

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 94-76

August 23, 1994

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

FROM: William G. Stack, Associate General Counsel

SUBJECT: Reimbursement of Fees
NLRB v. A.G.F. Sports LTD.
146 LRRM 3022 (6/22/94)

This case is of interest for its discussion of reimbursement of Agency expenses in the context of seeking production of voter eligibility lists. The District Court for the Eastern District of New York permitted the Agency to be reimbursed for attorney fees at the prevailing market rate which in this case was \$150 per hour. The Court also allowed expenses for the salary of the Board Field Examiner attendance at both a conference with the employers and for the Board hearing. A key to the Agency's success in being awarded the full amount requested was the maintaining of accurate time records.

The Brooklyn Regional Office achieved this important decision for the Agency. Field Attorney Elias Feuer as well as Field Examiner Ariella Bernstein are the individuals most directly involved in achieving this result. Congratulations.



W. G. S.

Attachment

cc: NLRBU

MEMORANDUM OM 94-76

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per hour for expenses incurred in securing eligibility lists from multiple employers is not unreasonable, despite contention that this figure is excessive as applied to claims for attorney's fees by government attorneys. It is established law that government attorneys may be reimbursed at prevailing market rate.

**2. Attorneys' fees — Reimbursement
 — Eligibility list ▶56.03**

NLRB adequately supported its application for attorneys' fees incurred in securing eligibility lists from multiple employers, despite contention that board supported its application with "mere summary statements and conclusions with regards to when claimed services were performed." Board provided typewritten, well-detailed contemporaneous time records of work performed, as well as handwritten notes that accurately match typewritten records, which adequately document for each attorney date, number of hours expended, and nature of work done.

**3. Attorneys' fees — Reimbursement
 — Eligibility list ▶56.03 ▶37.22**

NLRB's expenditure of total of 16 attorney hours on legal memorandum supporting its motion to enforce its subpoenas of voter eligibility lists from multiple employers was not unreasonable, despite contention that board could have learned that employer did not intend to enter any opposition to motion before preparing memorandum, thereby obviating extensive submission. Employers cannot blame board for plainly foreseeable consequences of their failure to comply with board's subpoenas by refusing to produce lists.

**4. Attorneys' fees — Reimbursement
 — Eligibility list ▶56.03**

NLRB properly included in its application for reimbursement of attorneys' fees incurred in securing eligibility lists from multiple employers work that occurred prior to employers' non-compliance with subpoenas or that could be classified as "administrative" rather than "legal," where order awarding board reimbursement for all of its necessary expenses in securing voter eligibility lists from employers was broadly phrased, "including but not limited to attorney fees and expenses." Time billed for board field examiner's attendance at conference with employers and for board hearing, both prior to deadline for production of the voter eligibility lists, was sufficiently related to board's enforcement efforts to fall within scope of fee award; employers have failed to dem-

NLRB v. A.G.F. SPORTS LTD.

**U.S. District Court,
 Eastern District of New York**

**NATIONAL LABOR RELATIONS
 BOARD v. A.G.F. SPORTS LTD., et
 al., No. 93-049 (CBA), June 22, 1994**

**LABOR MANAGEMENT RELATIONS
 ACT**

**1. Attorneys' fees — Reimbursement
 — Eligibility list ▶56.03**

NLRB's request for reimbursement of its attorneys' time at rate of \$150

onstrate why hours billed by board attorneys one day before appearance before this court should be deemed as merely "administrative,"

Full Text of Opinion

AMON, District Judge: — By order dated March 30, 1993 this Court directed respondents A.G.F. Sports Ltd., B.J. Paper Products, Inc., Durlacher Co., Liberty House Trading, Corp., Lynch Novelty, Inc., and Nova Clutch, Inc. to produce voter eligibility lists, pursuant to a decision by the National Labor Relations Board (the "Board") calling for single employer elections at each of the respondent companies. In addition, the Court awarded attorney's fees and costs to the Board for its expenses in securing the lists.¹ Currently before the Court is the Board's application detailing those expenses and requesting reimbursement in a total amount of \$10,981.59.

The customary measure for attorney's fee awards is the "lodestar" figure, derived by multiplying an hourly rate by the number of hours reasonably spent by prevailing counsel. See *United States v. Kirksey*, 639 F.Supp. 634, 638 (S.D.N.Y. 1986). There is a "strong presumption" that the lodestar figure represents the "reasonable" fee. *City of Burlington v. Dague*, 112 S.Ct. 2638, 2641 [60 FEP Cases 11] (1992) (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1985)). In awarding fees, "judges may draw on their own experience as practitioners and on common sense," *Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 306, 320 (2d Cir. 1985), by adjusting the lodestar figure "on the basis of frankly subjective factors," *Mautner v. Hirsch*, 831 F.Supp. 1058, 1063 (S.D.N.Y. 1993) (quoting *In re Agent Orange Prods. Liab. Litig.*, 611 F.Supp. 1296, 1310

¹ The Court's March 30, 1993 order stated that respondents must:

[j]ointly and severally reimburse the Board for all common costs and expenditures incurred by the Board in its efforts to secure each of the individual voter eligibility lists, including but not limited to attorney fees and expenses incurred in connection with the preparation and processing of the Application herein, and in securing full compliance with the Order herein, and individually reimburse the Board for those costs and expenditures related to its efforts to secure compliance by individual Respondents. Said amounts will be determined by the Court based upon the submission of affidavits by the Applicant.

Order, March 30, 1993, at 3. Since that date, respondent Durlacher Co. has reached a settlement with the Board, which has withdrawn its fee request and now seeks to discontinue this action as against Durlacher.

(E.D.N.Y. 1985), *modified on other grounds*, 818 F.2d 216 (2d Cir. 1987)). Reasonable attorney's fees may include reasonable charges for the work of non-attorneys employed in generating an attorney's work product. See *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 285, 109 S.Ct. 2463, 2470 [50 FEP Cases 17] (1989); *United States Football League v. National Football League*, 887 F.2d 408, 416 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071, 110 S.Ct. 1116 (1990).

[1] In support of its application, the Board has documented 63.45 hours of attorney time, 31.35 hours of non-attorney time, and \$456.22 in miscellaneous expenses. See Decl. of Elias Feuer, Ex. C. The Board requests reimbursement of its attorneys' time at a rate of \$150 per hour.² Although respondents assert that this figure is excessive as applied to claims for attorney's fees by government attorneys, it is established law in this Circuit that government attorneys may be reimbursed at the prevailing market rate. See *City of Detroit v. Grinnell*, 495 F.2d 448, 471 (2d Cir. 1974); see also *Kirksey, supra*, 639 F.Supp. at 637 (holding that proper hourly rate for government attorney is the "amount to which an attorney of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation") (quoting *Grinnell*, 495 F.2d at 471). The Court is persuaded that an hourly rate of \$150 is reasonable in this case. See Decl. of Arthur Z. Schwartz, ¶ 2.

[2] The Court also finds no basis for respondents' contention that the Board has supported its application with "mere summary statements and conclusions with regards to when the claimed services were performed." Aff. in Opp'n, at 2. It is undisputed that an application for attorney's fees in this Circuit must be supported by contemporaneous time records. See *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147 (2d Cir. 1983). The Board's motion includes typewritten, well-detailed contemporaneous time records of the work performed. See Notice of Mot., Ex. C. In reply to respondents' opposition, the Board has supplemented these records with handwritten notes that accurately match the typewritten records. See

² The non-attorney time is calculated at different rates depending upon the duties of the employee and range from \$17.46 to \$44.71 per hour. See Feuer Decl., Ex. C. In its reply memorandum, the Board requests compensation for an additional 12.67 hours of attorney time expended in litigating the present motion. The total amount of the principal fee request, not including the time expended on this motion, is reduced by one-sixth to reflect the amount of the Board's fees attributable to respondent Durlacher Co. See *infra* footnote 3.

Applicant's Reply Memorandum, Exs. 2, 3, 4. These records adequately document for each attorney the date, the number of hours expended, and the nature of the work done. *See New York State Ass'n for Retarded Children, Inc.*, 711 F.2d at 1148.

[3] Respondents' objections to particular portions of the Board's fee request are similarly without merit. Respondents argue that it was excessive for the Board to expend a total of sixteen attorney hours on the legal memorandum supporting the Board's motion to enforce its subpoenas of voter eligibility lists. Before preparing the memorandum, respondents suggest, the Board could have learned that respondents did not intend to enter any opposition to the motion, thereby obviating an extensive submission. Having failed to comply with the Board's subpoenas, however, respondents cannot now blame the Board for the plainly foreseeable consequences of their refusal to produce the lists. Given the complexity of this action against multiple employers, *see Reply Mem.* at 4, and this District's requirement of a legal memorandum in support of "any motion," *see Joint Rules, United States District Courts for the Southern and Eastern Districts of New York, Civil Rule 3*, the Court concludes that the Board's expenditure of time was reasonable under the circumstances.

[4] The Court is similarly unpersuaded by respondents' arguments (1) that some of the work included in the Board's application occurred prior to respondents' non-compliance with the subpoenas, and (2) that some of the work done was administrative rather than legal and should therefore be reimbursed at a lower rate. As the Board notes, this Court's March 30, 1993 order was broadly phrased, awarding the Board reimbursement for all of its necessary expenses in securing voter eligibility lists from the several respondents, "including but not limited to attorney fees and expenses." *See supra* footnote 1. A Board field examiner's attendance at a conference with the parties on March 12, 1993 was sufficiently related to the Board's enforcement efforts to fall within the scope of the fee award. *See Reply Mem.*, at 6-7. Moreover, respondents' cavil at the amount of time billed at a Board hearing on March 23, 1993, the deadline for production of the voter eligibility lists, is also without substance. Having failed to appear at that hearing, respondents can hardly complain that the Board undertook vigorous efforts to enforce its valid subpoenas. *See id.* at 7-8. Finally, respondents have

failed to demonstrate why the Court should deem as merely "administrative" several additional hours billed by Board attorneys one day before the March 30, 1993 appearance before this Court. The Court finds that, in light of respondents' protracted refusal to comply with the subpoenas, these hours represent reasonable preparatory work in advance of that hearing.

Accordingly, the Court hereby grants the Board's request for attorney's fees and costs in the amount of \$9,081.59.³ The Court also grants the Board's request, which was unopposed by respondents, for an additional award of \$1,900.00 for the preparation of the Board's reply memorandum on the present motion. Pursuant to the terms of its settlement agreement with the Board, this case is hereby dismissed as against respondent Durlacher Co.

The specific liabilities of the five remaining respondents are as follows: Respondents A.G.F. Sports Ltd., B.J. Paper Products Ltd., Liberty House Trading Corp., Lynch Novelty, Inc., and Nova Clutch, Inc. shall be jointly and severally liable for the common costs and expenditures of the Board in the amount of \$9,341.34.⁴ Each of these respondents shall be primarily liable for a pro rata share of common costs and expenditures totalling \$1,868.27. In addition, each of the five respondents shall individually reimburse the Board for costs and expenditures in the following amounts:

A.G.F. Sports Ltd.	\$525.00
B.J. Paper Products, Inc.	\$ 65.25
Liberty House Trading Corporation	\$600.00
Lynch Novelty, Inc.	\$300.00
Nova Clutch, Inc.	\$150.00

The Clerk of the Court is hereby directed to close this case.

SO ORDERED.

³ This figure reflects the Board's total costs and expenditures pertaining to this motion, less the pro rata share of common costs and expenditures attributable to respondent Durlacher Co. and the \$65.25 in other expenses individually attributable to that respondent.

⁴ The figure for common costs and expenditures is derived by subtracting those expenses individually attributable to the five remaining respondents, as set forth in the schedule below, from the total award of \$10,981.59.