UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

MID-WEST TELEPHONE SERVICE, INC.		
and	**CASE**	**8-CA-38901**
WILFREDO PLACERES, AN INDIVIDUAL		
MID-WEST TELEPHONE SERVICE, INC.		
and	**CASE**	**8-CA-39168**
DUSTIN PORTER, AN INDIVIDUAL		
MID-WEST TELEPHONE SERVICE, INC.		
and	**CASES**	**8-CA-39297** **8-CA-39388**
BEN FANNIN, AN INDIVIDUAL		
MID-WEST TELEPHONE SERVICE, INC.		
and	**CASE**	**8-CA-39334**
MIKE WILLIAMS, AN INDIVIDUAL		

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF MOTION TO DISMISS RESPONDENT'S APPLICATION FOR ATTORNEY FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

Pursuant to Section 102.150 of the Board's Rules and Regulations, the undersigned Counsel for the Acting General Counsel files this Brief in Support of Motion to Dismiss Respondent's Application for Attorney Fees (the Application) under the Equal Access to Justice Act, 5 U.S.C. §504 et seq. (EAJA).

On October 19, 2012, Mid-West Telephone Service, Inc. (Respondent), filed its Application. The Application should be dismissed in its entirety because Respondent is not a "prevailing party" in Case Number 8-CA-038901, the only case that is the subject of the Application. Even assuming, *arguendo*, that Respondent is a "prevailing party," Respondent's Application should be dismissed because the Acting General Counsel was substantially justified in litigating the matter at issue. Finally, dismissal of the Application is appropriate because Respondent did not itemize expenses in the Application and failed to serve all parties to the litigation, as required by the Board Rules and Regulations.

I. PROCEDURAL HISTORY

This matter was consolidated for hearing with a number of other charges, all of which were heard by the Honorable Judge Mark Carissimi on October 11-13, 2011. Judge Carissimi issued his decision on December 28, 2011. Among his other determinations, Judge Carissimi concluded, after considering the principles expressed in *Independent Stave Co., Inc.*, 287 NLRB 740 (1987), that the private settlement between the Respondent and the Charging Party in charge 8-CA-038901, Wilfredo Placeres, should be approved over the objection of Counsel for the Acting General Counsel. It is this action by Judge Carissimi that the Respondent relies on in its Application.

II. RESPONDENT'S APPLICATION SHOULD BE DISMISSED BECAUSE RESPONDENT DOES NOT QUALIFY FOR RELIEF UNDER EAJA BECAUSE IT WAS NOT A "PREVAILING PARTY"

Under Section 102.143(b) of the Boards Rules and Regulations,

> A respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of that proceeding, and who otherwise

> meets the eligibility requirements of this section, is eligible to apply for an award of fees and other expenses allowable under the provisions of section 102.145 of these rules.

Thus, as a threshold matter, to be eligible for reimbursement of fees under EAJA, an applicant must be able to demonstrate that it was the "prevailing party" in the adversary adjudication. *Commissioner, INS v. Jean*, 496 U.S. 154, 160 (1990); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); Section 102.143(b) of the Board's Rules and Regulations. The burden is on the party seeking fees to establish that it is a prevailing party. *Reich v. Walter W. King Plumbing & Heating Contractor, Inc.*, 98 F.3d 147, 150 (4th Cir. 1996).

Under Board law, a Respondent does not become a "prevailing party" where a Region withdraws a complaint pursuant to a settlement agreement between the parties. *New York Newspaper Printing Pressmen's Union No. 2 (New York Times Co.)*, 352 NLRB 444 (2008); *Birmingham Chapter, Nat'l Elec. Contractors Ass'n*, 313 NLRB 770 (1994); *Carthage Heating & Sheet Metal Co.*, 273 NLRB 120, 122-123 (1984). *Cf. K & I Transfer & Storage*, 295 NLRB 853 (1989) ("Respondent is a prevailing party on allegations that the General Counsel withdraws, unless the withdrawal is based on settlement or mutual adjustment of the issue.") As the Board observed in *Dame & Sons Construction Co.*, 292 NLRB 1044, 1045 (1989), "the settlement precludes finding that either the Government or the Applicant won or lost."

In his decision, Judge Carissimi approved Placeres' request to withdraw the portion of his charge pertaining to his discharge. Judge Carissimi also dismissed the corresponding complaint paragraph. The foregoing actions were not based on Judge Carissimi's conclusion that the Respondent's defenses to the termination allegation had merit. Rather, Judge Carissimi examined the factors set forth in *Independent Stave Co.*, 287 NLRB 740 (1987), and concluded

that he would give effect to the parties' private settlement agreement despite opposition by Counsel for the Acting General Counsel.

Like a Regional Director's decision to withdraw a complaint based on a private settlement agreement, Judge Carissimi's decision to approve Placeres' withdrawal request did not make Respondent a "prevailing party." Pursuant to the settlement agreement, Respondent obligated itself to reinstate Placeres without requiring him to fill out any new employment paperwork and to provide him with a letter stating that it would not enforce any previously executed non-compete agreement. Respondent would not have had to take any of the foregoing actions had the complaint allegation regarding Placeres' termination been dismissed on the merits. Consequently, Respondent cannot show that it is a "prevailing party" in the underlying proceeding. *See, Carthage Heating*, 273 NLRB at 123; *Dame & Sons*, 292 NLRB at 1045. Because Respondent is not a prevailing party, its Application should be dismissed.

III. RESPONDENT'S APPLICATION SHOULD BE DISMISSED BECAUSE RESPONDENT IS NOT ENTITLED TO RELIEF UNDER EAJA BECAUSE THE ACTING GENERAL COUNSEL WAS SUBSTANTIALLY JUSTIFIED IN REFUSING TO GRANT CHARGING PARTY'S WITHDRAWAL REQUEST

An EAJA applicant who meets its burden of showing that it is a "prevailing party" will not be entitled to relief where the government can demonstrate that its position was substantially justified. *Commissioner, INS v. Jean*, 496 U.S. 154, 158 (1990); Section 102.44(a) of the Board's Rules and Regulations. The burden of demonstrating "substantial justification" is on the General Counsel. *Id.*

In *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), the Supreme Court held that "substantially justified" means "justified to a degree that could satisfy a reasonable person[,]" or "if it has a reasonable basis both in law and fact." The Board has adopted this definition. *Jansen*

Distributing Co., 291 NLRB 801 n. 2 (1988). Thus, the Acting General Counsel's position is substantially justified "when the evidence is 'what a reasonable mind might accept as adequate to support a conclusion' – i.e., where 'reasonable people could differ' on whether the allegation should be litigated." *Glesby Wholesale, Inc.*, 340 NLRB 1059, 1060 (2003), quoting *Pierce v. Underwood*, 487 U.S. at 563-566. The government is not required to establish that its decision to litigate was based on a substantial probability of prevailing.[1]

EAJA was not intended to "stifle the reasonable regulatory efforts of federal agencies,"[2] or to deter the government from "advancing in good faith a close question of law or fact.[3]

A determination as to whether the government was substantially justified in prosecuting the underlying case is made by examining the case as an "inclusive whole." *INS v. Jean*, 496 U.S. at 161-162. When examined in light of these standards, the Acting General Counsel's opposition to this private settlement was more than substantially justified.

The details of the agreement between Placeres and Respondent were never memorialized in any writing. However, as noted above, they were fairly straightforward: Placeres requested withdrawal of his charge and in exchange Respondent (1) brought him back to work, (2) did not require him to execute any employment documents, and (3) notified Placeres that it would not enforce any non-compete agreements he may have executed in the past. (Resp. Ex. 18 and 19) The settlement agreement does not provide for any backpay, although by the time of the hearing in this matter Counsel for the Acting General Counsel calculated that Placeres was owed around $20,000. (Tr. 146) Respondent returned Placeres to work in March 2011, prior to learning whether Placeres' withdrawal request had been approved by the Regional Director for Region 8.

[1] *Scarborough v. Principi*, 541 U.S. 401, 415 (2004); *Galloway School Lines, Inc.*, 315 NLRB 473 (1994).
[2] *Wyandotte Savings Bank v. NLRB*, 682 F.2d 119, 120 (6th Cir. 1982); *Shellmaker, Inc.*, 267 NLRB 20, 21 (1983).
[3] *Shellmaker, Inc.*, supra. *See, Abell Engineering & Manufacturing, Inc.*, 340 NLRB 133 (2003); *Galloway School Lines*, 315 NLRB 473 (1994).

In fact, Placeres did not even execute a withdrawal request until July 26, 2011. (Resp. Ex. 3) In addition, it was not until approximately April 8, 2011 that Respondent drafted a letter to Placeres assuring him that Respondent would not enforce the non-compete agreement. (Resp. Ex. 17, 18 and 19)

In *Independent Stave Co., Inc.*, 287 NLRB 740, 743 (1987), the Board stated that it will examine all the surrounding circumstances to determine whether a private settlement should be approved, including but not limited to:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

While Judge Carissimi ultimately disagreed with the position asserted by Counsel for the Acting General Counsel, a review of the basis for Counsel for the Acting General Counsel's position clearly demonstrates that it had substantial justification.

Counsel for the Acting General Counsel concedes that Placeres and Respondent both agreed to be bound by their private agreement and that there was no evidence of fraud, coercion or duress in reaching the agreement. However, Counsel for the Acting General Counsel strenuously opposed the settlement on other grounds.

Unlike many cases where the Board has determined that a settlement met the *Independent Stave* factors, there was no union-charging party here to advance the interests of Placeres in negotiating the settlement. *See*, *Service Merchandise Co., Inc.*, 299 NLRB 1132 (1990) (Board granted respondent's motion for summary judgment where union, respondent and six

discriminatees agreed to settlement); *Metro Mayaguez, Inc.*, 356 NLRB No. 150, sl. op at *1 (2011) (Board dismissed unilateral change allegation where union and respondent entered into agreement calling for respondent to pay all employees entitled to an unlawfully discontinued bonus); *American Pacific Concrete Pipe Co., Inc.*, 290 NLRB 623 (1988) (union, respondent and discriminatee all executed settlement agreement). Without the input of any union representative(s), individuals like Placeres are potentially at a severe disadvantage in such negotiations. *See, Al-Hilal Corp., Inc.*, 325 NLRB 318 (1998) (noting General Counsel's vigorous opposition to settlement requiring employees to resign to receive backpay in a situation where the union was also disclaiming interest).

Further, Counsel for the Acting General Counsel opposed the settlement because it was unreasonable in light of the nature of the violations alleged, the risks and the stage of litigation when asserted. The violation alleged in this case is that Respondent violated Section 8(a)(1) and (3) when it terminated Placeres because he was seeking assistance from the Union in connection with a pay dispute. In connection with the second of the *Independent Stave* factors, the Board has noted the "serious nature" of Section 8(a)(3) violations. *Frontier Foundries, Inc.*, 312 NLRB 73, 74 (1993). A serious violation requires something close to a complete remedy. The settlement did not provide that.

There are risks inherent to any litigation. Where there are unusual risks, the Board has found that an agreement providing for less than full backpay is a reasonable settlement. *American Pacific Concrete Pipe Co., Inc.*, 290 NLRB 623 (1988) (finding 50% backpay settlement reasonable where there was evidence of discrepancies between documents the discriminatee submitted to the General Counsel and unemployment office regarding his mitigation efforts). There is no evidence that Respondent is in poor financial health such that

any backpay ultimately awarded would be unlikely to be paid. *See*, *Id.* at 624. In addition, there is no evidence that Placeres would not be entitled to backpay for any period following his termination. Therefore, in the present case there were no additional risks other than those which are normally present in any litigation. In consideration of the above, Counsel for the Acting General Counsel asserts that it had substantial justification in opposing a private settlement that provided a 0% backpay settlement. *See*, *Frontier Foundries*, 312 NLRB at 74.

Furthermore, the settlement did not provide for any notice to employees. While not determinative, the Board often considers this factor as part of its *Independent Stave* analysis. *E.g.*, *Service Merchandise Co., Inc.*, 299 NLRB 1132 (1990) (approving settlement agreement providing for a notice posting, 100% backpay to five discriminatees and 50% to a sixth); *Frontier Foundries*, 312 NLRB at 74 (taking into consideration the absence of a notice in deciding not to accept the settlement).

Counsel for the Acting General Counsel was also substantially justified in opposing approval of the settlement in light of the stage of litigation. In *Independent Stave*, the Board noted that the settlement at issue was reached ten (10) days after the issuance of complaint. 287 NLRB at 743. The Board went on to reason that, "[t]his early resolution of the dispute after the Board processes have been invoked and the provision for reinstatement demonstrate to other employees a recognition of their statutory rights involved." *Id.* at 743. Likewise, in *Service Merchandise*, 299 NLRB at 1133, the Board approved an informal settlement where the agreement was reached one day after respondent served its answer to the complaint.

The facts in this case stand in stark contrast to those in *Independent Stave* and *Service Merchandise*. Here, the agreement to settle Placeres' charge was not hammered out until nearly one year after his termination, and ten (10) months after the Region issued a complaint in the

matter. Furthermore, in the period between Placeres' discharge and Respondent's offer to settle his case, four other charges were filed against Respondent involving serious allegations of unlawful threats and discrimination in violation of not only Section 8(a)(3) but also Section 8(a)(4). Unlike in *Independent Stave* and *Service Merchandise*, here there was no early resolution showing employees that their employer recognizes their statutory rights. To the contrary, Respondent's actions during the intervening period demonstrated to employees their employer's total disregard for their statutory rights. The absence of a notice as part of the settlement only reinforces employees' inescapable conclusions in this regard.

In light of all the circumstances in this case, and pursuant to the Board's test in *Independent Stave*, Counsel for the Acting General Counsel had more than substantial justification for opposing approval of this the non-Board settlement.

IV. THE APPLICATION SHOULD BE DISMISSED BECAUSE IT DOES NOT ITEMIZE EXPENSES AND WAS NOT SERVED ON ALL PARTIES TO THE LITIGATION

Were Respondent a "prevailing party" and, assuming for the sake of argument that the agency was not substantially justified in prosecuting the Placeres' matter, Respondent's Application should still be dismissed on the basis of two other deficiencies.

Any claims upon which Respondent did not prevail, and which are "distinct in all respects" from claims upon which it did prevail, "should be excluded in considering the amount of a reasonable fee." *Hensley*, 461 U.S. at 440. Consequently, compensable expenses must be identified, adequately documented, and incurred in connection with the issues on which Respondent prevailed. *Brandeis School*, 287 NLRB 836, 838-839 (1987).

However, Respondent's counsel, the law firm of Morrow & Meyer LLC, did not adequately identify and document its fees and expenses with regard to the Placeres charge. [4] Morrow's practice with respect to its billing records was to list everything its attorneys did on a given date and to list the total number of hours that they worked on issues related to the entire adversary adjudication, without identifying the amount of time spent on matters regarding the Placeres charge. In an effort to overcome this lack of detail, the Application states that since there were four charges, Respondent was seeking reimbursement of one quarter of the total number of hours that Morrow accrued, or 75.375 hours.[5] This is clearly insufficient. Accordingly, Respondent is not entitled to fees under EAJA because its Application fails to identify and adequately document expenses incurred by Morrow in connection with the adjudication of the Placeres charge.

Finally, the Application should be dismissed because while Respondent timely E-Filed its Application, Respondent failed to properly serve it. Pursuant to Section 102.148(a), Respondent must serve the Application on "all parties to the adversary adjudication in the same manner as other pleadings in that proceeding..." Respondent's Certificate of Service on page 6 of its Application states that only Regional Director Frederick Calatrello and Counsel for the Acting General Counsel Melanie Bordelois were served with the Application. Respondent failed to serve parties Wilfredo Placeres, Dustin Porter, Ben Fannin and Michael Williams. Consequently, the Application should be dismissed because Respondent did not serve all parties

[4] Respondent's Application seeks attorney fees at a rate of $125 an hour. Section 102.145(b) of the Board's Rules and Regulations provides maximum attorney fees of $75 per hour. Pursuant to Section 102.146 of the Board's Rules, to obtain fees greater than $75 per hour, Respondent must petition the Board under Section 102.124 of the Board's Rules for rulemaking to increase the maximum rate for attorney fees. Respondent has not filed such a petition.

[5] Respondent's attempt to estimate the hours Morrow dedicated to the Placeres charge is also mathematically flawed: five (5), not four (4) cases were consolidated.

to the adjudication. *See also*, OM 05-30 (January 12, 2005) ("The Board will not process any E-Filing without an appropriate statement of service.")

V. CONCLUSION

For all of the foregoing reasons, Respondent's Application should be dismissed.

Respectfully submitted,

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PROOF OF SERVICE

On November 15, 2012, Counsel for the Acting General Counsel's Brief in Support of Motion to Dismiss was E-Filed on the Board's website, with a copy served on Respondent via electronic and regular U.S. mail at:

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Also on November 15, 2012, a copy of Counsel for the Acting General Counsel's Brief in Support of Motion to Dismiss was sent via regular U.S. mail to the following:

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