

**Pacific Coast Metal Trades District Council and Seattle Metal Trades Council and Foss Shipyard, a Division of Foss Launch & Tug Co. (A Dillingham Company). Case 19-CB-4024(E)**

2 August 1984

**SUPPLEMENTAL DECISION AND ORDER REMANDING PROCEEDING**

**BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER**

On 22 March 1982 the National Labor Relations Board issued a Decision and Order<sup>1</sup> in the above-entitled proceeding affirming the administrative law judge's finding that Pacific Coast Metal Trades District Council and Seattle Metal Trades Council, the Applicants herein, had not engaged in unfair labor practices in violation of Section 8(b)(3) of the Act by refusing to execute a collective-bargaining contract with Foss Shipyard, A Division of Foss Launch & Tug Co. (A Dillingham Company).

Thereafter, the Applicants timely filed with the Board an application for attorneys' fees and expenses pursuant to the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. § 504 (1980) (EAJA), and Section 102.143 et seq. of the Board's Rules and Regulations (Board's Rules). In their application, the Applicants argue that, as prevailing parties in the underlying adversary adjudication, they are entitled to an award of fees and expenses under EAJA. On 26 April 1982, pursuant to Section 102.148(b) of the Board's Rules, the Board ordered that the matter be referred to the judge for appropriate action. Thereafter, the General Counsel filed a motion to dismiss the application for award of fees and expenses, and the Applicants timely filed a response thereto. On 8 June 1982 the judge issued an order denying the General Counsel's motion to dismiss. On 7 July 1982 the General Counsel filed an answer to the Applicants' application and a supporting memorandum. Subsequently, during a conference call between the parties, the judge requested that the parties submit a supplemental memorandum on the issue of the Applicants' eligibility for an award under EAJA, as well as on the merits of the application. Pursuant to the judge's request, the General Counsel filed a supplemental memorandum, with attachments,<sup>2</sup> on 10 December 1982. On 20 December 1982 the Applicants filed a motion to strike the attachments to the supplemental memorandum, and the General Counsel filed a response to the Applicants' motion.

<sup>1</sup> 260 NLRB 1117 (1982).

<sup>2</sup> The attachments consisted of several letters and two affidavits obtained during the General Counsel's administrative investigation of the unfair labor practice charge.

On 11 January 1983 the judge issued the attached supplemental decision in this proceeding in which he granted the Applicants' motion to strike the evidentiary materials attached to the General Counsel's supplemental memorandum, and also found that the General Counsel had failed to demonstrate that his position in the case was substantially justified as required under Section 102.144 of the Board's Rules. The judge found that pursuant to Section 102.143 of the Board's Rules the Applicants are eligible for an award under EAJA and accordingly ordered that the Applicants be awarded attorneys' fees and expenses as provided in EAJA and Section 102.145 of the Board's Rules. Thereafter, the General Counsel filed exceptions and a supporting brief, the Applicants filed exceptions and a supporting brief, and the General Counsel and the Applicants filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In his exceptions, the General Counsel contends, *inter alia*, that the judge erred in failing to aggregate the net worth and number of employees of the Applicants and their affiliated member local unions as required by Section 102.143(g) of the Board's Rules and, as a result, erroneously found the Applicants to be eligible for an award of fees and expenses under EAJA. In their answering brief, the Applicants argue that the General Counsel's interpretation of the Board's Rules, which would require that its net worth be aggregated with that of its constituent labor organizations, is overly broad and runs contrary to the fundamental purpose of EAJA, because it would preclude a small entity with "any" affiliations of protection from governmental attack. Further, the Applicants argue that their constituents do not exercise any substantial degree of control over the trade councils which would warrant the aggregation sought by the General Counsel.

We find that aggregation may be appropriate on the facts of this case. Section 102.143 of the Board's Rules provides that only prevailing parties who meet certain eligibility requirements relating to total net worth and, in most cases, number of employees shall be eligible for an award of fees and expenses under EAJA. Specifically, Section 102.143(c)(5) provides as follows:

(c) Applicants eligible to receive an award are as follows:

...

(5) any other partnership, corporation, association, or public or private organization with a net worth of not more than \$5 million and not more than 500 employees.

In addition, Section 102.143(g) provides as follows:

(g) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

In finding the Applicants' net worth should not be aggregated with the net worth of their member labor organizations, the judge found that the evidence showed that there was an insufficient degree of financial control exercised by the trade councils over the local unions or by the local unions over the trade councils to constitute an affiliation within the meaning of Section 102.143(g) of the Board's Rules or Section 1.104(f) and (g) of the Model Rules of the Administrative Conference of the United States after which the Board's EAJA rules were fashioned.<sup>3</sup> Moreover, the judge found that if the net worth of a local union were to be automatically "lumped together" with the net worth of international unions, trade councils, or affiliated local unions, as he construed the General Counsel to be urging, then EAJA would for all practical purposes be a nullity as to all but the smallest labor organizations.<sup>4</sup>

At the outset we address the question whether it would be unjust or contrary to the purpose of the EAJA to aggregate the net worth of a trade council and its member labor organizations for the purpose of determining eligibility for an award of fees and expenses under that statute. For the reasons set forth below, we find that it would not. As indicated in Section 102.143(g) of the Board's Rules, the aggregation of the net worth of an applicant and another entity is not simply permissible; rather it is

<sup>3</sup> Administrative Conference of the United States, *Equal Access to Justice Act: Agency Implementation*, 46 Fed.Reg. 32900, 32902-32903 (June 25, 1981).

<sup>4</sup> Since this case does not involve the relationship between an international union and its affiliated local unions, we find it unnecessary to pass on the judge's observation with respect to the eligibility issues posed by that relationship.

mandated where the entity is directly or indirectly controlled by, or in control of, the applicant. This is so because the stated, and limited, purpose of EAJA is to assist only "certain individuals, partnership corporations, and labor and other organizations, who may be deterred from seeking review of, or defending themselves against, unreasonable governmental action because of the expenses involved."<sup>5</sup> As indicated by the Administrative Conference of the United States which prepared the Model Rules, the intent of Congress was to aid "truly small entities rather than those that are part of larger groups of affiliated firms."<sup>6</sup> The only express statutory exclusion to aggregation for the purpose of computing net worth and determining EAJA eligibility where related entities have joined a larger group for a common objective is that pertaining to agricultural cooperatives. Accordingly, we find that, where the facts evince the requisite degree of direct or indirect financial control between a trade council and the labor organizations it represents for bargaining purposes, such an aggregation would not be unjust or contrary to the purposes of EAJA.<sup>7</sup>

As to the facts of this case, we find that, contrary to the findings of the judge, the Applicants' member local unions may exert sufficient direct or indirect financial control over the Applicants to be considered affiliates and to require that their net worth be aggregated with that of the Applicants for EAJA eligibility purposes. In this connection, we note that the record shows that the local unions pay to the Applicants a monthly affiliation fee and a per capita tax or dues for each union member. While the judge found such fees insufficient to exhibit the kind of financial control envisioned by Section 102.143(g) of the Board's Rules and section 1.104(f) and (g) of the Model Rules, the financial statements filed by the Applicants with their application indicate that the vast majority of the Applicants' total cash receipts are derived from these contributions from the local unions. Thus, the record suggests that the Applicants are merely creatures of the local unions and are substantially, if not completely, dependent on the local unions for their financial support. We therefore find that the judge erred in failing to give the parties an opportunity to develop fully the issues relating to the question of affiliation, including the sources and nature of the Applicants' income. Accordingly, we shall order that this matter be remanded to the judge for the purpose of receiving further evidence

<sup>5</sup> EAJA, sec. 202(a).

<sup>6</sup> 46 Fed.Reg. 32900, 32902-32903 (June 25, 1981).

<sup>7</sup> EAJA, sec. 203(b)(1)(B).

and making further findings and conclusions concerning the Applicants' EAJA eligibility. If, on review of this evidence, the judge finds that the Applicants derive a majority of their financial support, either directly or indirectly, from their member local unions, the Applicants' net worth shall be combined with that of their member local unions to determine the Applicants' eligibility under EAJA. We shall further order that the judge prepare and serve a second supplemental decision containing findings of fact and conclusions of law upon the evidence received concerning the Applicants' EAJA eligibility.

In his exceptions, the General Counsel also contests the judge's interpretation of Section 102.150 of the Board's Rules and his granting of the Applicants' motion to strike certain evidentiary materials first filed as attachments to the General Counsel's supplemental memorandum. For the reasons set forth below, we agree with the General Counsel that the judge erred in failing to consider the proffered evidence.

The complaint in the underlying unfair labor practice case alleged that the Applicants violated Section 8(b)(3) by conditioning their execution of a collective-bargaining contract with the Charging Party on the Charging Party's use of a different corporate name on the contract. The central issue in the case was whether the Charging Party had in fact changed its name from Foss Launch & Tug Co. (A Dillingham Company) to Foss Shipyard, A Division of Foss Launch & Tug Co. (A Dillingham Company). In his answer to the Applicants' application for fees, the General Counsel asserted that his decision to go forward with the underlying case was reasonable within the meaning of EAJA based, inter alia, on certain information discovered during the General Counsel's administrative investigation of the unfair labor practice charge. Specifically, the General Counsel stated that in issuing the complaint and proceeding to hearing he relied on sworn statements contained in affidavits obtained from officials of the Charging Party during the investigation that it had changed its corporate name for business purposes. Also, the General Counsel claimed that the Applicants failed to cooperate with the General Counsel during the investigation by refusing to permit union officials to be interviewed, and by failing to raise the issue of whether the Charging Party had actually changed its name. In his memorandum in support of his answer to the application, the General Counsel stated that, if the factual allegations relating to the investigation were controverted by the Applicants, "an appropriate showing can and will be made by General Counsel." In response to the judge's subsequent oral re-

quest for the parties to file a supplemental memorandum on the issue of "substantial justification," the General Counsel filed a supplemental memorandum and attached affidavits and letters from the investigative file to support the factual allegations relating to the investigation of the charge. In their motion to strike the attachments, the Applicants contested the General Counsel's submission of the documentary evidence with the supplemental memorandum on the grounds that the parties had not agreed to file further evidentiary materials. In the alternative, the Applicants requested that, if the evidence were accepted, a hearing be conducted on the issues raised by the General Counsel.

In granting the Applicants' motion and striking the attachments to the General Counsel's supplemental memorandum, the judge ruled that the General Counsel had failed to comply with Section 102.150(c) of the Board's Rules which provides in pertinent part as follows:

(c) . . . If the answer is based on alleged facts not already in the record of the adversary adjudication, supporting affidavits shall be provided or a request made for further proceedings under section 102.152.

The judge reasoned that, since the General Counsel failed to submit the affidavits and letters simultaneously with his answer, the evidentiary materials could not properly be included in the record. We disagree.

The General Counsel, in his answer to the Applicants' application for fees, set forth the basis for the General Counsel's decision to go forward with the adversary adjudication. While the General Counsel, in his answer, relied on factual allegations relating to the investigation of the unfair labor practice charge which were not part of the record in the adversary adjudication, he also made it clear that, if these nonrecord facts were controverted, he could and would provide supporting evidence. We find that the General Counsel, in taking this approach, properly sought to preserve the confidentiality of the affidavits and other materials contained in the Region's investigative file, while reserving the right to release such materials should a material factual dispute arise. As noted above, Section 102.150(c) of the Board's Rules specifically gives the General Counsel the option of submitting with the answer supporting affidavits on alleged facts not already in the record of the adversary adjudication or making a request for further proceedings under Section 102.152 of the Board's Rules.<sup>8</sup>

<sup>8</sup> Sec. 102.152 provides, in pertinent part:

The General Counsel's stated willingness to adduce supporting evidence should certain alleged non-record facts be contested was in effect a request for such further proceedings should they be necessary. When the judge thereafter requested each of the parties to file a supplemental memorandum on several issues including that of "substantial justification," the General Counsel had little choice but to respond, which he did in a timely manner. Indeed, under the circumstances, the General Counsel had reason to construe that request as an order for further proceedings under Section 102.152(a)—even though the judge did not mention that section of the Board's Rules. Consequently the General Counsel's submission of supporting evidence regarding the issue of substantial justification was warranted, if not mandated, by the judge's request. Thus, contrary to the judge, we find that the General Counsel's manner of proceeding complied with the provisions of Section 102.152(a) of the Board's Rules and that the judge therefore erred in granting the Applicants' motion to strike the materials submitted by the General Counsel as attachments to his supplemental memorandum.

We further find no merit to the Applicants' contention that acceptance of the evidentiary materials at issue will deprive it of an opportunity to respond. Had the judge permitted the introduction of these materials, as he should have, the Applicants, pursuant to Section 102.152(a) of the Board's Rules, could have requested, or the judge on his own initiative could have solicited, a reply thereto and, if necessary, a hearing could have been conducted.

Accordingly, we shall order on remand that, in the event the Applicants are found to be eligible for an EAJA award, the judge shall accept into evidence and consider the General Counsel's attachments to the supplemental memorandum. As the parties have not had an opportunity to develop fully the issues relating to the allegations contained in the General Counsel's attachments, we shall order that the judge reopen the record and, if necessary, conduct an evidentiary hearing for the purpose of receiving further evidence on the issues raised in the subject materials relating to the General Counsel's claim that his position in the underlying adjudication was substantially justified.<sup>9</sup>

(a) . . . 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 . . . additional written submission, or an evidentiary hearing.

<sup>9</sup> We do not at this time pass on the findings of the judge with respect to the effective date of EAJA or the appropriate type and amount of awards and fees to be awarded herein.

## ORDER

It is ordered that this proceeding is remanded to Administrative Law Judge Jay R. Pollack for the purpose of reopening the record and, if necessary, conducting a hearing to receive further evidence relating to the Applicants' eligibility for an award of fees and expenses under EAJA and, in the event it is determined that the Applicants are eligible for an EAJA award, to accept into evidence the attachments to the General Counsel's supplemental memorandum concerning whether the General Counsel was substantially justified in proceeding in the underlying case and to resolve any material factual disputes in connection with these issues.

IT IS FURTHER ORDERED that the judge prepare and serve on the parties a second supplemental decision containing any necessary credibility resolutions, findings of fact upon the evidence received pursuant to the provisions of this Order, conclusions of law, and recommendations; and that, following service of the second supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

### SUPPLEMENTAL DECISION

(Equal Access To Justice Act)

JAY R. POLLACK, Administrative Law Judge. On March 22, 1982, the National Labor Relations Board issued a Decision and Order in the above-captioned case (260 NLRB 1117) adopting my recommended Order, as modified, and dismissing the complaint in its entirety.

On April 21, 1982, Pacific Coast Metal Trades District Council and Seattle Metal Trades Council (the Applicants) filed an application for attorneys' fees and expenses under the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 (EAJA), and Section 102.143 of the Board's Rules and Regulations. On April 26, the Board referred this matter to me for appropriate action. After considering the record in the underlying unfair labor practice case, the pleadings in this action,<sup>1</sup> and the memoranda supplemental thereto, I make the following findings and conclusions.

#### I. SUBSTANTIAL JUSTIFICATION

EAJA provides that an administrative agency award to a prevailing party certain expenses incurred in connec-

<sup>1</sup> The Applicants filed a motion to strike certain evidentiary materials submitted by the General Counsel as attachments to his legal memorandum in opposition to fees and costs. Under Sec. 102.150 of the Board's Rules, if the General Counsel's position is based on alleged facts not already in the record of the underlying adversary adjudication, supporting affidavits *shall* be provided or a request made for further proceedings under Sec. 102.152. Here, the General Counsel filed no affidavits with his answer but rather attempted to file affidavits and other documents some 5 months later. Accordingly, as the General Counsel has not complied with the Board's Rules, the evidentiary materials are not properly part of the record and the Applicants' motion is granted.

tion with an adversary adjudication, unless the agency finds that the position of the Government was "substantially justified." Although EAJA is silent on the meaning of the "substantially justified" standard, the legislative history of EAJA contains an instructive passage:

The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made. In this regard, the strong deterrents to contesting Government action require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question. The committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable.

The standard, however, should not be read to raise a presumption that the Government position was not substantially justified simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980), cited in *Enehaul, Inc.*, 263 NLRB 890 fn. 2 (1982). See also S. Rep. No. 253, 96th Cong., 2d Sess. 6-7 (1980).

In the underlying unfair labor practice case, the Board's General Counsel alleged that the Applicants violated Section 8(b)(3) of the National Labor Relations Act by refusing to execute a collective-bargaining agreement with Foss Shipyard, A Division of Foss Launch & Tug Co. (A Dillingham Company) (the Company). The Applicants did not dispute that a collective-bargaining agreement had been reached as a result of multi-employer/multiunion bargaining. However, the Applicants contended that the proper party to the contract was Foss Launch & Tug Co. At the hearing on September 17, 1981, the evidence revealed that the proper legal name of the Company was Foss Launch & Tug Co. (A Dillingham Company). On October 20, 1981, the General Counsel filed a motion to withdraw the complaint on the ground that the Applicant could not "be legally compelled to execute a contract with a name other than the properly registered name." However, the Company opposed the General Counsel's motion to withdraw the complaint. Thereafter, on November 5, 1981, on the basis of the entire record, I found no merit to the allegations of the complaint and granted the motion to withdraw the complaint. On March 22, 1982, the Board modified my Order and dismissed the complaint in its entirety.

Based on the facts and circumstances set forth above, I find that the General Counsel has not shown that his conduct of the instant proceeding was substantially justified. Under the General Counsel's view of the case, the legal name of the Company was controlling. However,

that particular fact was a matter of public record, available to the General Counsel prior to his issuance of the complaint. As discussed above, in order to defeat an award the General Counsel must show that his case had a reasonable basis in law and fact. I find that the General Counsel has failed to carry that burden.

## II. ELIGIBILITY

The General Counsel contends that the Applicants are not eligible under EAJA because the net worth of affiliated labor organizations allegedly total in excess of \$5 million. Section 504(b)(1)(B) of EAJA excludes from coverage<sup>2</sup> any association or organization whose net worth exceeded \$5 million at the time the adversary adjudication was initiated. Section 102.143(g) of the Board's Rules and Regulations provides:

(g) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

As stated above, the General Counsel contends that the Applicants' net worth should be determined by the aggregate net worth of their member labor organizations. The General Counsel concedes that local unions are separate and distinct entities from the trade councils and that one is not automatically responsible for the misconduct of the other. See *Mine Workers (Blue Diamond Coal)*, 143 NLRB 795, 797 (1963); *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 217 (1979). On the other hand, in cases in which a local union, in its capacity as an employer, is charged with the commission of unfair labor practices, the Board in asserting jurisdiction over a local union has relied upon affiliation with its international union. See *State County Employees AFSCME Local 17*, 251 NLRB 880, 882 (1980); *Chain Service Employees Local 11*, 132 NLRB 960 (1961), *enfd.* in relevant part 302 F.2d 167 (2d Cir. 1962). However, none of those cases are on point. Here, the question is the application of the EAJA.

The EAJA does not make any reference to the affiliates of applicants. The reference to affiliates in the Board's Section 102.143(g), *supra*, apparently stems from the Model Rules of the Administrative Conference of the United States,<sup>3</sup> Section 104(f) and (g):

<sup>2</sup> With exceptions not applicable here.

<sup>3</sup> 46 Fed. Reg. 32900 et seq.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

The record herein simply shows that local unions in the metal trades industries enjoy membership in the two trade councils which comprise the Applicants. Each local union pays a per capita tax for each of its members and a nominal monthly affiliation fee. However, there is no evidence of a financial relationship between the local unions and the trade councils envisioned by the Board or Model Rules. The record herein does not show financial control exercised by the trade councils over the locals or by the locals over the trade councils. Accordingly, I find that the Applicants' net worth does not include the worth of the member local unions. Moreover, if the net worth of a local union would have to be automatically lumped together with the net worth of international unions, trade councils, or affiliated local unions, then for all practical purposes EAJA would not apply to labor organizations, save some small in-plant groups. Thus, the General Counsel's interpretation of the term "affiliates" in Section 102.143(g) would, in effect, nullify EAJA with respect to labor organizations. In any event, I find that the Applicants' net worth, i.e., that of the two trade councils taken together, does not exceed the eligibility limitations of EAJA.

### III. EFFECTIVE DATE OF EAJA

The General Counsel contends that fees incurred prior to October 1, 1981, are not recoverable. Section 208 of Pub. L. 96-481 provides that the Act "shall take effect on October 1, 1981, and shall apply to any adversary adjudication . . . which is pending on, or commenced on or after, such date."<sup>4</sup> Accordingly, EAJA's test for re-

<sup>4</sup> Sec. 102.143(a) of the Board's Rules and Regulations defines an "adversary adjudication" as an unfair labor practice proceeding pending before the Board on notice of hearing at any time between October 1, 1981, and September 30, 1984. To the extent that Sec. 102.143(a) is inconsistent with EAJA, the rule must yield.

covery of attorneys' fees is whether the case was pending on or after October 1, 1981, and not when the fees were incurred. *Tyler Business Service v. NLRB*, 695 F.2d 73 (4th Cir. 1982). See also *Heydt v. Citizens State Bank*, 668 F.2d 444 (8th Cir. 1982); *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974).

### IV. REASONABLE ATTORNEYS' FEES

EAJA explicitly provides for awards at "prevailing market rates for the kind and quality of the services furnished," up to the ceilings for attorneys and experts.<sup>5</sup> The legislative history indicates that the computation of attorneys' fees should be based on prevailing market rates without reference to the fee arrangements between the attorney and client.<sup>6</sup>

The Board's Rules and Regulations follow this view. Accordingly, Section 102.145(a) provides:

Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

In the instant case, the Applicants' attorney provided services under a retainer agreement. As discussed above, the terms of the retainer agreement between the Applicants and their attorney are not relevant to the computation of compensation under EAJA. Rather, the award of fees is determined according to prevailing general professional standards. As the prevailing rate is in excess of \$75 per hour, the \$75 rate is utilized herein. See, e.g., *International Maintenance Systems Group*, 262 NLRB 1 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

### ORDER

The application of Pacific Coast Metal Trades District Council and Seattle Metal Trades Council is hereby granted in the following particulars:

1. The Applicants are awarded attorneys' fees for 20 hours at \$75 per hour for the defense of the unfair labor practice case.
2. The Applicants are awarded \$315.50 for travel expenses in connection with its trial defense.
3. The Applicants are awarded attorneys' fees for the times spent preparing and prosecuting this application for costs under EAJA.<sup>8</sup>

<sup>5</sup> Sec. 504(b)(1)(A).

<sup>6</sup> H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980).

<sup>7</sup> All outstanding motions inconsistent with this Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>8</sup> See *Tyler Business Services v. NLRB*, supra; *Young v. Kenley*, 641 F.2d 192, 195 (4th Cir. 1981).