 357 (2006). Regardless, for many other reasons the ALJ

⁶ Raley's best and final offer to the IDCA included a retroactive pay component conditioned upon an affirmative ratification vote. However, when it implemented the offer, Raley's included the retroactive feature despite the rejection by the IDCA members.

⁷ The judge found Peterson to be "passionate" in her support of Local 588. For this and other reasons he also rejected her testimony as to much more damning matters involving conduct at the Rancho Cordova store.

clearly concluded (as the Board found) that Abfalter's memo limiting the activities of Raley's grocery employees failed to establish that Raley's coerced employees or unlawfully assisted UDCEA/ UWRU.

Between September 15 and 23, 1993, Wright and his allies engaged in "intensive activity" seeking to obtain majority support for the UDCEA in the clerks' unit. As the Board found, much of this activity "occurred at Raley's stores, including those in Grass Valley (Wright's home store when actively employed), Benicia, Fair Oaks, and Placerville." The Board further found that the UDCEA's "campaign activity involved in-store visits, telephone calls to other stores, and the faxing of copies of the petition to employee supporters, often using Raley's telephones and fax machines," much of which occurred during worktime. The ALJ found that Wright, in the period between September 16 and 21, actively solicited support for UDCEA, often speaking to employees on the floor during their worktime, in the employee break rooms, and in other areas inaccessible to the general public during personal visits to widely-scattered stores, including those at Auburn, Benicia, Citrus Heights, Folsom, Granite Bay, El Dorado Hills, West Sacramento, Windsor, and Rohnert Park.

Several complaint allegations pertinent to this EAJA application grew out of the UDCEA's organizing drive that occurred from September 15 through 23 and Raley's conduct toward Local 588's officials and supporters during this period. In these allegations, the General Counsel asserted that unlawful conduct by Raley's local managers and supervisors coerced employees, and unlawfully assisted the UDCEA organizing effort. One allegation alleged that Raley's provided legal assistance for the new independent union in the postrecognition period and that Raley's and the new drug clerks representative sought to enforce an unlawful fee under the a contractual union-security provision. Below, I have summarized the disposition of the allegations that pertain to the application.

- *Condoning the use of company fax machines and telephone system at several locations to circulate its organizing petitions and to submit them to the headquarters' office.* (Complaint ¶18) The Board largely adopted The ALJ's conclusions that this allegation lacked merit because it amounted to little other than "ministerial aid" inasmuch as the evidence established employees commonly used of the company's communications for personal purposes contrary to official written policies limiting their use to official business purposes and that discipline occurred only on a rare occasion when an employee was deemed to have abused the privilege established by practice.⁸

⁸ Wright frequently used the equipment at the Grass Valley store where he worked and the nearby Yuba City store to transmit organizing materials and talk with his allies. A Grass Valley supervisor gave Wright a verbal warning for using store equipment on September 18 and the Grass Valley store manager gave him a written warning on September 21 for using the telephone in his office to campaign. On September 23, Wright transmitted his demand for recognition from the fax machine in the store manager's office at Grass Valley. At the very least, the headquarters staff paid little attention to the source of the

The ALJ repeatedly noted that Eidam transmitted the IDCA's disclaimer letter over company equipment. Even so, the ALJ concluded that the use of company fax machines to transmit UDCEA petitions and its demand for recognition amounted to an official use sanctioned by the company's formal policy. The Board declined to adopt this latter finding because it implicated an outcome in other pending cases.

- *Allowed Wright to solicit support for the UDCEA during a lengthy meeting he conducted with employees during their work time in a company office at Benicia and a supervisor instructed an employee to speak with Wright during work time.* (Complaint ¶19) Benicia supervisor Wallis told employee Hernandez during his work time that Wright wanted to talk to him in an upstairs office about a union and to take as much time as needed. The Board adopted the ALJ's dismissal of this allegation because Wright, as a Rayley's employee, enjoyed a Section 7 right of access to the Benicia store because the evidence established that Rayley's had always tolerated visits by off-duty, offsite employees with on-duty employees in both work and non-work areas. Likewise, the judge inferred from the credited evidence that Wallis had spoken as a friend rather than as a supervisor when he told Hernandez that a union guy (Wright) wanted to speak with him upstairs and that he could take all the time he needed.
- *Denied store access to Local 588 officials seeking to visit with the drug clerks at Fairfield, Fair Oaks, and Rohnert Park during periods when the UDCEA widespread store access to solicit employee support.* (Complaint ¶20 and ¶23) This allegation is based on the efforts of Local 588 officials to gain access to certain stores immediately after Wright's visit to the Benicia store. Rayley's managers uniformly barred their access to the drug centers in order to solicit the support of the drug clerks. Relying on *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the ALJ dismissed these allegations on the ground that the employer could lawfully bar nonemployee organizers while permitting employees access for similar organizing purposes. The Board found that the ALJ correctly distinguished between off-duty employees' right of access to their workplace to engage in Section 7 activity and nonemployee union supporters' more limited rights of access. 348 NLRB [at 386]. In addition, the Board concluded that *Lechmere's* exception based on a discriminatory access practice did not apply here

UDCEA's transmissions. In any event, the ALJ viewed the fax headers as hearsay. 348 NLRB at 442. However, the prevailing view treats fax headers as nonhearsay because they do not qualify as a "statement" under Rule 801(a) of the Federal Rules of Evidence since they amount to data generated by a machine rather than assertions or nonverbal conduct of a "person." *U.S. v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003), and the treatise cited there.

because all of "UDCEA's active supporters were Rayley's employees." 348 NLRB at 387.

- *Told employees that they could not talk to Local 588 agents on company time or in the store (Rohnert Park); and told employees they should not talk to Local 588 agents (South Lake Tahoe).* (Complaint ¶23 and ¶25) The ALJ dismissed the allegation pertaining to the conduct of the Rohnert Park manager. In doing so, he discredited the account of Cindy Shephard, the General Counsel's employee witness, supporting the allegation, and credited the testimony of store manager Kiehlmeier and two other employee witnesses, all of whom claimed that the store manager only said that he *preferred* they not talk to representatives of either union during work time.
- The ALJ also dismissed the South Lake Tahoe allegations after discrediting the account provided by two employee witnesses called by the General Counsel to support them. He found their testimony too unreliable "to support any feature of paragraph 25." Affirmatively, the ALJ, based on the credited testimony of Rayley's manager Forkner found that the store management had not encouraged employee support for UDCEA.
- *Interrogated a employee, created the impression among the employees that their union activities were under surveillance, and told an employee that Local 588 representatives would be barred from the Ukiah store even though Rayley's granted access to UDCEA agents.* (Complaint ¶24) The ALJ dismissed the Ukiah allegations. As to the allegation that manager Graves told employees that he would escort Local 588 agents from the store, the ALJ concluded the statement, if made, would have been lawful. But in any event, the ALJ credited Graves' denial that he ever told employees as much. As to the surveillance and interrogation allegations, the ALJ discredited the testimony of the General Counsel's witnesses that the alleged interrogation which implied surveillance occurred three days before Rayley's recognized the UDCEA. The ALJ found the testimony of employees Jack and Harmon unreliable in face of Graves' denial of the statements they attributed to him. The ALJ concluded that the so-called Local 588 "pizza meeting" (Jack and Harmon keyed their claims about Graves' questioning from this meeting) occurred a few days after Rayley's recognized the UDCEA rather than before as the two employees claimed.
 - *Removed Local 588 authorization cards and a button left at the store by a Fair Oaks employee; told an employee to cease wearing a Local 588 button; and encouraged employees to sign the UWRU petition so they would get raises sooner.* (Complaint ¶21) In the absence of exceptions, the Board affirmed the ALJ's finding the Rayley's violated Section 8(a)(1) when Fair Oaks manager Haring admittedly told employee Lee to remove a button that signified his support for

Local 588 and when he admittedly removed Local 588 authorization cards from a break room bulletin board. However, the Board rejected the General Counsel's exceptions seeking a finding that this same conduct violated Section 8(a)(2) and tainted UDCEA/UWRU's majority.⁹ The Board concluded that the evidence failed to establish that employees at other locations knew about this "isolated" conduct. The ALJ largely discredited Lee's testimony about the events found unlawful and other Lee testimony elicited to show that Haring also directed employees to sign the UDCEA/URWU petition, interrogated employees as to whether they had done so, and explained a rival union petition he left posted on the ground that "only memoranda supported by . . . Raley's belonged on the bulletin board."

- *Permitted employees to circulate pro-UDCEA petitions at the Rancho Cordova store during work time and told employees after the organizing drive that Raley's executives instructed managers to be actively involved with the UDCEA organizing.* (Complaint ¶22) The ALJ found that some unknown individual faxed a UDCEA petition to the Rancho Cordova pharmacy where employee Brenda Peterson (a vocal Local 588 supporter) received it, gave it to supervisor Renfree, and made a fuss over UDCEA's use of the company's fax machines to organize. Shortly afterward, Peterson discovered the petition on the break room table and confronted Renfree again. She insisted that he call headquarters (she says Abfalter; he says he could not remember who he ultimately called) to report a violation of company policy. When he did so, Renfree received an instruction to secure the petition in the store manager's desk which he did. Meanwhile, Ruthie Gordon, a pro-UDCEA employee and a former IDCA steward, confronted Renfree concerning the whereabouts of the petition. Renfree told her that it had been secured in the manager's "office." Three or four days later, Peterson saw the petition in Gordon's possession with two signatures, including Gordon's. Peterson asserted that both Gordon and Renfree admitted to her that Renfree gave the quarantined petition to Gordon. However, the ALJ, crediting Gordon's testimony that employee Eddie Pine (who died before the hearing) surreptitiously retrieved the petition from the manager's office over Peterson's testimony, rejected the allegation that the company aided Gordon's solicitation effort. The ALJ also credited claims by store supervisors that they lacked knowledge of Gordon's solicitation activities, and found no evidence that Gordon solicited signatures for the UDCEA petition during work time.
- *Questioned a Placerville employee as to whether he or other employees had signed the UDCEA petition*

⁹ No employees from Fair Oaks or Placerville (where 8(a)(1) conduct also occurred) signed a UDCEA petition.

or a Local 588 authorization card. (Complaint ¶26) The ALJ found the Placerville manager Beard unlawfully interrogated employee Miser in violation of Section 8(a)(1) when she called him to her office during his lunch break and "wondered aloud" in an irritated manner why no one had signed the UDCEA petition on the break room table. When Beard added that it was in the employees' own "best interests" to be represented by a union, Miser disagreed and left her office. But the ALJ further held that the General Counsel failed to show that Beard unlawfully assisted the UDCEA in violation of § 8(a)(2) because of uncertainty as to whether this conversation occurred after Local 588 started an active campaign.¹⁰ The Board concurred at least in the result and went further. It found that the divergent enforcement practices of the local managers relating to Raley's rules about solicitation and distribution during work time, derived largely from accumulated evidence about the IDCA years, precluded finding a pattern of disparate enforcement. For that reason, the Board concluded that the contrasting managerial conduct at Placerville (leaving UDCEA petition in the break room) and at Fair Oaks (removing Local 588 cards from the break room) insufficient to establish disparate enforcement company rules. 348 NLRB at 386 fn. 19.

- *Provided legal assistance to UWRU beginning in October 1993 at a time when its attorney performed work for Raley's or was being paid to represent Raley's and provided financial assistance to Wright in the form of two payments unrelated to his wages, disability, or benefits.* (Third and Fourth Amended Consolidated Complaints ¶27) Following Wright's testimony denying, in essence, that he received payments from Raley's to aid in organizing the UDCEA, the General Counsel effectively withdrew this allegation by issuing the Fourth Amended Consolidated Complaint that contains no reference to the allegation about Wright found in ¶27(b) of the Third Amended Consolidated Complaint.

However, the General Counsel continued to press the legal assistance allegation in Complaint ¶27(a). The ALJ dismissed this after concluding from his factual analysis that attorney Henry Telfeian had actually

¹⁰ Seemingly, the ALJ thought that, for purposes of § 8(a)(2), the General Counsel's burden included the elimination of all evidentiary ambiguity as to whether the Beard/Miser confrontation occurred after Local 588 started active campaigning. Obviously, he declined to infer the existence of a rival union situation, with all its attendant implications, based on Teel's September 15 memo and Abfalter's two directives the following day which Beard presumably received and read. And elsewhere, the ALJ found that Local 588 mailed literature with enclosed authorization cards to unit employees on September 17 and directed its organizers on September 20 to visit Raley's stores, distribute authorization cards, and mobilize support among employees. Finally, the ALJ found that from the time of Eidam's September 14 disclaimer until September 23, a number of Raley's drug clerks engaged in concerted activity on behalf of Local 588 and against the UDCEA.

concluded his services for Raley's prior offering to represent the UDCEA and the lack of evidence that Raley's retained Telfeian further. The Board affirmed the ALJ's conclusion. It said the ALJ had found that: (1) Telfeian ceased representing Raley's in September 1993; (2) Telfeian acted on his own acted on his initiative in seeking the UDCEA work; (3) Raley's expressed disapproval of his action but had no authority to stop him; (4) even if a conflict existed, it would not have implicated Raley's; (5) no simultaneous representation occurred; and (6) the services Telfeian performed for the UDCEA were confined to matters in which Raley's had no interest or involvement. 348 NLRB at 387 fn. 24.

The ALJ, by contrast, found that Telfeian concluded his work on behalf of Raley's on October 15 when he finished drafting a letter to Local 588 related to the UDCEA name dispute. Due to administrative procedures at Keck, Mahn, and Cate (the law firm that engaged Telfeian as a substitute when its partner, Patrick Jordan, Raley's regular labor relations attorney, left for an extended vacation in mid-September), the letter was dated and mailed on October 18. On October 15, after completing the Raley's UDCEA letter, Telfeian attempted unsuccessfully to reach Wright to offer his legal services to the UDCEA, purportedly motivated his contempt Local 588's hounding of the UDCEA over the name issue. A few days later Wright returned Telfeian's call and the two entered into an arrangement for Telfeian to represent UDCEA. During the first week of October, Telfeian disclosed his intentions to Jordan but the ALJ found that Telfeian's first direct disclosure to any Raley's official occurred when he sent a letter to Teel on November 10, supposedly about two weeks after Wright and Telfeian struck a deal.¹¹ In his letter to Teel, Telfeian asked Teel to advise if he objected to his arrangement with the UWRU. Teel never responded.

- *Recognized the UDCEA and entered into a collective bargaining agreement with it (by then renamed the UWRU) with a union security clause at a time when that union did not represent a majority or an uncoerced majority in the drug clerks unit.* (Complaint ¶29 and ¶30) Throughout the period from September 16 through 23, Wright and his allies faxed signed UDCEA petitions to Raley's headquarters. On September 23 Wright faxed a letter to Abfalter claiming that UDCEA represented a majority of the drug clerks and demanding recognition. In the early eve-

¹¹ Although not explained, the Board's finding that Raley's expressed disapproval of Telfeian's plan to offer his services to the UDCEA appears to be based on a lunch conversation between Jordan and Telfeian before the latter finished performing work for Raley's in which Jordan strongly advised Telfeian against doing so. Presumably, the Board treated Jordan as Raley's agent for purposes of this disclosure even though, at the time, both worked for the same law firm performing services for Raley's.

ning, Raley's sent a letter to Wright recognizing UDCEA as the new bargaining agent for the drug clerks. On October 24, the UWRU and Raley's entered into a 3-year contract, retroactive to October 3, containing a union-security clause.

During the hearing, the General Counsel abandoned its allegation that the UDCEA never acquired a numerical majority after conceding the Regional Office made an error calculating the number of signed petitions the UDCEA submitted to Raley's. However, the General Counsel continued to advance the parallel claim that the UDCEA never represented an uncoerced majority and, hence, the recognition, and the subsequent execution and maintenance of the UWRU contract were unlawful.

The ALJ concluded that Raley's lawfully recognized the UDCEA and that the parties entered into a valid contract.¹² In the process, he resolved numerous contentions about the unit scope, employee eligibility, and signature authenticity that permitted him to find ultimately that the UDCEA submitted petitions to Raley's containing 355 valid signatures in a unit of 673 employees, or 18 more signatures than necessary for a majority. Further, he found, in effect, Raley's 8(a)(1) conduct during the organizing campaign insufficient to taint the UDCEA's showing of a majority because its support came from stores where no unlawful conduct occurred, and because the violations found were too isolated and unknown at other locations.

- *Written threats by the UWRU to certain employees during the period from March through August 1994 that it would seek their discharge by Raley's and subsequent requests that the employer to do so because the employees refused to pay a reinstatement fee (a/k/a late fee) the union charged habitually delinquent dues payers. Written threats by Raley's to discharge these employees for failing to pay "period dues and uniformly required initiation fees."* (Complaint ¶32, ¶33, and ¶36.) These allegations stem from the UWRU's efforts to enforce its internal late fee rule through the contractual union-security clause in 1994 and 1995. At that time, the late fee amounted to a dues or initiation fee surcharge of five dollars for every month of delinquency.¹³ The Board affirmed the ALJ's conclusion that the late fee constituted an integral part of the UWRU's established dues structure. The ALJ found the late fee analogous schemes found in to cases where the Board concluded that arrangements providing for discounts upon the timely

¹² Raley's attorney told the General Counsel that "negotiations with UDCEA/UWRU were held on September 27 and 30, and October 8 and 13, and that a "wrap-up meeting was held on or about October 28." GC Answer: 53.

¹³ Later, the UWRU modified this fee provision in its bylaws but the revised provision was not challenged in this case.

or early payment of dues were lawful. Both rejected the argument that the late fee amounted to a penalty or a fine as found in early cases never overruled by the Board. Hence, both concluded that collection of the fee under the union-security contract was lawful.

B. Analysis and Conclusions

1. Complaint paragraphs 27(b): The prevailing party question

The Applicant claims prevailing party status as to all 8(a)(2) allegations that would affect its status as the lawfully recognized employee representative. Counsel for the General Counsel asserts that the Applicant does not qualify as a prevailing party under EAJA as to complaint paragraph 27(b) (alleging employer payments to assist Wright's organizing campaign) because the Regional Director voluntarily withdrew the allegation before the hearing closed.

To be a "prevailing party" under Federal fee-shifting statutes, an applicant must have achieved a judicially-sanctioned "material alteration of the legal relationship of the parties." *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). *Buckhannon* holds that Federal fee-shifting statutes require a disposition by means of a judicially enforceable order or a settlement agreement enforceable through a consent decree. *Id.* at 604. However, an applicant will not be considered a prevailing party under a Federal fee-shifting statute if the "material alteration" resulted from the Government's voluntary action. *Id.* at 605.

Although *Buckhannon* did not arise out of an EAJA claim (the appendix in *Marek v. Chesny*, 473 U.S. 1, 49 (1985), shows more than 100 Federal fee-shifting statutes), several courts have concluded the majority's sweeping language makes clear that it applies to all such statutes using the phrase "prevailing party." The Ninth Circuit, where this dispute arose, has specifically applied the *Buckhannon* rule to EAJA. *Carbonell v. I.N.S.*, 429 F.3d 894 (9th Cir. 2005); *Perez-Arellano v. Smith*, 279 F.3d 791 (9th Cir. 2002). And in *Morillo-Cedron v. District Director for the US Citizenship & Immigration Services*, 452 F.3d 1254 (11th Cir. 2006), the court noted all Federal appellate courts that have considered the question to date have applied the *Buckhannon* rule to EAJA.

Seemingly, however, no case involving the impact of *Buckhannon* on the prevailing-party rule utilized by the Board has been decided. In the past, the Board treated EAJA applicants as the prevailing party even as to significant allegations voluntarily withdrawn by the General Counsel prior to a decision by an ALJ or the Board. For example, in *Shrewsbury Motors*, 281 NLRB 486, 487-488 (1986), the Board found an applicant qualified as a prevailing party under EAJA where the Regional Director withdrew a complaint in two stages, the last just days before the scheduled hearing. Later, in *K & I Transfer & Storage*, 295 NLRB 853 (1989), the Board, relying on *Shrewsbury*, found an applicant qualified as a prevailing party as to a *Johnnie's Poultry* allegation withdrawn by the Regional Director so the hearing could proceed without delay.

In *Shrewsbury*, the ALJ relied on his reading of the legislative history and several Federal cases finding applicants to be prevailing parties on matters not actually decided following

litigation. In effect, the ALJ adopted the "catalyst" theory as applied by various courts of appeals at the time. That theory treated an applicant as a prevailing party in an administrative proceeding if it achieved a desired result even though brought about by the agency's voluntarily-implemented change. In fact, two of the cases cited by the judge explicitly applied the catalyst theory¹⁴ and the others unmistakably applied it without using the precise terminology. When *Shrewsbury* came before the Board, it adopted the ALJ's rationale without comment.

The *Buckhannon* majority emphatically rejected the catalyst theory in favor of the combined judicially-sanctioned, material-alteration concept. For that reason, continued application of *Shrewsbury* and its progeny would be at odds with the Supreme Court's interpretation of a "prevailing party" under Federal fee-shifting statutes.

To the extent that the ALJ here in any way approved the withdrawal of complaint paragraph 27(b), I find his involvement amounted only to a procedural, housekeeping step.¹⁵ Standing alone, the voluntarily withdrawal of complaint paragraph 27(b) lacks any character of a settlement between the parties. Undoubtedly, a withdrawal of a complaint allegation induced by consideration that serves as a remedy for some alleged violation of the Act might qualify as a judicially-sanctioned, material alteration within the meaning of *Buckhannon* but that plainly is not the case here. Accordingly, I find that the Applicant is not a prevailing party as to complaint paragraph 27(b) of the third amended complaint. *Buckhannon*, *supra*.

2. The General Counsel's substantial justification defenses

The General Counsel invokes EAJA's "substantial justification" defense for the remaining complaint allegations affecting the Applicant. Those allegations involved the Applicant's organizing drive in mid-September 1993, its status as the collective-bargaining representative of Raley's drug clerks, its collective-bargaining agreement with Raley's, and its effort to enforce the union-security provision in that collective-bargaining agreement.

Preliminarily, the substantial justification requirement of the EAJA establishes a clear threshold an agency must meet to defeat a prevailing party's eligibility for fees. It properly focuses on the governmental misconduct giving rise to the litigation. *Commissioner, INS v. Jean*, 496 U.S. 154, 165 (1990). The mere fact that the General Counsel lost or advanced a position contrary to prior precedent does not mean the litigation lacked substantial justification within the meaning of EAJA. *Wyandotte Savings Bank v. NLRB*, 682 F.2d (6th Cir. 1982).

Under EAJA, the litigation does not require justification "to a high degree" but it does require a rationalization beyond "merely undeserving of sanctions for frivolousness."¹⁶ *Pierce*

¹⁴ See *Dawson v. Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979); *Williamson v. HUD Secretary*, 533 F.Supp. 542, 544 (E.D.N.Y. 1982).

¹⁵ From the time the hearing opens until the case is transferred to the Board, the ALJ rules on all motions. NLRB Rules and Regulations, Secs. 102.25 and 102.47.

¹⁶ The Board rejected arguments by the Applicant and Raley's seeking attorney-fee awards from the General Counsel under *Tiidee Prod-*

v. Underwood, 487 U.S. 552, 565–66 (1988). In *Pierce*, the Supreme Court selected between two, “almost contrary” connotations suggested by the word “substantially” as used in the Federal fee-shifting statutes. On the one hand, the Court noted, the word refers to large or considerable in amount or value as in the statement, “He won the election by a substantial majority.” On the other hand, the word connotes the essence of something, or, based on the dictionary the Court cited, “such in substance or in the main” as in the statement, “What he said was substantially true.” The *Pierce* opinion rationalizes the Court’s judgment that the word “substantially” as used in EAJA derives its meaning from the latter connotation, that EAJA requires justification only to “a degree that would satisfy a reasonable person.” Accordingly, the Court concluded EAJA requires government agency litigation to have a reasonable basis in both law and fact in order to satisfy the “substantially justified” standard under EAJA. 487 U.S. at 564–465.

The General Counsel has the burden of proving that fees should not be awarded. *Timms v. US*, 742 F.2d 489, 492 (9th Cir.1984), *Meaden Screw Products Co.*, 336 NLRB 298, 299–300 (2001). See also NLRB Rules and Regulations, Sec. 102.144(a). Where the General Counsel presents evidence which, if credited by the fact finder, would constitute a prima facie case of unlawful conduct, then the General Counsel satisfies EAJA’s “substantially justified” standard. *Auto Workers Local 2333 (B.F. Goodrich Co.)*, 343 NLRB 281 (2004), and the cases cited there. If it is possible to draw a set of inferences from the circumstances present in a case that would have supported the General Counsel’s position, then the Board treats the General Counsel’s arguments as substantially justified. *Europlast, Ltd.*, 311 NLRB 1089 (1993), *affd.* 33 F.3d 16 (7th Cir. 1994). Reasonable differences of opinion about witness credibility, the weight accorded various aspects of the evidence, and the inferences permissible from a given set of events influence the outcome of litigation and bear heavily on the question of substantial justification under EAJA. *Mathews-Carlsen Body Works*, 327 NLRB 1167, 1168. (1999). Similarly, where the General Counsel’s position is substantially justified if he possesses evidence at the time a complaint issues that could reasonably lead an administrative law judge to find a violation and

ucts, 194 NLRB 1234 (1972), *enfd.* 502 F.2d 349 (D.C. Cir. 1974). In *Tiidee*, the Board sanctioned the respondent employer for engaging in frivolous litigation by ordering the reimbursement of the charging party union for its attorney fees. The Applicant and Raley’s claimed that the General Counsel, in essence, abused the trial process by conducting a postcomplaint investigation and by pursuing frivolous theories of liability. The Board rejected this claim on the ground that sovereign immunity precluded the application of *Tiidee* sanctions against the General Counsel and on the further ground that the record would not justify such sanctions even if *Tiidee* applied. The General Counsel’s answer frequently refers to the Board’s characterizations about the complexity of this litigation. The Applicant correctly argues that the justification required by EAJA differs significantly from the *Tiidee* test and, therefore, little or no consideration should be accorded to the Board’s complex-litigation dicta. Although I recognize that the *Pierce* and *Tiidee* standards differ quantitatively, the Board’s observations about the complexity of this litigation have some relevance to the questions presented here and have been considered.

does not possess evidence that clearly would defeat the allegation. *Lion Uniform*, 285 NLRB 249, 253–254 (1987).

In addition to the foregoing principles, the appellate court in *Martinez v. Secretary of Health & Human Services*, 815 F.2d 1381, 1383 (10th Cir. 1987), confronted the problem that arises when the existing law lacks clarity. The court, quoting dicta from a prior case and citing its antithesis in a later case, concluded that the clarity of the governing legal principles, or lack thereof, must be taken into account when assessing substantial justification under EAJA. Thus, the court stated:

“For purposes of the EAJA, the more clearly established are the governing norms, and the more clearly they dictate a result in favor of the private litigant, the less ‘justified’ it is for the government to pursue or persist in litigation.” *Spencer v. NLRB*, 712 F.2d 539, 559 (D.C. Cir. 1983), *cert. denied* 466 U.S. 936 (1984). Conversely, if the governing law is unclear or in flux, it is more likely that the government’s position will be substantially justified. See *Washington v. Heckler*, 756 F.2d 959, 961–962 (3d Cir. 1985).

EAJA “aims to penalize unreasonable behavior on the part of the Government without impairing the vigor and flexibility of its litigating position. *Pullen v. Bowen*, 820 F.2d 105 (4th Cir. 1987). But EAJA is not intended to deter the Government from bringing forward close questions. *Abell Engineering & Mfg., Inc.*, 340 NLRB 133 (2003).

a. The coercion and assistance allegations unrelated to store access and late fee issues

Complaint paragraph 28 alleges that Raley’s assisted and supported the UWRU in violation of Section 8(a)(2) by the conduct alleged in complaint paragraphs 18 through 27, including various subparagraphs. An employer commits unfair labor practice under Section 8(a)(2) if it dominates or interferes with the formation or administration of a labor organization or by contributing financial or other support to a union seeking to represent its employees. “[T]he difference between unlawful assistance and unlawful domination is one of degree, as is the difference between permissible cooperation and unlawful assistance.” *Homemaker Shops*, 261 NLRB 441, 442. (1982).

Complaint paragraph 37 alleges that Raley’s independently violated Section 8(a)(1) by the conduct described in complaint paragraphs 9 through 17, and 19(a)(1), 21(a)(4), 24(c), 25(a), and 26(a). An employer engages in an unfair labor practice within the meaning of Section 8(a)(1) if it interferes with, restrains, or coerces employees for exercising their Section 7 rights. The conduct alleged in complaint paragraphs 9 through 17 predates the formation of UDCEA/UWRU and has no relationship to this Application. The remaining independent 8(a)(1) allegations in complaint paragraph 37 bear on the allegation only to the extent that conduct found unlawful also was found to violate Section 8(a)(2) or otherwise affected the Applicant’s majority standing.

Six of the unlawful assistance allegations grew out of the disparate access issues that will be discussed separately in the next section. Fifteen other allegations charge that Raley’s coerced employees and interfered with or assisted with the formation of the UDCEA during the September 1993 organizing

campaign. The Board adopted the ALJ's conclusion that the General Counsel sustained the burden of proof as to two coercion allegations but rejected argument that the same conduct also constituted unlawful assistance. As both infractions occurred at stores where the UDCEA failed to secure support anyway, the ALJ also found these allegations insufficient to taint any petition signatures that union relied on to show its majority status or to taint the entire process.

The ALJ resolved the remaining 13 allegations (that also claimed interference and assistance) against the General Counsel largely on the basis of his credibility resolutions, the inferences he drew, and the weight he accorded various aspects of conflicting evidence offered in support of, and to rebut, the allegations. Had that ALJ resolved credibility and made inferences favorable to the General Counsel, a basis would have existed for the Board to find that Raley's managers and supervisors:

- Informed employees around September 15 that ICDA officials and the Local 588 grocery clerks would not be allowed to engage in Section 7 activities on work time while permitting UDCEA supporters to circulate its petitions on work time.
- Condoned the use of its facsimile system to circulate the UDCEA petitions even in face of protests from employee Peterson at Rancho Cordova who supported rival Local 588 and notwithstanding Raley's written rule limiting the use of that system to official company business.
- Directed an employee at Benicia to use work time to visit with Wright about the UDCEA.
- Encouraged employees at the South Lake Tahoe store to support the UDCEA while discouraging them from talking with Local 588 organizers.
- Interrogated Ukiah employees about their activities on behalf of Local 588 and created the impression their activities were under surveillance.
- Told employees at Fair Oaks to sign the UDCEA's petition, interrogated employees as to whether they had done so, and told employees that the UDCEA's petition had been left on the bulletin board because Raley's supported that union.
- Assisted the UDCEA at the Rancho Cordova store by providing the UDCEA petition quarantined to the manager's desk drawer by headquarters management to a UDCEA sympathizer for the purpose of circulating it without limitation as to time.

The General Counsel initially challenged the mathematical basis for UDCEA's majority status claim but abandoned that theory during the litigation. Thereafter, the General Counsel relied on a theory, or theories, that Respondent's various acts of assistance and interference tainted the UDCEA's majority status.

In *Dairyland USA Corp.*, 347 NLRB 310 (2006), the Board summarized the legal standards applied to 8(a)(2) cases over the years where the General Counsel alleges that the employer's pattern of unlawful assistance tainted a union's majority standing. That case states:

An employer violates Section 8(a)(2) of the Act when it extends recognition to a union that does not represent an uncoerced majority of employees. *Ladies Garment Workers v. NLRB (Bernhard-Altman)*, 366 U.S. 731 (1961). The General Counsel does not need to show, with mathematical precision, that the union lacks the support of an uncoerced majority of employees. *SMI of Worcester, Inc.*, 271 NLRB 1508, 1520 (1984); *Clement Bros. Co.*, 165 NLRB 698, 699 (1967) (holding that coercion of 7 employees out of 129 who signed authorization cards in a unit of approximately the same size was sufficient to infer a larger pattern of coercion amid other violations), enfd. 407 F.2d 1027 (5th Cir. 1969). Rather, "[a] pattern of company assistance can be sufficient to invalidate all cards." *Famous Castings Corp.*, 301 NLRB 404, 408 (1991) (quoting *Amalgamated Local 355 v. NLRB*, 481 F.2d 996, 1002 fn. 8 (2d Cir. 1973)). In determining whether a pattern of unlawful assistance exists, the Board examines the totality of the circumstances, including conduct occurring both before and after recognition of the union. *Farmers Energy Corp.*, 266 NLRB 722, 722-723 (1983) (determination of whether employer's pre- and post-recognition unlawful acts tainted majority status depends on the entire "general contemporaneous current of which they were integral parts") (quoting *Machinists Lodge 35 v. NLRB*, 110 F.2d 29, 35 (D.C. Cir. 1939), affd. 311 U.S. 72 (1940)), enfd. 730 F.2d 1098 (7th Cir. 1984); *Windsor Castle Health Care Facilities*, 310 NLRB 579, 592 (1993) (finding that "circumstances occurring after the execution of the collective-bargaining agreement further manifest[ed] a pattern of assistance"), enfd. in relevant part 13 F.3d 619 (2d Cir. 1994).

When the General Counsel's coercion and assistance allegations collapsed under the ALJ's credibility determinations and unfavorable inferences, the basis for the General Counsel's allegations about UDCEA's tainted majority (complaint par. 29), its recognition (also complaint par. 29), and its union-security clause (complaint par. 30) also collapsed.

The Applicant argues that the ALJ's credibility resolutions were unnecessary as that the General Counsel's case could have been cast aside with a motion to dismiss at the end of the hearing. However, I find that contention to be largely ipse dixit; at least the reply makes no attempt to support it with any cohesive argument. It is abundantly obvious that the ALJ rejected a similar argument when the Applicant made to him. Plainly, the ALJ's credibility resolutions and inferences largely determined the overall result in this case. Indeed, in its decision the Board makes four separate references to its reliance on the "credited record."

Examples abound demonstrating the effect of the ALJ's credibility determinations. Thus, Wright's visit to the Benicia store constituted a key component of the General Counsel's case relating to conduct during the Applicant's organizing drive. As to the specific coercion and assistance allegations arising from that mid-September visit, the inference made by the ALJ that Willis' statement to Hernandez amounted to nothing more than one friend talking to another was critical to re-

solving this allegation. By stark contrast, the Board affirmed an ALJ's conclusion in *Famous Castings Corp.*, 301 NLRB 404 (1991), that an employer "blatantly" assisted a labor organization in violation of Section 8(a)(1) and (2) where its supervisor told an employee to go "upstairs" to talk to the union representatives and later gave the employee union cards. The ALJ's conclusions about this tell-tale incident, shaped largely from his subjective inference about the degree of Hernandez' personal relationship with Wallis (who did not testify), had an important impact on this critical issue.

Likewise, the ALJ's wholesale rejection of Brenda Peterson's testimony except where corroborated by a supervisor or an employee aligned with the UDCEA also proved significant. It precluded a finding that Abfalter's first memo to the store managers had been publicized to employees and that the Rancho Cordova store manager provided the quarantined UDCEA petition to Ruth Gordon for circulation among the employees.

I also find the General Counsel substantially justified with respect to the allegation in complaint paragraph 27(a). Again, the credibility determinations and inferences made by the ALJ and the Board had a significant impact on the outcome of this issue. Wright provided the General Counsel with an affidavit in January 1994 that substantially contradicted the credited testimony he and Telfeian provided at the hearing on which the findings about these allegations rest. Thus Wright, whose hearing testimony the ALJ credited on virtually every contradicted point, told the General Counsel in that affidavit that:

Sometime in the middle of October, I received a call from Mr. Henry Telfeian. He said he had heard that I was running a new labor organization. He then told me about himself. He told me he was a retired labor attorney who was interested in a new approach to labor. He told me that if [I] was interested in representation by him, I should call him. He gave me his number. I asked him where he had heard about us. He said that, in the past, he had had ties with Raley's counsel, Pat Jordan. That's about all I can recall to the conversation. I did not decide to hire Mr. Telfeian at that time.

....

After discussing the matter with four other representatives, the UWRU decided to hire Mr. Telfeian. We hired Mr. Telfeian sometime in mid-October, prior to October 18.

In labor relations law, counsel switching sides is virtually an unheard of occurrence. If Wright's affidavit statements are credible, this switch would have been all the more abnormal because it occurred in the midst of collective-bargaining negotiations with a misleading disclosure to the new client and a very belated disclosure to the old client. Where the overall context included Raley's enthusiastic embrace of the UDCEA's organizing effort, I find a substantial basis existed for reaching inferences quite contrary to those ultimately made as to this allegation particularly in view of the timing of the move.

Even the allegation about the use of Raley's telephone and fax systems (complaint par. 18) for UDCEA organizing purposes shows the complex, litigation judgments the General Counsel faced. Although the ALJ appears to have relied primarily on the testimony that emerged on cross-examination of

the General Counsel's witnesses to resolve this issue, the ALJ obviously chose to accord much less weight to other evidence favorable to the General Counsel. Thus, Raley's unquestionably maintained a written policy limiting the use of its telephone and fax systems to official company business except in case of emergencies. As with other policies, rule enforcement was obviously left to the whim of local managers and supervisors, a situation entirely susceptible of an opposite conclusion, i.e., that their claims about these subjects amounted largely to self-serving declarations. Clearly, Abfalter's first memo following the IDCA disclaimer reinforced the company's expectations about the enforcement of existing policies. And the directions given Supervisor Renfree by Abfalter or some other headquarters' official to quarantine the UDCEA petition in the store manager's desk after it had been faxed the Rancho Cordova pharmacy and intercepted by Brenda Peterson provides a specific example that would lend support to a conclusion that the company intentionally provided Wright and his allies widespread access to the Raley's phone and fax equipment during their organizing effort.

Accordingly, I have concluded that the dismissal of virtually all of the General Counsel's case discussed in this section resulted from the inferences and credibility resolutions made by the ALJ and affirmed by the Board. Had the ALJ's credibility determinations and inferences been more favorable to the General Counsel, I find an ample basis would have existed for concluding that Raley's conduct tainted UDCEA's majority standing. Such a finding, of course, would have vitiated the collective-bargaining relationship, including the collective-bargaining agreement with its union-security clause. For these reasons, I find the General Counsel met the burden of proving the allegations addressed in this section were reasonable and substantially justified within the meaning of EAJA.

b. The access issues

Relying on *Lechmere*, supra, and the fact the all of the UDCEA organizers were Raley's employees, the Board and the ALJ resolved disparate access claims against the General Counsel. To be sure, *Lechmere* plainly justifies an employer's denial of access to nonemployee union organizers such as the Local 588 agents because, as that case reiterates, nonemployee organizers enjoy only a derivative Section 7 right of access to an employer's private property that applies only in rare circumstances where the employees are deemed inaccessible by other reasonable means. Although *Lechmere* distinguishes the rights of nonemployees from employees, its holding applies to non-employees only.

The six access allegations at issue claim, in essence, that Raley's local managers denied Local 588 nonemployee organizers access to its stores while it permitting Wright access to whatever store he wanted to visit in order to solicit on behalf of UDCEA during the critical mid-September 1993 period. The General Counsel's answer characterizes these allegations as "novel." I find little novelty in them at all. Wright's off-duty status during the organizing campaign presented an issue that has had a contentious history.

Based on Wright's employee status, the Board and the ALJ concluded that Section 7 protected his right to visit various

Raley's stores where, as here, local Raley's managers purportedly made no little or no effort to control access by off-duty or offsite employees, a remarkable practice considering the large quantities of pharmaceuticals presumably present in and around the areas outside employees were supposedly permitted to freely visit.¹⁷

The Board rejected the General Counsel's contention that Raley's "gave discriminatory campaign access to UDCEA." In the Board's view, the fact that "all of UDCEA's active supporters were Raley's employees" precluded the application of *Lechmere's* exception relating to disparate access in rival union situations. In addition, the Board adopted the ALJ's finding that local store managers "could not continuously monitor all of their store areas for [union] activity, and when pro-UDCEA employees from other stores came to solicit local employees for signatures, local managers did not immediately become aware of their presence or their activity."¹⁸ But with respect to the critical Benicia situation, the same supervisor who told Hernandez to speak with Wright in an upstairs office intercepted and ejected the Local 588 agent who appeared at the store only a day or 2 later.

Regardless, I find that the General Counsel was substantially justified in bringing the disparate access allegations. In my judgment, the existing case law provided an ample basis for the General Counsel to prosecute this issue. Thus, in *Duane Reade, Inc.*, 338 NLRB 943 (2003), the Board held that an employer violates Section 8(a)(2) by permitting the nonemployee organizers access to its premises during an organizing campaign while excluding a rival union's nonemployee organizers. And in *Ernst Home Centers, Inc.*, 308 NLRB 848, 849-50 (1992), a case remarkably similar to this, the Board found that an employer violated Section 8(a)(1) by denying a nonemployee union agent access to employees on its sales floor while permitting an employee promoting a decertification petition wide ranging access to the sales floors at several store locations.

In addition, even though Wright clearly was an employee throughout the mid-September campaign period, he was on a medical leave of absence and, hence off duty on a full-time basis. For reasons detailed below, the developing Board and court precedent applicable to the access by off-duty and offsite employees fully warranted the General Counsel's litigation that implicated Raley's unusually permissive attitude toward Wright's access to its stores while on leave. The General Counsel use of disparate treatment language in casting the complaint's access allegations called for a rational analysis of the legal basis for Raley's denial of access to the Local 588 agents and, separately, a reasoned analysis for granting access to Wright.

¹⁷ In addition, the process by which a local management distinguishes an offsite employee dressed in street clothes from an ordinary shopper is not at all apparent.

¹⁸ As there is an absence of a clear finding by the Board or the ALJ identifying any other employee who solicited at a store other than their own during the UDCEA's organizing effort, I find the words "pro-UDCEA employees" is a euphemistic reference to Wright and Wright alone.

As noted, *Lechmere* certainly would explain the conclusions reached by the Board and the ALJ as to the Local 588 agents but the legal basis for Wright's widespread access to the sales floors and other areas at several stores while in a leave status is much murkier. As illustrated below the basis for, and degree of, access by off-duty and offsite employees, to an employer's property has a long and turbulent history. If in the final analysis, the Board and the ALJ been determined that basis for Wright's access was grounded on Raley's permissive attitude toward him and his activities rather than on solid Section 7 grounds, then far different conclusions about the access allegations and the entire case would have been compelled.¹⁹

The contentious history concerning access by off-duty employees to which I refer began with *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973). There, the Board (Members Fanning and Jenkins dissenting) reversed an ALJ's holding that the employer violated Section 8(a)(1) by maintaining a rule barring access to its premises by off-duty employees. The *Lenkurt* majority alluded to the distinction between employees and nonemployees for purposes of engaging in union solicitation on an employer's premises and concluded that the "status (of an off-duty employee) is more nearly analogous to that of a nonemployee, and he is subject to the principles applicable to nonemployees." [Emphasis added.] Going further, the majority described both as "invitees" so that "one is no more entitled than the other to admission." 204 NLRB at 922.

But the following year in *Bulova Watch Co.*, 208 NLRB 798 (1974), the Board began to limit *Lenkurt*. It held that an employer violates the Act by denying employees access to *areas outside the plant* for handbilling purposes during periods shortly before their work shifts. Two years later, the Board concluded in *Tri-County Medical Center*, 222 NLRB 1089 (1976), that *Lenkurt* must be narrowly construed to prevent undue interference with the rights of employees under Section 7 to freely communicate their interest in union activity to those who work on different shifts, *Id.* Separately, Chairman Murphy specifically disagreed with the *Lenkurt* majority's view that off-duty employees are analogous to nonemployees for purposes of restricting their access to parking lots and adjacent roadways. 222 NLRB at 1098 fn. 4.

Following the *Lechmere*, the Board again confronted the *Lenkurt* majority's comparison between off-duty employees and nonemployees. In *Nashville Plastic Products*, 313 NLRB 462 (1993), the respondent-employer appealed the ALJ's conclusion that it violated the Act by barring off-duty employees from handbilling on its premises in areas outside the plant. The Board rejected the employer's contention "that the access rights of off-duty employees equate to those of nonemployees." Although the Board acknowledged the *Lenkurt* majority made a similar analogy, it said that it would continue to adhere to *Tri-County's* narrow construction of *Lenkurt*. The Board specifi-

¹⁹ Even so, the Board and the ALJ found that store managers and supervisors often lacked knowledge about the activities of Wright and his supporters at the stores. But where the evidence shows they promptly intercepted Local 588 organizers when they entered stores, these findings implicitly involve credibility judgments favorable to Raley's and the UDCEA.

cally rejected the employer's contention that *Lechmere* applied to off-duty employees. *Lechmere*, the Board asserted, only distinguished the access rights of nonemployees from the rights of employees as originally established in seminal case of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). As in *Tri-County*, the Board upheld the ALJ's conclusion because the employer had barred the off-duty employees from distributing union literature in outside areas of the employer's plant.

More recently, the Board, in *ITT Industries*, 331 NLRB 4 (2000), found that an employer violated Section 8(a)(1) by barring offsite employees from distributing union literature in the parking lot at a sister plant not too distant from the plant where they worked. Relying on *Tri-County*, the ALJ found a violation and the Board adopted the ALJ's decision without comment.

When the D.C. Circuit initially reviewed the Board's decision, it refused to enforce the *ITT Industries* order because of the Board's failure address the trespassory character of offsite employees entering their employer's property at locations other than where they worked. *ITT Industries v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001). Accordingly, the court remanded the case to the Board with an instruction to "consider and craft" a decision in light of the various concerns the court noted throughout its lengthy review of Federal access cases. The court summed up its concerns as follows at 251 F.3d at 1004:

[T]he Board failed even to acknowledge that the question of off-site employee access rights was an open one, i.e., that . . . § 7 and the [Supreme] Court's cases are silent on the issue. Rather, the Board decided *sub silentio* that § 7 guarantees all off-site employees, whether members of the same bargaining unit or not, some measure of free-standing, nonderivative access rights. . . . Indeed, by applying the *Tri-County* balancing test, the Board decided without analysis that trespassing off-site employees possess access rights equivalent to those enjoyed by on-site employee invitees. Because it is by no means obvious that § 7 extends nonderivative access rights to off-site employees, particularly given the considerations set forth in the [Supreme] Court's access cases, the Board was obliged to engage in considered analysis and explain its chosen interpretation.

During the period that this case (Raley's) was pending on exceptions, the Board specifically decided the issue posed by the *ITT Industries* court but in another case. *Hillhaven Highland House*, 336 NLRB 646 (2001), enf. 344 F.3d 523 (6th Cir. 2003). In *Hillhaven*, the Board concluded:

(1) under Section 7 of the Act, offsite employees (in contrast to nonemployee union organizers) have a nonderivative access right, for organizational purposes, to their employer's facilities; (2) that an employer may well have heightened private property-right concerns when offsite (as opposed to on-site) employees seek access to its property to exercise their Section 7 rights; but (3) that, on balance, the Section 7 organizational rights of offsite employees entitle them to access to the outside, nonworking areas of the employer's property, except where justified by business reasons, which may involve considerations not applicable to access by off-duty, onsite employees. To this extent, the test for determining the right to

access for offsite visiting employees differs, at least in practical effect, from the *Tri-County* test for off-duty, onsite employees. [336 NLRB at 648.]

The Board reasoned in *Hillhaven* that offsite employees were different in important respects from persons who have no employment relationship with the employer involved such as non-employee union organizers. Offsite employees, the Board noted, are "not only 'employees' within the broad scope of Section 2(3) of the Act, they are 'employees' in the narrow sense: 'employees of a particular employer' (in the Act's words), that is, employees of the employer who would exclude them from its property." Consequently, the Section 7 rights implicated involve employees who work for the same employer, rather than simply a shared interest resulting from belonging to the working class generally or because they work in the same industry or community. As nothing in the Act or in the Supreme Court's prior access cases suggest that, as against their own employer, the rights of offsite employees were "somehow derivative of other employees' rights, when they are exercised at a location other than the customary site of employment," employees who seek to encourage the organization of "similarly situated" employees at another employer facility seek to further their own welfare through the strength of numbers. Even though employees who work for the same employer may work at different locations, they often have common, albeit not always identical, interests and concerns related to wages, benefits and other workplace issues that may be addressed through concerted action. For these reasons the Board found that "the Section 7 rights of offsite employees are "non-derivative and substantial." 336 NLRB at 648-649

But *Hillhaven* also recognized that access accorded to offsite employees could also involve distinct considerations when accommodating the tension between employee Section 7 rights and their employer's property rights. Even though the Board recognized that offsite employees might be strangers in one sense, the existence of the employment relationship distinguishes them from persons who are complete strangers. Because of that relationship, the Board felt that it is easier for an employer to regulate the employee's conduct than it would be to regulate a complete stranger's conduct. But problems nonetheless abound because the employer's control of the disputed premises often implicates security, traffic control, personnel, and like issues that do not arise with access by onsite employees. 336 NLRB at 649-650.

Therefore, in balancing the employees Section 7 rights with the employer's property interests, the *Hillhaven* Board concluded that offsite employees should be permitted access to outside, nonworking areas of the employer's property, except where justified by business reasons. But having reached that conclusion, the Board cautioned that it would take into account an employer's predictably heightened property concerns and might in certain cases limit or bar access where "the influx of offsite employees might raise security problems, traffic control problems, or other difficulties." 336 NLRB at 650.

In *Hillhaven*, the Board's acknowledged that an employer is "arguably" free to define the terms of its invitation to employees so that "any employee engaged in activity to which the

employer objects on its property might be deemed a trespasser, not an invitee.” Therefore, the balance struck by the Board’s in *Hillhaven* represented its effort to heed the Court’s admonishment in *Babcock & Wilcox* that it reconcile employees’ Section 7 rights and an employers’ property rights “with as little destruction of one as is consistent with the maintenance of the other.” 351 U.S. at 112.

When a Board panel turned to the remanded *ITT Industries* case, it applied the *Hillhaven* rationale and found those offsite employees enjoyed a substantial “nonderivative right of access” especially where, as there, they sought to organize a three-plant unit. *ITT Industries*, 341 NLRB 937 (2004). This latter fact caused the Board panel to conclude that the employees in *ITT Industries* shared common concerns even greater than those which existed in *Hillhaven*. The Board then balanced the employer’s property concerns, grounded on security and past instances of vandalism, against the offsite employees’ access rights and concluded (with Chairman Battista dissenting) that the employer’s concerns did not justify its total ban on their handbilling in the plant parking lot. Subsequently, the D.C. Circuit enforced the Board’s order based on its supplemental decision. *ITT Industries v. NLRB*, 413 F.3d 64 (2005).

Arguably, Wright’s wide ranging access in mid-September 1993 to store interiors and nonpublic areas cannot be explained by the rationale in *ITT Industries* and *Hillhaven*. Despite the unique circumstances arising from his lengthy leave during that period, the Board and the ALJ appear to have treated him virtually as an on-duty employee throughout that period. Of course had it been concluded that the degree of access accorded him did not flow from some basis grounded in Section 7 but rather from the employer’s leniency toward him because it favored his activities, the outcome would necessarily have favored the General Counsel. However, the Board seemingly lumped Wright with all other employees and concluded on the basis of the type of access previously accorded them in other contexts, they enjoyed a Section 7 right of access to Raley’s sales floors and back area anywhere, anytime even though it strictly controlled access by the Local 588 organizers, Local 588 grocery clerks, and former IDCA officers. Regardless, considering the General Counsel’s important role as the gatekeeper in the development of national labor policy, I find he was substantially justified in litigating the access issues presented by these peculiar facts.

c. The late fee issue

The General Counsel argues that these allegations presented a “close question.” involving “difficult legal issue which necessitated a protracted analysis by the judge.” The Respondent argues that the cases relied upon by the General Counsel had been “superseded.” The ALJ candidly stated that the resolution of the question presented by the late fee allegations was “particularly murky” and “may depend on which cases you read.”

The General Counsel’s principal theory underlying the allegations that the UWRU (f/n UDCEA) and Raley’s violated the law when they threatened to enforce the contractual union-security provision in 1994 (complaint pars. 32 and 33) collapsed with the dismissal of the allegations about coercion and assistance during the mid-September organizing drive. The ALJ specifically found these allegations fell because:

I have earlier concluded, in substance, that the General Counsel failed to rebut that presumption, i.e., failed to establish any credible factual or legal basis for finding that UDCEA’s majority-showing on which the recognition was based was the “tainted” product of “coercion” or any other form of unlawful “assistance” by Raley’s. Thus, the recognition was lawful, and it created a lawful 9(a) relationship between Raley’s and the new union, one in which the parties were legally free to enter into a labor agreement containing a union-security clause, and to “maintain” and “enforce” the clause. Accordingly, all counts are dismissed which allege either unlawful “maintenance” of a union-security agreement by the respondent parties, or which suppose that routine acts of enforcement of the agreement were unlawful because Raley’s and UWRU had no right to enter into or maintain the agreement in the first place. [*Raley’s*, 348 NLRB 382, 539 (2006).]

But even assuming the lawfulness of the union-security provision, the General Counsel also claimed that the UWRU’s effort to collect the late fee using that mechanism was unlawful. On this point, the analytical focus by the Board and the ALJ centered the language in Section 8(a)(3) that exempts union-security agreements from the general union-based discrimination prohibition. That exemption is made up of two provisos. The second proviso was at the core of this allegation. It effectively prohibits the discharge of an employee under a union-security contract if the employer has reasonable grounds for believing that (the employee’s union) membership was terminated for reasons other than the failure of the employee “to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.” Where all of the statutory criteria are met and the union meets its fiduciary obligations to the employee, then it may enforce the payment of the requisite dues and fees required by demanding that the employer terminate the dues-delinquent employee. If the fine or assessment lacks the uniform and periodic character required by the statute, then the union is usually left to collect that type of membership obligation elsewhere, typically in the state courts. *Operating Engineers Local 542C (Ransome Lift)*, 303 NLRB 1001, 1003 (1991).

The UWRU justified its reinstatement surcharge or late fee on the ground that it always had been an integral and uniform part of its periodic dues structure. Its function, as distinguished from its form, the UWRU argued, was no different from that served by certain dues-discount programs previously approved by the Board. The ALJ agreed and concluded that the UWRU’s late fee, uniformly assessed against all employees who failed to pay their dues on time, was analogous to the dues discount provisions upheld in previous Board cases.

The Board adopted the ALJ’s result with an overt reference to the discount analogy. Instead it simply found that the late fee was not a penalty or an assessment but rather a legitimate component of “periodic dues” within the meaning of Section 8(a)(3). Because the Board felt that the amount of the late fee (\$5 per month) was “not disproportionate to the cost the (UWRU) incurred in collecting late dues and was not an arbi-

trary, excessive, or irregular," it did not fall outside the protection of Section 8(a)(3).

The Board cited three cases for its conclusion. In one, *Retail Clerks Local 322 (Ramey Supermarkets)*, 226 NLRB 80 (1976) (the *Local 322* case), the Board adopted without comment the ALJ's conclusion that the union could lawfully threaten to seek the discharge of a "financial-core" employee under a union-security agreement where the employee refused to pay a \$50 "reinitiation fee" uniformly charged all unit employees who failed to pay dues for 3 months or longer. Even the ALJ stated that "[t]he legal situation with respect to the reinitiation fee is not so clear" where, as in that case, the fee would not be an incident to acquiring membership or the benefits of membership. But ultimately the ALJ found that efforts to collect the reinitiation fee lawful even as to nonmembers because it was a charge the union "uniformly" levied on everyone after they became 3 months delinquent in their dues payments. 226 NLRB at 91. Although the ALJ cited precedent for the proposition that a union could lawfully charge a union member a fee to regain lost membership, he cited no precedent for applying a similar result to financial-core employees.

The Board also cited *Teamsters Local 959 (RCA Service Co.)*, 167 NLRB 1042 (1967) (the *Teamsters Local 959* case) and *Machinists Lodge 1345 (Cobak Tool)*, 157 NLRB 1020 (1966) (the *Machinists Lodge 1345* case), both discount cases. In the *Teamsters Local 959* case, the Board held that the union's scheme discounting regular dues by 30 percent if paid 15 days early to be lawful; in the *Machinists Lodge 1345* case, the Board affirmed a trial examiner's conclusion that a 6-percent discount for prompt dues payment did not amount to an unlawful penalty against those who failed to qualify for the discount.

Obviously, the Board and the ALJ rejected the General Counsel's contention that Raley's and the UWRU violated the Act by using the union-security clause to compel payment of the UWRU's late fee because it failed to meet the statutory definition of "periodic dues and initiation fees uniformly required." But I find the General Counsel reliance on the Board's decision in the *Great Atlantic & Pacific Tea Co.*, 110 NLRB 918 (1954) (the *A & P* case) to be reasonable and justified. Despite Respondent's claim that the case has been superseded, it has never been overruled.

A & P held that the use of the union-security clause to collect a \$1 surcharge against members who did not pay their dues for more than a month unlawful. The Board found the added charge, mandated by the union's constitution, was not periodic by nature because it was intermittently imposed, i.e., whenever an employee failed to pay dues on time.²⁰ For that reason, the Board concluded that the surcharge amounted to a "punishment for the nonpayment of dues on time." Arguably the \$5-per-month charge here is indistinguishable from the *A & P* surcharge, save for an inflation adjustment. In fact, even the ALJ,

²⁰ The union's constitution in that case required members to pay their dues by the end of the month or be subject to a \$1 assessment. The constitution also provided that members who failed to pay the delinquent dues plus the assessment by the middle of the following month "will then be removed from their jobs." The case arose when *A & P* terminated an employee that *Local 12* reported as 2 months delinquent in the payment of dues and the added assessment.

in adopting the UWRU's argument stated that "both dues-discount programs and delinquency surcharge programs commonly serve a twofold function, both as an incentive to timely payment and as a disincentive to delinquency."

But the final result in a subsequent, related case, *Bakery Workers Local 12*, 115 NLRB 1542 (1956), enfd. denied 245 F.2d 211 (3d Cir. 1957) (the *Local 12* case) found the technical difference between a discount and a surcharge to be controlling. The *Local 12* case involved the same union that appeared in the *A & P* case. By the time the second case came along, *Local 12* had increased its standard dues by one dollar and added a provision granting members a \$1 discount for the timely payment of dues. But the Board (Members Murdock and Peterson dissenting) reached the same result as it had in the *A & P* case. The majority reasoned that the union's discount scheme essentially included the problematic assessment or fine found in the earlier case as a part of its regular dues structure.

The court of appeals refused to enforce the Board's order in the *Local 12*. It distinguished the discount case from the surcharge case (*A & P*) on the ground that the discount scheme met the "technical requirements" of Section 8(b)(2) whereas, by implication, the surcharge case did not. The court's opinion finds no fault whatever with the Board's decision in the *A & P* case. Rather, it went to some length to explain that the Board simply added a surcharge for failure to pay dues in a timely manner to a growing list of other intermittent assessments that cannot be collected through the "medium of an existing union-security contract," i.e., fines for engaging in dual unionism, fines for failing to attend union meetings, and fines for refusing to picket. Accordingly, I find the General Counsel could quite reasonably and very logically to read the court's opinion as saying essentially this: surcharges for the failure to pay dues on time do not meet the "technical requirements" of Section 8(a)(3) and 8(b)(2); a discount for paying dues on time does meet those "technical requirements."

No doubt the UWRU's contention, which the ALJ and the Board effectively adopted, that its surcharge serves the same purpose as the approved discounts has a certain practical appeal. But this argument is not without shortcomings, not the least of which is that the surcharge uniformity is grounded on the fact that it is written into the union's governing documents. Arguably, according significant weight to that factor poses a clear threat to the continued vitality of the second union-security proviso in Section 8(a)(3) as it would mean that unions could avoid the consequences of that proviso by simply writing a designated fine directed at unwanted behavior into their by-laws and restrain employees at will. And no one should be surprised if lexicologists scorned the discount/surcharge analogy as comparable to a straight line/twisted pretzel analogy.

Regardless, using the scale established by the *Martinez* court, I find the clarity of guiding precedent would rank quite low. For that reason and the fact that *A & P* has never been overruled, I have concluded that the General Counsel's prosecution of the reinstatement or late fee issue to have been substantially justified under EAJA.

3. Summary of findings

To summarize, the Applicant is not a prevailing party as to the allegation in paragraph 27(b) of the third amended consolidated complaint. In addition, the General Counsel was substantially justified in bringing the other allegations that pertained directly to the Applicant or that sought to affect the status or interests of the Applicant. Therefore, I conclude that the application should be dismissed in its entirety. Having reached these conclusions, consideration of the parties' contentions about specific fees or costs submitted with the verified application is unnecessary.

CONCLUSIONS OF LAW

1. The Applicant is a labor organization within the meaning of Section 2(5) of the Act.

2. The Applicant is a association qualified as a "party" under 5 U.S.C. § 504(b)(1)(B)(ii).

3. The Applicant is not a prevailing party within the meaning of 5 U.S.C. § 504(c)(1) as to paragraph 27(b) of the third amended consolidated complaint issued in this proceeding.

4. The General Counsel's allegations in the fourth consolidated amended complaint, insofar as they pertained to the Applicant or sought to affect the Applicant's status under Section 9(a) of the Act or its other interests, were substantially justified within the meaning of 5 U.S.C. § 504(c)(1).

Based on the foregoing findings of fact and conclusions of law, I issue the following recommended²¹

ORDER

The application for allowable fees and costs under the Equal Access to Justice Act filed by the United Wholesalers and Retailers Union is dismissed in its entirety.

Dated: Washington, D.C. October 10, 2007

²¹ Pursuant to NLRB Rules and Regulations Sec. 102.48(a) the Board will adopt these findings, conclusions, and recommended Order absent the filing of timely and proper exceptions as provided under NLRB Rules and Regulations Sec. 102.154, and all objections and exceptions to them will be deemed waived for all purposes.