

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

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

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

Respectfully submitted by:

ROY SPA, LLC

By: Michael E. Avakian

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

August 29, 2016

TABLE OF CONTENTS

TABLE OF CASES. iii

I. INTRODUCTION. 1

II. QUESTIONS PRESENTED. 1

III. STATEMENT OF THE CASE. 3

 A. Complaint Allegations. 3

 B. Stipulations. 4

 C. The Motion in Limine. 4

 D. The General Counsel’s Opening Statement. 5

IV. STATEMENT OF FACTS. 5

 A. Background Facts. 5

 1. Background. 6

 2. Jurisdictional Allegations. 6

 3. The Dress Code Issue. 8

 B. Judge Marchionese’s Findings. 10

V. ARGUMENT. 12

 1. The ALJ Failed to Consider the Statutory Requirements for Evaluating Claims under the EAJA. 12

 2. The Judge Failed to Examine the Entire Record for Facts and Evidence that Show No Substantial Justification for the Underlying Basis in Fact for the Allegations in the Complaint and the Litigation of the Case Once the Facts Became Clear. 15

 a. There Was No Dress Code Change as Alleged. 17

 b. There Was No Change in Commission Rate for Cosmetologists. 18

 3. The Board’s Remand for Consideration of the Case as a Whole Invited the ALJ to Not Consider the General Counsel’s Case as a Whole. 21

 4. The Judge Failed to Explain Why Jurisdiction Under the National Defense Standard was Not Included in His “Inclusive Whole” Review. 26

 5. The Judge’s Determination that the Substantive 8(a)(5) allegations against Roy Spa were Substantially Justified is Not Supported by the Record. 28

6.	The Assertion of a New Allegation by the Judge of Dress Code “Enforcement” Which was Never Asserted by the General Counsel in the Complaint Shows the Complaint was Not Substantially Justified.	32
7.	The Commission Rate Change for Cosmetologists was Not a Term of Employment for Bargaining.	35
8.	The ALJ Erred in Failing to Account for the Lack of A Representative Complement of Employees Before An Obligation to Bargain Forms.	36
9.	The Judge Failed to Properly Account for the Expiration of the Section 10(b) Statute of Limitations for Asserting a Refusal to Bargain Claim When Assessing the Lack of Substantial Justification for the Complaint.	42
10.	The Section 10(b) Limitations Period Barred the Complaint Allegations Upon Respondent’s Repudiation of Any Union Obligations.	44
11.	An Award of Fees Should be Made Under EAJA in This Case.	50
	CONCLUSION.	50

TABLE OF AUTHORITIES

CASES

<u>A & L Underground in Vallow Floor Coverings, Inc.</u> , 335 N.L.R.B. 20 (2001).	47, 48
<u>Authorized Air Conditioning Co. v. NLRB</u> , 606 F.2d 899 (9th Cir. 1979).	31
<u>CitiSteel USA, Inc. v. NLRB</u> , 53 F.3d 350 (D.C. Cir.1995).	30, 37, 38
<u>Elmhurst Care Center</u> , 345 N.L.R.B. 1176 (2005).	40-42
<u>Environmental Def. Fund v. Watt</u> , 554 F.Supp. 36 (E.D.N.Y. 1982).	13
<u>Exxon Chem. Corp. v. NLRB</u> , 386 F.3d 1160 (D.C. Cir. 2004).	46
<u>Fall River Dyeing & Finishing Corp. v. NLRB</u> , 482 U.S. 27 (1987).	11, 29, 36, 37, 42
<u>Fort Knox Constr. Co.</u> , 112 N.L.R.B. 140 (1955).	27
<u>Fort Sam Houston Beauty Shop</u> , 270 N.L.R.B. 1006 (1984).	28
<u>Glesby Wholesale, Inc.</u> , 340 N.L.R.B. 1059 (2003).	12, 25
<u>Golden State Bottling Co. v. NLRB</u> , 414 U.S. 168 (1973).	30
<u>Harter Tomato Products Co.</u> , 321 N.L.R.B. 901 (1996).	37
<u>Hensley v. Eckerhart</u> , 461 U.S. 424 (1983).	50
<u>Ladies Garment Workers v. NLRB (Bernhard-Altmann)</u> , 366 U.S. 731 (1961).	40
<u>Local Lodge 1424, Machinists v. NLRB</u> , 362 U.S. 411 (1960).	43, 45-48

<u>Lorance v. AT & T Technologies, Inc.</u> , 490 U.S. 910 (1989).	46
<u>NLRB v. Burns Int’l Security Serv., Inc.</u> , 406 U.S. 272 (1972).	29, 36, 37, 42
<u>NLRB v. Fant Milling Co.</u> , 360 N.L.R.B. 301 (1959).	43
<u>NLRB v. Katz</u> , 369 U.S. 736 (1962).	29
<u>NLRB v. Local Union No. 46, Metallic Lathers</u> , 727 F.2d 234 (2d Cir. 1984).	30
<u>NLRB v. Metropolitan Life Insurance Co.</u> , 380 U.S. 438 (1965).	33
<u>National Resources Defense Council v. EPA</u> , 703 F.2d 700 (3d Cir. 1983).	14
<u>O K Barber Shop</u> , 187 N.L.R.B. 823 (1971).	5, 24, 28
<u>Pentagon Barber Shop, Inc.</u> , 255 N.L.R.B. 1248 (1981).	24, 28, 29
<u>Pierce v. Underwood</u> , 487 U.S. 522 (1988).	12, 50
<u>Precision Striping, Inc. v. NLRB</u> , 642 F.2d 1144 (9th Cir. 1981).	31
<u>Regal Knitwear Co. v. NLRB</u> , 324 U.S. 9 (1945).	30
<u>Spencer v. NLRB</u> , 712 F.2d 539 (D.C. Cir. 1983).	13, 16, 18, 22
<u>Western Area Housing Co.</u> , 107 N.L.R.B. 1263 (1954).	27

STATUTES AND REGULATIONS

5 U.S.C. §504(a).	12
5 U.S.C. §504(b)(b)(E).	13
29 U.S.C. §160(b).	2, 44, 49

LEGISLATIVE MATERIAL

H.R. REP. NO. 99-120(I),
99th Cong., 1st Sess. 1985, 1985 WL 47108 (1985) 13

RESPONDENT'S BRIEF TO THE BOARD

INTRODUCTION

The Board has determined in Roy Spa LLC's first Exceptions to the ALJ's ruling on Roy Spa's Application for fees under the Equal Access to Justice Act, 5 U.S.C. § 504 *et seq.* ("EAJA"), that Roy Spa is the "prevailing party." Roy Spa, LLC, 363 N.L.R.B. No. 183 n.16 (2016). In its review of those Exceptions, the Board agreed the ALJ failed to consider whether the "General Counsel's litigation position as an inclusive whole" was substantially justified. Id. Slip op. at 5. The matter was remanded to the Chief Administrative Law Judge for reassignment because ALJ Marchionese had retired in the interim. Id. n.3.

Chief Administrative Law Judge Giannasi assigned the case to himself. But see id. n.1 (reassignment from chief judge to another judge). He received the General's Counsel's response to Roy Spa's Application for fees and Roy Spa's Reply on July 5, 2016. No hearings were held. The Supplemental Decision and Order issued seven days after Roy Spa filed its Reply Brief. JD-66-16 (July 12, 2016).

QUESTIONS PRESENTED

1. Whether the ALJ erred in failing to find the General Counsel's inability to produce any evidence to show his "litigation position" alleging Roy Spa had "a substantial impact on national defense" for asserting national defense jurisdiction, was not substantially justified under the EAJA.
2. Whether the ALJ erred in failing to find that the General Counsel's litigation position in pursuing two alleged refusals to bargain over changes in terms and conditions of employment claims against Roy

Spa, were not substantially justified because the changes occurred more than six months beyond the Section 10(b) statute of limitations period of repudiation of any bargaining obligations with the Union. 29 U.S.C. § 160(b).

3. Whether the ALJ erred in failing to find the General Counsel's litigation position was not substantially justified when he pursued an alleged change in dress policy (no wearing jeans) when wearing jeans was prohibited in extant written policies of both Roy Spa and AAFES.
4. Whether the ALJ erred in failing to find the General Counsel's litigation position was not substantially justified when he alleged a change in initial wage rates for cosmetology positions never employed by Roy Spa at Malmstrom AFB or been part of the former unit of barbers previously represented by the Union.
5. Whether the ALJ erred in failing to find there was no substantial justification for the General Counsel's complaint as an inclusive whole.
6. Whether the ALJ erred in failing to award attorney's fees and cost of \$96,569.55 as set forth by Roy Spa in its Supplemental Affidavit.

III. STATEMENT OF THE CASE

The Complaint was filed on June 18, 2012. GC1(a).¹ It alleges violations of Sections 8(a)(1) & (5) of the Act, GC1(e). The Complaint is based upon facts about Roy Spa's operations debunked by the ALJ Marchionese in his Decision on the

¹"GC" refers to General Counsel exhibits. "R." refers to Respondent's exhibits. "Tr. " refers to the transcript pages from the hearing. "[name]" refers to the name of the witness.

merits, JD(ATL)-18-13.²

A. Complaint Allegations.

1. Successor. The Complaint alleges Roy Spa was a successor to The Old Fashioned Barber. Complaint ¶2(d).

2. Purchases and Receipts. The Complaint alleged that Roy Spa “purchased and received at both Malmstrom Air Force Base Montana and Elgin Air Force Base Florida facilities, products, goods, and services in excess of \$5,000 directly at each location from points located outside the States of Montana and Florida, respectively.” Complaint ¶2(e) (emphasis added).

3. Services. That Roy Spa “provided services valued in excess of \$5,000 to points located outside the State of Virginia.” GC19.

4. National Defense. That Roy Spa’s hair cutting services “had a substantial impact on the national defense of the United States.” Complaint ¶2(f)

5. Commerce. That Roy Spa has been engaged in commerce within the meaning of the Act. Complaint ¶2(g).

6. Company Policies. That Roy Spa reduced commission rates on July 19, 2012, for “hair care services” and implemented a dress code. Complaint ¶¶ 8(a) & (b).

7. Bargaining. That Roy Spa has refused to bargain in good faith with the Union. Complaint ¶7.

8. That Roy Spa violated the Labor Act as the Company’s actions

²Due to the commonplace nomenclature for the two Supplemental Decisions issued by the two ALJs in this case, Roy Spa will generally discuss the findings of each by naming the ALJ.

allegedly “affect commerce” within the meaning of Sections 2(6), 7, and 8(a)(1) and (5) of the Act, Complaint ¶7-8.

B. Stipulations. The parties ‘stipulated and agreed” on several facts during the hearing. The Stipulation was received by the ALJ as GC2, to wit:

- “1. Respondent is a Virginia limited liability entity and does business at Fort Huachuca Army Base in Arizona, Dyess Air Force Base in Texas, Eglin Air Force Base in Florida, and Hanscom Air Force Base in Massachusetts.
2. On July 12, 2011, Respondent was awarded a five-year contract to provide Family Haircare Service at Malmstrom AFB, located in Montana. Respondent has operated pursuant to that contract since on or about September 1, 2011.
3. Between the dates of January 1, 2011, and December 31, 2011, Respondent had gross income of \$421,028; as reported in Respondent's Federal tax filings for that year, the most recent year for which a filing is available.
4. By this stipulation General Counsel moves to amend the relevant time periods in the pleadings, where necessary, to correspond to the January 1, 2011, and December 31, 2011, period referenced above. The Charging Party and Respondent do not oppose this motion.
5. Upon the approval of this Stipulation by the Administrative Law Judge, it may be admitted, without objection, as Board Exhibit 2 in the Hearing scheduled for this case. Upon admission, General Counsel withdraws paragraphs 1, 3, 6, and 7, of its January 28, 2013, subpoena duces tecum issued to Respondent.”

C. The Motion in Limine. Roy Spa presented two written motions prior to calling witnesses. The first, R1, requested that counsel for the General Counsel specify the bases for jurisdiction over Roy Spa under the national defense standard. The second motion, R2, requested that the hearing be bifurcated to decide whether sufficient evidence to establish jurisdiction since Roy Spa did not meet the \$500,000

retail establishment threshold for commerce jurisdiction in O K Barber Shop, 187 N.L.R.B. 823 (1971).

Both motions were denied. ALJ Marchionese determined to hear the evidence on all aspects of the case. Tr. 15.

D. The General Counsel's Opening Statement.

The General Counsel made an opening statement to outline the theory of jurisdiction in his case. His argument at pages 19-20 of the Transcript, with emphasis, is:

“The complaint alleges Respondent is a successor, consistent with the Supreme Courts decision in Burns International Security Services and subsequent Board decisions. The complaint also alleges Respondent *unlawfully refuses to bargain with the union regarding changes in commission rates and a dress code unilaterally made after moving to the new Exchange facility last year*, almost a year after assuming the contract.

The unusual context of the instant case also relates to the other issue before you regarding jurisdiction. The complaint asserts the Board has jurisdiction over Respondent under the national defense standard. Respondent denies this assertion, as we heard this morning, but *the evidence will demonstrate that as the only provider of regulation haircuts on a large military base, Respondent does have a substantial impact on national defense*, consistent with the Board's decision involving other civilian service providers on military bases.”

No evidence was introduced to support any of the four asserted jurisdictional allegations in the Complaint, *i.e.*, purchases and receipts, ¶2(e), services, GC19(written amendment to complaint), national defense, ¶2(f), and commerce, ¶2(g).

III. STATEMENT OF FACTS

A. Background Facts.

1. Background. The Stipulation establishes Roy Spa was awarded a contract by the Army and Air Force Exchange Service on July 12, 2011, to operate a family hair center on September 1, 2011, on Malmstrom Air Force Base, Great Falls Montana. Roy Spa inquired of AAFES's contract officer Debra Meiers before bidding on the contract, whether a union contract covered the solicited operations and was informed there was none.

AAFES is not an agency of the United States. Tr. 194 ll.16-17. AAFES is a non-appropriated fund activity that operates as a nonprofit organization. It uses no tax dollars in its business. Tr. 253 ll.18-19; 255 ll.8-10, 14-15, 256 ll.4-6. Counsel for the General Counsel produced no evidence to dispute AAFES's operations on Malmstrom or at any other location.

2. Jurisdictional Allegations. The parties' entered into the previously identified Stipulation "regarding some of the disputed jurisdictional facts." Tr. 148 l.22. It was received into evidence, tr. 147 ll.5-10.

The Stipulation shows that Roy Spa "had gross income of \$421,028; as reported in Respondent's Federal tax filings for that year, the most recent year for which a filing is available." Stip. ¶3. The Stipulation further established itself as an agreement of the Parties to an unopposed motion to amend to the Complaint to plead "the relevant time periods in the pleadings, where necessary, to correspond to the January 1, 2011, and December 31, 2011, period referenced above ["[b]etween the dates of January 1, 2011, and December 31, 2011" in ¶3]. The Charging Party and Respondent do not oppose this motion."

Counsel for the General Counsel then introduced GC 16 and GC 17 as *all* the

documentary support for his case against Roy Spa.

(1) GC 17 contains “invoices from Cosmo Prof.” Tr. 177 l.7. Roy Spa objected to the admissibility of the document which included data for year 2012 because the exhibit violated the terms of paragraph 4 of the Stipulation limiting the “relevant time periods” in the Complaint to 2011. Tr. 180 l.21.

After its admittance, the General Counsel developed no testimonial evidence what GC16 represents from any witness. There was no testimony of who “Cosmo Prof” is and what it did. The exhibit revealed three purchases in 2011 totaling \$308.11. The twelve-month purchase total related to Cosmo Prof in GC16 is \$3,985.65.

(2) GC17 was introduced to show concession payments to AAFES. The dollar net sales totals to under Stipulation’s ¶4 in 2011, was \$3,808.63.

(3) Elgin Air Force Base. The General Counsel alleged jurisdiction in paragraph 2(e) of the Complaint from Elgin Air Force Base:

“During the past calendar year, in conducting its operations described above, Respondent purchased and received at both its Malmstrom Air Force Base Montana and Elgin Air Force Base Florida facilities, products, goods, and services valued in excess of \$5,000 directly at each location from points located outside the States of Montana and Florida, respectively.” [Emphasis added].

Counsel for the General Counsel introduced not a single piece of evidence of financial data for Eglin Air Force Base in Florida. The ALJ recognized the deficiency before closing the hearing: “So far, I don’t think there’s any evidence in the record about Elgin Air Force Base other than the fact there’s the allegation that there’s an operation there. I haven’t seen any financial records related to that.” Tr. 191 ll.19-22.

(4) Virginia. Counsel for the General Counsel moved to amend his Complaint at the close of his case with an allegation that Roy Spa provided services outside of Virginia, GC 19, to wit:

“General Counsel moves to amend paragraph 2(e) of the Complaint to alternatively allege that Respondent provided services valued in excess of \$5000 to points located outside the State of Virginia.”

At the hearing, the General Counsel explained his claim “that they provided services in excess of \$5,000 at points outside the State of Virginia.” Tr. 187 ll.19-22; 188 ll.1-2. Roy Spa objected to this late oral motion to amend the complaint, tr. 191 ll.7-25 to 192 l.2. Tr. 326.

Despite its protest being overruled, no evidence of any contracts with AAFES or any other governmental entity was introduced into evidence from Virginia by counsel for the General Counsel. No evidence of what services by contract or subcontract with any other person was introduced into evidence by counsel for the General Counsel.

(5) Other Locations. Counsel for the General Counsel further adduced general information relating to Roy Spa’s operations in R12. Tr. 309. However, he introduced no evidence to show what operations were conducted in any business location or the dollar volume of services allegedly performed by Respondent in Virginia or Florida as alleged in the Complaint and GC19.

3. The Dress Code Issue.

The General Counsel pled Roy Spa implemented a new dress code in July 2012.

Roy Spa’s implemented its Employee Manual at Malmstrom in September

2011, ten months before the charge was filed. See R15. The dress code provision set forth on page 8 of the Manual. It provides:

Dress Code

Here are the basic dress code policies:

- All dress will project an image of fashion, professionalism and good taste
- Overly casual clothing is unacceptable (i.e., graphic t-shirts, flip flops, twill cargo pants, faded and/or torn garments, etc.)
- Clothing made of denim or corduroy material is not permitted (i.e., *jean jackets, skirts, etc*)

Regulations set forth by Occupational Safety and Health Administration (OSHA) and **AAFES supercede these policies**. Any fines incurred by the employee are the employee's sole responsibility. [Emphasis added].

AAFES has a national dress code that applied to Malmstrom concessionaire employees. R14; Tr. 245 ll.4-21, l.22-246 l.1. It applied to Malmstrom at all times. Tr. 223 ll.17-19. The AAFES dress code, R14, specifically prohibits jeans: "This policy applies to ALL CONCESSIONAIRES & ROVERS: a. **NO** Jeans." [Emphasis in original]. Roy Spa's Handbook echoes the prohibition on wearing jeans, as shown above.³

The Employee Manual was provided to all employees. GC employee witness Marcella MacDonald testified:

Q. When you came to work at Roy Spa, did they provide you a handbook to review of their policies?

A. Yes, they had a handbook.

Q. Did you ultimately sign a document indicating that you had received or read the handbook?

A. Yes, we signed saying that we had saw it and read it.

Tr. 132:9-14.

³The Union did not deny Old Fashioned Barber had a dress code. Tr. 71 ll.1-3.

The former union CBA with the Old Fashioned Barber, GC 3 Art. 4, explicitly provided that nothing in the CBA would contravene any AAFES directive!

The provisions of this Agreement shall in every way be subject to and controlled by the provisions of the present and any future contracts between the Company and the Army and Air Force Exchange Service (AAFES) for the operation covered by this Collective Bargaining Agreement, and any provision of this Agreement inconsistent or in conflict therewith shall be null and void. The provisions of said Exchange contract or contracts are made part of this Agreement as if set forth at length herein.

All parts of said contract, as they shall be relevant to the enforcement of this Article, shall be made available to the Union.

It is further understood that the conduct of the Company's business must at all times be in compliance with regulations and directions from officials acting pursuant to said Exchange Service contract and in compliance with the policies of the Army and Air Force as they are interpreted by them.

Union Business Agent Hallfrisch concurred that AAFES policies controlled and overrode the CBA. Tr. 59:18; 64:8. That would include the dress code.

B. Judge Marchionese's Findings.

ALJ Marchionese's review of the alleged unfair labor practices, JD(ATL)-12-14 (June 28, 2013), which is now the Board's established precedent under Section 102.48 of the Board's Rules and Regulations, found:

1. "The record contains **no evidence** that would show what, if any impact, a labor dispute or strike by the Respondent's employees would have on the operations at the base specifically, or on the national defense generally. ALJD 5:23-25 (emphasis added).
2. On the record here, I conclude that the Acting General Counsel has not met his burden of proving that the Board has jurisdiction over the Respondent's operations at Malmstrom under the national defense

standard. **Nothing in the record establishes that haircuts are vital to the national defense**, or that the military operations at Malmstrom would be disrupted or adversely affected if service members and their dependents could not get a haircut, permanent, hair color, or any of the other services offered by the Respondent due to a strike or other labor dispute. While the provision of the Respondent's services is a convenience to Malmstrom personnel, it is not necessary to the defense of our nation." ALJD 5:32-39 (emphasis added).

3. "The bid solicitation and the bid submitted by the Respondent were based on there being no collective-bargaining agreement in place." ALJD 6:9-10.
4. "[T]he Respondent **never agreed** to recognize the Union as the 9(a) representative of its employees at Malmstrom." ALJD 6:16-17 (emphasis added).
5. By July 2012, "only three unit employees remained. The other two, who did not have cosmetology licenses, left their employment. The Respondent increased its complement to nine employees, all with cosmetology licenses." ALJD 6:26-29.⁴
6. "While the evidence would suggest a general refusal to recognize and bargain with the Union, the complaint only alleges a refusal to bargain

⁴Roy Spa's contractual goal set by AAFES required employment of eighteen (18) cosmetologists. Tr. 273 ll.19-21. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 46-48 (1987). Roy Spa employed seven workers at the time of the charge, only three of whom were qualified cosmetologists. Tr. 305 l.1

regarding two discrete subjects, i.e., the change in commission rate and the adoption of a dress code. This may very well be due to the fact that any such general refusal to recognize and bargain occurred more than 6 months before the Union filed its charge on June 18, 2012.” ALJD 6:33-35.

V. ARGUMENT

1. The ALJ Failed to Consider the Statutory Requirements for Evaluating Claims under the EAJA.

Nowhere in the ALJ’s ruling is the EAJA statute described or even quoted. Neither did the ALJD cite the Board’s standard for EAJA awards set forth in its regulation, Section 102.144(a).⁵ Rather, the only EAJA authority cited by the ALJ is a single Board case, Glesby Wholesale, Inc., 340 N.L.R.B. 1059 (2003), and Pierce v. Underwood, 487 U.S. 552 (1987).

5 U.S.C. §504, provides two key statutory directives.

First, subsection(a)(1), states:

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 was substantially justified or that special circumstances make an award unjust. *Whether or not the position of the*

⁵102.144(a) states:

“Standards for awards.—(a) 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. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel’s position in the proceeding was substantially justified.”

agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

Second, 5 U.S.C. §504(b)(E) provides:

(E) “*position of the agency*” means, *in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based*; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

Subsection (b)(E) was added by Congress in 1985 to reverse the D.C. Circuit’s decision in Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), which decided that only the Agency’s action in the litigation itself and not the underlying Agency basis giving rise to the action, is scrutinized. The Congress was swift to respond.

The House Report, H.R. Rep. 99-120(I), H.R. Rep. 99-120, H.R. Rep. No. 120(I), 99th Cong., 1st Sess. 1985, 1985 WL 47108 at 20-21 (Leg. Hist.), rejected Spencer’s limitation of its legislative intent:

in clarifying the ‘position’ term, the committee expressly rejects the holding of the District of Columbia circuit in *Spencer v. N.L.R.B.*, 712 f.2d 539, 577 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1908 (1984), that the only government ‘position’ to be scrutinized in the context of an EAJA case is that taken in the litigation itself.

This restrictive view, adopted by several other courts of appeal has resulted in the denial of a number of meritorious fee claims, because it fails to focus attention on the unjustified government activity that formed the basis of the litigation.

If the government’s litigation position was the sole consideration, the government could insulate itself from fee liability simply by conceding error or settling, because such actions will always be deemed ‘reasonable’ litigation positions; thereby having the effect of substantially justifying their position. *Environmental Defense Fund v. Watt*, 554 F.Supp. 36, 41 (E.D.N.Y. 1982). Interpreting the EAJA so as

to restrict its application to mere litigation arguments and not the underlying action which made the suit necessary, would remove the very incentive for careful agency action that congress hoped to create in 1980. *National Resources Defense Council v. EPA*, 703 F.2d 700, 710 (3d Cir. 1983).

The committee's clarification of the 'position' term is *intended to broaden the court's or agency's focus of inquiry for EAJA purposes beyond mere litigation arguments, and to require an assessment of those government actions that formed the basis of the litigation*. We believe this conclusion is implicit in the EAJA definition of the term 'United States', which 'includes any agency and any official of the united states acting in his or her official capacity' (28 U.S.C. 2412(d)(2)(c)), rather than merely the position taken by the government's lawyers. The committee here *makes the broader view of government agency conduct explicit*.

* * *

in cases where the private party is a prevailing defendant, the definition of 'position of the United States (or agency)' necessarily *includes an evaluation of the facts that led the agency to bring the action against the private party* to determine if the agency or government action was substantially justified. To meet its burden on proof in these cases, the agency must demonstrate to the court or adjudicative officer that it was substantially justified.

Judge Giannasi's error occurred in failing to look at both the underlying basis for the General Counsel's Complaint and compare that to the case presented to Judge Marchionese. In the language of House Report, the Judge should not have focused on "mere litigation arguments," but "require[d] an assessment" to show substantially justified basis for "those government actions," *i.e.*, the complaint allegations.

Here, Judge Giannasi took a narrow view of the case rather than the required "broader view of government agency conduct" the 1985 Amendment intended. He failed to deconstruct the General Counsel's allegations to establish any substantial factual basis for taking any of the positions asserted. It was not

enough for the Judge to state the GC could form an argument from certain facts alleged. Rather, there must be admissible evidence behind the claims made.⁶

2. The Judge Failed to Examine the Entire Record for Facts and Evidence that Show No Substantial Justification for the Underlying Basis in Fact for the Allegations in the Complaint and the Litigation of the Case Once the Facts Became Clear.

The GC never explained 1) why he alleged no general refusal to bargain in the Complaint as identified by ALJ Marchionese (because Section 10(b) barred the assertion). He never explained 2) why he introduced no evidence to support his claim that the haircuts are vital to national defense. He never explained 3) on what evidence he claimed Roy Spa purchased more than \$5,000 of goods from out of state. He never explained 4) on why he alleged commerce jurisdiction in paragraph 2(g) of the Complaint. He never explained 5) why he alleged business at Eglin Air Force Base related to the Board's jurisdiction. He never explained 6) why Roy Spa's repudiation of all obligations with the Union was not outside the statute of limitations. He never explained 7) why his complaint contradicted the finding of no jurisdiction by Region 15 against Roy Spa at Eglin Air Force Base six months earlier. R16; Tr. 128-34.⁷

⁶In a Rule 11 context, Fed. R. Civ. Proc. 11(b)(3), an attorney's signature on a pleading "certifies...the factual contentions have evidentiary support" or will likely have support. Rule 11 applies to this proceeding under Section 102.39 of the Board's Rules and Regulations: "Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)." This requirement was overlooked.

⁷Judge Marchionese rejected the exhibit of prior GC action; it went into the Rejected Exhibits file. An offer of proof was made regarding the withdrawal of two charges against Roy Spa filed on September 1, 2011, and November 1, 2011, by Region 15—the same period (continued...)

Despite Roy Spa's raising these very clear factual omissions (and allegation of reckless pleading of facts) in its EAJA Brief, Judge Giannasi refused to "broaden" his review of the GC's actions to encompass the evidentiary bases which were deployed to establish jurisdiction over Roy Spa. Congress' express rejection of Spencer is visible in how the D.C. Circuit would evaluate Judge Giannasi's ruling as it stands now. The Court requires heightened review when inconsistent positions are taken against a private party. The Court stated, 712 F.2d at 561:

To clarify our position: when the government *acts* inconsistently, and subsequently loses a civil suit challenging its behavior, it should be obliged to make an especially strong showing that its *legal arguments* were substantially justified in order to avoid liability for fees under the EAJA.

Since Congress changed the statute to include the Agency's underlying position, the General Counsel must "make an especially strong showing" that his underlying facts were substantially justified. Judge Giannasi did not consider or apply a more intensive review of facts in the record.

His review should have also included the bar of Section 10(b) applicable to the allegation of change in terms and conditions of employment, first because there was none, and second, because the Union's assertion of a bargaining relationship was repudiated beyond the limitations period. These facts were in the case and brought to Judge Giannasi's attention. Even then, the GC's Response never refuted ALJ Marchionese's inference that 10(b) applied and barred his Burns claim: "any

⁷(...continued)

the facts and jurisdiction in the instant case had been undertaken by Region 19. Here, Roy Spa was singled out for "atypically harsh treatment" because the Agency officials (the General Counsel's representatives) "took a different position (inexplicably or maliciously) in one or a few cases." Spencer, 712 F.2d at 560 (noting "Consistency of the Government's Position" towards a single private party was a cited grievance to Congress).

such general refusal to recognize and bargain occurred more than 6 months before the union filed its charge on June 18, 2012.” ALJD 6:35-37.

Finally, regarding the Complaint’s allegation there was a change in terms and conditions of employment made by Roy Spa, the Judge failed to consider whether any changes had *in fact been made* from the contractual terms and conditions of employment existing in the prior Old Fashioned Barber CBA. On this allegation, the Judge’s understanding of the case, understanding of the evidence, and of witnesses he never saw, is substantially in error.

a. There Was No Dress Code Change as Alleged.

This allegation was explained only once in testimony at the hearing. It is that Roy Spa told employees could wear “no jeans,” tr. 157:17, not there was no dress code. The Complaint ¶5(b) provided no facts regarding the allegation. Judge Marchionese found “AAFES always had a dress code for concessionaire’s employees,” ALJD 6 n.6, and it specifically prohibited wearing jeans. R14.⁸ So did Roy Spa’s Employment Manual. R15.

Judge Giannasi agreed that Roy Spa “was free...to set the initial terms under which it would employ them,” ALJD 7:4, but, he erred by holding “Respondent did not avail itself of this opportunity,” ALJD 7:5. Roy Spa’s Handbook shows it availed itself of implementing terms of employment and terms it contract with AAFES compels. The Judge’s Decision reveals he either did not review Roy Spa’s Handbook, R15, or why without explanation he refused to credit it, despite undisputed record testimony from witnesses from both sides that the policy existed

⁸AAFES Manager Stacey Cossel confirmed this policy.

and each employee was given a copy. Tr. 224:5-9; 25:1-2.

Judge Giannasi did not refer to the dress code allegation in any other detail, how he could credit any GC witness on it, or other facts to help him establish a reasonable basis for an entirely new allegation in these circumstances other than the one-line hearing statement by one employee witness.

Since the Union contract expressly adopts AAFES policies and states an AAFES policy “controls” any terms and conditions in the CBA-an exhibit introduced by the GC-the pursuit of a claim of change in terms and conditions of employment was baseless.

b. There Was No Change in Commission Rate for Cosmetologists.

The only other discrete allegation in the Complaint is Roy Spa “changed the commission rates” in ¶5(a). Again, Judge Giannasi failed to explain how the allegation had reasonable merit when in the former The Old Fashioned Barber’s written CBA with the Union applied its jurisdictional coverage only to “all barbers,” GC3 p.1 Art.1, when providing only “barber services,” GC3 p.2 Art, 5 Sec. 1. That CBA shows a 65.5% commission rate beginning on May 1, 2011. Id. Art 5 Sec.1. At the time, the Union represented no beauty salons. Tr. 70 1.7.

The undisputed testimony revealed significant differences between the services provided by a barber and a cosmetologist. Tr. 204. The GC adduced no testimony in the record that the Old Fashioned Barber CBA covered cosmetology services. The Bureau of Labor Statistics (BLS) Occupational Employment definition of the Cosmetology profession was admitted in evidence. R7.

Cosmetologists:

Provide beauty services, such as shampooing, cutting, coloring, and styling hair, and massaging and treating scalp. May apply makeup, dress wigs, perform hair removal, and provide nail and skin care services. Excludes “Makeup Artists, Theatrical and Performance (39-5091), “Manicurists and Pedicurists” (39-5092), and “Skincare Specialists” (39-5094).

The BLS Barbers description was also admitted into the record. R8.

Barbers: “Provide barbering services, such as cutting, trimming, shampooing, and styling hair, trimming beards, or giving shaves.” R8. Cosmetologists do not shave beards. Tr. 204 ll.21-22. “A cosmetologist is someone who is trained professionally in an accredited school and licensed by a state to perform services as cuts, color, perms, chemicals. They’re allowed to use chemicals. They’re also trained in male services, facials, makeup, waxing. It’s very extensive.” Tr. 195 ll.3-7.

When Roy Spa moved into the new AAFES facility it compensated its cosmetologists with more money at 60% commission-and it employed no barbers-higher total pay because the services for women were more expensive. AAFES set all the prices for services performed. A men’s regular haircut was set at \$8.15; a “Women’s” Hair Cut (Basic)” started from \$17.50 to over \$80.00 depending on the services requested. R13, Ex. D p.2.

Because Judge Marchionese found when “Respondent moved” it “changed the type of services performed from a barber shop to a full service salon, and changed the customer base to increase the number of women for whom it provided hairstyling services,” ALJD 6:23-25, Roy Spa was not restrained from establishing a rate for a position explicitly outside of any CBA terms—for the recognized bargaining unit exclusively recognized for the Teamsters only included “barbers.”

Judge Giannasi called this new service an “alleged new focus” in derogation

of Judge Marchionese's finding, now the Board's settled Order, that Roy Spa's change in services was "envisioned by its contract with AAFES." ALJD 6:23. Roy Spa's AAFES contract explicitly states: "This solicitation will change the current service from barbershop only to encompass all family haircare services." R13, Schedule Family Haircare p.1.

This was not a tangential event for the former employer. Old Fashioned Barber was instructed to "remove all" its equipment, furniture, tools, and supplies. R6. "He needed to gut the place." Tr. 201 1.5.

In the new AAFES Mall, Roy Spa had to buy new equipment and supplies to furnish the space. Tr. 201; R13 Ex. G (listing equipment "the concessionaire must furnish").

More troubling is the Judge's statement "even if these changes could somehow have resulted in a decision favorable to Respondent," which is precisely what Roy Spa achieved, the GC's case would still not be "without substantial justification." How this change in business operation can become an EAJA defense for the General Counsel is not explained. Why this change in operation did not suggest a pause in litigating case by the GC is unanswered.

At that juncture, Judge Giannasi's failure to consider the differences between cosmetologist and barbers, the CBA's coverage of only a unit of barbers, the Old Fashioned Barber's recognition of representation for only barbers, and Roy Spa's compliance with its AAFES contract to perform family hair services and employ only cosmetologists (employees that can perform all hair care services for men and women), runs off the track. Paragraphs 4(a)-(c) of the Complaint specifically alleges

the Union represented only “all barbers” of Old Fashioned Barber.

3. The Board’s Remand for Consideration of the Case as a Whole Invited the ALJ to Not Consider the General Counsel’s Case as a Whole.

The Board’s remand order influenced Judge Giannasi to circumscribe his required statutory review.

The Board’s Directive in its 2016 Decision, Slip op. at 5, stated:

Determining substantial justification requires evaluation of the General Counsel’s litigation position as an inclusive whole. Because the judge limited his evaluation of the General Counsel’s position to the issue of jurisdiction, that inclusive determination has not yet been made. Accordingly, although we agree with the judge that the General Counsel’s position as to jurisdiction was substantially justified, we deny the General Counsel’s motion to dismiss the EAJA application, and we remand this case for further consideration of the application, subject to the provisions of Board Rules Sections 102.150 through 102.153.

Judge Giannasi misstated the ruling: “the Board ruled that the General Counsel was substantially justified in asserting jurisdiction over the Respondent,” despite dismissal of the Complaint. JD-66-16 p.1 n.1. That restatement is *not* what the Board directed. His misunderstanding led to failing to consider the case as an inclusive whole.

In the introduction to its discussion, Roy Spa, LLC, 363 N.L.R.B. No. 183 at 1 (2016), the Board majority wrote “While we agree with the judge’s conclusion that the General Counsel was substantially justified in asserting jurisdiction over Roy Spa, we nevertheless deny the motion to dismiss the EAJA application and remand to the chief administrative law judge for further proceedings consistent with this decision.”

In the text of its Decision, the Board’s analysis showed that Judge Marchionese had only considered the General Counsel’s assertion of national defense jurisdiction “without determining whether the General Counsel’s position on the merits of his unfair labor practice allegations was substantially justified.” Slip op. at 4. “Based on that failure to evaluate the merits of the General Counsel’s case as a whole, we reverse the judge and remand.” Id.

The Board quoted the EAJA itself, but referred to a footnote in Pearce v. Underwood, 487 U.S. 552, 566 n.2 (1988), Slip op. at 4, to employ a paraphrase that “[t]he General Counsel’s litigation position is substantially justified ‘if a reasonable person could think it is correct, that is, if it has a reasonable basis in fact and law.’”

What the Court said is different:

Contrary to Justice BRENNAN's suggestion, *post*, at 2556, our analysis does not convert the statutory term “substantially justified” into “reasonably justified.” Justice BRENNAN's arguments would have some force if the statutory criterion were “substantially *correct*” rather than “substantially *justified*.” But a position can be justified even though it is not correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.

The Supreme Court does not refer to the “position” of the government for substantial justification is only a “litigation position.” The Court first addressed the Government’s underlying argument at the pleading stage and then turned to its “litigating position.” Id., at 569. It agreed in that case the government’s argument it could permissibly change statutory language was not substantially justified. The Court noted argument that “the most direct precedents at the time the Government took its position in the present case” were adverse decisions (just as the Board’s most recent cases on national defense jurisdiction in Pentagon Barbershop shows).

Id. at 570. This discussion reveals an EAJA determination “as a whole” must incorporate all the facts in the case.

The appearance to Judge Giannasi that the Board removed a portion of the whole from consideration, left his Supplemental Decision and Order standing without consideration of the case as a whole, even though the Board explicitly directed that “evaluation of the General Counsel’s case as an inclusive whole” be made. Slip op. at 5. The Board’s intent could not have deleted consideration of all proof because no record evidence is cited to show how the General Counsel intended to prove jurisdiction on national defense standard in his litigation position. Rather, the Board only found the argument of jurisdiction could be made General Counsel, not that it was established or how he tried to do so.

This is reflected in a careful reading of the Board’s own Analysis section, including its agreement with Judge Marchionese “that the General Counsel’s position that the Board had jurisdiction over Roy Spa pursuant to the Board’s national defense standard was substantially justified.” Slip op. at 4. Again, the statement only refers to the allegation of jurisdiction and not any proof.

On the same page of its Decision, the Board refers to its “national defense standard. See *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB 318, 320 (1958) (holding that the Board will ‘assert jurisdiction over all enterprises, as to which the Board has statutory jurisdiction, whose operations exert a substantial impact on the national defense, irrespective of whether the enterprise’s operations satisfy any of the Board’s other jurisdictional standards.’).”

That two-part formulation (statutory jurisdiction + substantial impact on

national defense) is precisely the EAJA factor Judge Giannasi ignored. In Judge Marchionese's first decision, he found no jurisdiction (part two) because Roy Spa had no substantial impact on the national defense because the General Counsel introduced no such evidence: "nothing in the record" shows this. ALJD 5:34.

Hence, Judge Marchionese's Supplemental Decision indicates in older cases the Board simply included national defense jurisdiction without discussion whenever statutory jurisdiction was met. Rote inclusion of national defense jurisdiction is contrary to 45 years of settled precedent in the most recent cases from O K Barber Shop, 187 N.L.R.B. 823 (1971), to Pentagon Barber Shop, Inc., 255 N.L.R.B. 1248, 1248 (1981) (establish what the "link between the Employer's operations and the national defense effort is."). But, the earlier cases had not been overruled. JD (ATL)-12-14 at 3:35. Judge Marchionese believed the issuance of the Complaint in reliance upon the early cases and in contradiction to the later cases, was "close." Even then, the General Counsel never attempted the argument.⁹

As the Board noted in citing Ready Mixed Concrete, supra, a showing of "substantial impact on the national defense" is required. All that was confirmed in the Board's EAJA Order is the allegation of national defense jurisdiction could be made, not that the General Counsel had any evidence to prove it:

In his supplemental decision and order granting the General Counsel's motion to dismiss the EAJA application, the judge found that the

⁹The General Counsel never produced a witness to explain "military operations at Malmstrom would be disrupted or adversely affected if service members and their dependents could not get a haircut, permanent, hair color, or any of the other services offered by the Respondent due to a strike or other labor dispute. While the provision of the Respondent's services is a convenience to Malmstrom personnel, it is not necessary to the defense of our nation." ALJD at 5.

General Counsel was substantially justified *in asserting* national defense jurisdiction.

Roy Spa, LLC, 363 N.L.R.B. No. 183 at 4 (emphasis added).

Review of a case under EAJA requires a “determination at each successive phase or ‘discrete substantive portion’ of the litigation.” Glesby Wholesale, Inc., 340 N.L.R.B. 1059, 1060 (2003). This is because an EAJA award may be granted over a portion of the claims.

In Glesby, the employer prevailed on all claims, but did not apply for fees over two that required a credibility determination involving “the most significant allegation in the case.” Id. EAJA fees were denied for that reason.

The instant case required the Judge Marchionese to render no credibility determinations to recommend dismissal on the merits. The General Counsel offered no person to testify that haircuts were vital to the defense of the United States.

Whether or not there were Section 8(a)(5) violations was evident in the documentary and testimonial evidence. AAFES had a dress code and the Old Fashioned Barber’s CBA followed AAFES. The former CBA covered only barber services and not cosmetology. The CBA had no provision for the payment of non-unit cosmetologists. And, actions Roy Spa took to repudiate bargaining, recognition, and changes in terms and conditions of employment commenced outside the 10(b) period.

Therefore, looking at any “discrete substantive portion” of the case finds the General Counsel presented an incomplete factual presentation. He 1) failed to “establish” jurisdiction over Roy Spa, 2) failed to establish facts to rebut the repudiation of the union outside the Section 10(b) period, 3) failed to disprove the

existence of an AAFES dress code was in effect and known by employees, 4) failed to show any basis for asserting the Union represented cosmetologists under the former CBA or otherwise (*e.g.*, through cards) the Union represented a majority of Roy Spa's cosmetologists.

The General Counsel put on no rebuttal case. Tr. 327:21. Neither did the Union. Tr. 327 1:24.

4. The Judge Failed to Explain Why Jurisdiction Under the National Defense Standard was Not Included in His "Inclusive Whole" Review.

Judge Giannasi's Decision indicates he believed the Board decided all aspects of the jurisdictional issue. See n.1. Roy Spa believes that view is erroneous.

Nothing in the Board's May 2016 Decision in this case would lead anyone to believe that EAJA review of all parts of the General Counsel's litigation of his jurisdiction claim over Roy Spa was shut off. Rather, the Board clearly stated in its Decision: "[d]etermining substantial justification requires evaluation of the General Counsel's litigation position as an inclusive whole." Slip op. At 5. This is especially so because the Board explained that dismissal of the Complaint "placed Roy Spa in the same position it would have been had the complaint been dismissed on the merits." Slip op. at 5 n.16.

The General Counsel lost on the merits because he introduced no evidence to establish providing haircuts to servicemen was vital to national defense. AAFES Manager Cossel testified without contradiction haircuts are "not mandatory." Tr. 248 ll.11-13.¹⁰ Failing to establish the required second prong of the analysis of

¹⁰The only evidence of a "military haircut" was introduced by Roy Spa to
(continued...)

national defense jurisdiction resulted in Judge Marchionese's ruling, affirmed now as the Board's Order.

The Board's stated requirement for meeting the second prong proof is reflected in Western Area Housing Co., 107 N.L.R.B. 1263, 1264 (1954), a case involving an employer with a written agreement directly with the Navy to provide housing to Navy personnel, establishes more must be shown than just the relationship with the military or a presence on or off the base:

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

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

¹⁰(...continued)

debunk the claim of such a haircut as a popular fiction. Air Force Regulation, R20 (AFI 36-2903, 3-1), does not even use the word "haircuts." "Airmen have the right, within established limits, to express their individuality through their appearance," id., within a 1.5 inch hair length. The Army has no specific policy because it recognizes its varied missions do not allow it to impose a uniform appearance standard, R21. Its Regulation leaves hair decisions to "leaders at all levels to exercise good judgment." AR 670-1, 1-8. The Army permits personnel, such as Sikh soldiers, to not even get haircuts. Army Regulation 600-20, 5-6(g)(4)(d), Command Policy, permits the wearing of religious headgear by Sikh soldiers whose religious practices do not allow haircuts. See <http://www.army.mil/article/36339> (Aug. 26, 2016).

along with \$70,000 in purchases of supplies. Roy Spa is no different.

Not only has no Board case ever provided an indication the national defense was a minimal threshold, but in Pentagon Barber Shop, Inc., 255 N.L.R.B. 1248, 1248 (1981), and O K Barber Shop, 187 N.L.R.B. 823 (1971), show the Board abandoned extending this coverage to barber shops and beauty simply by alleging the performance of “services for part of the defense establishment” to assert Board jurisdiction under the national defense standard. See Fort Houston Beauty Shop, 270 N.L.R.B. at 1007.

As required by Pentagon Barber Shop, the General Counsel had specific elements to meet the national defense standard. Not only did the General Counsel fail to present a prima facie case on the national defense standard, the Judge Marchionese explained that “Nothing in the record establishes that haircuts are vital to the national defense.” How can the General Counsel’s case be substantially justified when there is “nothing in the record” for him to make the claims he did?

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

5. The Judge’s Determination that the Substantive 8(a)(5) allegations against Roy Spa were Substantially Justified is Not Supported by the Record.

Judge Giannasi first addresses the successor assertion. ALJD at 5-6. He cites to the Supreme Court’s Burns decision despite Judge Marchionese’s finding

the allegation was not alleged because it could not be. The Board's imprimatur confirms the inapplicability of Burns.

But, Judge Giannasi claims "the substantive allegations of the complaint" asserted Roy Spa "was a successor employer required to bargain with the incumbent union," ALJD 5:17-18, but does not recognize failing to bargain with the Union was not alleged as a ULP. He further notes an employee perspective presumes majority status flows from one employer to the next. Id. He recognized obligations can arise under Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987), and NLRB v. Katz, 369 U.S. 736 (1962), but not from NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 278-79 (1972), which is the only case the GC argued. Tr. 19.

Under Fall River, Judge Giannasi agreed the "successor is not bound to apply the terms of the predecessor's bargaining agreement and may set initial terms on which it will hire the predecessors employees." ALJD 5 n.6. Roy Spa did that as it provided new employees its Employee Manual which set forth its terms and conditions of employment. R15.

Under EAJA review now, Judge Giannasi relies upon what "Judge Marchionese stated in his original decision" to find Roy Spa was a successor (even though failure to treat with the union was not an alleged violation) and it is still somehow obliged to bargain with the union. ALJD 6:13-14. The error in this portion of the Supplemental Decision is Judge Marchionese and the Board did **not** find Roy Spa was a successor. It may be an underlying assumption, but it is too late to argue it is a legal fact; the contrary fact is *res judicata*.

There has been no suggestion that Roy Spa is the *alter ego* of Old Fashioned Barber or that Old Fashioned Barber terminated its contract with AAFES to evade any bargaining obligation. Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13-14 (1945). Judge Marchionese found AAFES's "bid solicitation and the bid submitted by the Respondent were based on there being no collective-bargaining agreement in place." ALJD 6:8-9.

Central to any successorship analysis is the opinion in Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 (1973), applying the element of notice. The *sine qua non* of successorship liability is the perceived ability of the purchasing entity to identify (and quantify) the cost of assuming the seller's liabilities, thereby enabling the purchaser to secure indemnity from the seller or negotiate adjustments in the purchase price. Id. at 185. Knowledge cannot be imputed. NLRB v. Local Union No. 46, Metallic Lathers, 727 F.2d 234, 237 (2d Cir. 1984).

"Substantial continuity exists when the new company has 'acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'" CitiSteel USA, Inc. v. NLRB, 53 F.3d 350, 353 (D.C. Cir.1995) (quoting Golden State Bottling Co., Inc. v. NLRB, 414 U.S. at 184).

Roy Spa confirmed with AAFES-its contractor-there was no union contract in place. Tr. 197 ll.19-21.

The legal basis for suggesting change in terms and conditions of employment requires establishing what terms and conditions of employment were established by Roy Spa in September 2011 when it began operation at Malmstrom so a change

thereafter could be established. The question of change is entirely speculative for the Judge or GC to make when the Old Fashioned Barber CBA adopted all AAFES policies and AAFES had a dress code. Roy Spa instituted a dress code on day one of its operation.

Even if one might agree Roy Spa could still be a successor ten months after it repudiated all relationships with the union, argued infra, Judge Giannasi left unexplained how the Union representing only barbers performing solely barbering services may assert a Section 9(a) statutory claim for the wages of an all cosmetologist unit of employees? In July 2012, Roy Spa employed nine cosmetologists and no barbers.

No evidence was introduced that employees hired by Roy Spa after September 2011 were union members. Union membership for Roy Spa employees who were involuntary union members under the union recognition clause in the Old Fashioned Barber CBA, GC 3, Art. 2 Section 1, do not count. See Precision Striping, Inc. v. NLRB, 642 F.2d 1144, 1147 (9th Cir. 1981); Authorized Air Conditioning Co. v. NLRB, 606 F.2d 899, 906 (9th Cir. 1979), cert. denied, 445 U.S. 950 (1980).

Judge Giannasi's observation that at the time of the move to the new location, Roy Spa did not assert the union lacked employee support to overcome a presumption of majority support, is incorrect. Roy Spa had long before repudiated the union's asserted status. The Union never responded with a timely petition or charge. The Union never presented authorization cards.

6. The Assertion of a New Allegation by the Judge of Dress Code “Enforcement” Which was Never Asserted by the General Counsel in the Complaint Shows the Complaint was Not Substantially Justified.

Judge Giannasi’s charges Roy Spa with changing employee dress code rules is erroneously based on “the uncontradicted testimony of two employee witnesses.” ALJD 5 1.20. No other part of the record is referred to. The factual suggestion of uncontradicted testimony is erroneous.

Roy Spa implemented its Employee Manual for employees at Malmstrom when it opened in September 2011. Judge Giannasi affirmed Roy Spa could set its initial terms of employment. Roy Spa’s Employee Manual clearly does so and explicitly adopts AAFES’s dress code. The Old Fashioned Barber’s CBA with the Union explicitly stated AAFES policies trump any term in the CBA. So, concessionaire employees on Malmstrom were always covered by the AAFES dress code.

When Roy Spa took over, Old Fashioned Barber employees were covered by the AAFES dress code that stated “no jeans” were to be worn by concessionaire employees.” Roy Spa explicitly imposed its own written “no jeans” policy consistent with the AAFES dress code at all other locations Roy Spa worked at.

Therefore, the claim that “changes and dress code *enforcement* were established by the uncontradicted testimony of two employee witnesses, the only employee witnesses at trial,” ALJD 6:19-21 (emphasis added), is correct if Judge Giannasi meant only the two employees had said so at trial. He is incorrect if his intention claimed that the dress code had changed. Judge Giannasi changes the Complaint and argument of the General Counsel in his review by suggesting this

new theory contrary to the case the General Counsel litigated—a change in dress code *implementation*.¹¹

Complaint ¶5(b) alleged: “On or about July 19, 2012, Respondent implemented a dress code policy for its employees.” As the hearing began, the General Counsel reaffirmed his allegation: “The complaint also alleges Respondent unlawfully refuses to bargain with the union regarding changes in commission rates and a dress code unilaterally made after moving to the new Exchange facility last year, almost a year after assuming the contract.” Tr. 20:1-5. Judge Marchionese stated the General Counsel’s allegation was “adoption of a dress code.” ALJD 6:35.

In his brief to Judge Marchionese, the General Counsel devoted only one paragraph to the existence of the purported two unilateral changes. Only one sentence of that argument paragraph relates to the dress code, *i.e.*, “Respondent also notified employees that a new dress code was in place, and that employees must wear black, white, tan and Brown.” Counsel for the Acting General Counsel’s Brief to the Administrative Law Judge at 7 (April 8, 2013).

At page 13 of his brief, the General Counsel recognized that the dress code may have been in place. He adduced no evidence to dispute the uncontradicted testimony that the employees had been provided Roy Spa’s Employee Manual on

¹¹Judge Giannasi’s argument is akin to NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438, 442-44 (1965), where, “the integrity of the administration process requires that courts may not accept appellate counsel’s *post hoc* rationalizations for agency action. *For reviewing courts to substitute counsel’s rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review.*” [Emphasis added]. Here, we understand Judge Giannasi’s view of the facts. But, it is not the General Counsel’s argument or reflected in the allegations made in the Complaint.

acceptance of employment. R15.

All Roy Spa's employees signed that they had read and received a copy of the Employee Manual. Tr. 132 ll.9-14. The Manual is also posted in the backroom of Roy Spa's dispensary. See R26 p.6 (showing picture of Employee Manual tacked on the bottom of employee bulletin board).

The undisputed testimony therefore is "Each individual employee is given a copy of the company employment manual when they are hired. They sign for it that they received it. They keep their own copy. It's their copy to keep and we keep the signed sheet in their personnel files." Tr. 224:5-9; 302:11.

The GC's own employee witness Marcella MacDonald agreed she had been provided a copy of the Manual, signed a receipt for it, and she had read it: "Yes, we signed saying we had saw [sic] it and read it." Tr. 132:9-14.

Judge Giannasi's subtle conversion of the Complaint allegation from *implementation* of a dress code to an *enforcement* change in it, has no basis in the record on EAJA review because EAJA looks at what the General Counsel alleged and relied upon, not what he might have alleged and proved. No legal basis for reforming the allegations are cited within his EAJA remand authority as no such law under EAJA exists.

Judge Giannasi's concept runs further afield as the required focus under the EAJA here is whether the General Counsel met *his* burden to show *his* assertions were substantially justified. There is no place for a finding of substantial justification from an argument the General Counsel never made.

Judge Giannasi failed to assert how the General Counsel could allege a dress

code change without inquiring whether a dress code was changed at all? The General Counsel introduced no evidence that a dress code changed from any document that might exist or from one produced by the Union; only one employee who reported “no jeans.”¹² Yet, the documentary evidence showed otherwise.

The finding the dress code changed as alleged by the General Counsel was not substantially justified.

7. The Commission Rate Change for Cosmetologists was Not a Term for Bargaining.

Roy Spa was entitled to set initial terms and conditions of employment. When it hired cosmetologists, they were of a classification the union expressly did not represent. There was no one performing such work for Roy Spa. No person at Old Fashioned Barber performed cosmetology services for women. “The women would not come in and get a haircut typically, unless they had real short manly style hair.” Tr. 109:25-110:1. The Union Business Manager did not even know whether Old Fashioned Barber cut women’s hair. Tr. 68:15-24.

Judge Giannasi provides no detail how he formed an apparent bargaining violation from the record except that the presumption for bargaining was not overcome. ALJD 6:24-25. He fails to address the basis for any statutory required bargaining with the Union over the hiring and wages for licensed workers in the cosmetology profession. The General Counsel offered no explanation—ever.

The Judge’s Supplemental Decision claiming substantial justification for this alleged unilateral change is without basis under the EAJA.

¹²Marcella MacDonald did not concur. She testified about colors, but not what was actually changed: “we can wear black, yellow, tan, and brown.” Tr. 117:15.

8. The ALJ Erred in Failing to Account for the Lack of A Representative Complement of Employees Before An Obligation to Bargain Forms.

Judge Giannasi's Supplemental Decision addresses the defense raised by Roy Spa incorrectly. ALJD 7:16-29. Failing to cite the caselaw he was utilizing or explaining why the caselaw relied upon by Roy Spa was incorrect, does not support a finding the General Counsel was substantially justified in suing.

Roy Spa had the right to set initial terms and conditions of employment under Burns, supra, because it had no contract with the Union. Judge Giannasi agreed. ALJD 6:13. Such an employer must recognize a union in a unit if it hires a majority of former employees once a representative complement of employees is achieved.

In Fall River Dyeing, 482 U.S. at 43, the Court set out the principles whether there was a substantial continuity between the two businesses to require any recognition.

Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Only “[i]f the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated.” Id. at 41.

Not only did Roy Spa contract with AAFES to hire only cosmetologists to perform all hair care services, it looked to an entirely different set of customers to meet its contract mandated service requirement—female dependents and

contractors.

Roy Spa looked to new customers living off base, to contractors, retirees, and anyone else getting on base (using census data to formulate its bid; R. Ex. 17) to determine whether it could accomplish the solicited contractual goals set out by AAFES. It then carried over only three of Old Fashioned's employees, when it moved to the Exchange facility to perform its written contractual obligation with AAFES. Different location, different job responsibilities, different employee rules, and different customers were necessary to do so.

The Burns type obligation to bargain does not arise even if bargaining appears warranted because it may violate Section 8(a)(2) of the Act unless the successor has retained a "substantial and representative complement" of employees. The obligation then arises by a demand for recognition or bargaining. Fall River Dyeing, 482 U.S. at 52.

That employee complement may not be achieved when the employer transforms its operation, products, production process, and customer base. In CitiSteel USA, Inc. v. NLRB, 53 F.3d 350, 354 (D.C. Cir. 1995), the Court denied enforcement of a finding to recognize and bargain where the work was "more complex," customers "were distinct," and "significant changes" to the mill "tilted strongly against continuity." In Harter Tomato Products Co., 321 N.L.R.B. 901, 903 n.14 (1996), the Board recognized a successorship occurs where there is no change in the processing business unlike CitiSteel USA.

Judge Giannasi never considered how the prongs of the successor test had been met, especially continuity of operations explained in CitiSteel USA when

significant differences between the services provided and employee licenses mandated between those implemented by Old Fashioned Barber and Roy Spa exist. See ALJD 7 1.10. Even then, the Judge does not explain how this disconnect was factually posed by the General Counsel in establish grounds for the Complaint.

Relevant evidence shows:

- Roy Spa had to hire licensed cosmetologists to meet its contractual obligations to AAFES. R13 Exhibit D.
- Roy Spa's contract with AAFES specifically required it to perform hair care services for men and women of all ethnic groups. Women's hair care, perms, coloring, and shampooing was not a part of the work ("barber services") performed by employees of Old Fashioned Barber.
- The AAFES's contract with Roy Spa specified longer hours and a seven-day workweek for the family hair care center. The expansion of those hours was a certainty and did occur.
- Roy Spa's Employment Manual delivered to all employees, specifically defined classifications of employees. First "licensed regular employees," both full and part-time. Second, "probationary employees." Third, "Temporary employees." R15 p.5.
- "Temporary employees are those employees who do not possess a Cosmetologist license." Id.
- Roy Spa's Malstrom operation was in "normal or substantially normal" operation when it began the Family Hair Care services in the new Exchange building in July 2012. It had on staff nine licensed cosmetologists. Only three had ever worked for Old Fashioned Barber.
- Roy Spa needed to employ eighteen cosmetologists to meet the contractual goals set for it in the AAFES contract.

Not only were barbers disabled to work for Roy Spa under its AAFES contract, but those barbers it initially hired were temporary employees. Judge Marchionese called the facts correctly finding at ALJD 6:25-29:

The employee complement also changed between September and July 2012. By the time of the conversion, only three unit employees

remained. The other two, who did not have cosmetology licenses, left their employment. The Respondent increased its complement to nine employees, all with cosmetology licenses.

Having started with 5 unit workers on September 1, ALJD 6 n.5, the unit diminished until July 2012 when it changed and Roy Spa hired six additional cosmetologists. Judge Giannasi's speculation this group of nine cosmetologists "included 2 supervisors," ALJD 7:24, is without basis and contradictory to the actual cosmetology licenses in evidence. R24. Dustin and Shiloh do not appear in the exhibit. They lost employment as they were barbers. Tr. 305:3-6. Therefore, the "net of new employees" for Roy Spa is six. Nine cosmetologists in July 2012 is more than it ever had employed performing barber services. In February 2013, Roy Spa employed ten persons. Tr. 273 ll.17-19.

Judge Giannasi explains nothing further about this implicit part of the Burns/Falls River Dyeing formulation, "even assuming some support for Respondent's position on representative complement, the General Counsel's contrary position was not without substantial justification." ALJD 7:27-29. But, there was no contrary position taken by the General Counsel arguing the representative complement for Roy Spa could comprise workers unable to fulfill the services specified in the AAFES contract. The GC only looked at the group of workers employed on September 2011 for nine months.

In Garner/Morrison, LLC, 353 N.L.R.B. No. 78 (2009), the Board found a Section 9(a) contract could not arise where the employer had not hired a representative complement of employees. There, the Board held that even under the conversion terms in Central Illinois Constr., that any such agreement remained

a Section 8(f) contract.

This requirement applies where a union has held an 8(f) relationship with an employer, but seeks to achieve 9(a) status through voluntary recognition, as demonstrated solely on the basis of a contract clause. *See Staunton Fuel, supra* at 718. Here, however, there was no substantial and representative complement of employees at the time that Garner/Morrison and the Carpenters entered into the 2002 Acceptance and 2002 Master Agreement. At the time of the signing, Garner/Morrison had only one employee, a carpenter; it employed no painters and tapers at all. Thus, Garner/Morrison could not lawfully recognize the Carpenters as the 9(a) representative of painters and tapers who had yet to be hired.

It makes perfect sense to impose this limitation to prevent circumvention of Section 8(a)(2) where the facts preclude the possibility of a showing of majority support. Judge Giannasi does not explain how the Union could assert bargaining rights over cosmetologists yet to be hired, under Garner/Morrison's rule.

The Board stated the same in Garner/Morrison, LLC, supra at 5:

An employer violates Section 8(a)(2) of the Act when it extends recognition to a union that does not represent an uncoerced majority of employees. *Ladies Garment Workers v. NLRB (Bernhard-Altman)*, 366 U.S. 731 (1961).

In Elmhurst Care Center, 345 N.L.R.B. 1176 (2005), enf'd 2008 WL 5378004 (D.C. Cir. 2008), an unfair labor practice case, the Board held the timing of any union recognition agreement requires a careful balance be considered between the interests of the new employees and future employees. This is especially applicable when a new business like the Family Hair Care Center opened at Malmstrom:

Where a newly opened business has granted recognition, an issue concerning the timing of recognition can arise. The Board has long balanced competing interests in these cases. On one hand, the Board

seeks to vindicate the right of those employees already employed, to engage in collective bargaining if they so choose. On the other hand, the Board seeks to have that choice made, not by a small, unrepresentative group of employees, but by a group that adequately represents the interests of the anticipated complement of the unit employees – all of whom will be bound, at least initially, by the choice of those who were hired before them.

345 N.L.R.B. at 1176-7.

The Board in Elmhurst Care Center explained the test to apply, 345 N.L.R.B. at 1177:

Balancing those two interests, the Board has long held that an employer’s voluntary recognition of a union is lawful only if, at the time of recognition, the employer: (1) employed a substantial and representative complement of its *projected workforce*, and (2) was engaged in its normal business operations. See, e.g., *Hilton Inn Albany*, 270 NLRB 1364, 1365 (1984). The test is in the conjunctive: if either prong is not met, a grant of recognition is unlawful. See *A.M.A. Leasing*, 283 NLRB 1017, 1024 (1987) (a finding that the employer “was not engaged in normal business operations . . . would alone establish a violation”). [Emphasis added].

Even in the “conjunctive,” the GC Complaint’s assertion fails both prongs of the Elmhurst Care Center test. Roy Spa had no representative sample of its “projected workforce” of cosmetology workers (and no barbers) to perform the work Roy Spa was contracted to do at Malmstrom until it had hired a majority of the expected eighteen employees. Only after July 2012 did it begin normal business operations. Roy Spa needed nine employees to minimally man a seven day operation at the new facility. Tr. 273 ll.15-17. A “representative complement” of that group would be five (5) cosmetologists. Three persons could not invoke an obligation to bargain.

Hilton Inn Albany cited in Elmhurst Care Center employed this very test. Importantly, the employers involved were only preparing to begin operations and

had only begun some hiring of certain categories of employees, but not many workers to perform operations. The training and preparation of the employees on hand during the union recognition was limited.

The GC's Complaint failed to meet the conjunctive requirement of both prongs 1 and 2 of the Elmhurst Care Center test to sustain even a slight possibility of meeting his burden of proof under EAJA. Therefore, Judge Giannasi's contention the GC's position "was not without substantial justification" is without merit.

Ignoring recognized components of the successorship test in Burns and Fall River Dyeing is no basis for a finding of substantial justification under the EAJA.

9. The Judge Failed to Properly Account for the Expiration of the Section 10(b) Statute of Limitations for Asserting a Refusal to Bargain Claim When Assessing the Lack of Substantial Justification for the Complaint.

Judge Giannasi's Supplemental Decision addresses the defense raised by Roy Spa by denouncing it. ALJD 7:31-32:2. He simply claims the "assertion is without merit, "ALJD 7:33, without addressing the substance of Roy Spa's defense. The effort only demonstrates how stretched from reality the General Counsel's litigation position is.

First, Judge Giannasi recognized that Judge Marchionese found "the complaint does not allege a general refusal to bargain." ALJD 7:35-36. Rather, it only alleged "two discrete subjects, i.e., the change in commission rate and the adoption of a dress code." ALJD 7:36-37. Judge Giannasi phrases the General Counsel's "allegations in this case involved the unilateral changes made *after the*

facility was moved.” ALJD 7:38-39 (emphasis added).¹³ This claim would be within the statute of limitations.

He therefore found that “the complaint made no allegations of unfair labor practices at that point. He asserts that the General Counsel’s reliance on “the successorship bargaining obligation that began at the time of the takeover [in September 2011] and continued thereafter...was presenting background evidence to show the existing bargaining obligation.” ALJD 743-45. Judge Giannasi’s view was to ignore all the events that occurred outside the Section 10(b) period, and considering only those selected earlier events that might shed light on those matters occurring within the limitations period under Machinists Lodge 1424 (Byron Mfg Co.) v. NLRB, 362 U.S. 411, 416-17.

This is not the EAJA required review of the litigated case as an inclusive whole—it is litigating a new theory. Unsettling is Judge Giannasi’s application of the ability of a complaint to allege matters growing out of a charge under NLRB v. Fant Milling Co., 360 N.L.R.B. 301 (1959), as allowing his own articulation of what the General Counsel might have alleged, argued, and proved, rather than what he alleged, argued, and proved.

This gets to the nub. The General Counsel’s case runs on one scenario: Did the takeover of the barber service by Roy Spa in September 2011 and hiring five barbers, trigger an obligation to bargain with the Union?

Judge Giannasi’s misunderstanding of Roy Spa’s position is startling. The

¹³Complaint ¶4(d) alleges “since about September 1, 2011, based on § 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit employed by Respondent.”

issue it posed is, did Roy Spa repudiate any demand for recognition or bargaining with the Union outside the Section 10(b) limitations period? In contrast, the Judge asserts “Respondent focused on the General Counsel’s contention that a successorship obligation was established at time of the takeover, which it asserts was beyond the 6 month period.” ALJD 7:40-41. The Judge’s contention is a straw man. Roy Spa argued it repudiated the Union’s demand for bargaining and recognition in the Fall of 2011.

10. The Section 10(b) Limitations Period Barred the Complaint Allegations Upon Respondent’s Repudiation of Any Union Obligations.

29 U.S.C. §160(b) directs “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board....”). The GC’s EAJA Answer supplies no responsive reason.

Judge Marchionese recognized this statutory barrier. “While the evidence would suggest a general refusal to recognize and bargain with the Union, the complaint only alleges a refusal to bargain regarding two discrete subjects....This may very well be due to the fact that any such general refusal to recognize and bargain occurred more than 6 months before the Union filed its charge on June 18, 2012.” ALJD at 6 lines 33-37.

The charge, GC1(a), alleged: “Since about September 1, 2011, and continuing to date, despite adopting the contract, the Employer has failed to execute the Letter of Understanding.”¹⁴

On these allegations, December 18, 2011, was the earliest date unlawful

¹⁴No evidence was admitted to show Roy Spa adopted any union contract.

activity could have been alleged from the Charge that Roy Spa was refusing to bargain with the Union. There also is no written evidence Roy Spa ever adopted a CBA. Tr. 75-76.

As in Judge Marchionese's Decision at 5-6, the Union knew by August 16, 2011, AAFES considered the CBA at Malmstrom had ceased in effect and the US DOL had issued no wage determination that would compel any other contractor to follow the union contract. Union Business Agent Hallfrisch testified to three contacts with Roy Spa in 2011. All fell outside the limitations period.

On August 25, 2011, Hallfrisch sent Joyce Cayli a letter asking her to sign a Letter of Understanding to continue the last "Collective Bargaining Agreement" in "full force and effect." GC Ex. 10. A few weeks later he called her. She told him she would not sign a contract she did not negotiate. Tr. 287 ll.14-15. On October 26, 2011, Mr. Hallfrisch pressed ahead on a pay complaint and received no response. Tr. 40 ll.1-2. On November 9, 14, and 17, 2011, he sent emails to Roy Spa requesting a response to his transmittal of a CBA, commission percentages, and holiday pay. GC 12. He received no response to any of his inquiries. Tr. 41 l.17-41 l.5.

As the Charge indicates, Roy Spa never signed the Letter of Understanding. His testimony of calls to Joyce Cayli pleading with her to sign a union contract contradicts the allegation that contractual relations were "adopted." Tr. 75:9-12.

The GC never had a basis to file the Complaint under the Supreme Court's decision in Local Lodge 1424, Machinists v. NLRB, 362 U.S. 411 (1960). For over fifty years LMRA law has been firm: "The statute begins to run when the unfair

labor practice occurs.” Exxon Chem. Corp. v. NLRB, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

In Machinists, the Court ruled that Section 10(b) of the Act barred the Board from declaring an act charged beyond the six-month period to be a “substantive” unfair labor practice. The Court held that if the Board could rule the act of signing a bargaining agreement to be unlawful in a later charge filed outside the six-month period, “the Board’s position would withdraw virtually all limitations protection,” 362 U.S. at 425, and disserve the interest in “industrial peace” which the Congress proscribed “even at the expense of the vindication of statutory rights.” 362 U.S. at 429.

The Court found the policy of the Act prohibits the use of facts to vindicate other rights outside the Section 10(b) period: “a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso.” 362 U.S. at 422. Here, the Complaint was “based on” Roy Spa’s refusal to bargain and its refusal to maintain the terms and conditions of the Old Barbershop CBA. Both purported unlawful acts occurred both within and well outside the limitations period; it was “a *suable* unfair labor practice only for six months following the making of the agreement” or failing to agree. Id. at 423 (emphasis in original).

In Lorance v. AT & T Technologies, Inc., 490 U.S. 910 (1989), the Court quoting to Machinists v. NLRB, 362 U.S. at 417, stated: “[W]here a complaint based upon that earlier event is time-barred,’ we reasoned, ‘to permit the event itself ‘to cloak with illegality that which was otherwise lawful’ ‘in effect results in

reviving a legally defunct unfair labor practice.” Judge Giannasi contends that the duty to bargain was background even though the duty was repudiated. That reasoning cannot stand in the face of a total repudiation to prop up a EAJA defense.

In A & L Underground, the employer sent the union a contract termination letter. The union’s attorney responded and stated the employer was bound to the existing collective bargaining agreement. See 302 N.L.R.B. at 467. Over a year expired before an unfair labor practice charge was filed against A & L. 302 N.L.R.B. at 467.¹⁵

The Board rejected the union’s charge. It reaffirmed that a continuing violation theory “cannot properly apply to a clear and total contract repudiation.” Id. at 468. Dilatory conduct injures the stability of relationships and “impairs the process for adjudicating those charges.” Id. “A party who has explicitly repudiated a collective-bargaining agreement should have the right to conclude after the 6-month limitation period has passed without charges being filed that it is free to negotiate a new agreement” or “to recognize and bargain with a different majority representative or to change employment conditions.” Id.

The Board explained A & L Underground in Vallow Floor Coverings, Inc., 335 N.L.R.B. 20, 20 (2001):

The Board held that when an employer completely repudiates the contract, the unfair labor practice is committed at the moment of the repudiation, and the 10(b) period begins to run when the union has clear and unequivocal notice of the repudiation. *Any subsequent failures or refusals to honor the terms of the contract do not constitute unfair labor practices themselves, but are simply the effect or result of the repudiation.* Accordingly, the union must file its charge within 6

¹⁵Here, almost ten months passed before Union filed its charge.

months after receiving clear and unequivocal notice of the repudiation or a complaint based on that conduct will be time-barred, even with regard to contract violations within the 10(b) period. *Id.*

If the contract has ceased by repudiation, provisions within it (such as the dress code and alleged pay increase) also cease:

As the Board noted in *Chemung Contracting Corp.*, 291 NLRB 773 (1988), “The intended purpose of [Section 10(b)] is that, in the absence of a properly served charge on file, a party is assured that on any given day its liability under the Act is extinguished for any activities occurring more than 6 months before.” See also *Koppers Co.*, 163 NLRB 517 (1967). In sum, by tolerating delay of charge filing, the rule fails to foster a climate in which both parties to a collective-bargaining relationship are able to assess their obligations to each other expeditiously and with reasonable certainty, and it thereby impairs the statutory goal of stabilizing collective- bargaining relationships.

Second, the continuing violation theory impairs the adjudication process because it permits litigation of distant events. The legality of a party’s contract repudiation necessarily depends on the circumstances as they existed at the time of its repudiation—the moment at which it clearly and totally sundered the contractual relationship. As the Supreme Court pointed out in *Bryan Mfg.*, *supra*, 362 U.S. at 419, a respondent’s ability to prepare a defense is increasingly prejudiced as those circumstances become more distant in time and pertinent evidence grows increasingly stale. Accord: *Chambersburg County Market*, *supra*. The ability of a decisionmaker to render an accurate decision, as well, is made correspondingly more difficult. Thus, the interest of ensuring fairness and just results in our adjudications warrants our rejection of the continuing violation approach in cases of this kind.

302 N.L.R.B. 468-69 (footnote omitted).

Here, the Union was on notice that not only did AAFES tell it that no contractual obligation applied any further, but Mr. Hallfrisch’s contacts with Ms. Cayli clarified she was not signing onto any union contract or representation. In *Kamal Corp.*, 354 N.L.R.B. No. 16 (2009), the Board held a union’s failure to file an 8(a)(5) charge within six months of notice that the employer was not complying with

all terms of the contract, was beyond the 10(b) limitations period and directed the complaint be dismissed. There is no justification under the EAJA for a different outcome.

Roy Spa's failure to bargain or recognize the Union after September 1, 2011, if even required, was notorious, open, and explicit. In Metropol Restaurant, 247 NLRB 132 (1980), a Section 8(a)(5) refusal to bargain Complaint was filed almost three years after execution of a letter of agreement and a year and a half (1½) after the employer told the union that "there was no contract." The Board ruled in Metropol that the Union's charge was barred by the section 10(b) statute of limitations. Id. at 137.

Here, on October 26, 2011, Mr. Hallfrisch complained that Marcella MacDonald had not been paid correctly. GC Ex. 11; Tr. 38 ll.13-18. He received no response. Tr. 40 ll.1-2. On November 9, 14, and 17, 2011, he sent emails to Roy Spa requesting a response to the transmittal of his CBA, commission percentages, and holiday pay. GC Ex. 12. He received no response to any. Tr. 41 l.17-41 l.5.

The earliest date that original unlawful activity can be alleged is six months prior to the charge filing date against Roy Spa, or December 18, 2011. 29 U.S.C. §160(b).

The undisputed evidence is Joyce Cayli told Mr. Hallfrisch she would not sign a contract she did not negotiate. Tr. 287 ll.14-15. There was no denial to this.

There was no substantial justification to use an alleged bargaining obligation and terms repudiated outside the 10(b) limitations period as "background" evidence to assert unilateral changes occurred within the limitations period under the EAJA.

11. Fees Should be Awarded Under EAJA for the Reckless Allegations in This Case.

No reasonable person would ever call the provision of cosmetology or barber services on a military base is vital to national defense. As Judge Marchionese found, there were no facts to support this position of the Agency.

Roy Spa prevailed on *every* aspect of the case as all the allegations were dismissed by the ALJ and entered by the Board. The ALJ improperly denied fees because he found the GC's case was substantially justified. ALJD 8 n.9. It was not.

As no other grounds are disputed, the rate and hours should be awarded as set forth in the Supplemental Declaration of Michael E. Avakian. That amount through the issuance of Judge Giannasi's Supplemental Decision is \$96,054.55.¹⁶

CONCLUSION

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

Respectfully submitted by:

ORAL ARGUMENT
REQUESTED

ROY SPA, LLC

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

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

Dated: August 29, 2016

¹⁶Roy Spa is entitled to fees incurred in moving its Application for costs and fees. It "should not result in a second major litigation," Pierce v. Underwood, 487 U.S. at 563, 108 S.Ct. 2541 (quoting Hensley v. Eckerhart, 461 U.S. 424, 437. Time spent in "obtaining" fees, Comm., IRS v. Jean, 496 U.S. at 162, "to cover the cost all phases of successful civil litigation addresses by the statute, id. at 166, are awardable.

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS was efiled to the Executive Secretary's Office and emailed to the following persons on this the 29th day of August 2016:

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

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

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