IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT COURT OF TEXAS
LUFKIN DIVISION

Sylvester McClain, et al. Plaintiffs, v. Lufkin Industries, Inc. Defendants.	§ § § § § § § § §	Civil Action No. 9:97 CV 063 (COBB)

PLAINTIFFS' OPPOSITION TO DEFENDANT LUFKIN INDUSTRIES, INC.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

I. INTRODUCTION

Despite the fact that Defendant Lufkin Industries, Inc. ("Lufkin") earlier complained that Plaintiffs produced *too much* information in support of their fee application, see Lufkin's Motion to Delay Consideration of Attorneys' Fees Issues Until This Case Has Been Heard on Appeal in Response to Plaintiffs' Motion to Extend Page Limit ("Motion to Delay") at 1-2, Lufkin now demands that Plaintiffs produce *even more* information. After receiving Lufkin's motion to compel, Plaintiffs attempted to offer a compromise to resolve the motion. Lufkin failed to respond to Plaintiffs' proposal or engage in a meaningful and good faith meet and confer process. Nonetheless, Plaintiffs are willing to produce to Lufkin certain additional documents that are the subject of its Motion to Compel. Accordingly, Lufkin's motion to compel those documents is moot.[1]

The remaining disputed categories of documents of which Lufkin seeks production are (1) the specific time entries Plaintiffs deleted as a result of their exercise of billing judgment and (2) receipts for all travel expenses incurred by Plaintiffs. As shown below, these documents are either irrelevant to the issues now before the Court, would be burdensome for Plaintiffs to produce or are duplicative and cumulative of evidence already produced by Plaintiffs.

[1] Plaintiffs will produce copies of invoices of Plaintiffs' experts. Additionally, while Plaintiffs view Lufkin's request for documents reflecting Plaintiffs' counsel's hourly rates in each year prior to 2005, of marginal relevance in light of well established case law reorganizing that current rates should be awarded to account for the delay in payment, see Missouri v. Jenkins, 491 U.S. 274 (1989), and Plaintiffs believe they have provided adequate information to Lufkin from which it can determine Plaintiffs' counsel's historical rates, see e.g., Declaration of Teresa Demchak in Support of Plaintiffs' Motion for an Award of Interim Attorneys' Fees ("Demchak Decl.") Exhibit 19 at 8, Plaintiffs will produce to Lufkin Goldstein, Demchak, Baller, Borgen & Dardarian's hourly rate sheets for the years 2000-2004. Plaintiffs' counsel Timothy B. Garrigan has no documents reflecting his hourly rates for the years in question.

II. ARGUMENT

Federal Rule of Civil Procedure 26(b)(1) allows the discovery of "relevant" material. Federal Rule of Civil Procedure 26(b)(2) further provides that a court may limit discovery if "(i) the discovery sought is unreasonably cumulative or duplicative …; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

Pursuant to Federal Rule of Civil Procedure 26(b) (1) and (2), the Court should overrule Lufkin's request for production of documents reflecting hours Plaintiffs' counsel did not bill to this case and Plaintiffs' travel receipts for the reasons discussed below.

III. LUFKIN'S CONTENTION THAT IT IS ENTITLED TO RECORDS OF TIME CHARGED, BUT NOT BILLED, BY PLAINTIFFS' COUNSEL IS NEITHER SUPPORTED BY CASE AUTHORITY NOR CONSISTENT WITH LUFKIN'S COUNSEL'S OWN BILLING PRACTICES.

Lufkin has not demonstrated that documents reflecting time charged, but not billed, by Plaintiffs' counsel in this case are relevant in light of the detailed contemporaneous time records submitted by Plaintiffs' counsel in this case. In Hensley v. Eckerhart, 461 U.S. 424 (1983), the Supreme Court emphasized the importance of the exercise of billing judgment, and described it as requiring "a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." Id. at 434. This is precisely the basis upon which Plaintiffs exercised billing judgment in their fee application. See Demchak Decl. at ¶ 73; Declaration of Timothy Garrigan in Support of Plaintiffs' Motion for an Award of Interim Attorneys' Fees, Costs and Expenses ("Garrigan Decl.") at ¶¶ 20, 23. Contrary to Lufkin's contention, the Court need not "simply take Plaintiffs' counsel at their word." Motion to Compel at 2. Plaintiffs' exercise of billing judgment is demonstrated by the time records themselves, which have been submitted to the Court. The Court and Lufkin can see for themselves that these

records do not contain excessive, redundant, or otherwise unnecessary hours. Moreover, Plaintiffs' counsel's Declarations, submitted under penalty of perjury, explain the bases on which they exercised billing judgment, including the type of billing entries they deleted and tasks they did or did not bill in their exercise of billing judgment. See Demchak Decl. at ¶¶ 73-75. Additionally, Lufkin has deposed Plaintiffs' counsel Mr. Garrigan and questioned him extensively regarding his exercise of billing judgment. See Excerpts of Deposition of Timothy B. Garrigan, ("Garrigan Depo.") taken on April 13, 2005, attached hereto as Exhibit 1.

The time records submitted by Plaintiffs in support of their fee motion provide the basis for assessing whether they have exercised billing judgment. See e.g., Hollowell v. Orleans Reg'l Hosp. LLC, 217 F.3d 379, 392 (5th Cir. 2000) (explaining its rejection of defendants' claim that plaintiffs failed to exercise reasonable billing judgment, "In light of the detailed records submitted by plaintiffs' counsel, and the careful review by the magistrate judge of all the time entries, we find defendants' argument that the billing records reflect noncompensable time or duplicative charges unavailing."); Carrabba v. Randalls Food Mkts., Inc., 191 F. Supp. 2d 815, 827 (N.D. Tex. 2002) (finding no proof in the record that attorneys exercised billing judgment because "the time records of [the attorney] affirmatively show that there was a failure to exercise the requisite judgment."); Lalla v. City of New Orleans, 161 F. Supp. 2d 686, 706 (E.D. La. 2001) (discussing numerous specific time entries that reflected duplication of effort and excessive time charges in the time records submitted by the plaintiffs, and holding that "*based upon the evidence in the record*, counsel's suggestion that there were a number of hours which were not billed is not supported and that plaintiffs did not exercise billing judgment in the submission of these time records." (emphasis added)).

Moreover, the accuracy and adequacy of the time records Plaintiffs submitted with their fee motion distinguishes them from evidence considered by courts in the cases Lufkin cites in its Motion to Compel. In Walker v. U.S. Department of Housing & Urban Development, 99 F.3d 761 (5th Cir. 1996), the court noted that, "the record and briefs strongly suggest that the plaintiffs' attorneys do not adequately understand the concept of billing judgment." Id. at 770.

The record in Walker included evidence that the attorneys deducted for hours inadequately documented and time spent on issues on which they did not prevail or which they did not ultimately pursue. Id. Similarly, in Leroy v. City of Houston, 831 F.2d 576 (5th Cir. 1987), the court noted that there were serious deficiencies in the billing records presented in the case, including "that some were reconstructed, after-the-fact summaries, some were often 'scanty,' some were never kept at all, and many lacked explanatory detail." Id. at 585. In light of the deficient time records, the court criticized the lower court's acceptance of the lawyer's "purported exercise of billing judgment." Id. Likewise in Alberti v. Klevenhagen, 896 F.2d 927 (5th Cir. 1990), the discussion of billing judgment arose in the course of the court's review of seriously inadequate time records. The court noted that even a cursory review of the fee petition revealed items not directly related to the litigation, and concluded that including such items reflected a lack of billing judgment. Id. at 933-34.

Here, Plaintiffs have demonstrated their understanding of the requirements of billing judgment and the standards regarding compensable time under applicable authority regarding fee applications, and they have explained their unassailable methods of exercising billing judgment. See Demchak Decl. at ¶¶ 73-75; Garrigan Decl. at ¶¶ 20, 23.[2] Furthermore, to the extent that Lufkin had any question about Mr. Garrigan's billing practice, including his exercise of billing judgment, Lufkin had the opportunity to and did question him about these matters during his deposition.[3] Significantly, Lufkin does not identify any specific aspect of Plaintiffs' time

[2] See Demchak Decl. at ¶ 73: ("in reviewing Goldstein Demchak's time records in preparation for this fee motion, I exercised billing judgment and deleted over 1,300 hours of attorney and staff time that originally had been billed to the case for a total reduction of $321,159.50. This represents 6.77% of the time my firm actually spent on the case. The deleted hours included time spent on matters that, in my judgment, were peripherally, but not directly, related to the legal theories and/or factual claims of the case; time that was, in my judgment, unproductive or unnecessarily duplicative of work performed by others; and all time of certain other timekeepers whose work, while necessary and productive, amounted to relatively small individual amounts (i.e., less than twenty (20) hours per timekeeper);" Garrigan Decl. at ¶¶ 20, 23 (explaining that he made an across the board 5% reduction of his firm's hours).

[3] Lufkin did not seek to depose any of Plaintiffs' other counsel.

records that indicates Plaintiffs do not understand the concept of billing judgment or that Plaintiffs failed to delete excessive, redundant, or unproductive hours. Accordingly, the thorough and detailed time records submitted by Plaintiffs provide the Court and Lufkin all the information that is necessary to assess whether Plaintiffs have exercised appropriate billing judgment.

Furthermore, Plaintiffs' exercise of billing judgment and submission of information to the Court and Lufkin regarding only the time billed as a result of the exercise of such billing judgment are consistent with normal practices. Plaintiffs note that in Lufkin's counsel Vinson & Elkins' ("V&E") submission of its time in In Re Food Fast Holdings, Inc., Case No. 02-10542 (Bankr. E.D. Tex.), it did not identify the specific billing entries it deducted, but instead simply noted that it made a "reduction for hours not billed." See Demchak Decl., Exhibits 21 and 24.[4]

Finally, with respect to Mr. Garrigan's unbilled time, it would be burdensome for him to have to identify such time and, in fact, no such documents reflecting such time exist – other than the time records Mr. Garrigan has already submitted with the fee motion – since Mr. Garrigan reduced his total hours by 5% without identifying any particular time entry to delete, see Garrigan Decl. at ¶¶ 20, 23, or did not record the time deleted in the exercise of billing judgment. See Exhibit 1.

For all of the reasons discussed above, the Court should reject Lufkin's request that Plaintiffs produce documents reflecting time charged, but not billed, to this case.

[4] Plaintiffs also note that the percentage of time deducted by V&E in In Re Food Fast Holdings, Inc. was significantly less than the percentages of time Plaintiffs' counsel have deducted from their fees in this case. Compare Demchak Decl., Exhibit 21 (3% reduction of hours by V&E in In Re Food Fast Holdings), Exhibit 24 (1% reduction of hours by V&E in In Re Food Fast Holdings) and Demchak Decl. ¶ 73 (6.77% reduction of Goldstein Demchak's time in this case); Garrigan Decl. ¶¶ 20, 23 (5% reduction of his firm's hours in this case.).

IV. LUFKIN MISCHARACTERIZES THE EFFORT THAT WOULD BE REQUIRED FOR PLAINTIFFS TO PRODUCE TRAVEL RECEIPTS AND FAILS TO EXPLAIN WHY PRODUCTION OF SUCH DOCUMENTS IS NECESSARY IN LIGHT OF THE EVIDENCE PLAINTIFFS HAVE ALREADY PRODUCED.

Lufkin misstates the steps Plaintiffs would have to undertake to produce their travel receipts. Lufkin states that to produce these documents "[a]ll that is needed is to copy them, some on both sides." Motion to Compel at 4. In fact, this is not *all* that is required and Plaintiffs so advised Lufkin in responding to Lufkin's request for production of these documents. Specifically, Plaintiffs explained:

> In the case of travel receipts, (hotel, meals, airlines, etc.) these are all attached to the expense reports. They would need to be disassembled (staples), copied on both sides (since notes were frequently made on the back of the receipts) and then organized so as to reflect the manner in which we maintain them. Similarly, at the time of travel, frequently the expenses were apportioned between or among more than one case according to case activities. Notations related to other case activities on these receipts and invoices would need to be redacted. It would be necessary for Goldstein Demchak to hire additional staff to locate, organize redact, and copy the materials for production.

Plaintiffs' Responses and Objections to Defendant's Third Request for Production of Documents, No. 2, attached as Exhibit A to Motion to Compel.

Additionally, Lufkin ignores that Plaintiffs have already provided adequate explanation for the variance in prices of airline tickets for different attorneys attending the same event and why it was necessary in some instances to purchase higher priced, but refundable, airline tickets, or to change the ticket and incur additional charges. See Demchak Decl. at ¶ 96(a)-(c).

Lufkin's reliance on 28 U.S.C. § 1821 in support of its argument that Plaintiffs must incur the substantial burden of producing these receipts is unavailing. As Lufkin acknowledges, 28 U.S.C. § 1821 expressly applies to "a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States." Section 1821 has nothing to do with a motion for reimbursement of a plaintiff's litigation costs and expenses, or the adequacy of

evidence submitted in support of such a motion. In fact, Lufkin cites no relevant authority supporting its claim that Plaintiffs, having produced 66 pages of detailed expense entries, see Demchak Decl. Exhibit 29, Garrigan Decl. Exhibit 2, should be forced to incur the additional time and expense to produce boxes of airline, hotel, rental car, restaurant and other travel receipts that are individually itemized by date, vendor, person incurring the expense and the amount of the expense in those entries. Furthermore, Lufkin offers no explanation of how its inspection of the receipts will assist it or the Court in determining whether any individual expense was "extravagant or unnecessary." See Motion to Compel at 1.

When considering fee petitions, a district court should be mindful of the Supreme Court's instruction that "[a] request for attorney's fees should not result in a second major litigation." Hensley, 461 U.S. at 437. Lufkin's demand, under the circumstances of this case and in view of the substantial evidence Plaintiffs have already produced to support their request for reimbursement of their expenses, is burdensome, duplicative and cumulative, and should be rejected by the Court.

V. CONCLUSION

For all of the reasons discussed above, Plaintiffs respectfully submit that the Court should deny Lufkin's request for production of documents reflecting time Plaintiffs' counsel have charged, but not billed, to the case and Plaintiffs' travel receipts.

Dated: April 19, 2005

Respectfully submitted,

By: /S/

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CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel of record in this case, including the following, with a true and correct copy of the foregoing by sending same via electronic filing to:

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on this ____ day of April, 2005.

/S/
Teresa Demchak