

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	Case No. 1:17-mc-18
	)	
v.	)	
	)	
COBALT COAL, LTD.,	)	
WESTCHESTER COAL LP,	)	
COBALT COAL CORP. MINING, INC.,	)	
	)	
Respondents.	)	
	)	

NATIONAL LABOR RELATIONS BOARD’S REPLY BRIEF IN SUPPORT OF  
APPLICATION FOR ATTORNEY FEES

Pursuant to this Court’s Order [ECF No. 17], the National Labor Relations Board (“Board”) has filed an application for attorney fees in the instant matter [ECF No. 21]. Cobalt Coal, Ltd. (“Cobalt”) has filed a response [ECF No. 22]. That response provides no basis upon which to deny recovery for any of the claimed time.

Initially, Cobalt makes no effort to dispute either the amount of time expended on any particular matter or the legal basis for the Board’s calculations. Those matters are accordingly conceded.

Cobalt’s Opposition appears instead merely to contend that the NLRB’s Motion was somehow unnecessary. On this matter, its burden of persuasion is substantial—it must demonstrate that its nondisclosures were “substantially justified” or that a fee award is “otherwise unjust,” else attorney fees are *mandatory*. Fed. R. Civ. P. 37(a)(5)(A). This it cannot do.

There is absolutely no dispute that Cobalt produced a number of

documents prior to the Motion being filed (Opposition Exhibit 1); indeed, the correspondence describing those prior productions is attached to the initial Declaration of Paul A. Thomas underlying the Board's motion. [ECF No. 15-2, at ¶¶ 6, 10, 11.] As the Board explained in detail in its reply correspondence [ECF No. 15-2, at ¶¶ 7, 12], those responses were incomplete in numerous respects. Cobalt was well aware of the NLRB's position long before the Motion to Compel was filed on July 6, 2018, given that the NLRB had reminded Cobalt multiple times of its discovery obligations in the months leading up to the Motion's filing. [ECF No. 15-2, at ¶¶ 13-15.]

Cobalt's Exhibits 2-4, and the accompanying portions of its Opposition, are simply irrelevant. They emerged out of a limited subpoena *issued to a third party* for financial documents created in 2018—long after the NLRB had served its First Request for Production in November 2017—concerning payments made pursuant to a bankruptcy settlement agreement. Cobalt produced some of the subpoenaed documents itself at the NLRB's request, but that limited production has nothing to do with the basis for the NLRB's Motion. The Motion to Compel was filed weeks before the NLRB subpoenaed the new financial documents. The NLRB is not seeking fees for any time spent on the August subpoena and related matters, and we are frankly unsure why Cobalt is bringing it to the Court's attention here.

Cobalt's Exhibit 5, meanwhile, implodes its own argument. By producing numerous responsive documents to the NLRB *following the grant* of the Motion

to Compel, Cobalt has implicitly conceded that those documents could and should have been produced *prior* to that filing. Thus, Cobalt's suggestion that the Motion to Compel was "unnecessary" blinks reality to a befuddling degree. The NLRB prevailed on this matter and obtained the production of numerous additional documents, a result which eminently justified the time expended upon the Motion.

Since Cobalt's nonresponsiveness was not "substantially justified," nor are there any other unusual factors warranting a denial of fees here, the NLRB's application for attorney fees should be granted.

Respectfully submitted,

**NATIONAL LABOR RELATIONS BOARD**

Dated: October 15, 2018

/s/ Paul A. Thomas

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