

**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
REPLY TO THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S 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

September 19, 2016

RESPONDENT'S REPLY BRIEF TO THE BOARD

INTRODUCTION

Because the General Counsel failed to comply with Section 102.46(d)(2) of the Board's Rules and Regulations, this Reply is constrained. The regulation requires:

The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof. It shall present clearly the points of fact and law relied on in support of the position taken *on each question*. [Emphasis added].

The General Counsel's answering brief addresses none of Roy Spa's questions on pages 1 and 2 of the Exceptions Brief. The critical questions Roy Spa posed and explained, show Judge Giannasi's EAJA decision is in error because no substantial justification for the both the underlying and litigation positions of the General Counsel ("GC") exist. The underlying case proceeded to complaint despite the failure of the GC to 1) to produce any evidence to show cutting hair had "a substantial impact on national defense," and his failure 2) to show how a union representing exclusively five "barbers" can lay claim to work performed in a unit comprising nine licensed cosmetologists.

Statutory review under The Equal Access to Justice Act, 5 U.S.C. § 504 *et seq.* ("EAJA"), requires examination of the case as "an inclusive whole." Judge Giannasi diminished the examination. He ruled the GC was substantially justified by asserting in the Complaint the possibility of jurisdiction and writing conclusory facts without producing any evidence in hand (or at hearing) to prove either one.

THE REMAND

The Board determined that Roy Spa is the EAJA "prevailing party." Roy Spa, LLC, 363 N.L.R.B. No. 183 n.16 (2016). In its Exceptions review to Judge

Marchionese's EAJA ruling, the Board agreed the Judge 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. Id. n.3.

Judge Giannasi assigned the case to himself. But see id. n.1 (requesting the chief judge to "designate another administrative law judge"). He received the General's Counsel's response to Roy Spa's Application for Fees and then Roy Spa's Reply thereto on July 5, 2016. No hearings were held. The Supplemental Decision and Order issued seven days later. JD-66-16 (July 12, 2016).

COUNTER-ARGUMENT

Roy Spa's Exceptions brief reviews the underlying case as an "inclusive whole." The GC asserts that review relitigates issues the GC prevailed on, including unnamed "flawed theories," even though Roy Spa is the prevailing party.

The GC argues the proper EAJA review here is to answer only whether Roy Spa as a successor employer unilaterally changed terms and conditions of employment in violation of Section 8(a)(5). Ans. 2. This argument of a violation can only exist (and violate the Act) if the claim of fact was timely filed. As asserted here, the GC's view of the Board's remand Order is myopic.

Under EAJA review, the GC was compelled to present evidence he relied upon for asserting all the allegations made. Nowhere in the Answering Brief are the facts identified and relied upon when the Complaint was filed.

To show substantial justification behind his assertions of national defense jurisdiction and unilateral changes, the GC was required to produce sufficient

evidence to show the claims could not only be theoretically asserted, but some credible evidence established them. The legislative history cited in the Exceptions Brief shows a broader and more scrutinizing review: “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.” 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. The GC’s Answer omits a response to the statutory purpose and how he met the standard on each litigation argument.

Judge Marchionese’s denial of Roy Spa’s Motion to bifurcate the case on the first day of hearing, See Ex. R-1, provided the GC with an unlimited opportunity to introduce evidence to support all his claims: “I’m going to hear all evidence on all aspects of the case. Tr. 15:19; “We’re going to go forward with the entire hearing.” Tr. 18:3. Even with that broad evidentiary allowance, the GC failed to cobble together any evidence to support each element on all his claims, including the bar of the Section 10(b) limitations period.

Roy Spa set forth in its Exceptions Brief at 42-49 that because it repudiated the claim of successorship in the Fall of 2011—taking both that allegation and a refusal to bargain outside the six-month limitations period of Section 10(b) as a violation—the complaint could not be substantially justified. The GC’s Answering Brief presents not a single word how his successorship argument survives repudiation or 10(b)—because he cannot. His silence is a waiver and a concession that repudiation occurred making the prosecution in contradiction to the statute of

limitations. NLRB v. FLRA, 313 Fed.Appx. 328, 2009 WL 585644 *1 (D.C. Cir. 2009); 5 C.F.R. 2424.32(c)(2) (FLRA). “Failure to respond to an argument...results in waiver.” Bontes v. U.S. Bank, NA, 624 F.3d 461, 466 (7th Cir. 2010). This is the reason no general refusal to bargain was alleged. ALJD 6:35-37. The scheme hoped Roy Spa would assert no defenses.

The GC also never explained to Judge Marchionese or Judge Giannasi “how” Roy Spa met all elements for becoming a legal successor. Even assuming it, as Judge Marchionese pointed out, the limitations period on repudiation had passed. ALJD 6:35-37. Judge Giannasi tries to shoehorn it in. But, the allegation is a nullity. Obfuscation is no substitute for a refusal to recognize or bargain claim.

The sweeping language in the Answering Brief invokes Judge Gianassi’s limited review and conceals the unreasonableness. Judge Giannasi asserted the Board only remanded the case for substantially justified consideration of “the narrow issue” of “unilateral changes.” Ans. 2. Nothing in the Board’s Decision limited the Judge as the GC argues. Why would the Board remand for a unified review of the “inclusive whole” of the case, if a whole swath of factual consideration was to be excluded?

Even assuming Roy Spa was a Burns successor so the unilateral change allegations could be considered, the GC does not explain how the unilateral change even occurred. Paragraph 6(b) of the Complaint stated: “(b) On or about July 19, 2012, Respondent implemented a dress code policy for its employees.”

But, that allegation still requires the GC to assert in this EAJA review how Roy Spa *remained* a Burns successor *at the time of the charge* such that it could be

liable for “implementing” a change (as alleged and as denied). Ans. 3.

Even a look at the substance of the alleged unilateral change that jeans were not permitted does not change the outcome. It is undisputed Roy Spa implemented its Employment Manual dress code, R-15 p.8 (“Clothing made of denim or corduroy material is not permitted (i.e., jean jackets, skirts, etc.”), and applied the AAFES Dress Policy, R-14 (“NO Jeans”), to employees on its first day of operation at Malmstrom AFB, on or about September 1, 2011. Tr. 132:9-14.

Burns permits a successor to set initial terms and conditions of employment. Roy Spa did just that with its Employment Manual. A change in dress policy did not occur. This gaping hole in the dress code allegation is never explained.

Judge Giannasi acted unrestrained by the required EAJA standards to consider what the GC did allege, produce, and challenge, to introduce an entirely new finding—the claim is a change in “enforcement” of the dress code. ALJD 6:19-21. This erroneous finding purportedly comes from “uncontested” testimony the Judge believed showed the dress code was not enforced, but that evidence was directly contested. See Tr. 223:17-25 (AAFES written dress code (R-14) applicable “at all times” at Malmstrom); Tr. 224 (Roy Spa applied its Employee Manual dress code (R-15) to every facility); Tr. 246:1-6 (The AAFES dress policy is enforced); Tr. 132 ll.9-14 (every employee is given a personal copy of the Employee Manual); Tr. 132:9-14. (Employee Marcella MacDonald testified on being hired she received the Employee Manual and signed a receipt stating she “saw it and read it.”). Compare Tr. 166:1-22 (employee Lucilla Williamson claims no knowledge of the dress code posted on Roy Spa’s bulletin board even on day of her testimony) with R-26 p.7

(showing Employee Manual posted at bottom of bulletin board), and Tr. 223:20-25 (Employee Manual last seen on Malmstrom bulletin board “yesterday”).

No reasonable person can say the GC’s litigation evidence that “Roy Spa implemented a new dress code policy” was substantially justified when it had the dress code in place. Judge Giannasi’s post-hoc review stating “enforcement” is the violation was never the GC’s “position.” That holding violates the EAJA statute.

The Complaint’s second unilateral change allegation, claimed Roy Spa set initial wage terms for cosmetologists who the Union explicitly *did not represent* and who were not in the bargaining unit, to violate the Act. Even if the cosmetologists could be included in a unit under some unknown theory (also not alleged by the GC), bargaining with the union was not required until Roy Spa as a successor retained a “substantial and representative complement” of employees under Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 52 (1987).

At the time of the complaint there were no barbers and nine cosmetologists. On the date of the charge, there were 5 barbers. Nowhere has the GC ever explained how it was substantially justified to allege 5 barbers could be a representative complement of a unit of 9 licensed cosmetologists with Roy Spa’s undisputed goal for hiring 9 more to perform its AAFES contract. Tr. 273 ll.19-21.

Judge Marchionese’s first Decision recognized the challenge to the GC’s argument of successorship: “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.” ALJD 6:25-28 (emphasis added). The finding recognizes the barber

unit had collapsed and a different *unit* of cosmetology employees were employed. “This change was specifically required by the Respondent’s contract with AAFES.” ALJD 4:43-44.¹ Judge Giannasi erred in questioning it. ALJD Supp. 7:9-10.

Judge Marchionese’s factual findings also establish no facts exist to satisfy each Burns element. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987), explained the Burns substantial continuity test is: “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.”

Roy Spa’s conversion from barbershop to full service salon with licensed cosmetologists demonstrates the condition could not be met. Old Fashioned Barber and Roy Spa were different. Their employees had different licenses. They had different policies-Roy Spa had a written Employee Manual. Cosmetologists used different equipment and chemicals. There was a different body of customers (men vs. women), different supervisors, and they worked in a different location.²

The GC produced no contradictory evidence at the hearing. His Answer does

¹“In deciding when a ‘substantial and representative complement’ exists in a particular employer transition, the Board examines a number of factors. It studies ‘whether the job classifications designated for the operation were filled or substantially filled and whether the operation was in normal or substantially normal production’ and ‘takes into consideration ‘the size of the complement on that date and the time expected to elapse before a substantially larger complement would be at work ... as well as the relative certainty of the employer's expected expansion.’ Ibid.” 482 U.S. at 48-49 (citation omitted).

²The GC’s Ans. at 13, argues the change in operations after ten months did not affect the complement of employee issue by pointing to Judge Giannasi who questioned whether any “changes took place” and who incredibly suggests the Union would have bargaining rights over cosmetologists. ALJD Supp. 7:9-13.

not dispute Roy Spa's transformation of the operation,³ products, production process, and customer base for the salon follows the finding of no continuity in CitiSteel USA, Inc. v. NLRB, 53 F.3d 350, 354 (D.C. Cir. 1995).⁴

EAJA requires the GC to show he possessed evidentiary facts; not that he could simply allege conclusory facts without factual support. See Fed. R. Civ. Proc. 11(b)(3) (requiring an attorney to demonstrate a basis in fact for every allegation).

1. EAJA Review as an Inclusive Whole Requires Consideration of the Issue of National Defense Jurisdiction and Not Just the Unilateral Change Allegations.

The GC's Brief reads as if he is the prevailing party. Dismissal of the Complaint places Roy Spa "in the same position it would have been had the complaint been dismissed on the merits." Roy Spa, LLC, supra at 5 n.16.

To show substantial justification for alleging jurisdiction and unilateral changes under the EAJA, it was necessary for the GC to present sufficient evidence not only that the claims could be asserted (i.e., theoretically could be pled), but some credible evidence established their elements. Judge Marchionese provided the GC an unlimited opportunity to introduce evidence to support his claims. Yet, no credible evidence was introduced to support every element of the dress policy and initial wage claims and how he would overcome the 10(b) limitations period.

The GC's EAJA burden for explaining what evidence he relied upon to

³The GC asserts Judge Giannasi believed the business never changed for ten months. That ignores the evidence. Roy Spa hired Old Fashioned Barber barbers as temporary employees, R-15 p.5. The AAFES contract required only cosmetologists.

⁴The GC embraces Judge Giannasi's implausible intuition the GC would have likely established the dress code claim, but for his defeat on jurisdiction. Br. 4. The overlooked Employment Manual's dress policy ensures the factual basis for success is erroneous.

support all the complaint's allegations is not excused by alleging Judge Giannasi undertook a "thorough review" of the case, Ans. 4—and overlooking the existence and enforcement of Roy Spa's Employment Manual, R-15, and AAFES Code, R-14. The GC's Answering Brief is silent because to discuss them requires acknowledgment of their existence and why the dress code rules did not preclude the allegation in July 2012 Roy Spa "implemented a new dress code." Complaint ¶8(b). The GC's defense of Judge Giannasi's Supplemental Order repeats the miscues Judge Giannasi took from Judge Marchionese's decision.

First, Judge Marchionese never indicated he thought the GC could have established his claims as the GC alleges at 4, 13. Rather, it was Judge Giannasi who commented. "Judge Marchionese seemed to suggest the violations" might have been established if there was jurisdiction. ALJD at 6:28-30. As there was no jurisdiction there were no violations. Judge Marchionese's comments about the alleged unilateral changes were simply not affirmative. See e.g., ALJD at 6 n.6 (using the word "may" in considering the dress code enforcement).

2. The Substantial Justification Standard was Not Met.

The GC reviews caselaw for the standard of substantial justification, but fails to quote the statute itself. The point of showing the legislative history and quoting it supra, is that litigation can always be viewed as reasonable, which is why the Congress amended the EAJA to overturn Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), and providing the standard "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."

Stating the GC attempted to make a case was a reasonable act is not the standard. Nor is failing to show a prima facie case. The question is whether in asserting national defense jurisdiction over a family hair salon, was it reasonable to allege the service provided by Roy Spa was vital to national defense? No reasonable person would ever admit the preposterous claim. There were no conflicting inferences from the evidence. Judge Marchionese found “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. It is too late to overcome the deficiency of “no evidence” and no “impact.” There being no evidence, the Complaint had no basis to allege national defense jurisdiction: “the national defense standard was not sufficient on the facts here to assert jurisdiction.” ALJD 3:36-37.

Approving this EAJA Application will not stifle the actions of the GC. It will draw a line that the standard of reasonableness requires production of factual evidence to establish alleged violations. Because determining substantial justification for the GC’s litigation position “requires evaluation...as an inclusive whole,” the inclusive whole review considers the underlying action upon which the agency action is “based.” 5 U.S.C. §504(b)(E). Substantial justification cannot be met when there is “no evidence.”

CONCLUSION

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

ORAL ARGUMENT
REQUESTED

Respectfully submitted by:

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: September 19, 2016

**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 REPLY TO THE GENERAL COUNSEL'S ANSWERING BRIEF was efiled to the Executive Secretary's Office and emailed to the following persons on this the 19th day of September 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