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

AUSTIN FIRE EQUIPMENT, LLC

and Case 15–CA–19697

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL–CIO

Kevin McClue, Esq.,
for the Acting General Counsel.
Harold Koretzky, Esq., Stephen Rose, Esq.,
Russell L. Foster, Esq., and *Sarah E. Stogner, Esq.,*
for the Respondent.
William W. Osborn Jr., Esq and *Natalie C. Mofett, Esq.,*
for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. On October 26, 2012, Austin Fire Equipment, LLC (the Respondent) filed an application for attorneys' fees and costs pursuant to the Equal Access to Justice Act (EAJA). On November 16, 2012, the Acting General Counsel filed a motion to dismiss application for an award of attorney fees and expenses under the Equal Access to Justice Act. On November 16, 2012, Respondent filed an amendment to its EAJA Application and on November 20, 2012, Respondent filed a second amendment to its EAJA Application. On December 7, 2012, Respondent filed a Memorandum in Opposition to motion to dismiss EAJA Application. Attached to the memorandum is a supplemental affidavit from Respondent's counsel as well as a request for additional fees and costs since the filing of Respondent's October 26, 2012 EAJA application.

On February 14, 2013, the National Labor Relations Board (the Board) referred the matter to the undersigned for appropriate action. On March 7, 2013, the Acting General Counsel filed counsel for Acting General Counsel's reply to Respondent's memorandum in opposition to motion to dismiss EAJA Application. On April 5, 2013, the Respondent filed Respondent's motion to strike untimely reply brief. On April 8, 2013, the Acting General

Counsel filed reply to Respondent's motion to strike reply brief. On April 25, 2013, Respondent filed Respondent's reply memorandum to support motion to strike untimely reply brief.

A. Preliminary Issues

1. Whether my decision is stayed

Counsel for the Acting General Counsel takes the position under Section 102.148(c) that this matter is stayed pending a final disposition of the underlying case. Section 102.148(c) provides that

> Proceedings for the award of fees, but not the time limit of this section for filing an application for an award, shall be stayed pending final disposition of the adversary adjudication in the event any person seeks reconsideration or review of the decision in that proceeding.

I note, however, that under Section 102.143, the Board's Rules specifically define an adversary adjudication" to mean unfair labor practice proceedings pending before the Board on complaint and backpay proceedings pending before the Board on notice of hearing." On February 7, 2013, the Board denied the Union's motion for reconsideration; addressing all remaining matters before the Board other than Respondent's application for attorney's fees and costs. On February 14, 2013, the Board referred Respondent's application for attorney's fees and costs to me for appropriate action. Accordingly, I do not find that my decision in this matter is stayed because of any other matters pending before the Board.

2. Whether the Acting General Counsel's reply brief and the Respondent's motion to strike the Acting General Counsel's reply brief are timely filed

a. The Board's applicable Rules and Regulations

Section 102.148 of the Board's Rules provide that an EAJA applicant has 30 days after the entry of the Board's final order in a proceeding to file its application for an award of fees and expenses. Upon filing, the application shall be referred by the Board to the administrative law judge (ALJ) who heard the adversary adjudication upon which the application is based. Section 102.148 provides that proceedings for the award of fees, but not the time limit of this section for filing an application for an award, shall be stayed pending final disposition of the adversary adjudication in the event any person seeks reconsideration or review of the decision in that proceeding.

Section 102.150 provides that within 35 days after service of an application, the Acting General Counsel may file an answer to the application. The filing of a motion to dismiss the application shall stay the time for filing an answer to a date 35 days after issuance of any order denying the motion. Within 21 days after service of any motion to dismiss, the applicant shall file a response thereto. Within 21 days after service of an answer, the applicant may file a reply.

b. The parties' pleadings

As outlined above, Respondent's EAJA application was initially filed on October 26, 2012 and the Acting General Counsel filed a motion to dismiss Respondent's application on November 16, 2012. On November 9, 2012, the Union filed a motion for reconsideration with the Board. On November 16 and 20, 2012, Respondent filed amendments to its EAJA application. On December 7, 2012, Respondent filed its memorandum in opposition to the motion to dismiss with documentation to amend the October 26, 2012 EAJA application. Counsel for the Acting General Counsel asserts that while the document was crafted as a memorandum in opposition to the Acting General Counsel's motion to dismiss, it did not merely respond to the Acting General Counsel's motion; but included new arguments and an exhibit requesting attorney fees that were not requested in its original EAJA application. The new exhibit was a supplemental affidavit by Respondent's counsel detailing the additional fees and costs since Respondent's initial filing of its EAJA Application.

On February 7, 2013, the Board denied the Union's motion for reconsideration. On February 14, 2013, the Board referred the EAJA application to me as the administrative law judge who heard the underlying case. On March 7, 2013, the Acting General Counsel filed a reply brief in support of its motion to dismiss Respondent's EAJA application. On April 5, 2013, Respondent filed a motion to strike the Acting General Counsel's brief that was filed on March 7, 2013. On April 8, 2013, the Acting General Counsel filed a reply to the Respondent's motion to strike the Acting General Counsel's brief.

c. Respondent's argument in support of its motion

As outlined above, the Board's Rules provide that the Respondent had 21 days to file a response to the Acting General Counsel's motion to dismiss. Respondent's memorandum in opposition to the General Counsel's motion to dismiss complied with the time frame required by the Board's Rules. Respondent asserts, however, that the General Counsel's March 7, 2013 reply to the Respondent's memorandum in opposition is untimely.

Specifically, Respondent argues that the Acting General Counsel was in possession of the Respondent's opposition to the motion to dismiss since December 7, 2012. Respondent argues that a right to reply is not provided for in the Board's Rules and Regulations and that the Acting General Counsel should not be permitted to file a reply more than 3 months after receiving Respondent's opposition when the Rules do not grant a right of reply, and counsel for the Acting General Counsel has failed to timely seek leave for such a filing. On March 6, 2013, counsel for the Acting General Counsel sent a letter to Respondent's counsel entitled "Notice of Intent to File Reply." Respondent asserts that the Acting General Counsel did not seek leave to file the Reply and thus it should be stricken.

d. The Acting General Counsel's response

The Acting General Counsel argues that the EAJA proceedings were stayed on November 9, 2012, pending the final disposition of the Union's motion for reconsideration

filed with the Board. Counsel for the Acting General Counsel further asserts that after counsel for the Acting General Counsel filed the motion to dismiss; Respondent filed three amendments to its EAJA application while the proceedings were stayed. Counsel additionally argues that "because the proceedings were stayed and counsel could not reasonably respond to Respondent's three amendments to its EAJA Application" until the Board ruled on the Union's motion for reconsideration, counsel for the Acting General Counsel elected to wait until the Board issued its final decision on the motion for reconsideration to file a reply to Respondent's three amendments to the EAJA application.

Counsel for the Acting General Counsel maintains that under Section 102.150 of the Rules, counsel for the Acting General Counsel had up to 35 days to file its supplement to its motion to dismiss responding to Respondent's three amendments to its EAJA application. Counsel argues that because its reply brief was filed on March 8, 2013, within 35 days of the Board denying the Union's motion for reconsideration and also within 35 days of the Board referring the EAJA application to the ALJ, it was timely filed.

Counsel for the Acting General Counsel further submits that under Rule 102.150, Respondent has 21 days after service of the of the reply brief to file a response. Because Respondent's motion to strike was not filed until April 5, 2013, and 28 days after being served with the reply brief, counsel for the Acting General Counsel asserts that Respondent's motion to strike is untimely and should be dismissed.

e. Analysis of the parties' ancillary motions

Section 102.148 of the Board's Rules and Regulations specifically provide that an application for an award pursuant to EAJA must be filed with the Board within 30 days of the issuance of the decision giving rise to the determination. Section 102.147 clearly delineates what must be included in any application filed with the Board. Section 102.47(f) requires that an EAJA applicant must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates, and the exhibit must provide full disclosure of the applicant's and its affiliates' assets and liabilities and must be sufficient to determine whether the applicant qualifies under the standards of the Rules. Respondent's October 26, 2012 application was incomplete and did not comport with the requirements of Section 102.7(f). The only evidence submitted by Respondent in support of its status as a party entitled to relief under EAJA was a single, one-page affidavit by owner Russell Ritchie. The affidavit states that Respondent's 2011 balance sheet was attached and that Respondent's net worth "did not exceed $7 million" when the complaint issued on January 31, 2011. Despite Ritchie's assertions, however, the balance sheet was not attached to the affidavit and there was no other information provided giving the requisite full disclosure of the Respondent's and its affiliates assets and liabilities. On November 16, 2011, Respondent finally submitted a copy of Respondent's 2011 balance sheet. On November 20, 2012, Respondent filed its second amendment to its application and included an affidavit signed by Ritchie, asserting that Respondent had no affiliates or subsidiaries and had not had any affiliates or subsidiaries in the past. Thus, it was only after November 20, 2012, that Respondent provided all of the necessary documentation required under Section 102.148; a period of 53 days after the Board's decision and 23 days after the deadline provided under the Board's Rules. The

Board's Rules and Regulations contain no provisions that allow for an applicant to amend an application for an award of attorney's fees and expenses.

While I have no doubt that the balance sheet was inadvertently omitted from the initial application on October 26, 2012, the fact remains that it took Respondent until November 20, 2012 to submit a full and complete application that met the requirements of Section 102.148. Furthermore, Respondent additionally amended its EAJA application by augmenting its claim and submitting an additional exhibit on December 7, 2012. Thus, I don't find that Respondent has a legitimate standing to enforce the time limits of the Board's Rules with respect to the Acting General Counsel when it has clearly gone beyond the time parameters of the Rules to enhance its original application.

Interestingly, counsel for the Acting General Counsel submits that because the proceedings were stayed by the Union's motion for reconsideration, counsel could not reasonably respond to Respondent's amendments to its EAJA application until the Board ruled on the Union's motion for reconsideration. I note, however, that 102.148 also provides that "Proceedings for the award of fees, but not the time limit of this section for filing an application for an award, shall be stayed pending final disposition of the adversary adjudication in the event any person seeks reconsideration or review of the decision that proceedings." Thus, the wording of this section implies that only the initial application for fees and expenses is exempt from the stay that is triggered by a request for reconsideration. Although counsel for the Acting General Counsel argues that a stay was in place as of November 9, 2012, counsel nevertheless filed its motion to dismiss Respondent's EAJA application on November 16, 2012.

In a written submission[1] on April 25, 2013, Respondent argues that the counsel for the Acting General Counsel filed its motion to dismiss on November 16, 2012 and during the pendency of the stay triggered by the Union's November 9, 2012 motion for reconsideration. Further Respondent argues that because Section 102.149(a) does not contemplate any right to supplement a reply in support of a motion to dismiss, the Acting General Counsel's reply brief in support of his motion to dismiss should be stricken in addition to the dismissal of the Acting General Counsel's motion to dismiss Respondent's EAJA application. Respondent does not, however, address the fact that it filed three amendments to its EAJA application following the commencement of the stay on November 9, 2012.

As discussed above, neither party has fully complied with the full provisions of the Board's Rules and Regulations with respect to time limits for the EAJA application and the requisite responses. Based on the parties' various arguments concerning the applicable sections of the Board's Rules and Regulations, there is certainly a justifiable basis to strictly limit the pleadings requested by the parties. Although both parties have arguably exceeded the parameters contemplated by the Board's Rules and Regulations, no benefit would be served in applying the Rules in an arbitrarily strict sense. Accordingly, in the interest of fairness to both the Respondent and the Acting General Counsel, and in order to allow the parties an

[1] The request for the submission was granted by me in a conference call with the parties on April 15, 2013.

opportunity to make a full and complete record on this issue, I deny Respondent's motion to strike the Acting General Counsel's reply brief, as well as, the Acting General Counsel's motion to dismiss Respondent's motion to strike, and I have fully considered the Respondent's entire application despite its fragmented submission and untimely amendments, as well as, the Acting General Counsel's motion to dismiss that was filed on November 16, 2012.

On the entire record, including the briefs and motions filed by the Acting General Counsel and the Respondent, I hereby grant the Acting General Counsel's motion to dismiss the Respondent's application for attorneys' fees and costs for the reasons set forth below.

B. Procedural and Factual History

On January 31, 2011, the Regional Director for Region 15 of the Board issued a complaint alleging that the Road Sprinkler Fitters Local Union No. 669, U.A., AFL–CIO (Union) had been the exclusive collective-bargaining representative for an identified group of Respondent's employees (the unit) since July 8, 2008. The complaint alleged that based on the Union's 9(a) status, the Respondent had failed to continue in effect all the terms and conditions of an agreement; effective from April 1, 2007 to March 31, 2010. The complaint further alleged that Respondent did so without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to such conduct and/or the effects of the conduct. The complaint also alleged that since about April 1, 2010, Respondent failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees and on or about July 13, 2010, Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit. Finally,[2] the complaint alleged that since on or about May 5, 2010, the Respondent failed and refused to furnish the Union certain information that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

1. A summary of the underlying facts

Russell Ritchie (Ritchie) is the owner and president of Austin Fire Equipment, LLC (Respondent). In June 2007, Ritchie entered into a one-job project agreement with the Union for work to be performed at a jobsite that was approximately 2 to 3 hours away from Respondent's facility. This first-ever agreement with the Union became effective on June 11, 2007, and was established to remain in effect through the completion of the project that was estimated to last approximately 6 months. During the term of the agreement, Respondent agreed to be bound by the 2007–2010 collective-bargaining agreement between National Fire

[2] On the last day of the hearing in this matter, the Acting General Counsel moved to amend the complaint to further allege that since May 2009, the Respondent had engaged in direct dealing with the employees. I reserved ruling on the motion, giving the parties an opportunity to argue their positions in the post-hearing briefs. In its post-hearing brief, the Acting General Counsel withdrew its motion to amend the complaint. The motion was granted.

Sprinkler Association, Inc. and the Union. There was no evidence presented that this agreement was a 9(a) agreement[3] or anything other than a one-job agreement.

In May 2008, Respondent was awarded a contract with Valero Refinery. In order to perform the job, Ritchie needed at least 12 sprinkler fitters for a period of 6 months. Ritchie testified that he told the Union that he would be willing to sign a 1-year agreement in order to obtain referral of the necessary sprinkler fitters. When Ritchie met with the union representatives, he was presented with the National Fire Sprinkler Association (NFSA) agreement that was in effect from April 1, 2007 to March 31, 2010. Ritchie testified that although he reminded the Union that he had discussed only a 1-year agreement, the union representatives told him that his agreement with the Union would have to continue through the entire period designated in the NFSA agreement.

On July 8, 2008, Ritchie signed the two-page signatory agreement, agreeing to be bound by all the terms and conditions of the NFSA agreement. At the time that Ritchie signed the signatory agreement, Ritchie also signed a document entitled "Acknowledgment of the Representative Status of Road Sprinkler Fitters Local Union No. 669, U.A. AFL–CIO" (Acknowledgment). The document included the following wording:

> The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ are members of, and are represented by Road Sprinklers Fitters Local Union No. 669, U.A., AFL–CIO, for the purposes of collective bargaining. The Employer therefore unconditionally acknowledges and confirms that Local Union 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant To Section 9(a) of the National Labor Relations Board.

At the time that Ritchie signed the Acknowledgment, the Union did not present or offer to present evidence to Respondent that it represented a majority of Respondent's sprinkler fitters.

Prior to May 2009, Respondent followed the terms of the contract for all the sprinkler fitters employed by the Respondent. Thereafter, Respondent did not follow all of the terms of the agreement.

2. Acting General Counsel's complaint

On January 31, 2011, the Regional Director for Region 15 of the National Labor Relations Board (the Board) issued a complaint against Respondent. The complaint alleged that since July 8, 2008, the Union had been the exclusive collective- bargaining representative for Respondent's sprinkler fitters under Section 9(a) of the Act and that since February 4,

[3] Under Sec. 9(a) and Sec. 8(a)(5) of the Act, employers are obligated to bargain only with unions that have been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." 29 U.S.C. §159.

2010, the Respondent failed to continue in effect all of the terms and conditions of the 2007–2010 NFSA agreement. The complaint further alleged that since April 1, 2010, Respondent failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees and that on or about July 13, 2010, Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of its employees. Finally, the complaint alleged that since about May 5, 2010, the Respondent failed and refused to furnish the Union certain information that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the bargaining unit employees.

C. Prevailing Legal Authority Concerning 9(a) and 8(f) Agreements

As an 8(f) agreement is not established by a showing of majority support, there is no presumption of majority status for the signatory union. *J & R Tile,* 291 NLRB 1034, 1036 (1988). In its decision in *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), enfd. Sub. Nom. *Ironworkers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), the Board held that parties entering into an 8(f) agreement will be required by virtue of Section 8(a)(5) and Section 8(b)(3) to comply with the agreement during its term, in the absence of a Board-conducted election where employees vote to change or reject their bargaining representative. Following the expiration of an 8(f) agreement, however, the union enjoys no presumption of majority status and either party may repudiate the 8(f) bargaining relationship. Id at 1377–1378. Thus, the distinction between a union's representative status under Section 8(f) and under Section 9(a) is significant because an 8(f) relationship may be lawfully terminated by either the union or the employer upon the expiration of their collective-bargaining agreement. Id at 1386–1387. By contrast, a 9(a) relationship and the derivative obligation to bargain continues after the contract expires, unless and until the union is shown to have lost majority support. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001).

As a general rule, the Board presumes that construction industry bargaining relationships are governed by Section 8(f) of the Act and that the union and the employer intended their relationship to be governed by Section 8(f) rather than Section 9(a). *Deklewa* at 1386–1387. In *Deklewa*, the Board explained that a 9(a) relationship could be proven by a showing that a construction industry employer voluntarily recognized a union "based on a clear showing of majority support among the unit employees, e.g., a valid card majority." Id at 1387 fn. 53. In a later decision in *J&R Tile*, 291 NLRB 1034, 1036 (1988), the Board went on to explain that to establish voluntary recognition, there must be positive evidence that the union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such.

In recent years, however, the Board has also held that voluntary recognition under Section 9(a) may also be established solely by the terms of the collective-bargaining agreement that meets certain minimum requirements. In *Staunton Fuel & Material*, 335 NLRB 717, 719–720 (2001), the Board held that a recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) representation status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union

as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support.

In its 2007 decision in *Madison Industries*, 349 NLRB 1306 (2007), the Board again reviewed the parties' rights and obligations under Section 8(f) and Section 9(a) with respect to contract language. The Board held that in determining whether the presumption of an 8(f) status has been rebutted, the Board will first consider whether the agreement, examined in its entirety, conclusively notifies the parties that a 9(a) relationship is intended. If it does, the presumption of Section 8(f) has been rebutted. If the parties' agreement does not do so, the Board considers any relevant extrinsic evidence bearing on the parties' intent as to the nature of their relationship. Id at 1308.

D. The ALJ Decision

The hearing in this matter was conducted in New Orleans, Louisiana, on June 22 and 23, 2011, and I issued a decision on November 29, 2011. In support of the issued complaint, the Acting General Counsel maintained the position that the Acknowledgment language satisfied all the elements of the *Staunton Fuel & Material* test. Based on the record as a whole, including credible testimony, I found that the Respondent entered into the bargaining agreement with the Union with the intent to be bound by an 8(f) agreement rather than a 9(a) agreement. I also found that Respondent unilaterally changed the terms and conditions of employment of its employees during the term of the collective-bargaining agreement to which Respondent had agreed to be bound. Thus, I found that Respondent violated Section 8(a)(5) of the Act by failing to continue in effect all the terms and conditions of the July 8, 2008 agreement.

Because I found that the Respondent and the Union did not enter into a 9(a) agreement, I did not find that the Respondent unlawfully failed to recognize and bargain with the Union after the expiration of the 2007–2010 agreement. Furthermore, because there was no bargaining obligation for Respondent beyond the expiration of the agreement, I did not find that Respondent unlawfully failed and refused to provide the information requested by the Union in May 2010.

E. The Board's Decision

On September 28, 2012, the Board issued a decision, adopting my conclusions that the parties' bargaining relationship was governed by Section 8(f) rather than Section 9(a) of the Act. The Board found that the parties' recognition agreement (Acknowledgment) does not meet the three-part test set forth in *Stanton Fuel & Material* (Central Illinois) 335 NLRB 717 (2001), to establish 9(a) status. The Board referenced its contemporaneous decision in *USA Fire Protection*, 358 NLRB No. 162 (2012), where the Acknowledgment language also fails to demonstrate that the respondent's recognition of the union was based on majority support among unit employees. The Board explained that in relying on *Staunton Fuel & Material*, they had also found in *USA Fire Protection*, that language concerning the employees' membership and representation by the union, without more, would not establish the parties'

intent to form a 9(a) relationship. The Board further explained that because the Union relies only on the Acknowledgment to support its assertion of 9(a) status and does not contend that any other evidence substantiates its position, they agreed with my recommended decision that 9(a) status has not been demonstrated and that the parties' relationship is governed by Section 8(f). The Board further adopted my recommended decision that Respondent violated Section 8(a)(5) and (1) by failing and refusing to continue in effect all the terms and conditions of the agreement between the National Fire Sprinkler Association, Inc. and the Union until the agreement's expiration.

F. Applicable Legal Standard for Determining EAJA Eligibility

EAJA, as specified in Section 102.143 of the Board's Rules and Regulations, provide that 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 certain eligibility requirements relating to net worth, corporate organization, number of employees, etc. is eligible to seek reimbursement for certain expenses incurred in connection with that proceeding. Section 102.144 further clarifies that the burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel's position in the proceeding was substantially justified. As the Board has found, the General Counsel must establish that he was substantially justified at each stage of the proceeding including at the time of the issuance of the complaint, taking the matter through hearing, and filing exceptions (if any) to the judge's decision. *Glesby Wholesale*, 340 NLRB 1059, 1060 (2003).

In weighing the unique circumstances of each case, a standard of reasonableness will apply. *Abell Engineering & Mfg., Inc*., 340 NLRB 133, 133 (2003). In defining "substantial justification", the Board has explained that it does not mean substantial probability of prevailing on the merits, and it is not intended to deter the agency from brining forward close questions or new theories of law. The Board has looked to the Supreme Court's definition of "substantial justification" under EAJA; finding that the justification is to a degree that could satisfy a reasonable person" or having a "reasonable basis both in law and fact*." Galloway School Lines*, 315 NLRB 473 (1994) citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). In *Jansen Distributing Co*., 291 NLRB 801 fn. 2 (1988), the Board adopted this definition for "substantially justified."

As the Court has noted, an agency's position is substantially justified when "reasonable people could differ" on whether the action should go forward. *Pierce v. Underwood* at 563–566. See also *Teamsters Local 741*, 321 NLRB 886, 889 (1996), where the Board followed *Pierce v.* Underwood in finding that substantially justified would include "justified to a degree that could satisfy a reasonable person" or "justified if a reasonable person could think it correct."

Although the General Counsel may not prevail in litigation, there is not a presumption that his position was not substantially justified, nor must it be established that the decision to litigate was based on a substantial probably of prevailing. *Westerman, Inc.,* 266 NLRB 799 (1983). The General Counsel may carry its burden of proving that its position was

substantially justified "by showing its position advanced 'a novel but credible extension or interpretation of the law'." *Timms v. U.S*. 742 F. 2d 489, 492 (9th Cir. 1984), quoting *Hoang Ha v. Schweiker*, 707 F. 2d 1104, 1106 (9th Cir. 1983).

G. Respondent's Argument

Citing 5 U.S.C.A. § 504, Respondent asserts that under EAJA, a prevailing party is entitled to recover reasonable attorneys' fees and other expenses incurred when the government recovers less than its previous demand from a private party in formal agency adjudication, unless the government's position was "substantially justified" or if special circumstances make an award unjust. In its application, Respondent asserts that the General Counsel was not substantially justified in pursuing this case while a nearly identical case involving the same Union and acknowledgment language was pending before the Board. Furthermore, Respondent maintains that Respondent acknowledged in its amended answer prior to hearing that a Section 8(f) relationship existed, and Respondent offered to settle for the exact outcome decided by the undersigned and by the Board.

H. Discussion and Analysis

1. Respondent's eligibility for EAJA relief

a. Respondent's net worth

Section 102.143 of the Board's Rules provides that the sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests and not more than 500 employees meets the eligibility criteria for an award. Respondent asserts that at the time that the complaint issued, Respondent had approximately 78 employees and its net worth was significantly less than $7 million. In support of this assertion, Respondent attached a one-page affidavit of its president, Russell Ritchie (Ritchie); stating that Respondent's net worth did not exceed $7 million when the complaint issued on January 31, 2011. In its application Respondent asserts that a copy of the balance sheet was attached to Ritchie's affidavit.

In responding to Respondent's EAJA application, Acting the General Counsel asserts that under Sec. 102.147(f) of the Board's Rules, an applicant must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates when the adversary adjudicative proceeding was initiated. In his motion to dismiss, the Acting General Counsel submits that the requisite exhibit must be sufficient to determine that the applicant qualifies under the standards and that the Respondent has not provided such an exhibit. In the motion to dismiss Respondent's application, the Acting General Counsel asserts that Respondent did not include Respondent's balance sheet as claimed and that Respondent's conclusory statement that its net worth did not exceed $7 million does not qualify as a detailed exhibit as required under Section 102.147 of the Board's Rules. The Acting General Counsel asserts that for Respondent to establish eligibility for an EAJA award, Respondent must submit information consistent with generally accepted accounting principles, together with an affirmation that the reported assets and liabilities are complete and accurate.

On November 16, 2012, and after receiving the Acting General Counsel's motion to dismiss, Respondent filed an amendment to its EAJA application. Respondent acknowledged that it had inadvertently failed to attach the 2011 balance sheet to its original application. Respondent attached a four-page Independent Accountants' Review Report dated May 25, 2012. Based on the analysis of the independent accounting firm and the detailed report, it is apparent that Respondent has met the threshold eligibility requirement and has demonstrated that its net worth does not exceed $7million.

b. Other criteria for eligibility

In his affidavit attached to Respondent's application for EAJA fees, Ritchie asserts that Respondent had only 78 employees at the time the complaint issued. Counsel for the Acting General Counsel does not dispute Ritchie's assertion and his claim is consistent with the evidence presented in the underlying trial. Respondent has further confirmed that it has no affiliates. Accordingly, I find that Respondent meets the criteria for an award as set forth in 102.143.

2. Whether the Acting General Counsel was substantially justified

Respondent asserts that despite extensive briefing, the legal issue here was quite simple-whether a one-page document identified as the Acknowledgment and signed by Respondent created a 9(a) relationship with the Union. Respondent argues that the Board has found that the Acknowledgement, on its face, did not and thus the General Counsel was not substantially justified in pursing this case since, "as a matter of law, the Acknowledgment was incapable of supporting a 9(a) relationship."

The Acting General Counsel asserts that the "substantially justified" standard does not raise a presumption that because the government did not prevail in litigating the case, that its position in the matter was not substantially justified. The Acting General Counsel submits that the circumstances and the evidence available to the Acting General Counsel at the various junctures of the proceeding support a finding that the government's position can be justified even though the Acting General Counsel did not fully prevail in case.

In its application, Respondent asserts a number of bases to support its position that the General Counsel was not justified in pursuing this case.

a. Respondent's argument concerning the pendency of a similar case

On June 21, 2010, Administrative Law Judge Michael Marcionese issued a decision in *USA Fire Protection.*[4] On September 28, 2012 and the same day that the Board issued its decision in the instant case, the Board affirmed Judge Marcionese's decision in 358 NLRB No. 162 (2012). In adopting the administrative law judge's conclusion that the relationship between the union and the employer was governed by Section 8(f) rather than Section 9(a) of

[4] 2010 WL 3285412 based on the complaint in Case 10–CA–38074.

the Act, the Board found that the language of their recognition agreement, on which the union exclusively relied, failed to satisfy the three-part test set forth in *Staunton Fuel & Material, Inc*, 335 NLRB 717 (2001). Specifically, the Board explained that under *Staunton Fuel & Material*, the agreement's statement that a clear majority of the unit members are members of, and are represented by the union was insufficient to show that the employer's recognition of the union was based on majority support among the unit employees. As in the instant case, the Board found that the employer violated the Act by making unilateral changes in terms and conditions of employment during the terms of the collective-bargaining agreement.

Respondent argues that the General Counsel was not substantially justified in pursuing the instant case while *USA Fire Protection*; a nearly identical case involving the same Union and Acknowledgment form, was pending before the Board. Respondent submits that the administrative law judge's decision in *USA Fire Protection* issued over a month before the Union filed its charge and the judge's decision was pending before the Board over 6 months before the underlying complaint in this case issued. Respondent asserts that in its pre-hearing and post-hearing briefs to me and to the Board, it maintained that the judge's decision in *USA Fire Protection* supported its position that Section 8(f) of the Act governed its relationship with the Union.

Respondent contends that the Acting General Counsel was not substantially justified in pursuing this case on facially invalid language, especially given that *USA Fire Protection* was pending Board review. Furthermore, Respondent suggests that the Acting General Counsel "could and should have stayed this proceeding until after the Board issued its decision" in *USA Fire Protection*.

In support of its claim that the Acting General Counsel should have stayed this proceeding until after the Board ruled in *USA Protection Fire*, Respondent points to the Board's finding in this case that the Acknowledgment failed to meet the three-part *Staunton Fuel & Material* test and the Board's reference to its related explanation in *USA Fire Protection.*

I do not find merit to Respondent's argument that the Acting General Counsel was required to stay this proceeding until the Board ruled in *USA Fire Protection*. The circumstances and progression of the *USA Fire Protection* case did not provide authority for the Acting General Counsel to stay the proceeding in this case. At the time that the complaint issued in this case, there was an administrative law judge decision in *USA Fire Protection* that was favorable to the Respondent's position, and nothing more. The administrative law judge's decision was simply a recommendation to the Board and established no precedent for the Board and served as no authority binding on any other administrative law judge in dealing with similar circumstances.

b. Other factors existing at the time the complaint issued

Counsel for the Acting General Counsel asserts that based on the recognition language in the Acknowledgement, there was substantial justification to believe that the Acknowledgement signed on July 8, 2008, satisfied each element of the test set forth by the

Board in *Staunton Fuel & Material*. Counsel points out that in two Board cases decided prior to *Staunton Fuel & Material*, the Board found substantially similar recognition language in an acknowledgement created a 9(a) relationship with the signatory employers. *Triple A Fire Protection,* 312 NLRB 1088 (1993); *MFP Fire Protection*, 318 NLRB 840 (1995). In *Triple A Fire Protection*, the acknowledgement language included the wording: "The Employer, executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, Road Sprinkler Fitters Local Union 669, U.S., AFL–CIO, for purposes of collective bargaining. The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act. "The Board found that by executing the acknowledgement, the employer voluntarily and unequivocally granted recognition to the union as a 9(a) representative. In its decision, the Board added that it would not at that late date inquire into the union's showing of majority status.

The identical acknowledgement language was in issue in *MFP Fire Protection*; a case decided by the Board in 1995. The administrative law judge in *MFP Fire Protection* found that *Triple A Fire Protection* was controlling and found that the acknowledgement language in issue was sufficient to find that the parties had a 9(a) relationship. The Board adopted the Judge's decision without additional comment.

Thus, at the time that the Acting General Counsel issued its complaint in the instant case, there were two previous Board cases in which identical language had been found sufficient to establish a 9(a) relationship between this union and other employers, even without the union independently proving its majority status. In its decision in *Staunton Fuel & Material,* the Board further clarified that a written agreement will establish a 9(a) relationship if its language unequivocally indicates that the union requested recognition as majority representative, the employer recognized the union as majority representative, and the employer's recognition was based on the union's having shown, or having offered to show, an evidentiary basis of its majority support. *Staunton Fuel & Material*, 335 NLRB at 717.

The Acting General Counsel maintains that based on the recognition language in the Acknowledgment, the General Counsel was substantially justified in believing that the Acknowledgement form that Respondent signed satisfied each element of the test set forth in Staunton Fuel & Material. Furthermore, the Acting General Counsel argues that the fact that the Union in this case did not make a showing of majority support to Respondent concurrent with the signing of the collective-bargaining agreement did not preclude the Acting General Counsel from being substantially justified in asserting that there was a 9(a) relationship. Citing the Board's decision in *H. Y. Floors & Gambline Painting*, 331 NLRB 304 (2000), the Acting General Counsel asserts that to establish voluntary recognition pursuant to 9(a) in the construction industry, the Board requires that the union unequivocally demanded recognition as the employees' 9(a) representative, and that the employer unequivocally accepted it as such. Thus, the General Counsel asserts that because the Acknowledgement language could be read in isolation and was not ambiguous, the General Counsel was substantially justified in asserting that the Acknowledgement met the three-part test of *Stanton Fuel & Material.*

c. Credibility and extrinsic evidence

In its argument that the Acting General Counsel was not substantially justified in seeking to establish a 9(a) relationship, Respondent argues that there were no credibility determinations for the ALJ to decide. Specifically, Respondent argues that there were no credibility conflicts here that required judicial resolution and that if credited, would constitute a prima facie case and thereby have a reasonable basis in law and fact. Respondent's argument is without merit. For the reasons discussed below, credibility was very much a factor in my reaching a conclusion that the parties did not enter into a 9(a) relationship on July 8, 2008.

Noting the importance of employees' statutory rights of self-organization and self-determination, the Board explained in *Madison Industries,* 349 NLRB 1306 1309 (2007), that extant Board law requires proof that an agreement "unequivocally demonstrates that the parties intended to be governed by Section 9(a) before Section 9(a) may be found on the basis of contractual language. Id at 1309. In its decision in *Madison Industries*, the Board found that the judge erred by limiting his analysis solely to the language of a contractual provision to find that the parties had established a 9(a) relationship. The Board pointed out that *Staunton Fuel & Material* requires an examination of the parties' entire agreement to determine whether a 9(a) relationship was intended.

As the Board pointed out in *Staunton Fuel & Material*, above at 720 fn. 15, it will continue to consider relevant extrinsic evidence bearing on the parties' intent in cases where the contract's language is not independently dispositive. Furthermore, the Board has continued to consider extrinsic evidence of intent when the intent of the parties cannot be determined solely by the examination of the agreement in its entirety. *J. T. Thorpe & Son, Inc*., 356 NLRB No. 112, slip op. at 3 (2011); *Allied Mechanical Services,* 351 NLRB 79, 82 (2007).

In the instant case, Ritchie testified that when he contacted the Union, he only wanted to enter into an agreement for one year. He contended that although he agreed that he would commit to the NFSA contract that was scheduled for another year and 8 months, he did so because no one told him that the contract was binding beyond the contract period. He also testified that while he did not understand the meaning of the Acknowledgement, he signed it on July 8, 2008, because the union representatives told him that it was required. Union Business Manager William Puhalla confirmed that when the union representatives met with Ritchie on July 8, 2008, Ritchie told them that he had expected to sign an agreement for only a year's period of time. Union Business Agent Tony Cacioppo also testified that in all four meetings with Ritchie in May, June, and July 2010, Ritchie continued to mention that he would be interested in a project-by-project agreement with the Union.

In my decision that issued on November 29, 2011, I made the following conclusions:

> I find Ritchie's testimony credible with respect to the circumstances of his signing the July 8, 2008 agreement. Aside from the fact that Ritchie's

> testimony was consistent and plausible, it was essentially uncontroverted. It is apparent from his testimony that he sought out the Union to obtain skilled sprinkler fitters to work on the large project that was to begin in 2008. His knowledge of collective-bargaining agreements with the Union was limited to the prior 8(f) agreement that he signed the previous year.

I found no credible evidence that Ritchie ever discussed with the Union the possibility of his entering into an agreement that would bind him as a 9(a) employer. Based on Ritchie's testimony as well as that of Union Representative Puhalla, I found that Ritchie continued to seek only a project-by-project agreement even when he met with the Union in 2010.

In crediting Ritchie, I considered all of the testimony concerning the events preceding July 8, 2008, as well as the circumstances of the signing of the agreement on July 8, 2008. I considered the fact that no union representative testified that the Acknowledgement was ever explained to Ritchie or that he was told anything about the significance or the meaning of 9(a) recognition and acknowledgement.

I also found it significant that at the time that Ritchie signed the Acknowledgement, the Union did not present or offer to present evidence to Respondent that it represented a majority of Respondent's sprinkler fitters. The Union did, however, explain that all 14 existing sprinkler fitters would have to be covered by the agreement. Based on that explanation, Ritchie met with his employees and told them that they needed to join the Union if they wanted to continue employment with Respondent. Ritchie credibly testified that all of his employees with the exception of one were against joining the Union. Ritchie told them to trust him because it would be a good move for the Company. Thus, when Ritchie signed the agreement, he knew that the Union did not represent a majority of his employees and the Acknowledgement language was not only equivocal, but completely false. Thus, Ritchie signed a document that he knew to be facially false.

Accordingly, in crediting Ritchie's testimony, and after considering the entire record testimony, I found that Respondent entered into the agreement with the Union with the intent to be bound by an 8(f) agreement. I found that there was no record evidence that supported a finding that Ritchie had any intent to enter into a 9(a) relationship with the Union. The only document that referred to a 9(a) relationship was the Acknowledgement that was signed without discussion or explanation and which was fallacious on its face.

As the Board noted in *David Allen Co.,* 335 NLRB 783 (2001):

> Credibility issues which are not subject to resolution by the General Counsel in the investigative stage of proceeding on the basis of documents or other objective evidence are, in the first instance, the exclusive province of the administrative law judge. Accordingly, where the General Counsel is compelled by the existence of a substantial credibility issue to pursue litigation, and thereafter presents evidence which, if credited, would constitute a prima facie case, the General Counsel's case has a reasonable basis in law and fact and is substantially justified.

In a very early decision concerning eligibility for EAJA expenses, the Board noted that it was immaterial that the General Counsel may not have established a prima facie case of a violation. The Board went on to explain that where the General Counsel presents evidence which, if credited by the fact finder, would constitute a prima facie case of unlawful conduct, the General Counsel's position has been deemed to be substantially justified within the meaning of 102.144(a). *Barrett's Interiors,* 272 NLRB 527, 528 (1984).

Had I not credited Ritchie's testimony, I may have concluded that the total record evidence supported a finding that Richie entered into the agreement with the Union with the intention and full understanding that he was initiating a 9(a) relationship with all of the requisite obligations and duties. Because credibility and extrinsic evidence were so significant in this case, the Acting General Counsel had a reasonable basis in law and fact and the General Counsel was substantially justified in not only issuing a complaint in this matter, but also in pursuing the complaint allegations throughout these proceedings.

d. Whether the General Counsel was substantially justified in rejecting the Respondent's settlement offer

Respondent contends that it made numerous attempts to settle this case prior to hearing on the basis of an 8(f) relationship, but the Acting General Counsel refused to consider a settlement short of the Respondent recognizing the Union in a 9(a) relationship. Respondent asserts that it offered to settle for the exact outcome decided by the ALJ and the Board. Respondent contends that its offer to settle should have been accepted by the Acting General Counsel and that the Acting General Counsel's refusal to even consider the Respondent's offer to settle consistent with the 8(f) result reached by the ALJ and affirmed by the Board was not substantially justified. In support of this assertion Respondent cites the Board's decision in *Charles H. McCauley Associates, Inc*., 269 NLRB 791 (1984). I note, however, that in *Charles H. McCauley*, the Board affirmed the judge's decision in finding that the respondent's application for an award of fees under EAJA should be dismissed because the General Counsel's case was reasonably grounded in fact and law and was substantially justified. In this case, the Fifth Circuit Court of Appeals on appeal agreed with the Board that the respondent unlawfully terminated an employee. In a remand, the Court directed the Board to ascertain whether the respondent had made an unconditional offer of reinstatement and whether such offer had been rejected by the employee. In a second hearing, the judge discredited the employee's testimony and found that the respondent had offered the employee unconditional reinstatement. The Board, in ruling on the EAJA issue, noted that while the General Counsel's position at the second hearing was rejected, the Board agreed with the judge that the General Counsel properly pursued this matter to a second hearing "because the General Counsel cannot himself resolve credibility issues."

Thus, it would appear that *Charles H. McCauley* lends support to the Acting General Counsel's rejection of Respondent's offer of settlement prior to the instant hearing. To have accepted Respondent's offer to settle with a remedy based on only an 8(f) agreement, the Acting General Counsel would have had to make a credibility determination that Ritchie signed the Acknowledgement with only the intent to be bound to an 8(f) bargaining

agreement. The Acting General Counsel could not have made that credibility determination any better in the instant case than the General Counsel could have done so in *Charles H. McCauley* or any other case in which credibility is a factor in determining whether there is a violation of the Act.

In a more recent decision involving the claim for fees under EAJA, the Board noted that it was clearly the judge's crediting of witnesses and not the General Counsel's failure to state a prima facie case that led to the judge dismissing the complaint. *Tim Foley Plumbing Service*, 337 NLRB 328, 329 (2001).

In contrast to Respondent's arguments concerning its offer to settle, counsel for the Acting General Counsel maintains that throughout the entire investigative phase of the unfair labor practice charge, in its Answer to the Complaint, in its pre-trial brief to ALJ, at the trial, and in its post-trial briefs, Respondent argued that in May 2009, it repudiated the collective-bargaining agreement and did not have a 8(f) relationship with the Union after May 2009. The Acting General Counsel further maintains that Respondent never made a settlement offer in writing to the Acting General Counsel.

Inasmuch as I have found that the Acting General Counsel was substantially justified in rejecting a settlement offer based solely on an 8(f) agreement, there is no need to address the nature or extent to which any such offer was made by the Respondent.

CONCLUSIONS OF LAW

1. The Acting General Counsel has met his burden of establishing that his position during all stages of this proceeding was substantially justified on the basis of the administrative record as a whole.

2. In view of my conclusion that the Acting General Counsel's position was substantially justified with regard to the complaint allegation regarding the existence of a 9(a) relationship, I need not decide whether the Respondent's alleged fee amounts are excessive, improper, or lacking sufficient specificity as asserted by the Acting General Counsel in his motion to dismiss.

On these findings and this conclusions of law, and on the entire record, I issue the following recommended[5]

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order here shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

IT IS ORDERED that the application for fees and expenses filed by Austin Fire Equipment, LLC, be and it hereby is dismissed.

Dated, Washington,:D.C. May 6, 2013

Margaret G. Brakebusch
Administrative Law Judge