

Laborers Funds Administrative Office of Northern California, Inc. and Office and Professional Employees International Union, Local 3. Case 20-CA-21333(E)

May 17, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On May 9, 1990, Administrative Law Judge Jerrold H. Shapiro issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief. The Applicant filed cross-exceptions and an answering brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

In his supplemental decision, the judge granted the Applicant's application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA) and the Board's Rules and Regulations, Section 102.143 et seq. The General Counsel excepts to the award, challenging virtually all aspects of it, including the judge's findings that the General Counsel's position in the underlying unfair labor practice case (Case 20-CA-21333, unreported in the Board volumes) was not substantially justified. For the reasons stated below, we reverse the judge's finding that the General Counsel's position was not substantially justified and deny the application.¹

EAJA provides that an administrative agency may award certain expenses incurred in connection with an adversary adjudication to a prevailing party, unless the agency finds that the Government's position was substantially justified. Substantial justification is not to be equated with a substantial probability of prevailing on the merits.² Nor is the standard intended to deter the Government in good faith from advancing close questions of fact and law or to preclude it from exploring

¹The General Counsel also excepts to the judge's findings that the Applicant met eligibility standards with respect to net worth, that precomplaint fees and costs, compensation for law clerks' services and postcomplaint fees and costs related to the preparation of its August 16, 1988 letter and to issues on which it did not prevail should be awarded, and that one-half the fees paid by Applicant to its attorneys for legal services should be awarded. The Applicant excepts to the judge's calculation of attorney's fees at the hourly rate of \$75 rather than the higher hourly rate charged by its attorneys. In view of our finding that the General Counsel was substantially justified in prosecuting the case, we find it unnecessary to reach these issues.

²*Jim's Big M*, 266 NLRB 665 (1983).

novel questions of law.³ Rather, as the Supreme Court stated in *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), the phrase "substantial justification" means "justified to a degree that could satisfy a reasonable person" or having a "reasonable basis both in law and fact."⁴

Unfair Labor Practice History

As the record in the underlying unfair labor practice proceeding and the instant supplemental proceeding establishes, the parties' last collective-bargaining agreement was effective from November 1, 1976, through October 31, 1979. Prior to the agreement's expiration, the Applicant and the Union began negotiating a successor agreement. When the 1976-1979 agreement expired, the Applicant unilaterally changed, among other things, the employees' contractual workweek from 32 hours, 4 days a week to 35 hours, 5 days a week. On January 9, 1981, in an earlier proceeding,⁵ an administrative law judge found that the unilateral change violated Section 8(a)(5) and (1) of the Act, and ordered that the Respondent restore the status quo ante and make the employees whole for any losses of earnings resulting from the change. On February 26, 1981, the Board adopted the judge's Order in an unpublished decision.

For 6 years following the Board's decision, the Applicant steadfastly refused to remedy these unilateral change violations, notwithstanding that, on August 14, 1981, the United States Court of Appeals for the Ninth Circuit issued a judgment granting enforcement of the Board's Order and in the 5 years following, four additional orders to compel the Applicant's compliance with the enforced Board Order.⁶ During that period the Applicant repeatedly maintained that its unilateral changes had been instituted following an impasse in negotiations. The Applicant also refused to post notices to employees, to notify the Regional Director for Region 20 about its compliance efforts, and to make its records available to the Regional Office. On January 27, 1986, following a special master's report to the court on January 3, 1986, that recommended among other things that a writ of body attachment for civil contempt be issued for David Johnson, the Applicant's administrator and secretary, the Applicant partially re-instituted the 4-day, 32-hour workweek. Six months later, however, the Applicant reneged and notified employees:

³*Craig & Hamilton Meat Co.*, 276 NLRB 974 (1985).

⁴The Court found that a sentence in the 1985 House Committee Report, H.R. Conf. Rep. No. 99-120 (1985), which defined substantial justification as "more than mere reasonableness" was not an authoritative interpretation of what the 1980 statute meant or of what the 1985 Congress intended.

⁵Case 20-CA-14543.

⁶Contempt adjudication orders were issued on February 16 and November 25, 1983, May 8, 1984 (order denying rehearing), and December 9, 1986. Only the latter order was published, No. 81-7401, December 9, 1986. 124 LRRM 2078.

Since our voluntary compliance with the [special master's] recommendation on January 27, 1986, there has been no request for bargaining by the Union and no new proposals; since the government has admitted that an impasse has long been in place and there has been virtually no change in any circumstance, we will return to the workweek, holiday and sick leave conditions which existed on January 26, 1986. This restoration of the workweek, holiday and sick leave conditions will take effect on July 7, 1986.⁷

On April 17, 1987, the Applicant once more restored the 4-day, 32-hour workweek in accordance with the Board's 1981 Order. Official compliance was not achieved, however, until December 1987, following the settlement of disputed amounts owed pursuant to the make whole provisions of the Board's 1981 Order.

Despite the Applicant's conduct, on November 19, 1986, the Union and the Applicant resumed bargaining for an agreement to succeed the 1976-1979 agreement. At their introductory bargaining session the Applicant and the Union agreed that holidays and the workweek were major issues. On several occasions between the commencement of negotiations and July 20, 1987, when the Respondent unilaterally implemented its final offer thereby giving rise to the charges in Case 20-CA-21333, Union Negotiator George Davis informed the Applicant's negotiator, Robert Russell, that compliance with the Board's outstanding Order was very important to employees and would facilitate reaching an agreement. Although Russell stated that compliance matters were not within the scope of his negotiating authority, he said he would pass along the Union's compliance concerns to the Applicant's administrator, Johnson.⁸

The Union and the Applicant held 12 additional bargaining sessions, and at least two "informal" meetings which only the chief negotiators attended before negotiations broke off in late July 1987. Although they reached agreement on numerous subjects, they were still far apart as of April 13, 1987, on the "major" issues described above. Nor was their disagreement on the workweek surmounted when, on April 17, 1987, the Applicant restored the 4-day, 32-hour workweek in compliance with the Board's 1981 Order. From start to finish of the negotiations, the Applicant insisted on a 5-day workweek and the Union insisted on a 4-day workweek. At the April 21 session, the Applicant proposed a 5-day, 37-1/2-hour workweek for the first year of the contract and a 5-day, 40-hour workweek for the

remaining 2 years. At their next session on May 4, the Applicant proposed a 5-day, 35-hour workweek for the first year of a 2- or 3-year contract and a 37-1/2-hour, 5-day workweek for the remainder of the contract. The Union adhered to its proposal for a 4-day, 32-hour workweek but proposed that the contract be reopened after the first year to renegotiate the workweek. Previously, the Union had proposed "splitting" the workweek by scheduling employees to work 32 hours Monday through Thursday and Tuesday through Friday. The Union stated that the shorter workweek made layoffs less likely. The Applicant stated that the longer workweek made for greater efficiency. On June 3, Davis and Russell met alone to discuss outstanding proposals and at this meeting the Union proposed a "favored nations" clause that would allow the Applicant to adopt a more favorable workweek should one be reached between the Union and any other employer. Davis indicated that all the collective-bargaining agreements the Union had with other employers provided for 4-day workweeks, and the Union wanted to keep those contracts standard because it believed if it gave in on one it would have to give in to other employers.

On July 2, the Applicant presented its final offer to the Union in the presence of a Federal mediator. The offer included the proposed 5-day, 35-hour workweek, as well as provisions for a wage increase and the observance of holidays falling on a Saturday that were previously proposed or deemed acceptable by the Union. At the same meeting, the Applicant rejected the Union's workweek proposals. On July 16, the employees rejected the Applicant's final offer, as a result of which Russell informed a union business representative that the Applicant would implement its last offer on July 20. Thereafter, as stated, the Applicant returned to the 35-hour workweek on July 20, and the Union filed an 8(a)(5) charge (Case 20-CA-21333).

The Regional Director initially dismissed the charge, finding no nexus between the Applicant's unlawful conduct in Case 20-CA-14543 and its July 20 implementation of the 35-hour workweek. The Union appealed the dismissal, and on April 18, 1988, the General Counsel's Office of Appeals issued a letter stating that the case raised issues warranting a hearing and directing the Regional Director to issue a complaint. On May 24, 1988, a complaint issued. At the hearing, counsel for the General Counsel declined to acknowledge that an impasse occurred, asserting that any deadlock in negotiations that occurred was tainted by the Respondent's 6-year failure to comply with the Board's Order in Case 20-CA-14543, and therefore was not a legally cognizable impasse.

The judge found that an impasse did occur and that there was insufficient evidence of a nexus between the Respondent's prior unfair labor practices and the impasse. He found that although the Union requested dis-

⁷The admission of impasse referred to is not explained nor substantiated by the record. The record does indicate that the Applicant raised an impasse argument during contempt proceedings, but that the court rejected the argument as waived.

⁸At all times material to the events in Cases 20-CA-14543 and 20-CA-21333, Johnson was primarily responsible for the formulation of personnel and labor relations policies.

discussion about the Respondent's obligation to comply with the outstanding orders at the outset of negotiations, it never included compliance among its bargaining proposals, and that while the Union repeatedly stated that compliance would make it easier to reach an agreement, its negotiators did not testify that the delayed compliance influenced the Union's bargaining position or the employees' rejection of the Respondent's workweek proposal—even though that was the only issue separating the parties at the time of the Respondent's unilateral implementation of its final contract proposal. He noted that the Applicant restored the status quo ante 3 months prior to impasse, and found further that each party engaged in hard bargaining on the workweek issue, and that the Union's inability to compromise was due to its fear of adverse economic consequences and desire to avoid a dangerous precedent for upcoming negotiations with other employers.⁹ Based on the foregoing, he dismissed the complaint in the underlying case.¹⁰

EAJA Analysis

In the instant proceeding, the judge found that the General Counsel's theory of the underlying case was not supported in fact or law. In so finding, he first noted that the General Counsel did not challenge the Applicant's claim of impasse. He also drew an adverse inference from the General Counsel's failure to interview the Applicant's agents prior to issuing the complaint, and imputed knowledge of the tenor of negotiations and positions of the parties during negotiations to the General Counsel based on submissions made to the Regional Office by the Applicant's attorney prior to the hearing. Regarding legal sufficiency, the judge found that none of the cases cited by the General Counsel for the proposition that the Applicant's prior unfair labor practices precluded unilateral implementation of its proposals are factually comparable to the underlying case. *M & C Vending Co.*, 278 NLRB 320 (1986); *Wayne's Dairy*, 223 NLRB 260 (1976); and *Bethlehem Steel Co.*, 147 NLRB 977 (1964).

Contrary to the judge, we find that, although not armed with the strongest facts for prevailing in the unfair labor practice case, the General Counsel possessed sufficient evidence on which to prosecute the case. The General Counsel was aware of the prior unfair labor practices and the Applicant's refusal until midway through negotiations to take even partial steps to remedy them. The General Counsel was also aware of the Applicant's continued insistence in the most recent negotiations on formalizing agreement on the workweek

and attendant overtime provisions that were unlawfully implemented, its continuing failure to provide the backpay due employees and union funds that would have fully restored the status quo ante, and the Union's repeated requests throughout negotiations that the Applicant remedy the unfair labor practices in order to raise employee morale and facilitate reaching an agreement. Even considering the General Counsel's possession of the information submitted by the Applicant's attorney, i.e., that the Union never insisted that an agreement was contingent on compliance with the Board's Order and that the Union in fact asserted unrelated grounds for its position on the workweek, we find, that the General Counsel was correct in concluding that Applicant's claim of impasse "raise[d] Section 8(a)(5) and (1) issues warranting Board determination based upon record testimony developed at a hearing."¹¹ We note particularly that for the General Counsel to prevail in the underlying proceeding it was necessary only for him to prove the claimed impasse was based in part on the Applicant's unremedied unfair labor practices.¹² Accordingly, we do not view the evidence as necessarily inconsistent with, or as precluding a theory that an impasse, if reached, was not legally cognizable.

It is also significant that the judge had to make credibility findings between the testimony of Union Negotiator Davis and Applicant Negotiator Russell concerning the references to the Applicant's outstanding backpay liability during negotiations. The fact that the credibility resolutions did not affect the judge's ultimate decision does not compel a finding that substantial justification was lacking. Obviously, the General Counsel was not required to believe all the assertions made in the Applicant's prehearing submissions to the Regional Office, particularly in view of the discrepancy between the Union's and the Applicant's version of the incidents.¹³ In this connection, we do not view *Iowa Parcel Service*, 266 NLRB 392 (1983), enf. 739 F.2d 1035 (8th Cir. 1984), cert. denied 105 S.Ct. 595 (1984), as being as readily distinguishable from the instant case as the judge does.

The fact that counsel for the General Counsel extended an invitation to the Applicant to participate in an investigation after issuance of the complaint does not of itself give rise to a finding of insufficient justification especially given the sequence of events here. The Regional Office had completed its investigation before the Regional Director initially decided not to issue complaint. The General Counsel reversed that decision on appeal because, in disagreement with the Regional Director, he concluded that the evidence gath-

⁹The judge also rejected the Union's contention that the Applicant engaged in bad-faith bargaining by negotiating with a preconceived intent to bring about an impasse so as to enable it to reinstate the conditions over which it had so long delayed compliance.

¹⁰*M & C Vending Co.*, 278 NLRB 320 (1986); *Wayne's Dairy*, 223 NLRB 260 (1976); and *Bethlehem Steel Co.*, 147 NLRB 977 (1964).

¹¹This was the language used in the letter from the Office of Appeals reversing the Regional Director on his initial refusal to issue complaint.

¹²See *Bethlehem Steel Co.*, supra.

¹³*Advance Development Corp.*, 277 NLRB 1086 (1985).

ered in that investigation could be construed, if credited by a judge, as making out an unfair labor practice.¹⁴ The Regional Director then issued complaint on the direction of the General Counsel, but, out of an abundance of caution, invited a submission by the Applicant.

In sum, it is irrelevant whether, in a further investigation after the General Counsel had directed issuance of complaint, the Applicant's witnesses would have supported assertions made in the Applicant's September 9, 1987 position statement. Reasonable minds could differ as to the legal significance of those factual assertions. The General Counsel did not act unreasonably in concluding that there was at least a triable case as to whether the Applicant's year-long delay in remedying its unfair labor practice that was related to the unit employees' workweek tainted the impasse on that same subject.

Finally, we note that although the cases relied on by counsel for the General Counsel are not on all fours with the underlying case, they all indicate that a background of unlawful unilateral changes may be such as to taint an otherwise legally cognizable impasse. Given that the Board has no per se test for determining the length of time that must elapse or the number of sessions that must take place before impasse occurs, and that an impasse determination is made on a case-by-case basis, and in view of the Applicant's renewed insistence on terms it had unlawfully imposed for 6 years, we find that the General Counsel possessed a reasonable basis in law, as well as fact, to prosecute a case alleging that the Respondent's conduct violated the Act.

ORDER

The National Labor Relations Board reverses the recommended Order of the administrative law judge and orders that the application of the Applicant, Laborers Funds Administrative Office of Northern California, Inc., San Francisco, California, for attorney's fees and expenses under the Equal Access to Justice Act is denied.

¹⁴This is not to suggest that the Board will uphold all decisions of the Office of Appeals to sustain appeals as substantially justified. Rather, in considering the adequacy of an investigation or the lack thereof, we will examine the circumstances surrounding the processing of the charge. We will not deem a post-appeal investigation or offer to investigate to be inadequate simply because it follows the issuance of the complaint.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This supplemental proceeding is before the National Labor Relations Board (Board), for consideration of the verified application for attorneys fees and costs (Application), submitted on

June 8, 1989, by Respondent Laborers Funds Administrative Office of Northern California, Inc. (Applicant), pursuant to the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. § 504 (1980), as amended in Pub. L. 99-80, 99 Stat. 183 (August 5, 1985) (EAJA), and Section 102.143, et seq., of the Board's Rules and Regulations.

On May 9, 1989, the Board issued an Order¹ in the above-entitled case adopting my findings and conclusions that the Applicant herein, had not engaged in unfair labor practices in violation of the National Labor Relations Act (Act) and dismissing the complaint in its entirety.

In its June 8, 1989 Application, the Applicant argues that as the prevailing party in the underlying adversary adjudication it is entitled to an award of fees and expenses under the EAJA. On June 9, 1989, pursuant to Section 102.148(b) of the Board's Rules, the Board ordered that the matter be referred to me for appropriate action. Thereafter, on July 13, 1989, the General Counsel filed a motion to dismiss the Application and the Applicant on August 11, 1989, filed a timely response.

On August 17, 1989, having considered the General Counsel's motion to dismiss and the Applicant's response, I issued an order denying the motion to dismiss, without prejudice, and directed the Applicant to resubmit a schedule of fees recomputed at the hourly rate of \$75 and to file certain additional information pertaining to its eligibility for an award and to the propriety and reasonableness of certain of the fees and expenses requested. On October 2, 1989, in response to my order of August 17, 1989, the Applicant filed a schedule of fees recomputed at \$75 an hour and submitted the additional requested information.

On November 14, 1989, the General Counsel filed an answer to the Applicant's Application and a supporting memorandum. Thereafter, on December 5, 1989, the Applicant filed a reply to the General Counsel's answer.

On December 7, 1989, having considered the General Counsel's answer and the Applicant's reply, I issued an order directing the Applicant to submit certain additional information pertaining to its eligibility for an award. On January 5, 1990, in response to my order of December 7, 1989, the Applicant submitted the additional requested information. Thereafter, on February 5, 1990, the General Counsel filed a response.

Subsequent to filing the Application, the Applicant submitted further fee statements concerning fees and expenses incurred in the preparation and prosecution of the Application. These statements were a part of the supplemental declarations filed by the Applicant's attorney on these dates: July 7, 1989; October 2, 1989; November 10, 1989; December 5, 1989; December 18, 1989; January 29, 1990; and February 16, 1990.

Based upon the record in this supplemental proceeding, described supra, and the record in the underlying unfair labor practice proceeding, and having considered the parties' arguments, I make the following findings and conclusions.

The Issues

The EAJA, as applied to this case, provides for an award of attorney's fees and expenses to the Applicant, the "prevailing party" in the underlying unfair labor practice pro-

¹Not reported in the Board volumes.

ceeding, provided the Applicant meets the EAJA's eligibility requirements and provided further that the General Counsel fails to show that the General Counsel's position in the underlying unfair labor practice proceeding was "substantially justified." Other than their agreement that the Applicant is a prevailing party, the parties dispute virtually everything else of significance. General Counsel contends that the Applicant does not meet the EAJA's eligibility requirements and, in any event, that the General Counsel's position in the unfair labor practice proceeding was substantially justified. The General Counsel also contends that even if the Applicant is entitled to an award of fees and expenses, that the Applicant's fees and expenses incurred before the issuance of the complaint in the underlying unfair labor practice proceeding are not compensable, and that I am without authority to award the Applicant more than \$75 an hour for attorney's fees, and that in certain other enumerated respects the Applicant's claims for fees and expenses are either excessive or not recoverable. I shall address each of these issues in turn.

The Applicant's Eligibility

1. The Evidence

The Applicant, a nonprofit corporation, is in the business of administering Section 302(c)(5)(6) Labor Management Relations Act (LMRA) trust funds, which it does by contracting with the funds to provide administrative services at cost. The Applicant has two offices in San Francisco, California, which it leases from the Laborers Pension Trust Fund. It employs a work force of approximately 60 employees, including managers, accountants, claims processors, collectors, and bookkeepers. Its nonsupervisory employees are represented for the purpose of collective bargaining by Office and Professional Employees International Union, Local 3, the Charging Party in the underlying unfair labor practice proceeding.

The trust funds administered by the Applicant are irrevocable trust funds, as required by Section 302(c) of the LMRA, and are established pursuant to employer-union collective-bargaining contracts to provide health, retirement, holiday, vacation, and employment training program benefits to the covered employees and their dependents. They are administered, in accord with Section 302(c) of the LMRA, by an equal number of employer and union appointed trustees and a neutral trustee selected by the union and employer appointed trustees. The trustees owe a strict fiduciary duty to the beneficiaries of the trust funds, and therefore cannot seek to operate the funds to advance the interests of themselves personally or the interests of the union or employer which appoints them as trustees. See generally *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

Three of the trust funds administered by the Applicant are the Laborers Pension Trust Fund for Northern California (Laborers Pension Trust Fund); the Laborers Health and Welfare Trust Fund for Northern California (Laborers Health & Welfare Trust Fund); the Laborers Holiday-Vacation Trust Fund for Northern California (Laborers Vacation Trust Fund); and (Laborers Pension-Health & Welfare-Vacation Trust Funds). Laborers Pension-Health & Welfare-Vacation Trust Funds have the same trustees.

In 1963 their trustees, on behalf of the Laborers Pension-Health & Welfare-Vacation Trust Funds, incorporated the Applicant for the primary purpose of administering the La-

borers Pension-Health & Welfare-Vacation Trust Funds and other trust funds formulated pursuant to collective-bargaining contracts between employers and labor organizations affiliated with the International Hod Carriers, Building and Common Laborers' Union of America.

I reject the Applicant's apparent contention that the trustees incorporated the Applicant on behalf of themselves as individuals, rather than on behalf of the Laborers Pension-Health & Welfare-Vacation Trust Funds, for whom they acted as trustees. Any doubt that the trustees acted on behalf of these three trust funds when they created the Applicant is removed by the fact that article 10 of the Applicant's articles of incorporation provides, in substance, that if the Applicant is dissolved or otherwise goes out of business, that any assets remaining after its debts have been satisfied shall be distributed among the Laborers Pension-Health & Welfare-Vacation Trust Funds, rather than among the individual trustees.

The Laborers Pension Trust Fund and the Laborers Vacation Trust Fund have no places of business and employ no employees. The Laborers Health & Welfare Trust Fund has an office in Oakland, California, where it employs a work force of approximately 46 employees, including clerical and administrative employees, claims adjusters, and a supervisor, all of whom are represented by Teamsters Local No. 856.

The Applicant, as a nonprofit corporation, is "owned," in a sense, by "members" rather than by shareholders.² The Applicant is not owned by its members in the usual sense of ownership, because unlike the shareholders of a for-profit corporation, the Applicant's members do not receive a share of the Applicant's profits inasmuch as nonprofit corporations, like the Applicant, have no profits. Nor are the Applicant's members eligible to receive any of the Applicant's assets, if the Applicant is dissolved. As noted previously, upon dissolution, the Applicant's assets will be distributed to the Laborers Pension-Health & Welfare-Vacation Trust Funds.

Since its incorporation, the Applicant's members have been the 10 trustees of the Laborers Pension-Health & Welfare-Vacation Trust Funds. These trustees are also the Applicant's board of directors. In this regard, the Applicant's bylaws state the, "the business and affairs of the [Applicant] shall be conducted by a board of 10 directors elected by and from the members." Consistent with the bylaw, the Applicant's 10 members, the trustees of the Laborers Pension-Health & Welfare-Vacation Trust Funds, voted themselves to be the Applicant's board of directors. It is undisputed that the trustees, in their capacity as the Applicant's board of directors, are the governing body of the Applicant and conduct the business and affairs of the Applicant. An example of this is contained in the record of the underlying unfair labor practice proceeding. There, it was established, the Applicant hired the management consultant firm of Scarth-Lyons to negotiate on its behalf with Local 3, only after Scarth-Lyons was interviewed and approved by the Applicant's Board of

²Although the "owners" of the Applicant are its "members," the Applicant's accountant, and presumably the Applicant itself, are under the impression that the Applicant is owned by the Laborers Pension-Health & Welfare-Vacation Trust Funds. In this regard, the accountant's notes to the Applicant's annual final statements for the years 1987 and 1988 state that, "the [Applicant] is a corporation owned by Laborers Pension-Health & Welfare-Vacation Trust Funds] through issuance of membership certificates to each of the trustees of the Trust Funds." The financial statements of the Laborers Pension-Health & Welfare-Vacation Trust Funds reveal that it is the funds, rather than their individual trustees, who pay the Applicant for the membership certificates.

Directors, and during the subsequent contract negotiations with Local 3, the essential contract proposal advanced by Scarth-Lyons, on the Applicant's behalf, were made only after having been approved by the Applicant's board of directors.

During the fiscal year ending May 31, 1988, the Applicant's revenues totaled \$5,170,870, all of which consisted of administrative fees paid to the Applicant by the following trust funds: Laborers Health & Welfare Trust Fund, \$1,462,292; Laborers Pension Trust Fund, \$1,107,318; Laborers Vacation Trust Fund, \$889,406; Laborers Training and Retraining Trust Fund for Northern California, \$784,168;³ Northern California Cement Masons Administration, Inc., \$778,603; Laborers Contract Administration Trust Fund for Northern California, \$3,100; Annuity Pension Fund, \$3,034;⁴ and, Aggregates and Concrete Association of Northern California, Inc. Employees' Security Fund, \$139,934. In other words, during the fiscal year ending May 31, 1988, approximately 67 percent of the Applicant's revenue was in the form of administrative fees paid to the Applicant by the Laborers Pension-Health & Welfare-Vacation Trust Funds. Also for the previous fiscal year ending May 31, 1987, the record reveals that approximately 64 percent of the Applicant's revenue was in the form of administrative fees paid to the Applicant by the Laborers Pension-Health & Welfare-Vacation Trust Funds.

In addition to providing the majority of the Applicant's revenue, the Laborers Pension-Health & Welfare-Vacation Trust Funds loaned the Applicant \$480,000, which loan is still outstanding, and guaranteed the Applicant's monthly payments for leased business equipment. In this regard, the record reveals that each of the Laborers Pension-Health & Welfare-Vacation Trust Funds holds a promissory note valued at \$160,000 for moneys they have loaned to the Applicant, and that in 1983 the Applicant entered into a 7-year lease for electronic data processing equipment at a monthly rental of \$11,200 and that the Laborers Pension-Health & Welfare-Vacation Trust Funds jointly guaranteed these monthly lease payments.

It is undisputed that the net worth of the Applicant for the fiscal year ending May 31, 1988, was \$30. It is also undisputed that the net worth of the Laborer Vacation Trust Fund was \$2,529,980 and the net worth of the Laborers Training Trust Fund was \$4,992,809 for the fiscal years ending May 31, 1988.⁵

The financial statements of the Laborers Pension Trust Fund show that for the fiscal year ending May 31, 1988, its net assets available for benefits totaled \$495,191,290 and that its present value of accumulated plan benefits, also known as the present value of accrued benefits, totaled \$650,569,700. It is undisputed that the annual financial statements of the trust funds involved in this case, do not specifically identify

³The trustees of the Laborer Pension-Health & Welfare-Vacation Trust Funds, each of whom are members-directors of the Applicant, are also the trustees of the Laborers Training and Retraining Trust Fund for Northern California (Laborers Training Trust Fund).

⁴The Annuity Pension Fund is a part of the Laborers Pension Trust Fund.

⁵The above net worth computations for the Laborers Vacation Trust Fund and Laborers Training Trust Fund are based on their net assets available for benefits, as set forth in the financial statements in evidence, inasmuch as the Applicant presented no evidence that either of these trust funds had present value of accrued benefits, also known as present value of accumulated benefits, as of the fiscal year ending May 31, 1988.

their net worth, but to compute their net worth it is necessary to subtract the present value of accumulated plan benefits, also known as the present value of accrued benefits, from the trust fund's net assets available for benefits. In this regard, Sunil Bhardwaj states in his declaration:⁶

The financial statements [of the Laborers Pension-Health & Welfare-Vacation Trust Funds] contained in Exhibits B, C and D are those which are required to be prepared for defined benefit plans pursuant to the standards established by the Financial Accounting Standards Board ("FASB"). FASB Statement—35 (Accounting and Reporting for Defined Benefit Plans) requires (1) a Statement of Net Assets Available for Benefits The Statement of Net Assets Available for Benefits is not a statement of "net worth." "Net Worth" is a term in general business use that reflects the difference between an entity's total assets and its total (current and long-term) liabilities. The Statement of Net Assets Available for Benefits is exclusive of the value of accumulated plan benefits, which is a long-term liability. The accounting profession does not calculate a defined benefit plan's "net worth," because of the uncertainty of relying on actuarial information, which is necessary for stating the present value of accumulated plan benefits. Although financial statements for defined benefit plans do not state "net worth," an approximation of the concept can be derived by subtracting the present value of accumulated plan benefits from net assets available for benefits.

Accordingly, subtracting the present value of accumulated plan benefits for the Laborers Pension Trust Fund as of May 31, 1988 (\$650,569,700) from its net assets available for benefits as of May 31, 1988 (\$495,191,290), establishes that the net worth of the Laborers Pension Trust Fund as of May 31, 1988, was a minus \$155,378,410.

I reject counsel for the General Counsel's contention that the net worth of the Laborers Pension Trust Fund and the Laborers Health & Welfare Trust Fund, *infra*, is limited to their total assets minus their current liabilities. In support of this contention counsel states that since the funds have no current obligation to pay the benefit claims which will be made in the future, that these future claims on benefits do not affect the funds' net worth. Counsel for the General Counsel offers no authority for the proposition that it is only the current liabilities of the trust funds that can be used to compute their net worth, and has not otherwise contradicted the declaration of the Applicant's expert, Sunil Bhardwaj, that "[net] worth" is a term in general business use that reflects the difference between an entity's total assets and its total (current and long-term) liabilities," and that [a]lthough financial statements for defined benefit plans [referring to the trust funds involved herein] do not state "net worth," an approximation of the concept can be derived by subtracting the present value of accumulated plan benefits from net assets available for benefits."

⁶Bhardwaj is employed by the "big 8" accounting firm of Arthur Anderson & Co. as a certified public accountant and manager. He supervised the auditing of the financial records of the Laborers Pension-Health & Welfare-Vacation Trust Funds for the fiscal year ending May 31, 1988.

The financial statements of the Laborers Health & Welfare Trust Fund show that for the fiscal year ending May 31, 1988, it had net assets available for benefits of \$5,519,758. As I have noted previously, the financial statements of the Laborers Health & Welfare Trust Fund do not specifically identify its net worth. Rather the Fund's net worth is computed by subtracting the present value of accumulated plan benefits, also known as accrued benefits, from the net assets available for benefits. However, in the case of the Laborers Health & Welfare Trust Fund, unlike the Laborers Pension Trust Fund, the auditors who audited its books of account for the fiscal year ending May 31, 1988, did not prepare a document showing the Fund's accrued benefits. In order to establish the Funds' total accrued benefits, as of May 31, 1988, the Applicant submitted a declaration from Jordon Smith, a group manager for the Martin E. Segal Company, the company that is the actuary for the Laborers Pension-Health & Welfare-Vacation Trust Funds.

In his declaration, Smith stated that the annual statistical reports prepared by Martin E. Segal for the Laborers Health & Welfare Trust Fund are prepared under his direction and supervision and further stated that he was familiar with the financial statements prepared by the auditors of Arthur Anderson & Co. for the Laborers Health & Welfare Trust Fund, because in preparing those financial reports the auditors and the actuaries employed by Martin E. Segal worked together in fulfilling their respective responsibilities. Smith also declared:

Participants in the Laborers Health & Welfare Trust Fund for Northern California earn future eligibility for benefits as they work. For example, work performed in the period from February through July earns eligibility for benefits in the following period of September through February. Thereafter, as of the end of the Trust Fund's fiscal year, May 31, participants have earned future eligibility. The potential liability for that future eligibility as [of] May 31, 1988, was in excess of \$8 million and is not shown on the Trust Fund's audited financial statements.

Financial statements for employee benefit funds do not identify "net worth." If one were to calculate the theoretical net worth of the Laborers Health & Welfare Trust Fund as of May 31, 1988, the potential liability for future earned eligibility, in the amount of in excess of \$8 million, would need to be taken into account.

Accordingly, based on Smith's declaration, subtracting the present value of the Laborers Health & Welfare Trust Fund's accumulated plan benefits as of the fiscal year ending May 31, 1988 (\$8 million), from the Trust Fund's net assets available for benefits as of May 31, 1988 (\$5,519,758), establish that the net worth of the Laborers Health & Welfare Trust Fund, as of May 31, 1988, was a minus \$2,480,242.

I reject counsel for General Counsel's contention that Smith was not shown to be competent to submit a declaration about the present value of the accumulated benefits for the Laborer Health & Welfare Trust Fund, and for this reason I should find the Applicant has failed to present any evidence of the present value of the accumulated benefits for the Laborers Health & Welfare Trust Fund. As an actuary who worked in conjunction with the Trust Fund's auditors in auditing the fund's business records for the period ending

May 31, 1988, Smith was competent to submit a declaration about the Fund's accumulated benefits as of the fiscal year ending May 31, 1988. I note that counsel for the General Counsel did not request that I afford him an opportunity to cross-examine Smith about the matters contained in his declaration, but simply requested that I reject his declaration in its entirety because he was an incompetent declarant.

2. Analysis

Section 102.143(c) of the Board's Rules and Regulations, in pertinent part, defines a party eligible for an award under the EAJA as a corporation with a net worth of not more than \$7 million and not more than 500 employees as of the date of the complaint in an unfair labor practice proceeding.⁷ In addition, Section 102.143(g) of the Board's Rules and Regulations states:

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 . . . will be considered an affiliate for purpose of this part, unless such treatment would be unjust and contrary to the purpose of the EAJA . . . 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 *Noel Produce, Inc.*, 273 NLRB 769 (1984), where the Board rejected an applicant's contention that the Board had exceeded its administrative authority in adopting Section 102.143(g), the Board stated:

Section 102.143(g) is merely an adoption of the rule recommended by the Administrative Conference of the United States which received and considered comments on the validity of the rule. Although EAJA is silent on the matter, the requirement [that the net worth of an applicant be consolidated with that of its affiliates in determining eligibility] implements the purpose of the Act, which sought to establish "financial criteria which limit the bill's application to those persons and small businesses for whom costs may be a deterrent to vindicating their rights (citation omitted)." Parties that meet the eligibility standard only because of technicalities of legal or corporate form, while having access to a large pool of resources from affiliated companies, do not fall within this group of intended beneficiaries. Moreover, in our attempt to ensure that the rule does not eliminate deserving applicants, Section 102.143(g) provides that in limited circumstances net worth will not be consolidated where "such treatment would be unjust and contrary to the purposes of the EAJA . . . in light of the actual relationship between the affiliated entities."

The Applicant contends it is eligible for an award of fees and expenses under the EAJA because its net worth did not exceed \$7 million and it employed not more than 500 employees during the time material. The General Counsel con-

⁷The complaint issued in the underlying unfair labor practice proceeding on May 24, 1988.

tends that the Laborers Pension-Health & Welfare-Vacation Trust Funds and the Laborers Training Trust Fund are affiliates of the Applicant within the meaning of Section 102.143(g) of the Board's Rules and Regulations, which requires that the net worth of these five entities be aggregated to determine the Applicant's eligibility for an award under the EAJA. The Applicant's response is that the Laborers Pension-Health & Welfare-Vacation Trust Funds and the Laborers Training Trust Fund are not affiliates of the Applicant within the meaning of Section 102.143(g) and, in any event, even if they are affiliates of the Applicant, the Applicant is still eligible for an award under the EAJA.

I am of the opinion that the Laborers Pension-Health & Welfare-Vacation Trust Funds are affiliates of the Applicant within the meaning of Section 102.143(g), because the record reveals that these three trust funds created the Applicant, exercise financial and administrative control over the Applicant, provide the Applicant with the vast majority of its operating revenues, and otherwise make their financial resources available to the Applicant. The several considerations set forth below, in their totality, have led me to this conclusion.

As described in detail *supra*, the Applicant is a creature of the Laborers Pension-Health & Welfare-Vacation Trust Funds; the Applicant was incorporated by the trustees of those trust funds, on behalf of those trust funds, for the purpose of administering them. Besides forming the Applicant, the trustees of the Laborers Pension-Health & Welfare-Vacation Trust Funds, as described in detail *supra*, are the Applicant's Board of Directors and, as such, they exercise financial and administrative control over the Applicant's affairs.

The Applicant's contention that the Laborers Pension-Health & Welfare-Vacation Trust Funds "have no control of any nature over the Applicant" and that the funds' ten trustees "have simultaneous control of the Applicant and the three trust funds," lacks merit. I recognize that in general, "[a] trustee is not an agent. An agent represents and acts for his principal . . . [a trustee] has no principal." *Taylor v. Davis*, 110 U.S. 330, 334-335 (1884); 1 *A. Scott, Law of Trust*, Sec. 8, 74-79 (3d Ed. 1967) (distinguishing trustees from agents). However, I am persuaded that the record establishes that at the very least the Laborers Pension-Health & Welfare-Vacation Trust Funds exercise indirect control over the Applicant because, as I have found *supra*, it was the funds' trustees who created the Applicant and did so on behalf of the trust funds and for the benefit of the trust funds and their beneficiaries; and it is the funds' trustees who, on behalf of the trust funds and for the benefit of the funds and their beneficiaries, exercise control over the financial and business affairs of the funds.

Since the trustees of the Laborers Pension-Health & Welfare-Vacation Trust Funds did not form the Applicant for their own personal benefit as individuals, but formed it in their capacity as trustees of the Laborers Pension Health & Welfare-Vacation Trust Funds for the benefit of those trust funds, and in view of the trustees' fiduciary responsibilities toward the beneficiaries of those funds, it is a fair inference that in exercising their financial and administrative control over the Applicant, the trustees do so with an eye toward the welfare of the Laborers Pension-Health & Welfare-Vacation Trust Funds. Plainly, the welfare of those trust funds includes the financial solvency of the Applicant, inasmuch as the Applicant was created by these trust funds to administer their

funds. Indeed, the Laborers Pension-Health & Welfare-Vacation Trust Funds have in fact placed their financial resources behind the Applicant by guaranteeing the Applicant's monthly lease payments for electronic data processing equipment and by loaning the Applicant almost \$500,000.

The vast majority of the Applicant's revenue is the form of fees paid to the Applicant by the Laborers Pension-Health & Welfare-Vacation Trust Funds; during the fiscal year ending May 31, 1988, approximately 67 percent of the Applicant's income was from the fees paid to it by the Laborers Pension-Health & Welfare-Vacation Trust Funds. In addition to providing the vast majority of the Applicant's revenue in the form of administrative fees, the Laborers Pension-Health & Welfare-Vacation Trust Funds have made their financial resources available to the Applicant by means of substantial loans and by guaranteeing to a third party that the Applicant will fulfill a contractual obligation. In this regard, as described previously, the Laborers Pension-Health & Welfare-Vacation Trust Funds have made loans totaling \$480,000 to the Applicant, which are still outstanding, and for the past several years have guaranteed the Applicant's monthly rental payments of \$11,200 for electronic data processing equipment used by the Applicant in the operation of its business.

It is for all of the above-stated reasons that I am persuaded the Laborers Pension Trust Fund, the Laborers Health & Welfare Trust Fund, and the Laborers Vacation Trust Fund are affiliates of the Applicant within the meaning of Section 102.143(g) of the Board's Rules and Regulations. See generally *Pacific Coast Metal Trades District Council (Foss Shipyard)*, 271 NLRB 1165 (1984), and 295 NLRB 156 (1989).

Counsel for the General Counsel' further contention that the Laborers Training Trust Fund is an affiliate of the Applicant within the meaning of Section 102.143(g) lacks merit. The Laborers Training Trust Fund was not a party to the creation of the Applicant inasmuch as the Applicant's articles of incorporation provide that, "[t]he members of the Applicant shall be the duly appointed trustees of the [Pension Laborers-Health & Welfare-Vacation Trust Funds]." Also, unlike the Laborers Pension-Health & Welfare-Vacation Trust Funds, the Laborers Training Trust Fund has not loaned the Applicant money or guaranteed its payments for leased business equipment or otherwise made its financial resources available to the Applicant. The Laborers Training Trust Fund is merely one of the Applicant's customers which may at any time chose to do business with someone else. In contrast, the Laborers Pension-Health & Welfare-Vacation Trust Funds are realistically obligated to do business with the Applicant because: it was the trustees of those trust funds, acting on behalf of those trust funds, who incorporated the Applicant for the purpose of administering the Laborers Pension-Health & Welfare-Vacation Trust Funds: it is the trustees of the Laborers Pension-Health & Welfare-Vacation Trust Funds, who, as members of the Applicant, are in the loose sense of the word, the "owners" of the Applicant; it is the Laborers Pension-Health & Welfare-Vacation Trust Funds who have loaned the Applicant \$480,000 and guaranteed the Applicant's monthly payments for leased office equipment; and, it is the Laborers Pension Trust Fund which has entered into a long-term lease with the Applicant for the Applicant's use of office space in property owned by that fund. In view of these circumstances, the fact that the persons who were the

trustees of the Laborers Training Trust Fund on May 24, 1988, coincidentally, on that date, were the same persons as the trustees of the Laborers Pension-Health & Welfare-Vacation Trust Funds as of that date, is insufficient to establish that the Laborers Training Trust Fund is an affiliate of the Applicant within the meaning of Section 102.143(g). I am also persuaded there has been no showing that the "financial relationship" between the Applicant and the Laborers Training Trust Fund is such that it would constitute "special circumstances" so as to make it appropriate, under Section 102.143(g), to aggregate the Laborers Training Trust Fund's net worth with that of the Applicant's and its affiliates.

Having found that the Laborers Pension-Health & Welfare-Vacation Trust Funds are affiliates of the Applicant within the meaning of Section 102.143(g) of the Board's Rules and Regulations, the remaining question concerning the Applicant's eligibility for an award of fees and expenses under the EAJA, is whether the combined net worth of the Applicant and its affiliates totals not more than \$7 million.

As I have found *supra*, the net worth of the Applicant and its affiliate as of the fiscal year ending May 31, 1988, was as follows: Applicant, \$30; Laborers Vacation Trust Fund, \$2,529,980; Laborers Pension Trust Fund, minus \$155,378,410; and Laborers Health & Welfare Trust Fund, minus \$2,480,242. Obviously, their combined net worth is not more than \$7 million. Accordingly, having concededly met the other eligibility requirements, the Applicant is eligible for an award of fees and expenses under the EAJA.

Assuming I have erred in computing the net worth of the Laborers Health & Welfare Trust Fund, and its net worth is \$5,519,758, as contended by the General Counsel, and assuming I have also erred in concluding that the Laborers Training Trust Fund is *not* an affiliate of the Applicant and it would otherwise be inappropriate to combine its net worth with the Applicant's, the combined net worth of the Applicant and its affiliates would still not exceed \$7 million because of the Laborers Pension Trust Fund's \$155,378,410 negative net worth. In going to conclude, I considered and rejected the counsel for the General Counsel's contention that when combining the net worth of an applicant and its affiliates, it is unnecessary to include the net worth of those affiliates who have a negative net worth. The contention that the net worth of the affiliates herein may be viewed separately, is contrary to the plain language of Section 102.143(g) of the Board's Rules and Regulations: "The net worth . . . of the applicant and all of its affiliates shall be aggregated to determine eligibility." While there may be good reasons for not following the plain language of the Board's Rules and Regulations in certain situations, I am not at liberty to depart from the straightforward and unambiguous language of the Board's Rules and Regulations requiring the aggregation of the net worth of all of an applicant's affiliates, where, as here, the General Counsel has cited no authority or even offered a rationale for deviating from the Rule's plain language, and there is no obvious reason for concluding that the Rule does not mean what it says.

The General Counsel's Justification for Issuing the Complaint

On November 1, 1979, when its current collective-bargaining contract with Local 3 expired, the Applicant, which was at the time engaged in negotiating the terms of a suc-

cessor contract with Local 3, unilaterally instituted its final contract proposal, even though the negotiations had not reached an impasse. One of these unilateral changes was the substitution of a 5-day 7-hour workweek for the employees' 4-day 8-hour workweek. The other unilateral changes instituted at that time were the elimination of premium pay, the elimination of four paid holidays, changes in employee eligibility requirements for paid holidays and sick leave, and a change in policy regarding a laid-off employee's eligibility for recall. On February 26, 1981, in Case 20-CA-14543, the Board, in an unpublished Order, adopted the findings and conclusions of an administrative law judge that the Applicant's above-described unilateral conduct violated Section 8(a)(5) and (1) of the Act. To remedy the Applicant's unilateral changes in the employees' terms and conditions of employment, the Board ordered the Applicant, among other things, to restore the status quo ante, until such time as the parties bargained in good faith for a reasonable time and reached a new agreement or, in the alternative, reached an impasse, and also ordered the Applicant to make the employees whole for any loss of earnings they may have suffered by reason of the Applicant's November 1, 1979 unilateral changes in their terms and conditions of employment.

On August 14, 1981, the Court of Appeals for the Ninth Circuit entered a judgment enforcing the Board's order. That judgment summarily adopted the Board's order of February 26, 1981. Thereafter, for several years, the Applicant refused to comply with the court's judgment of August 14, 1981, and its subsequent orders.

It was not until April 17, 1987, that the Applicant fully restored the status quo ante, as required by the court's judgment and contempt orders, and it was not until December 1987 that, in compliance with the court's judgment and contempt orders, that the Applicant made the employees whole for the losses they incurred as the result of its unfair labor practices.

In the meantime, in November 1986, after a lengthy hiatus, the Applicant and Local 3 resumed their negotiations for a successor collective-bargaining contract. As described in detail in my decision in the underlying unfair labor practice proceeding, there is no dispute that after extensive negotiations with Local 3, which resulted in an impasse, that on July 20, 1987, the Applicant implemented the terms of its final contract offer which included its proposed 5-day 7-hour workweek, thereby unilaterally changing its employees' workweek from 4- to 8-hour days to 5- to 7-hour days.

On July 22, 1987, Local 3 filed its unfair labor practice charge with the Board's Regional Director in this case, alleging that the Applicant had violated Section 8(a)(5) and (1) of the Act by unilaterally implementing terms and conditions of employment without bargaining to an impasse with Local 3. The Regional Director, after conducting an investigation, notified all parties, by letter dated September 23, 1987, that there was insufficient evidence to establish a violation of the Act, as alleged, because "there does not appear to be an nexus between [the Applicant's earlier violations of the Act] and the current failure to reach agreement." Local 3 filed a timely appeal with the Office of Appeals of the Board's General Counsel. The Office of Appeals by letter dated April 18, 1988, informed the parties that Local 3's appeal had been "sustained" because "it was concluded that the employer's declaration of a bargaining impasse and unilateral implemen-

tation of changes in terms and conditions of employment raised Section 8(a)(5) and (1) issues warranting Board determination based upon record testimony developed at a hearing before an Administrative Law Judge.”

The complaint in the underlying unfair labor practice proceeding was issued by the General Counsel on May 24, 1988, and it alleged, in substance, that on July 20, 1987, the Applicant changed the workweek of its employees represented by Local 3 from a 32-hour workweek, comprised of 4-8 hour days, to a 35-hour workweek, comprised of 5-7 hour days, and further alleged that by engaging in this conduct the Applicant violated Section 8(a)(5) and (1) of the National Labor Relations Act, because this change in the employees’ terms and conditions of employment was made unilaterally and in the absence of “a valid impasse.” In support of this allegation, the General Counsel did not contend that the contract negotiations between the Applicant and Local 3 had not reached impasse by July 20, 1987, when the Applicant unilaterally imposed the terms of its last contract offer, including the 40-hour workweek of 5- to 8-hour days. Rather, it was the General Counsel’s position that the bargaining impasse which existed on that date was not a valid impasse because the Applicant’s prior unremedied unlawful unilateral changes found by the Board in Case 20–CA–14543 tainted the impasse, thus, the General Counsel contended that the Applicant was not privileged to unilaterally implement the workweek provision of its last contract offer. More specifically, it was the position of the General Counsel that the bargaining negotiations had not reached impasse by July 20, 1987, because of these factors: The Applicant previously violated Section 8(a)(5) of the Act in 1979 by unilaterally changing the employees’ terms and conditions of employment in several different respects, including their workweek from 4-8 hour days to 5-7 hour days, and subsequently for several years refused to comply with the judgment and orders of the court requiring it to remedy those unfair labor practices by restoring the status quo ante; the Applicant fully restored the status quo ante, as required by the court’s judgment and contempt orders, only a little more than 3 months before July 20, 1987; and, it was not until approximately 5 months after July 20, 1987, that the Applicant, in compliance with the court’s judgment and contempt orders, made the employees whole for the losses they incurred as the result of the Applicant’s unfair labor practices.

I rejected the General Counsel’s position because I found that the record failed to establish that a cause of the parties’ bargaining impasse was the Applicant’s previous unlawful unilateral changes in the employees’ terms and conditions of employment and, in defiance of the court’s judgment and contempt orders, its delay in remedying those changes. Neither the General Counsel nor the Charging Party excepted to my decision. Subsequently, the Board, in an unpublished order, adopted my findings and conclusions that the Applicant had not engaged in unfair labor practices in violation of the Act and dismissed the complaint in its entirety.

The EAJA provides that a prevailing party may receive an award for fees and expenses incurred in connection with an adversary adjudication involving an administrative agency of the Federal Government, unless it is shown that the position of the agency was “substantially justified” or that “special circumstances” make an award unjust. Here, the General Counsel contends that the agency’s position in the underlying

unfair labor practice proceeding was substantially justified, even though it was judged to be without merit. The law is settled that substantially justified means “justified to a degree that could satisfy a reasonable person,” or having a “reasonable basis both in law and fact.” *Pierce v. Underwood*, 109 S.Ct. 2541, 2550 (1988). I am of the opinion that the General Counsel was not substantially justified in issuing the complaint in this proceeding.

Regarding the General Counsel’s contention that the parties’ bargaining impasse as of July 20, 1987, was tainted by the Applicant’s failure to rescind its prior illegal unilateral changes of the employees’ terms and conditions of employment, the law is settled that when an employer implements unlawful unilateral changes in employees’ terms and conditions of employment, the employer “violates the Act even if it then enters into bargaining on that subject, so long as it has failed in the interim to reinstate the condition it has unlawfully discontinued.” *American Commercial Lines*, 291 NLRB 1066, 1075 (1988), citing, *NLRB v. Allied Products Corp.*, 548 F.2d 644, 652 (6th Cir. 1977). If, however, after implementing the illegal unilateral changes the employer continues to bargain with the union which represents its employees and an impasse in bargaining occurs, the impasse is considered valid even though the employer in the interim failed to rescind the unilateral changes and reinstate the conditions it had previously unlawfully discontinued. *Dependable Building Maintenance Co.*, 274 NLRB 216, 219 (1985), *supp. dec.*, 276 NLRB 27 (1985); *Eagle Express Co.*, 273 NLRB 501 (1984); *J.D. Lunsford Plumbing*, 254 NLRB 1360 (1981). See also *NLRB v. Cauthorne*, 691 F.2d 1023, 1026 (D.C. Cir. 1982) (“where an employer and a union have bargained in good faith, despite the employer’s prior unilateral changes in wages and conditions of employment, the employer’s liability for the unlawful unilateral changes terminates on the date when the parties execute a new agreement or reach a lawful impasse.”). But, if there is a showing that the prior unremedied unlawful unilateral conduct was a factor (not necessarily the sole one) that caused the bargaining impasse, it taints the impasse and precludes the employer from relying on the impasse as a defense to its unilateral change in the employees’ terms and conditions of employment. See *Shipbuilders (Bethlehem Steel) v. NLRB*, 320 F.2d 615 (D.C. Cir. 1973), on remand sub nom. *Bethlehem Steel Co.*, 147 NLRB 977 (1964). In the instant case, however, the record fails to establish that when the General Counsel issued the complaint herein that she had a reasonable factual basis for believing that the Applicant’s failure to rescind its prior illegal unilateral changes in the employees’ terms and conditions of employment and restore the status quo ante, despite the several court orders that it do so, was a cause of the parties’ July 20 bargaining impasse.

The only evidence in the possession of the General Counsel which colorably suggested that the Applicant’s failure to rescind those unilateral changes, despite the several court orders that it do so, contributed to the eventual impasse in the Applicant’s contract negotiations with Local 3, was the following: Local 3’s request and the Applicant’s refusal in January 1987, at the outset of the contract negotiations, to discuss the Applicant’s legal obligation to rescind the illegal unilateral changes it had made in the employees’ working condition; and, Local 3’s statements made to the Applicant at several subsequent negotiation meetings that it would be

easier for Local 3 to reach agreement on the terms of a new contract with the Applicant if the parties sit down and "resolve" the issues concerning the Applicant's legal obligation to rescind the illegal unilateral changes it had made in the employees' condition of employment. However, the other evidence submitted to the General Counsel during the investigation of Local 3's unfair labor practice charge, and the failure of Local 3 to supply certain evidence in support of that charge, should have demonstrated convincingly to the General Counsel that the Applicant's lengthy delay in rescinding the illegal unilateral changes it had made in the employees' working condition, in derogation of several court orders to rescind those changes and restore the status quo ante, played no part in the bargaining impasse. In this regard, the record shows that at the time of the issuance of the complaint in this proceeding and its prosecution, the General Counsel knew the following.

Three months prior to July 20, 1987, the date on which the Applicant implemented its contract proposal providing for a 5-day 35-hour workweek, the Applicant on April 17, 1987, rescinded all of the illegal unilateral changes it had made in the employees' working conditions and, in compliance with its legal obligation, restored the status quo ante including the restoration of the employees' 4-day 32-hour workweek.

During the several bargaining sessions which predated April 17, 1987, Local 3 and the Applicant were far apart concerning their respective workweek proposals; Local 3 continually proposed that the employees work a 4-day 32-hour workweek, as provided in the parties' last collective-bargaining agreement, and the Applicant continually proposed that they work a 5-day 40-hour workweek.

Between April 17, 1987, when the Applicant rescinded the illegal unilateral changes it had made in the employees' working conditions and restored the status quo ante, and July 20, 1987, when the Applicant implemented its 5-day 35-hour workweek proposal, the parties' negotiators held four bargaining sessions, during which they discussed their respective bargaining proposals and positions at length and reached agreement on a substantial number of issues which had previously divided them. However, they remained as far apart as ever on the major issue of the employees' workweek. The Applicant, as described supra, previously had been demanding a 5-day 40-hour workweek, but now proposed a 5-day 35-hour workweek for the first year of the parties' contract, and a 5-day 37-1/2-hour workweek for the remainder of the contract's term. Local 3, however, refused to budge from the position it had held since the start of the negotiations in December 1986; a 4-day 32-hour workweek, as provided in the parties' most recent collective-bargaining agreement and in Local 3's current collective-bargaining agreements with other employers in the industry. During one of the bargaining sessions held between April 17 and July 20, 1987, Local 3's negotiator explained to the Applicant's negotiator that one of the reasons for Local 3's insistence on a 4-day 32-hour workweek was that since Local 3's collective-bargaining contracts with other employers in the industry contained this provision, Local 3 felt it would be adversely affected if it agreed to a more favorable provision in its negotiations with the Applicant.

In support of its unfair labor practice charge, Local 3 did not supply the General Counsel with evidence that during the

period which postdated April 17, 1987, that Local 3's conduct at the bargaining table and its conduct in rejecting the Applicant's final contract proposal was influenced by the Applicant's delay in rescinding the illegal unilateral changes it had made in the employees' working conditions and restoring the status quo ante. I have presumed that if Local 3 had presented such evidence to the General Counsel in the form of statements by officials of Local 3 or employees or of Local 3's literature addressed to the employees or third parties, that counsel for the General Counsel would have presented this evidence in the underlying unfair labor practice proceeding.

The above-described considerations, in their totality, have persuaded me that when the General Counsel issued the complaint in the underlying unfair labor practice proceeding, the General Counsel did not have a basis for reasonably believing that the impasse in bargaining between Local 3 and the Applicant, which existed on July 20, had been caused in whole or in part by the Applicant's delay in complying with its legal obligation to rescind the illegal unilateral changes it had made in the employees' working conditions and to restore the status quo ante. Rather, the evidence which the General Counsel possessed, particularly the evidence describing how Local 3 had conducted itself at the bargaining table during the 3-month period after the Applicant had rescinded its illegal unilateral changes and restored the status quo ante, clearly warranted the inference that the Applicant's delay in rescinding the unilateral changes and restoring the status quo ante had absolutely nothing whatever to do with the parties' bargaining impasse. The reasonableness of this inference should have been even more readily apparent to the General Counsel because of Local 3's failure to furnish evidence that Local 3's conduct at the bargaining table subsequent to April 17 and its July 16, 1987 rejection of the Applicant's final contract proposal, was conduct influenced by the Applicant's delay in complying with its legal obligation to rescind the illegal unilateral changes it had made in the employees' working conditions, or that Local 3 believed this to have been the case.

The General Counsel's contention that the parties' bargaining impasse herein was tainted by the Applicant's failure to make the employees whole for the loss of earnings they had suffered because of the Applicant's illegal unilateral changes lacks a reasonable basis in law. Counsel for the General Counsel cites no authority and there is none which, expressly or by implication, holds that a bargaining impasse cannot justify unilateral changes in employees' working conditions, if one of the reasons for the impasse was the employer's failure to comply with that part of a Board order, in an unfair labor practice case, which requires the employer to make the employees whole for their loss of earnings. One of the reasons for the lack of authority is that an employer, who has been found to have violated the Act by unilaterally changing his employees' working conditions and because of this has been ordered by the Board to, among other things, make the employees whole for the loss of earnings they may have suffered, has the right under the Board's Rules and Regulations to litigate, in a Board-conducted backpay hearing, the amount of backpay claimed. This is exactly what the Appli-

cant did in the present case.⁸ Under these circumstances, the Applicant was not obligated to negotiate with Local 3 about the amount of backpay it owed under the terms of the Board's make-whole order,⁹ instead of exercising its right under the Board's Rules and Regulations to litigate this issue in a Board-conducted backpay proceeding. Accordingly, even if a contributing cause of the eventual impasse in the parties' bargaining negotiations was the Applicant's refusal to discuss with Local 3, as a part of their contract negotiations, its legal obligation to make whole the employees for the earnings they lost because of the Applicant's unfair labor practices, the General Counsel had no reasonable basis in law for taking the position that it tainted the impasse.

In any event, the General Counsel failed to establish that when the complaint issued, the General Counsel had a reasonable *factual* basis for believing that the Applicant's failure to make the employees whole for their loss of earnings was one of the factors which contributed to the bargaining impasse. As I have found *supra*, the evidence in the possession of the General Counsel overwhelmingly indicated that the sole cause of the parties' impasse in bargaining was their irreconcilable and intransigent bargaining positions concerning the employees' workweek, which because of this warranted the inference that even absent the Applicant's failure to make the employees whole by July 20, the parties would still have been at an impasse on that date. This is vividly demonstrated by the fact that even after the Applicant in December 1987 made the employees whole for their loss of earnings, in compliance with the orders of the Board and court, the contract negotiations still remained hopelessly deadlocked for the same reasons—the parties' irreconcilable differences over the employees' workweek.

Lastly, I considered counsel for the General Counsel's argument that, "[i]n view of the [Applicants] prior commission of unfair labor practices of the same kind as alleged in the charge herein and its deliberate refusal to comply with the Board and court orders over a period of several years, it was

⁸On approximately April 17, 1987, the date on which the Applicant complied with the Board order by rescinding all of the unilateral changes and restoring the status quo ante, the Board's Regional Office commenced its investigation to determine the amount of backpay owed under the terms of the Board's make-whole order. Thereafter, when the Regional Office personnel determined the amount of backpay owed and submitted this figure to the Applicant, the Applicant disputed that amount and, as a result, the Board's Regional Director on August 11, 1987, issued a backpay specification and notice of hearing, which afforded the Applicant an opportunity to legally dispute the Regional Director's claims. Subsequently, between August 11, 1987, and December 1987, the Applicant reached an agreement with the Regional Director on the amount of the backpay owed by the Applicant under the terms of the Board's order, and pursuant to that agreement, in December 1987 the Applicant paid these moneys to the employees, thus satisfying the make whole provisions of the Board's order. There is no record evidence which shows that in disputing the amount of backpay, which the Board's Regional Director claimed was required to satisfy its backpay obligation, that the Applicant acted frivolously or in bad faith, or that the General Counsel had reason to believe that this was the case.

⁹In January 1987, at the start of the contract negotiations, the Applicant's negotiator refused the request of Local 3's negotiator to discuss the Applicant's legal obligation to make whole the employees for the loss of earnings they incurred as a result of the Applicant's illegal unilateral changes in their working conditions. Subsequently, on several occasions during contract negotiating sessions, Local 3's negotiator informed the Applicant's negotiator that it would be easier for Local 3 to reach agreement on the terms of the new contract, if the Applicant would sit down and "resolve" the issues concerning the Applicant's legal obligation to make whole the employees for their loss of earnings incurred because of the Applicant's illegal unilateral changes in their working conditions.

reasonable [for the General Counsel] to conclude that such conduct normally has an impact on the bargaining process and is likely to affect the conduct of the parties at the bargaining table." I recognize, as counsel for the General Counsel suggests, that there are circumstances where the nature of an employer's unfair labor practices will so undermine a union's bargaining position so as to warrant the reasonable inference that a good-faith bargaining impasse could not thereafter take place, unless the employer first remedied its illegal conduct. Here, however, it is undisputed that the General Counsel knew that 3 months prior to the disputed impasse in bargaining, the Applicant had remedied the most significant aspects of its unfair labor practices by rescinding the illegal unilateral changes it had made in its employees' working conditions and by restoring the status quo ante. In any event, there is no *per se* rule or conclusive presumption that an employer's unfair labor practices automatically precludes the possibility of meaningful negotiations and prevents the parties from reaching a good-faith impasse. *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982). In the instant case, for the sake of argument, assuming that on its face the employer's unfair labor practices and its deliberate refusal to comply with the orders of the Board and court for a period of several years, was the type of misconduct reasonably calculated to have led the General Counsel to believe that unless fully remedied such conduct would preclude good-faith bargaining from occurring, it did not mean that the General Counsel was privileged to shut her eyes to what had in fact occurred during the parties' contract negotiations. It was only by ignoring what in fact had taken place during the parties' contract negotiations that the General Counsel could have reasonably believed that the Applicant's prior unfair labor practices and its contemptuous refusal to comply with the court's orders to remedy that conduct, contributed to the parties' bargaining impasse. For, as I have found *supra*, the evidence which the General Counsel possessed or, as described *infra*, would have possessed in greater detail, if she had not failed to accept the Applicant's offer to submit it during the investigatory stage of this case, demonstrated overwhelmingly to the General Counsel that the sole cause of the parties' impasse was the irreconcilable and intransigent bargaining positions taken by the parties concerning the employees' workweek, and that because of this, even absent the Applicant's unfair labor practices and its contemptuous refusal to remedy those practices, the parties' contract negotiations would still have been at impasse during the time material.

In finding, as described *supra*, that the General Counsel had knowledge of what occurred during the collective-bargaining negotiations between the Applicant and Local 3, I relied upon the September 9, 1987 position letter to the Board's Regional Director from the Applicant's attorney, Robert W. Tollen, and the uncontradicted testimony of Robert Russell, the Applicant's negotiator, which was given by Russell when he testified on behalf of the Applicant during the unfair labor practice proceeding. My reason for attributing to the General Counsel the knowledge of Russell's testimony concerning the parties' contract negotiations, follows.

Shortly after Local 3 on July 22, 1987, filed its unfair labor practice charge, Attorney Tollen notified the Board's Regional Office that the Applicant was prepared to allow the Board agent assigned to investigate the charge to take state-

ments from the Applicant's negotiators about the contract negotiations between the Applicant and Local 3. In response Attorney Tollen was informed that the Regional Office personnel did not desire to interview the Applicant's negotiators because the General Counsel did not dispute the Applicant's assertion that the contract negotiations had reached an impasse during the time material to the charge. Thereafter, after considering the evidence submitted by Local 3 in support of its charge and the information set forth in Attorney Tollen's September 9, 1987 position letter, the Board's Regional Director notified all parties, by letter dated September 23, 1987, that there was insufficient evidence to establish a violation of the Act, as alleged, because "there does not appear to be a nexus between [the Applicant's earlier violations of the Act] and the current failure to reach agreement." Local 3 appealed the Regional Director's dismissal to the General Counsel's Office of Appeals, which during the latter part of April 1988 notified the Applicant that Local 3's appeal had been sustained and that the case had been remanded to the Board's Regional Director with instructions to issue a complaint, absent a settlement. On May 2, 1988, Attorney Tollen, on behalf of the Applicant, wrote the Regional Director, in pertinent part, as follows:¹⁰

We are in receipt of the letter of April 18, 1988 from the General Counsel's Office of Appeals directing you to issue a complaint in the above matter. The General Counsel is in error. She does not have substantial justification for the issuance of a complaint. We ask that no complaint issue. In the event that a complaint does issue, and we are ultimately successful, we will seek attorney's fees, pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 et seq.

Your office has provided us with the cages that were cited by the Office of Appeals. They are *Olive Knoll Farms, Inc.*, 223 NLRB 260, 265 (1976); *Bethlehem Steel, Inc.*, 147 NLRB 977 (1964); and *M & C Vending Co.*, 278 NLRB 47 (1986). Those cages stand for the obvious legal principle that "there can be no legally reorganizable impasse . . . if a cause of the deadlock is the failure of one of the parties to bargain in good faith." *Industrial Union v. NLRB*, 320 F.2d 615, 621 (3rd Cir. 1963). As the Administrative Law Judge wrote in *Wayne's Olive Knoll Farms*: "A party cannot parlay an impasse resulting from its own misconduct into a license to make unilateral changes." 223 NLRB at 265. We acknowledged that principle in our letter to you of September 9, 1987, at page 5.

The General Counsel does not have substantial justification for concluding that the Laborers Fund administrative office's prior failures to bargain in good faith were the cause of the impasse reached in July, 1987. The Office of Appeals' letter recites that issues have been raised "warranting Board determination based upon record testimony developed at a hearing before an Administrative Law Judge." That statement is wrong. The General Counsel does not know whether such issues have been raised. Region 20 did not interview the Administrative Office's witnesses. Please see page 4 of my letter of September 9, 1987, noting that the

Administrative Office was prepared to give statements, but that Region 20 did not want them. Section 10056.4 of the Casehandling Manual [sic] recites that the charged party should be contacted if the investigation of the charging parties evidence points to a prima facie case. We do not believe that the evidence submitted by Local 3 pointed to a prima facie case that the prior failures to bargain in good faith caused the July, 1987 impasse. Even if that evidence had pointed to a prima facie case, that case might have been dispelled if Region 20 had interviewed the Administrative Office's witnesses.

The General Counsel's wish to develop record testimony does not satisfy the substantial justification standard. By directing the issuance of a complaint without interviewing the charged party's witnesses, the General Counsel has denied herself the opportunity to determine that there is substantial justification for the issuance of a complaint.

The Regional Director did not respond to this letter and, prior to the issuance of the complaint on May 24, 1988, did not afford the Applicant with an opportunity to present its evidence concerning the parties' contract negotiations, by either interviewing the Applicant's witnesses concerning those negotiations or by having Attorney Tollen submit the witnesses' statements. The May 24, 1988 complaint notified the parties that the hearing in the matter would be held before an administrative law judge on August 2, 1988, but due to conflicts in their schedules the attorneys for the Applicant and Local 3 asked that the matter be rescheduled to another date and these requests were granted, and the hearing was eventually rescheduled to be held August 30, 1988.¹¹ Prior to that date, on August 12, 1988, the Attorney assigned to prosecute the case for the General Counsel wrote Attorney Tollen, as follows:

I have been assigned to represent the General Counsel of the National Labor Relations Board at the hearing in the above-captioned case. It has come to my attention that on May 2, 1988 you sent a letter to Robert H. Miller, Regional Director, Region 20 asserting that your client had not been afforded the opportunity to make evidence available to the Regional Office during the investigation in the above-captioned case.

It is the policy of this agency to afford the Charged Party an opportunity to make available to the Regional Office evidence concerning the factual issues raised during the investigation of an unfair labor practice charge. Accordingly, the Regional Office now desires to afford Respondent an opportunity to make available evidence in the above-captioned case. Such evidence will be carefully considered by the Regional Office. Moreover, the Regional Office will inform the office of Appeals of any evidence which Respondent may present. As you know, the Office of Appeals made the decision to issue the Complaint in the above-captioned case.

It is requested that you please advise the Regional Office in writing by the close of business on August

¹⁰ A copy of this letter was sent to the Director of the General Counsel's Office of Appeals.

¹¹ On August 19, 1988, the Regional Director issued an order rescheduling the hearing to October 18, 1988, at the request of the Charging Party's attorney.

18, 1988, whether Respondent desires to make available evidence in the above-captioned case. In the event that I do not hear from you by that date, it will be assumed that your client does not desire to present evidence. If your client requires additional time to make a decision, you may request an extension of the due date prior to August 18, 1988.

On August 16, 1988, Attorney Tollen, by letter, responded to counsel for the General Counsel's letter, as follows:

I am in receipt of your letter of August 12, 1988, which strikes me as insincere. If I am wrong, then I apologize in advance, but the fact is that the Regional Office first issued a complaint and then waited more than three months to react to my letter of May 2, leaving only 2 weeks remaining before the hearing. Further, the reason a Respondent presents his evidence to the Regional Office is to convince the Regional Office that no complaint should issue. Otherwise, one would not present his evidence to his adversary. The April 18, 1988 letter from the Office of Appeals remanded the case to the Regional Director with "instructions to issue [a] complaint." I find nothing in the letter that left the Regional Director with discretion to take evidence from the Respondent and then to decide not to issue a complaint. Nor does your letter of August 12 tell me that the Office of Appeals has joined in your request for additional evidence or authorized the Regional Director to reconsider the issuance of a complaint. Indeed, your statement that any evidence Respondent offers "will be carefully considered by the Regional Office" appears to be carefully crafted go as not to speak on behalf of the Office of Appeals. So does your statement that "the Regional Office will inform the Office of Appeals of any evidence which Respondent may present."

The proper way to have gone about this matter initially would have been for the Office of Appeals to have reversed the Regional Director's decision not to issue a complaint and to have directed the Regional Director to resume his investigation. You have not advised me that the Office of Appeals will now allow the Regional Director to withdraw the complaint and to re-evaluate whether or not a complaint should issue, based on a completed investigation.

Neither counsel for the General Counsel nor the Regional Director responded to this letter.

During the subsequent unfair labor practice hearing counsel for the General Counsel, as had been represented to the Applicant's attorney during the investigation of the case, did not contest the Applicant's contention that the collective-bargaining contract negotiations between the Applicant and Local 3 had reached a state of impasse during the time material. Rather, counsel for the General Counsel took the position that the impasse was not a valid one because it was tainted by the Applicant's prior unfair labor practices. As a result, the testimony of Robert Russell, the Applicant's negotiator, which described the parties' contract negotiations, was not contradicted by the General Counsel, except in one respect; Russell's testimony about the discussion between him-

self and Local 3's negotiator concerning the Applicant's prior unfair labor practices.

In view of the Applicant's request that the General Counsel interview its negotiator concerning the contract negotiations between Local 3 and the Applicant, for the specific purpose of affording the Applicant an opportunity to demonstrate to the General Counsel that there was no "substantial justification" for the General Counsel to believe that the Applicant's prior unfair labor practices contributed to the parties' bargaining impasse, and in view of the General Counsel's failure to interview the Applicant's negotiator or to otherwise, in lieu of that, request that the Applicant's attorney submit detailed evidence of those negotiations, and in view of the fact that this conduct was contrary to Section 101.4 of the Board's Statement of Procedure and contrary to customary operating procedure, and considering that the General Counsel has offered no good reason for deviating from the General Counsel's usual policies, I find it is appropriate to attribute to the General Counsel the knowledge of what occurred during the contract negotiations between the Applicant and Local 3, as described by the Applicant's negotiator Russell when he testified during the unfair labor practice hearing. Presumably if the General Counsel had followed the General Counsel's usual practices and procedures during the investigation of Local 3's charge and had interviewed Russell at that time, as requested by the Applicant, or in lieu of that, instructed the Applicant's attorney to submit a detailed statement describing the parties' contract negotiations, Russell or the Applicant's attorney would have submitted to the General Counsel the same detailed description of the parties' contract negotiations as contained in Russell's unfair labor practice hearing testimony. As noted supra, his testimony in all but one respect was not disputed by Local 3's negotiator.

To sum up, as described supra, Attorney Tollen's letters to the Board's Regional Office of September 7, 1987, and May 2, 1988, placed the General Counsel on notice that the Applicant was prepared to and desired to present detailed evidence concerning the collective-bargaining negotiations between the Applicant and Local 3, for the specific purpose of showing the General Counsel that there was no substantial justification for the General Counsel to believe that the Applicant's prior unfair labor practices contributed to the impasse in those negotiations. However, because apparently the General Counsel, as evidence by the April 18, 1988 Office of Appeals' letter, had "concluded that the [Applicant's] declaration of a bargaining impasse and unilateral implementation of changes in the terms and conditions of employment, raised Section 8(a)(5) and (1) issues warranting Board determination based upon record testimony developed at a hearing before an Administrative Law Judge," the General Counsel chose to shut her eyes to what had in fact occurred during the parties' contract negotiations, and in disregard of the General Counsel's usual investigatory practices and procedures issued the complaint without affording the Applicant an opportunity to present its detailed evidence of the parties' contract negotiations, which would have shown the General Counsel that the General Counsel was without substantial justification in issuing the complaint.

In my opinion where, as in the instant case, the charged party specifically notified the General Counsel of the specific evidence it desired to submit, specifically informed the General Counsel that after considering that evidence it would be

readily apparent to the General Counsel that there was no "substantial justification" for the issuance of the complaint, and the General Counsel without good reason and in violation of the Board's usual practices and procedures went ahead and issued the complaint without affording the Applicant an opportunity to submit that evidence, and where, as here, the record further reveals that if the General Counsel had followed the usual practices and procedures and considered the Applicant's evidence, that the evidence would have demonstrated to the General Counsel that there was no substantial justification for the issuance of the complaint, I am persuaded that knowledge of such evidence should be attributed to the General Counsel and that, under such circumstances, it would be contrary to the policies underlying the EAJA to find that the General Counsel had substantial justification in issuing the complaint.

I have considered that in *Iowa Parcel Service*¹² the General Counsel's investigation of an unfair labor practice charge was inadequate and violated the Board's procedures because of the General Counsel's failure to ascertain the charged employer's evidence or position, yet the Board, with court approval, in the subsequent EAJA proceeding rejected the employer-applicant's contention that had there been an adequate investigation, the General Counsel would not have had sufficient information in his possession to justify the issuance of the complaint, where the record revealed that the General Counsel had sufficient information in his possession to justify the issuance of the complaint. The instant case, however, differs significantly from *Iowa Parcel Service* because unlike that case the Applicant in the instant case specifically notified the General Counsel of the specific type of evidence it desired to present and notified the General Counsel that this evidence would demonstrate to the General Counsel that there was no "substantial justification" for the issuance of a complaint, and the record further shows that in the instant case, if the General Counsel had afforded the Applicant the opportunity to submit the evidence it desired to submit, that the evidence would have demonstrated to the General Counsel that there was no substantial justification for the issuance of the complaint.

I agree with the Applicant that the General Counsel's belated invitation to the Applicant to submit its detailed evidence of the negotiations, issued approximately 2-1/2 months after the issuance of the complaint and virtually on the eve of the scheduled unfair labor practice hearing, came too late because the conduct of the General Counsel was reasonably calculated to lead the Applicant's attorney to believe that to submit his evidence at that late date would have been an exercise in futility. Moreover, when the Applicant's attorney responded to counsel for the General Counsel's invitation by inquiring whether, after considering the evidence, the Board's Regional Director, under whose name the complaint had issued, would have the authority to withdraw the complaint, the Applicant's attorney received no answer from either counsel for the General Counsel or any other other representative of the General Counsel. Absent such an assurance or, at the very least, some assurance that the complaint would be withdrawn if the evidence submitted warranted its withdrawal, it is not surprising that the Applicant's attorney

failed to submit his evidence to counsel for the General Counsel on the eve of the scheduled unfair labor practice hearing.

If I have erred in imputing to the General Counsel the knowledge of Russell's unfair labor practice testimony concerning the contract negotiations, I would still conclude that Attorney Tollen's September 7, 1987 position letter to the Regional Director, by itself, contained sufficient factual information about the parties' negotiations so as to have placed the General Counsel on notice that the Applicant's prior unfair labor practices played no part in the parties' current bargaining impasse and that the sole cause of the impasse was the parties' intransigent bargaining position over the subject of the employee workweek.¹³ Attorney Tollen's position letter informed the Regional Director of the following pertinent facts: 3 months before the July 20, 1987 bargaining impasse, the Applicant had rescinded all of its illegal changes in the employees' working conditions and had completely restored the status quo ante; during this 3-month period Local 3 and the Applicant had held several lengthy bargaining sessions and, as a result of those sessions, the parties had reached agreement on virtually all of the issues which had kept them from reaching agreement, except for the issue of the employees' workweek; the parties were hopelessly deadlocked over the issue of the employees' workweek and had refused to compromise on that subject both prior to July 20, 1987, and during the negotiations held after July 20, 1987; and, Local 3 had explained to the Applicant that it was not possible for Local 3 to compromise its bargaining position concerning the employees' workweek because it was afraid that its collective-bargaining contracts with other employers in the industry, which included the workweek provision it was proposing, would be adversely affected if it compromised on that issue during its negotiations with the Applicant. These representations, contained in Attorney Tollen's position letter, were not contradicted by counsel for the General Counsel when they were presented during the unfair labor practice hearing. In my opinion, they establish the General Counsel had no reasonable factual basis for believing that the Applicant's prior unfair labor practices contributed to the impasse in bargaining which had occurred during the time material to this case.

In support of the contention that the General Counsel had a reasonable factual basis when she issued the complaint for believing that the Applicant's illegal unilateral changes in the employees' working conditions contributed to the parties' bargaining impasse, the General Counsel relies on the Board's decisions in *M & C Vending Co.*, 278 NLRB 320, 325 (1986); *Wayne's Dairy*, 223 NLRB 260, 265 (1976), and *Bethlehem Steel Co.*, 147 NLRB 977 (1964). Counsels for the General Counsel in this proceeding and in the unfair labor practice proceeding merely cited these cases and made no attempt to compare them factually with the instant case to persuade me that it was reasonable for the General Counsel to rely on them. This is not surprising since *M & C Vending* and *Wayne's Dairy* do not remotely resemble the instant case factually; they differ materially from the instant

¹² 266 NLRB 392, 393 (1983), enf. 739 F.2d 1305, 1311-1312 (8th Cir. 1984).

¹³ Although not relevant, I note in passing that after considering all of the evidence submitted by Local 3, in support of its charge, and Attorney Tollen's September 7, 1987 position letter, the Board's Regional Director dismissed Local 3's charge in this case because he was of the view that the Applicant's prior unfair labor practices did not contribute to the parties' bargaining impasse.

case in so many significant respects that I will not burden this already over-long decision by summarizing their pertinent facts. *Bethlehem Steel*, although factually closer to the instant case, is, as I noted in my decision in the unfair labor practice proceeding, factually distinguishable in significant respects, including the fact that there the employer had not rescinded its prior illegal changes in its employees' working conditions and restored the status quo ante, by the date it was claiming that a bargaining impasse justified its subsequent unilateral changes. Here, as described in detail supra, the General Counsel when she issued the complaint knew the following: the Applicant's unfair labor practices had been rescinded and the status quo ante fully restored, as long as 3 months prior to the disputed impasse; knew that the parties had held lengthy contract negotiations during that interim and continuing thereafter; knew that during those negotiations Local 3 remained unyielding in its position concerning the employees' workweek; and, knew that Local 3 refused to compromise its position on that subject, which position it had continually maintained since the start of the negotiations several months earlier. I recognize, as noted by counsel for the General Counsel, that "no two cases are alike; no single precedent can fix the answer to the next," but I am persuaded that the General Counsel was unreasonable in relying on *Bethlehem Steel* and the other cited cases as authority for the issuance of the complaint in this case.

It is for all of the reasons set forth above that I find the General Counsel was not substantially justified in initiating and pursuing the unfair labor practice proceeding herein against the Applicant.

The Applicable Hourly Rate for Attorney's Fees

The EAJA, Section 5 U.S.C. § 504(b)(1)(A), provides that "attorney or agent fees shall not be awarded in excess of \$75 per hour, unless the Agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceeding involved, justifies a higher fee." Section 102.145 of the Board's Rules limits recoverable fees to \$75 per hour and Section 102.146 provides that in order to increase the maximum fee, that any person may file a petition with the Board for rulemaking to increase the maximum fee and that the petition should state why higher fees are warranted by an increase in the cost of living or a special factor such as the limited availability of qualified attorneys or agents for the proceedings involved.

The hourly rates charged the Applicant for the services of the partner of the law firm, who represented the Applicant throughout this case, ranged from \$185 to \$210. The hourly rate of the attorneys who assisted him, ranged from \$95 to \$140. The Applicant contends that "the \$75 rate is totally out of touch with reality" and urges that it be compensated at the actual rates charged by its attorneys or, at the very least, the rate of \$75 an hour be adjusted to take into account the increase in the cost of living. However, the Applicant has not made a request to the Board, by application for rulemaking or otherwise, for an increase in the allowable hourly rate of \$75. Absent such a request and a favorable ruling by the Board, I am without authority to consider the Applicant's request for attorney's fees higher than the maximum provided by the EAJA and the Board's Rules. Accordingly, I

shall compute the Applicant's attorney's fees herein at the hourly rate of \$75.

The Applicant's Claim for Fees and Expenses Incurred Prior to the Issuance of the Complaint

As described supra, the unfair labor practice charge in the underlying unfair labor practice proceeding was filed by Local 3 on July 22, 1987, and on May 24, 1988, the General Counsel issued the complaint.

Counsel for the General Counsel contends that all of the Applicant's fees and expenses incurred prior to the issuance of the complaint are not compensable under the EAJA because they were not incurred in connection with the General Counsel's prosecution of the complaint, but were incurred as a part of the Regional Director's investigation of Local 3's charge.

Counsel for the Applicant contends that although generally fees and expenses incurred before the issuance of a complaint issued in an unfair labor practice proceeding are not compensable under the EAJA, that those incurred in the instant case from September 2 through September 22, 1987, in connection with the Applicant's September 9, 1987 position letter to the Board's Regional Director, are compensable because the investigation of the facts and the legal research which went into the preparation of that position letter were both useful and of the type ordinarily necessary for the Applicant to advance its case during the subsequent adversary adjudication. The facts pertinent to this issue are as follows.

Early in September 1987, Attorney Tollen, the Applicant's lawyer, was notified by Regional Office personnel that it appeared to the Board's Regional Office that Local 3's charge was meritorious. Attorney Tollen was also given the factual and legal basis for this belief, and invited to submit a statement of position. The theory of the alleged violation, as explained to Attorney Tollen, was the same theory as was ultimately relied on by the General Counsel in the issuance of and the prosecution of the complaint. Thereafter, during September 1987, in response to the invitation of the Board's agent to submit a statement of position to the Board's Regional Director, the Applicant's lawyer did the following: Analyze the cases relied on by the Board's Regional Office, which were essentially the same cases relied on by the Counsel for the General Counsel during the prosecution of the complaint; researched the circumstances under which a prior unfair labor practice, including one still unremedied, might taint an otherwise valid bargaining impasse; interviewed the employees of the management consultant firm who, on behalf of the Applicant, were negotiating with Local 3, so as to learn more about the precise facts as they related to this legal research; and had further discussions with the personnel of the Board's Regional Office about the legal theories involved.

Based upon the aforesaid investigation of the facts and law, Attorney Tollen prepared an 8-page position letter which, on September 9, 1987, he submitted to the Board's Regional Director. This letter sets forth the Applicant's position as to the facts and the law, and was a response to the contention of the Board's Regional Office personnel that the bargaining impasse between Local 3 and the Applicant was not a valid one because it had been tainted by the Appli-

cant's prior unremedied unfair labor practices.¹⁴ The letter was written for several reasons: To persuade the Board's Regional Director not to issue a complaint; and to collect together, organize and preserve the analysis of the Applicant's defenses for use in the event a complaint issued. Ultimately, the investigation of the facts, the legal research, and the analysis of that research as applied to the facts, all of which went into the September 9, 1987 position letter, formed the basis for the Applicant's successful defense against the General Counsel's prosecution of the complaint; the record shows that in trying its case before me during the unfair labor practice hearing, the Applicant used virtually all of this information—factual and legal—in presenting its case-in-chief. In view of the above-described factors, I agree with the Applicant that the time spent by the Applicant's lawyer in preparing the September 9, 1987 position letter submitted to the Board's Regional Director, concerned work which was both useful and of a type ordinarily necessary to advance the Applicant's position during the later adversary adjudication.

The statutory provision on which the Applicant's fee application is based (5 U.S.C. § 504(a)(1)) applies only to fees and expenses incurred "in connection with" an "adversary adjudication" before an administrative agency, and 5 U.S.C. § 504(b)(1)(C) defines "adversary adjudication" as "an adjudication under Section 554 of this title in which the position of the United States is represented by counsel or otherwise." Sections 102.143 and 102.144 of the Board's Rules and Regulations, which implement those provisions of the EAJA, state in pertinent part, "[a]n eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication," and defines the term "adversary adjudication" to mean "unfair labor practice proceedings pending before the Board on complaint, and backpay proceedings . . . pending before the Board on notice of hearing."

Counsel for the General Counsel takes the position that even if the investigation of the facts and the legal research work that went into the preparation of the Applicant's September 9, 1987 position letter to the Regional Director were both useful and of a type ordinarily necessary for the Applicant to advance its case during the subsequent adversary adjudication, that as a matter of law those fees and expenses are not compensable under the EAJA, because they were incurred prior to the issuance of the complaint. Counsel cites no Board authority for this position. In this regard, I note that in the handful of cases where the Board has issued EAJA awards and where the successful applicants have asked to be compensated for precomplaint legal fees and expenses, that the administrative law judges have ruled against the applicants on this issue and the applicants did not file exceptions to the judges' decisions. *DeBolt Transfer*, 271 NLRB 299 (1984), and *Evergreen Lumber Co.*, 278 NLRB 656 (1986). Thus, the Board has not ruled on this question. The Applicant relying on *Webb v. Dyer County Board of Education*, 471 U.S. 234 (1985), contends that if the legal serv-

ices performed by its lawyers in connection with the submission of its September 9, 1987 position letter to the Regional Director were both useful and ordinarily necessary to the Applicant to advance its side of the litigation during the General Counsel's prosecution of the complaint, that the expense of those legal services is compensable under the EAJA, even though they were performed prior to the issuance of the complaint. I agree.

In *Webb* a school teacher, after being terminated by the Board of Education, retained counsel to represent him in an administrative proceeding before the Board of Education, where the teacher contested his termination on the grounds that it was racially motivated and that his constitutional rights had been violated. Four years later the Board of Education decided to adhere to its decision. Subsequently, the teacher instituted an action in federal district court, seeking relief under various civil rights statutes, including 42 U.S.C. § 1983. The case was subsequently settled by entry of a consent order awarding the teacher damages and other relief. Thereafter, the teacher filed a motion for an award of fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which provides that, "[i]n any action or proceeding to enforce" certain civil rights statutes, including Section 1983, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." The district court, with the approval of the Court of Appeals, awarded a fee, but rejected the teacher's contention that it should cover services performed by counsel in the administrative proceeding before the Board of Education.

In *Webb* the Supreme Court held that a "prevailing party" within the meaning of Section 1988 was not entitled to a fee award for services rendered during a school board hearing not required for pursuit of a Section 1983 claim, and in this regard reasoned (*Webb v. Dyer County Board of Education*, 471 U.S. at 241):

Congress only authorized the district courts to allow the prevailing party a reasonable attorney's fee in an "action or proceeding to enforce [§ 1983]." Administrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce Sec. 1983, and even though the petitioner obtained relief from his dismissal in the later civil rights action, he is not automatically entitled to claim attorney's fees for time spent in the administrative process.

The Court then went on to consider the teacher's second theory—that under the Court's reasoning in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), even if there was no automatic entitlement for the time spent on the administrative proceeding, that such time would be compensable if it was shown to have been reasonably expended in the preparation for the later litigation. *Webb v. Dyer Board of Education*, 461 U.S. 234, 241–244 (1985). The Supreme Court, in considering this argument, emphasized that each case must be decided on its own facts, and that although some legal services performed before formally filing a lawsuit are compensable under Section 1988, it was not error for the district court to exclude the 5 years of easily separable administrative time in computing a "reasonable attorney's fee" for the teacher's counsel, where "[t]he [teacher] made no suggestion

¹⁴ Although the letter also dealt with the Regional Office's personnel's contention that the Applicant was in contempt of the court's order, this constituted only a de minimis part of the letter. I also note that the fee statement submitted by the Applicant for the period (Sept. 2 through 22, 1987) reveals none of the legal research and analysis performed by the Applicant's lawyers in connection with the preparation of the letter, dealt with the contention that the Applicant's prior unremedied unfair labor practices had tainted the parties' bargaining impasse.

below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the state it reached before settlement.” *Webb v. Dyer County Board of Education*, 471 U.S. at 243. In other words, as the Court of Appeals for the Third Circuit stated in *Delaware Valley Citizens’ Council for Clean Air v. Pennsylvania*, 762 F.2d 272, 277 fn. 7 (1985), “the Supreme Court recently held in *Webb* that fees may be recovered under 42 U.S.C. § 1988 for time spent by counsel pursuing ‘optional administrative proceedings,’ so long as counsel’s work ‘was both useful and of a type ordinarily necessary to advance the [civil rights] litigation’ to the point where the party prevailed.” See also *Webb v. Dyer County Board of Education*, 471 U.S. at 244–245 (Brennan, J., concurring in part and dissenting in part) (Court’s conclusion authorizes limited awards of fees under Sec. 1988 for work performed in optional state administrative proceedings if such work was “useful and of a type ordinarily necessary to the successful outcome of the subsequent litigation.”).

In view of the Supreme Court’s opinion in *Webb*, and having found, *supra*, that the time spent by the Applicant’s lawyers in preparing the September 9, 1987 position letter involved legal work which was both useful and of a type ordinarily necessary to advance the Applicant’s position during the later adversary adjudication, I further find that the Applicant’s legal fees and expenses incurred from September 2 through September 22, 1987, in connection with that position letter, are compensable under the EAJA.¹⁵

The Applicant’s Claim for Fees and Expenses Incurred
Before the Complaint Issued, but Subsequent to the
Applicant’s Notice from the General Counsel that the
General Counsel Intended to Issue the Complaint

On May 24, 1988, the complaint in the underlying unfair labor practice case issued. However, as described *supra*, on April 18, 1988, the General Counsel notified all of the parties to the proceeding that the General Counsel’s Office of Appeals was remanding the case to the Board’s Regional Director with instructions to issue a complaint, absent settlement. The Applicant contends it is entitled to the legal fees and expenses it incurred between April 18, 1988, and May 24, 1988, in connection with the anticipated issuance of the complaint, because the General Counsel’s April 18, 1988 announcement that a complaint would be issued should be equated with the issuance of a complaint for the purposes of the EAJA. Counsel for the General Counsel takes the position that as a matter of law no fees and expenses incurred prior to the actual issuance of a complaint are compensable under the EAJA. Counsel for the General Counsel’s position places form over substance.

I am of the opinion that when the General Counsel notifies the parties involved in an unfair labor practice investigation, including the charged party, that the General Counsel has decided that absent settlement a complaint will issue, that this announcement realistically is the equivalent of the actual

issuance of a complaint for purposes of the EAJA, and that it is reasonable to expect that the charged party’s lawyer or agent at that point in time will act in anticipation of the issuance of the complaint.¹⁶ However, as provided in the EAJA the legal fees and expenses incurred during this period, as during the period which postdates the issuance of the complaint, must be incurred in connection with the “adversary adjudication” to be compensable.

In the instant case, between April 18, 1988, when the Applicant was notified by the General Counsel that a complaint would issue, and May 24, 1988, when the complaint issued, the Applicant’s attorneys performed the following legal services for which the Applicant is seeking reimbursement: considered the General Counsel’s decision to issue the complaint and the theory of the complaint; met with the Applicant’s business manager and its collective-bargaining negotiators, for the purpose of discussing with them the General Counsel’s decision to issue the complaint; considered and researched the cases which the General Counsel indicated she intended to rely on in support of the complaint; considered asking the General Counsel to reconsider her decision to issue the complaint; considered the possibility of filing a motion for summary judgment in response to the issuance of the complaint; considered and researched possible defenses to the complaint; considered and researched the Board’s Rules and Regulations concerning the EAJA and cases arising under the EAJA, with the object of determining whether the Applicant would qualify as a “prevailing party” under the EAJA and whether the General Counsel had “substantial justification” to issue the complaint; and, on May 2, 1988 Attorney Tollen, wrote a letter to the Board’s Regional Director, with a copy to the General Counsel’s Office of Appeals. This letter which has been set forth in detail *supra*, can be briefly summarized as follows: It began by stating that the General Counsel had no “substantial justification” for issuing the complaint, asked that the complaint not issue, and warned that if the complaint did issue and the Applicant ultimately prevailed, that the Applicant intended to seek attorney’s fees under the EAJA; analyzed the legal authority which the General Counsel had relied on in concluding that the issuance of a complaint was warranted because there was not a valid bargaining impasse; stated that the evidence submitted by Local 3 did not establish a *prima facie* case and that even if the evidence submitted by Local 3 indicated that the parties’ bargaining impasse had been tainted by the Applicant’s prior unfair labor practices, this *prima facie* showing would have rebutted by the Applicant’s evidence, if the Board’s Regional Director had complied with the Applicant’s request and interviewed the Applicant’s witnesses; and, the letter ended by complaining that by failing to interview the Applicant’s witnesses, the General Counsel had denied herself of the opportunity to determine that there was no “substantial justification” for the issuance of the complaint.

¹⁵ Although *Webb* and *Hensley v. Eckerhart*, 461 U.S. 424 (1983), on which the Court’s opinion in *Webb* was based in substantial part, involved fee applications under the Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. § 1988, the standards set forth in those opinions appear to be “generally applicable” to all cases in which Congress has authorized an award of fees to a “prevailing party.” 461 U.S. at 433 fn. 7.

¹⁶ The situation of an attorney for a charged party who has been notified by the General Counsel that the General Counsel intends to issue a complaint against his client in the immediate future, is analogous to the situation of an attorney who represents a party that is in the process of preparing to initiate litigation against another party by filing a complaint. In those situations, if the plaintiff prevails in his lawsuit, he can recover attorney’s fees for the legal services performed prior to the filing of the complaint insofar as those services are reasonably related to the litigation which the complaint generates. See *Webb v. Dyer County Board of Education*, 471 U.S. 234, 250–251 (1985) (Brennan, J., concurring in part and dissenting in part).

I am of the opinion that all of the above-described legal services were reasonably connected with the anticipated issuance of the complaint and are of the type of services normally associated with the issuance of a complaint in a Board unfair labor practice proceeding. I am also of the opinion that the Applicant's counsel did not act prematurely when, after being notified that the General Counsel had decided to issue a complaint, he promptly researched and considered the applicability of the EAJA and thereafter notified the General Counsel that the Applicant believed it qualified as an eligible party under the EAJA and that if it prevailed in the upcoming litigation it intended to seek attorney's fees under the EAJA because the General Counsel lacked "substantial justification" in issuing the complaint. The Applicant's counsel would have been remiss in his responsibility toward his client, if knowing that a complaint would be issued, he had not researched and considered the applicability of the EAJA and had not notified the General Counsel of the fact that his client was eligible for an award and that the General Counsel had no substantial justification to issue the complaint because of, among other things, the Regional Director's failure to interview the Applicant's witnesses. In any event, even if the Applicant's attorney acted prematurely at this point in time in considering the applicability of the EAJA, the Applicant's fees and expenses for those services are still compensable under the EAJA, because the time spent in April and May 1988 researching and considering the EAJA's applicability was useful and of a type ordinarily necessary to the successful outcome of the subsequent litigation involving the Applicant's claims under the EAJA. *Webb v. Dyer County Board of Education*, 471 U.S. 234 (1985); cf. *Reliable Tile Co.*, 280 NLRB 408, 408 at fn. 7 (1986).

It is for the foregoing reasons, that I find the legal fees and expenses incurred between April 18 and May 24, 1988, which have been claimed by the Applicant, are recoverable under the EAJA.

The Applicant's Claim for Fees and Expenses Incurred in Connection with the Applicant's Attorney's August 16, 1988 Letter to the Board's Regional Director

Counsel for the General Counsel contends that the Applicant's legal fees and expenses incurred in connection with the preparation of the Applicant's Attorney's August 16, 1988 letter to counsel for the General Counsel are not compensable under the EAJA, even though they were incurred after the complaint issued, because they were not incurred in connection with the General Counsel's prosecution of the complaint, but were incurred as a part of the Regional Director's precomplaint investigation.

This contention lacks merit. The letter was written several months after the complaint and notice of hearing had issued and shortly before the scheduled unfair labor practice hearing and, as described in detail supra, inquired whether the Board's Regional Director, in whose name the complaint and notice of hearing had been issued, had been given the authority by the Board's General Counsel to withdraw the complaint, if the evidence submitted to counsel for the General Counsel by the Applicant should persuade the Regional Director that this was the appropriate course of action. Clearly, this letter, whose primary purpose was to determine whether the Regional Director had authority to withdraw the outstanding complaint and notice of hearing, was written by the

Applicant's attorney in connection with the General Counsel's prosecution of the complaint. The fact that it was written in response to counsel for the General Counsel's belated invitation to the Applicant, on behalf of the Board's Regional Director, to make available the Applicant's detailed evidence of the negotiation, so as to allow the Regional Director to consider that evidence, does not detract from the fact that the letter's principal purpose was to determine whether the Regional Director, after considering the evidence, had authority to withdraw the complaint. Obviously if the Regional Director lacked such authority or was unable to otherwise assure the Applicant that if the Applicant's evidence warranted it, that the complaint would be withdrawn, it would have been foolish, under the circumstances, for the Applicant to submit its evidence to counsel for the General Counsel.

The Applicant's Claim for Legal Fees and Expenses for Services Relating to Defenses upon Which It Did Not Prevail

The complaint in the underlying unfair labor practice proceeding consists of a single claim; the allegation that the Applicant violated Section 8(a)(5) and (l) of the National Labor Relations Act by unilaterally changing its employees' workweek. The Applicant was the "prevailing party" in that proceeding for purposes of the EAJA because that claim was dismissed in its entirety.

The Applicant's lawyer, in preparing the Applicant's defense to the alleged unfair labor practice, spent time determining whether the Applicant was subject to the Board's jurisdiction inasmuch as it seemed to counsel that, since the Applicant had no direct inflow or outflow of goods and services across state lines, it was questionable whether an organization such as the Applicant, which was paid to administer employee benefit plans for trust funds and which operated entirely within the State of California, would be subject to the Board's jurisdiction. Ultimately, however, counsel decided that the trust funds' purchases of insurance policies from out of the state satisfied the Board's indirect outflow jurisdictional standard, at which point the Applicant dropped its jurisdictional defense and during the outset of the unfair labor practice hearing conceded that it met one of the Board's applicable jurisdictional standards and was an employer engaged in commerce.

Also, in defending itself against the General Counsel's complaint, the Applicant argued it was not obligated to negotiate with Local 3 about the restoration of the status quo ante, as required by the Board's and court's orders, because the subject of compliance with those orders constituted a nonmandatory subject of bargaining, thus, the Applicant argued its refusal to negotiate with Local 3 about that matter could not have tainted the parties' otherwise valid bargaining impasse. However, in dismissing the complaint in its entirety, I did not need to reach that defense.

Counsel for the General Counsel takes the position that since the Applicant's above-described jurisdictional and nonmandatory subject of bargaining defenses did not prevail, that with respect to those defenses the Applicant was not a prevailing party under the EAJA and because of this should not be compensated for the legal fees and expenses it paid for the time its lawyer spent researching and considering those defenses. The Applicant, on the other hand, contends this issue is governed by the Supreme Court's decision in

Hensley v. Eckerhart, 461 U.S. 424 (1983), and that based on the Court's reasoning in that decision, it is entitled to recover legal fees and expenses incurred in connection with its jurisdictional and nonmandatory subject of bargaining defenses, even though it did not prevail on those defenses. I agree.

In *Hensley* the Supreme Court held that in assessing attorney's fees under "prevailing plaintiff" statutes in cases where the plaintiff has raised multiple claims in a single action and only succeeded on some of them, the district court must award fees in accordance with the plaintiff's degree of success. More specifically, the Court stated that where the plaintiff's action represents "distinctly different claims for relief that are based on different facts and legal theories," the court must deny fees for services rendered on the unsuccessful claims. 461 U.S. at 434-435. However, in cases where a plaintiff is a prevailing party which involve but a single claim or multiple claims which involve a common core of facts and/or related legal theories, the Court noted that in those situations (461 U.S. at 424):

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensated fee. Normally this will encompass all hours reasonably expended on the litigation In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit [Citation omitted]. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

The unfair labor practice proceeding involved, in which the Applicant was the prevailing party, consisted of only a single claim against the Applicant. The Applicant's jurisdictional and nonmandatory subject of bargaining defenses were a part of the Applicant's efforts to defend itself against that single claim and there is no showing that those defenses were considered and/or raised frivolously or in bad faith. Quite the opposite, the record reveals that the Applicant acted reasonably in considering and researching those defenses. It is for these reasons, and based on the Supreme Court's decision in *Hensley*, that I find the legal fees and expenses incurred by the Applicant in connection with its jurisdictional and nonmandatory subject of bargaining defenses are compensable under the EAJA, even though the Applicant did not prevail on those defenses.¹⁷

The Applicant's Claim for Fees Paid for Services Performed by a Lay Clerk

The Applicant's claim for legal fees submitted herein includes a claim for 12-3/4 hours of work performed by a law clerk.

The record establishes that it is the current practice in the applicable geographic area for attorneys to bill their clients for work performed by law clerks and that the market rates charged for the past several years ranged from \$65 to \$75

¹⁷ Although *Hensley* involved a fee application under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, the standards set forth in that opinion are "generally applicable" in all cases in which Congress has authorized an award of fees to a "prevailing party." 462 U.S. at 433 fn. 7.

an hour, with the current rate being \$75 an hour. Consistent with the current rates in the community, the Applicant was billed at \$75 an hour for the services performed by the law clerk. This is what the Applicant is claiming in this proceeding.

Counsel for the General Counsel contends that under the EAJA, a law clerk's services must be treated as part of a law firm's overhead and, as such, included in the attorney's hourly rate. Alternatively, counsel for the General Counsel contends that, assuming the services of a law clerk are compensable under the EAJA, that those services should be calculated at actual cost—what the law clerk is actually paid per hour.

The Applicant takes the position that the question of how a "prevailing party" under the EAJA should be compensated for legal fees paid for services performed by a law clerk was settled by the Supreme Court in *Missouri v. Jenkins*, 57 U.S.L.W. 4735 (June 19, 1989), where the Supreme Court held that under the Civil Rights Attorney's Fees Awards Act of 1976 (U.S.C. § 1988), that a "prevailing party" should be compensated for the legal work of paralegal and law clerks at the market rate for their services, rather than at their cost to the attorneys. I agree. The Court's rationale in *Missouri v. Jenkins*, in my opinion, is equally applicable to the manner in which a prevailing party must be reimbursed under the EAJA for the money it paid for the legal services performed by law clerks. In the instant case, as I have found supra, there is no dispute that the requested rate of \$75 an hour for the legal services performed for the Applicant by the law clerk was in line with the current community rate. Accordingly, the Applicant's request that it be reimbursed in that amount is meritorious.

The Amount of the Applicant's Recovery

In order to substantiate the amount of the legal fees and expenses it incurred in connection with the underlying adversary adjudication and in connection with the preparation and prosecution of its Application in the instant supplemental proceeding, the Applicant submitted fee statements which show the dates and hours spent by its lawyers and law clerks in performing those services, with a description of the specific services performed and expenses incurred.¹⁸ These fee statements were submitted as a part of the several Declarations filed in this proceeding by the Applicant's attorney.¹⁹ These Declarations, among other things, explain and clarify the fee statements in certain respects. I note that the updated

¹⁸ The fee statements relied on by the Applicant are dated as follows: October 16, 1987; May 24, 1988; June 22, 1988; July 26, 1988; August 24, 1988; September 15, 1988; October 19, 1988; November 28, 1988; December 20, 1988; January 17, 1989; February 21, 1989; March 16, 1989; April 24, 1989; May 16, 1989; June 2, 1989; June 15, 1989; July 10, 1989; August 21, 1989; September 19, 1989; October 23, 1989; November 17, 1989; December 8, 1989; January 19, 1990; and, February 16, 1990. As noted previously, the Applicant does not rely on a September 22, 1989 fee statement because it concedes that the legal services and expenses encompassed by that statement were not connected with the underlying adversary adjudication or the instant supplemental proceeding.

¹⁹ These Declarations were filed on the following dates: June 6, 1989; July 7, 1989; October 2, 1989; November 10, 1989; December 5, 1989; December 18, 1989; January 29, 1990; and February 16, 1990. I note that the last Declaration erroneously states it was executed on January 29, 1990. The contents of the Declaration, the date it was served on the other parties, and the date of receipt for filing, establish it was executed on or about February 16, 1989, and filed immediately thereafter.

revised schedule of fees computed at the \$75 an hour rate which is attached as an "Exhibit B" to several of the Declarations is incorrect in these respects: The June 22 fee statement shows 4.25 hours of legal services, not 4.50 hours as set forth in revised schedule; the May 16, 1989 fee statement shows 25.55 hours of legal services, not 25.05 as set forth in the revised schedule; and, the revised schedule incorrectly refers to a July 15, 1989 fee statement which it states shows 17.20 hours of legal services, whereas the record shows there is no such fee statement, but that there is a July 10, 1989 fee statement which shows 20.65 hours of legal service.

I have reviewed and considered each of the aforesaid fee statements and declarations and conclude that the Applicant was billed by its attorney for 387.38 hours of legal services. In view of the findings of fact and conclusions of law set out in previous sections of this decision, I further find that all of these legal services were performed in connection with the underlying adversary adjudication or in connection with the preparation and prosecution of the Application in this supplemental proceeding. Since the Applicant is entitled to an award of \$75 an hour for the fees it paid for those legal services, I further find that the Applicant is entitled to an award of \$29,053.50 in legal fees under the EAJA, plus any additional compensable legal fees it may incur in connection with its further prosecution of the Application.

Regarding the Applicant's claim for the expenses it incurred in connection with the aforesaid legal services, I reviewed and considered each of the aforesaid fee statements and declarations, and concluded that the Applicant has been billed \$5,160.53 for legal expenses. In view of the findings of fact and conclusions of law set forth in previous sections of this decision, I concluded that these expenses were incurred by its lawyer in connection with the underlying adversary adjudication or in connection with the preparation and prosecution of the Application in this supplemental proceeding, as well as in connection with other unrelated legal matters. In this last regard, my analysis of the fee statements has led me to conclude that in a number of cases it is not possible to determine whether a particular expense, or what part of a particular expense, was incurred in connection with those legal services compensable under the EAJA, rather than in connection with some nonrelated legal work which the attorney was performing at that time for the Applicant. However, my review and analysis of the fee statements submitted by the Applicant revealed that significantly more than a majority of the claimed expenses were connected with the legal services performed by the Applicant's lawyer which, as I have found supra, are compensable under the EAJA. But, in view of the impossibility in a number of instances of determining whether a particular expense, or what part of that expense, was incurred in connection with those legal services, rather than with other noncompensable legal services, I shall compensate the Applicant for only 50 percent of the \$5,160.53 it paid in legal expenses. Accordingly, I find that the Applicant is entitled to an award of \$2,580.27 in legal expenses under the EAJA, plus any additional compensable legal expenses it may incur in connection with the further prosecution of its application.

In recommending this award of fees and expenses, I considered the General Counsel's contention that certain specified expense claims should be denied because of inadequate documentation, and the General Counsel's further contention

that the fee award should be reduced because: an unreasonable number of hours were spent researching the Applicant's jurisdictional and non-mandatory subject of bargaining defenses; the total of research hours spent in connection with defending the Applicant in the underlying unfair labor practice proceeding "seems somewhat excessive"; and, "the overall time spent on research and preparation of [the] EAJA application . . . is excessive and unreasonable." I reject these contentions because I am persuaded that the Applicant's expenses were adequately documented.²⁰ And, considering the complexity of the issues involved and the high-quality of the legal services provided, I am persuaded that the time for which reimbursement is claimed was reasonably expended.

CONCLUSIONS OF LAW

1. The Applicant is a prevailing party within the meaning of the EAJA and meets the eligibility requirements of the EAJA.

2. The position of the General Counsel in issuing and in prosecuting the complaint in this case was not substantially justified nor were there special circumstances which would make an award of attorney's fees and expenses unjust.

3. The Applicant is entitled to an award of attorney's fees and expenses under the EAJA totaling \$31,633.77, plus additional compensable fees and expenses it may have incurred or may incur in connection with the further prosecution of its application since the period covered by the Applicant's last submission.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²¹

ORDER

It is ordered that the Applicant, the Laborers Funds Administrative Office of Northern California, Inc., San Francisco, California, be awarded the sum of \$31,633.77, pursuant to its application for an award under the Equal Access to Justice Act, plus the additional fees and expenses incurred in connection with compensable portions of its EAJA application since the period covered by the Applicant's last submission.²²

²⁰In the section of the Applicant's fee statements, as is the case with most fee statements submitted to clients by law firms, the particular "expense" for which the Applicant was billed is briefly described in terms of "copying charge," "delivery service," "telephone call," "Lexis Research Service," "On-Line Research Service," and "travel." I agree with the Applicant that further documentation for the purpose of identifying line items would require the production of voluminous records and involve an inordinate amount of time. As indicated supra, rather than have the Applicant supply further documentation, I have reviewed the Applicant's fee statements and analyzed them in the light most favorable to the General Counsel.

²¹If 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.

²²If the parties are unable to agree within a reasonable period of time concerning the amount of any fees and expenses, incurred after the date of the Applicant's most recent submission, to which the Applicant is entitled in connection with the prosecution of the application, the Applicant should submit to the Judge a revised application for fees and expenses consistent with this Supplemental Decision and Order.