

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

ROY SPA, LLC,

and

Case 19-CA-083329

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 2

**GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE SUPPLEMENTAL
DECISION OF ADMINISTRATIVE LAW JUDGE
GIANNASI DENYING ATTORNEY'S FEES AND EXPENSES
PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

Ryan Connolly, Counsel for General Counsel, submits this Answering Brief to Respondent's Exceptions to the Supplemental Decision and Order ("Supplemental Decision") of Chief Administrative Law Judge Robert A. Giannasi ("Judge Giannasi") dated July 12, 2016, in which he denied Respondent's Application for Attorney's Fees and Expenses pursuant to the Equal Access to Justice Act ("EAJA").

I. INTRODUCTION

The EAJA is not intended to deter the government from advancing in good faith a close question of law or fact. Judge Giannasi issued his July 12, 2016, Supplemental Decision following a partial remand by the Board to address whether the General Counsel had "substantial justification" to issue and litigate the underlying complaint alleging unilateral changes (as substantial justification to assert jurisdiction had already been established). As he correctly found, the General Counsel was substantially justified; thus, Respondent's EAJA Application was denied.

By its Exceptions to that Supplemental Decision Respondent now attempts to re-litigate, at length, issues already resolved in favor of the General Counsel during prior stages of the case, and flawed theories already repudiated and rejected by both Administrative Law Judge and Board. Therefore, although the General Counsel disputes and rejects the entirety of Respondent's claims in its Exceptions, it is neither productive nor appropriate to engage in lengthy arguments regarding already resolved issues when addressing a remand from the Board on a single, narrow issue.

Accordingly, while a brief review of the procedural history and issues resolved is set forth herein to provide context to Respondent's view of the case, the General Counsel addresses only those arguments pertaining to the narrow issue remanded by the Board and decided by Judge Giannasi in his Supplemental Decision: whether the General Counsel was substantially justified in alleging and litigating that Respondent, as a successor employer, made unilateral changes in the terms and conditions of employment of its union-represented employees, in violation of §§ 8(a)(5) and (1) of the Act.

II. PROCEDURAL HISTORY

The underlying case involved applying the Board's national defense standard to a hair salon operating on Malmstrom Air Force Base in Montana. As fully addressed by Administrative Law Judge Marcionese ("Judge Marcionese") in his Supplemental Decision dismissing Respondent's EAJA claim, the material facts in this case fell within a limited spectrum of Board cases addressing a specific jurisdictional question.¹ (ALJD

¹ The June 28, 2013, Decision by Judge Marcionese on the merits of the case is referred to as the "Decision on the Merits," the August 13, 2013, Decision adopting by the Board in absence of exceptions is referred to as the "Board Decision," the February 28, 2014, Supplemental Decision and Order by Judge Marcionese dismissing Respondent's Application for an Award of Fees and Expenses is referred to as the

Supp Judge Marcionese 3:35-38). Although he ultimately dismissed the complaint for a lack of jurisdiction under the national defense standard, Judge Marcionese nonetheless found in his Supplemental Decision that “the question of jurisdiction was close and could have gone either way;” as such, the General Counsel was substantially justified in litigating the matter. (ALJD Supp Judge Marcionese 4:9)

Upon review of the Judge Marcionese’s Supplemental Decision, the Board concluded that, while the General Counsel was substantially justified in proceeding in regard to jurisdiction, EAJA requires an examination of the whether General Counsel was substantially justified in proceeding in the “inclusive whole.” *Roy Spa, LLC*, 363 NLRB No. 183, slip op. at 4 (2106). Accordingly, such an examination required not only the jurisdictional issue already addressed by Judge Marcionese in his Supplemental Decision, but also the merits of the General Counsel’s substantive case as to whether Respondent, as a *Burns* successor, violated § 8(a)(5) when it unilaterally changed its employees terms and conditions of employment. *Id.*, slip op. at 5. As Judge Marcionese had not explicitly addressed the substantive issue in his Supplemental Decision, the Board remanded that limited issue to the Division of Judges.

In light of Judge Marcionese’s retirement, Chief Administrative Law Judge Giannasi handled the case on remand. He adroitly reviewed the lengthy history of the case and addressed the single issue remaining following remand by the Board in his decision. He found the material facts were not in dispute and, given Board law

“Judge Marcionese Supplemental Decision,” the Board’s decision addressing the merits of that decision of May 10, 2016 is referred to as the “Supplemental Board Decision,” and the July 12, 2016 Decision by Judge Giannasi is referred to as the “Judge Giannasi Supplemental Decision.” References to the Supplement Decision of Judge Giannasi will be referred to by page number and line number as (ALJD Supp __:__). References to the Supplemental Decision of Judge Marcionese will be referred to by page number and line number as (ALJD Supp Judge Marcionese __:__) Respondent’s Brief in Support of Exceptions will be referred to by the page number as (R Br __).

governing successorship and unilateral changes, the General Counsel likely would have established the alleged violations but for the jurisdiction issue. (ALJD Supp 6:28-35) Indeed, at a minimum, he found that the General Counsel was substantially justified in litigating the substantive case. (ALJD Supp 7:12-14; 27-29) As the Board had already found the General Counsel was substantially justified as to the jurisdiction issue, Judge Giannasi concluded the General Counsel was therefore substantially justified as to the inclusive whole of the case, from issuance of complaint through hearing. Accordingly, he dismissed Respondent's EAJA claim in its entirety. (ALJD Supp 6:35-36)

By its Exceptions, Respondent now attempts to revive its failed arguments, reopen decided issues, and even request oral argument before the Board. None of this is well-considered in light of Judge Giannasi's thorough review and reliance on established legal precepts. As such, the General Counsel requests that the Board defer to Judge Giannasi's Supplemental Decision and dismiss Respondent's EAJA application.

III. ANALYSIS

In pages 2-4 of his Supplemental Decision Judge Giannasi describes the facts of the case and reviews the prior decisions. As this fully and accurately address the factual background of this case, and it is not necessary to repeat those facts here. This section addresses how, consistent with well-established law, Judge Giannasi correctly found that "the General Counsel was not only substantially justified in alleging and litigating the bargaining violations in the complaint, but, as Judge Marcionese seemed to suggest in his decision, the violations would probably been established had the General Counsel succeeded on the jurisdictional issue." (ALJD Supp 6:28-30)

The following sections address the substantial justification standard, which is a mixed question of law and fact, as well as the Board's standard for the successorship and bargaining violations alleged. In regard to both the successorship and bargaining violations the manner in which Judge Giannasi correctly applied the law to the facts of this case and correctly concluded that General Counsel was substantially justified in litigating all aspects of the case is addressed.

A. The Substantial Justification Standard

A fee applicant who is a prevailing party may not receive an EAJA award if the government's position was substantially justified. *I.N.S. v. Jean*, 496 U.S. 154, 158 (1990); § 102.44(a) of the Board's Rules and Regulations. The burden of demonstrating "substantial justification" is on the General Counsel. *Id.* See also *Meaden Screw Products Co.*, 336 NLRB 298, 299-300 (2001); §102.144(a) of the Board's Rules and Regulations. The Board has further found that "[t]his standard is not as demanding as 'justified to a high degree' or 'substantial probability of prevailing.'" *Glesby Wholesale, Inc.*, 340 NLRB 1059, 1060 (2003), citing *Pierce v. Underwood*, 487 U.S. 562, 563-66 (1988). Accordingly, whether a government action is substantially justified involves an inquiry into the reasonableness of that action.

1. Substantial Justification is a Question of Reasonableness

In *Pierce v. Underwood*, 487 U.S. at 565, the Supreme Court held that "substantially justified" means "justified to a degree that could satisfy a reasonable person [,]" or "if it has a reasonable basis both in law and fact." The Board has adopted this definition. *Jansen Distributing Co.*, 291 NLRB 801, n.2 (1988). Thus, the General Counsel's position is substantially justified "when the evidence is 'what a reasonable mind might accept as adequate to support a conclusion' — *i.e.*, where 'reasonable

people could differ' on whether the allegation should be litigated." *Glesby Wholesale, Inc.*, 340 NLRB at 1060, quoting *Pierce v. Underwood*, 487 U.S. at 563-66.

No adverse inferences may be drawn from the government's failure to prevail in the underlying litigation, nor is the government required to establish that its decision to litigate was based on a substantial probability of prevailing. *Scarborough v. Principi*, 541 U.S. 401, 415 (2004); *Galloway School Lines, Inc.*, 315 NLRB 473 (1994); *Wolf Street Supermarket d/b/a Jim's Big M*, 266 NLRB 665, n.1 (1983), *enfd.*, 742 F.2d 1446 (2nd Cir. 1984); *Iowa Parcel Service*, 266 NLRB 392 (1983), *enfd.*, 739 F.2d 1305 (1984), *cert. denied*, 105 S. Ct. 595 (1984). As stated by the Supreme Court, the government's position can be substantially justified "even though it is not correct ... if a reasonable person could think it correct, that is if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. at 566 n.2. Thus, the government will be found to be substantially justified where "at least one permissible view of the evidence shows a reasonable basis in law and fact" *Welter v. Sullivan*, 941 F.2d 674, 676 (8th Cir. 1991) (citation omitted).

Moreover, EAJA was not intended to "stifle the reasonable regulatory efforts of federal agencies," *Wyandotte Savings Bank v. NLRB*, 682 F.2d 119, 120 (6th Cir. 1982); *Shellmaker, Inc.*, 267 NLRB 20, 21 (1983), or to deter the government from "advancing in good faith a close question of law or fact." *Shellmaker, Inc.*, 267 NLRB at 21. See also *Abell Engineering & Manufacturing, Inc.*, 340 NLRB 133 (2003); *Galloway School Lines*, 315 NLRB at 473. The EAJA was not designed to inhibit the government from advancing a novel but credible extension or interpretation of the law. *Timms v. U.S.*, 742 F.2d 489 (9th Cir. 1984). Where precedent is not so factually identical as to be

"conclusive" of a particular issue, the General Counsel is not without substantial justification in litigating a matter. *University of New Haven*, 279 NLRB 294, 295 (1986). "Closeness itself is evidence of substantial justification," *Welter v. Sullivan*, 941 F.2d at 676, and the government is substantially justified where the "case was not an easy one [and] required Government attorneys and an administrative law judge to make difficult judgments on the evidence." *Pullen v. Bowen*, 820 F.2d 105, 109 (4th Cir. 1987), abrogated on other grounds, *Lively v. Bowen*, 858 F.2d 177, 180 n.1 (4th Cir. 1988).

2. Determining Substantial Justification Requires Examination of the Case as an Inclusive Whole

Examination of whether the government was substantially justified in the underlying case is made by examining the case as an "inclusive whole." *I.N.S. v. Jean*, 496 U.S. at 161-62. "While the parties' postures on individual matters may be more or less justified, EAJA ... favors treating a case as an inclusive whole, rather than as atomized line-items." *Glesby*, 340 NLRB at 1060; *I.N.S. v. Jean*, 496 U.S. at 161-62. This means that a court must make a "single finding" as to whether the government's singular position was substantially justified, which "operates as a one-time threshold for fee eligibility in EAJA cases." *I.N.S. v. Jean*, 496 U.S. at 160. Thus, "[t]he Board does not award EAJA fees for individual complaint allegations on which an applicant might have prevailed, but determines whether the allegations as 'an inclusive whole' were substantially justified." *Glesby*, 340 NLRB at 1060. See also *C. Factorum, Inc.*, 337 NLRB 1 (2001); *Golden Stevedoring Co.*, 343 NLRB 115 (2004) (the "General Counsel's overall position is substantially justified").

In determining whether the government was substantially justified, the court looks "beyond the issue on which the petitioner prevailed to determine, from the totality

of circumstances, whether the government acted reasonably....” *Roanoke River Basin Ass’n v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993). As the Board has stated, “[w]here the General Counsel’s position as a whole was substantially justified at a particular stage of the litigation, no EAJA fees for that stage will be awarded, even if certain allegations, considered individually, were not substantially justified.” *Glesby*, 340 NLRB at 1060. Even if the Board should find that the General Counsel was unreasonable as to some issue, e.g., a single allegation, or stage, such as the investigation, if the overall prosecution was reasonable, no EAJA fees should be awarded. See, e.g., *Golden Stevedoring Co., Inc.*, 343 NLRB 115, 116 (2004) (EAJA fees were denied despite lack of substantial justification in prosecuting a particular allegation not found to be a “significant” portion of the proceeding). Thus, the determination of whether the General Counsel was reasonable is based on the prosecution of the case as a whole; that is, on the totality of issues and sum of the stages.

3. Substantial Justification Can Exist Without Proving a Prima Facie Case

Regarding the connection between evidence presented and substantial justification, the Board has specifically remarked that the government’s position can be “deemed reasonable in fact and law notwithstanding that the General Counsel failed to establish a prima facie case.” *David Allen Co.*, 335 NLRB 783, 784 (2001). In addition, the government will be found to be substantially justified if it presented evidence, which, if credited, would have constituted a prima facie case. *Auto Workers (B.F. Goodrich)*, 343 NLRB 281 (2004); *David Allen Co.*, 335 NLRB 783 (2001); *SME Concrete, Inc.*, 267 NLRB 763 n.1 (1983). The government is entitled to rely upon any evidence supporting its position which it had at the time it acted, as well as upon any inferences drawn from

that evidence, so long as the evidence and inferences are not inherently incredible. See *Iowa Parcel Service*, 266 NLRB 392 (1983); *Barrett's Contemporary and Scandinavian Interiors, Inc.*, 272 NLRB 527 (1984); *Bosk Paint & Sandblast Co.*, 270 NLRB 514 (1984).

Moreover, where conflicting inferences could be drawn from the evidence, the government is entitled to resolve those conflicts in favor of the allegations alleged. *Iowa Parcel Service*, 266 NLRB 392 (1983), *enfd.* 739 F.2d 1305, *cert denied* 105 S. Ct. 595 (1984); *Westerman, Inc.*, 266 NLRB 799, 800 (1984), *enfd.*, 749 F.2d 14 (6th Cir. 1984). When it is “possible to draw a set of inferences from the circumstances ... that would have supported the General Counsel's position,” these arguments will be found to have had a reasonable basis in law and fact and therefore to be substantially justified. *Meaden*, 336 NLRB at 302-303, quoting *Europlast, Ltd*, 311 NLRB 1089 (1993), *affd.*, 33 F.3d 16 (7th Cir. 1994). See also *Bennington Iron Works*, 278 NLRB 1087, 1088 (1986). “That the arguments ultimately proved to be unpersuasive is insufficient to sustain the Application because they were not insubstantial.” *Meaden*, 336 NLRB at 302-303, quoting *Europlast*, 311 NLRB 1089 (1993).

Further, the lack of substantial evidence in the underlying proceeding “alone is not a proper basis for the allowance of fees and expenses under [the EAJA;] ... the fact that [a] court finds a decision ... not supported by substantial evidence is not equivalent to a finding that the position of the United States was not substantially justified.” *Couch v. Secretary of Health and Human Servs.*, 749 F.2d 359, 360 (6th Cir. 1984). *Accord*, *Welter v. Sullivan*, 941 F.2d 674 (1991). In determining substantial justification, the issue is not how the government's position looks in retrospect, but how it looked at the

time the government acted. See, e.g., *Martin v. Lauer*, 740 F.2d 36, 44-45 (D.C. Cir. 1984).

B. Substantial Justification Regarding Successorship and Unilateral Change

1. Burns Successorship Requires Bargaining

A union that has been voluntarily recognized by an employer or certified through an election process enjoys a presumption of majority support. *Levitz Furniture Co.*, 333 NLRB 717 (2001) That presumption continues during transition, in the event of a change in an employer in a successorship situation. *Fall River Dyeing Corp.*, 482 U.S. 27 (1987). In *Fall River*, the Supreme Court noted, “[w]e now hold that a successor’s obligation to bargain is not limited to a situation where the union in question has been recently certified. *Id.* at 41. Where, as here, a union has a rebuttable presumption of majority status, this status continues despite a change in employers. *Id.*

Under the Board’s well-established successorship doctrine, referred to as the “*Burns* Successor” standard, an employer will be considered a successor to a collective-bargaining relationship, and have a bargaining obligation with an incumbent union, if the evidence demonstrates continuity of the work force and substantial continuity in the business enterprise. *Fall River*, 482 U.S. at 43. See *Burns International Security Services*, 406 U.S. 272 (1972). Continuity in the workforce is a question of whether a majority of the successor employees are employees of the predecessor. *Fall River*, 482 U.S. at 41.

Substantial continuity of operations is a factual inquiry based upon the totality of the circumstances, considering factors such as: (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are

doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products, and basically has the same body of customers. *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 9 (2007), citing *Fall River*, 482 U.S. at 43. These factors are assessed primarily from the perspective of the employees, that is, "whether 'those employees who have been retained will ... view their job situations as essentially unaltered.'" *Cadillac Asphalt*, 349 NLRB at 9.

Changes to the nature of the business after the bargaining obligation arises do not defeat a union's claim to recognition, and accordingly, questions of timing are of critical importance in a successorship analysis. *Torch Operation Co.*, 322 NLRB 939 (1997). The bargaining obligation matures when a successor hires a majority of a predecessor's employees and when a union makes a demand for recognition. *MSK Corp.*, 341 NLRB 43 (2004). These two events need not occur in any particular order and the request need not be in any particular form. *Id.* at 44.

2. Unilateral Changes by a Successor are Unlawful

Both the Board and the courts have long recognized that an employer must notify and consult with its employees' chosen union before imposing changes in wages, hours, and conditions of employment. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). Unilateral changes strike at the heart of a union's ability to represent unit employees and are antithetical to the statutory objective of establishing working conditions through collective bargaining. See *The Little Rock Downtowner, Inc.*, 168 NLRB 107, 108 (1967), *enfd.*, 414 F.2d 1084 (8th Cir. 1969). See also *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). A unilateral change in

represented employees' terms and conditions of employment is unlawful if it is a "material, substantial and significant" change to a mandatory subject of bargaining. *Toledo Blade Co.*, 343 NLRB 385 (2004); *Flambeau Airmold Corp.*, 334 NLRB 165 (2001). Wages and employee dress codes are both mandatory subjects of bargaining. *Jag Healthcare, Inc. d/b/a Galion Pointe*, 359 NLRB No. 88 (2013); *Medco Health Solutions of Las Vegas*, 357 NLRB No. 25 (2011), *enfd. in rel. part, Medco Health Solutions of Las Vegas v. NLRB*, 701 F.3d 710 (D.C. Cir. 2012).

In the *Burns* successor context, a successor employer is generally free to set the initial terms and conditions of employment. *Burns*, 406 U.S. at 294-95. However, changes made to employee terms of conditions of employment following the maturation of a bargaining obligation constitute unlawful unilateral changes. *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enfd on other grounds*, 529 F.2d 516 (4th Cir. 1975).

C. Judge Giannasi Properly Found the General Counsel Was Substantially Justified in Proceeding

As Judge Giannasi, quoting Judge Marcionese, correctly stated, "the facts on the substantive complaint issues are not in dispute." (ALJD Supp 6:4-5) Specifically, the evidence establishes Respondent is unequivocally a *Burns* successor and that it made unilateral changes: Respondent hired all of the predecessor's employees, their supervisors, and continued the same hair cutting business at the same location for the same customers, for at least 10 months following the takeover. (ALJD Supp 6:6-8) Indeed, as stated by Judge Giannasi, the evidence is "overwhelming" that, at the time of the takeover, there was a substantial continuity of operations. (ALJD Supp 6:10-12)

Respondent disputed successorship in two ways, arguing that it planned to change the nature of its operations at Malmstrom, and that its bargaining obligation did

not attach until it hired a representative complement of employees. (ALJD Supp 6:38-40; 7:16-19) Judge Giannasi correctly rejected these defenses, finding that successorship is a test properly measured at the time of the takeover. (ALJD Supp 7:2-3) As a question of fact, uncontroverted testimony established that no changes took place for at least 10 months after Respondent assumed control, and Respondent only appeared to hire 2 additional employees during that period, a minor change. (ALJD Supp 7:3-10, 22-25)

As a matter of law, Judge Giannasi concluded that, even if Respondent's proposed changes argument "somehow could have resulted in a decision favorable to Respondent," General Counsel's position still would have been substantially justified under the circumstances. (ALJD Supp 7:12-14) Similarly, in regard to Respondent's representative complement argument, Judge Giannasi concluded that even "assuming some support for Respondent's position on representative complement," General Counsel would still have been substantially justified in taking the case to the litigation stage. (ALJD Supp 7:27-29) In short, the General Counsel would likely have established its case absent the jurisdictional issue given the undisputed nature of the facts, but even if not successful Judge Giannasi concluded the General Counsel was certainly substantially justified in pursuing the complaint allegations.

D. Respondent's Exceptions Raise No Valid EAJA Arguments

By its Exceptions Respondent attacks Judge Gianassi's well-reasoned Supplemental Decision with a scattershot approach, raising issues from *res judicata* to attempting to reverse the presumption of majority support and claim the Union failed to present authorization cards. (R Br 29; 31) Further, Respondent makes arguments

based on alter ego status and other standards not germane to the instant case. (R Br 30) These attacks are not defenses, have no base in the facts of the case, and only serve to confuse the straightforward substantive issue presented on successorship. For the reasons correctly identified by Judge Giannasi, Respondent became a *Burns* successor with a bargaining obligation at the time of the takeover.

Further, Respondent does not even dispute that it reduced employees' commission rates and began enforcing a dress code 10 months after the takeover in question. (ALJD Supp 6:17-19). Judge Giannasi correctly held these are mandatory subjects of bargaining, and the bargaining obligation incumbent in *Burns* successorship had attached 10 months prior to these changes. (ALJD Supp 6:21-23) Accordingly, he concludes, "here again, the facts and the law support the General Counsel's theory of violation." (ALJD Supp 6:25-26)

As with the successorship issue, Respondent attempts to attack Judge Giannasi's conclusions regarding the unilateral changes by creating issues where none exist and arguing findings contrary to both the undisputed facts and well-established law. In regard to the alleged unilateral change in employees wage rates, Respondent does not dispute that the change occurred, but accuses Judge Giannasi of failing to establish a basis for a bargaining violation outside a presumption. (R Br 35) Respondent may wish it otherwise, but, as Judge Giannasi correctly describes in detail, a bargaining obligation can attach precisely in this manner under *Burns*, and Respondent did not "present evidence to overcome the Union's presumption of majority support." (ALJD Supp 6:24-26) Respondent fails to counter Judge Giannasi's point-by-point analysis of the bargaining relationship, and further fails to address a point made

throughout Judge Giannasi's Supplemental Decision: even if one of Respondent's legal arguments would have been ultimately successful before an administrative law judge, it does not lessen the substantial justification the General Counsel had in pursuing the case to litigation.

Regarding the dress code, Respondent seeks to create a material distinction in pleading between the implementation of a dress code and the enforcement of a dress code that lay dormant. (R Br 32-33) Respondent's argument on this point lacks merit, Judge Giannasi's finding in this regard is perfectly sound under Board law, but Respondent's assertion also misses the point made by Judge Giannasi in footnote 7 of his Supplemental Decision, which specifically addresses this argument. Even if Respondent could make this argument regarding the merits, and it was rejected as early as Judge Marcionese's Decision on the Merits, in the EAJA context this is insufficient, Respondent's admitted change in employment conditions was sufficient to create substantial justification. (ALJD Supp 6:32-34, n.7)

IV. CONCLUSION

By its Exceptions, Respondent continues to argue its case on the merits and asserts the reasons it believes it would have been ultimately successful before an administrative law judge, although Judge Marcionese's Decision on the Merits strongly suggests otherwise, a point made several times by Judge Giannasi in his Supplemental Decision. ALJ Gianassi's findings and conclusions discussed above were based on a correct analysis of the facts and application of the law. Judge Giannasi found, correctly, that Respondent was almost certainly a *Burns* successor that made admitted unilateral changes after a bargaining obligation attached, and that, absent the jurisdictional issue, General Counsel would have established the violations alleged. Respondent's

arguments certainly do not color the well-reasoned conclusion of Judge Giannasi's Supplemental Decision that General Counsel was substantially justified in all aspects of the case, which is what the Board remanded to him to determine.

Based on the foregoing, Respondent's Exceptions have no merit and the General Counsel requests that the Board reject them in their entirety and adopt Judge Giannasi's recommended findings and conclusions of law.

Signed at Seattle, Washington, on September 9, 2016.

Respectfully submitted,



Ryan E. Connolly
Counsel for General Counsel
National Labor Relations Board
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

CERTIFICATE OF SERVICE

I hereby certify that a copy of General Counsel's Answering Brief to Respondent's Exceptions to the Supplemental Decision of Administrative Law Judge Giannasi Denying Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act was served on the 9th day of September, 2016, on the following parties:

E-FILE:

Gary Shinnars, Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570

E-MAIL:

Michael E. Avakian, Attorney
The Center on National Labor Policy, Inc.
5211 Port Royal Rd., Ste. 610
Springfield, VA 22151-2100
MAvakian@nationallaborpolicy.org

Timothy J. McKittrick, Attorney
McKittrick Law Firm, P.C.
PO Box 1184
Great Falls, MT 59403-1184
kitty@strainbld.com


Kristy Kennedy, Office Manager