

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

**GARNER/MORRISON, LLC**

**and**

**Case 28-CA-021311**

**INTERNATIONAL UNION OF PAINTERS AND  
ALLIED TRADES, DISTRICT COUNCIL #15,  
LOCAL UNION #86, AFL-CIO-CLC**

**and**

**Case 28-CB-006585**

**SOUTHWEST REGIONAL COUNCIL OF  
CARPENTERS**

**MOTION TO DISMISS RESPONDENT GARNER/MORRISON'S APPLICATION  
FOR FEES AND OTHER EXPENSES PURSUANT TO THE  
EQUAL ACCESS TO JUSTICE ACT**

Counsel for the General Counsel (CGC) moves, pursuant to Section 102.150 of the National Labor Relations Board's Rules and Regulations (the Board's Rules), for dismissal, in its entirety, of the Application for Attorney's Fees and Costs (the Application) of Respondent Garner/Morrison, LLC (Respondent) for attorney's fees and costs under the Equal Access to Justice Act (EAJA) 5 U.S.C. Section 504 et seq., because the General Counsel was substantially justified – reasonable in fact and law – in the underlying matter as a whole and because the Application does not comport to the Board's Rules.

**I. Procedural History**

On April 5, 2007, International Union of Painters and Allied Trades, District Council #15, Local Union #86, AFL-CIO-CLC (the Painters Union) filed the charge in Case 28-CA-021311 against Respondent, and a copy of this charge was served on Respondent on April 6, 2007. The Painters Union filed the amended charge in Case 28-CA-021311 against

Respondent on May 30, 2007, and a copy of this charge was served on Respondent on May 31, 2007. On May 31, 2007, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the Complaint) issued against Respondent and Southwest Regional of Carpenters (the Carpenters Union ), alleging that Respondent violated Section 8(a)(1) of the Act by interrogating employees and engaging in surveillance of employees while the Carpenters Union solicited union authorization cards from Respondent's painter and taper employees as well as Section 8(a)(1) and (2) of the Act by rendering unlawful assistance and support to the Carpenters Union.

Following an unfair labor practice hearing on September 5 and 6, 2007, Administrative Law Judge James M. Kennedy (the ALJ) issued his decision on December 21, 2007, dismissing the complaint allegations as to Respondent and the Carpenters Union. CGC and the Painters Union filed exceptions to the decision. On January 27, 2009, a two-member Board panel issued its Decision and Order Remanding, finding violations of Section 8(a)(1) and (2) of the Act and remanding an interrogation allegation to the ALJ to make "appropriate credibility findings and determine whether the credited testimony" established an interrogation violation. *Garner/Morrison, LLC*, 355 NLRB 719, 724 (2009).

On September 20, 2010, the United States Court of Appeals for the District of Columbia granted Respondent and the Carpenters Union's petitions for review and a motion for remand, and remanded the case to the Board based on the decision of the United States Supreme Court in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). On remand, the Board issued its decision on May 27, 2011, finding that Respondent engaged in unlawful surveillance as the Carpenters Union solicited support from Respondent's employees. In this context, the Board found that Respondent went beyond stating its preference for the Carpenters Union by remaining

in the room while the Carpenters solicited employees to sign its authorization cards.

*Garner/Morrison, LLC*, 356 NLRB 1301, 1305 (2011).

On June 27, 2011, Respondent filed with a Board a Motion for Reconsideration (the Motion). In the Motion, Respondent cited *Coamo Knitting Mills, Inc.*, 150 NLRB No. 35 (1964), for the proposition that “the presence of employer representatives at a union meeting where employees signed authorization cards was not sufficient to taint the cards obtained by the union at such meeting.” The Motion at pp. 11-12.

By an unpublished order dated August 18, 2011, the Board denied the Motion because Respondent failed to establish “extraordinary circumstances” warranting reconsideration under Section 102.48(d)(1) of the Board’s Rules and Regulations. The Board noted at footnote 4:

In its motion, Respondent *Garner/Morrison* for the first time cites *Coamo Knitting Mills*, 150 NLRB 579 (1964), in support of its argument that, even assuming that it unlawfully surveilled employees while they signed union authorization cards, such unlawful surveillance did not taint the Carpenters’ showing of majority support. Although *Garner/Morrison*’s belated citation of this case does not establish “extraordinary circumstances” *Coamo Knitting Mills* is nonetheless distinguishable. In that case there was no complaint allegation, much less any Board finding, that the employer engaged in unlawful surveillance of employees signing authorization cards.

Respondent and the Carpenters Union once again filed petitions for review with the United States Court of Appeals for the District of Columbia. On June 21, 2016, the court remanded the case to the Board because the Board did not “adequately distinguish” *Coamo Knitting Mills* from the instant case. On August 27, 2018, a Board majority issued a Supplemental Decision and Order, finding that there was no “material difference” between the facts in the instant case and the circumstances in *Coamo Knitting Mills*. In dismissing the complaint allegations, the majority noted:

[W]hile the presence of employer representatives at a meeting where authorization cards are distributed might, under different circumstances, constitute unlawful surveillance, interference, or assistance in violation of Section 8(a)(1) and (2) of the Act, and lead to unlawful acceptance of assistance in violation of Section 8(b)(1)(A) of the Act, the record as a whole does not support a finding of illegality in the instant case. The Board in *Coamo* found lawful conduct that is materially indistinguishable from that of the Respondents here. Accordingly, we find that Garner/Morrison did not engage in unlawful surveillance in violation of Section 8(a)(1) of the Act, and we shall dismiss that allegation. We further find that the authorization cards were not tainted, and therefore the Carpenters represented an uncoerced majority of the employees on April 2, when Garner/Morrison extended 9(a) recognition to the Carpenters and the Respondents entered into a new memorandum agreement. We therefore dismiss the 8(a)(2) and 8(b)(1)(A) allegations as well.

In dissent, Member Pearce distinguished the facts here from those in *Coamo Knitting Mills* as he would affirm the Board's finding of a violation of Section 8(a)(1) and (2) of the Act. Member Pearce explained:

...In *Coamo*, one manager remained on the factory floor during a meeting that was attended by 145–150 employees, and the Board found that the employer made no effort to determine which of its approximately 170 employees were present. Here, in contrast, 4 of Garner/Morrison's highest executives, including 3 owners, remained in the room while the Carpenters solicited authorization cards from 23 employees. Even if Garner/Morrison's executives could not identify the specific documents the employees were signing, they could easily see which of their 25 painting and taping employees attended the meeting, which employees went to the back of the room, and which employees accepted the documents provided by the Carpenters. The employees in this case would therefore have had much greater reason to fear than the employees in *Coamo* that their employer was monitoring whether they executed, or refused to execute, authorization cards, and they would thus have felt pressured to sign.

Additionally, in *Coamo*, the union initiated contact with the employer, and neither was aware of any rival union activity. 150 NLRB at 582, 584–585. The employer in *Coamo* also waited until the next day to recognize the union. *Id.* at 587. In contrast, in this case, Garner/Morrison contacted the Carpenters and asked it to arrange the April 2 meeting shortly after learning that the Painters had obtained an authorization card majority and was seeking recognition as the 9(a) representative of the painters and tapers. Garner/Morrison also immediately recognized the Carpenters at the April 2 meeting, without examining the cards or

authenticating the signatures. This “instantaneous” 9(a) recognition of the Carpenters deprived employees, who reasonably might have felt pressured by the presence of Garner/Morrison’s executives to sign authorization cards, of the opportunity to take subsequent action to either revoke their authorization cards or to freely choose whether to be represented by the Carpenters or the Painters through the Board’s election procedures. (footnote 6 omitted).

On October 1, 2018, the Board referred Respondent’s application for fees and expenses to Chief Administrative Law Judge Robert A. Giannasi for appropriate action.

## **II. Timeliness of this Motion**

After the referral of the Application, CGC expected to respond to an order to show cause from the Judges’ Division and awaited such an order. It was not until Chief Administrative Law Judge Giannasi made an email inquiry on November 9, 2018, that CGC realized that a show cause order would not issue. CGC recognizes that this motion is outside the 35 days for answering an application under the Board’s Rules Section 102.150(a). As the Board explained in *Roy Spa, LLC*, 363 NLRB No. 183 (2016):

EAJA does not restrict a judge’s discretion to grant an extension of time for the General Counsel to respond to an EAJA application. See generally 5 U.S.C. § 504. Congress neither established any deadline for executive agencies to respond to EAJA applications, nor, indeed, required agencies to respond at all. Rather, Congress delegated to each agency the responsibility to establish “uniform procedures for the submission and consideration of applications.” *Id.* § 504 (c)(1).

Pursuant to this delegated authority, the Board has established uniform procedures that provide for significant discretion in the General Counsel’s and administrative law judges’ processing of EAJA applications. Section 102.150(a) of the Board’s Rules and Regulations provides that the General Counsel *may* file an answer, and provides that a judge *may* treat the absence of an answer as consent to the award requested. And, Section 102.152 provides:

Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the documents in the record. The

administrative law judge, however, upon request of either the applicant or the General Counsel, or on his or her own initiative, may order further proceedings, including an informal conference, oral argument, additional written submission, or an evidentiary hearing. An evidentiary hearing shall be held only when necessary for resolution of material issues of fact.

(b) A request that the administrative law judge order further proceedings under this section shall specifically identify the disputed issues and the evidence sought to be adduced, and shall explain why the additional proceedings are necessary to resolve the issues.

(c) An order of the administrative law judge scheduling further proceedings shall specify the issues to be considered.

Thus, the Board's rules—consistent with the statute—provide that a judge may decline to treat the General Counsel's failure to file a timely answer to an EAJA application as consent to the award, and may, on the judge's own initiative, order further proceedings as necessary to resolve the issues, including additional briefing by the parties, or even a further evidentiary hearing. Granted, the rules expressly contemplate that such further proceedings will not be necessary in ordinary circumstances. But, because the rules would permit a judge, in unusual circumstances, to order additional briefing even after a failure by the General Counsel to timely respond to an EAJA application, the discretion the rules provide does not preclude the authority to grant, for cause, a late request for an extension of time to respond to an EAJA application. We need not here define the precise contours of administrative law judges' discretion in this regard because we find that, under the circumstances of this case, the judge's order fell well within his discretion. (footnotes omitted)

The foregoing establishes that the assigned Administrative Law Judge has discretion to consider this motion. CGC urges that this is especially true in a case now over 11 years old and litigated by an attorney who is no longer with the Regional Office. Further, the Application is lacking as explained below. Consistent with the case authority above, the Administrative Law Judge has discretion to permit Respondent to correct its claim for legal fees and to file the appropriate exhibit showing the net worth of Respondent.

### **III. Argument**

#### **A. Substantially Justified Standard**

The Application should be dismissed because the General Counsel was substantially justified in its issuance of the Complaint, the pursuit of the case to trial before the administrative law judge, and in the filings of exceptions with the Board. EAJA, as applied through Section 102.143 of the Board's Rules, provides that the prevailing party in litigation with the Board is not entitled to an award of attorney's fees and expenses incurred in the litigation if the government's position was "substantially justified." *Blaylock Electric*, 319 NLRB 928, 929 (1995). To determine whether the government's position at a particular stage of litigation is substantially justified, the case should be treated as an, "inclusive whole, rather than as itemized line-items." *In re Glesby Wholesale, Inc.*, 340 NLRB 1059, quoting *Commissioner, INS v. Jean*, 496 U.S. 154, 161-162 (1990).

Although EAJA does not define the term "substantially justified," the Supreme Court has explained the standard as "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Supreme Court held in *Pierce* that the government's failure to prevail at trial cannot be determinative on its own, finding, "[A] position can be substantially justified even though it is not correct ..." *Pierce*, 487 U.S. at 566 n. 2. The Board adopted the Supreme Court's language in *Pierce* in *Jansen Distributing Co.*, 291 NLRB 801 at fn. 2 (1988). The "substantially justified" standard does not require the General Counsel to establish that its position and decision to litigate was based on a significant probability of prevailing at trial. *Carmel Furniture Corp.*, 277 NLRB 105, 1106 (1985). Accordingly, the mere fact the General Counsel lost a particular stage

of litigation, does not mean the General Counsel's position lacked substantial justification for the purposes of EAJA relief. *Alpha-Omega Electric*, 312 NLRB 292, 293 (1993).

**B. The General Counsel Was Substantially Justified Here**

Based on the procedural history summarized above, the General Counsel was substantially justified here in issuing the Complaint, proceeding to trial before the administrative law judge, filing exceptions with the Board, and seeking to enforce the Board orders. The Board upheld a finding of violation twice, once in 2009 before a two-member panel and again in 2011 with three members. Even when the Board dismissed the Complaint in 2018, Member Pearce's dissent establishes that the *Coamo Knitting Mills* relied upon by the Board majority and the Court of Appeals for the District of Columbia may be distinguished from the facts in the instant case, as demonstrated by Member Pearce's detailed explanation of the facts and circumstances of each case.

**C. Respondent's Citing of *Coamo Knitting Mills***

Respondent did not cite *Coamo Knitting Mills* until it described it in the Motion filed June 27, 2011. Without conceding that the General Counsel was not substantially justified throughout the litigation, Respondent should not be entitled to a claim of fees and expenses before citing this case. Further, a single case, cited for the first time midway through litigation, does not establish that the General Counsel was not substantially justified, even though the Board eventually accepted this case as precedent following the remand from the Court of Appeals for the District of Columbia Circuit. It was appropriate for the Board to decline to reconsider its second decision. As explained by the Board in denying the Motion, by citing the case in the Motion for the first time, Respondent did not establish "extraordinary circumstances" as a basis for the Board to reconsider its second finding of a violation.

**D. Respondent Failed to Limit its Fees According to the Board's Rules**

Section 102.145(b) of the Board's Rules provides that "No award for the attorney or agent fees under these Rules may exceed \$75 per hour." Respondent seeks to exceed this amount by citing to the adjusted for cost-of-living increases as posted on the Ninth Circuit Court of Appeals website. (the Application Declaration No. 8). The Board's Rules do not permit fees above the \$75 per hour rate, and Respondent has not filed a petition under the Board's Rule Section 102.124 to increase the amount of the fees claimed as described in Board's Rule 102.146.

**E. Respondent Failed to Include a Net Worth Exhibit of Its Client According to the Board's Rules**

While the Application contains a general description of Respondent and its net worth, Section 102.145(f) of the Board's Rules provides:

Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in §102.143(g)) when the adversary adjudicative proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Administrative Law Judge may require an applicant to file such additional information as may be required to determine its eligibility for an award.

Respondent has the burden to prove by a preponderance of the evidence that it has limited financial resources and is therefore entitled to fees under the EAJA. See *State of Louisiana v. Lee*, 853 F.2d 1219, 1223 (5th Cir.1988). The Application fails to meet the Board's requirement for establishing net worth and should be denied on that basis. In the alternative, the assigned Administrative Law Judge should require Respondent to meet the Board's requirements to establish that Respondent qualifies to make an EAJA claim.

#### **IV. Conclusion**

Based on the foregoing, Respondent has failed to provide sufficient financial information to show that it qualifies for fees under EAJA. Even if Respondent is found to qualify for fees, the General Counsel was substantially justified as a whole in litigating this matter, and the Application should be denied in its entirety. In the alternative, the Administrative Law Judge should permit Respondent to show that it qualifies for fees under EAJA in the amount permitted by the Board's Rules and limit any recovery to the period after Respondent first cited *Coamo Knitting Mills*.

Dated at Las Vegas, Nevada, this 13<sup>th</sup> day of November 2018.

Respectfully submitted,

**/s/ Stephen E. Wamser**

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## CERTIFICATE OF SERVICE

I hereby certify that the **MOTION TO DISMISS RESPONDENT GARNER/MORRISON'S APPLICATION FOR FEES AND OTHER EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT** in *GARNER/MORRISON, LLC*, Cases 28-CA-021311 and 28-CB-006585, was served via E-Gov, E-Filing, and E-Mail, on this 13<sup>th</sup> day of November 2018, on the following:

### **Via E-Gov, E-Filing:**

Honorable Jeffrey Wedekind  
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