

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 90-82

November 2, 1990

TO: All Regional Directors, Officers-in-Charge
and Resident Officers

FROM: Joseph E. DeSio, Associate General Counsel

SUBJECT: Documentation of Charged Party's Noncooperation
in Investigations

As you know, it is the General Counsel's burden of establishing that an EAJA Award should not be made. In this regard, it is sometimes essential that we demonstrate that we have sought and a charged party has refused its cooperation during the investigation of the charge. This was discussed in the initial EAJA Memorandum 81-55, at pages 3 and 4. In addition, model letters were supplied in OM 89-5 to assist the Regions in documenting a charged party's failure to cooperate.

I wish to reemphasize the importance of carefully documenting both our efforts to secure a charged party's cooperation in the investigation of charges and that party's failure to cooperate. By so documenting our efforts and the charged party's refusal, we will be able to better defend EAJA suits when noncooperation is the defense. Further, we will be in the best possible position to make this defense without enmeshing our Board agents in time-consuming, problematical testimonial appearances.

So that we can be assured that charged parties are provided with an adequate opportunity to cooperate, and that our efforts in this regard have been documented, please establish procedures to obtain information concerning these matters. In one Region, the Agenda Outline which is submitted in every case includes the following section:

EAJA (Equal Access to Justice Act)

1. Did Charged Party present evidence?
2. Did Charged Party give affidavits, copies of exhibits, etc.?
3. Has the extent of Charged Party's cooperation or lack of cooperation been fully documented?

Such a procedure provides an adequate means for keeping the Regional Director informed that Agency policy concerning matters of charged party cooperation is being carried out and the extent, if any, of charged party cooperation. Such information could be included in any pre-agenda or post-agenda document such as FIR, Agenda Outline or Agenda Minute.

Please discuss this memorandum and the documentation procedures to which it refers at your next professional training session.

J. E. D.

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cc: NLRBU