

The Long Island Radio Company d/b/a All Shores Radio Company and New York Local, American Federation of Television and Radio Artists, AFL-CIO. Cases 29-CA-7753(E)

30 September 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 27 June 1985 Administrative Law Judge Robert T. Snyder issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief. The Applicant filed cross-exceptions and a brief in support of its cross-exceptions and in response to the General Counsel's exceptions.¹

The National Labor Relations Board has considered the supplemental decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

On 16 October 1981 the Board, in the absence of exceptions, adopted the judge's initial decision dated 27 August 1981. In his decision, the judge had determined that the 8(a)(3) and (5) allegations of the consolidated complaint did not have merit and recommended dismissal of the complaint in its entirety. The Board's unpublished Order adopting the judge's decision resulted in the dismissal of the entire unfair labor practice case against the Applicant.

On 13 November 1981, on the Applicant's request, the Executive Secretary of the Board extended the time for the Applicant's filing of an application for an award of attorney's fees and expenses in this case pursuant to the Equal Access to Justice Act (EAJA).² By a telegram dated 17 November 1981, the Executive Secretary confirmed that the Board had extended the time for filing the Applicant's EAJA application until 23 November 1981.

On 23 November 1981 the Applicant filed its initial EAJA application. This application was one of the first to be filed with the Board after EAJA became effective 1 October 1981. On several subsequent occasions, as more fully revealed in the judge's supplemental decision, the Applicant has amended its application, inter alia, to update the

amount of fees and expenses sought and to more fully conform with the requirements of EAJA and the corresponding Board Rules and Regulations, Section 102.143 et seq.³ In turn, the General Counsel has filed responses to the application and its amendments and has disputed the timeliness, sufficiency, and merit of the Applicant's claim for an EAJA award.

The judge, in various rulings and in his supplemental decision, addressed the matters raised by the parties' pleadings and awarded some of the fees and expenses requested by the Applicant. In doing so, the judge ruled in the Applicant's favor on two critical motions. Thus, the judge denied the General Counsel's motion to dismiss and found that the Applicant's application was timely filed. Further, the judge granted the Applicant's Motion for Partial Summary Judgment on the issue of substantial justification and recommended that the Applicant be awarded \$149,039.30. The General Counsel timely excepted to both adverse rulings.

For the reasons detailed below, we reverse the judge and grant the General Counsel's motion to dismiss. We find that the Board is without jurisdiction to consider the Applicant's application and, consequently, we deny the Applicant's EAJA claim on that basis.⁴

The General Counsel has opposed the Applicant's application on several procedural and substantive grounds, as fully detailed by the judge in his supplemental decision. One significant ground asserted for dismissal of the application involves the Board's jurisdiction under EAJA. Manifestly, whether attorney fees should be awarded to the Applicant turns on whether the Board has jurisdiction to consider this EAJA claim. The resolution of this threshold issue is, in view of the peculiar factual circumstances involved, a case of first impression and, in all likelihood, *sui generis*.

By motion dated 5 July 1983, the General Counsel raised the question of whether the Board lacks jurisdiction to consider this EAJA application be-

³ On 12 May 1986 the Applicant submitted directly to the Board a fourth amended application for attorney fees pursuant to the Equal Access to Justice Act. This fourth amendment purports to update the amount of recoverable attorney fees which have been incurred by the Applicant since the judge's supplemental decision issued. In conjunction with its fourth amended application, the Applicant also filed a petition for rulemaking to increase the maximum rate for attorney fees. By letter dated 12 May 1986, the Board notified the parties in the case that the fourth amended application was being held in abeyance pending the disposition of the case. In view of our disposition of the case discussed herein, the Applicant's petition for rulemaking is denied.

⁴ We find it unnecessary to reach the merits of the Applicant's EAJA claim in view of the Board's lack of jurisdiction to consider it. We, therefore, do not pass on the substantial justification issue. We also find it unnecessary to pass on any of the judge's findings and conclusions regarding the fees and expenses allegedly incurred by the Applicant during the unfair labor practice or EAJA proceedings.

¹ The Applicant also requested oral argument in this case, which request the General Counsel has opposed. This request is denied as the record, the exceptions, the cross-exceptions, and the briefs adequately present the issues and the positions of the parties.

² 5 U.S.C. § 504 (1982). Subsequently, EAJA was amended. See Pub. L. 99-80, 99 Stat. 183-187 (1985).

cause the Applicant failed to strictly comply with the specified 30-day filing period of EAJA⁵ notwithstanding the fact that it had been filed within the 1-week extension to the filing period granted by the Executive Secretary on behalf of the Board. The General Counsel noted that several Board decisions which have been enforced by various circuit courts of appeals⁶ held the 30-day statutory filing requirement to be a jurisdictional prerequisite that cannot, for any reason, be legally extended by the Board.

In his ruling dated 28 November 1983, the judge denied the General Counsel's motion to dismiss the application for lack of Board jurisdiction.⁷ The judge based his denial of the motion on two different grounds. As an initial matter, the judge determined that the Executive Secretary's grant of the 1-week extension to the EAJA filing period constituted an "interpretation" by the Board that the 30-day limitation imposed by EAJA was subject to modification for good cause within the discretion of the Board. The judge considered that this "interpretation" by the Board was binding on him and the parties as the "law of the case." The second ground relied on by the judge to deny the General Counsel's motion is equitable estoppel, which the judge, however, mistakenly mislabeled as "the equitable principle of collateral estoppel." Applying recognized equitable estoppel principles, the judge found that the factual circumstances of this case warranted a finding that the Board is estopped from refusing jurisdiction over the Applicant's application. In the judge's view, it would be unjust to permit what he considered a retroactive application of a more rigid interpretation of EAJA enunciated in *Monark Boat Co.*, supra, to the present situation which arose 8 months before the new interpretation came into existence.

The General Counsel excepts to the judge's ruling of 28 November 1983 and renews her prior arguments for dismissal of the Applicant's application on jurisdictional grounds.⁸ The General Coun-

sel's primary contention is that the 30-day filing requirement is jurisdictional and cannot be extended or waived and equitable estoppel cannot lie against the Board because an EAJA proceeding comprehends a waiver of sovereign immunity. A secondary argument urged by the General Counsel is that, even assuming arguendo estoppel against the Board is available in EAJA proceedings under appropriate factual circumstances, the facts of this case do not warrant invoking the estoppel doctrine.

In response, the Applicant defends the soundness of the judge's analysis of estoppel and, alternatively, renews its earlier position, which was rejected by the judge, that the 30-day filing requirement of EAJA is a statute of limitations and, as such, can be waived by the Board. The Applicant strongly urges that jurisdiction lies with the Board, stating at one point that to hold otherwise would not only hamper the exercise of authority by the Board's Executive Secretary but also would permit the Board, after years of costly litigation, "to renege on its word" to the Applicant which relied in good faith on the filing extension.

To place the parties' arguments and the judge's reasons noted above in better perspective, we initially set forth the following stipulated facts which are relevant to the jurisdictional issue.⁹

On 13 November 1981 Andrew A. Peterson of the law firm of Jackson, Lewis, Schnitzler & Krupman, counsel for the Applicant, made a written request of Associate Chief Administrative Law Judge Edwin H. Bennett that the 30-day period for filing an EAJA application be extended for the Applicant.¹⁰ Although the General Counsel was served with a copy of this request, there is no indication whether the Applicant solicited the General Counsel's view. The General Counsel did not respond to the Applicant's telegram.

On the same day, Peterson telephoned Judge Bennett to orally request the month extension and to advise him that the written request was being delivered contemporaneously. Judge Bennett advised Peterson that this was the judge's first dealing with EAJA. Judge Bennett reviewed the applicable Board Rules. He concluded that he lacked

⁵ 5 USC § 504(a)(2) See also Board's Rules and Regulations, Sec 102 148(a)

⁶ See, e.g., *Monark Boat Co.*, 262 NLRB 994 (1982), enfd 708 F 2d 1322 (8th Cir 1983), *Columbia Mfg Corp.*, 265 NLRB 109 (1982), enfd 715 F 2d 1409 (9th Cir 1983)

⁷ The judge nevertheless found that the General Counsel's motion, which had been submitted approximately 18 months after the Applicant's initial filing of its application, was timely We agree See *Haynes-Trane Service Agency*, 265 NLRB 958 (1982)

⁸ In considering her exceptions to the judge's supplemental decision, the General Counsel asks the Board to take administrative notice of *Soncraft, Inc v NLRB*, 814 F 2d 385 (7th Cir 1987), dismissing an appeal of 281 NLRB 569 (1986), and *Lord Jim's v NLRB*, 772 F 2d 1446 (9th Cir 1985), enfg 264 NLRB 1098 (1982) The Applicant does not oppose the General Counsel's request

⁹ Like the judge, we find that an evidentiary hearing is unnecessary inasmuch as the parties' written stipulation of facts contained in the record satisfactorily covers the key events relating to the grant of the 1-week filing extension

¹⁰ The pertinent part of Peterson's written request to Judge Bennett is Counsel for the Employer hereby respectfully moves for an extension of time within which to file its application for attorneys fees and expenses pursuant to the Equal Access to Justice Act from November 16, 1981 until December 16, 1981 This request is necessitated by the novelty of the Act under which application must be made and the complexity of the underlying legal issues Copies of this request have this day been hand-delivered to all interested parties

authority to act on the Applicant's request and suggested that Peterson contact the office of the Board's Executive Secretary with respect to the requested extension.¹¹

According to the parties' stipulated facts, on the same day, Peterson sent a telegram to John C. Truesdale, Executive Secretary of the Board, requesting an extension of time within which to file the Applicant's EAJA application.¹² Although the General Counsel was served with a copy of this telegram, there is no indication whether the Applicant solicited the General Counsel's view. The General Counsel did not respond to the Applicant's telegram to the Executive Secretary.

Peterson also telephoned the office of the Board's Executive Secretary on the same day. Peterson first spoke with Associate Executive Secretary Joseph E. Moore and then Executive Secretary Truesdale. Moore assured Peterson that some extension would be granted. He, however, was not certain that the full 1-month extension sought by the Applicant would be granted. Moore stated that he would have to discuss the matter and would call Peterson back. Later that day, Moore and Peterson talked again. This time Moore was less definite and stated that he was uncertain whether an extension would be granted. He then asked Peterson to speak with Truesdale. Truesdale told Peterson that only a few EAJA applications had been filed up until that time, and that this was the first request for an extension of time within which to file such an application. Truesdale asked Peterson how long an extension the Applicant was seeking. Peterson stated that the Applicant was requesting an extension of time until 16 December 1981 to file the application.

¹¹ On 13 November 1981 Judge Bennett also forwarded a written reply to Peterson regarding the latter's request for an extension to the EAJA filing period. The pertinent part of his reply, which was received by the Applicant's counsel on 17 November 1981, is

This is in reply to your letter of November 13, 1981, requesting an extension of time in which to file an application for attorneys fees and expenses pursuant to the Equal Access to Justice Act. As I advised you during our phone conversation, it is my opinion that the time prescribed for filing such application is statutory and that no extension may be granted. It further is my opinion that such discretion in this regard as may exist, would be exercised by the Executive Secretary on behalf of the Board and not by the undersigned. Section 102.149(b) of the Board's rules and regulations pertains to motions for extensions of time which may be made to the undersigned with respect to motions, documents or pleadings filed with the administrative law judge after referral of the case by the Board to the judge.

Accordingly, I consider that I am without authority to grant your aforesaid request.

¹² Peterson's telegram addressed to the Executive Secretary essentially repeated verbatim the Applicant's request and reasons for an extension, which had previously been submitted to Judge Bennett, as described above in fn 10. Peterson also mentioned in his telegram to Truesdale his earlier dealings with Judge Bennett on this subject as follows.

This request has also been made of Associate Chief Administrative Law Judge Edwin R. [sic] Bennett in New York, it is being repeated to you because Judge Bennett has expressed doubt concerning his authority to pass upon this request under 29 C.F.R. Section 102.149

Truesdale stated that a 1-month extension would not be granted. Peterson then requested that the time for filing the application be extended until 23 November 1981. The Executive Secretary granted that request on behalf of the Board and later confirmed the extension by forwarding a telegram dated 17 November 1981.

The Applicant admitted, and the judge found, that if the Executive Secretary had denied the extension, the application could have been timely filed. The Applicant specifically noted that its counsel had offices in both Washington, D.C., and Baltimore, Maryland, to facilitate compliance with the filing requirement.

On 11 January 1982 Deputy General Counsel John E. Higgins Jr. telephoned Robert Lewis, a senior member in the law firm that represents the Applicant. Higgins reiterated that the Board had granted the Applicant an extension of time within which to submit its application. He advised that for future reference the firm should be aware that the General Counsel had researched the law and concluded that no extensions of time in which to file EAJA applications may be granted. Higgins advised that this would be the General Counsel's position in all future cases.

Turning to the applicable law, EAJA, Section 504(a)(2), provides that a party seeking attorney's fees and expenses "shall within thirty days of a final disposition in the adversary adjudication, submit . . . an application to the Board."¹³ In *Monark Boat Co.*, 262 NLRB 994 (1982), the Board observed that EAJA is a relinquishment of the Government's immunity from suit and therefore must be strictly construed, that the language of Section 504(a)(2) with respect to the 30-day filing requirement is mandatory, and that it makes no provision for exceptions or Agency discretion. These observations led the Board to conclude that the 30-day period for filing an application is a jurisdictional prerequisite which the Board cannot legally extend. Since *Monark*, the Board has adhered to this strict construction of Section 504(a)(2). It has consistently held that the 30-day filing requirement of Section 504(a)(2) is jurisdictional and cannot be waived or extended. For example, in *Lord Jim's*, 264 NLRB 1098 (1982), and *Columbia Mfg. Corp.*, 265 NLRB 109 (1982), the Board held that it could not legally expand its jurisdiction by rulemaking or otherwise.

¹³ Similarly, Sec 102.148(a) of the Board's Rules and Regulations, which was in effect when the Applicant's application became due in November 1981, provides that "an application may be filed . . . but in no case later than 30 days after the entry of the Board's final order in the proceeding" (Emphasis added).

The Board does not stand alone in viewing EAJA's filing requirements as jurisdictional. Both the Eighth (in *Monark Boat*) and Ninth Circuits (in *Columbia Mfg. Corp.* and *Lord Jim's*) have enforced Board decisions propounding this view and have specifically concurred in the Board's strict interpretation of Section 504(a)(2).¹⁴ The Eighth Circuit in *Monark*, without hesitation, agreed that "the statutory language and history of the EAJA supports the Board's conclusion that the thirty-day time limitation was a mandatory, jurisdictional condition."¹⁵ Likewise, the Ninth Circuit in *Columbia Mfg.* succinctly held that "the NLRB's strict construction of the thirty-day time limit was correct."¹⁶ In a slightly different context, while reviewing EAJA's other filing requirements, both the Seventh and the District of Columbia Circuits have, in effect, endorsed the determination that EAJA's filing requirements are jurisdictional and nonwaivable.¹⁷

Coupled with this strong case precedent is another indication that strict construction of Section 504(a)(2) is warranted. When EAJA was reauthorized in 1985, the Board's interpretation of Section 504(a)(2) was not altered or even addressed by Congress. On the other hand, where Congress disagreed with a particular interpretation of other EAJA language, for example, "position of the agency" in Section 504(a)(1), the "misinterpretation" was corrected with the enactment of the 1985 amendments.¹⁸ Congressional inaction with respect to Section 504(a)(2) suggests satisfaction with the Board's strict interpretation of that provision.

In view of the foregoing, we agree with the judge's rejection of the Applicant's argument that the 30-day filing requirement of EAJA is a statute of limitations and, as such, can be waived by the Board. We, however, disagree with his view that the strict interpretation of Section 504(a)(2) should not be retroactively applied in the instant case, relying on the Board's actions taken in *Screw Machine Products Co.*, 94 NLRB 1609 (1951), and *Vanity Fair Mills*, 256 NLRB 1104 (1981). *Screw Machine* involved the exercise of the Board's discretionary jurisdiction. There was no contention that the Board's broad statutory jurisdiction did not encompass the employer's operations. A problem arose because the Board was, at the time, in the process of changing the standards for the assertion

of jurisdiction based on the volume of business done by an employer. At the time of the filing of the representation petitions in 1948 and 1949, the employer's volume of interstate commerce did not meet the Board's prior standards, but when an unfair labor practice complaint against the employer issued in 1950, the employer's volume of interstate commerce did satisfy the Board's new commerce standards. The Board declined to apply the new standards retroactively and to assert jurisdiction. This is very different from the instant case, however, in which the Applicant has urged the Board to *expand* its jurisdiction and accept an application filed beyond the 30-day maximum statutory limit. It is not a matter of whether the Board entertains a "liberal" construction of the Board's rules. Rather, the Applicant has solicited action from the Board which simply cannot be squared with the language of Section 504(a)(2) itself much less with the legislative history and authoritative judicial construction.

Similarly, distinguishable from the instant situation is *Vanity Fair Mills*, supra. Once again the issue centered on the Board's exercise of its discretionary jurisdiction. The Board reinstated an untimely decertification petition because the individual petitioner, through no fault of his own and relying on flawed advice from the Regional Office regarding the Board's contract-bar principles, filed his petition after the employer and the union had agreed to a successor collective-bargaining agreement. The Board's contract-bar principles, however, constitute a creature of Board policy designed to balance the conflicting interests in providing stability to the bargaining relationship while allowing the fullest exercise of employee choice in selection of a bargaining representative. Noncompliance with the Board's contract-bar principles simply does not extend the Board's statutory jurisdiction. Thus, we reject the judge's erroneous notion that, on prior occasions, the Board has declined to give retroactive effect to a new Board rule which has an impact on the scope of the Board's statutory jurisdiction or has carved exceptions to the rules in order to enlarge the Board's statutory jurisdiction.

Based on the foregoing, we conclude that the Board is without jurisdiction to consider the Applicant's application because it did not satisfy the filing requirements of Section 504(a)(2). Even though we consider this result to be the most faithful to the statutory scheme of EAJA, we are not insensitive to its harshness. In this regard, we are guided by the recent remarks of Circuit Judge Easterbrook in his concurring opinion in *Bailey v. Sharp*, 782 F.2d 1366, 1373 (7th Cir. 1986), that "[a] court without jurisdiction is a court without

¹⁴ *Monark Boat Co v NLRB*, 708 F 2d 1322 (8th Cir 1983), *Columbia Mfg Corp v NLRB*, 715 F 2d 1409 (9th Cir 1983), and *Lord Jim's v NLRB*, 772 F 2d 1446 (9th Cir 1985)

¹⁵ 708 F 2d at 1327

¹⁶ 715 F 2d at 1410

¹⁷ *Sonicraft, Inc v NLRB*, 814 F 2d 385 (7th Cir 1987), and *Action on Smoking & Health v C A B*, 724 F 2d 211, 225 (D C Cir 1984)

¹⁸ See, e g, 131 Cong Rec 9992 (July 24, 1985) (Senator Grassley)

power, no matter how appealing the case for exceptions may be." This holds true irrespective of any application of the principle of the "law of the case."¹⁹ We, therefore, shall dismiss the Applicant's application for lack of jurisdiction.

The Applicant, however, claims that the dismissal of the application would disserve the public interest and it would be grossly unfair to "penalize" an otherwise eligible party to receive an EAJA award because its counsel justifiably relied on the extension granted by the Board's Executive Secretary. In this respect, the Applicant asserts that the principles of equitable estoppel should be applied here.

It is well recognized that estoppel is an equitable remedy and should be used with care. Although the U.S. Supreme Court has never clearly held that estoppel is not available against the Government,²⁰ the Court has repeatedly shown a strong reluctance to find the Government estopped on the same terms as private litigants.²¹ In *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), the Court held that a field representative of the Federal Crop Insurance Corporation could not bind the Government by entering into an agreement to insure crops excluded from the program in question by Federal regulations of which the agent and the purchaser of the insurance were not aware. Justice Frankfurter, who delivered the opinion of the Court, stated:

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority. [322 U.S. at 384.]

Having recognized that the case presented hardship, Justice Frankfurter further remarked that

¹⁹ We also reject the Applicant's claim that the General Counsel implicitly agreed to the filing extension as the "law of the case." We do not infer acceptance on the basis of the General Counsel's failure to respond to the Applicant's two telegrams and Deputy General Counsel Higgins' telephone conversation of 11 January 1982 described above. We also do not infer acquiescence from the fact that the General Counsel's motion to dismiss on jurisdictional grounds was not submitted until July 1983. In any event, acquiescence on the part of the General Counsel cannot expand the Board's jurisdiction.

²⁰ See *Moser v. U.S.*, 341 U.S. 41, 47 (1951); *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 60-61 (1984).

²¹ *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), *Montana v. Kennedy*, 366 U.S. 308 (1961), and *U.S. Immigration & Naturalization Service v. Hibi*, 414 U.S. 5 (1973).

[t]he circumstances of this case tempt one to read the regulation, since it is for us to read it, with charitable laxity. But not even the temptations of a hard case can elude the clear meaning of the regulation. [Id. at 386.]

In 1981 the Supreme Court in *Schweiker v. Hansen*, 450 U.S. 785 (1981), reasserted its marked opposition to estoppel of the Government in the circumstances of that case. In *Schweiker*, an individual did not file a written claim for her mother's insurance benefits because the field representative for the Social Services Administration erroneously told her that she was not eligible for the benefits. In its per curiam decision, the Court held that the Government was not estopped even though the individual's failure to comply with the written filing requirement was directly attributable to the field representative's error. Fairness was not a consideration in the Court's opinion, which essentially adopted the dissenting opinion below of the late Judge Friendly.

In his dissenting opinion, Judge Friendly made two important observations which are applicable to our considerations of the case here. His first observation was that an applicant's eligibility for an award does not mean that he may ignore certain application requirements. In other words, following the conditions imposed on the application is not an idle gesture even if the applicant meets the eligibility requirements. In this regard, Judge Friendly stated that "Congress did *not* wish *all* those eligible . . . to receive them," but "wished such benefits to flow only to those *applying* for them." (Emphasis added.)²² Judge Friendly's second observation was that "[t]here are some rules of federal law that had best [be] left unchanged until Congress decides to alter them even when the result is much harsher than here. This is one of them."²³ In other words, he was not persuaded that estoppel was the appropriate mechanism to allow for some deviation from the written filing requirement imposed by regulation. Judge Friendly's observations clearly support our rejection of the Applicant's argument that EAJA's filing requirements should be relaxed to accommodate eligible parties who file applications beyond the 30-day statutory deadline. We agree with Judge Friendly's view that eligibility is simply not enough.

In light of these Supreme Court decisions disfavoring estoppel when the Government is involved, we are not in a position to chart out a different course, especially in the instant case which involves sovereign immunity. The Applicant, on the

²² *Hansen v. Harris*, 619 F.2d 942, 957 (2d Cir. 1980).

²³ Id. at 958.

other hand, claims that equitable doctrines apply against the Government even in cases involving waivers of sovereign immunity. For support, the Applicant has directed our attention to, inter alia, *Armstrong v. United States*, 516 F.Supp. 1252 (D.Colo. 1981); *Exchange & Savings Bank of Berlin v. United States*, 226 F.Supp. 56 (D.Md. 1964); and *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970). On consideration, we do not consider any of these cases so factually similar to the instant situation arising in the EAJA context that their holdings are conclusive to the question of whether estoppel should lie here.

In *Armstrong*, supra, the Government repeatedly and systematically misled the plaintiff, a former Air Force Academy student, about his active duty status at the time of his knee injury and treatment. The district court found that the plaintiff relied on the Government's conduct to his detriment by failing to file an earlier application for veterans benefits following his discharge from the Air Force. The court denied, on estoppel grounds, the Government's motion to dismiss the plaintiff's claim for veterans benefits covering the period prior to the filing date of his application. In finding that the Government agents in *Armstrong* engaged in affirmative misconduct, the court in *Armstrong* was quick to point out that estoppel is "rarely a proper defense against the government" and "[t]he government is immune from estoppel only where the acts of its agents are erroneous, illegal, or unauthorized." 516 F.Supp. at 1254. These statements suggest that the district court in *Armstrong* would have reached a different result and found no estoppel if it had been faced with the instant situation of a Government agent exceeding his scope of authority and erroneously purporting to confer statutory jurisdiction beyond that conferred by Congress.

In *Exchange & Savings Bank of Berlin*, supra, the taxpayer relied on the filing deadline set forth in an IRS notice which had mistakenly been sent to him. As a result, the taxpayer filed an untimely tax refund action in the district court. The district court held that the Government was estopped from asserting that the taxpayer's suit was barred because the taxpayer failed to comply with the relevant filing requirements. Although the filing requirements were jurisdictional, the judge found clear legislative recognition that the 2-year filing requirement involved was not inflexible. On this point, he found that the pertinent statute itself contained a provision for exception to the 2-year filing requirement. This is totally unlike the structure of EAJA, which has no provision for exception, as first recognized by the Board in *Monark Boat Co.*,

262 NLRB 994 (1982), enfd. 708 F.2d 1322 (8th Cir. 1983).

Also distinguishable from the instant case is *Brandt v. Hickel*, supra. In that case, the plaintiffs had filed an application for an oil and gas lease with the local office of the Bureau of Land Management. Based on its interpretation of a departmental decision, the local office rejected the application. The local office subsequently notified the plaintiffs that they could refile their application by deleting the objectionable part and without any loss of priority in terms of gaining the desired lease. Later, it was discovered that the local office was wrong on both points and the plaintiffs lost their priority. The court determined that the plaintiffs had been denied due process. In this respect, the local office's notice to the plaintiffs was deficient in that it failed to inform them that the rejection of their application adversely affected them while mistakenly telling them that their priority could be maintained by filing another application. The court determined that collateral estoppel could be applied and that the Secretary of the Interior could be bound by the local office's misinformation to the plaintiffs regarding the effect of a second filing.

A notable difference between *Brandt* and the instant case is that the former is concerned with the administrative regularity of a system of appeals created by the Secretary of the Interior. The immediate result of the estoppel in *Brandt* was not to enlarge the agency's statutory jurisdiction, but rather was to ensure that the Secretary's own appellate rules, which the Secretary had authority to make, were administered in a fair manner. Given these circumstances, we fail to see how *Brandt* can be relied on to extend our statutory jurisdiction under EAJA. More is at stake than merely the Board's administration of its own internal rules which are, in any event, not inconsistent with the plain language of Section 504(a)(2) of EAJA.

Accordingly, we conclude that equitable estoppel principles cannot be applied to enlarge the Board's jurisdiction under EAJA.

ORDER

The application of the Applicant, The Long Island Radio Company d/b/a All Shores Radio Company, Babylon, New York, for attorney's fees and expenses under the Equal Access to Justice Act is denied.

Alison C. Fairbanks, Stuart Weisberg, and Harold J. Datz, Esqs., for the General Counsel.
Harold Weinrich, Esq., of Baltimore, Maryland, and
Andrew A. Peterson, Esq. (*Jackson, Lewis, Schnitzler &*

Krupmen), of White Plains, New York, for the Applicant.

SUPPLEMENTAL DECISION

Equal Access to Justice Act

ROBERT T. SNYDER, Administrative Law Judge. This supplemental proceeding is before the National Labor Relations Board (the Board), for consideration of the "Application for Award of Attorney's Fees and Expenses," (the Application), filed by Respondent, the Long Island Radio Company, d/b/a All Shores Radio Corp. (Applicant), pursuant to the provisions of the Equal Access to Justice Act (EAJA), Pub. L. 96-481, Stat. 2325 and Sec. 102.143 et seq. of the Board's Rules and Regulations.

I. HISTORY OF THE PROCEEDING

On 16 October 1981 no statement of exceptions having been filed with it, and the time allowed for such filing having expired,¹ the Board issued an order adopting my findings, conclusions, and recommended Order undersigned as contained in my decision dated 27 August 1981 and dismissed the consolidated complaint.

After granting a request of Respondent extending the time to file the application to 23 November 1981 an application was filed on that date, and by Order dated 1 December 1981, the Board referred this matter to the me for appropriate action.

By a more than seven-page ruling on motions and order dated and issued 24 May 1982, I denied General Counsel's motion to dismiss the application, which relied, in part, on the claim that the fees and expenses were not recoverable because they were incurred prior to the effective date of EAJA,² granted the Applicant's motion to amend its application to include fees and costs incurred in the processing and litigation of the EAJA application³ conditioned on compliance with the Board's pleading requirements and authorized the filing within 10 days of an amended application during certain pleading defects, and including additional fees and costs incurred after 20 November 1981, the date of the Application, except any fees or costs incurred in amending the original application to comply adequately with the Board's Rules.⁴

¹ At the request of the Charging Party, the time to file exceptions and brief was extended to 5 October 1981.

² These rulings in principle have since been affirmed by the Board in *DeBolt Transfer*, 271 NLRB 299 (1984), in which it held that the award shall include pre-1 October 1981 fees and expenses incurred defending the unfair labor practice case and that the award shall include fees and expenses for time spent pursuing recovery of attorney's fees under the EAJA.

"Most courts which have considered the question have recognized the right to recover attorney's fees for the time spent litigating the fee issue itself, both to prevent the defendant from effectively defeating enforcement of the statute by erecting costly barriers to the fee recovery and to enable the court to make its determination of fees on the basis of a full examination of the facts" Berger, *Court Awarded Attorneys' Fees. What Is "Reasonable"?* 126 U. of Pa. Law Review 281, at 320, fn. 159 (1977)

³ See fn. 2

⁴ Pursuant to Sec. 102.153(b) of the Board's Rules and Regulations, this ruling and order, together with all other interlocutory rulings, amended applications, answer and amended answers, transcript of confer-

A first amended application was timely filed, which included a claim for certain fees incurred to date in pursuing the EAJA award. This was followed by the filing by the General Counsel of an answer and memorandum in support of an answer. In its answer, the General Counsel withdrew a prior objection to the Applicant's claim of eligibility by virtue of a net worth of less than \$5 million and employment of fewer than 5 million employees by Applicant and its affiliates and subsidiaries. The General Counsel denied that it was not substantially justified in issuing a complaint and proceeding to a hearing in the case, continued to press its objection to recoverability of fees incurred prior to 1 October 1981, EAJA's effective date, and fees related to the EAJA proceeding itself (although an objection was previously rejected by me), and pleaded that the amended application failed to sufficiently detail the specific services performed as required by Section 102.147(h) of the Board's Rules and that many of the fees and expenses claimed were excessive and unreasonable.⁵

On 16 July 1982 the Applicant filed a reply and motion for partial summary judgment on the issue of substantial justification. After noting that Section 102.144(a) places on the General Counsel the burden of proving that its position over which the Applicant has prevailed was substantially justified, the Applicant argued that the General Counsel had neither provided supporting affidavits to supplement the underlying record nor requested further proceedings on the question whether it was substantially justified, thus permitting decision on that issue, without a hearing, based on the facts in the record in the underlying proceeding. The Applicant supported its argument that the General Counsel had failed to satisfy its burden of proving that it was substantially justified in the underlying proceeding in a memorandum of law filed 2 August 1982, and accompanied this filing with a letter arguing that I had the authority and should exercise it to rule on this motion separately and apart from consideration of the issue of the amount of any award of fees and costs.

By memorandum filed 8 September 1982, the General Counsel opposed the motion, arguing, *inter alia*, that it was procedurally improper under the Board's EAJA rules, it lacked merit because issuance of the complaint was substantially justified, no fees were recoverable because, as of 1 October 1981, there was no "adversary adjudication" then pending since only the Charging Party and not the General Counsel had requested an extension of time beyond 1 October 1981 to file exceptions to the judge's decision and therefore there was no governmental prosecution as of the EAJA effective date, and, finally, "special circumstances" made an award of attorneys' fees unjust.

ence, other written submissions including legal memoranda and briefs, responses and replies, comprise the record in this proceeding which shall be forwarded to the Board for filing with the original of this decision

⁵ Issue was thus finally joined on the two matters in dispute—substantial justification and what fees, if any, are recoverable—although subsequent conferences, further amended pleadings including documentation and memoranda, served to sharpen and refine the differences between the parties

By letter dated 7 October 1982, and filed 8 October 1982, the Applicant filed a reply to the General Counsel's response to the Applicant's motion, responding to the arguments made by the General Counsel in its opposition to the motion. Ruling on the motion was reserved and shall be made in this supplemental decision.

By Order dated 5 November 1982, I convened a pre-hearing conference for 19 November 1982 to deal specifically with the issue raised by the General Counsel's answer denying the Applicant's entitlement to the fees sought and asserting that the claim to the fees lacked specificity, was excessive, and contained errors in itemizing and describing specific services on which the claimed fees were based.⁶ The Order required both parties to come prepared to make full disclosure and state positions, to enter stipulations, and narrow the issues so that a hearing on the issue of the reasonableness of the fees sought could be limited or avoided, but if a hearing proved to be necessary, it was set down for later that month.

As a consequence of the discussions that took place on 19 November 1982, the conference was continued on 30 November 1982 to be held on the record. On 30 November 1982 a lengthy stipulation was read into the record, memorializing an agreement entered into between the General Counsel and the Applicant pursuant to which Respondent would provide greater specificity and a more detailed statement of the fees sought in its first amended application and the General Counsel would have an opportunity to respond.

The 30 November 1982 transcript—a half hour and more than 14 pages in length—also contains my preliminary views that fees sought in connection with preparation of the data to be provided pursuant to the stipulation would be denied for the same reason that I previously denied fees sought in connection with the Applicant's preparation of the first amended application, although ruling was reserved pending full submissions by both parties. That reason was that the Applicant should not be rewarded for time spent and services performed in curing defects and inadequacies in complying with the Board's Rules and Regulations requiring that "The Application shall be accompanied by full documentation of the fees and expenses for which an award is sought." See Section 102.147(h) relating to the contents of the application and documentation of fees and expenses.⁷

On 7 January 1983 the Applicant filed its second amended application for attorney's fees, claiming a total of \$148,361.50 in connection with both the underlying unfair labor practice proceeding (\$125,506) and the in-

stant EAJA proceeding (\$22,855). Attached were 11 exhibits detailing billing and time records and specifying the dates, times by hour, and portions thereof, and nature of legal services performed by each of 25 attorneys and law clerks for whose services claim was asserted.

On 30 March 1983 the General Counsel filed its response to applicant's second amended application, disputing portions of the claim for fees as excessive and unreasonable on its face and that it also lacked sufficient specificity in certain areas. The General Counsel sought a considerable reduction in an award and, with respect to claims lacking sufficient specificity, a denial of the claim.

On 20 April 1983 the Applicant filed a memorandum of law in reply to the General Counsel's response.⁸

Subsequently, by letter dated 5 July 1983, the General Counsel now for the first time raised the issue that the Applicant was time-barred because of having failed to file its application within the 30-day statutory period, strictly construed by the Board in *Monark Boat Co.*, 262 NLRB 944 (1982), *enfd.* 708 F.2d 1322 (8th Cir. 1983), as a jurisdictional requirement.

Following a responsive letter dated 18 July 1983, from the Applicant, in a joint conference call I proposed the entry of a factual stipulation, which ultimately was prepared and entered by the parties on 12 and 17 August 1983, respectively. The stipulation set forth the facts relating to the Applicant's request and subsequent granting of that request, by Executive Secretary John C. Truesdale, on behalf of the Board, for an extension of time within which to file the original the application. By order dated 24 August 1983, I incorporated the General Counsel's 18 July 1983 letter motion and later submissions, including the stipulation, into the record in this proceeding, denied the Applicant's request for an evidentiary hearing as unnecessary in the absence of any dispute as to material issues of fact, and directed a briefing schedule on this newly raised issue.

Both parties filed memoranda of law in support of their respective positions, and by a more than 11-page ruling on motion and order dated 28 November 1983, I denied the General Counsel's motion to dismiss the application for an award of fees and expenses on the ground of untimely filing of the application, grounding this ruling on the law of the case and the equitable principle of collateral estoppel.

By letter dated 19 November 1983, the General Counsel responded to a request for such advice from the parties, that it would not seek special permission of the Board to appeal my ruling on motion and order, but would preserve its right to except thereto, if necessary, following issuance of this supplemental decision.

On further inquiry from the Applicant by letter dated 5 January 1984, by order dated 11 January 1984, I granted leave to the Applicant to further update its claim by filing a supplement to its second amended application to

⁶ The General Counsel in its answer also made a specific request, if warranted in the view of the judge, for a hearing, *inter alia*, whether the fees claimed represented productive worktime and as to their reasonableness.

⁷ I noted on the record my view that the first amended application had failed to comply with the specificity requirement of the EAJA and the Board's Rules, but that, in view of the stipulation, I found it unnecessary to so rule (Tr 13.) The Applicant also preserved its right to challenge its claimed failure to comply with the full documentation requirement, while at the same time, in a good-faith effort to expedite the proceeding, agreeing to provide the specification demanded by the General Counsel insofar as it could do so by reconstructing the details omitted from its retainer, billing, and time records.

⁸ By order dated 18 March 1983, I ruled, *inter alia*, that on the filing of the Applicant's reply, the proceeding in all its ramifications would be ripe for decision and, accordingly, no further submissions would be permitted. As will be seen *infra*, a further motion filed by the General Counsel, going to the jurisdiction of the Board to consider the merits of the EAJA claim itself, necessitated a limited departure from that ruling.

specify those services rendered in connection with the instant proceeding from 1 December 1982 to date, and leave to the General Counsel to respond.

On 14 February 1984 the Applicant filed a third amended application, adding \$41,561.50 to its claim. As a consequence, the Applicant now sought an award of \$64,416.50 for services rendered in connection with the EAJA proceedings to date, and an overall award (including services related to the underlying unfair labor practice proceeding) of \$189,923.⁹

The General Counsel responded to this third amended application in a response filed 6 March 1984, opposing certain portions of the added claim as unreasonable because they were duplicative, excessive, nonproductive, and improper and because they were curative of earlier failures to comply with statutory requirements.

II. THE ISSUE OF SUBSTANTIAL JUSTIFICATION

A. Standard to be Applied and Allocation of the Burdens of Proof

EAJA provides that an administrative agency shall award to a prevailing party certain expenses incurred in connection with an adversary adjudication, unless the agency finds that the position of the government was "substantially justified."¹⁰

The legislative history of the EAJA also makes clear that once the private party has demonstrated that it has prevailed in the litigation, the Government bears the burden of demonstrating that its position was substantially justified.¹¹ The courts have consistently recognized this principle. See, e.g., *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983); *S & H Riggers & Erectors v. O.S.H.R.C.*, 672 F.2d at 430 (5th Cir. 1982); *U.S. ex rel. Heydt v. Citizens State Bank*, 668 F.2d at 447 (8th Cir. 1982).

In its memorandum of law in support of its Reply and Motion for Partial Summary Judgment, the Applicant argues that "substantially justified" means that the Agency's justification for bringing the suit must be more than reasonable; it must be substantial. It cites in support *S & H Riggers & Erectors v. O.S.H.R.C.*, supra ("the case was nonfrivolous, that is, having some justification, merit or foundation."); *Wolverton v. Schweiker*, 533 F.Supp. 420, 424 (D. Idaho 1982) (The standard of "substantially justified" is "slightly above one based on reasonableness");

and *Spang v. United States*, 533 F.Supp. 220, 226 (W.D. Okla. 1982) (An Agency's action may not be deemed substantially justified where it "chose to gloss over" evidence which would have exonerated the applicant from the underlying charges).

The Applicant also relies on statements made during the congressional hearings on EAJA for its claim of a standard higher than "reasonable."

The General Counsel, in its memorandum in response to the motion for partial summary judgment, disputes this contention, pointing out that the subsequent committee reports in the House and Senate characterize the "substantially justified" standard as one of reasonableness:

The test of whether or not a government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis both in law and fact, no award will be made. [S. Rep. 96-253, 96th Cong., 1st Sess. at 6; H. Rep. 96-1418, 96th Cong., 2d Sess. at 10.]

The General Counsel also refers to the conference report which states that "[t]he test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact." [H. Rep. 96-1534, 96th Cong., 2d Sess. at 22.]

Only one of the three cases relied on by the Applicant is inconsistent with a standard of reasonableness. Of far greater significance is the fact that, after the Applicant filed its memorandum, the Board in *Enerhaul, Inc.*, 263 NLRB 890 (1982), reversed in other grounds, 710 F.2d 748 (11th Cir. 1983), resolved this issue by holding that the standard, in accordance with the legislative history of EAJA, is one of reasonableness in law and fact. The Board stated:

The legislative history of EAJA characterized "substantially justified" as a test of reasonableness, and further clarified that, "(w)here the Government can show that its case had a reasonable basis both in law and fact, no award will be made." [H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980), reprinted in 5 U.S. Code Con. & Ad. News 4984, 4989.]

The Board further commented in a footnote, "We do not . . . suggest that a finding that the General Counsel established a *prima facie* case is a prerequisite to finding the General Counsel's position reasonable in law and fact. We shall continue to analyze EAJA applications on a case-by-case basis. Id. at fn. 3.

In *Jim's Big M*, 266 NLRB 665 fn.1 (1983), the Board expounded further on the standard and its relation to the presence or absence of a *prima facie* case in the underlying unfair labor practice proceeding:

In its exceptions, Applicant Jim's Big M argues, in substance, that a failure of the General Counsel to establish a *prima facie* case should automatically entitle an applicant to an award under EAJA. Contrary to the Applicant's contentions, we find that

⁹ A 22 February 1984 letter from Applicant added \$345 related to an inadvertent omission of an additional 46 hours of services, thus increasing the EAJA award sought to \$64,761.50 and the overall award sought to \$190,268.

¹⁰ In 5 U.S.C.A. § 504(a)(1) the EAJA provides that an agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

Sec. 102.144(a) of the Board's Rules and Regulations, provides, in relevant part, that

An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified.

¹¹ H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10-11, 19 (1980), S. Rep. No. 253, 96th Cong., 1st Sess. 6, 21 (1979).

the presence or absence of a *prima facie* case is not determinative of whether or not an applicant is entitled to an EAJA award. Rather, the legislative history of EAJA states that the standard "is essentially one of reasonableness" and is not to be equated with "a substantial probability of prevailing," S.Rep. F96-253, at 6-7 (1979); H.R. Rep. No. 96-1418, at 10-11 (1980).¹²

In *Jim's Big M*, the Board had dismissed the complaint after the administrative law judge had found the evidence failed to establish a *prima facie* case based, in large part, on the absence of credited evidence of union animus by the Applicants. As the case thus turned on credibility, the Board concluded that the position taken by the General Counsel was reasonable under its *Enerhaul, Inc.*, standard.

The Board's further elucidation of the standard in *SME Cement*, 267 NLRB 763 (1983), is also enlightening. There, in commenting on the administrative law judge's correct description of the standard, the Board took care to note "that for the General Counsel's position to be substantially justified within the meaning of Sec. 102.144(a) of the Board's Rules and Regulations, the General Counsel must present evidence which, if credited by the fact-finder, would constitute a *prima facie* case of unlawful conduct by the Respondent." *Id.* at fn. 1.

The Board's standard has received approval not only in the Court of Appeals for the Eleventh Circuit (*Enerhaul, Inc. v. NLRB*, cited *supra*) but also in the Court of Appeals for the Seventh Circuit (*Temp Tech Industries v. NLRB*, 756 F.2d 586, 590 fn. 4 (7th Cir. 1985), and the Court of Appeals for the Fifth Circuit (*S & H Riggers & Erectors, v. O.S.H.R.C.*, 672 F.2d 426 (5th Cir. 1982)).

Spencer v. NLRB, cited *supra*, 712 F.2d at 560, further notes that "Sensitivity to the central objective of the [EAJA]—reduction of the deterrents to challenges of unreasonable government conduct—thus suggests that, in categories of cases in which substantial investments of effort and money commonly are required to prosecute suits to their ultimate conclusions, the government should be obliged to make an especially strong showing that its persistence in litigation was justified."

B. Application of the Standard and Allocation of Burdens of Proof to the Underlying Proceeding

It is clear that in the underlying proceeding the Applicant prevailed. The consolidated complaint alleged violations of Section 8(a)(1), (3), and (5) of the Act. The allegations included claims of discriminatory discharges of three named employees, Maura Bernard, Alan Duke, and Michael Devlin. The complaint also alleged a refusal to bargain arising from the Respondent's, now Applicant's, refusal to recognize the Charging Union, New York

Local, American Federation of Television and Radio Artists, AFL-CIO (Union), in an appropriate unit following the Union's request to bargain. The General Counsel's theory of violation of the bargaining obligation was grounded on the *Gissel* principle (*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)), that the Applicant's conduct was such, by virtue of its unlawful discharge of three unit employees and expressions of hostility to union organization, that the imposition of a bargaining order was warranted. The General Counsel, of course, also alleged that the Union represented a majority of the bargaining unit employees at the time of its demand.

Contrary to these allegations and relief sought, I found no merit to any of these claims and recommended dismissal of the consolidated complaint in its entirety. Since no exceptions were filed by any party (although the Union received an extension of time to file exceptions beyond the effective date of the EAJA—a matter which will be briefly discussed in the next subheading), the Board adopted my decision *pro forma*.

Regarding the next and central issue in this proceeding, I conclude that the the General Counsel has failed to sustain its burden of demonstrating that its position in issuing a complaint and in litigating the allegations made there was substantially justified.

The most compelling reason for reaching this conclusion, that the Government's case did not have a reasonable basis in either law or in fact, is that the Government failed to present evidence, although credited, which made out a *prima facie* case of unlawful conduct by the Applicant. *SME Cement*, cited *supra*.

The General Counsel relied on certain testimonial evidence showing knowledge by the Applicant of union involvement by employees and allegedly demonstrating anti-union hostility, to help establish its case for discriminatory discharge and the refusal to bargain. All of this evidence was credited and found by me, yet was held to be insufficient to establish a basis for concluding either that the discharges were discriminatory or that the Applicant refused to bargain in good faith.

Thus, I credited General Counsel witness Vickie King's controverted testimony that she had told Alissa Coates, secretary to the sales manager, in June 1979, the year in which the alleged violations occurred, the jocks were getting involved in a union. In this conversation King was credited in referring to Bernard, Devlin, and Duke's interest in organizing, although two others employees were named as most active. I also credited King's later declaration to Coates in mid-October 1979 that the d.j.s (disc jockeys) were bringing in a union. Coates did acknowledge in her later testimony on behalf of the Applicant that she had responded, as King had testified, she already knew and it was not going to do any good. King was further credited in her controverted testimony that after asking the receptionist in mid-November 1979, when a union demand letter addressed to Respondent was expected to arrive, she attributed to Coates the remark, "Don't worry, Sandra [personal secretary to Respondent's president and general manager Franz Allina] already knows about it."

¹² Compare *Spencer v. NLRB*, cited *supra*, 712 F.2d at 557, quoting from a passage of legislative history.

The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. 52 H.R. Rep. No. 1418, *supra* at 10-11, S. Rep. No. 253, *supra*, at 6-7, U.S. Code Cong. & Admin. News 1980, at 4889.

Significantly, I declined to credit Coates' denial that she refrained from passing along to Respondent any information about the Union she received from King. King was also credited, as against Allina's denial, that in her own exit interview, among other things, Allina told her he was bringing in a new staff and he felt she would not cooperate with it.

On another conflict in testimony, between King and Marty Curley, the program director, I concluded that, in fact, on 10 or 11 November, 1979, at the time of the alleged discriminatory discharges, Curley had commented when introducing a song called "Union City Blues" to be played over the air, "that's the story of what's going on around here."

In a conflict between dischargee Bernard on the one hand and Curley and employee Ucciardo on the other, I credited Bernard that in late October 1979, Curley responded to an employee inquiry about receipt of the Union's demand letter, "Oh the Union, oh yes, Frank [Franz Allina] and I have talked about that." Finally, I also credited Ucciardo, as against Curley's denial, that on 11 November 1979, shortly after the alleged discriminatory discharges, Curley told him to keep his nose clean and not to speak to anybody who had been discharged from the station. I further found that Ucciardo, a part-time employee fearful of his own status with the Respondent, "probably had more extensive discussions about AFTRA [with Curley] at the time the staff members' union interest was reviving and plans were underway for Ucciardo and Andres (the two employees who played the leading role in the employees' revived interest in union organization) to visit the AFTRA offices in mid-September. . . . The very extent of Ucciardo's friendship with Curley and reliance on Curley for advice, in spite of the general secrecy with which the d.j.s knowingly proceeded with their involvement, convinces me that Respondent had some advance word that the Union would be making a bargaining demand."

The foregoing recital establishes that whatever disputed evidence of union knowledge and alleged unions animus the General Counsel adduced on the record was credited.¹³ Neither the strictly limited evidence of union knowledge, generally, nor the extremely limited evidence of knowledge of the alleged discriminatees' union involvement, nor the ambiguous statements supposedly reflecting on union attitudes which, I concluded, could not support a finding of animus, were sufficient predicates for claiming discrimination in the dismissals of the three named employees. When coupled with the General Counsel's failure to explain the retention of a no less active union employee named Tortora, and evidence of

the secretive and vacillating nature of the employees' union interest, the only evidence which raises a suspicion of union causation for the discharges is their timing, coming 2-1/2 to 3 weeks after receipt by Respondent of the Union's bargaining demand and approximately the same or even a shorter time after filing of the RC petition.

But even this mere suspicion is swept away by the overwhelming evidence of Respondent's valid business reasons for the dismissal of the three named employees, among others, on which it commenced to act well before the employees renewed their union interest and surreptitiously signed cards and the Union contacted the Respondent and filed for an election:

Respondent's consideration of employee replacements, even of a wholesale nature . . . make clear that even before the announcing staff made tentative gestures toward organizing, the Respondent had made important managerial decisions which on their application, ultimately led to the replacement of the disc jockeys.

It is also apparent that during the hiatus in union interest over the late summer, particularly from late July to mid-September, Respondent took concrete steps to actively recruit replacements for the d.j.s, by advertising, soliciting applicants, renewing applicants' demo tapes and making inquiries as to their availability for permanent employment before actual offers were ultimately made. There is hardly any evidence to support the view that these activities were related to employee union interest, and an abundance of evidence to show their relationship to increasing dissatisfaction with d.j.'s on air performance and lack of cooperation with the new format.

These business grounds constitute a second compelling reason for concluding that the General Counsel had insufficient basis to issue or to prosecute the complaint. All Respondent's asserted and persuasive reasons for replacing many of its on-air staff were disclosed to the General Counsel by the Respondent during the postcharge and precomplaint investigation. As the General Counsel acknowledges at page 3 of its answer to application dated 22 July 1982, "the Respondent, (herein also referred to an [sic] 'The station' or 'the Applicant') *while otherwise cooperating in the investigation*, refusal to permit its officials to give sworn signed affidavits." [Emphasis added.]

Thus, the General Counsel does not dispute that all the facts relating to the Respondent's business defenses, viz, the timing of the decisions to replace the on-air d.j. staff, the reasons for doing so, including the ongoing review of on-air performances and critiques of each d.j. and the documentation which formed part of the basis for the reviews and critiques, as well as the substance of the meetings at which the d.j.s. were critiqued, were either made available to it or could have been if they had been requested.¹⁴

¹⁴ According to the Board's Casehandling Manual (Part One), Unfair Labor Practice Proceedings, evidence is only sought from the charged
Continued

¹³ The other items presented by the General Counsel as bearing on Respondent's antiunion animus, but not disputed by Respondent, were also noted in the decision. One, a 20 November 1979 letter from Allina to employees after filing of the union petition for certification in Case 29-RC-4756, urged rejection of the Union on the grounds, inter alia, that a union contract would restrict employee access to discuss problems and would make the employees subject to union rules, regulations, and financial obligations. The other item was testimony by an employee that in a group employee meeting held in December 1979, Allina reiterated his views that possible union contract restrictions on access except by way of shop steward and grievance procedures would interfere with employee-management working relationships.

A third, subsidiary ground for concluding that the General Counsel did not have a reasonable basis in law and fact for issuing complaint, at least on the 8(a)(5) allegation, is that, even apart from the lack of a majority in the bargaining unit arising from the failure of the cases of the three alleged discriminatees to rise to the level of a prima facie showing of violation,¹⁵ the General Counsel failed, in investigation, to consider or to include in the unit all employees who appear on-air in accordance with *Hampton Roads Broadcasting Corp. (WCH)*, 100 NLRB 238 (1952), the case which first laid out the principle that the separate community of interest among employees who regularly appear before the microphone warranted a finding that such employees constitute an appropriate unit apart from all other radio station employees.¹⁶

By excluding from the unit three employees, two regular part time and the third full time, who regularly render services before the microphone, none of whom executed union designation cards, the General Counsel was clearly in error in alleging in the complaint majority union support at the time of receipt of the Union's demand.¹⁷

In the consolidated complaint, the General Counsel alleged majority union designation and union demand as of 17 October 1979. That date was also erroneous, as the record showed the Respondent did not receive the Union's demand letter until 22 October 1979 at the earliest. As a consequence of this error, one employee, a union signatory, who quit on either 17 or 18 October could not conceivably have been included in the unit, thereby reducing by one the union designees among the employees.

The errors just enumerated, the failure to properly establish the date of the bargaining demand, and the failure

party when the charging party's evidence and leads point to a prima facie case, par 10056 4 of the manual. There is, of course, strong doubt that the charging party's evidence and leads suggested a prima facie case. On the record, I found otherwise. Furthermore, the manual also recognizes that not all respondent (or charged party) representatives will submit signed affidavits on interview and, when they are not forthcoming, memorandum should be prepared outlining the information disclosed and pertinent records and documents reviewed. Manual at secs 10056 7 and 10058 2.

¹⁵ If the date selected to measure the Union's majority designations in the unit is the date of Respondent's alleged unfair labor practices, 10 or 11 November 1979, the exclusion of the three alleged discriminatees further diminishes the Union's showing among even the more limited group of employees who comprised the unit as urged at the hearing by the General Counsel.

¹⁶ Recently, in *KJAZ Broadcasting Co.*, 272 NLRB 196 (1984), the Board departed from that principle where the facts show no readily separable community of interest among on-air employees. Of course, at the time of the underlying proceeding *Hampton Roads*, supra, was still the guiding law.

¹⁷ The General Counsel may have relied on the Respondent's position taken at the RC hearing in failing to consider or include the three additional employees in the on-air unit. At that hearing, the Respondent failed to mention the three employees, describe their duties, or take a position on their inclusion. This presumed reliance does not shield General Counsel from the obligation for purposes of investigating preliminarily to issuing an unfair labor practice complaint of assuring that its actions were reasonably based.

The General Counsel's weak assertion made in its posttrial brief that neither of the two regular part-time employees who should have been added to the unit appeared live over the air waves, also fails to raise its claim of majority designation to a reasonable level.

to properly prepare on the composition of the unit, all led to the Government's improper allegation of a refusal to bargain in good faith, with serious adverse consequences to Respondent. As the Applicant points out and includes in its moving papers, prior to hearing, the General Counsel sought a settlement from it including recognition of the Union as exclusive bargaining agent and an undertaking to bargain in good faith with the Union in the unit of employees who render services before the microphone. Were Respondent to have agreed to that settlement, it would have recognized a minority union and, further, would have reinstated and made whole three employees whom it had legitimately terminated from its work force. For all the foregoing reasons, the Applicant is thus in a strong position to claim fees under the EAJA for having undergone the financial burden of meeting at trial the Government's unreasonable claims advanced by it in the consolidated complaint.

One last point here is in order. During the hearing, in the presentation of its case, the General Counsel failed to take positions that might have strengthened its support of the allegations of the consolidated complaint. On the factual issue of the date of receipt by Respondent of the Union's bargaining demand, the General Counsel did not offer any evidence to clarify or aid in establishing the erroneous date it alleged in the complaint. The difference in dates affected the probable inclusion of one card signer. Although promised at the hearing, the General Counsel failed to supply any argument or case law in its posttrial brief on the issue of whether the discharged employees had engaged in protected concerted activities when they criticized the new music format. Without such presentation, the Government, already in a weak position, lost an opportunity to seek to convince me that the discharge of the three 8(a)(3)'s violations had some nexus to Respondent hostility to their opposition to the imposition of the new record playing policies, conduct which itself, it could have argued, warranted protection under Section 7 of the Act. While my conclusion was to the contrary, the General Counsel presented me with no argument that might have given cause for additional thought. The General Counsel failed to prepare a proper foundation for the introduction of a document—employee Ucciardo's written comments about conversations he had with Manager Curley immediately following the alleged unlawful discharges—which would have corroborated and thereby strengthened the testimony I did receive and credit relating to this matter. Finally, the General Counsel failed to properly and timely move to amend the consolidated complaint to allege the conversation alluded to as violative of Section 8(a)(1) of the Act.

The foregoing failings in trial presentation reinforce the conclusions I have previously reached that the Government here unreasonably proceeded to prosecute a complaint, which its own witnesses failed to sustain and which Respondent cooperation in the pretrial phase showed clearly lacked any merit. Accordingly, I also now grant Applicant's motion for partial summary judgment on the issue of substantial justification on which ruling had been reserved.

III. THE GOVERNMENT'S CLAIM THAT NO
ADVERSARY PROCEEDING WAS PENDING ON 1
OCTOBER 1981

The General Counsel argues in its papers that because only the Charging Union sought an extension of time beyond the effective date of EAJA, 1 October 1981, to file exceptions, the Government, was not pursuing an adversarial claim against the Respondent when the EAJA became effective.¹⁸ This argument lacks merit and the General Counsel's motion to dismiss the application premised on it is hereby denied.

Nothing precluded the General Counsel from filing exceptions after the effective date of the EAJA. The extension, granted at the Union's request, was available to all parties to the proceeding. Furthermore, nothing would have prevented the General Counsel from filing cross-exceptions after the Union's filing of exceptions by 5 October 1981.

In any event, by issuing complaint, the General Counsel set in motion a whole set of legal procedures, which ultimately led to the pendency of the proceeding which was instituted without final Board determination after the effective date of EAJA. The General Counsel cannot claim lack of participation in a proceeding it had sole authority to commence and which it never abandoned before or after 1 October 1981. If the General Counsel had wished to avoid the implications and impact arising from the EAJA at the time the Charging Union sought its extension to file exceptions, it could have advised all parties of that implication in an effort to convince the Charging Union, for example, that an extension to file exceptions, keeping alive the proceeding beyond 1 October 1981 without final Agency determination and not exercising the privilege of actually filing exceptions, subjected it to the risk of a possible EAJA award. There is no evidence that it did so. The General Counsel could also have opposed the grant of an extension for the reason cited, among others. Again, it did not do so.

Finally, any exceptions the Charging Union might have filed would have permitted the Board to review all matters and issues raised by the exceptions, examine the record, and issue a decision resolving the basic question of whether to sustain in whole or in part the General Counsel's complaint, thus, extending the adversary adjudication in which the General Counsel was the prosecuting party, beyond 1 October 1981.

For the foregoing reasons, I also conclude that the General Counsel has failed to show "special circumstances" within the meaning of 5 U.S.C.A. § 504 (a) (1) (see § quoted at fn. 10, supra), which would serve to render an award of legal fees unjust or inappropriate as argued by the Government at pages 7-8 of its 7 September 1982 memorandum filed in response to Applicant's motion for partial summary judgment and other pleadings.

¹⁸ As noted earlier, one of the predicates for an award under the EAJA is that there be an "adversary adjudication" conducted by an agency of the Federal Government. See fn. 10 supra.

IV. REASONABLE ATTORNEY FEES

A. *The Underlying Unfair Labor Practice Proceeding*

1. Applicant's second amended application

In this document, Applicant claims the following hours, hourly rates and fees for legal services performed by the following lawyers, law clerks, and summer associates (law students):

Name	Hours	Rate	Fees
Mark L. Sussman, Partner and Lead Counsel	697.0 ¹⁹	\$75	\$52,275.00
Philip B. Rosen, Associate and Second Counsel	331.6	70	23,212.00
Arthur R. Kaufman, Partner	508.9	75	38,167.00
Neil M. Frank, Partner	24.5	75	1,837.50
Thomas P. Schntzler, Partner	6.5	75	487.50
William A. Krupman, Partner	3.3	75	247.50
Roger S. Kaplan, Partner	2.4	75	180.00
Steven S. Goodman, Associate	9	75	67.50
Robert E. Patterson, Law Clerk	29.0	75	2,175.00
Jo-Anne P. Morley, ²⁰ Law Clerk	12.0	70	840.00
Harold R. Weinrich, Associate	9.7	70	679.00
Andrew A. Peterson, Law Clerk	5.0	75	375.00
Paul J. Siegel, Associate	4.6	70	322.00
Nicholas J. Taldone, Associate	4.5	75	337.00
Berenice V. Figueredo, Law Clerk	4.0	70	280.00
Richard J. Curiale, ²¹ Law Clerk	3.0	75	225.00
John V. Nordlund, Associate	1.0	70	70.00
William Peters, Summer Clerk (student)	.3	70	21.00
Christopher C. Antone, Summer Clerk (student)	48.8	40	1,952.00
Michael Shapiro, Summer Clerk (student)	6.0	40	240.00
David F. Jasinski, Summer Clerk (student)	5.2	40	208.00
Karen Kurose, Summer Clerk (student)	4.0	40	160.00
Seamus M. Tuohey, Summer Clerk (student)	4.0	40	160.00
	2.0	40	80.00

¹⁹ This figure represents a reduction in hours claimed of 115 to correct an error in computation and a reduction of 14 hours representing services directly related to the EAJA proceeding.

²⁰ The submission fails to specify whether Morley became admitted as an attorney in 1980 before or after her services were performed on 15 August of that year.

²¹ Again, the submission is unclear as to whether Curiale was admitted to practice when he performed these services on 12 August 1980.

Name	Hours	Rate	Fees
Summer Clerk (student)			
Total			\$123,919.00

The Applicant has provided evidence that this amount was billed to it and the General Counsel does not dispute that Applicant has incurred services in the underlying proceeding for which it has incurred charges in the amount claimed.

Neither does the General Counsel dispute the hourly rate claimed for any lawyer, law clerk, or summer clerk (student), nor does it claim that the reconstructed detailed records prepared by Applicant's counsel do not reasonably relate to the original time and billing records on which they are based. See *Lindy Bros. Builders v. American Radiator Corp.*, 382 F.Supp. 999 11011 (E.D. Pa. 1974), vacated and remanded on other grounds 540 F.2d 102 (3d Cir. 1976) ("Lindy - D.C.").

The General Counsel raises a number of objections to the fees sought. Each of these shall be briefly discussed and then disposed of in turn.

In a memorandum in response to Applicant's motion for partial summary judgment and other pleadings, the General Counsel argues that Applicant unduly prolonged the hearing. It cites the fact that although involving three discharges and a bargaining order, the hearing took 12 days with Applicant, alone, calling seven witnesses, many of whom testified at length about facts already in the record. Applicant also engaged in lengthy direct and redirect examination of its witnesses and protracted cross-and re-cross-examination of the General Counsel's witnesses. The record thus exceeded 2500 pages. Applicant also submitted a 120-page posthearing brief.

The Government's claim here relates to Section 504(3) of the EAJA which provides, in pertinent part, that: "The adjudicative officer of the agency may reduce the amount to be awarded . . . to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy."²²

I have reexamined the record and am unable to agree with this contention. The Government called 10 witnesses over 5-1/2 days of hearing. Their examinations, with other matters, totaled over 900 pages of records. It was prudent for Respondent to make every effort to present, in turn, as strong a case as it could justifying the discharges and changes in on-air personnel grounded in management's business judgment. To do so, it called, among other witnesses, Respondent's vice president and general sales manager, the programming consultant who recommended and then participated in the process of introducing the new programming format and the critiquing of and ultimate decisions to replace on-air staff; the program director; and the president and general manager.

The testimony of these witnesses was substantial and extensive. Because each of them had participated in

meetings dealing with the Respondent's economic fortunes and with planning and implementing the radio station's revised format and the role of the on-air staff in seeking to make the format a success, it was natural to key on these individuals in presenting Respondent's defense. While reasonable men might differ about the necessity of getting a picture of the station's operations and problems from every possible perspective and describing the decision-making process that evolved in replacing staff who proved to be ineffective from every witness who participated, I am not about to conclude that in defending itself in a case of this nature, Respondent acted irresponsibly in presenting such a thorough defense. A case that might have concluded in 10 or 11 days rather than 12,²³ does not evidence an unreasonable protraction of the proceeding. Neither did Respondent's lengthy brief unduly prolong the decision making process. Respondent's care in arguing and presenting its case proved to be most helpful to me in isolating issues, making credibility resolutions, and analyzing the record and the relevant case law. Indeed, in spite of the length of its brief, Respondent also failed to deal with the issue on which aid was specifically sought, dealing with whether employee protests against the format constituted protected concerted activity. If it had done so, its brief would have been even longer.

Neither can I fault the extensive nature of the cross-examination of the General Counsel's witnesses when motive, union knowledge, animus, employee competence, loyalty, and adherence to a new record playing format for on-air performers were all subjects warranting exploration.

As the judge's decision was also not unduly delayed, having issued less than 11 months after close of hearing, I conclude that the Government's claim lacks merit.

In its response to Applicant's second amended application, the General Counsel objects to various categories of fees claimed in the underlying proceeding.

Section 504(b)(1)(A) of the EAJA defines the fees which may be awarded as follows:

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of \$75 per hour unless the agency determines by regulation that an increase in the cost of living or a special

²² Sec 102 144(b) of the Board's Rules tracks this language, providing that "An award will be reduced . . . if the applicant has unduly or unreasonably protracted the adversary adjudication"

²³ Two of the days were very short in duration because of problems in scheduling witnesses. In fact, the trial consumed not more than 10 full trial days, with a few going into the evening hours.

At least one extensive Respondent witness was called out of sequence on the agreement of all counsel in an effort to expedite the proceeding

factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)

Section 102.145 of the Board's Rules and Regulations provides, with respect to allowable fees and expenses:

Sec. 102.145 Allowable fees and expenses.—(a) Awards will be based on rates customarily charged by persons engaged 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.

(b) No award for the attorney or agent fees under these rules may exceed \$75 per hour. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or expert witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the following matters shall be considered:

(1) if the attorney, agent, or expert witness is in practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) the prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services;

(3) the time actually spent in the representation of the applicant;

(4) the time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudicative proceeding; and

(d) The reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of an applicant may be awarded to the extent that the charge for the service does not exceed the prevailing rate of similar services and the study or other matter was necessary for preparation of the applicant's case.

The Board has rejected a number of attempts to exercise its rule-making authority to increase the hourly fee above \$75 an hour. See *Stephens College*, 268 NLRB 1035 (1984); *International Maintenance Systems*, 262 NLRB 1 (1982); *Allied Lettercraft Co.*, 262 NLRB 2 (1982).

The General Counsel first asserts that the case presented a relatively simple 8(a)(1), (3), and (5) proceeding. Thus, the total hours claimed, in excess of 1500, appears inordinately high. I do not agree that the Government's characterization is accurate. No 8(a)(1), (3), and (5) case is "simple." The issues in the underlying unfair labor practice case were varied and complex. For Respondent, each discharge case presented a separate set of facts that had to be analyzed particularly with respect to the validity of its business defense and the competency and adherence to company policy of each employee, in a field of endeavor certainly out of the ordinary industrial or business setting. The various indicia of factors normally reviewed to determine the presence or absence of a prima

facie showing of discrimination had to be evaluated and analyzed. In particular, the unit issue required the marshalling of evidence by Respondent to show the nature of the work performed by all employees claimed to be part of the unit and the cases relied on to warrant their inclusion. While credibility was ultimately decided adverse to Respondent's position, it would have been remiss of Respondent to have failed to marshal all evidence at trial and in argument on which it relied in seeking to sustain its position as to the truthfulness of its witnesses' testimony denying statements evidencing union knowledge, hostility, and motive attributed to them. Respondent was justified in demonstrating at length the degree to which it went in seeking replacement employees for the alleged discriminatees, among others, over a number of months, prior to their termination, and the facts relating to that effort. Finally, the Government's prayer for unusual relief presented Respondent with the arduous task of seeking to minimize the extent of its alleged unlawful conduct and overcoming the claim of majority designations at the time of its receipt of the Union's bargaining demand, so that the reviewing authorities, myself as judge, and then the Board, as reviewing agency, would not be disposed to grant a *Gissel* bargaining order.

The Government next disputes the claim for fees incurred prior to the issuance of complaint. On this matter I am disposed to agree that no such fees are recoverable, as they were not incurred "in connection with [an adversary adjudication]" in the words of the statute and the Board's Rules. See fn. 10 supra.

In *Debolt Transfer*, cited supra, Administrative Law Judge Robert W. Leiner rejected a claim for fees and expenses incurred prior to the date of issuance of the complaint. He noted, among other things, that the General Counsel has no power to file charges thereby initiating a Board investigation and therefore no control over the incurring of expenses in the investigative, nonadjudicatory phase of the case. Furthermore, as Judge Leiner also noted, precomplaint legal fees are ordinarily expended whether or not complaint issues, thus they are not incurred "in connection with" the adversary proceeding. And where such services are most successful, in avoiding issuance of complaint, no fees are recoverable. The Board in *Debolt Transfer*, supra, affirmed Judge Leiner's rulings, findings, and conclusions as modified and adopted his recommended Order, although it did not comment separately on Judge Leiner's rejection of precomplaint claims as it did with respect to its affirmation of his allowance of both pre-1 October 1981 fees and expenses incurred defending the case and for time spent preparing and prosecuting the application for attorney's fees. Nevertheless, it is clear that the Board rejected recovery of precomplaint services and I am compelled by logic and precedent to agree.²⁴

²⁴ The Applicant's citation of administrative law judge's decisions in *Columbia Mfg Corp.*, 265 NLRB 109 (1982), and *Haynes-Trane Service Agency*, 265 NLRB 958 (1982), both reversing the judge's on other grounds, have no precedential value whatsoever.

These services, totaling 60.1 hours of work performed by attorneys Sussman, Weinrich, Frank, and Krupman and representing \$4507.50 of the fees sought, shall be deducted from the amount recommended here. They reflect hours spent on investigation of both the 8(a)(1) and (3) charge and, later, the 8(a)(1) and (5) charge, prior to issuance of the two complaints.

The General Counsel next disputes fees sought in connection with settlement discussions, meetings, conferences, research, and document preparation. In particular, the General Counsel objects to fees incurred as a result of Applicant's efforts to reach private settlements with the alleged discriminatees. Respondent/Applicant's efforts resulted in the payment of moneys in exchange for the execution of general waivers and releases by each of the three discharged employees.

In the judge's decision, at fn. 39, I deemed it unnecessary to decide whether, as urged by Respondent, these waivers barred relief for the dischargees inasmuch as I had recommended dismissal of their cases. I nonetheless concluded that in any event these negotiations between Respondent and the individual dischargees, not involving the Charging Union or the General Counsel, could not interfere with the public remedies available to the claimants under the Board proceeding, relying on the clear precedent of *Ideal Donut Shop*, 148 NLRB 236 (1964), enf'd. 347 F.2d 498 (7th Cir. 1965).

My decision on this matter, however, is not the equivalent of finding that Respondent's efforts in this regard, once it determined that it could not agree to the Region's terms of settlement, including reinstatement and a *Gissel* bargaining order, were so arbitrary as to warrant exclusion of services performed in furtherance of these individual settlements, from recovery of reasonable attorney fees under an EAJA award. It is doubtful whether the individual negotiations would have constituted unfair labor practices, even independent 8(a)(5) violations, but no such conduct was charged or litigated.

Respondent counsel's efforts here, like its other services designed to minimize its client's liability under the Act, were fully consonant with its overall legal effort in defending against the consolidated complaint.

Further, the fact that Respondent would not have prevailed on this issue had it been necessary to decide it, does not lessen the validity of the claim. As held by the court in *Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624, 626 (6th Cir. 1979), in interpreting a statute similar to EAJA, the Civil Rights Attorney's Fees Awards Act of 1976:

This approach [of the District Court, in cutting a fee award to a "prevailing party" where plaintiff had not prevailed in some issues or parts of issue] is not proper under the Fees Awards Act. The question as to whether the plaintiff have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiff's favor, they are entitled to recover attorney's fees for "all time reasonably spent on a matter" The fact that some of the time as spent in pursuing issues on research which was ultimately unproductive, rejected by the Court, or

mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions are frivolous or in bad faith.

Although the standard for recovery of fees differs under the EAJA, the underlying rationale expressed here is persuasive, makes eminent good sense, and I follow it here.

Surely, "Courts should be wary of interfering too deeply on the strategic judgments made by a litigator. Time should be disallowed only if it reflects duplication, padding, gross overstaffing, or if it was spent on clearly frivolous claims." Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 University of Pa. Law Review 281, at 320 (1977).

I also conclude, contrary to the General Counsel's claim, that the hours claimed for work performed in connection with the private settlements, 55 hours in whole and 1.8 hours in part,²⁵ are not excessive in terms of the case involved.

The General Counsel further questions the time spent by lead counsel Sussman and his associate counsel Rosen in preparing outlines of witnesses' examinations, both of Applicant's, and to a more limited extent, the General Counsel's. The total hours claimed are 114.6 in whole (\$8595) and 79.5 in part (\$5962.50). In some cases, the information provided by Applicant fails to show which witnesses' examination outlines were being prepared. Also, in a number of instances, for example that of planned examination of Program Director Martin Curley, both Sussman and Rosen combined spent 42.6 hours in whole and 19.5 hours in part, preparing it.

Curley's testimony consumed 2 to 3 days. Given that fact alone, I do not deem this time excessive. The General Counsel further argues that on this preparation for trial, among other phases of work, in which the Applicant has failed to specify in further detail the particulars concerning the nature of the work, the claim should be denied.

Section 102.147 (h) of the Board's Rules requires that:

(h) The application shall be accompanied by full documentation of the fees and expenses for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the dates and the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The administrative

²⁵ Hours spent "in part" reflects the fact that in some instances, a block of time was shown on Applicant's breakdown as attributable to more than one particular activity, such as research and witness preparation

law judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

I do not interpret this Rule as requiring an Applicant to do more than this Applicant has now done, generally,²⁶ in preparing its second amended application. When work in a particular period of time covered more than one category of work and even when the identity of the particular witness prepared remains unclear, a rule of reason must prevail. As noted by the Court of Appeals for the District of Columbia Circuit:

The sound administration of justice requires a balanced, informed approach to fee awards accomplished in reasonable time without turning such matters into a full trial. In light of the broad policy objectives [of] Congress . . . attorneys must not be deterred from engaging in this type of work by the prospect of protracted litigation over reasonable demands for compensation. *Nor should the zeal of government counsel be permitted to require applicants to expend substantial additional time supporting fee claims which will only result in a request for more compensation for these additional labors.*

National Ass. of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1329 (D.C. Cir. 1982) (emphasis added) (“Concerned Veterans”).

See also *Lindy Bros. Builders v. American Radiator Corp.*, 540 F.2d 102 (3d Cir. 1976) (*Lindy II*) (“It was not and is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps even dwarfing the case in chief. Once the district court determines the reasonable hourly rates to be applied, for example, it need not conduct a minute evaluation of each phase or category of counsel’s work.”) *Id.* at 116.

In *Lindy Bros. Builders v. American Radiator Corp.*, 487 F.2d 161, 167 (3d Cir. 1973) (*Lindy I*), the Third Circuit specifically stated that “[i]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney.” *Id.* at 167 (Emphasis added.) Rather, what is needed is “*fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations and the hours spent by various classes of attorney, e.g., senior partners, junior partners, associates . . .*” *Id.* (Emphasis added.) Accord: *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (*Copeland III*); *Concerned Veterans*, *supra*, 675 F.2d at 1327; *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42, 54 (D.C. Cir. 1982) (*EDF v. EPA*). The second amended application contains more than 100 pages of information which reasonably comports with the requirements set down in such decisions as *Lindy I*, *Lindy II*, and *Concerned Veterans*. I conclude that this Application is sufficiently detailed and adequate-

ly documented to permit me to make an independent determination as to the justification for the hours claimed.

As to witness preparation, the General Counsel asserts that the time involved, 156 hours, representing \$11,700 in fees, is excessive on its face. Further, the General Counsel asserts some of this work was duplicative, e.g., both Sussman and Rosen having spent different days preparing witness Curley. Finally, the Government notes, again, that some of the time claimed, 34.2 hours in whole and 49.9 hours in part, fails to identify the witness prepared.

I am not prepared to find this work excessive, in light of the serious and complex nature of the proceeding as previously described (See Sec. 102.145 (c)(4) of the Board’s Rules, *supra*), the absence of any pretrial discovery mechanism under existing Board procedure and the degree of expertise of the lawyers representing applicant, established both by the uncontested affidavits submitted with the amended application as well as the reputation this firm enjoys at the labor bar and the extensive nature of their labor and Board practice of which I may take official notice, *S.E.C. v. Kelly, Andrews & Bradley*, 473 F.Supp. 645 (S.D.N.Y. 1976); *Opie v. Meacham*, 293 F.Supp. 647 (C.D. Wyo. 1968).

Although the two latter factors are not specifically included as factors to be considered under the Board’s Rules, the former is reasonably related to the time actually spent in the representation of the applicant, a factor included at Section 102.145(c)(3) of the Board’s Rules, because, I conclude, in agreement with the Applicant, as argued in its memorandum of law in reply that the absence of any discovery mechanism placed a greater burden on Applicant in terms of preparation naturally reflected in the hours spent in preparing witnesses for trial. As to the latter factor, rather than calling for reduction in time as argued by the General Counsel at, e.g., page 19 of its response, I also conclude that this factor is directly related to the reasonableness of actual hours expended, Board’s Rule Sec. 102.145(c)(3), and note, in agreement with Application’s contention in its memorandum of law in reply that more qualified and expert counsel will take greater care in preparing witnesses and will exercise greater skill in uncovering issues and analyzing the case and its defenses, which, in the ordinary course, will also naturally consume a greater amount of time.

All three of these factors, I also conclude, have weighed heavily in my conclusions with respect to the reasonableness of multiple counsel at trial and the time reasonably spent in preparing Respondent’s posttrial brief. However, as this was a relatively complicated case and multiple attorney’s services were utilized, in order to minimize the possibility of duplicative, overlapping, or padded claims, I will follow the lead of appellate courts which have discounted the total hours claimed by a small percentage and in this case reduce the fee allowed by 10 percent. Thus, in *Northcross v. Board of Ed.*, cited *supra* at 636-637 the court noted that “hours may be cut for duplication, padding, or frivolous claims. In complicated cases, involving many lawyers, we have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate

²⁶ To be sure, claims may be legitimately contested, when on specific categories of work, for example, the documentation may prove to be inadequate. See, e.g., the discussion, *infra* as to the claim for services in researching a proposed motion to me never ultimately made.

duplication of services. *Oliver v. Kalamozoo Bd. of Educ.*, 576 F.2d 714 (6th Cir. 1978). Such an approach seems preferable to an attempt to pick out, here and there, the hours which were duplicative."

I also conclude that the General Counsel has failed to show that merely because Curley (and Allina) were prepared for trial by two different attorneys, the two counsel were engaged in duplicative work. In light of the nature of the proceeding and relief sought by the Government, and the factual support for the work provided by Applicant, I conclude that Applicant has met its initial burden of adequately documenting its claim here and that the Government has not met its burden of contesting the award on this issue. As stated by the court in *Concerned Veterans* at 1337-1338 of the concurring opinion of Tam, Circuit Judge:

The burden of proof is, of course, on the applicant and remains with the applicant throughout the proceedings. The initial burden of proceeding is also on the applicant. The applicant meets this burden by submitting an application accompanied by the sufficiently detailed supporting documentation contemplated by Copeland and clarified by our opinion today. The burden of proceeding then shifts to the party opposing the fee award, who must submit facts and detailed affidavits to show why the applicant's request should be reduced or denied. Just as the applicant cannot submit a conclusory application, an opposing party does not meet his burden merely by asserting broad challenges to the application. It is not enough for an opposing party simply to state, for example, that the hours claimed are excessive and the rates submitted too high.

Neither broadly based, ill-aimed attacks, nor nit-picking claims by the Government should be countenanced. District courts should examine with care the "issues" raised by opposing parties. If they appear to be more in the nature of a blunderbuss attack than a precise and well-founded challenge, the Government has failed to carry its burden, and assuming that plaintiff has met his threshold burden, the fees requested by plaintiff should be awarded.

However, as noted, this claim, as all others, will be discounted by 10 percent.

The Government's further claim as to lack of specification is denied, again because Applicant has met its initial burden under *Concerned Veterans*, supra, and *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980), by sufficiently detailing the time devoted to preparation of witnesses, and the General Counsel has failed to show with facts and/or specific, detailed argument analyzing those facts that preparation of other witnesses, not named, or preparation of multiple witnesses on the same day, without breaking down the time devoted to each, was unreasonable. In the example the General Counsel provides at pages 10-11 of its response, the witnesses named, other than Curley and Allina, to wit, Robert Buchman, Tony Michaels, and Alissa Coate, each proved to be important in the presentation of Respondent's defenses, in its attempts to meet the evidence of alleged

animus, union knowledge, and marketability of the station's musical format which the General Counsel sought to show in the presentation of its case in chief. The total time devoted to all named witnesses on the days in question was also not unreasonable.

I am prepared to deny the General Counsel's objection to recovery of fees for preparation for trial engaged in by both Sussman and Rosen, for the reasons previously stated. Objection is also raised to claims made on behalf of four others for preparation for trial: Partners Harold Weinrich and Arthur Kaufman and associate John Nordlund and clerk JoAnne Morley. Contrary to the General Counsel's assertion, Kaufman entered an appearance on behalf of Respondent and participated at counsel table on the first 2 days of hearing, 30 June and 1 July 1980. His claim is supported and documented and shall be allowed. Weinrich did not participate in the trial, and without an adequate explanation for his involvement in this phase, I will disallow the 2.0 hours (\$150) so allocated. Nordlund did not participate in the trial, and again, without an adequate explanation, his .3 hour (\$21) is also disallowed. Morley's claim for 2.6 hours of preparation, as well as 7.1 hours of participation in trial, both on 15 August 1980, shall be allowed. At the time, she was a law clerk, although admitted to practice sometime in 1980. Her appearance at trial represented only a second counsel for Respondent on that date, along with Sussman. As I have earlier indicated, but now hold, Respondent acted reasonably and responsibly in assigning two counsel to trial of the underlying proceeding (but only two), and Morley's appearance on 15 August to assist Sussman at counsel table is well within reasonable limits and her preparation and trial participation shall be compensated.

With respect to conferences, the Government's claim that conferences among counsel should be disallowed because of the "vast wealth of labor law experience" of Applicant's attorneys is rejected. Apart from the point earlier made, that experienced and sophisticated counsel will likely consult and plan strategy on more issues and in greater depth than would routine counsel, their time will also likely be far more productive than would be that of an attorney or law firm with less expertise. See *Northcross v. Board of Ed.* cited supra at 637. Conferences held, particularly among or between partners, will tend to have the salutary effect of sharpening issues, more precisely defining positions and strategy, and therefore, aiding the trier of the facts in expediting the trial and the decision, and making the trial process more productive and efficient.

The Government's ground of objection that the Board's Rules contemplate awards for only one attorney because Section 102.145(b) speaks in the singular is unworthy of comment. As for the Applicant not specifying the subject matter of the conferences, this was not generally the case. Conferences on trial and settlement strategy and the possibility of 10(j) injunctive relief, between partners and with another lawyer and clients related to the nature of the issues and possibilities of settlement, appear in the documentation. Where specification is lacking I nonetheless conclude conferences were held on

germane matters and were not an unreasonable expenditure of time.

I have already determined that a claim for two counsel at trial was reasonable and, accordingly, reject the Government's contention to the contrary.

Concerning the General Counsel's contention that trial attendance time has been inflated beyond the hours during which the trial was held, I agree that the Applicant's claim for 1 July 1980 is inflated, but by 1 hour, not 3.1 hours as contended. My review of the trial minutes show the hearing on 1 July 1980, excluding the 50-minute luncheon recess, was held over 6.05 hours (or 6.1 hours) as against the claim of 7.1 hours. I will reduce the claim in this regard of Sussman and Kaufman, each, by 1.0 hour.

I will also subtract 2.3 hours from Sussman's claim of 4.3 hours and 4.3 hours from Rosen's claim of 6.3 hours, both for participation in the approximately 2-hour trial session held on 2 July 1980. This session was extremely short because a scheduled General Counsel witness failed to appear and no others were then available. At the conclusion of the session an adjournment sine die was granted to permit enforcement of a subpoena for witness attendance by the General Counsel.

Turning to the General Counsel's objections to time claimed for research, I again express disagreement with its characterization of the case as not particularly difficult. The Government was seeking a particularly serious and comprehensive remedy—a bargaining order which has been the subject of enumerable litigations. Whether, assuming the Government established the Respondent's liability on the three discharge cases, such a remedy was warranted, was a prime subject for extensive research. So, too, were the multitude of questions surrounding each discharge case, the inclusion of certain employees in the bargaining unit, and the date to determine majority status, among other legal issues. Again, experienced and sophisticated counsel of the nature of the counsel representing Respondent would reasonably spend more time researching issues that might not have been considered or noted by inexperienced or less experienced counsel. The Applicant's counsel were also within reasonable parameters in assigning some of this work to law student clerks (summer associates) whose hourly charge of \$40 was slightly more than half permitted the hourly charge of the attorneys assigned to the case. These charges shall be affirmed.

On the brief submitted to me, I found it to be of excellent calibre and most helpful in the preparation of my decision. The care and skill taken in its preparation was well worth the effort, even with respect to those portions dealing with credibility resolutions. Although I rejected Respondent's arguments for crediting its witnesses when credibility conflicts appeared, their presentation proved helpful to me in weighing and ultimately deciding those questions. The legal arguments on unit, indicia of discriminatory motive, and business justification for the discharges, including extensive case citations and application of these cases to the facts, were invaluable.

The time spent in reading and analyzing the transcript and exhibits appears to have been reasonable—a pace of 280 pages over an 8 hour day is not unduly slow or inef-

ficient, especially given the nature of this case. Neither was the time spent in drafting, revising, and redrafting the brief ill spent, excessive, or unreasonable. The General Counsel has failed to show by either facts or close analysis that the claim made here should be disallowed. The paucity of its argument that the claim should be limited to preparation of an adequate or acceptable brief when the high stakes in this case justified preparation of a superior brief is apparent. All charges related to its preparation, including discussions and conferences among counsel during its preparation, are fully warranted and shall be approved.

I do agree with the General Counsel that certain claims for document preparation which fail to specify the document prepared should be disallowed. Without describing the document, the General Counsel is in no position to comment or adequately meet the claim. Accordingly, the 5.2 hours claimed for law student Michael Shapiro on 26 June 1980 shall be disallowed. Sussman's claim for 2.7 hours in preparing two letters to Applicant shall be allowed. A lawyer must, of necessity, be able to consult periodically with his client, with respect to the nature of the services being performed. Such time shall be treated like any other compensable service. These letters, not otherwise identified, are no exception.

The General Counsel's objections to services in preparing a motion for a bill of particulars and petitions to quash subpoenas are rejected. Contrary to the General Counsel's assertion, Respondent did not lose on the merits of the motion for a bill of particulars. My review of the transcript shows that on certain demands included in the motion, I directed the General Counsel to provide the requisite information see, e.g., Tr. 15, 17, 18, 19, 20, and 22 (transcript of underlying proceeding). In any event, as I have ruled earlier, even if Respondent's motion had been denied in full, Applicant would be entitled to recovery of fees incurred in its preparation. *Northcross v. Board of Ed.*, supra.

There is also no question that Respondent did not assert its objections to the subpoenaed materials in bad faith or as frivolous gestures. They were asserted seriously, and the rulings I made rejecting them appear at Tr. 1294 to 1300 of the underlying proceeding. Thus, the preparation of the petitions to quash also constitutes time reasonably expended in this matter. *Northcross v. Board of Ed.*, supra. The time devoted to all of these motions was not excessive.

Concerning the time listed by Applicant in furtherance of "motions prepared, but not made," totaling 37.5 hours in whole (\$2812.50) and 4.8 hours in part (\$360), I agree with the General Counsel that it should not be compensated. Whether it was unproductive, as claimed by the Government, is unclear. What I find decisive here is that without describing the nature of the motion or motions under consideration, the Government does not have the requisite minimum information necessary to determine whether to make a rational objection to the claim as excessive or unproductive and I do not have the necessary information on which to base a rational judgment or ruling. The Applicant having failed to provide sufficient detail to permit either a reasoned attack or an independ-

ent determination whether the hours claimed are justified, they shall be disallowed. *Concerned Veterans*, supra at 1326.

With respect to certain miscellaneous items that the General Counsel contests, I do not agree that requests for extensions of time to file documents or postpone hearing or brief should be uncompensated. They are part and parcel of a lawyer's work and also may, in the particular circumstances, provide the time necessary to better prepare a document or better prepare for resumption of hearing. The Government must be aware that, assuming fees are otherwise recoverable, all services that went into the successful defense against its prosecution will be calculated and totaled if not subject to some infirmity, not here apparent.

The preparation of a trial book was certainly productive, and the time (12.7 hours) which went into its preparation as well as organizing files will be compensated. The Applicant sufficiently described the "trial book," page 4 of exhibit 7 attached to its second amended application,²⁷ so as to overcome the General Counsel's objection on the ground of lack of specificity.

Nowhere in the second amended application do I find time attributable to meals and travel. The General Counsel's objection to such a request is accordingly rejected. I do not decide whether such time is recoverable.

Any time attributable to the representation proceeding will be disallowed as not arising in the unfair labor proceeding. The 3.5 hours in whole (\$262.50) sought are therefore rejected.

B. The EAJA Proceeding

1. Applicant's second amended application

In this document, Applicant claims the following hours, hourly rates, and fees for legal services performed by the following lawyers, law clerks, and summer associates (law students):

<i>Name</i>	<i>Hours</i>	<i>Rate</i>	<i>Fees</i>
Andrew A. Peterson, Associate and Co-lead Counsel	246.8	\$75	\$18,510.00
Harold R. Weimrich, Partner and Co-lead Counsel ²⁸	36.5	75	2,737.50
Roger S. Kaplan, Partner	9.5	75	712.00
Dolores Gehhardt, Law Clerk	16.0	40	640.00
Roger P. Gilson, Associate	1.4	75	105.00
Philip B. Rosen, Associate	.7	75	52.50
William A. Krupman,	.6	75	45.00

²⁷ The Applicant described the book as including pleadings, outlines of expected testimony of company witnesses, key cases in areas of the law expected to be an issue, etc. It appears to be akin to a trial brief, a document whose preparation constitutes an excellent preparation for a trial.

²⁸ Since July 1982

<i>Name</i>	<i>Hours</i>	<i>Rate</i>	<i>Fees</i>
Partner			
Add 1.4 hours at \$75 per hour erroneously included in breakdown for services performed in underlying proceeding			105.00
Total.....			\$22,907.00

The General Counsel's opposition to this fee does not include any attack on the fact that the Applicant has incurred charges in the amounts claimed.²⁹ Neither does the General Counsel dispute the hourly rates claimed nor the correspondence between the breakdowns of time included in the second amended application and the hours for which Applicant has either been billed or for which original records of time spent have been compiled.

Consistent with my interlocutory ruling denying fees for time spent in amending the original application to comply with the Board's Rules, see section I, paragraph 3, I will disallow the 11.5 hours (\$862.50) claimed by Andrew Peterson for preparing the first amended application in order to comply with my 24 May 1982 Order, as well as the .6 hours (\$45) claimed by Roger S. Kaplan for conferring with Peterson regarding my order at the time Peterson prepared the amendment.

In its response, the General Counsel questions the time devoted to research, 87.5 hours in whole (\$6002.50) and 52.0 hours in part (\$3900), by the persons named. Its contentions that the time is excessive and duplicative is rejected. This was a new law, requiring extensive research. Furthermore, the Government cannot have it both ways. By vigorously litigating the Applicant's claimed entitlement to fees the Government cannot both raise multiple issues seeking to block recovery and, at the same time, claim that the Applicant's responses to this effort do not warrant compensation. Indeed, the Government can claim credit here for increasing the compensable and reasonable fees incurred in the EAJA proceeding. As noted by the court in *Copeland III*, 641 F.2d at 888, in relation to the time generated in the underlying proceeding, but which comment is equally applicable to the nature of the litigation in the EAJA proceeding itself:

While the Secretary now suggests that there were really no serious issues at stake, this is not borne out by the facts. The litigation went forward in a relatively civilized manner but it was hard fought. The Government offered firm, persistent resistance throughout the litigation.

²⁹ A contingent fee arrangement was worked out between Applicant and counsel pursuant to which the Applicant would, unless successful, be invoiced for only one-half of the usual hourly rates of the attorneys principally responsible for the EAJA proceeding. That fee arrangement is not attacked by the General Counsel and should not adversely affect recovery in light of Sec 102.145 (a) of the Board's Rules that permits awards based on rates customarily charged "even if the services were made available without charge or at a reduced rate to the Applicant."

A later comment by the same court directly related to the fee proceeding itself is particularly apt:

Because time spent litigating the fee request is itself compensable, the depth of the inquiry ironically might lead to an *increase*, rather than a diminution, in fee awards. [Id. at 896.]

It is well to note here that the reduction in fees by a factor of 10 percent to minimize the possibility of duplicate or padded claims applies equally to the claims in the EAJA proceeding and the underlying case.

I reject the Government's objections to the 9.3 hours in whole and 13.5 hours in part devoted by multiple counsel to preparation of the original application, in view of the necessity of counsel to familiarize themselves with a newly adopted statute and Board Rules and their effort to prepare an application that would be dismissal proof. Even so, the General Counsel prepared and filed a motion to dismiss the application asserting a number of deficiencies in its preparation.

I find the time (13.7 hours in whole and 5.1 hours in part) spent on a 7-page letter response to the General Counsel's response to Applicant's motion for partial summary judgment a reasonable expenditure of time, contrary to the General Counsel's claim that the time was excessive. That letter was, in essence, a memorandum of law in response to the General Counsel's opposition to its motion that I dispose of the issue of substantial justification on the papers filed before turning to the issue of the fees. The Applicant's motion presented a well thought out approach to handling this matter as a two-step process and warranted serious consideration. Although I did not grant the request to dispose of the substantial justification issue separately, the Applicant's motion warranted the fee claimed, and is not separately contested in the Government's response to the second amended application.

The General Counsel's response to the motion for partial summary judgment not only dealt with claimed procedural defects in the bifurcated procedure the Applicant advocated in its motion but also made for the first time or reiterated defenses to the EAJA application itself, including substantial justification, special circumstances exist rendering an award of fees unjust, recovery of fees improper because no adversary adjudication as of the EAJA's effective date, no basis exists for recovery for fees incurred prior to the Act's effective date, undue prolongation of the hearing warranting reduction in fees, and prohibition of fee recovery in the EAJA proceeding. The Applicant was thus compelled to respond to each of these defenses, and did so in a letter brief which was economical and taut in its construction and presentation and worth the fee incurred.

Two other contentions disputing time devoted to document preparation, that by grouping several activities within the same block of time listed for an individual attorney, the General Counsel cannot sort out the time devoted to each, and fee requests for extension of time to file documents are unreasonable, are both rejected. I conclude that respective to the former contention, the Applicant provided sufficiently detailed summaries of serv-

ices reconstructed from its original billing and time records so as to meet its burden of presentation in this matter, see cases cited and quoted at supra, and I conclude as to the latter contention, it was the Government by its vigorous litigation of the issues which led to the request for extension of time and that such requests, in any event, are part and parcel of a lawyer's services that may be recovered as reasonable if the claim is otherwise valid.

I further reject the Government's objection to fees sought related to conferences held between counsel for the reasons previously stated.

I reject summarily the General Counsel's objection to participation in the informal conference held on 19 November 1982 by two of Applicant's counsel, noting that the General Counsel appeared by two counsel at the meeting that day. I finally reject the objection to 5-plus hours Attorney Peterson devoted to reviewing my nine page ruling on motions and order dated 4 May 1982. Among other matters dealt with, that Ruling required Applicant to take certain steps promptly if it wished to continue to make claim for services in this proceeding at the risk of dismissal of its application. The time Peterson devoted to a close reading and study of its ramifications was reasonably related to a successful prosecution of the EAJA application.

2. Applicant's third amended application³⁰

In this document, applicant claims the following hours, hourly rates, and fees for legal services rendered by the following lawyers:

<i>Name</i>	<i>Hours</i>	<i>Rate</i>	<i>Fees</i>
Andrew A. Peterson, Associate and Co-lead Counsel	457.2	\$75	\$ 34,290.00
Harold R. Weinrich, Partner and Co-lead Counsel	57.4	75	4,305.00
Philip B. Rosen, Associate	12.6	75	945.00
Christopher C. Antone, Associate	13.4	70	938.00
Mark L. Sussman, Partner	12.4	75	930.00
Roger S. Kaplan, Partner	3.7	75	277.50
Donna R. Tsamis, Associate	2.3 .3	70 75	161.00 22.50
William A. Krupman, Partner	.6	75	45.00
Neil M. Frank, Partner	.5	75	37.50
Total.			\$ 41,951.50

This claim, like the earlier ones, is not disputed in terms of the charges for which Applicant has been billed, the hourly rates of counsel, or the fact that the claims

³⁰ Applicant's request to modify the award sought to include 4 6 hours inadvertently omitted from the third amended application is granted.

are based on the time and billing records of counsel which have been incorporated in the Application and each amendment thereto.

The General Counsel again claims the fees sought are unreasonable, excessive, and not sufficiently detailed. I do not agree and, again, for the reasons I have previously stated respecting these same objections made to the second amended application. As an example of the Government's erroneous objection to a so-called lumped-together claim, it disputes Peterson's claim for 3.5 hours incurred on 11 March 1983 when he "Reviewed General Counsel's Answer; reviewed cases on reasonableness of attorneys' fees; outlined Applicant's Reply to the General Counsel's Answer." It would clearly be unreasonable to require a further breakdown of the time which meets Applicant's pleading burden, particularly when Applicant is reconstructing allocations of time from billing and time records almost a year old. Greater precision is not required by the EAJA, the Board's Rules or the cases previously cited and quoted at length and the Government's attack here fails to satisfy its burden of showing any of this time to be unreasonable or excessive.

An attack on Attorney Kaplan's claim for .9 hours incurred on three separate dates for a "conference" and "research regarding legal standards governing fee application and awards" because allegedly insufficiently explained also fails for the same reasons.

Turning to the Government's renewal of its contention that fees incurred in preparation of the second amended application are not recoverable, I agree, and will reduce the fee award recommended by the 113.1 hours in whole (\$8418.50) and 36.9 hours in part (\$2767.50) spent compiling billing information and drafting the document and the 3.2 hours in whole (\$237) and 27.4 hours in part (\$2055) spent discussing the document's preparation at conferences and in telephones calls. This ruling confirms the opinion I stated preliminarily at the continued conference held on the record on 30 November 1982, and for the reasons there stated. See section I, paragraph 10. This denial of recovery penalizes Applicant for failure to comply with the Act's and Rule's requirements, even though if Applicant had timely and initially complied with the pleading and specification standards, this time would have been fully recoverable. I am not convinced by Applicant's argument that a portion of this time should be recovered or that deductions should be made from earlier submissions only. In this ruling, I do not adopt the General Counsel's arguments that this time represents either duplication of work or is particularly excessive or represents a reconstruction of billing records,³¹ but rely solely on the contention that it would be improper to reimburse Applicant for time spent by its counsel in correcting an inadequate application under the statute. In so ruling, I recognize Applicant's reservation of its right, to contest, on appeal, my statement on the

record of the conference that its first amended application did not conform to the Board's specification requirements, and to challenge the degree of specificity requested by the General Counsel. See footnote 6, supra.

In its response to the third amended application, the General Counsel next attacks the claim for fees based on Applicant's preparation of its memorandum of law in reply to the General Counsel's response to the second amended application. The General Counsel asserts that because the memorandum of law was necessitated by Applicant's failure to comply with the pleading requirements of EAJA of specifically detailing the services performed, no recovery should be allowed. I do not agree. As the prior two sections of this supplemental decision (IV, A,1 and IV, B,1) make clear, the General Counsel's response to the second amended application placed in issue a whole host of objections to fee recovery of the services detailed in the second amended application which warranted Applicant in responding by way of its memorandum of law. Indeed, by my Order dated 18 March 1983 I overruled the General Counsel's opposition to the Applicant's request for an extension of time for filing its reply to the General Counsel's response to the second amended application. Noting that as that amended Application "constitutes a factual pleading relating solely to the reasonableness of the legal fees sought . . . to which the General Counsel has now responded with both factual and legal contentions, and to which Applicant should have the opportunity of replying by way of legal memoranda, in accordance with both the wording and spirit of the Board's Rules and Regulations, in particular Section 102.150 thereof, "I granted the requested extension to file a Reply."

The Government's further attack on the size of the fees claimed in preparing its memorandum in Reply is also rejected. The General Counsel's response was 24 pages long, with a 9-page attachment. They made detailed and specific arguments contesting the fees on numerous and varied grounds. The Applicant was well within reasonable limits in taking care in research and in framing its replies to these arguments and in submitting a 42-page legal memorandum containing three exhibits attached. Its arguments were cogent and knowledgeable and helpful to me in resolving the numerous issues presented. Particularly apt here is the comment of the U.S. District Court for the Southern District of N.Y. in *Richardson v. Civil Services Commission of the State of New York*, 449 F. Supp. 10, 11-12 (1978):

This Court finds more persuasive the argument advanced by plaintiffs and accepted by other courts that absent a showing of frivolity or bad faith a court engaged in measuring the fairness of fees sanctioned by the statute should not judge the strategic wisdom of every litigational tactic used or employ omniscient hindsight to expand or contract an award by a standard "requir[ing] attorneys (often working in new or changing areas of the law) to divine the exact parameters of the court's willingness to grant relief."

³¹ As acknowledged by the court in *Concerned Veterans*, supra, 675 F.2d at 1326-1327, "the better practice is to prepare detailed summaries based on contemporaneous time records indicating the work performed by each attorney for whom fees are sought." This is precisely what Applicant ultimately and belatedly did, as well as including submission of the actual time and billing records. See *EDF v. EPA*, cited supra, 672 F.2d 42 at 54.

The General Counsel disputes the fees sought in connection with the preparation of Applicant's response to the General Counsel's additional motion of dismissal. This was the motion which raised, for the first time, more than a year and a half after the filing of the application, the issue of timeliness of the application. The General Counsel calls this issue "relatively uncomplex." To the contrary, it was thorny, difficult, and complex, and, on my part, called for the deepest research and thought I was called on to make in this whole litigation. My ruling on motion and order exceeded 11 legal size pages, double-spaced and cited and analyzed a number of Supreme Court of the United States decisions in the course of making my ruling denying the relief sought. It was not unreasonable for Applicant's counsel to spend the time it did, at least 116 hours, possibly another 124, in research, drafting, and conferencing on Applicant's response.

Attorney Weinrich's time devoted to drafting a three page letter to me relating to the stipulation of facts I proposed and Applicant's fear that only a hearing would provide the kind of record necessary to resolve the issues raised by the General Counsel's motion on jurisdiction (timeliness) was not unreasonable under all the circumstances I have discussed and I will allow it. Again, requests for extensions of time which I find did not unduly delay the proceeding but which probably made the Applicant's presentations more effective and incisive are fully compensable.

Finally, the conferences among Applicant's counsel, in line with my earlier rulings on these objections, were, in my review, not excessive, were productive, and contributed to a sharpening of issues and better quality in presentation which in turn resulted in a more efficient and productive conclusion to the litigation before me, and I shall grant the fees requested for the time claimed.

Conclusion

On the basis of the foregoing, the Applicant is entitled to recovery as legal fees the following amounts:

I. The Underlying Unfair Labor Practice Proceeding			
A. Fees Claimed	\$123,919.00		
B. Fees Disallowed	8,795.50		
	\$115,123.50		
C. 10% Reduction	11,512.35 ^{m,s,n}		
D. Fees Allowed	\$103,611.15	\$103,611.15	
II. The EAJA Proceeding			
A. Second Amended Application			
1. Fees Claimed	\$22,907.00		
2. Fees Disallowed	907.50		
	\$21,999.50		
3. 10% Reduction	2,199.50		
4. Fees Allowed	\$19,800.00	\$19,800.00	
B. Third Amended Application			
1. Fees Claimed	\$41,951.50		
2. Fees Disallowed	13,478.00		
	\$28,473.50		
3. 10% Reduction	2,847.35		
4. Fees Allowed	\$25,628.15		
Total Fees		\$149,039.30	

It is, therefore, my recommended³²

ORDER

That Applicant be awarded \$149,039.30 pursuant to its EAJA application, as amended.

³² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.