

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

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

**RESPONDENT ROY SPA, LLC'S
REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL
DECISION OF THE ADMINISTRATIVE LAW JUDGE DENYING
RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES AND EXPENSES
PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

Respectfully submitted by:

ROY SPA, LLC

By: Michael E. Avakian

The Center on National Labor Policy, Inc.
5211 Port Royal Road, Suite 610
Springfield, VA 22151
(703) 321-9181

April 25, 2014

RESPONDENT'S REPLY BRIEF TO THE BOARD

INTRODUCTION

1. Roy Spa's Reply is restrained by the failure of the General Counsel to comply with Section 102.46(d)(2) of the Board's Rules and Regulations. This regulation requires:

The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof. It shall present clearly the points of fact and law relied on in support of the position taken *on each question*. [Emphasis added].

The General Counsel's short Answering Brief does not address any of Roy Spa's Questions Presented, or address one of the four questions in an organized fashion. The Answering Brief should be stricken for failure of the General Counsel to conform its answering brief to the Rule.

2. It is notable that the General Counsel does not contest Roy Spa's argument that it is otherwise entitled to an award under EAJA if he is wrong on the merits of his argument that his actions have been substantially justified in fact and in law.

This Reply Brief does reply to sections of the General Counsel's Brief addressing *in passim* the stated Questions.

1. The General Counsel Utterly Fails to Explain How His Complaint was Factually and Legally Substantially Justified in Covering a Beauty Salon Under the National Defense Standard.

Roy Spa's First and Fourth Questions Presented asked whether there was any basis to connect the provision of beauty salon services to the national defense of the United States without adducing any affirmative evidence. In its Exceptions Brief, Roy Spa explained that the General Counsel had produced no facts connecting its beauty salon to "national defense." No independent documentary

evidence about Malmstrom AFB; nothing.

The General Counsel's Answering Brief is so general as to be evasive. His assertion that "the present facts fell within a limited spectrum of Board cases addressing this specific jurisdictional question," Ans. 1, was never explained in the record. Those "present facts" in the Answering Brief are broadly described to be that "Respondent was the sole provider of haircuts to servicepersons on a large military base and available alternatives were limited." Ans. 9.

Those "facts," even if true, would not meet the Board's national defense standard under any analysis because the General Counsel produced no facts to prove even these limited assertions. First, the General Counsel never produced any evidence that Respondent was in fact the sole provider of haircuts on the base for military personnel, but was only the AAFES concessionaire, or even that haircuts are required of all military personnel.¹ Second, he produced no evidence showing how many haircut providers were established off base to support the second prong of his theory of limited alternatives. Third, the General Counsel never introduced evidence to show that Malmstrom was a "large military base." No evidence about the size of Malmstrom AFB compared to any other military installation was ever adduced by the General Counsel; no such finding was requested of or made by the ALJ.²

¹Roy Spa was the sole AAFES family hair services provider on Malmstrom AFB. The General Counsel failed to adduce any testimony (call any witness) concerning the extent (or percentage) of hair care services provided by the Air Force and Army units as a self-sustaining capability to their own personnel in order to buttress this assertion.

²Roy Spa introduced R17 to show that 3,472 persons lived on Malmstrom AFB, in
(continued...)

Rather, the General Counsel demonstrated no understanding of what is necessary to prove a level of indirect services that meets the “national defense standard.” The Board’s stated requirement necessitates the showing of a substantial impact on national defense. As stated in Western Area Housing Co., 107 N.L.R.B. 1263, 1264 (1954), a case involving an employer with a written agreement directly with the Navy to provide housing to Navy personnel, more must be shown than just the relationship with the military or a presence on or off the base:

The employees involved here are the maintenance employees, janitors, and gardeners employed by the owner of a housing development. The only pretext for asserting jurisdiction would have to be the fact that most of the tenants are Navy personnel and civilian employees of the Navy Department and their families. In our opinion, the maintenance and operation of this housing development has no substantial effect on national defense.

Furthermore, the Board found that a project manager for tenant services performed on housing projects on Fort Knox and Fort Campbell, Kentucky, also did not have “a substantial effect on the national defense.” See Fort Knox Constr. Co., 112 N.L.R.B. 140, 141 (1955). The small business there is similar in character to Roy Spa. Fort Knox Construction was paid \$72,000 on \$1 million rentals turned

²(...continued)

order to demonstrate that it was required to provide hair care services to non-military and off-base personnel in order to be profitable—it could not turn a profit solely servicing military personnel, tr. 262, 273; nor could Old Fashioned Barber operate profitably on just haircuts provided to military personnel, which is the reason why it shuttered its doors. R5. Exhibit R17 also reveals that Malmstrom AFB is a very small military installation. In comparison, Fort Hood, Texas, has 45,414 airmen and soldiers living on base; more than twelve times the number residing on Malmstrom AFB.
<http://www.hood.army.mil/facts/FS%200703%20-%20Fort%20Hood%20Overview.pdf>

over to the Army with \$70,000 in purchases of supplies. Roy Spa is no different.

What the General Counsel's tried unsuccessfully to turn his case on was the myth that the United States military imposes a certain "military style" haircut on its airmen and soldiers that require professional barber services.

The Air Force's Regulation, R20 (AFI 36-2903, 3-1), does not even use the word "haircuts."³ "Airmen have the right, within established limits, to express their individuality through their appearance," *id.*, within a 1.5 inch hair length. The Army has no specific policy because it recognizes its varied missions do not allow it to impose a uniform appearance standard, R21. Its Regulation leaves hair decisions to "leaders at all levels to exercise good judgment." AR 670-1, 1-8. The Army permits personnel, such as Sikh soldiers, to not even get haircuts.⁴

Although none of the above "facts" are persuasive enough to show an impact on national defense, the General Counsel's Answering Brief is noteworthy for its failure to identify a single specific transcript reference to support any of his contentions. He does at footnote 2 indicate he would refer to "Transcript citations" in his brief, but does not cite to a single transcript page in his Answering Brief.

The General Counsel seeks solace on "facts" expressed in pages 2-5 of the ALJD, but the ALJ's findings of fact there recite Roy Spa's presentation, not identifying or crediting any evidence the General Counsel presented in support of

³The Air Force regulation requires that hair be clean, well-groomed, and neat. Personnel may wear hairnets, wigs and hairpieces. Wigs and hairpieces may cover baldness, as well.

⁴Army Regulation 600-20, 5-6(g)(4)(d), Command Policy, permits the wearing of religious headgear by Sikh soldiers whose religious practices do not allow haircuts. See <http://www.army.mil/article/36339> (Mar. 25, 2010).

his case.⁵

The only other assertion the General Counsel makes is that the situation at hand lies somewhere between Spruce Up Corp., 194 N.L.R.B. 841, 843 (1972), and Gina Morena Enterprises, 181 N.L.R.B. 1007 (1970) (retail sales over \$500,000), with Fort Sam Houston Beauty Shop, 270 N.L.R.B. 1006 (1984), and Pentagon Barber Shop, Inc., 255 N.L.R.B. 1248, 1248 (1981), providing it an opening to claim that a business doing less than \$500,000 in sales could be covered by the national defense standard alone. Ans. 9-10. The General Counsel claims that this distinction is a “critical point.” Ans. 10.

But, this is a distinction without a difference. The ALJ simply observed that in the earlier cases, the retail and national defense jurisdiction findings were established together. ALJSD 3. The ALJ believed that because the Board did not expressly “overrule the older cases,” that the General Counsel had a shot at the argument of a distinction; “[b]ecause the Board had never addressed the exact factual situation here.” ALJSD 3. But, neither did the General Counsel address nor raise this “close” legal distinction in his post-hearing brief to the ALJ as the basis for his decision to litigate.

If this *post hoc* rationale becomes an EAJA standard, no EAJA award could ever be granted. Congress did not allow agencies to escape responsibility so easily, for substantial justification of an agency action must have a substantial basis in fact and law, not a minuscule one. Here, the distinction made rests on but a sliver

⁵The General Counsel does not dispute that his interested witnesses are not to be credited over the disinterested subpoena testimony of AAFES Manager Stacey Cossel, under settlement rules of credibility, as set forth at Exceptions Br. 11 n.5

of hope.

In fact, a close reading of the earlier cases ties the retail jurisdiction to the national defense standard because other noteworthy facts were found. The two jurisdictional bases do not stand alone. In the instant case, no other factual similarities between the jurisdictional bases were put in evidence to allow the General Counsel to claim even a “college try.”

Therefore, it was never “entirely reasonably” to assert the national defense standard applied to Roy Spa. Ans. 11.

Not only has no Board case ever provided a whit of indication that the national defense was a minimal threshold, but the recent decisions in Pentagon Barber Shop, Inc., 255 N.L.R.B. 1248, 1248 (1981), and in O K Barber Shop, 187 N.L.R.B. 823 (1971), show that the Board abandoned the possibility of extending this coverage to barber shops and beauty salons on simplistic facts.

The General Counsel’s reliance upon the ALJ’s assertion that the matter was “close” is also not helpful because the ALJ never explained what he meant. Of course, the ALJ recognized that the early cases had required a combination of the \$500,000 threshold in order to find the national defense standard met, thereby suggesting that the national defense standard could possibly be applied to barber shops and hair salons without the retail standard being met.

But, the Board closed that door for alleging merely performing “services for part of the defense establishment” to assert Board jurisdiction under the national defense standard in Fort Houston Beauty Shop, 270 N.L.R.B. at 1007.

As required by Pentagon Barber Shop, the General Counsel had specific

elements to meet the national defense standard. Not only did the General Counsel fail to present a prima facie case on the national defense standard, the ALJ here at ALJD 5, explained that “Nothing in the record establishes that haircuts are vital to the national defense.” How can the General Counsel’s case be substantially justified when there is “nothing in the record” for him to make the claims he did?

The General Counsel seeks to walk away from his statutory requirement under the EAJA to ensure his case is factually and legally substantially justified. Here, he can adduce no facts to meet any element of his prima facie case. In addition, his own brief to the ALJ failed to identify any caselaw that allowed him an opening to make the assertion of national defense jurisdiction for hair salons without also satisfying the commerce jurisdiction threshold.

This case has been a guessing game for Roy Spa. Keep it in the dark. Make all sorts of general allegations about the facts. Hope for the best.

This is not a situation where a single allegation or stage of the investigation was found to be reasonable. To the contrary, the ALJ found, “nothing in the record” linked Roy Spa’s services to a vital national defense interest. And, as importantly, the General Counsel never introduced a single iota of testimony from any Defense Department official to articulate what the national defense interest was in the case.

As a result, the General Counsel never produced any evidence that “military operations at Malmstrom would be disrupted or adversely affected if service members and their dependents could not get a haircut, permanent, hair color, or any of the other services offered by the Respondent due to a strike or other labor dispute. While the provision of the Respondent’s services is a convenience to

Malmstrom personnel, it is not necessary to the defense of our nation.” ALJD at 5.

The General Counsel linked nothing to Roy Spa as directed by Pentagon Barber Shop, which is the most recent precedent specifying the requirements to be met to extend national defense jurisdiction coverage to a barber shop.

The General Counsel was not substantially justified in moving forward with his Complaint knowing full well that he had no evidence to support him; his responsibility under the case law. This situation is unlike the cases argued at Ans. 6, where the General Counsel’s evidence simply failed to constitute a prima facie case. The General Counsel introduced “nothing in the record” on any material point.

2. The Answering Brief Does Not Deny the General Counsel had No Factual or Legal Basis for Asserting 8(a)(5) allegations against Roy Spa.

As argued on pages 19 and 31 of Roy Spa’s Exceptions Brief, Roy Spa was unjustifiably required to defend against allegations made by the General Counsel that it was a “clear” Burns successor to the Old Fashioned Barber. The Answering Brief’s silence on this second Question Presented is deafening.

In his opening statement at Tr. 19-20, counsel for the General Counsel argued: “The complaint alleges Respondent is a successor, consistent with the Supreme Court’s decision in Burns International Security Services and subsequent Board decisions.”

The ALJ dismissed the assertion in its entirety in one sentence at ALJD 6 ll.35-37.

The General Counsel adduced no facts and no law to make these successor

assertions against Roy Spa. His litigation conduct forced Roy Spa to defend against the unfounded and statutorily barred allegations not substantially justified. Roy Spa was forced to devote ten pages of its Brief to the ALJ on this baseless allegation of fact and law (pages 55-65).

3. The ALJ Improperly Granted the General Counsel an Extension of Time to File His Motion to Dismiss.

The General Counsel at 3 n.3. of his Answering Brief asserts no argument to rebut Roy Spa's Exceptions under the Board's EAJA Rules, as set forth in Section 102.149(b), to contend that he was authorized to delay the filing of an Answer or a motion to dismiss Roy Spa's EAJA Petition no later than October 30, 2013. Rather, he relies on the ALJ's Order of November 22, 2013, because there was no authority for the ALJ's action.

While the ALJ's November 22, 2013, Order was corrected by the ALJ's Order on November 26, 2013, the ALJ's reasoning was that the government shutdown was a cause of confusion. That reasoning, however, is based upon nothing in the Board's EAJA Rules, when the Board's Order clearly suspended filing dates equal to the number of days of the shutdown, and no more time without a timely motion.

Yet, there has been no confusion by any other parties before the Board on filing times counted during the government shutdown. As previously stated in Roy Spa's Exceptions Brief, no exceptional reasons exist for the General Counsel to file a motion for extension of time three weeks late, when the Board's own Rules 102.149(b) require such a motion to be filed "not later than 3 days before the due date of the document."

Relying on the ALJ Order does not answer this Question Presented. The

footnote response acknowledges his motion for extension of time was baseless.

4. Remaining Arguments Made by the General Counsel Pose Irrelevant and Insupportable claims.

Two stray remarks are made in the General Counsel's Answering Brief.

- The General Counsel claims that the retail standard was not a ground alleged for jurisdiction over Roy Spa because the ALJ said it was not. As set forth in Roy Spa's exceptions, Paragraphs 2(g), 7 & 8 of the Complaint alleged that Roy Spa was engaged in commerce within the meaning of the Act. It was only during the hearing that the retail allegation was dropped. Tr. 10 l.25.

The allegation was dropped only when Roy Spa filed its Motions in Limine. R1 & R2. The commerce allegation should never have been made in the first place. It should have been dropped before the hearing began because the General Counsel knew and stipulated that Roy Spa was did not meet the retail standard threshold.

However, the commerce allegations in the Complaint were never formally removed by the General Counsel, forcing Roy Spa to litigate the matter and argue it in brief, without any justification for forcing this burden upon it.

- It is suggested that if the General Counsel had presented evidence that could have been credited, it would constitute a prima facie case sufficient to establish substantial justification. Ans. 8. The ALJ found "no evidence" was introduced relevant to the establishment of the national defense standard. Logic dictates that substantial justification in fact and law has not been shown.

CONCLUSION

For the reasons set forth above and in Roy Spa's Exceptions Brief, the ALJSD should be reversed and EAJA fees awarded as set for in the Exceptions Brief.

Respectfully submitted by:

ROY SPA, LLC

By: /s Michael E. Avakian
Michael E. Avakian

The Center on National Labor Policy, Inc.
5211 Port Royal Road, Suite 610
Springfield, VA 22151
(703) 321-9181

Dated: April 25, 2014

**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 RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS was efiled to the Executive Secretary's Office and emailed to the following persons on this the 25th day of April 2014:

Ryan Connelly, Esq.
National Labor Relations Board
Region 19
915 2nd Avenue - Room 2949
Seattle, WA 98174-1078
ryan.connnelly@nlrb.gov

Timothy J. McKittrick, Esq.
McKittrick Law Firm, P.C.
410 Central Ave, Ste 622
PO Box 1184
Great Falls, Mt 59403-3128
kitty@strainbid.com

/s Michael E. Avakian
Michael E. Avakian
The Center on National Labor Policy, Inc.
5211 Port Royal Road, Suite 610
Springfield, VA 22151