

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ROY SPA, LLC,

and

Case 19-CA-083329

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 2,

**GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE SUPPLEMENTAL
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Ryan Connolly, Counsel for General Counsel, submits this Answering Brief to Respondent's Exceptions to the Supplemental Decision of the Administrative Law Judge.

I. INTRODUCTION

In his Supplemental Decision and Order dated February 28, 2014, Administrative Law Judge Michael Marcionese correctly dismissed, in its entirety, Respondent's Application for an Award of Fees and Expenses pursuant to the Equal Access to Justice Act. In his Supplemental Decision ALJ Marcionese accurately and fully explained why, although he previously dismissed the underlying Complaint in this case, the General Counsel was substantially justified in litigating the same Complaint. By its Exceptions, and its Brief in Support of those Exceptions, Respondent now merely repeats its failed and flawed arguments before the Board.

The underlying case involved applying the Board's national defense standard to a hair salon operating on Malmstrom Air Force Base in Montana. As fully addressed by ALJ Marcionese, in both his Decision and Supplemental Decision in this case, the present facts fell within a limited spectrum of Board cases addressing this specific jurisdictional question.¹ While ALJ Marcionese ultimately dismissed the Complaint for a lack of jurisdiction under the national

¹ The June 28, 2013, Decision on the merits of the case is referred to as the "Decision," the February 28, 2014, Supplemental Decision and Order dismissing Respondent's Application for an Award of Fees and Expenses is referred to as the "Supplemental Decision."

defense standard, he nonetheless found in his Supplemental Decision that “the question of jurisdiction was close and could have gone either way;” as such the General Counsel was substantially justified in litigating the matter.

Given this substantial justification, and the well-established principle that EAJA is not intended to deter the government from advancing in good faith a close question of law or fact, the General Counsel requests that the Board defer to ALJ Marcionese’s Supplemental Decision dismissing Respondent’s application.

II. ANALYSIS

Consistent with well-established law, ALJ Marcionese correctly found the General Counsel demonstrated Respondent should not be awarded fees pursuant to EAJA by showing General Counsel’s position in litigation was “substantially justified.” (ALJD Supp 2:25-28)² Substantial justification is a question of fact and law. As the facts of the instant case are fully and accurately described by ALJ Marcionese in pages 2-5 of his Decision, they are not repeated here.

The following sections first address the substantial justification standard, described in detail on page 2 of the Supplemental Decision and correctly applied in this case. The specifics of the Board’s discretionary national defense standard, the “close” substantive issue that decided the merits of the instant case, are addressed in the second section. The third section addresses ALJ Marcionese’s application of the law to the facts of this case, and his correct conclusion that General Counsel was substantially justified in litigating the Complaint.

Respondent has filed numerous Exceptions, but all are answered by the fundamental finding in the Supplemental Decision, that the General Counsel was substantially justified in

² Transcript citations will be referred to by page number and line number as (Tr. __:__). References to the Decision will be referred to by page number and line number as (ALJD __:__), references to the Supplement Decision will be referred to by page number and line number as (ALJD Supp __:__).

litigating the instant matter.³ General Counsel's Motion to Dismiss, granted by the Supplemental Decision, was based purely on General Counsel's substantial justification. Accordingly, neither the Motion to Dismiss, the Supplemental Decision, nor this Answering Brief address issues such as Respondent's status as a "prevailing party," seeking an increase in the compensable rate, and other issues rendered moot by the finding of substantial justification.

A. ALJ Marcionese Correctly Applied the Substantial Justification Standard

1. Substantial Justification is a Question of Reasonableness

A fee applicant who is a prevailing party may not receive an EAJA award if the government's position was substantially justified. *I.N.S. v. Jean*, 496 U.S. at 158; § 102.44(a) of the Board's Rules and Regulations. The burden of demonstrating "substantial justification" is on the General Counsel. *Id.*; *See Meaden Screw Products Co.*, 336 NLRB 298, 299-300 (2001); §102.144(a) of the Board's Rules and Regulations. The Board has further found that "[t]his standard is not as demanding as 'justified to a high degree' or 'substantial probability of prevailing.'" *Glesby Wholesale, Inc.*, 340 NLRB 1059, 1060 (2003), *citing Pierce v. Underwood*, 487 U.S. at 562, 563-66 (1988). Accordingly, whether a government action is substantially justified involves an inquiry into the reasonableness of that action.

In *Pierce v. Underwood*, *supra* at 565, the Supreme Court held that "substantially justified" means "justified to a degree that could satisfy a reasonable person [,]" or "if it has a reasonable basis both in law and fact." The Board has adopted this definition. *Jansen Distributing Co.*, 291 NLRB 801, n.2 (1988). Thus, the General Counsel's position is substantially justified "when the evidence is 'what a reasonable mind might accept as adequate to support a conclusion' — *i.e.*, where 'reasonable people could differ' on whether the allegation

³ To the extent Respondent attempts, by Exceptions 4 and 25, to revive its unsuccessful opposition to ALJ Marcionese granting General Counsel an extension of time to file its Motion to Dismiss, General Counsel's position is that these Exceptions should be dismissed for the reasons stated in ALJ Marcionese's Order Granting Extension of Time dated November 22, 2013.

should be litigated.” *Glesby Wholesale, Inc.*, 340 NLRB at 1060, quoting *Pierce v. Underwood*, 487 U.S. at 563-66.

No adverse inferences may be drawn from the government's failure to prevail in the underlying litigation, nor is the government required to establish that its decision to litigate was based on a substantial probability of prevailing. *Scarborough v. Principi*, 541 U.S. 401, 415 (2004); *Galloway School Lines, Inc.*, 315 NLRB 473 (1994); *Wolf Street Supermarket d/b/a Jim's Big M*, 266 NLRB 665, n.1 (1983), *enfd.*, 742 F.2d 1446 (2nd Cir. 1984); *Iowa Parcel Service*, 266 NLRB 392 (1983), *enfd.*, 739 F.2d 1305 (1984), *cert. denied*, 105 S. Ct. 595 (1984). As stated by the Supreme Court, the government's position can be substantially justified “even though it is not correct ... if a reasonable person could think it correct, that is if it has a reasonable basis in law and fact.” *Pierce v. Underwood*, 487 U.S. at 566 n.2. Thus, the government will be found to be substantially justified where “at least one permissible view of the evidence shows a reasonable basis in law and fact” *Welter v. Sullivan*, 941 F.2d 674, 676 (8th Cir. 1991) (*citation omitted*).

Moreover, EAJA was not intended to “stifle the reasonable regulatory efforts of federal agencies,” *Wyandotte Savings Bank v. NLRB*, 682 F.2d 119, 120 (6th Cir. 1982); *Shellmaker, Inc.*, 267 NLRB 20, 21 (1983), or to deter the government from “advancing in good faith a close question of law or fact.” *Shellmaker, Inc.*, 267 NLRB at 21; see *Abell Engineering & Manufacturing, Inc.*, 340 NLRB 133 (2003); *Galloway School Lines*, 315 NLRB at 473. EAJA was not designed to inhibit the government from advancing a novel but credible extension or interpretation of the law. *Timms v. U.S.*, 742 F.2d 489 (9th Cir. 1984). Where precedent is not so factually identical as to be “conclusive” of a particular issue, the General Counsel is not without substantial justification in litigating a matter. *University of New Haven*, 279 NLRB 294, 295 (1986). “Closeness itself is evidence of substantial justification” *Welter v. Sullivan*, 941 F.2d at 676, and the government is substantially justified where the “case was not an easy one [and] required Government attorneys and an administrative law judge to make difficult judgments on

the evidence.” *Pullen v. Bowen*, 820 F.2d 105, 109 (4th Cir. 1987), *abrogated on other grounds*, *Lively v. Bowen*, 858 F.2d 177, 180 n.1 (4th Cir. 1988).

2. Determining Substantial Justification Requires Examination of the Case as an Inclusive Whole

Examination of whether the government was substantially justified in the underlying case is made by examining the case as an “inclusive whole.” *I.N.S. v. Jean*, 496 U.S. at 161-62. “While the parties’ postures on individual matters may be more or less justified, EAJA ... favors treating a case as an inclusive whole, rather than as atomized line-items.” *Glesby*, 340 NLRB at 1060; *I.N.S. v. Jean*, 496 U.S. at 161-62. This means that a court must make a “single finding” as to whether the government’s singular position was substantially justified, which “operates as a one-time threshold for fee eligibility in EAJA cases.” *I.N.S. v. Jean*, 496 U.S. at 160. Thus, “[t]he Board does not award EAJA fees for individual complaint allegations on which an applicant might have prevailed, but determines whether the allegations as ‘an inclusive whole’ were substantially justified.” *Glesby*, 340 NLRB at 1060. *See also C. Factorum, Inc.*, 337 NLRB 1 (2001); *Golden Stevedoring Co.*, 343 NLRB 115 (2004) (concluding that the “General Counsel’s overall position is substantially justified”).

In determining whether the government was substantially justified, the court looks “beyond the issue on which the petitioner prevailed to determine, from the totality of circumstances, whether the government acted reasonably...” *Roanoke River Basin Ass’n v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993). As the Board has stated, “[w]here the General Counsel’s position as a whole was substantially justified at a particular stage of the litigation, no EAJA fees for that stage will be awarded, even if certain allegations, considered individually, were not substantially justified.” *Glesby*, 340 NLRB at 1060. Even if the Board should find that the General Counsel was unreasonable as to some issue, *e.g.* a single allegation, or stage, such as the investigation, if the overall prosecution was reasonable, no EAJA fees should be awarded. *See, e.g., Golden Stevedoring Co., Inc.*, 343 NLRB 115, 116 (2004) (EAJA fees were

denied despite lack of substantial justification in prosecuting a particular allegation not found to be a “significant” portion of the proceeding). Thus, the determination of whether the General Counsel was reasonable is based on the prosecution of the case as a whole; that is, on the totality of issues and sum of the stages.

3. Substantial Justification Can Exist Without Proving a Prima Facie Case

Regarding the connection between evidence presented and substantial justification, the Board has specifically remarked that the government’s position can be “deemed reasonable in fact and law notwithstanding that the General Counsel failed to establish a prima facie case.” *David Allen Co.*, 335 NLRB 783, 784 (2001). In addition, the government will be found to be substantially justified if it presented evidence, which, if credited, would have constituted a prima facie case. *Auto Workers (B.F. Goodrich)*, 343 NLRB 281 (2004); *David Allen Co.*, 335 NLRB 783 (2001); *SME Concrete, Inc.*, 267 NLRB 763 n.1 (1983). The government is entitled to rely upon any evidence supporting its position which it had at the time it acted, as well as upon any inferences drawn from that evidence, so long as the evidence and inferences are not inherently incredible. See *Iowa Parcel Service*, 266 NLRB 392 (1983); *Barrett’s Contemporary and Scandinavian Interiors, Inc.*, 272 NLRB 527 (1984); *Bosk Paint & Sandblast Co.*, 270 NLRB 514 (1984).

Moreover, where conflicting inferences could be drawn from the evidence, the government is entitled to resolve those conflicts in favor of the allegations alleged. *Iowa Parcel Service*, 266 NLRB 392 (1983); *Westerman, Inc.*, 266 NLRB 799, 800 (1984), *enfd.*, 749 F.2d 14 (6th Cir. 1984). When it is “possible to draw a set of inferences from the circumstances ... that would have supported the General Counsel’s position,” these arguments will be found to have had a reasonable basis in law and fact and therefore to be substantially justified. *Meaden*, 336 NLRB at 302-303, *quoting Europlast, Ltd*, 311 NLRB 1089 (1993), *affd.* 33 F.3d 16 (7th Cir. 1994); see also *Bennington Iron Works*, 278 NLRB 1087, 1088 (1986). “That the arguments

ultimately proved to be unpersuasive is insufficient to sustain the Application because they were not insubstantial.” *Meaden*, 336 NLRB at 302-303, *quoting Europlast*, 311 NLRB 1089 (1993).

Further, the lack of substantial evidence in the underlying proceeding “alone is not a proper basis for the allowance of fees and expenses under [the EAJA;] ... the fact that [a] court finds a decision ... not supported by substantial evidence is not equivalent to a finding that the position of the United States was not substantially justified.” *Couch v. Secretary of Health and Human Servs.*, 749 F.2d 359, 360 (6th Cir. 1984). *Accord, Welter v. Sullivan*, 941 F.2d 674 (1991). In determining substantial justification, the issue is not how the government’s position looks in retrospect, but how it looked at the time the government acted. *See, e.g., Martin v. Lauer*, 740 F.2d 36, 44-45 (D.C. Cir. 1984).

B. ALJ Marcionese Correctly Recognized the Development of the Discretionary National Defense Standard in Finding Substantial Justification

Contrary to Respondent’s arguments, which erroneously combine the Board’s discretionary jurisdiction retail standard, discretionary jurisdiction national defense standard, and statutory jurisdiction principles, ALJ Marcionese correctly identified that only the Board’s discretionary national defense standard is at issue in determining whether substantial justification existed. The Board’s discretionary retail standard was not alleged in the Complaint and the parties stipulated Respondent had gross revenues under \$500,000. (ALJD Supp 3:22-25) Similarly, statutory jurisdiction is not at issue, as ALJ Marcionese found this was established by the General Counsel. (ALJD Supp 3:21-22) As correctly framed by ALJ Marcionese in the Supplemental Decision, substantial justification is demonstrated here by the facts of the present case and how they fit within a well-defined set of Board cases applying the Board’s discretionary jurisdiction national defense standard to barber shops and hair salons located on military bases. (ALJD Supp 3:21-44)

From its early adjudication, the Board has applied discretionary jurisdiction standards in addition to the statutory jurisdictional requirements of the Act itself; standards based on an

Employer's amount, and type, of interstate commerce. One of the jurisdictional standards that has evolved since that time is the "national defense" standard, as articulated in *Ready Mixed Concrete and Materials, Inc.*, 122 NLRB 318, 320 (1958).

The Board first applied the national defense jurisdictional standard to a barber shop located on a military base in *Spruce Up Corp.*, 181 NLRB 721 (1970). The employer in *Spruce Up* operated barber shops at a number of military bases, including Fort Bragg, North Carolina. *Id.* at 723. In applying the national defense standard the Board noted simply that "Respondent's services at Fort Bragg are supplied exclusively to military personnel at a special rate and are essential to members of the Armed Forces." *Id.* A week after issuing *Spruce Up*, the Board issued its decision in *Gino Morena Enterprises*, 181 NLRB 808 (1970), which also involved an employer operating barber shops on military bases. In that case, the Board similarly applied the national defense jurisdictional standard.

In his Supplemental Decision ALJ Marcionese recognized these cases as the first step in the Board's development of this line of cases. He noted the Board had historically applied the national defense standard to assert jurisdiction over barber shops on military bases that were similar to Respondent's operation, citing *Spruce Up Corporation* and *Gino Morena Enterprises*. (ALJD Supp 3:26-29) He also specifically noted the point made above, that although the evidence in those cases showed that the employers also satisfied other discretionary standards, it was the national defense standard that was cited by the Board as a basis for finding jurisdiction. (ALJD Supp 3:30-32)

The Board returned to the barber shop context and elected not to apply national defense standard in *Pentagon Barber Shop, Inc.*, 255 NLRB 1248 (1981). In that case, the Board did not assert jurisdiction over a barber shop operated through a concession agreement with the Defense Department in the concourse of the Pentagon building, where the barber shop was outside the designated security area and was open to the general public. *Id.* The Board distinguished *Spruce Up* on the basis that the Pentagon barber shop at issue was "open to the

general public as well as to employees of the Pentagon,” was “easily accessible to the public in view of its proximity to a major subway entrance,” and there were other barber shops available to Pentagon employees in the local vicinity. *Id.* at 1248-49. The Board specifically noted in not applying the national defense standard that a potential strike or picketing would likely not disrupt operations, or have an adverse impact on national defense. *Id.* at 1249.

The Board also declined to apply national defense jurisdiction in *Fort Houston Beauty Shop*, 270 NLRB 1006 (1984), specifically holding that its special responsibility as a Federal agency to reduce the number of labor disputes which might have an adverse effect on the Nation’s defense required a case-by-case analysis to determine the impact a labor dispute might have on the defense facility. *Id.* at 1007. In *Fort Houston Beauty Shop* 80 percent of the employer’s business consisted of services for dependent wives and children, and the remaining 20 percent consisted of WAC soldiers and Army doctors. *Id.* The Board concluded that, based on those facts, a labor dispute was not likely to have an adverse effect on the normal functioning of the army post or substantially impact national defense. *Id.*

ALJ Marcionese also recognized these cases in finding substantial justification in his Supplemental Decision. He noted in these latter cases the Board had declined jurisdiction over hair care facilities under the national defense standard, citing to *Fort Houston Beauty Shop* and *Pentagon Barber Shop*. (ALJD Supp 3:32-34). He also specifically addressed how the Board had not overruled the older cases such as *Spruce Up Corporation* and *Gino Morena Enterprises*, but distinguished them from *Fort Houston Beauty Shop* and *Pentagon Barber Shop* on the facts. (ALJD Supp 3:33-35)

C. The General Counsel was Substantially Justified

General Counsel argued, in regard to the merits, that as Respondent was the sole provider of haircuts to servicepersons on a large military base and available alternatives were limited, the instant facts correlated more strongly to the critical facts in *Spruce Up* and *Gino Morena*, and could be distinguished from those in *Pentagon Barber Shop* and *Fort Houston*

Beauty Shop. In his Decision on the merits ALJ Marcionese acknowledged that the facts of the instant case "...lie between *Spruce Up* and *Gino Morena* on one hand and *Pentagon* and *Fort Houston* on the other," but he ultimately concluded Respondent's services constituted a convenience, and under *Fort Houston Beauty Shop* this was insufficient to meet the requirements of the national defense standard. (ALJD 4:36-37; 5:36-39)

In his Supplemental Decision, addressing the substantial justification of the General Counsel in litigating the Complaint, ALJ Marcionese reiterated this critical point, expressly stating that the instant case "fell between the two lines of cases cited above." (ALJD Supp 3:37-38) Continuing, ALJ Marcionese correctly assessed that "the latter cases were sufficiently distinguishable from the facts here that they did not compel dismissal of the complaint just as the facts of the older cases were sufficiently distinguishable that they did not compel the assertion of jurisdiction." (ALJD Supp 3:38-40) He then concluded, prior to finding substantial justification, that "because the Board had never addressed the exact factual situation here, "reasonable minds" could differ as to whether the Respondent's operations were closer to the facts of *Spruce Up* and *Gino Morena* than *Ft. Houston* and *Pentagon*." (citations omitted)

As ALJ Marcionese stated in the Supplemental Decision, EAJA is not intended to stifle the reasonable regulatory efforts of federal agencies or to deter the government from advancing in good faith a close question of law or fact. Yet, that is precisely what Respondent seeks by its Application. Respondent claims an unreasonable prosecution where the Complaint against it was dismissed because of a jurisdictional finding addressing to a limited and infrequently interpreted area of Board adjudication.

In each step of his analysis of substantial justification ALJ Marcionese correctly applied the facts and law. ALJ Marcionese described the instant case best when, in his Supplemental Decision, he stated the jurisdictional question in this case was "close and could have gone either way," and because of this, the General Counsel was substantially justified "in issuing the complaint and litigating the issue of jurisdiction rather than dismissing the unfair labor practice

charge and leaving the Charging Party and the employees it represented with no remedy for a potential violation of the Act.” (ALJD Supp 4:9-14)

III. CONCLUSION

Based on the foregoing, Respondent’s Exceptions have no merit. ALJ Marcionese’s findings and conclusions discussed above were based on a correct analysis of the facts and application of the law. The Board has issued cases, including *Spruce Up*, *Gino Morena*, *Pentagon Barber Shop*, and *Fort Houston Beauty Shop*, which assessed the application of the discretionary national defense standard to barber shops and hair salons on military bases. As ALJ Marcionese acknowledged in the Decision and specifically found in the Supplemental Decision, the facts of this case fell in the spectrum of these cases with varying results. It was entirely reasonable for the General Counsel to assert the standard applied to Respondent, certainly before a full evidentiary record was developed, but also when that record was constructed. Ultimately, Respondent was successful in its argument, but this in no way diminishes that General Counsel was substantially justified in applying these cases and litigating the instant Complaint. As a result, General Counsel requests the Board adopt the findings and conclusions of the Supplemental Decision.

Signed at Seattle, Washington, on April 11, 2014.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of General Counsel's Answering Brief to Respondent's Exceptions to the Supplemental Decision of the Administrative Law Judge was served on the 11th day of April, 2014, on the following parties:

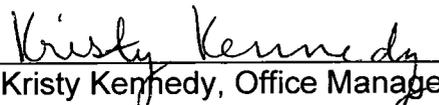
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