UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AUSTIN FIRE EQUIPMENT, LLC Respondent Employer	*	Case No. 15-CA-019697
and	*	
ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO Charging Party Union	*	

MOTION TO DISMISS APPLICATION FOR AN AWARD OF ATTORNEY FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

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NOW COMES Kevin McClue, Counsel for the Acting General Counsel, and moves, pursuant to Section 102.150 of the National Labor Relations Board's Rules and Regulations (Rules), that the Administrative Law Judge dismiss the application of Austin Fire Equipment, LLC (Respondent) for an award of attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. Section 2412(d), and in support of said motion states as follows:

On November 29, 2011, Administrative Law Judge Margaret G. Brakebusch (ALJ Brakebusch) issued her decision in the above proceeding and, on the same date, the proceeding was transferred to and continued before the National Labor Relations Board (Board) in Washington, D.C. ALJ Brakebusch concluded that Section 8(f) rather than Section 9(a) of the Act governed the relationship between the Parties. In finding the Parties enjoyed a Section 8(f) rather than Section 9(a) relationship, ALJ Brakebusch found that the Acknowledgement form

signed by the Parties in the instant case contained recognition language identical to the recognition language contained in the acknowledgment form signed by the union and employer in ***Triple A. Fire Protection***, 312 NLRB 1088 (1993), but that the extrinsic evidence surrounding the signing of the two acknowledgement forms were different. ALJ Brakebusch concluded, based on the extrinsic evidence surrounding the signing of the Acknowledgment form in the instant case, that there was ambiguity as to whether the Parties intended to create a Section 9(a) relationship. Based on the extrinsic evidence, ALJ Brakebusch concluded the Parties' relationship was governed by Section 8(f), and it was not unlawful for Respondent to withdraw recognition from the Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (Union) when the Parties' contract expired. ALJ Brakebusch found that Respondent violated Section 8(a)(1) and (5) of the Act regarding the Section 8(f) allegations[1] of the Complaint and Notice of Hearing (Complaint) issued on January 31, 2011, and dismissed the allegations relating to Section 9(a) of the Complaint.

On September 28, 2012, the Board issued a Decision in Order (Board's DO) affirming ALJ's Brakebusch's rulings, findings, and conclusions to the extent consistent with, and for the reasons stated in, **G&L Associated, Inc. d/b/a *USA Fire Protection***, 358 NLRB No. 162 (September 28, 2012).[2] The Board upheld ALJ Brakebusch's finding that Respondent enjoyed a Section 8(f) relationship with the Union. The Board upheld the dismissal of the Section 9(a) allegations of the Complaint. In upholding the dismissal of the Section 9(a) allegations of the Complaint, the Board concluded the recognition language in the instant case was not identical to the recognition language in ***Triple A. Fire Protection***. Because the Acknowledgement form in the instant case did not contain the words "have designated," the Board agreed with ALJ

[1] In finding that Respondent violated Section 8(a)(1) and (5) of the Act, ALJ Brakebusch rejected Respondent's assertions that in May 2009, Respondent repudiated the Section 8(f) contract it enjoyed with the Union.
[2] The Acknowledgement form in the instant case is identical to the acknowledgement form in **USA Fire Protection.**

Brakebusch's determination that the Parties' relationship was governed by Section 8(f) of the Act, rather than Section 9(a); however, the Board, unlike ALJ Brakebusch, determined that the recognition language contained in the Acknowledgement form did not meet the three–part test set forth in ***Staunton Fuel & Material (Central Illinois)***, 335 NLRB 717 (2001) to establish Section 9(a) status.

On October 26, 2012, Respondent filed the instant application for attorney fees under the EAJA.

On November 9, 2012, the Union filed a Motion for Reconsideration with the Board requesting the Board reconsider its decision regarding the Section 9(a) allegations of the Complaint.

I. Respondent's application is deficient in that it fails to provide evidence sufficient to establish that it is eligible to apply for fees.

Under Section 102.143(c)(5) of the Rules, a respondent is eligible to apply for fees under EAJA if it is a "private organization with a net worth of not more than $7 million and not more than 500 employees." Section 102.47(f) of the Rules states that each EAJA applicant "must provide with its application a **detailed exhibit** showing the net worth of the applicant and any affiliates...when the adversary adjudicative proceeding was initiated." Sec. 102.147(f) (emphasis added). This exhibit must provide "full disclosure of the applicant's and its affiliates' assets and liabilities," and be "sufficient to determine whether the applicant qualifies under the standards in this part." Section 102.147(f). Respondent has not provided such an exhibit in this case. Moreover, Respondent fails to state in its application whether it has any affiliates or subsidiaries for which information must be disclosed pursuant to Rule 102.47.

The only evidence submitted by Respondent in support of its status as a party entitled to relief under EAJA is a single, one-page affidavit (Respondent Exhibit A, Affidavit of Russell Ritchie). The affidavit, which is signed by Respondent's president, Russell Ritchie (Ritchie), states that Respondent's 2011 balance sheet is attached and that Respondent's net worth "did not exceed $7 million when the complaint issued on January 31, 2011." However, Respondent did not attach a balance sheet to its EAJA application. Respondent's conclusory statement that its net worth does not exceed $7 million does not qualify as a "detailed exhibit showing the net worth of the applicant and any affiliates" as required by Section 102.147 of the Rules; nor does it constitute a "full disclosure of the applicant's and its affiliates' assets and liabilities," that is "sufficient to determine whether the applicant qualifies under the standards in this part" as described in Section 102.147(f).

The burden of proof is upon the EAJA claimant to establish it meets the threshold criteria. ***National Truck Equipment Association v. National Highway Traffic Safety Administration***, 972 F.2d 669, 671 (6th Cir. 1992), citing ***In re Davis***, 899 F.2d 1136, 1144 (11th Cir.), *cert. denied,* 498 U.S. 981 (1990); see also ***Fields v. United States***, 29 Fed. Cl. 376, 382 (1993), aff'd 64 F.3d 676 (Fed. Cir. 1995); ***Kinney ex rel. N.L.R.B. v. Federal Security, Inc.***, 2002 WL 31017644 (N.D.Ill., 2002), at *3. Courts have found conclusionary assertions of the type Respondent made here insufficient to satisfy an applicant's burden of proof under EAJA. See ***Shooting Star Ranch v. United States***, 230 F.3d 1176, 1178 (10th Cir. 2000) ("[w]hen challenged as to eligibility for an EAJA award, the party seeking such an award must do more than make a bare assertion that it meets the statutory criteria").

In order to establish eligibility, an EAJA applicant "must submit information consistent with generally accepted accounting principles, together with an affirmation that the reported

assets and liabilities are complete and accurate." ***American Pacific Concrete Pipe Co. v. NLRB***, 788 F.2d 586 (9th Cir. 1986); ***Continental Web Press v. NLRB***, 767 F.2d 321 (7th Cir. 1985). A conclusory, self- serving affidavit, such as the one provided by Respondent here, is insufficient to establish party status under EAJA. ***Kinney***, supra at *3. A petitioner seeking fees under EAJA must present sufficient evidence so that its net worth may be ascertained and verified by the court. ***Id.*** The Board should not be in the position of speculating as to the net worth of Respondent. See ***Fields,*** supra, 29 Fed. Cl. at 383; ***Kinney***, supra at *4. Because Respondent has failed to establish eligibility for an award under EAJA, its application should be dismissed.

II. Respondent's application should be dismissed because the Acting General Counsel's position in the unfair labor practice proceeding was substantially justified.

Even if it can establish eligibility under EAJA, Respondent is not entitled to attorney's fees in this matter because the Acting General Counsel's position was substantially justified. As defined under EAJA, the term "substantially justified" means "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." ***Pierce v. Underwood,*** 487 U.S. 552, 565, 108 S.Ct. 2541 (1988). The government's "position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." ***Pierce v. Underwood,*** supra at 566, n. 2. The Board has adopted this formulation of substantial justification. See ***Teamsters Local Union No. 741***, 321 NLRB 886 (1996); ***Jansen Distributing Co.***, 291 NLRB 801, n. 2 (1988).

The "substantially justified" standard does not raise a presumption that because the government did not prevail in litigating the case, that its position in the matter was not substantially justified. ***Scarborough v. Principi***, 124 S. Ct. 1856, 1866 (2004). To establish

substantial justification, the Acting General Counsel must demonstrate that he was "substantially justified at each stage of the proceeding ... An examination of the circumstances and evidence available to the General Counsel at these junctures is required in order to determine whether the General Counsel has carried his burden." ***Galloway School Lines, Inc.*** 315 NLRB 473 (1994). The government's "position can be justified even though it is not correct." ***Pierce***, supra at 566, n. 2.

A. Summary of Pertinent Facts

The facts surrounding Respondent's signing of the Acknowledgement form are basically undisputed.

Before 2007, Union representatives had multiple contacts with Respondent in order to build a relationship with Respondent and to work toward having Respondent sign with the Union as a signatory contractor. In June 2007, Respondent was awarded a job at the Meadowview Health & Rehab Facility (Meadowview) in Minden, Louisiana. The job was approximately two to three hours away from Respondent's office in Prairieville, Louisiana, and although the work was the type performed by Respondent's regular sprinkler fitters, Respondent contacted the Union to obtain trained sprinkler fitters for the job.

On June 5, 2007, Respondent signed a Section 8(f) One-Job-Project Agreement with the Union for the Meadowview job. The Union referred two sprinkler fitters with the last names Kent and Thompson to work at the Meadowview job. The Meadowview job lasted six months. During the six-month period, Kent and Thompson were responsible for the Meadowview job and did not work under the supervision of any of Respondent's other employees.

Under the terms of the One-Job-Project Agreement, Respondent paid Kent and Thompson at the collective bargaining agreement's (CBA) hourly rates and made fringe benefit

payments to the Union on behalf of Kent and Thompson in accordance with the CBA. Respondent was extremely satisfied with Kent's and Thompson's work.

In May 2008, Respondent was awarded a "million-dollar sprinkler job" at the Valero Refinery (Valero) in Krotz Springs, Louisiana to start in October 2008. Respondent needed 12 sprinkler fitters to complete the job, and Respondent contacted the Union about signing a contract.

Ritchie testified at trial that he only wanted a one-job agreement for the Valero job, but the Union would not allow him to sign a one job agreement. Ritchie further testified the Union took advantage of him because the Union's representatives knew he needed employees for the Valero job. According to Ritchie, Respondent needed the sprinkler fitters to start the Valero job immediately. Ritchie asserted that because of Respondent's immediate need for the sprinkler fitters, Respondent was forced to become a Union contractor.

Ritchie's assertions are not supported by the facts. The Valero job did not start until October 2008. Thus, Ritchie's testimony that "the job needed to start already" was a false statement. Ritchie did not offer any testimony about how the Union forced him to sign a contract on July 8, 2008, for a job that did not start until October 2008.

On July 8, 2008, representatives of the Respondent and the Union met at Respondent's office in Prairieville, Louisiana for the contract signing ceremony. Respondent became a signatory contractor to the CBA by signing the signatory page of the CBA. After signing the signatory page of the CBA, Respondent signed the Acknowledgement. The Acknowledgement reads as follows:

> The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ are members of, and are represented by Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, for purposes of collective bargaining.

> The Employer therefore unconditionally acknowledges and confirms that Local Union 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

At the time Respondent signed the Acknowledgement, the Union did not present or offer to present evidence to Respondent that it represented a majority of Respondent's sprinkler fitters.

At the trial, Ritchie testified that before July 8, 2008, Respondent did not have a copy of the CBA. Ritchie's testimony is not supported by the facts. As noted above, Respondent paid Kent and Thompson hourly wages according to the CBA and made fringe benefit payments on their behalf in accordance with the CBA. The reasonable conclusion is that in order for Respondent to abide by the terms and conditions of the CBA in 2007, it had a copy of the CBA before July 8, 2008.

Furthermore, the undisputed evidence is that before July 8, 2008, the parties agreed to exclude Respondent's Dow employees who performed sprinkler fitter work at Dow facilities from the bargaining unit. Union representative Tony Cacioppo testified that before July 8, 2008, Ritchie had a copy of the CBA, and he and Ritchie compared the CBA with Respondent's Dow contract. The reasonable conclusion is that in order for the parties to compare contracts and agree to exclude employees who performed sprinkler fitter work at Dow facilities from the CBA, Ritchie had a copy of the CBA before July 8, 2008.

After signing the Acknowledgement on July 8, 2008, Respondent starting hiring Union referrals to work for Respondent. By the end of July 2008, Respondent, even though the Valero job was not scheduled to start until October 2008, had hired five sprinkler fitters referred to it by the Union.

Based on Respondent's willingness to become a Union contractor several months before the start of the Valero job, it was reasonable for the Acting General Counsel to conclude Respondent elected to become a Union contractor in July 2008 because Respondent knew it was establishing a Section 9(a), instead of a Section 8(f), with the Union.

After Respondent became a signatory contractor, the Union provided Respondent with a grant of $100,000 to help defer any potential increased costs of business. Respondent received this grant money over time, originally through payments from the local union of $4.00 an hour for every hour worked by bargaining unit employees, based on reports Respondent submitted to the Union's national office in Maryland. In January 2009, the Union increased the amount of grant paid out per hour to $16.00 an hour. By the end of March 2009, Respondent had received $100,000.

B. The Acting General Counsel was substantially justified in asserting that the Acknowledgement met the Central Illinois Three-Part Test

Based on the above facts, the Acting General Counsel was substantially justified in litigating the Section 9(a) allegations of the Complaint. In the construction industry, the difference between a Section 8(f) and Section 9(a) relationship is of great importance in determining whether the parties engaged in unlawful conduct under the Act. An 8(f) relationship allows for a construction industry employer to recognize a union for the duration of a contract and then terminate the bargaining relationship upon the expiration of the contract. This is in contrast to a 9(a) relationship which requires the employer to bargain with the union over a new agreement unless the union is shown to have lost majority support. See ***John Deklewa & Sons***, 282 NLRB 1375 (1987); ***Central Illinois Construction***, 335 NLRB 717 (2001).

In ***Central Illinois***, the Board held that contract language alone is sufficient to create a 9(a) relationship with a construction industry employer instead of the presumptive 8(f). The Board

established a three-part test to determine the sufficiency of contract language to establish a 9(a) relationship: 1) that the union requested recognition as the majority or 9(a) representative of the unit employees; 2) that the employer recognized the union as the majority or 9(a) bargaining representative, and 3) that the employer's recognition was based on the union having shown, or having offered to show that it had the support of a majority of unit employees. ***Central Illinois,*** supra at 719-20. The three factor test in ***Central Illinois*** was adopted by the Board from the Tenth Circuit's decisions in ***NLRB v. Triple C. Maintenance, Inc.***, 219 F.3d 1147 (10th Cir. 2000), enfg. 327 NLRB 42 (1998), and ***NLRB v. Oklahoma Installation Co.***, 219 F.3d 1160 (10th Cir. 2000), denying enf. 325 NLRB 741 (1998). The Board considers whether the agreement between the parties, examined in its entirety, "conclusively notifies the parties that a 9(a) relationship is intended." ***Oklahoma Installation***, supra at 1165.

Based on the recognition language in the Acknowledgement, the Acting General Counsel was substantially justified in believing that the Acknowledgement form Respondent signed on July 8, 2008, satisfied each element of the test set forth by the Board in ***Central Illinois***. In fact, in two pre-***Central Illinois*** cases the Board found substantially similar recognition language in an acknowledgement created 9(a) relationships with the signatory employers. See ***Triple A Fire Protection***, 312 NLRB 1088 (1993); ***MFP Fire Protection***, 318 NLRB 840 (1995). In addition, the language of the Acknowledgement in the instant case stated that the employer "has, on the basis of objective and reliable information, confirmed that a clear majority of [employees] ... are represented" by the Union. The Acting General Counsel was substantially justified in believing that such language was unequivocal evidence that Respondent recognized that the Union had the majority support of employees at the time of signing. (See **Saylor's, Inc.**, 338 NLRB 330 (2002)

(finding contract language sufficient to establish a 9(a) relationship where the language stated the union had submitted evidence of majority support).

The fact that the Union in this case did not make a showing of majority support to Respondent concurrent with the signing of the CBA did not preclude the Acting General Counsel from being substantially justified in asserting the Respondent and Union entered into a 9(a) relationship. (See **H.Y. Floors & Gameline Painting**, 331 NLRB 304 (2000) (Where the recognition language is found to be "unequivocal," it is irrelevant whether or not the Union actually presented the Employer with evidence of its majority status at the time of recognition.)

Accordingly, the Acting General Counsel was substantially justified in asserting the Acknowledgement met the ***Central Illinois*** three-part test and that the Acknowledgement language could be read in isolation and was not ambiguous.

C. The Acting General Counsel was substantially justified, even if, the Acknowledgement is viewed with extrinsic evidence

At no point during the processing of the instant case did Respondent assert that the Acknowledgment did not meet the ***Central Illinois*** three-part test. Instead, Respondent first argued that in May 2009, it repudiated the CBA and that it did not even have a Section 8(f) relationship with the Union. ALJ Brakebusch and the Board properly dismissed Respondent's argument and found that Respondent had not repudiated the CBA. Second, Respondent argued that the standard announced by the Administrative Law Judge in ***USA Fire Protection*** should govern the instant case. In that case, the Administrative Law Judge concluded that the Acknowledgement form met the **Central Illinois** three-part test, but that extrinsic evidence, along with the Acknowledgement, should be considered in determining whether the employer and union intended to establish a Section (9)(a) relationship.

Even considering extrinsic evidence, the Acting General Counsel was substantially justified in arguing that the Parties had established a Section 9(a) relationship. When Respondent signed its first agreement with the Union, it was an 8(f) agreement for one job. Therefore, prior to July 8, 2008, Respondent knew it could sign one-job agreements with the Union. Based on the facts of the instant case, it was reasonable for the Acting General Counsel to infer that based upon Respondent's agreement to the terms of the CBA, Respondent had decided to enter into a long-term association with the Union because of Kent's and Thompson's job performance. Immediately after signing the Acknowledgement, Respondent started hiring sprinkler fitters who were referred to it by the Union, even though, the Valero job was not scheduled to start until October 2008. It was reasonable for the Acting General Counsel to concluded that Respondent immediately started hiring Union referred sprinkler fitters, even though the Valero job did not start until October 2008, because Respondent knew it had established a long-term Section (9)(a) relationship with the Union instead of the previous Section 8(f) relationship it had enjoyed with the Union for the one job.

During the investigation of the unfair labor practice charge and at the trial, Ritchie claimed it was not the Respondent's intent to enter into a Section 9(a) relationship with the Union. However, based on Ritchie's previous unreliable statements that he became a Union contractor in July 2008, for a job that started in October 2008, and that he did not have a copy of the CBA before July 8, 2008, the Acting General Counsel reasonably concluded that Ritchie's position was purely self-serving and not supported by the facts. The reasonable inference from Respondent's conduct was that before signing the Acknowledgement on July 8, 2008, Respondent desired to enter into a Section 9(a) relationship with the Union and not the Section 8(f) relationship it had previously enjoyed with the Union and that any verbal statements by

Respondent to the contrary after the fact were merely self-serving and not supported by the totality of the facts. The Acting General Counsel's reasonable reading of the extrinsic evidence noted above made it substantially justifiable for the Acting General Counsel to continue litigating the instant case. See ***John Keller d/b/a Union Carbide Building Co.***, 276 NLRB 1410, 1412 (1985) (When evidence is "not of such sufficient clarity as to be readily susceptible of resolution without resort to the crucible-like testing of an evidentiary hearing," the Board has found the General Counsel to be substantially justified in litigating the matter.) The Acting General Counsel cannot be faulted for continuing to litigate this matter after the presentation of Respondent's evidence during the investigation and at the trial.

Only by looking at the information available to the Acting General Counsel at each stage of the litigation can the Board determine whether his actions were substantially justified. As previously noted, the Acting General Counsel was justified in arguing that the Acknowledgement met the ***Central Illinois*** three-part test. Up until the Board's Decision and Order, Respondent and the Acting General Counsel reasonably believed the Acknowledgement met the ***Central Illinois*** three-part test, and the only issue was whether extrinsic evidence should be considered along with the Acknowledgement in determining the intent of the Parties. Based on the facts of the instant case, even if extrinsic evidence was considered by the Acting General Counsel, the Acting General Counsel was still reasonably justified in believing the Parties created a Section (9)(a) relationship. The fact that the Board ultimately determined that the Acknowledgement did not meet the ***Central Illinois*** three-part test does not mean that the Acting General Counsel's actions leading up to that point were unreasonable. The Acting General Counsel was substantially justified in litigating this matter, and the instant EAJA application should be dismissed.

D. Respondent's assertion that it would have settled the unfair labor practice charge, but for the Section 9(a) allegations is purely self-serving

Throughout the entire investigative phase of the unfair labor practice charge, in its Answer to the Complaint, in its pre-trial brief to ALJ Brakebusch, at the trial, and in its post-trial briefs, Respondent argued that in May 2009, it repudiated the CBA and did not have a Section 8(f) relationship with the Union after May 2009. In addition to the above stated facts, Respondent never made a settlement offer in writing to the Acting General Counsel. Respondent's actions demonstrate that it never intended to settle the Section 8(f) allegations of the Complaint.

Respondent's true intent is demonstrated by the exceptions it filed to ALJ Brakebusch's findings of fact and conclusions in law regarding the Section 8(f) allegations of the Complaint. As previously noted, ALJ Brakebusch found that Respondent did not repudiate the CBA in May 2009, and that the Parties enjoyed a Section 8(f) relationship until the CBA lawfully expired. Respondent excepted to ALJ Brakebusch's findings of fact and conclusions in law in this regard. To now say that it would have settled the Section 8(f) allegations is truly disingenuous and not supported by Respondent's conduct.

III. Respondent has made excessive fee demands which should be reduced to reflect reasonable billing judgment.

In the event that the EAJA application is not dismissed in its entirety, Respondent has made several clearly excessive fee demands which should be reduced to reflect reasonable billing judgment.[3] A fee applicant is required to "make a good faith effort to exclude...hours that are excessive, redundant, or otherwise unnecessary ...." ***Hensley v. Eckerhart***, 461 U.S. 424, 434 (1983). Respondent has submitted a fee application that seeks an hourly rate far in

[3] If this Motion to Dismiss is not granted, the Acting General Counsel reserves the right to raise additional arguments regarding the Respondent's fee demands in its Answer to the Respondent's application.

excess of the maximum amount allowed by the Board, and is seeking payment for time spent on allegations of the Complaint upheld by ALJ Brakebusch and the Board and in duplicative efforts in this case. These fee demands should be struck down as redundant and excessive.

A. Respondent's fee demands are in excess of the maximum amount allowed under the Board's Rules and Regulations

In its application, Respondent seeks reimbursement at rates in excess of $75.00 per hour. Under Section 102.145(b) of the Rules, "[n]o award for ... attorney ... fees under these rules may exceed $75 per hour." Respondent's fee request is more than the maximum rate allowable under the Rules. If any fees are awarded to Respondent in this matter, they should be at a rate that is no higher than the $75 per hour as outlined in the Rules.

B. Respondent is attempting to recover for expenses it incurred during the investigative phase of the unfair labor practice charge

The billing records submitted by Respondent reflect numerous hours Respondent spent during the investigative phase of the proceedings (Respondent Exhibit C, Attorney I. Harold Koretzky Invoice No. 131657). In Invoice No. 131657, Respondent includes fees related to Respondent responding to the unfair labor practice charge. A party may not recover fees under EAJA for time expended responding to unfair labor practice charges during the investigatory phase of the proceedings. See ***Hardwick Co.***, 296 NLRB 75, 83 (1989); ***Evergreen Lumber***, 278 NLRB 656, 662 fn. 13 (1986). The fees related to Respondent responding to the unfair labor practice charge during the investigative phase of the proceeding should be denied.

C. Respondent's billing records are not sufficiently detailed to determine what efforts were expended on the allegations that Respondent lost

Respondent did not prevail in the entire unfair labor practice case. ALJ Brakebusch and the Board upheld the allegations of the Complaint related to Section 8(f) of the Act. Yet the billing records submitted by Respondent with its application (Respondent Exhibit C) do not indicate what portion of time its counsel spent preparing and litigating the allegations in which it prevailed or lost. Respondent's billing records are too imprecise to allow for full payment of the fees requested, and if fees are awarded, any payment should be reduced accordingly. See ***Epilepsy Foundation of Northeast Ohio v. NLRB***, 2002 WL 1331873 (D.C. Cir. 2002) (in this unpublished decision, the EAJA award was reduced because applicant's fee request failed to provide itemization with sufficient detail to determine what efforts were expended on issues that the fee applicant won.)

D. Respondent is claiming an excessive amount of time for drafting and filing the instant EAJA petition.

Respondent claims that it expended a total of 64.90 hours in preparing its EAJA application (Respondent Exhibit C). The 64.90 hours claimed by Respondent to prepare the application in the instant matter is clearly excessive. See ***Precision Concrete v. NLRB***, 362 F.3d 847, 853 (D.C. Cir. 2004) (reducing hours by 50% in the EAJA case due to counsel's familiarity with the case which was gained from representing the EAJA applicant in earlier litigation stages, and because of the lack of complexity of the product presented to the court); See ***Epilepsy Foundation of Northeast Ohio***, *supra* (fees reduced when the same attorneys participated in the trial before ALJ and subsequent appeal to the Board, which should have saved them significant time in preparing their appeal to the court).

In an EAJA case, the "fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." ***Hensley v. Eckerhart***, 461 U.S. 424, 437 (1983). Respondent has failed to establish that it is entitled to the award it requested. In the event any fees are awarded to Respondent, they should be reduced significantly to address the excessive hourly rate demanded, fees related to the investigation of the unfair labor practice charge, any duplicative efforts, and the attempts to recover for time spent on allegations ALJ Brakebusch and the Board found to have merit.

IV. Conclusion

In view of the foregoing, as well as the record before the Administrative Law Judge and the Board in the underlying unfair labor practice case, Respondent's EAJA application should be dismissed in its entirety.

Respectfully submitted this 16th day of November, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2012, I electronically filed a copy of the Counsel for the Acting General Counsel's Motion to Dismiss Application for an Award of Attorney Fees and Expenses Under the Equal Access to Justice Action in Case No. 15-CA-019697 to the National Labor Relations Board's Office of the Executive Secretary and forwarded a copy by electronic mail to the following:

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