

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

ROY SPA, LLC,)	
)	
Respondent,)	
and)	Case No.: 19-CA-83329
)	
INTERNATIONAL BROTHERHOOD OF,)	ALJ Michael A. Marchionese
TEAMSTERS LOCAL 2,)	
)	
Charging Party.)	

**MEMORANDUM IN SUPPORT OF APPLICATION BY PREVAILING PARTY
FOR ATTORNEY’S FEES AND EXPENSES PURSUANT
TO THE EQUAL ACCESS TO JUSTICE ACT**

Roy Spa, LLC (“Roy Spa”) respectfully requests that it be awarded attorney’s fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 *et seq.* (“EAJA”), as the prevailing party in the above litigation. Roy Spa, LLC., ALJD 18-13 (2013). Roy Spa meets each of the statutory requirements for the award of fees and expenses. It has attached to its Application materials required by the EAJA and the Board’s Rules and Regulations.

**A. THE GENERAL COUNSEL’S LITIGATION POSITION WAS
NOT SUBSTANTIALLY JUSTIFIED.**

The General Counsel has the burden to prove all its actions with regards to the positions lost were substantially justified in both the investigation and litigation portions of the case. 29 C.F.R. § 102.144(a). Substantial justification must be established at *each* stage of the proceeding. Galloway School Lines, 315 N.L.R.B. 473 (1994):

To meet this burden, the General Counsel must establish that he was substantially justified at each stage of the proceeding, i.e., at the time of the issuance of the complaint [and] taking the matter through hearing ... An examination of the circumstances and evidence available to the General Counsel at these junctures is required in order to determine whether the General Counsel has carried his burden.

Here, Roy Spa submits the General Counsel failed to investigate the factual basis for the

case prior to filing the Complaint and then acted during the course of the hearing to ignore Roy Spa's significant evidence and in particular, the threshold questions set forth in Roy Spa's two Motions in Limine before the hearing commenced. The entire thrust of the General Counsel's case was to ignore the retail standards for commerce jurisdiction set by the Board in O K Barber Shop, 187 N.L.R.B. 823 (1971), as Roy Spa at all times clearly did not meet the \$500,000 retail establishment threshold. In fact, Counsel for the General Counsel responded to the Administrative Law Judge's whether the retail standard was asserted in the case. He admitted: "No, the \$500,000 is not alleged." Tr. 10 1.25.

Notwithstanding this threshold, the Regional Director pursued jurisdictional coverage under the national defense standard, despite the fact that in Fort Sam Houston Beauty Shop, 270 N.L.R.B. at 1007, the Board explained that a small business's simple location on a military base would not be enough to establish discretionary jurisdiction. Rather, the burden was on the Acting General Counsel to prove that the business service provided to the base, if disrupted by a labor dispute, and with no alternatives, would adversely affect the military defense of the nation. This he failed to do.

The conceptual foundation of the Regional Director's case was a nonstarter from the beginning. The Regional Director's Complaint failed 1) to allege why hair services to military personnel are in fact vital to national defense, 2) to explain why if hair services are so vital to national defense, uniformed Air Force personnel at Malmstrom do not perform such services to the servicemembers themselves, 3) to allege that base personnel had no available alternatives for hair care services in off-base barber shops, and 4) to introduce a single military person associated with Malmstrom to echo the purported claim that haircuts are vital to national defense.

Rather, counsel for the General Counsel called only three civilians (one union business agent and two cosmetologists) not connected with the military to testify. From these persons,

counsel for the General Counsel further failed to adduce any evidence to show how the closure of the AAFES Family Hair Care salon on Malmstrom Air Force Base due to a labor dispute, would adversely impact the Air Force's mission when base personnel could turn to the 30 alternative facilities within 5 miles of the Base as the AAFES Manager credibly testified to.

No other testimony was adduced by counsel for the General Counsel to rebut the applicability of the Board's decision in Fort Sam Houston Beauty Shop, 270 N.L.R.B. at 1007, the case at the center of Roy Spa's defense. As the Administrative Law Judge recognized, the General Counsel had the burden to prove discretionary jurisdiction and "the General Counsel did not meet this burden." ALJD 3 1.15. It was never enough for the Regional Director to *propose* or claim that he had a sufficient *prima facie* case in the investigative stage before he filed the Complaint. When he learned the *prima facie* case could not be supported (on any dollar threshold) upon receipt of the subpoenaed materials before the hearing commenced, the case should have been terminated. That is the decision the Congress directed Agencies to make, continue to evaluate and review. Ducking incurs a penalty.

Moreover, because the investigative and litigation positions of the Region are evaluated for purposes of the EAJA, several points in time clearly arose when the General Counsel's position went over the brink of good faith substantial justification. The first time was when the Complaint was filed with absolutely no supporting economic data for its alternative theory (of \$5,000 of materials between states). The second time was when the Region was provided all the documents it had subpoenaed from Roy Spa before the hearing began (and/or had obtained during the investigation stage) which should have independently convinced the Regional Director that insufficient commerce dollars and military interest were involved. The third time was on the first day of the hearing when the Region and Counsel for the General Counsel were apprised of Roy Spa's Motion for an Order Directing the General Counsel to Specify the Basis

for Asserting the Board's Jurisdiction Exists in this Case which requested him to explain the jurisdictional allegations, to wit:

“2. In particular, the Complaint is void of any facts to support Complaint ¶2(f)'s legal conclusion. The Board has never asserted jurisdiction over a barber or beauty shop on a military installation that has not also met the retail dollar threshold. The Respondent's right to fair notice and due process to defend itself are compromised when the Board has long-decided that a small business providing haircuts and beauty services “does not provide a service essential to the operation of the Army post” under the national defense standard. *Fort Houston Beauty Shop*, 270 N.L.R.B. 1006, 1007 (1984). Despite this clear directive, the Regional Director alleges simply no facts to explain what the “link between the Employer's operations and the national defense effort is.” *Pentagon Barber Shop, Inc.*, 255 N.L.R.B. 1248, 1248 (1981).

3. Not requiring the General Counsel to disclose the basis for his assertion that “Respondent has a substantial impact on national defense of the United States” by styling hair, the hearing will simply evolve into a fishing expedition for facts and expectedly, go out of control. Merely performing “services for part of the defense establishment” is insufficient to assert Board jurisdiction under the national defense standard. *Fort Houston Beauty Shop*, 270 N.L.R.B. at 1007. More must be alleged if the General Counsel is permitted to circumvent settled caselaw.”

The fourth non-substantial act occurred when Counsel for the General Counsel obtained the Stipulation that calendar year 2011 was the year relevant for gross revenue, but then sought to introduce evidence into year 2012, over objection, which failed to establish even his own \$5,000 assertion of inflow. The ALJD shows Roy Spa being billed for \$4,912.15 in a one-year period, but with no evidence or information adduced whether the materials were shipped from within state or from out of state. ALJD 2 ll.35-40.

And fifth, when Counsel for the General Counsel introduced no evidence to establish the allegation in Paragraph 2(e) of the Complaint alleging the purchase and receipt of goods “at both its Malmstrom Air Force Base Montana and Eglin Air Force Base Florida facilities, products, goods, and services valued in excess of \$5,000 directly at each location from points located outside the States of Montana and Florida, respectively.” At the close of General Counsel's

case, this deficiency in financial records from Eglin AFB was clear: “So far, I don’t think there’s any evidence in the record about Eglin Air Force Base other than the fact there’s the allegation that there’s an operation. I haven’t seen any financial records related to that.” Tr. 191 ll.19-22.

Despite the Administrative Law Judge’s observation at the time, Counsel for the General Counsel made no attempt to introduce any such evidence, to seek a continuance of the hearing to do so, or even to introduce any rebuttal testimony whatsoever regarding commerce or any other facts relating to operation of the Malmstrom installation that Respondent introduced. Neither did counsel for the Acting General Counsel explain why the allegation was even made regarding Eglin Air Force Base and thereby forcing Roy Spa to respond and defend.

The whole pre-litigation investigation phase and then the litigation phase was not substantially justified. Rather, the nature of the only evidence introduced by the Acting General Counsel demonstrates that there was an intent to punish Roy Spa for exercising its lawful rights to run its workforce and hold to its rightful business interests when its operation did not affect interstate commerce under any known test. It was further unreasonable for the Acting General Counsel to make an argument about Roy Spa’s impact as an AAFES concessionaire on national defense without calling a single person associated with the Department of Defense to support the contention.

In fact, the inference must be that the military *did not* and/or *would not* support his assertion as he was unable to locate a single military person to support it. No effort was even made through qualified surrogates (experts or Department of Defense civilian personnel) to demonstrate a great federal interest of haircuts and hair coloring upon national defense.¹

¹Respondent introduced evidence at the hearing that an earlier charge was dismissed against Roy Spa at Eglin by a different Regional Director due to the lack of commerce jurisdiction. Counsel for the Acting General Counsel adduced no new information, except to try to run Roy Spa over again with the same commerce data that was previously found determinative. He

Roy Spa at all times warned the General Counsel that it would seek EAJA fees in this case (Answer, Motions, and Brief). Assuming the risk of a finding of unjustified behavior under the EAJA, counsel for the General Counsel sought multiple amendments to the Complaint to patch up his case. The amendments were granted over Respondent's objection on the expectation of forthcoming substantiating evidence. These unsubstantiated amendments further caused Respondent to confront and address new theories without forewarning.

Finally, Counsel for the General Counsel made no attempt to rebut any portion of Roy Spa's case in chief. He failed to refute the verity of Roy Spa's documentary and testimonial evidence.

The multiple issues posed in the Complaint against Roy Spa and upon which Roy Spa was forced to defend serially were:

1. Government Contract. The Complaint alleged Roy Spa performed hair care services pursuant to a government contract. Complaint ¶2(c).
2. Successor. The Complaint alleges Roy Spa is a successor to The Old Fashioned Barber. Complaint ¶2(d).
3. Purchases and Receipts. The Complaint alleges that Roy Spa "purchased and received at both Malmstrom Air Force Base Montana and Elgin Air Force Base Florida facilities, products, goods, and services in excess of \$5,000 directly at *each* location from points located outside the States of Montana and Florida, respectively." Complaint ¶2(e) (emphasis added).
4. Services. That Roy Spa "provided services valued in excess of \$5,000 to points located outside the State of Virginia." GC19.
5. National Defense. That Roy Spa's hair cutting services "had a substantial impact on the national defense of the United States." Complaint ¶2(f).
6. Commerce. That Roy Spa has been engaged in commerce within the meaning of the Act. Complaint ¶2(g).

ignored the basis for that finding. This shows an apparent willingness to take repeated cracks at Roy Spa in every Region of the Board until stopped by an EAJA fees award.

7. Agents. That Joyce Cayli held the position of “Owner” in Roy Spa and Hasan Cayli held the position of “Manager” of Roy Spa within the meaning of Section 2(13) of the Act. Complaint ¶ 5.
8. Representation. That Teamsters Local 2 has at all times been the Section 9(a) representative of Roy Spa’s employees. Complaint ¶4(d).
9. Company Policies. That Roy Spa reduced commission rates on July 19, 2012, for “hair care services” and implemented a dress code. Complaint ¶¶ 8(a) & (b).
10. Bargaining. That Roy Spa has refused to bargain in good faith with the Union. Complaint ¶7.

The General Counsel’s case fell far short of establishing each and every one of these claims during the hearing and in brief. This conduct of the Agency cannot be considered substantially justified within the meaning of 28 U.S.C. §2412(d). The General Counsel’s burden, of course, is not to make just any showing of justification, but rather a “strong showing to demonstrate that its action was reasonable.” H.Rep. No. 1418, 96th Cong., 1st Sess. 16, 22, reprinted in 18 U.S. Code Cong. & Ad. News 4984, 4997 (1980).

The Acting General Counsel will likely assert that Regional Director’s position was justified by arguing that he did not defend against the truth of the factual evidence produced by Roy Spa during the course of litigation. However, it must be recognized that this case was carried forward on the concept of a “clear” Burns successor argument in formal proceedings and in prehearing conference calls. None of those elements were ever established by the Acting General Counsel, as Roy Spa did not have a representative complement of employees until July 2012. Counsel for the General Counsel never had the evidence to even make the assertion.

As recognized in the ALJ Decision here, the refusal to bargain and recognize charge was not within the four corners of the Complaint (the Burns violation claim). It was “very well due to the fact that any such general refusal to recognize and bargain occurred more than 6 months before the union filed its charge on June 18, 2012.” ALJD 6 ll.36-37. Therefore, the allegation

of successorship was beyond the Section 10(b) limitations period. To push the Burns case with facts that were expressly precluded by the statutory terms of Section 10(b) was not substantially justified.

Counsel for the Acting General Counsel had all the documents it believed could support its case via subpoena before the hearing began and the first witness was called. Still, the Regional Director was undeterred.

Clearly, counsel for the Acting General Counsel had no evidence to refute 1) Roy Spa's AAFES Contract provisions establishing a family hair salon and closing the barber shop at Malmstrom, 2) the testimony of the AAFES Small Business Manager as to the existence of a dress code for concessionaires working on the premises and that there was no union contract in effect, and 3) the evidence that the U.S. Army and Air Force did not require specific haircuts, highlighting a major public misperception that the military establishment requires a common and specific "regulation" haircut from its personnel. That surprise occurred because of the complete lack of a prior investigation and a loose foundational understanding of the military, Malmstrom AFB access policies, and upon what even generally should be services considered vital to national defense.

As the case progressed, counsel for the General Counsel persistently refused to acknowledge the evident facts of the case as it was unfolding. Unlike the FHA and IRS, respectively, in Operating Engineers, Local No. 3 v. Bohn, 541 F. Supp 486, 495 (D. Utah 1982) and Alspach v. District Director of Internal Revenue, 527 F. Supp 225, 229 (D. Md. 1981), relevant because federal cases unfold in a similar fashion under the EAJA, the General Counsel did not concede the facts evidenced in its own files. In Bohn, the court noted that the government's litigation position was reasonable and laudable for capitulating nine days after a complaint was filed. In Alspach, the IRS conceded the case after counsel had received and

reviewed the file. The policy of the EAJA is to encourage agencies to reverse their course, if necessary, even during litigation before judgment. The Acting General Counsel must show that the Government's position had a “reasonable basis in law and fact.” Pierce v. Underwood, 487 U.S. 552, 566 n. 2 (1988).

The General Counsel disregarded a possible safe harbor by ending the case before Roy Spa was forced to present its case. Rather, he steamed forward against Roy Spa. On this record, the General Counsel’s position was not substantially justified. Accordingly, an EAJA award is eminently reasonable.

**B. THE RESULTS OBTAINED BY
ROY SPA COULD ONLY HAVE BEEN
ACHIEVED BY DEFENDING THE CASE FULLY.**

Roy Spa, a small family owned business, was forced to challenge each of the General Counsel’s Complaint allegations, implied facts, and ongoing amendments of alleged unfair labor practices under the Act. See 29 U.S.C. §§158 & 160. The General Counsel was not substantially justified when he confirmed Roy Spa held not only an insignificant interstate presence, but performed absolutely nothing vital to national defense. Not only did Counsel for the General Counsel and the Regional Director completely refuse to explain their position on these grounds (such as how haircuts are vital to service personnel at war and then loosely describing what a “regulation” haircut as the Service Regulations describe them), it forced Roy Spa to show the existence of numerous alternative haircut alternatives available off Base and further introduce the actual Army and Air Force appearance regulations to refute the claim that no standard military haircut existed at all. Counsel for the Acting General Counsel did so by completely refusing to consider the defenses that Roy Spa set forth explicitly in its Affirmative Defenses in the Answer to the Complaint, which Roy Spa sustained.

The Board’s issuance of its Order agrees that the counsel for the Acting General Counsel

did not carry the burden of proof on jurisdiction by successfully making a showing of any support for his national defense standard claim. He made no showing to connect a vital national defense need to the provision of family hair care services to military personnel and their families. Further ignored, is the Board's own requirement that the impact of a labor dispute on providing said hair services to the military must be assessed in light the requirements set forth in Pentagon Barber Shop. The evidence in the administrative record before the Board is completely void of any of this information which the General Counsel had the burden to carry.

The ALJ Decision's analysis shows the establishment of not a single peg to establish statutory or discretionary interstate commerce jurisdiction was achieved. It is definitely arbitrary and capricious for the Acting General Counsel, charged with enforcing this Act to give short shrift to a Respondent's small business operation and not fully assessing its defenses.

Roy Spa was successful on every key allegation presented in the instant case. The General Counsel must admit, as the Supreme Court has found, that "in determining what, if any, award is appropriate, 'the most critical factor is the degree of success obtained.'" Hensley v. Eckerhart, 103 S.Ct. 1933, 1941 (1983).

Clearly, the General Counsel vigorously opposed Roy Spa's arguments throughout this litigation by persisting to amend the Complaint when the appropriate time for the General Counsel to raise a jurisdictional point was in the original Complaint allegation, Tr. 189 ll.9-13, reject the thrust of Respondent's Motions, choosing to ignore the Stipulation confining financial evidence to 2011, and persisting to attempt to show monetary inflow from invoices that simply did not even meet his own asserted \$5,000 minimum threshold, which he should have known.

This evidence was in the possession of the Region no later than return of the subpoena. The General Counsel's acquiescence could have remedied the situation. But, he did not. Thus, Roy Spa could only have obtained these results through litigation. No reasonable person could

possible find that providing haircuts to servicemembers and their families and children is vital to national defense. That is precisely what the Board explained in Fort Sam Houston, 270 N.L.R.B. at 1007, where the Board concluded that unless the national defense standard applied to the beauty salon, it would not exercise statutory jurisdiction over the business: “Even assuming that statutory jurisdiction could be found in this case, we conclude that the application of the national defense standard here would be inappropriate....Accordingly, we find that the policies of the Act would not be effectuated by assertion of jurisdiction in this case assuming, without finding, that statutory jurisdiction has been met.”

Roy Spa has effectuated Congress’ purpose by following the procedures set forth in the EAJA. One purpose of the EAJA is to enable small businesses as respondents an incentive to defend against arbitrary agency action. Roy Spa has served a public purpose and benefitted the development of the Labor Laws by contesting the General Counsel’s unjustified action here.

The legislative history indicates that Congress intended to encourage private parties to challenge governmental action.² Thus, an award of attorney’s fees vindicates the very Congressional purpose for which the EAJA was enacted.

C. THE EAJA IS APPLICABLE TO THE INSTANT CASE.

Roy Spa has submitted a Declaration of Joyce Cayli that demonstrates that Roy Spa has less than 500 employees and its profit loss for 2012 in sufficient detail to show its net worth is and was less than \$ 7 million at the time the Complaints were filed against it. 5 U.S.C. § 404

²Moreover, the effect of the Federal Rules of Civil Procedure on the EAJA was well known to Congress. Section 205(a) of the Act, 94 Stat. 2330, repealed Rule 37(f) so that the EAJA could be applied to the government. The EAJA, in fact, borrowed the “substantially justified” language from Rule 37. See Washington Urban League v. FERC, 743 F.2d 166, 168 (3d Cir. 1984); Recovering Attorneys’ Fees From the Government Under the Equal Access to Justice Act, 56 Tulane L. Rev. No. 3 at 906 (April 1982).

(a)(4)(B). The figure is consistent with the Stipulation reached by the parties in the underlying case that “Between the dates of January 1, 2011, and December 31, 2011, Respondent had gross income of \$421, 028; as reported in Respondent's Federal tax filings for that year, the most recent year for which a filing is available.” GC Ex. 2.

The unfair labor practice proceeding was an “adversary adjudication” within the meaning on the EAJA as well. 5 U.S.C. § 504 (a)(4)(C). Resolution of this case was through an “adjudicative officer.” 5 U.S.C. § 504 (a)(4)(D).

**D. ROY SPA HAS ADEQUATELY SUBSTANTIATED
ITS APPLICATION FOR FEES AND COSTS.**

Roy Spa has adequately documented the request. Its supporting affidavits and itemized statement of time expended and itemized statement of expenses fulfill the statutory and regulatory requirements of the Board. 29 C.F.R. § 102.147.

Roy Spa has submitted affidavits which provide daily accounting of the hours reasonably expended and tasks performed by its attorney that worked on the case. This type of documentation has long been found to be adequate throughout the period of time since the EAJA was established. “[I]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted.” National Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982); Copeland v. Marshall, 641 F.2d 880, 881-82 (D.C. Cir. 1980)(en banc).

“[N]o more is necessary than ‘fairly definite information as to the hours devoted to various general activities, eg., pretrial discovery, settlement negotiation, and the hours spent by various classes of attorneys....’” Copeland at 891. Furthermore, the Supreme Court has stated that “[p]laintiff’s counsel, of course is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his

time expenditures.” Hensley v. Eckerhart, 103 S.Ct. 1933, 1941, n.12(1983). (citation omitted). Roy Spa’s application for fees satisfies such documentation requirements.

In the event that the Board deems it necessary for Roy Spa to submit more detailed documentation after deciding that the award should be made, Roy Spa is prepared to do so. The time spent in providing such specific itemization is also recoverable under the EAJA. See Natural Defense Council v. EPA, 595 F. Supp 65, 72 (D.D.C. 1984); Copeland v. Marshall, 641 F.2d 880, 869 (D.C. Cir. 1980).³

Moreover, counsel has deleted fees and expenses from the final fees claimed in preparing the instant Fee Application. There is no redundant supervision or work sought.

The fact research in this case involved a careful scrutiny of the Board’s and federal court caselaw. “It is an inherent part of an attorney’s task to determine what types of expertise should be brought to bear on a legal problem, and absent a clear misallocation of resources this Court is unwilling to second-guess counsel’s judgment.” Laffey v. Northwest Airlines Inc., 572 F. Supp. 354, 366 (D.D.C. 1983) (citations omitted).

Furthermore, Roy Spa is entitled to recover the various costs and expenses claimed. In Laffey, the court granted attorneys’ out-of-pocket expenses, noting that “[a] number of courts have held that where attorneys’ fees are authorized expressly by statute, recoverable litigation expenses are not limited to taxable costs.” Id. at 382 (citing Dowdell v. City of Apopka, 698 F.2d 1181, 1188-89(11th Cir. 1983); Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1100(5th Cir. 1982); Wheeler v. Durham City Board of Education, 585 F.2d 618, 623 (4th Cir. 1978)).

With regard to documentation of expenses, the Laffey court explained:

³EAJA fees case should not turn into another major piece of litigation. Commonwealth of Puerto Rico v. Heckler, et. al., 745 F.2d 709, 714 (D.C. Cir. 1984).

It is not necessary for Plaintiff's to explain the purpose of every photocopy that is produced and every expenditure that is made in connection with the litigation. For most out-of-pocket costs, it is enough for Plaintiffs to identify the expenses by category with a general description of the types of charges included in each category....Copeland specifically admonished trial courts to avoid "becom[ing] enmeshed in a meticulous analysis of every detailed facet of the professional representation." 641 F.2d at 896(quoting Lindy II, 540 F.2d at 116).

Id. at 383.

E. THE MAXIMUM HOURLY RATE AWARDED SHOULD BE INCREASED TO REFLECT THE CHANGE IN THE COST OF LIVING.

Section 102.145(a) provides that:

Awards will be based on rates customarily charged by persons in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

Roy Spa requests compensation for Mr. Avakian at the rate of \$475 per hour to conform with this Section as explained below.

Due to inflation and increases in the cost of living, Roy Spa also requests that the hourly rate for its attorney be set at no lower than \$186.55 per hour which reflects the rise in the consumer price index between 1985 and 2013, as the Ninth Circuit has established under the EAJA. Montana is located within the territorial jurisdiction of the Ninth Circuit and would have jurisdiction to review the Board's decision under the EAJA here. The statutory rate is now \$125.00 per hour.

The original version of the EAJA enacted on October 12, 1980 set forth an attorneys' fee rate of \$75 hour. The Board issued its current version of regulations under the EAJA with this rate in 1981. 26 Fed Reg. 48087 (Sept. 30, 1981). On August 5, 1985, the Congress revised the rate by increasing it to \$125 hour. See 5 U.S.C. 504(b)(1)(A). The Board, however, never

revised the rate upward in its regulations to comply with the statutory change.⁴

The consumer price index rose between 1980 and 2013. According to the Bureau of Labor Statistics, a consumer price index of \$75 in the 1980 statutory authorization would be valued at \$212.53 (as of August 8, 2013), and for the Board's \$75 figure in 1981, the rate would be \$192.56 for 2013 (as of August 8, 2013). See http://www.bls.gov/data/inflation_calculator.htm. This represents a rise in the cost of living of 65% from 1980 and 61% from 1981.

The Laffey Matrix used by the Civil Division of the United States Department of Justice for setting rates under statutes authorizing attorney's fees, establishes the lowest rate for an attorney with 1-3 years of experience to be \$180 per hour—2.4 times the Board's \$75 rate. Copy attached. Attorneys with more than twenty years of experience are awarded a \$505 hourly rate. In Covington v. District of Columbia, 57 F.3d 1101, 1105 n.14, 1109 (D.C. Cir. 1995), cert. denied, 516 U.S. 1115 (1996), the Court of Appeals stated that the Laffey Matrix is evidence of prevailing market rates for litigation counsel in the Washington, D.C. area.

5 U.S.C. §504(b)(1)(A) specifically provides for an increase in the hourly rate due to “the cost of living,” a built in approved factor. The EAJA increase to \$125.00 per hour was formed in 1985.

Clearly, the cost of living has risen in the last thirty-two years as reflected in official BLS figures and calculated for EAJA fees in the federal courts. This reality of increased costs and higher fees justifies the Board's award of a higher fee within the meaning of 5 U.S.C.

⁴Respondent requests that the Board consider increased fee rates within the decision here in order to facilitate the granting of a petition to raise the rate under Section 102.146 of the Board's Rules and Regulations. Consistent with Board caselaw, once an ALJ has approved a fee award under the EAJA, a petition to raise the rate may be filed. E.g., Arizona Mech. Insulation LLC, 345 N.L.R.B. 1257, 1260 (2005).

504(b)(1)(A).⁵

**G. THE FEE AWARD SHOULD BE INCREASED
TO ACCOUNT FOR THE SPECIAL FACTOR
OF LIMITED AVAILABILITY OF QUALIFIED ATTORNEYS**

Proceedings before the Board require not only an understanding of the LMRA, but a clear understanding of the Board's procedural rules, regulations, casehandling manual, evidentiary procedures, as well as Board and judicial caselaw. The understanding is developed over time by the members of the practicing labor law bar, which is small compared to other fields of law.

A Virginia company seeking legal representation in a Board case in Great Falls, Montana, would be severely hampered in obtaining representation. An internet search identifies only one firm there:

http://lawyers.findlaw.com/lawyer/lawyer_dir/search/jsp/stdSearch_process.jsp?refinedSearchBox=1&keyword=labor&location=Great+Falls%2C+Montana&x=0&y=0. And, only four firms advertising they handle employment law:
<http://lawyers.findlaw.com/lawyer/firm/Employment-Law---Employee/Great-Falls/Montana>.

With really no choice available to it in Montana, the Respondent chose to seek legal assistance from an attorney close to its principal office where they could meet in person and prepare the case. Experienced labor law counsel are widely available in the Washington, D.C. Metropolitan area. Respondent is located in a Virginia suburb of Washington, D.C.

But, this is not to say that Respondent had the financial resources to protect its interest from the government. The cost of litigation with the General Counsel in Montana was a significant deterrent to Respondent. Based on its limited annual income of approximately \$475,000, Roy Spa is clearly one entity "for whom cost may be a deterrent in vindicating their

⁵In light of the interpretation of the federal courts under the EAJA, it would be unreasonable for the Board to maintain that a \$75 hour fee established thirty-two years ago is consistent with its statutory responsibility.

rights.” H.R. REP. No. 96-1418, at 10 (1980), U.S.Code Cong. & Admin.News 1980, p. 4988.

The Washington area allowed Respondent to seek assistance from multiple sources.

Respondent was ultimately able to obtain counsel in their backyard through the Center on National Labor Policy, a nonprofit charitable legal aid organization, through whom Respondent was able to retain Mr. Avakian. This qualifies Respondent for receiving an attorney’s fees award under EAJA and the Board’s Section 102.145 rule “even if services were made available without charge or at a reduced rate to the applicant.” Parties, “if they [otherwise] qualify under the EAJA, should be able to recover ‘reasonable fees and expenses of attorneys’ for their . . . retained pro bono counsel despite the fact that, if [the Court] denied fees, they would not pay any fees to counsel.” American Ass’n of Retired Persons v. EEOC, 873 F.2d 402, 406 (D.C. Cir. 1989); see NAM v. U.S. Dep’t of Labor, 159 F.3d 597, 607 (D.C. Cir. 1998).

The instant case contained numerous layers of legal questions that had to be addressed and prepared for by counsel as set forth on pages 5-6 supra, including the purported Burns successor formula, the representative complement question, and the validity of the unfair labor practices if the jurisdictional issue was overcome. Each issue had to be addressed because the General Counsel pled and argued these points at the hearing and in the Complaint, regardless of their frivolity.

Seasoned counsel was required. The undersigned has had considerable experience under the National Labor Relations Act and even argued the EAJA case of Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), which Decision swiftly prompted the Congress to revise the EAJA to explicitly cover scrutiny of the agency’s underlying position and raised the fee rate from \$75 hour to \$125 hour (incorporating a cost of living increase itself).

Mr. Avakian’s regular private practice rate for cases arising under the LMRA is \$475.00 per hour. This is less, but close to the prevailing rate under the Laffey Matrix. Competent

counsel required to deter aberrant agency action will simply not accept work for \$75 hour (and assume professional liability) under the present Board established rate. As indicated in the Laffey Matrix, the federal government will pay \$505 for senior attorneys in fee shifting cases. The Board should do the same as it has done in other contexts.

The Board has followed the lead of other agencies in exercising its remedial authority, such as with its change in awarding compound interest on backpay awards. The Board should follow the Justice Department's lead and use the Laffey Matrix for attorneys fees awards for attorneys practicing in the Washington, D.C. area.

Keeping the reimbursement rate artificially low undermines Congress' purpose to deter government action against small business and vindicates the client's choice of counsel.

CONCLUSION

For the reasons set forth in the Application and in this Memorandum, Roy Spa LLC respectfully requests that this court award Roy Spa costs, attorneys' fees and expenses in the amount of \$66,725.31 pursuant to the Equal Access to Justice Act.

Respectfully submitted,

ROY SPA LLC

BY: /s Michael E. Avakian
Michael E. Avakian

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Dated: September 12, 2013

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

ROY SPA LLC,)	
)	
Respondent,)	
and)	Case No.: 19-CA-83329
)	
INTERNATIONAL BROTHERHOOD OF,)	
TEAMSTERS LOCAL 2,)	
)	
Charging Party.)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the MEMORANDUM IN SUPPORT OF APPLICATION BY PREVAILING PARTY FOR ATTORNEYS' FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT was mailed to the following persons on this the 31st day of October 2001:

Ryan Connelly, Esq.
National Labor Relations Board
Region 19
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/s Michael E. Avakian
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