JD(SF)–27-07
Sacramento, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

RALEY'S

and Cases 20-CA-24973
20-CA-25354

INDEPENDENT DRUG CLERKS ASSN.

RALEY'S (United Wholesalers & Retailers Union,
Party to the Contract)

and Cases 20-CA-25649
20-CA-26294

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 588, UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL UNION

UNITED WHOLESALERS & RETAILERS UNION (Raley's)

and Case 20-CB-9623

CHRIS ZICARELLI, An Individual

and Case 20-CB-9742

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 588, UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL UNION

and Case 20-CB-9932

THOMAS MOORE, An Individual

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 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 (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 $7,000,000, 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 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

[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.

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 work time. 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 offsite, 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" thirty 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 multi-employer 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 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

[2] This memo was also posted at the drug centers and formed the basis of one complaint allegation that Raley's violated Section 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.

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 four-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.

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 co-worker 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

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[3] Raley's did not file an application. It 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.

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

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 co-chair 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% 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 center 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

[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.

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 No. 25 at p. 76. Regardless, for many other reasons the ALJ 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 work time. 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 work time, 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 September 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 post-recognition 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.

- ❖ <u>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.</u> (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

[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.

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] 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 Raley's employee, enjoyed a Section 7 right of access to the Benicia store because the evidence established that Raley'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. Raley'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 No. 25 @ p. 5. In addition, the Board concluded that *Lechmere's* exception based on a discriminatory access practice did not apply here because all of "UDCEA's active supporters were Raley's employees." 348 NLRB No. 25, fn. 21.

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[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 UDCEA's transmissions. In any event, the ALJ viewed the fax headers as hearsay. 348 NLRB No. 25, p. 61. However, the prevailing view treats fax headers as non-hearsay 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 non verbal conduct of a "person." *U.S. v. Khorozian*, 333 F.3d 498, 506 (3rd Cir. 2003), and the treatise cited there.

- 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 Raley'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 Raley'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 Raley'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 Raley'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 Raley'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."

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

- 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 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 UCDEA petition in the break room) and at Fair Oaks

[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.

(removing Local 588 cards from the break room) insufficient to establish disparate enforcement company rules. 348 NLRB No. 25, 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 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 No. 25, 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

[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.

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 evening, 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 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 ¶ 27(b): The Prevailing Party Question

[12] Raley's attorney told the General Counsel that "negotiations with UDCEA/UWRU were held on September 27, September 30, 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 by-laws but the revised provision was not challenged in this case.

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 ¶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 and Care Home, Inc. v. West Virginia Department of Health and 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. INS*, 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*, 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' voluntarily-implemented change. In fact, two of the cases cited by the judge explicitly applied the catalyst theory[14] 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.

[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).

To the extent that the ALJ here in any way approved the withdrawal of Complaint ¶27(b), I find his involvement amounted only to a procedural, housekeeping step.[15] Standing alone, the voluntarily withdrawal of Complaint ¶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 ¶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 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

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[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, § 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 Products*, 194 NLRB 1234 (1972), enf'd. 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 post complaint 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.

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. United States,* 742 F.2d 489, 492 (9th Cir.1984), *Meaden Screw Products Co*., 336 NLRB 298, 299-300 (2001). See also NLRB Rules and Regulations, § 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 (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 does not possess evidence that clearly would defeat the allegation. *Lion Uniform*, 285 NLRB 249, 253-54 (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 to 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, 961-62 (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*, 340 NLRB 133 (2003).

a. The Coercion and Assistance Allegations
Unrelated to Store Access and Late Fee Issues

Complaint ¶28 alleges that Raley's assisted and supported the UWRU in violation of §8(a)(2) by the conduct alleged in Complaint ¶18 through ¶27, including various subparagraphs. An employer commits unfair labor practice under § 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 ¶37 alleges that Raley's independently violated §8(a)(1) by the conduct described in Complaint ¶9 though ¶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 §8(a)(1) if it interferes with, restrains or coerces employees for exercising their §7 rights. The conduct alleged in Complaint ¶9 though ¶17 predates the formation of UDCEA/UWRU and has no relationship to this Application. The remaining independent 8(a)(1) allegations in Complaint ¶37 bear on the allegation only to the extent that conduct found unlawful also was found to violate §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 thirteen 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 No. 30 (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. *ILGWU v. NLRB (Bernhard-Altmann)*, 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 Brothers 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), enf'd. 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 *International Assn. of Machinists, Tool and Die Makers Lodge No. 35 (Serrick Corp.) v. NLRB*, 110 F.2d 29, 35 (D.C. Cir. 1939), affd. 311 U.S. 72 (1940)), enf'd. 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"), enf'd. in relevant part 13 F.3d 619 (2d Cir. 1994).

When 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 ¶29), its recognition (also Complaint ¶29), and its union-security clause (Complaint ¶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 resolving 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 §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 ¶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.
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> * * * * *
>
> 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 an 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 ¶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* 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 § 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 nonemployees 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 § 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

[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.

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 two 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 §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.

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 § 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,* 204 NLRB 921 (1973). There, the Board (members Fanning and Jenkins dissenting) reversed an ALJ's holding that the employer violated § 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 mine] Going further, the majority described both as "invitees" so that "one is no more entitled than the other to admission." 204 NLRB 922.

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[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.

[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.

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 § 7 to freely communicate their interest in union activity to those who work on different shifts. 222 NLRB 1089. 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 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 specifically 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 *Babcock & Wilcox,* 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 § 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 DC Circuit initially reviewed the Board's decision, it refused to enforce the *ITT Industries* order because of the Board's failure address the tresspassory character of offsite employees entering their employer's property at locations other than where they worked. *ITT Industries, Inc. 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 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'd. 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 onsite) 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 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 nonemployee 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 § 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 "nonderivative and substantial." 336 NLRB 648-49

But *Hillhaven* also recognized that access accorded to offsite employees could also involve distinct considerations when accommodating the tension between employee § 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 649-50.

Therefore, in balancing the employees § 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 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 *Babcox & Wilcox* that it reconcile employees' § 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. 105, 112 (1956).

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 DC Circuit enforced the Board's order based on its supplemental decision. *ITT Industries v. NLRB*, 413 F.3d 64 (DC Cir 2005).

Arguably Wright's wide ranging access in mid-September 1993 to store interiors and non-public areas cannot by 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 § 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 § 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 ¶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. 348 NLRB No 25, slip op 159.

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

The Board cited three cases for its conclusion. In one, *Retail Store Employees 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 three 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 "uniformily" levied on everyone after they became 3 months delinquent in their dues payments. 226 NLRB 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% 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% 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 *The Great Atlantic & Pacific Tea Company (Bakery Workers Local 12)*, 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 one dollar 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, 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 and Confectionery Workers' Local 12*, 115 NLRB 1542 (1956), enf'd. denied, 245 F.2d 211 (3rd 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 one dollar discount for the timely payment of dues. But the Board (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 § 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

[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 two months delinquent in the payment of dues and the added assessment.

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 § 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 § 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 ¶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 ¶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 recommended[21]

[21] Pursuant to NLRB Rules and Regulations § 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 § 102.154,and all objections and exceptions to them will be deemed waived for all purposes.

ORDER

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

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

William L. Schmidt
Administrative Law Judge