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ATTORNEYS’ FEES, THE NLRB, AND THE EQUAL ACCESS TO JUSTICE ACT: FROM BAD TO WORSE

Risa L. Lieberwitz*

INTRODUCTION

The National Labor Relations Board’s (NLRB) power to remedy the effects of unfair labor practices is expressed in Section 10(c) of the National Labor Relations Act, as amended, (NLRA), as the power to take “such affirmative action . . . as will effectuate the policies of this Act. . . .” The breadth and generality of this provision, however, creates uncertainty regarding the actual scope of the Board’s remedial power. Unquestionably, the Board may order reinstatement and back pay, issue cease and desist orders, bargaining orders, and orders for remedial notice posting. The Board’s authority to order less traditional remedies, however, has been the subject of debate and has led to extensive litigation.

In particular, though not explicitly provided for in Section 10(c), the NLRB has awarded attorneys’ fees and litigation expenses to the charging party in certain unfair labor practice proceedings. The rationale for such awards against violators of the NLRA has evolved into a distinction between respondents who raise “frivolous” defenses, in which case the Board will award attorneys’ fees, as opposed to respondents with “debat-
able" defenses, against whom the Board refuses to order attorneys' fees. Since 1972, when the Board first awarded attorneys' fees, in *Tydee Products, Inc.*, the Board has taken a timid and conservative approach to awarding such fees.

Despite the Board's repeated application of its frivolous versus debatable defenses standard, the underlying question remains regarding the Board's authority to award attorneys' fees. This question was specifically reserved by the United States Supreme Court in 1974, and was recently revived in a case involving J.P. Stevens & Company. In the *Stevens* case, the Supreme Court granted a writ of certiorari on the question of the Board's authority to award attorneys' fees under Section 10(c). The Court again left the question open, however, remanding the case for further consideration in light of another recent Supreme Court decision.

Another recent statutory development in the area of attorneys' fees awards has affected NLRB proceedings; this time, however, from the direction of fee awards to respondents and against the agency. Under the Equal Access to Justice Act (EAJA), which was effective October 1, 1981, a prevailing party in litigation against the federal government will be awarded attorneys' fees, unless the government proves that its position was substantially justified or where special circumstances would render an award unjust. The EAJA applies to civil proceedings before agencies and federal courts where the federal government is a party. Since its enactment, both agencies and federal courts have interpreted various provisions of the EAJA, including the definition of the parties eligible for fee awards and the meaning of statutory terms such as the "position" of the government in litigation and whether the government had "substantial justification" for its position.

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5. See infra text accompanying notes 116-50. The term "attorneys' fees" ordered by the NLRB will be used to refer to attorneys' fees and other litigation expenses, such as witness fees, expert witness fees and incidental expenses incurred in litigation.


7. See infra notes 184-241 and accompanying text.


11. Id. See infra text accompanying notes 156-61.


15. See infra notes 378-90 and accompanying text.

This article will examine the issues encompassed in the area of awards of attorneys’ fees to parties in proceedings before the NLRB. The study will, therefore, include analysis of fee shifting under Section 10(c) against respondents who have violated the NLRA as well as fee shifting under the EAJA to respondents who have prevailed in litigation against the Board. The article will first examine the American Rule and the common law and statutory exceptions to the policy against fee shifting. The NLRB’s approach to fee shifting will be studied against this general background, with particular emphasis on the policy considerations underlying theories of the Board’s remedial power under Section 10(c). The resolution of issues of the existence of Board authority to award fees and the scope of that power will also entail a discussion of the Board’s fee awards in light of relevant Supreme Court decisions and as compared with fee shifting in the federal courts.

Following the study of fee shifting under Section 10(c), the article will focus on fee awards under the EAJA, including a critical analysis of the statutory provisions and the legislative history. Next, the article will study the implementation of the EAJA, with particular emphasis on NLRB proceedings in examining whether the EAJA is necessary or appropriate in light of historical fee shifting policies. This study will analyze the relaxed standard of proof for fee awards for both prevailing plaintiffs and defendants under the EAJA and the burden of proof placed on the government, as well as the purported justifications for these provisions.

After completing the separate studies of attorneys’ fees awards under the NLRA and the EAJA, the statutes will be compared. This comparative analysis will focus primarily on the different standards of proof under each statute, resulting in a far more stringent standard of proof for fee awards against violators of the NLRA than against prevailing respondents before the Board. The divergent standards will be analyzed and critiqued against the background of fee shifting policies generally, and particularly in the context of the public policies and equities underlying vigorous enforcement of the NLRA.

**Fee Shifting and the American Rule**

Fee shifting in the United States is controlled by the “American Rule,” which generally prohibits federal courts from awarding attorneys’ fees to a party in litigation, absent a common law or statutory exception. As a federal tribunal, therefore, the NLRB must formulate policies on fee shifting in light of the American Rule. Thus, a study of the Board’s authority to award attorneys’ fees under Section 10(c) of the NLRA logically begins the examination of the American Rule and its exceptions.

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The American Rule has been applied by the federal courts since 1796.\textsuperscript{18} This policy developed in opposition to the long standing English practice which regularly allows attorneys’ fees to the prevailing party.\textsuperscript{19} Underlying the American Rule is the basic value that poor litigants should be able to litigate meritorious claims free of the deterrent effect that fee shifting inevitably would have on their willingness to file suit.\textsuperscript{20} A related reason for disallowing fee shifting is that attorneys’ fee awards would constitute an unwarranted penalty against a party who chooses to engage in litigation.\textsuperscript{21} Further bases cited in support of the American Rule include the time-consuming and expensive judicial process of litigating the fee question itself\textsuperscript{22} and the potential compromise of “... the principle of independent advocacy... by having ‘the earnings of the attorney flow from the pen of the judge before whom he argues.’ ”\textsuperscript{23}

Critics of the American Rule contend that the prevailing party is not fully compensated unless the losing party is also assessed litigation expenses.\textsuperscript{24} Further, critics of the American Rule allege that the policy against fee shifting prevents poor litigants from litigating meritorious claims because of the difficulties of retaining an attorney.\textsuperscript{25} Regardless of the merits of the arguments against fee shifting, however, the American Rule is firmly entrenched in the federal courts. As the Supreme Court stated, “[t]he general practice of United States is in opposition [sic] to [fee shifting]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.”\textsuperscript{26}

\textsuperscript{18} In 1796, the United States Supreme Court first announced the American Rule in Arcambel v. Wisemann, 1 U.S. (3 Dall.) 306 (1796); See Note, Attorney’s Fees and the Federal Bad Faith Exception, 29 Hastings L.J. 319, 320 (1977).

\textsuperscript{19} Id.

\textsuperscript{20} Summit Valley Indus. v. Local 112, 456 U.S. 717, 725 (1982); Note, supra note 18 at 321 (citing Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967)).

\textsuperscript{21} Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Note, supra note 18 at 321.

\textsuperscript{22} Summit Valley Indus. v. Local 112, 456 U.S. 717, 725 (1982); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Note, supra note 18, at 321.


\textsuperscript{25} Note, supra note 18 at 321.

\textsuperscript{26} Alyeska Pipeline Serv. Co. v. The Wilderness Soc’y, 421 U.S. 240, 249-50 (1975) (quoting Arcambel v. Wisemann, 1 U.S. (3 Dall.) 306, 306 (1796)). The Alyeska Court noted that the “early holding” of Arcambel has been consistently followed. 421 U.S. at 250.
Despite the apparent breadth of the American Rule, the United States Supreme Court has reaffirmed repeatedly that federal courts may exercise their inherent equitable powers to award attorneys’ fees “when the interests of justice so require” and “whenever the overriding considerations indicate the need for such a recovery.” These policy considerations have resulted in well-established common law exceptions to the American Rule, embodied in the bad faith and common fund exceptions.

The bad faith exception is broadly defined as the award of attorneys’ fees to a prevailing party when the opposing party has acted “in bad faith, vexatiously, wantonly, or for oppressive reasons.” The award of fees under this exception is punitive, as it punishes the unsuccessful litigant for its “unreasonably obdurate behavior.” Fee shifting for bad faith actions is also considered an unusual remedy, requiring the prevailing party to meet a strict standard of proof of bad faith conduct.

A party may act in bad faith either in conduct underlying the initiation of the lawsuit or in conduct during the course of the litigation. In the first instance, attorneys’ fees may be awarded against a party which unreasonably refuses to recognize the clear legal rights of another, leading inevitably to a lawsuit. The more frequent case, though, involves the

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27. Hall v. Cole, 412 U.S. 1, 4-5 (1973). The Supreme Court stated that “the power to award such fees is part of the original authority of the chancellor to do equity in a particular situation.” Id. (quoting Sprague v. Ticonic Nat’l Bank, 307 U.S. 161, 166 (1939)). The Court’s quotation refers to the origin of federal equity jurisdiction from the English Court of Chancery, which had the discretion to apply its notions of justice to award litigation expenses to one of the litigants. Note, Awards of Attorney’s Fees in the Federal Courts, 56 St. John’s L. Rev. 277, 279 n.5 (1982) [hereinafter cited as Awards]. The equity power of the English Chancery Courts was given to the federal equity courts by the Judiciary Act of 1789, Act of Sept. 27, Ch. 20, 1 Stat. 73. Note, supra note 18, at 324 and at n.34.


29. As discussed infra, at note 44, the common fund exception has evolved and expanded to include the “substantial benefit” exception as well. Hall v. Cole, 412 U.S. 1, 5-6, n.7 (1972). The substantial benefit exception, however, also has been cited as a separate common law exception.


31. Id. Note, supra note 18 at 320-31; Awards, supra note 27, at 281.


33. Note, supra note 18, at 331; Awards, supra note 27, at 284. Thus, causes of action or defenses with a reasonable basis or genuine dispute of law or fact would not be subject to a finding of bad faith conduct. Id. See, e.g., Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1980); Adams v. Carlson, 321 F.2d 168 (7th Cir. 1975).

34. Note, supra note 18, at 324-35; Awards, supra note 27, at 282-83; Legal Services Manual, supra note 29 at 1/15. For an extensive list of cases illustrating each category, see Awards, supra note 26, at 282-83 nn.18-19.

35. See, e.g., Bell v. School Bd. of Powhatan County, 321 F.2d 494 (4th Cir. 1963) (plaintiffs’ suit was caused by the school board’s prolonged “evasion and obstruction” of desegregation many years after Brown v. Board of Educ., 347 U.S. 483 (1954)). See also Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951) (labor union sued by some of its members for racial discrimination).
second category, where a party acts in bad faith during the course of litigation. These actions include the filing of frivolous lawsuits, assertion of frivolous defenses, dilatory conduct, unnecessary motions or petitions, and generally, vexatious or wanton conduct throughout the suit. The federal courts' equitable powers extend as well to attorneys who engage in bad faith litigation.

Under the "common fund" exception to the American Rule, a federal court may award attorneys' fees to a successful plaintiff whose litigation creates a "common fund" shared by members of a certain group. This fee award avoids unjust enrichment by those who benefit from the results of the plaintiff's actions without having contributed to the litigation costs.

With the expansion of public interest statutes, the federal courts during the early 1970s sought to exercise their inherent equitable powers even further, by awarding attorneys' fees to plaintiffs viewed by the courts

36. LEGAL SERVICES MANUAL, supra note 28, at 1/15.
43. See, e.g., Boeing Co. v. Van Gemert, 444 U.S. 472, 47-81 (1980); Hall v. Cole, 412 U.S. 1, 5-7, and n.7 (1973); Trustees v. Greenough, 105 U.S. 527, 531-32 (1881); LEGAL SERVICES MANUAL, supra note 29, at 1/12; Awards, supra note 27, at 280-81. The benefited group must be small in number and easily identifiable, allowing for apportionment of costs with some certainty. LEGAL SERVICES MANUAL, supra note 29, at 1/12.
44. Id. The plaintiff need not sue as representative of a class to recoup attorneys' fees from the fund; the establishment of the right of others to recover from specific assets of the same defendant is sufficient. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Hall v. Cole, 412 U.S. 1, n.7 (1973). Further, the common fund exception has evolved and expanded to encompass the "substantial benefit" exception, where the plaintiff's successful litigation may create monetary or nonpecuniary benefits for others. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393-97 (1970). See Hall v. Cole, 412 U.S. 1 (1973) (where the Court traces the evolution and expansion of the common fund exception to the broad parameters of the substantial benefit exception). Id. at 5-7, n.7. Even when the benefits are not monetary, the plaintiff is entitled to contribution to the fee award from the members of the benefited class. Id.; LEGAL SERVICES MANUAL, supra note 29, at 1/13-1/14.
Attorneys' Fees as "private attorneys general." Thus, the federal courts sought to encourage private litigants to enforce public rights created by statute, by awarding attorneys' fees to the successful plaintiffs who "had acted to vindicate 'important statutory rights of all citizens . . .'" and who "had ensured that the governmental system functioned properly." The need to encourage private parties to file suit to enforce public statutory rights was found particularly important where the successful plaintiff could receive only non-monetary relief such as an injunction. Under these circumstances, potential litigants would be deterred from filing suit because of the cost of litigation against well-financed defendants; furthermore, non-wealthy litigants would have difficulty finding an attorney willing to file suit in such a case.

The "private attorney general" theory met its demise, however, in *Alyeska Pipeline Service Co. v. Wilderness Society*. Private litigants had successfully sought declaratory and injunctive relief against the Secretary of the Interior, on the grounds that he intended to issue permits to Alyeska Pipeline Service Company in violation of the Mineral Leasing Act of 1920. Alyeska Pipeline had become a party to the suit as well by intervention. The Court of Appeals for the District of Columbia, which had ruled for the plaintiffs on the merits in the appeal from the District Court, also awarded attorneys' fees to the plaintiffs under the "private attorney general" theory.

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52. *Id.* at 241-44. The plaintiff's suit was initially brought in federal District Court under the Mineral Leasing Act of 1920 and the National Environmental Policy Act of 1969. *Id.* at 243.

53. *Id.* at 243.


55. 495 .2d at 1036.
The Supreme Court reversed the Court of Appeals' fee award, narrowly interpreting the federal courts' equitable power to fashion exceptions to the American Rule. Finding that neither the common law bad faith nor common fund exception permitted a fee award in this case, the Court held that the Circuit Court could not award attorneys' fees absent explicit statutory authorization for such an award. Thus, the Supreme Court left intact the power to award fees under the pre-existing common law exceptions, which the Court viewed as "unequivocal assertions of inherent power" in the courts to allow attorneys' fees in particular situations. Apart from these exceptions, however, the federal courts did not possess "any roving authority . . . to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." To the contrary, the Court held that Congress alone had the power to provide for statutory exceptions to the American Rule. Thus, Congress, not the courts, must decide which statutory policies are important enough to warrant attorneys' fees in order to encourage private litigation.

*Alyeska Pipeline*, therefore, limited federal courts to awarding attorneys' fees under the bad faith or common fund exceptions to the Ameri-

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56. The Court noted that the Circuit Court of Appeals had concluded that the parties' position "was manifestly reasonable and assumed in good faith . . . ". 421 U.S. at 245 (quoting 495 F.2d at 1029, and that "a[pplication of the 'common benefit' exception . . . would 'stretch it totally outside its basic rationale . . . "]

57. 421 U.S. at 262-63.

58. Id. at 259. The Court discussed the origins of the American Rule, noting that it had consistently followed the rule against fee shifting. Id. at 249-50.

59. Id. at 260.

60. Id. at 262. In addition to using the American Rule as a basis for its decision, the Court cited the general statutory rule that allowances for counsel fees are limited to the sums specified by the costs statute. Id. at 255.

61. Id. at 262, 269. The Court cited statutes which make "specific and explicit provisions for the allowance of attorneys' fees." Id. at 260.

Justice Marshall vigorously dissented from the majority decision. Marshall cited the Court's precedents interpreting the bad faith and common fund exceptions as establishing the federal courts' broad independent equitable power to award attorneys' fees "when the interests of justice so require." Id. at 272-75. In particular, Marshall traced the evolution and expansion of the common fund exception to include the common benefit exception. Id. at 274-78. Specifically, Marshall described the case of *Hall v. Cole*, 412 U.S. 1 (1973), to illustrate this expansion. In that case, the Supreme Court affirmed the authority of the federal court to grant attorneys' fees to the plaintiff union member whose litigation against the union "had conferred a substantial benefit on all the members of the union by vindicating their free speech interests." Id. at 272. The union member sued the union under the "free speech" provisions of the Labor-Management Reporting and Disclosure Act, which contained no explicit reference to awards of attorneys' fees. Thus, viewing the Court's prior interpretations of the federal courts' equitable powers, Marshall rejected the distinction made by the majority between the common law exception permitted in *Hall v. Cole*, and the newly created *Alyeska Pipeline* requirement of explicit statutory authority for attorneys' fees awards. 421 U.S. at 277-78. Marshall found the statutory silence concerning the attorneys' fees to be an improper basis for disallowing the federal courts' equitable authority to grant fees "as soon as the far from bright line between common benefit and public benefit is crossed." Id. at 277-78.
can Rule or under specific statutory authority. Congress has authorized fee shifting in many statutes, particularly in civil rights litigation. In fact, following *Alyeska Pipeline*, Congress reacted promptly by enacting the Civil Rights Attorney’s Fees Awards Act of 1976, under which a federal court may award attorneys’ fees to the prevailing party litigating under various civil rights statutes. As noted by the *Alyeska* Court, Congress has based the fee shifting legislation on the “private attorney general” concept to encourage private enforcement of the public policy expressed in the substantive provisions of the statute.

Judicial interpretation of various fee shifting statutes has resulted in different treatment of prevailing plaintiffs as opposed to prevailing defendants. In *Newman v. Piggie Park Enterprises, Inc.*, the United States Supreme Court interpreted congressional intent underlying the attorneys’ fees provision of Title II of the Civil Rights Act of 1964.


63. 42 U.S.C. §1988; See LEGAL SERVICES MANUAL, supra note 29, at 1/2; Awards, supra note 27, at 288.

64. 421 U.S. at 263; See also Derfner, supra note 62, at 241. One writer has stated that the legislative histories of the fee shifting statutes show common congressional goals of encouraging private enforcement of public policy by litigants of modest means; of deterring unlawful conduct which might occur by parties who would feel insulated from lawsuits were there no provisions for fee awards to a prevailing plaintiff; and of generally deterring conduct against statutory policies. Awards, supra note 27, at n.34.

In the area of labor relations, Congress has explicitly provided for fee shifting in litigation under certain statutes. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k) (1976) (prohibiting discrimination in employment and authorizing attorneys’ fees awards to the prevailing party, other than the Equal Employment Opportunity Commission or the United States); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-624 (1976); Fair Labor Standards Act, 29 U.S.C. §216(b) (1970), as amended (Supp. IV 1974) (attorneys’ fees awards are mandatory to prevailing parties who have brought private actions to enforce the minimum wage and overtime provisions. The fee award under this provision of the Fair Labor Standards Act applies only to private actions and not to suits brought pursuant to Section 17 by the Secretary of Labor, based on the view that the private attorney general theory is inapplicable to suits by and at the expense of the public agency. Edwards, *Labor Relations and Attorneys’ Fees*, 34 N.C.L. REV. 1161, 1164 and n.14 (1976); Railway Labor Act, 45 U.S.C. §153(g) (1970) (attorneys’ fees are mandatory to a party who prevails in enforcing an order of the National Railroad Adjustment Board); Labor Management Reporting and Disclosure Act, 29 U.S.C. §§431(c) and 501(b) (1970) (federal court has discretion to award attorneys’ fees against a defendant labor organization for violation of the inspection of records and fiduciary duties provisions). See Edwards, at 1161, n.4.


which prohibits discrimination in public accommodations on the basis of race, color, religion or national origin. Because enforcement of the public rights created by Title II relies in part on private litigation resulting in an award of an injunction instead of damages, the Court held that a prevailing plaintiff under Title II is entitled to attorneys' fees unless special circumstances would render such an award unjust. Thus, the Court virtually eliminated the discretion of the courts in awarding attorneys' fees to prevailing plaintiffs under Title II. Thereafter, the Supreme Court found the Piggie Park standard of awarding attorneys' fees to the prevailing plaintiff equally applicable to the fee shifting provisions of Title VII of the Civil Rights Act of 1964.

Though the attorneys' fees provision of Title VII states that fees may be awarded to “the prevailing party,” a far more stringent standard is applied to prevailing defendants. In Christiansburg Garment Co. v. EEOC, the Supreme Court held that a prevailing defendant in a Title VII case may be awarded attorneys' fees only by proving that the plaintiff’s action was “frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.” The Court justified the different standards by citing the same “equitable considerations” underlying the “private attorney general” theory; that the plaintiff is “the chosen instrument of Congress to vindicate” important public policies, and the related fact that attorneys' fees are not only awarded to the prevailing plaintiff, but also against a violator of federal law.

Fee Shifting Under Section 10(c) of the NLRA

Section 10(c) of the NLRA states that if the Board finds that a respondent has engaged in unfair labor practices, the Board “shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirma-

67. The plaintiffs had brought a class action to enjoin racial discrimination at several restaurants in South Carolina. 390 U.S. at 400.
68. Id. at 401-02. The Court noted that the Attorney General may intervene in privately initiated Title II suits “of general public importance,” and may independently institute a civil action only where there is a “pattern of practice” of discrimination. 42 U.S.C. §§2000a-3(a), a-5. 390 U.S. at n.2.
69. 390 U.S. at 403.
72. Id. at 421. The standard adopted by the Court, therefore, is somewhat less stringent than the common law bad faith exception, which would permit attorneys' fees even without the statutory authorization. Id. at 421-22; See Awards, supra note 27, at 302.
73. 434 U.S. at 419.
tive action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Thus, the congressional statement of the Board’s remedial power does not specify remedies other than cease and desist orders, reinstatement, and back pay. There is no mention of the well accepted remedy of bargaining orders, nor of the more unusual remedy of attorneys’ fees. In terms of the American Rule against fee shifting, this statutory statement of remedies immediately brings to mind the Supreme Court decision of *Alyeska Pipeline* and its holding that federal courts may not engage in fee shifting absent the authority found in a common law exception or in statutory allowance of attorneys’ fees. After *Alyeska Pipeline*, the question must be resolved whether the National Labor Relations Board, as a federal administrative agency, is empowered to award attorneys’ fees under any circumstances. If the Board does have this power, the inquiry moves to the question of the conditions under which the Board may award attorneys’ fees; that is, whether the Board is limited to awarding fees against a party acting in bad faith, or whether the Board may go beyond this common law exception absent further statutory authorization.

The interpretation and application of the American Rule and its exceptions in the federal courts are, of course, relevant to the resolution of the issues concerning fee shifting under Section 10(c). To fully explore the question of attorneys’ fees awards by the NLRB, however, the general law of fee shifting must be juxtaposed with interpretations of remedial authority unique to the Board, including the scope of the Board’s remedial power and the policies underlying the parameters of that authority. This juxtaposition will reveal the tensions between the American Rule and the policies underlying the remedial powers of the Board, and will provide a perspective from which to identify the effect of the American Rule on the Board’s power to award attorneys’ fees.

**General Remedial Policies**

Any study of the implementation of Section 10(c) and the scope of the Board’s power to remedy the effects of unfair labor practices must be made against the broader background of the Board’s recurring problem of formulating truly effective remedies. For example, the usual remedies for the discharge of an employee in violation of Section 8(a)(3) of the NLRA are an order of reinstatement and back pay, a cease and desist order, and the posting of a remedial notice at the employer’s place of

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75. 29 U.S.C. §160(c).


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business.\textsuperscript{77} The usual remedy for an employer's refusal to bargain in violation of Section 8(a)(5) is an order to bargain in good faith.\textsuperscript{78} Each of these commonly ordered remedial actions, however, suffers from the problem of delay inherent in the administrative and judicial processes under the NLRA.\textsuperscript{79} In any case where a respondent is found to have committed an unfair labor practice and is therefore ordered to take some remedial measures, there is a delay of years between the initial order and its enforcement, if the respondent chooses to take advantage of the full appellate route.\textsuperscript{80} The time span from the administrative law judge's (ALJ) recommendation of a remedy to the review of such recommendation by the Board, to the enforcement of the Board order by a Circuit Court of Appeals\textsuperscript{81} causes the remedial effect of the order to dissipate.\textsuperscript{82}

The problem of the lack of effectiveness of Board remedies because of the delay in enforcing the remedy is most prevalent in employer unfair labor practices\textsuperscript{83} aimed at avoiding initial unionization, and after unionization,

\begin{itemize}
\item \textsuperscript{79} See NLRB Power, supra note 76, at 1671–74.
\item \textsuperscript{80} Id...
\item \textsuperscript{81} In fiscal year 1981, from the filing of the charge to the completion of the hearing before an administrative law judge, a median of 217 days elapsed. From the close of the hearing to issuance of the ALJ's recommended order, a median of another 139 days elapsed. From the date of the ALJ decision to issuance of a Board order, a median of another 120 days elapsed. 46 NLRB Ann. Rep. 228 (1981). Further, in fiscal year 1981 if the respondent refused to comply with a Board order, forcing the Board to seek enforcement in a Circuit Court of Appeals, a median of another 111 days was added to the process between the time of the issuance of the Board decision and the filing of a petition in the Court of Appeals. Between the time the petition was filed and the issuance of the Court's opinion, a median of another 390 days elapsed. (Telephone conversation with a member of the Statistical Service Staff, NLRB Office of Division of Administration, (Oct. 31, 1983)). It should be noted that the "median," as a statistical measure, is, unlike "average," insensitive to the actual size of the larger numbers.
\item \textsuperscript{82} NLRB Power, supra note 76, at 1673–74; Murphy, Discriminatory Dismissal of Union Adherents During Organizing Campaigns: Suggested Remedial Amendments, 4 INDUS. REL. L.J. 61, 70–73 (1980); Note, NLRB Remedies—Moving into the Jet Age, 27 BAYLOR L. REV. 293, 294 (1975) [hereinafter referred to as Jet Age].
\item \textsuperscript{83} The discussions in this article regarding remedial problems under the NLRA, as well as the critique of the application of the EAJA to NLRB proceedings will be restricted to employer unfair labor practices. This restriction is based, in part, on the fact that the vast majority of complaints are issued against employers. In fiscal year 1981, 83.5% of the 5,711 complaints issued were against employers; 14.7% were issued against unions, and 1.8% of the complaints were issued against both employers and unions. 46 NLRB Ann. Rep. 228 (1981). Further, the restriction of remedial problems of the NLRA to employer unfair labor practices is based on the fact that employers often directly benefit from delays in litigation of unfair labor practices, while unions do not. On a purely theoretical level, the expense of litigation as compared with the Board's less costly nonpunitive monetary and
avoiding a first contract with the union. The discharge of union activists during the organizational campaign and the use of dilatory tactics during bargaining will not be remedied for a period of four or five years. During that time the effects of the discharge, threats, or bad faith bargaining tactics may have their desired effects on the employees, either intimidating them to vote against unionization at all, or encouraging them to decertify the union during the extended period of bargaining which has failed to yield a contract. Further, the limited and rarely exercised injunctive power of the Board helps employers take advantage of the delay throughout the process. Thus, an employer guilty of violating either Sections 8(a)(3) or 8(a)(5), used as examples above, may have actually achieved the purposes behind its unlawful conduct by exploiting the delay factor built into the system.

nonmonetary remedial orders should compel both unions and employers to avoid increasing their litigation expenses through delay. Such a balancing test, however, views the Board processes in a vacuum. The most significant costs to be balanced are those involving the collective bargaining process itself. For the employer, the long term financial benefits of avoiding entering into a collective bargaining agreement with a union may far outweigh the specific costs of litigation. In contrast, such delays will only hurt the union whose collective bargaining strength is dissipated by the delay in reaching a contract. Further, the union will not reap a corresponding benefit through delay in litigating unfair labor practices.

The benefits for an employer growing out of the delay in litigating unfair labor practices is also critical to the discussion of the problems inherent in the application of the EAJA to the NLRB. Specifically, the existence of these benefits from litigation delay may be viewed as incentives to litigation, without the need for further incentives provided by the EAJA. The critique of the EAJA will, to this extent, be restricted to the litigation of employer unfair labor practices.

84. NLRB Power, supra note 76, at 1674-76; Murphy, supra note 82, at 72-73; Jet Age, supra note 82, at 294; See generally, Labor Reform Act of 1977, Hearings on H.R. 8410 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1978) [hereinafter cited as Labor Law Reform].

85. NLRB Power, supra note 76, at 1673-76. Another method of using the delay inherent in the system to an employer's advantage is by raising an objection to the scope or composition of a bargaining unit following certification of that unit by the Board. In order to obtain judicial review of this objection, the employer must refuse to bargain with the union, thereby committing a "technical violation" of Section 8(a)(5). In such cases, the Board generally grants the General Counsel's motion for summary judgment, finding that the employer has unlawfully refused to bargain. The Board then seeks enforcement of its order in the Circuit Court of Appeals, which reviews the employer's unit objections. See Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 817 (1974); Attorneys' Fees, supra note 76, at 962.

86. NLRB Power, supra note 76, at 1673-76. There is also evidence that the delay in reaching a contract decreases the chances that the parties will ever enter into a contract at all. NLRB Power, supra note 76, at 1675 (citing P. Ross, The Labor Law in Action—An Analysis of the Administrative Process Under the Taft-Hartley Act 6, 12 (1966)). See also Ex-Cell-O Corp., 185 N.L.R.B. 107, 74 L.R.R.M. 1740 (1970).

87. Though Section 10(j) gives the Board discretion to petition for an injunction after issuing a complaint alleging commission of an unfair labor practice, the Board rarely exercises this authority. 29 U.S.C. §160(j); NLRB Power, supra note 76, at 1671 n.12. By contrast, under Section 10(l), the Board is required to petition in federal district court for an injunction after issuing a complaint alleging a violation of section 8(b)(4)(A), (B), or (C), or Section 8(e) or Section 8(b)(7). 29 U.S.C. §160(l).
The problem of delay is exacerbated by statutorily and judicially imposed limitations on the Board’s remedial power. One such restriction is the prohibition against punitive measures to remedy the effects of unfair labor practices. 88 This rule is an outgrowth of the theory that employees should be “made whole” by the remedy, or returned to the “status quo.” 89 These “make-whole” remedies, however, have been widely criticized as being ineffective. 90 For instance, an order to bargain in good faith provides no incentive to the recalcitrant employer to comply. 91 In other cases, eventual compliance with an order of reinstatement with back pay may be viewed as the least expensive course from a cost-benefit analysis by an employer who wishes to discourage employees from unionizing, particularly since the back pay is mitigated by an employee’s interim earnings. 92

The prohibition against punitive orders is a judicially created doctrine. 93 Though this restriction on Board authority appears in neither the NLRA nor its legislative history, 94 the United States Supreme Court has held that Congress intended the NLRA to have purely a remedial purpose; that the “language [of Section 10(c)] should be construed in harmony with the spirit and remedial purposes of the Act.” 95 The Court also found that the deterrent effect of a punitive measure would not place it within the scope of Section 10(c); nor would a Board determination that the punitive order would effectuate the policies of the NLRA legitimize the order. 96 To be remedial, an order must be “related to the proven unlawful conduct.” 97

88. See, e.g., Carpenters Local 60 v. NLRB, 365 U.S. 651 (1961); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940); Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938); NLRB Power, supra note 76, at 1679–83.
89. Phelps Dodge Co. v. NLRB, 313 U.S. 177, 194, 197–98 (1940); Murphy, supra note 82, at 63.
90. See, e.g., St. Antoine, A Touchstone for Labor Board Remedies, 14 WAYNE L. REV. 1039, 1040 (1968); Attorneys’ Fees, supra note 76, at n.7; NLRB Power, supra note 76, at 1674, 1679–83; Labor Law Reform, supra note 76.
91. The Board has stated: “... [W]e are not unmindful of the consequences that existing remedial limitations visit upon the Board’s capacity meaningfully to remedy unlawful refusals to bargain in particular... [a] mere affirmative order [to bargain] does not eradicate the effects of an unlawful delay... in the fulfillment of a statutory bargaining obligation.” Wellman Indus., Inc., 248 N.L.R.B. 325, 326 n.8, 103 L.R.R.M. 1743, 1485 n.8 (1980) (quoting Ex-Cell-O Corp., 185 N.L.R.B. 107, 108, 74 L.R.R.M. 1740, 1741 (1970)).
92. See NLRB Power, supra note 76, at 1674–76, 1679–83.
94. Id.
96. Id. at 12. Regarding the deterrent effect of Board orders, the Court stated, “That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.” Id.
97. NLRB v. Express Publishing Co., 312 U.S. 426, 433 (1941), quoted in St. Antoine, supra note 90, at 1040. For examples of Supreme Court decisions invalidating Board orders as punitive, see...
Another limitation on the Board's remedial power is the axiom that remedies may not be overly speculative. This restriction led the Board to refuse to award damages as a "make-whole" remedy where an employer has unlawfully refused to bargain. This proposed damage remedy was rejected by the Board on another ground as well, representing an additional restriction on the Board's remedial power; that is, under Section 8(d) the Board may not compel the parties to agree to contract terms or concessions in bargaining. This prohibition was applied by the Supreme Court in *United Steelworkers v. NLRB (H.K. Porter Co.)* to strike down a Board order that an employer agree to a checkoff clause to remedy the employer's unlawful refusal to enter into such a contract clause.

The limitations on the Board's powers under Section 10(c) represent a conservative approach to the authority of the Board to order remedies which will effectuate the policies of the NLRA. This approach coexists and is in tension with other interpretations of the grant of authority under Section 10(c) as being broad, flexible and open to creatively formulated remedies. This more liberal view of the Board's remedial power flows

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Consolidated Edison v. NLRB, 305 U.S. 197 (1938) (Board order invalidating contracts between a labor organization and an employer); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940) (Board order that an employer deduct from back pay to employees the amounts they had received for work performed on "work relief projects" prior to the employees' reinstatement and to pay such amounts to the appropriate governmental agencies); Carpenters Local 60 v. NLRB, 365 U.S. 651 (1961) (Board order that the respondent, either union or employer, reimburse all employees for all dues and fees collected under an illegal hiring hall agreement between the employer and the union). See discussion of Carpenters Local 60 in St. Antoine, supra note 90, at 1041.

98. St. Antoine, supra note 90, at 1045; Attorneys' Fees, supra note 92, at 957.

99. Ex-Cell-O Corp., 185 N.L.R.B. 107, 74 L.R.R.M. 1740 (1970); St. Antoine, supra note 90, at 1045; Attorneys' Fees, supra note 76, at 957. Note, An Analysis of the NLRB's Objections to a Make-Whole Remedy in Refusal to Bargain Cases, 3 Rutgers-Camden L.J. 272 (1971). The Board rejected the assertion that it has the authority to award damages to employees to remedy this violation, based on the amount of increased wages and fringe benefits that the employees would have received if the employer had bargained in good faith to a contract. Tiidee Products, Inc., 194 N.L.R.B. 1234, 1234-36, 79 L.R.R.M. 1175, 1176-79 (1972). In International Union of Elec. Workers v. NLRB (Tiidee I), the United States Court of Appeals for the District of Columbia held that the Board did possess the authority under Section 10(c) to order damages on this basis to remedy the employer's refusal to bargain. 426 F.2d 1243, 1252-53 (D.C. Cir.), cert. denied, 400 U.S. 950 (1970).

100. The relevant portion of Section 8(d) states: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith... but such obligation does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. §158(d) (1964).


102. 397 U.S. 99 (1790).

103. Id.
from the Board's position as an administrative agency with special expertise in the area of labor relations. In creating the NLRB, Congress intended to give the Board members the freedom to apply their expertise in determining how best to effectuate the policies of the NLRA. The ultimate goal of carrying out national labor policy can be achieved, therefore, only by giving the Board the independence and flexibility to formulate creative remedial orders. In the early years after the passage of the NLRA, the Supreme Court described the unique qualities of the NLRB in applying national labor policy: "[a]ttainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies." The Supreme Court's characterization of the Board reveals that the responsibility for enforcing public rather than private rights requires the Board to be afforded far more flexibility in ordering remedies than courts determining only private disputes.

The view that the Board has broad remedial power dictates a liberal interpretation of the actual language of Section 10(c). Thus, consistent with the experimental nature of the authority to order affirmative action, the Supreme Court has interpreted the phrase "including reinstatement of employees with or without back pay, as will effectuate the policies of this Act," as illustrative of possible remedies, rather than as a limitation on the Board's remedial power.

The division between the restrictions on the Board's authority to order punitive remedies and the image of a Board with wide ranging remedial power inevitably results in some inconsistent decisions. In one case the Supreme Court was faced with a challenge that the Board's calculation of back pay on a quarterly basis between the date of discharge and the employer's offer of reinstatement would be a punitive measure. Though there was evidence that this system would be "punitive" in some cases, the majority of the Court discounted this result, stating:

We prefer to deal with these realities and to avoid entering into the bog of logomachy, as we are invited to, by debate about what is "remedial" and what is "punitive." It seems more profitable to stick closely to the direction of the Act by considering what order does, as this does, and what order does not bear appropriate relation to the policies of the Act.


105. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1940).

106. Id. at 188-94; NLRB Power, supra note 76, at 1684.


108. Id. at 348.
In addition to general theories of the meaning of Section 10(c), other practical guidelines have been suggested for the Board to follow in framing specific orders. One consideration is that remedies should be equitable in relation to the special facts and circumstances of each case. In particular, it has been suggested that the motivation behind the unlawful actions be closely examined to determine the most equitable remedy against that respondent. A related guideline is that remedies should be created appropriate to the individual case rather than the application of boilerplate remedies for that category of unfair labor practice. This approach envisions the formulation of remedial orders specifically aimed at effectuating the policies of the NLRA as closely as possible in every case. Finally, the Board has been urged to clearly articulate the basis for its orders, in order to ensure enforcement of the orders in the Circuit Courts of Appeals, and to deter the commission of similar unfair labor practices by other parties, who will be fully apprised of the consequences and the reasons underlying the Board action.

Generally, the NLRB has resisted testing the limits of its remedial power. For example, the Board rejected an invitation by the Circuit Court of Appeals of the District of Columbia to exercise the full scope of its authority under Section 10(c) by awarding damages representing lost wages and benefits caused by an employer's refusal to bargain. It appears that following its defeat in H.K. Porter, the Board has been hesitant to experiment with novel remedies.

Attorneys' Fees Awards by the NLRB

In spite of its exhibited timidity in fashioning creative orders, however, the Board has awarded attorneys' fees in a narrow class of cases. Again, in this area of unusual remedies, the Circuit Court of the District of Columbia was instrumental in encouraging the Board to take stronger

109. St. Antoine, supra note 90, at 1056.
110. Attorneys' Fees, supra note 76, at 965; NLRB Power, supra note 76, at 1683.
111. St. Antoine, supra note 90, at 1056-57; Attorneys' Fees, supra note 76, at 965.
112. Id.
113. The United States Supreme Court recently reiterated the need for the Board to articulate the reasoning behind its remedial orders in Shepard v. NLRB: “The administrative process will best be vindicated by clarity in its exercise . . . [I]t will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order.” U.S., 103 S.Ct. at 669 (1983) (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941)); see also St. Antoine, supra note 90, at 1057.
115. The Board has been criticized for its conservative approach toward the development of remedies, particularly in awarding damages. See Attorneys' Fees, supra note 76; NLRB Power, supra note 76.
affirmative action against certain violators of the NLRA. Examination of the development of the rationale of the Board’s policy toward fee shifting is necessary to resolve the issue of the Board’s authority to award attorneys’ fees, and to determine the scope of cases in which the Board finds fee shifting appropriate.

The Board’s theoretical approach to fee shifting evolved during the litigation of unfair labor practice charges in *Tiidee Products, Inc.* and *Heck’s, Inc.* These cases wound a circuitous route through the administrative and judicial process, which the Board itself described as a “labyrinthian history.” In both cases, the employers committed unfair labor practices, including refusals to bargain, in violation of Section 8(a)(5). Further, in each case, the charging party union requested the Board to expand its usual order under Section 10(c) to include awards of damages and litigation and organizational expenses. The Circuit Court and the Board differed on the scope of the Board’s remedial power, with each tribunal’s views determined by its interpretation of the recurring issues central to the determination of the scope of the Board’s remedial authority. In particular, those issues revolve around the questions of the Board’s equitable powers as compared with the federal courts, the role of the charging party in furthering public as well as private interests in litigation, and the effectuation of the policies of the NLRA through Board remedial orders.

In the first *Tiidee Products* case (*Tiidee I*), the Board petitioned the Circuit Court of Appeals for the District of Columbia for enforcement of its order that the employer bargain in good faith. In addressing the union’s request for an expanded remedial order, the court was cognizant


120. *Id.*

of the systemic problems in creating effective remedies, particularly in dealing with "a brazen refusal to bargain," as the court found that "[e]nforcement of the obligation to bargain collectively is crucial to the statutory scheme." The court criticized the Board's narrow order to the employer to bargain in good faith as encouraging frivolous litigation resulting in delay caused by and of benefit to the employer. Thus, the court stressed the "broad command" behind the Board's Section 10(c) grant of authority as a mandate for devising effective and creative remedies. In particular, the court encouraged the Board, on remand, to award damages to employees representing benefits which employees would have received had a contract been reached. Even if the Board rejected this suggestion, the court urged the application of alternate remedies such as the award of litigation costs to "prevent the employer from having a free ride during the period of litigation." Realizing that such language conjured images of penalties, however, the court quoted the Supreme Court's conclusion that a remedy may properly constitute punishment as well as compensation.

On remand in 

On remand in Tiidee I, the Board rejected as overly speculative the invitation to award damages to remedy the refusal to bargain. In order to avoid the "counter-productive" quality of the bargaining order in this case, however, the Board ordered alternate remedies, including payment by the employer of the Board's and the union's litigation costs and expenses. The Board based the attorneys' fees award on a general rationale of serving the public interest by keeping the Board's and the courts' crowded dockets free of frivolous litigation, thereby affording "speedy access" to these tribunals, and thus effectuating the policies of the NLRA. Chairman Miller, concurring, emphasized his separate opinion

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122. 426 F.2d at 1249.
124. Id. at 1249-50.
125. Id. at 1248-49.
126. Id. at 1250-53.
127. Id. at 1251.
128. Id. at 1250 n.8. The vitality of the "penal" objection is also undercut by the Supreme Court's decision in NLRB v. J.H. Rutter-Rex Mfg. Co., Inc., 396 U.S. 258, 265 (1969): "But the Board could properly conclude that backpay is not only punishment for an unfair labor practice, but is also a remedy designed to restore, so far as possible, the status quo which would have obtained but for the wrongful act."
130. Id. at 1234-35, 79 L.R.R.M. at 1177.
131. In addition to the litigation costs, the Board ordered that the remedial notice be mailed to each employee's home, that the Union be given access to the employer's bulletin boards during negotiations, and that the employer furnish the union with a list of employees' names and addresses to be kept current for one year. Id. at 1235-36, 79 L.R.R.M. at 1177-78.
132. Id. at 1236, 79 L.R.R.M. at 1179.
of the nature of the public interest served by the attorneys’ fees award.\textsuperscript{133} In Miller’s view, the union protected the public interest by filing and litigating unfair labor practice charges, as the enforcement of the NLRA depends solely on the initiation of charges by private parties.\textsuperscript{134}

In the second \textit{Tiidee Products} case (\textit{Tiidee} II), the Board, on remand from the Circuit Court of Appeals, expanded its order to include attorneys’ fees to the Board and the union, based on the employer’s unfair labor practices which were “part of the same pattern of patently frivolous litigation” begun in \textit{Tiidee} I.\textsuperscript{135} The Board, however, expanded its rationale for the purpose of the award as remedying the direct effects of the unlawful conduct which had imposed increased costs on the parties.\textsuperscript{136} Further, the Board found that the fee shifting would deter future similar violations.\textsuperscript{137}

Concurrent with the litigation of \textit{Tiidee} I and II, \textit{Heck’s, Inc.} was winding its way through the appellate route. The Board's opinions in \textit{Heck’s} highlight the importance of the perception of the nature of the charging party's role in determining whether attorneys' fees will be awarded. While finding that the employer's repeated unfair labor practices were “clearly aggravated and pervasive,”\textsuperscript{138} the Board denied the union's request for attorneys' fees, based on the role of the charging party in light of the familiar principles that the Board may not impose punitive orders or compensate for collateral losses.\textsuperscript{139} Unlike \textit{Tiidee Products}, in \textit{Heck’s} the Board found that the public interest would not be served by fee shifting, based on its view that the union’s part in protecting the public interest by initiating and following through the litigation is “incidental to its efforts to protect its own private interests.”\textsuperscript{140}

Again, the Circuit Court of Appeals of the District of Columbia adopted a broader view of appropriate remedies than the Board itself. The court enlarged the Board order to include attorneys’ fees to the Board

\textsuperscript{133} \textit{Id.} at 1237–38, 79 L.R.R.M. at 1179–80.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} 196 N.L.R.B. 158, 158, 79 L.R.R.M. at 1692, 1693 (1972) (supp. decision).

\textsuperscript{136} \textit{Id.} at 159, 79 L.R.R.M. at 1693.

\textsuperscript{137} \textit{Id.}


\textsuperscript{139} \textit{Id.} at 889, 77 L.R.R.M. at 1517.

\textsuperscript{140} \textit{Id.} The Board acknowledged that “the statutory scheme involves an interblending of public and private interests, and [that] the participation of a charging party can serve a public as well as its own private interests,” citing the Supreme Court's case of United Auto Workers Local 283 v. Scofield, 382 U.S. 205, 212 (1965). However, the Board viewed the NLRB as fulfilling the “primary responsibility” for protecting the public interest in labor disputes. 191 N.L.R.B. at 889, 77 L.R.R.M. at 1517. The Board contrasted Board processes with litigation expenses award under Title II of the Civil Rights Act of 1964, which it viewed as placing “greater reliance on private action for the vindication of public rights.” \textit{Id.} at 889 n.4, 77 L.R.R.M. at 1517 (citing Newman v. Piggie Park Enters., 390 U.S. 400 (1968)).
and the union, finding that the Board had changed its policy toward fee shifting when it awarded fees in *Tiidee I*. The court refused to take a mechanistic approach to the issue of fee shifting. Therefore, the court did not find significant the failure of the Board to describe the employer's defenses as "frivolous;" the Board's characterization of the misconduct as "clearly aggravated and pervasive" supported an attorneys' fees award.

The United States Supreme Court granted certiorari on the issue of the Court of Appeals' enlargement of the Board order and held that the court should have remanded the case to the Board for the "opportunity to clarify the inconsistencies" between *Tiidee Products* and *Heck's*. Figuring prominently in the Court's opinion was the Court of Appeals' failure to reconcile the Board's reliance on its view of the subsidiary role of the charging party in litigation as justifying the denial of attorneys' fees under the circumstances of the case. The Court foreshadowed the Board's opinion on remand by speculating that the Board might find that the public interest in clear dockets is served by awarding attorneys' fees where the employer litigates frivolous defenses, but not where the employer's defenses are debatable.

Significantly, the Court specifically reserved the underlying question of the Board's power to award litigation and organizational expenses under Section 10(c). The Court's opinion relied instead on the misuse of the lower court's appellate review power. Therefore, the Court did not express approval or disapproval of any potential theory for fee shifting.

On remand, the Board followed the Supreme Court's proposed distinction between frivolous and debatable defenses to harmonize *Heck's* and *Tiidee Products*. Thus, attorneys' fees would not be awarded where an employer raised debatable defenses, even though the employer committed "clearly aggravated and pervasive misconduct." The Board's opinion is, however, noticeably lacking in guidance as to the meaning of frivolous and debatable defenses. The Board also clearly left the door open for expansion and modification of its theory, stating that it did not

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142. Id. at 551. The court stated: "It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging party and the board." Id.
143. NLRB v Food Store Employees Union, Local 347, 417 U.S. 1, 9 (1974).
144. Id. at 8-9
145. Id.
146. Id. at 8, n. 9.
147. Id. at 8.
149. Id. at 767, 88 L.R.R.M. at 1052.
“intend to lock in concrete any past precedent, nor to appear to make this Decision the authoritative expansion of future remedial policy.”

The distinction between frivolous and debatable defenses has remained the basis for the Board’s decision regarding attorneys’ fees awards, though with little more illumination as to the meaning of this characterization of the employer’s litigation posture. The question persists, however, whether the Board may exercise its remedial power to award attorneys’ fees. In fact, this issue was recently revived following the Supreme Court decision of Summit Valley Industries, Inc., where the Court held that federal courts may not award attorneys’ fees to employers under Section 303 of the Labor Management Relations Act for reimbursement of fees incurred by the employer in prior unfair labor practice proceedings before the Board. The Court applied Alyeska Pipeline’s interpretation of the American Rule to find that Congress did not intend the term “damages” in Section 303 to include attorneys’ fees. Following Summit Valley, the issue of Board authority to award attorneys’ fees was resurrected in the litigation involving a recent Board award of litigation and organizational expenses against J.P. Stevens & Co., Inc. at its Wallace, North Carolina facility. Following the Fourth Circuit’s enforcement of the Board order which included these expenses, the Supreme Court granted certiorari on the fees issue. The Court did not address the issue, though, vacating the judgment below and remanding the case for further consideration in light of Summit Valley. In

150. Id. at 768, 88 L.R.R.M. at 1052.
153. 29 U.S.C. §187 (1978). Section 303(b) provides, in relevant part: “Whoever shall be injured in his business or property by reason of any violation of Subsection(a) may sue therefor in any district court of the United States...and shall recover the damages sustained by him and the cost of the suit.”
154. 456 U.S. at 725-27. The Ninth Circuit Court of Appeals had enforced the Board’s order based on findings that the union had engaged in unlawful secondary and jurisdictional activity, in violation of Sections 8(b)(4)(B) and 8(b)(4)(D) of the NLRA. United Bhd. of Carpenters and Joiners of America, Local 112 v. NLRB, 574 F.2d 457 (9th Cir. 1978).
155. 456 U.S. at 721-22. Summit Valley sought damages under Section 303 based on its business losses resulting from the union activity and attorneys’ fees expended during the Board proceedings.
156. J.P. Stevens & Co., 244 N.L.R.B. 407, 409, 102 L.R.R.M. 1039, 1040 (1979). The Board found Stevens in violation of Sections 8(a)(1), (3) and (5).
159. Id.
October, 1982, the Fourth Circuit Court of Appeals remanded the case to the Board for reconsideration on this question. Following the remand, in mid-October, 1983, the parties entered into a settlement of all J.P. Stevens litigation, including the issue of attorneys' fees. As the Board will not have the opportunity to decide the attorneys' fees issue in this case, the power and scope of the Board's fee shifting power remains an open question.

When the Board does finally address these questions, thorough resolution of the issues will require integration of the general rules of fee shifting, Board remedial policies and the underlying themes of Tiidee and Heck's. In fact, the arguments for and against the existence of Board power to award attorneys' fees reflect the historic tensions between placing limitations on Board remedial authority and extending a broad area to the Board for creative and flexible expressions of remedial power.

The arguments against Board fee shifting authority have several bases. The most basic argument asserts that an administrative agency, unlike the federal courts, "does not possess inherent equitable power because it is a creature of the statute that brought it into existence." This approach goes beyond Alyeska, by prohibiting the Board from awarding fees under any circumstances absent explicit statutory authority, even under the common law exceptions to the American Rule.

A second argument against Board fee shifting power stems from a literal interpretation of "affirmative action" ordered by the Board under Section 10(c) as limiting monetary compensation to back pay, thereby precluding fee awards. This position would emphasize the holding of Alyeska, reaffirmed by Summit Valley, that Congress must provide explicitly for fee shifting. Thus, as with the term "damages" in Section 303, the term "affirmative action" would be too general to include attorneys' fees.

Even assuming that the Board possesses equitable power, fee shifting by the Board has been criticized as violating the maxim against punitive

160. The remand was ordered over J.P. Stevens' opposition. See Petitioner's Response in Opposition to Respondent's Motion to Remand, J.P. Stevens & Co., Inc. v. NLRB, Case No. 79-1502 (unpublished).


163. Again, this view was expressed as Judge MacKinnon's personal opinion in Tiidee III: "Moreover, where monetary compensation is involved, the Congress thought it necessary to state explicitly that employees could be 'reinstated with or without back pay.' " International Union of Elec. Workers, AFL-CIO v. NLRB, 502 F.2d 349, 353, n.* (D.C. Cir. 1974) (emphasis in original).
orders. The Supreme Court itself has called attorneys’ fees a punitive measure. Thus, the “deterrence rationale” of awarding fees against the violator of the NLRA arguably would place fee shifting outside the scope of Section 10(c).

The characterization of the charging party’s role in Board litigation also figures in the debate over the Board’s power to award attorneys’ fees. In *Tiidee Products* and *Heck’s*, the Board majority assigned a minor role to the charging party in fulfilling public interests by litigating unfair labor practice charges. Opponents of fee awards would, therefore, emphasize the private nature of the charging party’s interests to narrow the circumstances allowing for fee shifting.

The arguments in favor of the Board authority to order fee shifting represent a broad interpretation of Section 10(c), as opposed to emphasizing the limits on Board remedial authority. Supreme Court precedent repeatedly recognizes the importance of allowing the Board leeway to create effective remedies without restricting the agency to the “narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.” Thus, this view of the Board’s equitable power would enable it to formulate remedies such as fee shifting, at least within the common law exceptions to the American Rule. Further, a literal interpretation of Section 10(c) would be unjustified in light of the Supreme Court’s interpretation of Section 10(c) as providing examples of appropriate remedies, without purporting to provide exclusive remedies.

The response to the characterization of attorneys’ fees awards as punitive must concentrate on the remedial aspect of fee shifting under the

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164. *Attorneys’ Fees*, supra note 76, at 957–58. Judge MacKinnon stated the majority opinion in *Tiidee III* that fee awards to the union as charging party, were more remedial than punitive, but separately expressed his personal view that such awards to the NLRB would be impermissibly punitive. *International Union of Elec. Workers v. NLRB*, 502 F.2d 349, 356–57, n.*** (D.C. Cir. 1974). In *Tiidee III*, the majority held that fees were not properly awarded by the Board to itself in *Tiidee I* and *II*, while affirming the Board’s power to award fees to itself. *Id.* at 357–58.


166. *See* supra text accompanying notes 132–34 and 140.

167. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1940). *See* supra text accompanying notes 104–06.

168. *See* supra text accompanying notes 132–34 and 140.

169. This argument was expressed by the General Counsel and the Union in the litigation of *J.P. Stevens & Co.* (Wallace) on remand from the United States Supreme Court for reconsideration in light of *Summit Valley*. *See* Reply of NLRB to Petitioner’s Response in Opposition to Motion for Remand (October 9, 1982); Intervenor’s Response to Petitioner’s Response in Opposition to Respondent’s Motion to Remand (October 14, 1982); Charging Party’s Statement of Position Regarding Reconsideration of the Board of Its Awards of Litigation and Organization Expenses (November 17, 1982) (all briefs unpublished).

Atorneys' Fees

In further *J.P. Stevens* litigation concerning its Roanoke Rapids facility, the union argued that the fee award was not punitive, highlighting the Board's description of the award to the union "as remedial and non-punitive, and a remedy which contemplates the recovery of costs which by no means should be viewed as collateral." This approach views fee awards as a direct remedy for the injury created by the respondent's frivolous litigation. Even assuming a punitive aspect to fee shifting, however, the validity of such awards may be supported by Supreme Court precedent approving Board orders which achieve both a punitive and compensatory purpose.

The objection that fees awarded to the Board are punitive is more problematic, as the equities of returning the charging party to the *status quo ante* are absent. Regardless of the punitive nature of the award, though, the order of fees to the Board is arguably proper; it is consistent with the Supreme Court's demonstrated willingness to ignore the limitation on punitive damages where an order effectuates important policies.

The role of the charging party in litigation is viewed more broadly by proponents of fee shifting. This view, expressed by then Chairman Miller in his concurrence in the *Tiidee* I remand, emphasizes that the enforcement of national labor policy depends solely on the charging party's initiation of the administrative process. The charging party's role in furthering public policies, therefore, analogized to the "private attorney general," weighs in favor of awarding attorneys' fees to encourage litigation, at least within the common law exceptions.

The public nature of Board litigation is also important in distinguishing *Summit Valley*. As noted by the General Counsel in *J.P. Stevens*

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174. *International Union of Elec. Workers, AFL-CIO v. NLRB*, 502 F.2d 349, 356-57, 357 n.*** (D.C. Cir. 1974) (MacKinnon, J., separate opinion). The D.C. Circuit Court of Appeals approved the award of attorneys' fees to the Board in *Food Store Employees, Local 347 v. NLRB*, 476 F.2d 546, 551 (D.C. Cir. 1973), stating that "... employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board." See also *J.P. Stevens & Co.*, 244 NLRB 407, 459 (1979): "... it is only reasonable that the general tax paying community be relieved from shouldering the expenses entailed in protracted litigation at the hand of Stevens' lawlessness."

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(Wallace), Summit Valley was concerned only with the federal court's award under Section 303, which involves purely private litigation. By contrast, Board orders under Section 10(c) further the public interest, presenting different circumstances by which to judge the award. Summit Valley may also be distinguished by the plaintiff's attempt to create a new exception to the American Rule by interpreting "damages" in Section 303 to include attorneys' fees. By contrast, Board awards of attorneys' fees for frivolous defenses fall within the bad faith exception.

In weighing the arguments for and against the Board's authority to award attorneys' fees, the scales tip in favor of affirming the Board's power. The Board's position as the expert body in interpreting the NLRA requires that it be given at least as much leeway as the federal courts to formulate orders which remedy the effects of unfair labor practices. Given the public interests furthered by Board orders under Section 10(c), and the compensatory nature of the fee awards, the deterrent aspect of fee shifting should not affect its validity. With regard to the specific challenge based on Summit Valley, the arguments in favor of Board authority retain their strength, as important distinctions exist between Summit Valley and fee shifting under Section 10(c).

The holdings of Alyeska Pipeline and Summit Valley will likely require the Board to order attorneys' fees within the parameters of the common law exceptions to the American Rule, as Section 10(c) contains no explicit grant of authority to order fee shifting. This conclusion would seem irrebuttable, but for a casual statement regarding Board remedies by the Supreme Court in the recent decision of Bill Johnson's Restaurants, Inc. v. NLRB. The case arose in the context of the Board's cease and desist order to halt prosecution of a state court civil suit brought by an employer against his employees in retaliation for their labor activity. The Court held that the Board may issue a cease and desist order only where the lawsuit is proven to be without merit, in addition to having been brought for a retaliatory purpose. In what is arguably dictum, the

176. Reply of National Labor Relations Board to Petitioner's Response in Opposition to Motion for Remand, Case No. 79-1502 (October 9, 1982), p. 3 (unpublished).
177. Id. See National Licorice Co. v. Labor Bd., 309 U.S. 350, 364 (1940): "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices."
178. Both the union and the General Counsel argued in the J.P. Stevens' Wallace remand that the attorneys' fees awards fall within the bad faith exception to the American Rule. See supra note 169.
180. ___U.S.____, 103 S.Ct. at 2165-67. The employees picketed the employer's restaurant alleging that management was unfair to its waitresses, and distributed a leaflet that accused management of sexual harassment and discrimination against union activists. The employer's state court complaint contained, inter alia, a libel count. ___U.S.____, 103 S.Ct. at 2165.
181. ___U.S.____, 103 S.Ct. at 2171.
Court stated that if the Board finds that the employer committed an unfair labor practice by filing the lawsuit, "the Board may order the employer to reimburse the employees whom he had sued for their attorneys' fees and other expenses . . . and order any other proper relief that would effectuate the policies of the Act."\textsuperscript{182} Certainly, this statement provides strong support for the Board's ability to award attorney's fees. Furthermore, in contrast to the interpretation of Section 303 in Summit Valley, the Court approved the award under Section 10(c) of prior litigation expenses. Thus, after Bill Johnson's Restaurants, it remains uncertain how far the Board may extend its fee awards. Due to the Court's total lack of analysis of the fee question, it is unclear whether the Court intended to limit the approval of the fee award to the facts of the case. Given the Court's repeated affirmation of Alyeska Pipeline,\textsuperscript{183} however, the Board is more likely limited to the restrictions of the common law exceptions to the American Rule.

\textit{Expansion of Fee Shifting Under Section 10(c)}

Examination of Board cases where litigation expenses have been requested shows that the awards which have been granted fall within the bad faith exception to the American Rule. In fact, Board case law shows that the Board's standards after Heck's are even more stringent than those applied by the federal courts in finding bad faith litigation by a party. The Board's self-imposed strictures, therefore, have resulted in an overly narrow assertion of its fee shifting power. Thus, the Board has room to expand its attorneys' fees awards within the confines of the common law bad faith exception.

The bad faith exception to the American Rule permits fee awards to the prevailing party when the opposing party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons."\textsuperscript{184} Though an extraordinary remedy, attorneys' fees have been granted in a variety of situations, including those involving conduct underlying the lawsuit as well as conduct during the actual litigation.\textsuperscript{185} The few cases where the Board has

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  \item \textsuperscript{182} ___ U.S.____, 103 S.Ct. at 2172.
  \item \textsuperscript{183} See Summit Valley Indus. v. Local 112, 456 U.S. 717 (1982); In Re Primus, 436 U.S. 412, 430 n.23 (1978); Ernst & Ernst v. Hockfelder, 425 U.S. 185, 211 n.30 (1976).
  \item \textsuperscript{184} Hall v. Cole, 412 U.S. 1, 5 (1973). See, e.g., Red School House, Inc. v. OEO, 386 F. Supp. 1177, 1193-94 (D. Minn. 1974) (fees awarded against defendant OEO where OEO halted funds to plaintiff schools, in violation of its own regulations and existing statutory directives); Baas v. Elliot, 71 F.R.D. 693, 694 (N.D. Miss. 1976) (fees assessed against defendant which removed state suit to federal court for the sole purpose of having the federal court dismiss the case for want of jurisdiction); Gates v. Collier, 70 F.R.D. 341, 345 (N.D. Miss. 1976) (defense against prison conditions suit was in bad faith where defendants sought to delay litigation and continued to deny "facts that were well documented and known."). See also infra note 207.
  \item \textsuperscript{185} See supra text accompanying notes 34-42.
\end{itemize}
awarded litigation expenses clearly are included within the bad faith exception. For example, in *Wellman Industries, Inc.*, the Board found that the Respondent’s defense to the refusal to bargain charge was “sufficient and frivolous.” Respondent defended against the charge on the ground that its employees had not voted on the merger of the Textile Workers Union and the Amalgamated Clothing Workers, though the Respondent had caused the employees’ ineligibility to vote by its own unfair labor practices. In *Koval Press, Inc.*, the Board awarded attorneys’ fees, finding that Respondent’s defenses to the allegation of a refusal to bargain were “patently frivolous,” and “defe[d] reality.” In that case, the employer refused to bargain based on its challenge to the appropriateness of the bargaining unit to which the employer had stipulated as appropriate, as well as its denial that the Board had issued a Certificate of Representative. On their face, the defenses put forth in these cases are so totally devoid of merit as to fit easily within the federal bad faith exception.

There are also cases, however, where the Board has refused to award attorneys’ fees under the stringent frivolous defense standard of *Tiidee Products* and *Heck’s*, but where a federal court could have awarded fees under the common law bad faith exception. For example, in *The Lebanon Times, A Division of Thompson Newspapers, Inc.*, the Board states, “[w]hile Respondent’s conduct was ultimately determined to have been in bad faith, we do not feel, in the facts presented, that its behavior was so egregious, nor its defenses so frivolous, that the usual remedies... will fail to remedy the unfair labor practices found.” Board member Murphy dissented vehemently from the denial of attorneys’ fees, noting her reasons for finding the award essential. Murphy described the employer’s bad faith bargaining as “outrageous,” with the employer’s bad faith exemplified by its own admission that it had unilaterally with-

187. Id. at 328, 103 L.R.R.M. at 1486.
188. Id. at 328–29, 103 L.R.R.M. at 1486–87. Due to the employer’s “prolonged refusal to bargain in good faith,” the employees were not a chartered local of the Textile Workers’ Union, which was required for eligibility to vote on the merger.
190. Id. at 1263, 101 L.R.R.M. at 1087.
191. Id. The employer also denied that the union received a majority of the employees’ votes. All the defenses were found to be nothing more than frivolous denials of the complaint allegations in order to delay the commencement of bargaining. Id. at 1263–64, 101 L.R.R.M. at 1086–87.
193. Id. at 649 n.2.
194. Id. at 649–51. Murphy criticized the Board for “abdicat[ing] their responsibility under Section 10(c) of the Act” to provide meaningful and creative remedies. Id. at 650–51.
195. Id. at 649.
held wage increases in order to apply economic pressure in bargaining. Further evidence of the employer's bad faith was the fact that its actions were "not the result of Respondent's innocence or inexperience with the requirements of Section 8(a)(5) and 8(d) [as] amply demonstrated by the fact that Respondent has engaged in substantially similar conduct, with substantially similar consequences, in the relatively recent past." In fact, as Murphy noted, the employer had been represented by the same negotiator in a prior case where it had been found guilty of similar unfair labor practices. Another case where the Board refused to award fees, overruling the ALJ's recommendation for the award is Standard Homes, Inc. As in Leavenworth Times, the ALJ's recommendation was based in part on a finding that the employer's actions were not "based on ignorance [of the NLRA] rather than a design to subvert it;" though the employer had not been adjudicated to have committed similar unfair labor practices, it had been previously involved in litigation before the Board. This factor was particularly significant in light of the clear nature of the violations involving repudiation of unambiguous terms of the collective bargaining agreement. The Board refused to award litigation expenses, despite the ALJ's finding of the employer's "willful abrogation of the collective bargaining agreement, and disregard of the Board's processes."

196. *Id.* at 650. Murphy also found that "indicative of Respondent's bad faith was its refusal to furnish the Union with information regarding its sick leave policy, a subject over which Respondent also insisted on sole discretion." *Id.*

197. *Id.* See cases cited, *id.* at 649 n.4.

198. *Id.* The prior case was Dothan Eagle, Inc., a subsidiary of Thomson Newspapers, 174 N.L.R.B. 804, 70 L.R.R.M. 1350 (1969), enforced, 434 F.2d 93 (5th Cir. 1970).


200. *Id.* at 1088.

201. *Id.* The ALJ cited R.L. Sweet Lumber Co., 207 N.L.R.B. 529, 85 L.R.R.M. 1073 (1973), enforced, 515 F.2d 785 (10th Cir.), cert. denied, 423 U.S. 986 (1975) and R.L. Sweet Lumber Co., 227 N.L.R.B. 1084, 95 L.R.R.M. 1388 (1977), both involving the employer's Standard Homes facility which was the subject of the instant allegations. *Id.*

202. The ALJ found that the undisputed facts did not give rise to any debatable issues, and that the employer's defenses were frivolous regarding the allegation that the employer repudiated a specific clause in the contract by unilaterally withholding a safety shoe allowance to certain employees, in violation of Section 8(a)(5) and 8(d). *Id.* at 1087-88, 95 L.R.R.M. at 1388.

203. *Id.* at 1085 n.2, 1088. The employer also refused to produce subpoenaed documents, and admitted that it was simply ignoring the subpoena. *Id.* at 1088. See infra text accompanying notes 230-31. See also Glenside Hosp. 234 N.L.R.B. 62, 62, 70, 97 L.R.R.M. 1091, 1091-92 (1978) (Board overruled ALJ's recommendation of attorneys' fees, despite the ALJ's characterization of the unlawful discharge of an employee as respondent's "premeditated misconduct"); Teckwal Corp., 253 N.L.R.B. 187, 187, 194-95, 105 L.R.R.M. 1508, 1508, 1509 (1980) (Board overruled ALJ's recommendation of attorneys' fees where the ALJ found respondent's conduct in violation of Section 8(a)(5) based on undisputed evidence; ALJ found fees appropriate though "Respondent's past litigation history is not comparable to that attributed to the Respondent in *Wellman Industries, Inc.*"); Litton Fin. Printing Div., A Div. of Litton Business Sys., Inc., 256 N.L.R.B. 516, 107 L.R.R.M. 1327 (1981) ("technical violation" by recidivist violator; Respondent refused to bargain based on allegations of union pre-election misconduct which had been overruled by a hearing officer and affirmed by the Board; attorneys' fees request denied by the Board with no analysis of Litton's notoriety as a violator of the NLRA nor the potential misuse of "technical violations" for delay).
These examples are linked by the common finding that the employer had engaged in repeated misconduct or that the employer was knowledgeable of the requirements under the NLRA because of prior litigation before the Board. This factor, combined with the bad faith evidenced by the overt nature of the unfair labor practices committed, result in circumstances which the Board finds insufficiently frivolous to meet the Heck's frivolous-debatable standard, but which would be sufficient to meet the bad faith standard of the federal courts.\(^{204}\)

The common law bad faith standard in cases of repeated misconduct was applied by the ALJ to recommend an award of attorneys’ fees in the J.P. Stevens litigation at its Roanoke Rapids facility.\(^{205}\) The ALJ found that Stevens’ repeated unfair labor practices “displayed the requisite 'willful and persistent defiance of the law' [which] falls within established exceptions to the counsel fee rule in American jurisprudence” to warrant fee shifting.\(^{206}\) The ALJ relied on federal precedent where attorneys’ fees were awarded based on bad faith conduct by a litigant which was also part of a pattern of evasion of legal obligations.\(^{207}\) This body of law, combined with the Board’s evident willingness in Heck's to leave room for new standards for fee shifting against the recidivist violator, convinced the ALJ that the fee award was appropriate.\(^{208}\) Though it adopted the ALJ’s recommendation, the Board failed to discuss this apparent change of

\(^{204}\) See also Betra Mfg. Co., 233 N.L.R.B. 1126, 1126–28, 97 L.R.R.M. 1005, 1007 (1977) (Murphy dissented from Board’s denial of attorneys' fees for surface bargaining, characterizing respondent's conduct as a “duplicitous bargaining charade;” Board found that not all defenses were patently frivolous, and noted that this was respondent's first violation); Crystal Springs Shirt Corp., 229 N.L.R.B. 4, 4 n.1, 7–8, 95 L.R.R.M. 1038, 1039 (1977) (Murphy dissented from Board's failure to order fees; ALJ concluded that it was “inescapable that Respondent had no intention of reaching an agreement with the Union.” Respondent had been found guilty of unfair labor practices in other divisions of its company); Eastern Maine Medical Center, 253 N.L.R.B. 224, 249, 105 L.R.R.M. 1665 (1980), enforced, 658 F.2d 1 (1st Cir. 1981) (ALJ refused to recommend fees though employer's conduct in violation of Section 8(a)(5) “was calculated and deliberate,” the employer was represented during negotiations by counsel who litigated the unfair labor practice charges, and where the ALJ concluded that “Respondent's litigation of this case was simply a continuation of its bad-faith [sic] bargaining attitude aimed at defeating the union.”). See supra note 184.

\(^{205}\) J.P. Stevens & Co., Inc., 239 N.L.R.B. 738, 769–75, 100 L.R.R.M. 1052, 1055 (1978). Respondent was found in violation of numerous allegations of Section 8(a)(5). Id. at 738, 770, 100 L.R.R.M. at 1052, 1053.

\(^{206}\) Id. at 773, 100 L.R.R.M. at 1055.

\(^{207}\) In particular, the ALJ relied on Vaughan v. Atkinson, 369 U.S. 527, 531 (1962); Brewer v. School Bd. of the City of Norfolk, Va., 456 F.2d 943, 949 (4th Cir. 1972); Bell v. School Bd. of Powhatan Co., Va., 321 F.2d 494, 500 (4th Cir. 1963); and Rolax, et al. v. Atlantic Coast Line R.R. Co., et al., 186 F.2d 473, 481 (4th Cir. 1951), as relevant in awarding fees where the bad faith conduct was part of a pattern of misconduct. 239 N.L.R.B. at 772–73. The ALJ noted that “the Board has not consciously addressed itself” to the bad faith exception to the American Rule “carved out” by the federal courts. Id. at 772.

\(^{208}\) Id. at 772–73.
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policy,\textsuperscript{209} causing the Fourth Circuit Court of Appeals to remand the case for clarification.\textsuperscript{210} Specifically, because the ALJ did not explicitly find the defenses to be frivolous, and because Stevens prevailed on some issues, the court required the Board to articulate any policy change adopted.\textsuperscript{211} In the Fourth Circuit's subsequent review of the \textit{J.P. Stevens} Wallace case, however, the court was satisfied with the Board's explanation of a narrow extension of its fee shifting doctrine to permit fee awards where the unfair labor practices are "flagrant, aggravated, persistent, and pervasive."\textsuperscript{212} The court also noted that J.P. Stevens might be the only employer which could meet this new standard.\textsuperscript{213} Due to the settlement of the \textit{J.P. Stevens} litigation, however, the Board will not have the opportunity to harmonize the Wallace and Roanoke Rapids cases, nor to comment on the Circuit Court's opinion.

Thus, the Board has shown some willingness to expand its theory of fee shifting from the stringent frivolous-debatable standard to a broader area closer to the federal bad faith exception to the American Rule. It appears, however, that this extension may be as narrow as the Fourth Circuit envisioned. The \textit{Standard Homes} case was decided after the \textit{Stevens} Wallace case, with the ALJ's recommendation supported by his finding of the willful and persistent misconduct, as in \textit{J.P. Stevens}.\textsuperscript{214} In rejecting this recommendation, however, the Board merely cited its refusal in \textit{Heck}'s "to award litigation costs, even if the respondent has 'engaged in "clearly aggravated and pervasive misconduct" or in the flagrant repetition of conduct previously found unlawful.'"\textsuperscript{215}

Recent Board law indicates that the Board not only views the \textit{J.P. Stevens} case as a unique case, but is even using the element of repeated misconduct to impose further restrictions on fee awards under the \textit{Tiidee Products} frivolous litigation standard. In October, 1982, the Board over-

\textsuperscript{209} Id. at 738-39.
\textsuperscript{211} While the ALJ had found that the defenses were not debatable, he had not explicitly characterized them as "frivolous." \textit{Id.} at 329. Further, the Court was uncertain as to whether the Board order relied on the ALJ's application of federal precedent concerning the bad faith exception to the American Rule, and his reliance on the Respondent's recidivism, or whether the Board had changed its standard of awarding fees on some other basis. \textit{Id.}
\textsuperscript{212} 668 F.2d 767, 777 (4th Cir. 1982). The Court also stated incorrectly that the Supreme Court had specifically approved the Board's frivolous/debatable standard for awarding attorneys' fees in \textit{NLRB v. Food Store Employees, Local 347}, 417 U.S. 1 (1974). 668 F.2d at 775. To the contrary, in that case, the Supreme Court specifically reserved the question of the Board's power under Section 10(c) to award fees at all. \textit{See supra} text accompanying notes 146-47.
\textsuperscript{213} 668 F.2d at 777.
\textsuperscript{215} \textit{Id.} at 1085 n.2, 104 L.R.R.M. at 1320.
ruled the ALJ's recommendation of attorneys' fees in *Admiral Merchants Motor Freight, Inc.*\(^{216}\) The Board affirmed the ALJ's findings that the employer violated Section 8(a)(5) and (1) by deliberately bypassing the union and directly bargaining with unit employees for contract concessions,\(^{217}\) describing the employer's defenses as "specious"\(^{218}\) and with "no basis for support in law or fact."\(^{219}\) However, the Board refused to award fees because the employer was not "a repeat offender"\(^{220}\) nor shown to be "engaged in a pattern of unlawful antiunion conduct for the purpose of denying all of its employees the exercise of the rights guaranteed employees by Section 7 of the Act."\(^{221}\) Further, the Board found that the employer had not "intentionally used defenses meritless on their face in a clear attempt to burden the processes of the Board and the courts."\(^{222}\)

These characterizations had never before been used as required elements for fee shifting. While the Board had shown some willingness in *J.P. Stevens* to expand fee shifting for recidivists, repeated misconduct has not been part of the frivolous/debatable defenses standard.\(^ {223}\) Furthermore, while the Board found that fee shifting achieves the purpose of freeing the dockets of frivolous litigation, there has been no requirement of proof that the Respondent engaged in such litigation for the specific purpose of burdening the dockets.\(^ {224}\)

One month after deciding *Admiral Merchants*, the Board awarded attorneys' fees in *Autoprod, Inc.*,\(^ {225}\) finding the employer's defenses to

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\(^{217}\) Id. slip op. at 2-3, 111 L.R.R.M. at 1527.

\(^{218}\) Id. slip op. at 8-9, 111 L.R.R.M. at 1529.

\(^{219}\) Id. slip op. at 8, 111 L.R.R.M. at 1529.

\(^{220}\) Id.

\(^{221}\) Id.

\(^{222}\) Id. slip op. at 9, 111 L.R.R.M. at 1529.

\(^{223}\) In the Board's supplemental decision awarding fees in *Tidee I*, there was no mention that a respondent must be a recidivist violator in order to award fees to the charging party. *Tidee Products, Inc.*, 194 N.L.R.B. 1234, 1236-37, 79 L.R.R.M. 1175, 1179 (1972) (supp. decision). In *Heck's Inc.*, where the Board clarified the standards for fee awards, the Board stated that the repetition of misconduct would not be sufficient by itself to warrant the award of attorneys' fees, but did not state that such repetition was an integral part of the frivolous/debatable standard. *Heck's Inc.*, 215 N.L.R.B. 765, 768, 88 L.R.R.M. 1049, 1052 (1974) (supp. decision). Further, in *Wellman Indus.*, Inc., the Board reviewed the standards established by *Heck's* and *Tidee Products*, and awarded fees to the charging party. The Board did not, however, state that the employer's recidivism was an essential element for its award, concentrating instead on the employer's defenses in the instant case. The repetition of misconduct was cited as one reason for requiring the employer to mail and read the remedial notice to the employees. *Wellman Indus.*, Inc., 248 N.L.R.B. 325, 325-29, 103 L.R.R.M. 1483, 1483-88 (1980).

\(^{224}\) In *Tidee I*, the Board stated: "The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation . . . we . . . order Respondent to reimburse the Board and the Union for their expenses . . . ." *Tidee Prods.*, Inc., 194 N.L.R.B. 1234, 1236, 79 L.R.R.M. 1175, 1179 (1972) (supp. decision).

Section 8(a)(5) charges to be "patently frivolous." The violations included the employer's attempt to avoid its obligation to bargain with the union pursuant to a reopener clause by asserting that no contract existed, even though the company president had signed a draft of the contract. In this case, unlike Admiral Merchants, the Board found that "[t]he Respondent's flagrant misconduct... caps a decade of contumacy and flagrant disregard of its employees' rights under the Act during which the Respondent has flouted court-enforced orders of the Board and persistently ignored its statutory obligations." In Autoprod, therefore, the emphasis on the employer's status as a repeat offender, in addition to its frivolous defenses, confirms the Board's increasingly restricted view of fee shifting.

In addition to awarding fees for the respondent's bad faith conduct underlying the litigation, the Board could order fee shifting, in accordance with federal court precedent for a bad faith conduct during the course of litigation. However, the Board thus far has refused to make such awards. In Standard Homes, Inc., the Board refused to award litigation expenses against the employer, which had refused to produce subpoenaed documents and admitted that it was simply ignoring the subpoena. In East Bay Chevrolet Co., d/b/a/ Time Chevrolet, the ALJ described "Respondent's trickery" in attempting to modify a bargaining unit description in the contract in order to obtain a decertification election. The Board adopted the ALJ's denial of attorneys' fees despite its finding that "the conduct complained of by the charging party may be lacking in good faith." The Board overruled the ALJ's recommended order of litigation expenses in Kings Terrace Nursing Home and Health Facility, where the employer's attorney had engaged in bad faith litigation

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226. Id. slip op. at 6, 111 L.R.R.M. at 1522.
227. Id. slip op. at 3-6, 111 L.R.R.M. at 1521-22. Respondent also violated Section 8(a)(5) by its failure to pay employee benefits under the contract and under an arbitrator's award. Id.
228. Id. slip op. at 2, 111 L.R.R.M. at 1521. Respondent had previously been found in violation of Sections 8(a)(1), (3) and (5) by its conduct during the union's organizing campaign and its subsequent bad faith bargaining. Id. slip op. at 2-5, 111 L.R.R.M. at 1521.
229. The Board stated: "In these circumstances, and in the light of the Respondent's long history of intransigence, we conclude that the traditional forms of relief are inadequate as a means of effectuating the policies of the Act and serving the public interest." Id. slip op. at 6, 111 L.R.R.M. at 1522.
231. Id. at 1085 n.2, 1088, 104 L.R.R.M. at 1330.
232. 242 N.L.R.B. 625, 101 L.R.R.M. 1229 (1979), aff'd, 659 F.2d 1006 (9th Cir. 1981)
233. Id. at 631, 101 L.R.R.M. at 1231.
234. Id. at 650-31, 101 L.R.R.M. at 1231.
235. Id. at 626, 101 L.R.R.M. at 1231. Specifically, the conduct complained of was directed to Respondent's attorneys' efforts to modify the unit by "trickery." The union had asked that the Board institute disciplinary proceedings against the attorney. Id. at 626, 631, 101 L.R.R.M. at 1230, 1231.
tactics. The morning of trial, the employer's attorney told the ALJ that his witnesses were unavailable that day because they were testifying in another proceeding.\(^{237}\) Though the ALJ continued the trial to the next day to allow the employer to present its witnesses, neither the employer nor its attorney appeared.\(^{238}\) Instead, the employer's attorney told the General Counsel by telephone that the case had been settled, though it had not.\(^{239}\) Despite these misrepresentations by the respondent's attorney, the Board found no evidence of bad faith.\(^{240}\)

Thus, there is ample support for Board authority to award attorneys' fees under Section 10(c), and in fact, for more liberal awards by the Board within the common law exceptions to the American Rule. In an area where existing statutory remedies have been repeatedly criticized as weak and ineffective, the Board should be encouraged to use its full remedial powers. The Board's current narrowing approach to fee shifting, evidenced by *Admiral Merchants*, is particularly distressing in its imposition of an even higher standard of proof for fee awards. The denial of attorneys' fees where defenses are frivolous but the respondent is not a repeat offender "makes a mockery of the administrative process by interposing frivolous roadblocks to the enforcement of public rights."\(^{241}\)

**Fee Shifting Under the Equal Access to Justice Act**

While the permissible scope of fee shifting by the NLRB under Section 10(c) remains an open question, there has also been a new development with regard to attorneys' fees awards against the NLRB and other federal agencies. The Equal Access to Justice Act (EAJA),\(^{242}\) which

\(^{237}\) *Id.* at 253, 94 L.R.R.M. at 1081.

\(^{238}\) *Id.*

\(^{239}\) *Id.*

\(^{240}\) *Id.* at 251, 94 L.R.R.M. at 1081. For examples of federal court cases awarding fees based on bad faith conduct during the course of litigation, see, e.g., Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983) (fees awarded against attorneys for their bad faith opposition to motion to disqualify); Lipsig v. National Student Mktg. Corp., 663 F.2d 178, 181-82 (D.C. Cir. 1980) (fees awarded against defendant for its bad faith conduct in litigating its counter claim, including the use of dilatory tactics during discovery and courtroom hearings, failure to meet filing deadlines, and misleading the court by misquoting or omitting material portions of documentary evidence).

\(^{241}\) This phrase was used by the ALJ in *Admiral Merchants* to describe the result of permitting the Respondent to advance its frivolous defenses. 265 N.L.R.B. slip op. at 9 (ALJ's decision). The ALJ placed this description in the context of the newly enacted EAJA: "Congress has expressed its view that Government ought not proceed against certain respondents in frivolous cases and has thus created machinery for recovery of litigation expenses against the Government in such cases. (Equal Access to Justice Act) [citation omitted]. Respondents likewise should not be permitted to make a mockery of the administrative process by interposing frivolous roadblocks to the enforcement of public rights." *Id.*

became effective October 1, 1981,\(^{243}\) provides for attorneys' fees awards to a prevailing party sued by a federal agency, unless the agency can prove substantial justification for its position or unless other circumstances would render the award unjust.\(^{244}\)

Some interesting questions may be raised concerning the appropriateness of the provisions of EAJA generally, and their application to the NLRB in particular. The treatment of these questions will be the subject of this section of the article. The equities of EAJA will be examined in the context of the general federal principles of fee shifting and in the specific context of NLRB proceedings, especially as compared with the present Board posture toward fee shifting.

**General Provisions of EAJA**

The EAJA represents a major inroad on the two traditional doctrines of sovereign immunity\(^{245}\) and the American Rule against fee shifting. Certain provisions make the federal government liable in civil litigation for attorneys' fees to the same extent as any private litigant, while other provisions create new fee shifting exceptions under which the federal government is subject to greater liability for attorneys' fees than private litigants. The EAJA amends 28 U.S.C. §2412 to permit courts to award attorneys' fees and expenses "to the prevailing party in any civil action brought by or against the United States" to the same extent as in cases involving private parties where awards are made under common


\(^{245}\) The Sovereign immunity doctrine protects the United States from suit, unless exceptions are explicitly provided for by statute. See the discussion of sovereign immunity and the EAJA in *Sun Rise*, supra note 244, at 273–77.
law and statutory exceptions to the American Rule. Additionally, 28 U.S.C. §2412(d)(1)(A) states that "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action [other than torts] brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." The parallel statute for litigation before administrative agencies, 5 U.S.C. §504, provides for attorneys' fees to be awarded to the prevailing party other than the United States, in adversary adjudications, unless the adjudicative officer finds substantial justification for the agency's position, or unless special circumstances would make an award unjust. The prevailing party dissatisfied with the agency level fee determination may seek discretionary review in the appropriate federal court. If review is granted, the federal court may modify the agency decision only upon finding that the agency abused its discretion. The federal review court also is empowered under 28 U.S.C. §2412(d)(3) to make initial determinations of fee awards upon judicial review of the merits of an adversary adjudication unless the government can fulfill the substantial justification or special circumstances criteria.

Thus, as applied to NLRB proceedings, an award may be made to a prevailing respondent by a federal circuit court of appeals which finds that the General Counsel's conduct falls within the common law bad faith exception to the American Rule. The court may also award fees if, upon review of the merits of a Board order remedying unfair labor practices, the court has refused to enforce the order, and subsequently finds that the General Counsel's position was not substantially justified and that no special circumstances existed which would make an award unjust. A prevailing respondent may also be awarded attorneys' fees by an ALJ or

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246. 28 U.S.C. §2412(b). This provision is not subject to the sunset provision. See supra note 243. 28 U.S.C. §2412(d)(2)(A) defines "fees and other expenses" as including attorneys' fees as well as other litigation expenses, such as expert witness fees and studies. This section also provides for a maximum of $75 an hour for attorneys' fees unless otherwise determined by the court. 5 U.S.C. §504(b)(1)(A) identically defines "fees and other expenses" as well as the maximum hourly rate, for administrative agency proceedings.

247. "Adversary adjudication" is defined by 5 U.S.C. §504(b)(1)(C), which in turn refers to adjudications under 5 U.S.C. §554, where the position of the United States is represented by counsel or otherwise.


250. Id.

251. Fees awarded against an agency are to be made by that agency, from funds appropriated to the agency for that purpose. Otherwise, fees are paid by the General Accounting Office in accordance with 28 U.S.C. §§2414, 2517. 5 U.S.C. §504(d)(1); 28 U.S.C. §2412(d)(4)(A). 28 U.S.C. §2412(e)(2) also provides that fee awards based on a finding of governmental bad faith are to be paid by the specific agency.
by the Board reviewing the ALJ's fee determination, under the substantial justification and special circumstances criteria.

The purpose behind the EAJA has been stated in various ways, based on the assumption that private civil litigants sued by the federal government feel coerced into compliance with the government's position because of the government's "greater resources and expertise" in litigation.\textsuperscript{2} Thus, Congress concluded that fee shifting against the government was necessary in order to encourage private litigants to defend against "unreasonable governmental action."\textsuperscript{252} Awards of attorneys' fees are intended to reduce the perceived economic deterrents to litigation and the economic disparity between private litigants and their government.\textsuperscript{253} The fee shifting has been described as well, as reflecting "a strong movement by Congress toward placing the Federal Government and civil litigants on a completely equal footing."\textsuperscript{255}

The congressional basis for the EAJA also has been articulated as the recognition "that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy."\textsuperscript{256} This general statement is surprising, in light of the historic use of this private attorney general theory only in connection with isolated statutes representing important public policy.\textsuperscript{257}

The EAJA places the burden of proof on the government to provide proof that its position was substantially justified or to show special circumstances rendering an award unjust.\textsuperscript{258} The standard of proof is identical for prevailing plaintiffs and defendants.\textsuperscript{259} The substantial justification test is described in the legislative history as "essentially one of reasonableness"\textsuperscript{260} with no award appropriate where the government proves that "its case had a reasonable basis in both law and fact."\textsuperscript{261} The House Report includes some examples of case dispositions which signal the possibility

\begin{footnotesize}
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\item \textsuperscript{253} Id. at 5, 1980 U.S. Code Cong. & Ad. News at 4984. The EAJA applies both to parties acting as plaintiffs against the government and as defendants. With regard to applications for attorneys' fees under 5 U.S.C. §504 by parties who have successfully defended against agency prosecutions, the EAJA will, therefore, be relevant only for defendants. Respondents in unfair labor practice litigation before the NLRB fit into this category of defendants.
\item \textsuperscript{254} Id. at 5--6, 1980 U.S. Code Cong. & Ad. News at 4984.
\item \textsuperscript{255} Id. at 9, 1980 U.S. Code Cong. & Ad. News at 4987.
\item \textsuperscript{256} Id. at 10, 1980 U.S. Code Cong. & Ad. News at 4988.
\item \textsuperscript{257} Derfner, supra note 62, at 260--61.
\item \textsuperscript{260} Id.
\item \textsuperscript{261} Id.
\end{itemize}
\end{footnotesize}
that the government's position was not substantially justified.262 These
dispositions include cases where there was a judgment on the pleadings or
a directed verdict or where a prior suit on the same claim had been
dismissed.263 The House Report also explains the "special circumstances"
standard as a "safety valve" to protect good faith governmental litigation
seeking novel extensions or interpretations of the law.264

The placement of the burden of proof is justified in the legislative
history as a logical choice of placing the burden on the party with readier
access to relevant evidence.265 Though the House Report recommending
passage of the EAJA disclaimed the creation of a presumption against the
government,266 the Report also states that "[i]t is intended that . . . an
award will be made unless the government comes forward with a showing
that its case was substantially justified or special circumstances make an
award unjust."267

The EAJA also provides restrictions on the eligibility of private
parties for fee awards under the substantial justification standard, in an
attempt to conform to the expressed purpose of encouraging small busi-
nesses to litigate against the government.268 According to the legislative
history, eligible parties include individuals whose net worth is less than
one million dollars and corporations and other businesses whose net
worth is less than five million dollars.269 The statute also provides for
eligibility for businesses with less than 500 employees.270 Though the
legislative history interprets this final limitation as excluding from eligibil-
ity any business with more than 500 employees, regardless of its net
worth,271 the actual wording of 28 U.S.C. §2412(c)(2)(B) in the disjunctive
would include as eligible a business with less than five million dollars net
worth, but more than 500 employees.272

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262. Id. at 11, 1980 U.S. CODE CONG. & AD. NEWS at 4989-90.
263. Id.
264. Id.
265. Id. at 10–11, 1980 U.S. CODE CONG. & AD. NEWS at 4989.
266. Id. at 11, 1980 U.S. CODE CONG. & AD. NEWS at 4990.
267. Id. at 16, 1980 U.S. CODE CONG. & AD. NEWS at 4995. This statement was made with
regard to Section 504(c)(1) which directs each agency to promulgate rules under the EAJA. The
House Report expressed the congressional intention that these rules provide for an award of fees
unless the government carries its burden of proof.
268. Id. at 9–10, 1980 U.S. CODE CONG. & AD. NEWS at 4988.
269. H.R. REP. No. 1418, 96th Cong., 2d Sess. 9, 1980 U.S. CODE CONG. & AD. NEWS at
4987–88.
270. Id. at 11–12, 1980 U.S. CODE CONG. & AD. NEWS at 4990.
271. Id.
272. 5 U.S.C. §504(b)(1)(B) specifically "excludes" from eligibility any business with more than
500 employees, which would exclude such businesses regardless of net worth. 28 U.S.C. §2412(d)(2)(B)
defines "party" as including three categories of businesses, and is written in the disjunctive form.
Therefore, a business with a net worth of less than $5 million would be included, regardless of the
number of employees.
A party eligible under the financial standards for a potential fee award must also be a prevailing party. The legislative intent was for interpretation of the term consistent with other fee shifting statutes. Thus, a party may qualify without having achieved a total victory, and without having participated in a full trial on the merits. Examples from the legislative history of prevailing parties under this definition include a party who has won a favorable settlement; a party who does not ultimately prevail on all the issues; and a defendant in litigation where the plaintiff has sought a voluntary dismissal of a groundless complaint.

General Critique of the EAJA

While the literature on the EAJA identifies some criticism which has been voiced about the EAJA, generally commentators have responded favorably to the passage and implementation of the statute. Though the general purpose of the EAJA of enabling weaker parties to litigate against unreasonable governmental legislation may be laudable, examination of the statute under its surface appeal reveals serious problems both with the passage of the statute and with its application. The general problems with the statute become apparent when the EAJA is studied in light of the development of the American Rule and its exceptions.

Criticism of the EAJA has come from a number of sources, including the Department of Justice. The Justice Department opposed the Senate Bill 265, from which the EAJA was derived, and submitted its own proposal for fee shifting against the government, authorizing fee awards when the government’s position was found to be “arbitrary, frivolous, unreasonable, or groundless,” or that the government continued the proceedings after its position clearly became so. The Justice Department supported its proposal, based on the Christiansburg Garment standard for fee shifting against defendants, with the theory that this standard was sufficient to ensure that fee shifting would be ordered where the government had acted in bad faith or unreasonably by applying a higher standard to the government’s conduct than the common law bad

\[274. \ \text{ H.R. REP. No. 1418, 96th Cong., 2d Sess. 11, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 4990.}\]
\[275. \ \text{ Id.}\]
\[276. \ \text{ Id.}\]
\[277. \ \text{ See supra note 244.}\]
\[278. \ \text{ Two days of hearings were held on S. 265, on May 20 and June 24, 1980. See Award of \text{ Attorneys’ Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. on \text{ Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm., 96th Cong., \text{ 2d Sess. (1980)}} [hereinafter cited as \text{ Hearings on S. 265}].}\]
\[279. \ \text{ H.R. REP. No. 7208, 96th Cong., 2d Sess. (1980).}\]
The proposed standard at the same time would protect against the chilling effect on government enforcement of statutory policies perceived by the Justice Department. In the Department's view, the substantial justification standard is overly harsh, and "invite[s] judicial second guessing and substitution by the courts of their judgment for the judgment of government attorneys." Further, the Department criticized the new layer of litigation as burdensome, inevitably resulting in "a retrial on the merits."

The fear that the substantial justification standard would chill government enforcement of public interest statutes was expressed by organizations outside the government as well. The AFL-CIO opposed the harsher standard of S. 265 because:

Such a standard would inhibit vigorous enforcement of the regulatory laws enacted by the Congress to protect the people of this country, not only by inducing a narrow and overly-cautious approach by the agency lest it risk depletion of its budget through fee awards, but by diverting agency resources and personnel into litigation of the justifiability of the Government's position in initiating the action which is ultimately unsuccessful.

The problem of the cost of the fee shifting litigation stems not only from the necessity of utilizing agency personnel to litigate the fee issue. High costs have been projected based on actual litigation expenses involved in litigating whether the government's position was substantially justified, as well as the other issues involved in the fee question, such as eligibility of the prevailing party and whether the party has indeed prevailed in the litigation on the merits. The Congressional Budget Office estimated the total cost of implementing the EAJA over three years as $330 million. Actual experience has resulted in lower costs than first estimated.

280. *Hearings on S. 265, supra* note 278, at 40 (statement of Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice).

281. *Id.* at 40-41.

282. *Id.* at 39.

283. *Id.* at 42.

284. *Id.* at 563 (correspondence from Director Ray Denison, Department of Legislation, AFL-CIO). See also *Id.* at 74 (statement of Mary Frances Derfner, Director, Attorneys' Fees Project, Lawyers Committee for Civil Rights Under Law); *Id.* at 92 (statement of Nancy Drabble, Acting Director, Public Citizen Congress Watch); *Id.* at 558 (correspondence from Karen Christenson, Legislative Counsel, American Civil Liberties Union).

285. *Id.* at 42 (statement of Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice).


287. Actual costs of the EAJA during the first nine months of its enactment have been cited as less than $1 million. *Equal Access, supra* note 244, at n.186.
Other problems arise from the eligibility standards which suffer from a lack of meaningful definitions of small businesses, which the legislation was designed to benefit. The definition of a small business is a value-laden concept, stemming from the American egalitarian tradition. This philosophy attaches negative characteristics to big business, as opposed to a positive view of small business as embodying American entrepreneurial values. Based upon this historical background, it would be reasonable to cast legislation designed to be of benefit to business in general in terms of its benefiting small business. This could be accomplished by broadly defining small business, thereby resulting in statutory eligibility for the vast majority of businesses in the country. The definitions themselves could be accepted as proper, however, because of basic misconceptions of the actual size of most "big" businesses; many businesses logically viewed as "big" based on annual receipts actually fit easily within statutory definitions based on size factors such as number of employees.

In the analysis of the definitions of small business in the EAJA, this perspective is found to have significant explanatory power. Arguably, the net worth criterion in the EAJA provides the most expansive approach to defining business size, due to the potential for applying accounting procedures to result in an unrealistically deflated net worth figure. Furthermore, the net worth figure of five million dollars has been criticized as "excluding virtually nobody." Thus, the net worth criterion is meaningless in determining the size of a business. This conclusion is reinforced by comparison of the EAJA net worth standard with the criteria applied by the major business reference publications such as Dun's Business Rankings, which ranks business size by annual sales volume and by the number of employees.

The House Report on S. 265 shows that the limit of 500 employees was added to the eligibility requirements by the House Committee on the Judiciary on review of the Senate bill, apparently in response to the criticism of the net worth standard. The cap of 500 employees, how-

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288. *Hearings on S. 265*, supra note 278, at 86 (statement of Nan Aron, Director, Council for Public Interest Law); *Sun Rise*, note 244, at 284.

289. *Hearings on S. 265*, supra note 278, at 76–77. (statement of Mary Frances Derfner, Director, Attorneys' Fees Project, Lawyers Committee for Civil Rights Under Law). Derfner also stated that of the approximately one million corporations in the United States, only ten to twenty thousand have a net worth of over $5 million, and that "it would be a surprise if more than a handful" of the approximately ten million partnerships and proprietorships have a net worth of more than $5 million. *Id.* at 79.

290. Dun's Business Rankings (Dun's Marketing Services) (1982), at VI. The Small Business Administration regulations also apply almost exclusively the standards of annual receipts and number of employees to define small businesses. 13 C.F.R. §§121.3–10 — 121.3–16 (1979).

ever, does even less than the net worth standard to limit the number of businesses which can meet the eligibility requirements. The most recent United States Census Bureau figures show that of the 4,543,000 business establishments in the United States, only 33,000, less than one percent, employ 250 or more employees. In Dun’s Business Rankings, in the category of Businesses Ranked by Size, only 1,728 private businesses and only 3,645 publicly owned businesses in the United States employ over 500 employees.

The statistics cited above show the misleading nature of the statutory provisions and the legislative history of EAJA in defining small business. The figures of the number of employees result in ineligibility for only a narrow segment of the population of business establishments. This result is inconsistent with the stated purpose of the EAJA and its eligibility requirements as “limit[ing] the bill’s applications to those persons and small businesses for whom costs may be a deterrent to vindicating their rights.” For example, it is unlikely that a well-known corporation such as the American Stock Exchange, Inc., which employs 500 employees, would be deterred from litigation without the attorneys’ fees provisions of the EAJA.

Other evidence has been cited as identifying a congressional purpose of interpreting the eligibility standards in favor of broader inclusion of businesses. The House Report defines net worth as the difference between total assets and total liabilities, with the value of assets to be determined by the cost of acquisition rather than fair market value. The Model Rules of the Administrative Conference of the United States have cited this section of the legislative history as expressing congressional intent to permit the low valuation of assets, thereby enlarging the set of eligible parties.

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293. Dun’s Business Rankings, supra note 290, at 1266.
Most disturbing of all objections to the EAJA focuses on the burden and standard of proof in the EAJA as effecting a complete upheaval of the historic theoretical justification for fee shifting legislation. Congress had previously authorized fee shifting in order to encourage private enforcement of important statutory public policies. Under the EAJA, though, Congress for the first time will be using fee shifting to deter governmental enforcement of public policies. The EAJA thus creates an entirely new exception to the American Rule. Witnesses testifying before Congress against S. 265 noted that prior to this legislation, all fee shifting statutes could be categorized within the private attorney general or bad faith exceptions to the American Rule. The major change in the fee shifting theory precipitated by S. 265 led one witness to describe the bill as an "unprecedented form [ ] of fee legislation for which no parallel exists, either here or in any other country in the world."

In addition to the major change in the general theory of fee shifting, the EAJA reverses the traditional "pro-plaintiff" approach to fee shifting. Under all fee shifting statutes based on the private attorney general theory, awards to the prevailing party have been interpreted to provide virtually automatic fee awards to the prevailing plaintiff acting as "the chosen instrument of Congress to vindicate" important public policies. The same term, "prevailing party," has been interpreted as providing for fee awards to defendants only where the defendant proves that the plaintiff's action was "frivolous, unreasonable or without foundation." This

298. See Hearings on S. 265, supra note 278, at 44 (testimony of Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice); id. at 75–80 (statement of Mary Frances Derfner, Director, Attorneys' Fees Project, Lawyers Committee for Civil Rights Under Law); id. at 80–82 (testimony of Armand Derfner, Lawyers Committee for Civil Rights Under Law); id. at 83–85 (statement of Nan Aron, Director, Council for Public Interest Law); id. at 92-93 (statement of Nancy Drabble, Acting Director, Public Citizen Congress Watch); id. at 573 (correspondence from Ray Denison, Director, Department of Legislation, AFL-CIO); id. at 558–59 (correspondence from Karen Christensen, Legislative Counsel, ACLU).

299. Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y, 421 U.S. 240, 263 (1975); Hearings on S. 265, supra note 278, at 75 (statement of Mary Frances Derfner, Director, Attorneys' Fees Project, Lawyers Committee for Civil Rights Under Law); id. at 84 (statement of Nan Aron, Director, Council for Public Interest Law).

300. Id. at 41 (testimony of Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice); id. at 75, 77 (statement of Mary Frances Derfner, Director, Attorneys' Fees Project, Lawyers Committee for Civil Rights Under Law).

301. Id. at 41 (testimony of Mary Frances Derfner, Director, Attorneys' Fees Project, Lawyers Committee for Civil Rights Under Law); id. at 84 (statement of Nan Aron, Director, Council for Public Interest Law).

302. Id. at 75 (statement of Mary Frances Derfner, Director, Attorneys' Fees Project, Lawyers Committee for Civil Rights Under Law).

303. Derfner, supra note 62, at 269.


discriminatory application of the identical term is justified by the public nature of the plaintiff's role as compared with the defendant's. The EAJA creates the unique situation of providing for fee awards to defendants resisting government enforcement under a standard which is far less stringent than the Christiansburg Garment "frivolous litigation" standard for defendants. Thus, the EAJA provides for a "pro-defendant" bias for fee shifting.

The reversal of the pro-plaintiff fee shifting theory is further aggravated by two characteristics of the EAJA. First, the burden of proof of substantial justification is placed on the government. Second, the construction of the statute necessarily creates a presumption that the government's position is not substantially justified. As a result, the combined effect of the standard of proof, the burden of proof and the presumption against the government's position significantly tips the balance in favor of the defendant, "impos[ing] on the United States, burdens borne by no other litigant, private or public."

The legislative history deals with the problem of the presumption against the government only on a superficial level; the House Report merely states that no presumption is created by the statute. This disclaimer does not, however, avoid the inevitable conclusion, based on the construction of the statute analyzed against the evidentiary law of presumptions, that a presumption does exist. A presumption has been defined as "a concept or rule of law regarding the effect that should be given to evidence. Once a fact or group of facts are established in an

306. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419 (1978). One court justified the distinction as follows: "The government has set up a regulatory system for the benefit of persons in the plaintiff's class. To make the regulation effective, private suits as well as public prosecutions are permitted. Suits by plaintiffs, if well founded, are in the public interest . . . . The defendant's vindication in a larger sense serves the interests of justice, but no more so than the successful defense of any suit." Hutchinson v. William C. Barry, Inc., 50 F.Supp. 292, 298 (D. Mass. 1943), quoted in Derfner, supra note 62, at 270.

307. As noted in Derfner, supra note 62, at n.78, prior to EAJA, no statute, with the exception of the Norris-LaGuardia Act, provided ready recovery of fees by defendants.


309. Though the legislative history denies the creation of a presumption against the government, witnesses during the congressional hearings on S. 265 found such a presumption to exist. See Hearings on S. 265, supra note 278, at 42 (statement of Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice); id. at 77 n.8 (statement of Mary Frances Derfner, Director, Attorneys' Fees Project, Lawyers Committee for Civil Rights Under Law); id. at 85 (statement of Nan Aron, Director, Council for Public Interest Law).

310. Hearings on S. 265, supra note 278 at 76 (statement of Mary Frances Derfner, Director, Attorneys' Fees Project, Lawyers Committee for Civil Rights Under Law).

action, another fact or group of facts must be assumed to exist in the
absence of sufficient rebuttal evidence."312 Under the administrative
agency provisions of the EAJA, "an agency that conducts an adversary
adjudication shall award, to a prevailing party ... fees and other
expenses incurred by the party ... unless the adjudicative officer of the
agency finds that the position of the agency ... was substantially justified.
..."313 (emphasis added). The allocation of the burden of proof is identi-
cal for civil actions in federal court,314 and for federal review of adminis-
trative adjudications.315 In all EAJA litigation, the prevailing party must
go forward with evidence that it has prevailed and is eligible to receive a
fee award.316 The prevailing party also must allege the amount sought and
that the government's position was not substantially justified.317 Once the
prevailing party satisfies this burden of going forward, the fee must be
awarded unless the government fulfills its burden of persuasion.318 In
other words, the prevailing party's allegations establish a presumption
that it is entitled to attorneys' fees unless the government disproves the
presumption by proving that its position was substantially justified.319
This statutory construction adheres directly to the Morgan theory of
presumptions, followed by a minority of jurisdictions.320 The Morgan
approach gives greater weight to presumptions than the Thayer approach,
adopted in the Federal Rules of Evidence.321 According to the Morgan
approach, "when a presumption is established the burden of persuasion
also shifts to the party against whom the presumption operates. This
party must then convince the trier that the nonexistence of the presumed
fact is more probable than its existence."322

312. Note, Civil Presumptions in Michigan: Dissipating the Cloud of Confusion that Sur-
AD. NEWS at 4992.
Report states, "In order to defeat an award, the government must show that its case had a reasonable
CONG. & AD. NEWS at 4992.
319. "It is intended that the rules [under Section 504(c)(1)] specify that an award will be made
unless the government come[s] forward with a showing that its case was substantially justified or
special circumstances make an award unjust." H.R. REP. No. 1418, 96th Cong., 2d Sess. at 16,
320. Note, supra note 312, at 567–68.
321. Id. at 567–68, 574–75.
322. Id. at 568. The author cites numerous works by Professor Morgan. See Morgan, Some
Observations Concerning Presumptions, 44 HARV. L. REV. 906 (1931); Morgan & Maguire, Looking
Backward and Forward at Evidence, 50 HARV. L. REV. 909 (1937); Morgan, Instructing the Jury
Upon Presumptions and Burden and Proof, 47 HARV. L. REV. 59 (1933).

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The Department of Justice objected to the presumption created by S. 265 against the government. The witness from the Justice Department told the House Judiciary Subcommittee that S. 265 was the only fee shifting statute stated in "absolute terms." Further, the Justice Department found the presumption particularly objectionable because it reverses the common law presumption that public officials act lawfully and in good faith in performing their public duties.

As noted earlier, the EAJA is based on the premise that a private party litigating against the government represents public and private interests. This view of the private litigant, particularly parties defending against governmental actions, is unconvincing in light of the congressional pattern of authorizing fee shifting in order to encourage private enforcement of specifically identified public policies. By contrast, the EAJA is omnibus legislation, authorizing fee shifting in virtually all civil litigation against the federal government, regardless of whether public or private interests are served. Under such an indiscriminate approach, the premise that public interests are served where the government is a party is rendered meaningless.

Where Congress has chosen to effect such a major upheaval of the American Rule and to place unprecedented burdens on the government as litigant, there should be important, clearly identifiable purposes fulfilled by the unique legislation. Rather, the legislative history of the EAJA reflects Congress' overreaction to the current administration's war cry of "overregulation" and governmental "harassment." The legislative history cites no attempt to rationally study governmental litigation to

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323. *Hearings on S. 265*, supra note 278, at 42 (statement of Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice).

324. *Id.* at 44.

325. *Id.* at 42 (statement of Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice).

326. A party who brings suit against the government based upon a statute designed to enforce public interests through private litigation may be in a different position with regard to the recovery of attorneys' fees than is the private defendant in an action filed by the government. This is because in addition to any application of the provisions of EAJA, such a plaintiff is also eligible for attorneys' fees from the government to the same extent as if that plaintiff were suing a private party defendant to enforce public policy. 28 U.S.C. §2412(b).

327. *Derfner*, supra note 62, at 254 n.95. Derfner describes three categories of fee shifting legislation: omnibus (authorizing fee shifting in civil litigation, regardless of the promotion of public or private interests); specific (authorizing fee shifting under a single statute); and generic (authorizing fee shifting for a specific category of cases). As she describes proposals leading to the EAJA: "While on the surface bills making the United States and federal agencies liable for fees whenever they lose almost any civil case may seem to resemble traditional attorneys' fee legislation, in fact such bills are not only wholly unprecedented one-way omnibus legislation, but also legislation which would retard, rather than augment, the policies of Congress." *Id.*


329. *Id.*
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determine whether any or all governmental agencies engage in bad faith litigation and, thus, whether the EAJA is needed. Instead Congress took what has been described as a “meat ax approach” in passing overly broad legislation regardless of the need. Congress’ failure to study the government’s litigation record is especially puzzling in light of the fact that federal litigators win eighty percent of their cases.

Critics of the EAJA did not oppose placing the parties on an equal footing. The Department of Justice’s proposal for awarding fees where government litigation was “arbitrary, unreasonable or groundless” would place private defendants in the same position as prevailing defendants under most fee shifting litigation and in a better position than private defendants seeking to prove the common law bad faith exception to the American Rule. The Christiansburg Garment standard also fulfills the perceived need to curb bad faith litigation by the government. The Department of Justice proposal, therefore, provides a viable alternative to the EAJA standards without causing a major unsupported change in fee shifting theory.

The Equal Access to Justice Act and the NLRB

1. Philosophical Inconsistencies

One witness before the House Judiciary Committee testified that the proposed EAJA was “... blunderbuss legislation which is guaranteed to do enormous damage to vast areas of law for which attorneys’ fees are ill adapted and unnecessary or counterproductive.” Comparison of the premises upon which the EAJA is based with the actual practice of litigants before the NLRB reveals that the NLRB fits the category of agencies for which fee shifting to the prevailing defendant is “ill adapted.” The underlying premise justifying the standards of S. 265 expressed in the legislative history was that private parties sued by the government will not contest the issues if the litigation costs exceed the cost of compliance with the government’s demands. The House Report states:

For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudica-

330. Id. at 78 (statement of Mary Frances Derfner, Director, Attorneys' Fees Project, Lawyers Committee for Civil Rights Under Law).

331. Derfner, supra note 62, at n.95.

332. Hearings on S. 265, supra note 278, at 558–59 (correspondence of Karen Christensen, Legislative Counsel, ACLU).

333. Under 28 U.S.C. §2412(b), parties litigating against the government are entitled to attorneys’ fees to the same extent as parties in private litigation. Thus plaintiffs are entitled to the “pro-plaintiff” approach to fee shifting authorized by Congress, while prevailing defendants against the government will be treated on an equal footing with defendants in private litigation.

334. Hearings on S. 265, supra note 278, at 76 (statement of Mary Frances Derfner, Director, Attorneys' Fees Project, Lawyers Committee for Civil Rights Under Law).
tory process. When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.\textsuperscript{335}

Thus, the EAJA is based on a cost-benefit analysis: a business faced with prosecution by a federal agency will accede to the government's wishes if it concludes that the costs of compliance are less than the costs of litigation. As discussed earlier, however, this cost-benefit approach is inaccurate as applied to litigation before the NLRB.\textsuperscript{336} Employer resistance to the General Counsel's prosecution of complaints is often based on different measures of costs and benefits; the costs of litigation are weighed against the costs of unionization.\textsuperscript{337} Where the employer wishes to resist unionization efforts, the delay factor of the litigation becomes a positive aspect of the process rather than an expense to be avoided if compliance is less costly. Thus, regardless of the merits of an unfair labor practice complaint, the employer will benefit from the time consumed by litigating the issues during a union organizational campaign or during collective bargaining for an initial contract, as the delay involved in litigation also works to dissipate union strength. The provision of attorney's fees under the standards of the EAJA, therefore, rewards such employers twice for their litigation; first, through the collateral benefit of the litigation delay, secondly, by creating the potential for fee awards under a standard which places unprecedented burdens on the government as litigant.

The inappropriateness of the EAJA standards for fee awards to respondents litigating unfair labor practice complaints was raised by a critic of S. 265 during congressional hearings.\textsuperscript{338} As noted by this witness, the premise that defendants will not contest government prosecution where the penalties are not costly collapses in face of the remedial scheme under the NLRA.\textsuperscript{339} Many unfair labor practices are remedied simply by the issuance of a cease and desist order and by requiring the respondent to post a remedial notice. These mild remedial measures are provided as the sole course of legal action to counter serious violations, such as unlawful refusals to bargain, where the respondent is simply ordered to bargain in good faith.\textsuperscript{340} Even where monetary relief is granted, the cost is reduced by the prohibition against punitive damages and the requirement to


\textsuperscript{336} See supra notes 76–92 and accompanying text.

\textsuperscript{337} Id.; See supra note 83.

\textsuperscript{338} Hearings on S. 265, supra note 278, at 85 (statement of Nan Aron, Director, Council for Public Interest Law).

\textsuperscript{339} Id.

\textsuperscript{340} See supra note 78.
deduct interim earnings from back pay.\textsuperscript{341} Given the cost-benefit premise of the EAJA, therefore, respondents eligible for awards under the EAJA should be expected rarely, if ever, to contest complaints issued by the General Counsel. As noted in the House Judiciary Committee hearings, however, "every year a significant number of the NLRB's complaints are challenged."\textsuperscript{342}

Another fallacy of the rationale for the EAJA, especially as applied to the Board's processes, is the view that the private litigant, the respondent before the ALJ and NLRB, is serving a public purpose by resisting the government's enforcement efforts. The premise fails when the respondent's role is analyzed in light of the Board's discussion in \textit{Heck's}. Using the Board's approach in \textit{Heck's}, the respondent would not be viewed as fulfilling a public purpose by litigating the unfair labor practice issues. The Board found that the charging party's role in furthering the public interest by initiating and litigating unfair labor practice charges was "incidental" to fulfillment of its private interests.\textsuperscript{343} Though the Board's view may be criticized as unduly narrow, it does place the respondent's role in such litigation in a more realistic perspective than the overly broad characterization in the legislative history of the EAJA. In keeping with the Board's view of private litigants, if a respondent's contest of an unfair labor practice complaint fulfills any public interest in shaping Board policy, it surely must be incidental to its private interests. Logically, the respondent's role in furthering the public interest is less than the charging party's, as the enforcement of employee rights under the NLRA depends solely on the initial efforts of the charging party.\textsuperscript{344} Given the imbalance of the roles of furthering important public policies, there is no justification for providing easier access to fee awards to a respondent under the EAJA standards, as compared to the stringent standards for fee awards to a charging party.

Another area which presents problems for equitable application of the EAJA concerns cases where the Board and the courts of appeals disagree on the proper interpretation of the NLRA. There are many examples of cases where circuit courts refuse to enforce Board orders because of the theoretical splits between the circuit courts and the NLRB.\textsuperscript{345} NLRB Member Zimmerman recently stated that this conflict

\textsuperscript{341}. Phelps Dodge v. NLRB, 313 U.S. 177, 197-98 (1941); F.W. Woolworth Co., 90 N.L.R.B. 289, 26 L.R.R.M. 1185 (1950); See Murphy, supra note 82, at 65-66.

\textsuperscript{342}. \textit{Hearings on S.265}, supra note 278, at 85 (statement of Nan Aron, Director, Council for Public Interest Law).

\textsuperscript{343}. See supra text accompanying note 140.

\textsuperscript{344}. See supra text accompanying notes 133-34.

\textsuperscript{345}. See Zimmerman and Dunn, \textit{Relations between the NLRB and the Courts of Appeals: A Tale of Acrimony and Accommodation}, 8 \textit{EMPLOYEE RELATIONS L.J.} 4 (1982) (examples used of issues upon which Circuit Courts and the Board have disagreed: shifting burdens of proof; bargaining units in health care facilities; discipline of union stewards for illegal strike participation; interpretation of the secondary boycott publicity proviso).
between the NLRB and the circuit courts proves that "[f]ew relationships between governmental entities are as fraught with potential for conflict as is that of administrative agencies and the courts that review their decisions." Zimmerman also criticized the courts' failure to defer to reasonable decisions even though the courts may disagree with the Board's theory.

For example, one area where conflict has developed between the Board and the courts is in the interpretation of the meaning of protected concerted activities. In *Krispy Kreme Doughnut Corp.*, the Board held that an employer violated Section 8(a)(1) by discharging an employee in retaliation for his expressed intention to file a workmen's compensation claim. The Board found that in pursuing a worker's compensation claim, the employee seeks benefits which "arise out of the employment relationship and are of common interest to other employees." Therefore, the discharged employee had engaged in concerted action to the mutual benefit of all employees, even though physically the employee had acted individually. The Board reasoned that the discharged employee's action was made in opposition to the employer's attempt to deny him and other employees access to worker's compensation benefits. The Sixth Circuit denied enforcement of the Board's order based on its view that the employee acted only for his individual benefit, rejecting the Board's broader definition of concerted activities.

Despite denial of enforcement in a circuit court of appeals, the Board is not required to, and often does not, adjust its interpretation of national labor policy; only upon final review by the United States Supreme Court must the Board follow the policy formulation of a higher tribunal. Thus, the NLRB may continue following its definition of concerted activity under *Krispy Kreme*, despite the Sixth Circuit's refusal to enforce the Board's orders. The Board has also clashed with other circuit courts in

346. *Id.* at 4.
347. *Id.* at 4–5.
349. *Id.* at 1053.
350. *Id.*
352. *Id.*
353. 635 F.2d 304 (6th Cir. 1980).
355. Since the Sixth Circuit's decision, the Board has continued to apply a broad definition of concerted activity. *See e.g.*, Country Club of Little Rock, 260 N.L.R.B. 1112, 109 L.R.R.M. 1301 (1982) (Board adopted the ALJs recommended findings that an employer violated Section 8(a)(1) by discharging an employee for filing a sex discrimination charge with the EEOC); Hotel and Restaurant
defining concerted activity. In one case, the Board found that an employee had engaged in protected concerted activity when she filed a sex discrimination complaint with a state agency against her employer. In reaching its holding, the Board specifically refused to follow the Ninth Circuit's narrow view of concerted activity "until such time as the Supreme Court may determine the issue."357

The adversary relationship between the Board and the courts poses problems under the EAJA. Under 28 U.S.C. §2412(d)(3), a federal court reviewing the merits of an agency adjudication must award attorneys' fees unless the government proves the substantial justification or special circumstances criteria. Further, the legislative history identifies a case where a prior suit on the same claim has been dismissed as one which "clearly raise[s] the possibility that the Government was unreasonable in pursuing the litigation."358 Thus, under the EAJA, the circuit court could chill the Board's enforcement efforts by punishing the Board for its refusal to change its interpretation of the NLRA to comply with that circuit.

At least one circuit court appears to have recognized the problem of awarding fees based on a split between the NLRB and the circuit courts. In Wyandotte Savings Bank v. NLRB, the employer sought attorneys' fees under the EAJA in the Sixth Circuit based on the court's earlier refusal to enforce the NLRB's bargaining order against the employer. The court had denied enforcement on the ground that the bargaining unit certified by the Board was inappropriate, and contrary to Sixth Circuit precedent. In denying the employer's application for attorneys' fees, the court found that the Board was substantially justified in seeking enforce-

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356. Hotel and Restaurant Employees and Bartenders Union, Local 28, 252 N.L.R.B. 1124, 105 L.R.R.M. 1444 (1980) (employer violated Section 8(a)(1) by discharging an employee for filing a sex discrimination charge with a state agency); United Investment Corp. d/b/a Santa's Bakery, 249 N.L.R.B. 1058, 104 L.R.R.M. 1248 (1980) (employer violated Section 8(a)(1) by discharging an employee for filing a claim for a governmental agency for back overtime wages).

357. Id. at 1124, 105 L.R.R.M. at 1444. In Country Club of Little Rock, the ALJ, in finding an 8(a)(1) violation, noted the conflict with the Circuit Courts on the definition of "concerted activity": "I am aware of the fact, as pointed out by the Respondent, that certain U.S. Circuit Courts of Appeal [sic] have refused to find that the actions of a single employee action alone constitute 'concerted activity' within the meaning of the Act, at least in the absence of a collective-bargaining agreement. However, I am bound by Board precedent which is clear and consistent in holding that actions of the kind involved here constitute protected concerted activity." 260 N.L.R.B. 1112, 1115 n.19 (1982) (ALJ decision).


359. 682 F.2d 119 (6th Cir. 1982).

360. Id. at 119.

361. Id. at 119-20.
ment of its bargaining order, despite the fact that the Sixth Circuit had
reversed the Board's position on the same issue in an earlier case.362 In
Wyandotte, the court identified factors which justified the Board's "rea-
sonable attempt to reopen a closed question."363 The court noted that at
least two other circuits had upheld the Board's position and that two
judges on the Sixth Circuit "have indicated support for the position taken
by the Board."364 Thus, in Wyandotte, the court was able to avoid the
difficult issue of awarding fees where a Board order is contrary to that
circuit's precedent. Other circuit courts will surely be faced with this
problem in other areas.365

2. Pragmatic Problems

In addition to the theoretical difficulties in applying the EAJA to the
Board, a number of pragmatic problems have arisen in the early attempts
to litigate under the EAJA in specific Board cases.

The concern about the cost of litigating the fee question is particu-
larly appropriate for the NLRB. During the first year of the implementa-
tion of the EAJA, almost half of the 103 applications filed with federal
agencies, were filed with the NLRB.366 General Counsel William Lubbers
has stated that the large percentage of applications to the Board was
anticipated, as the NLRB's caseload is greater than other agencies.367
During that same year, over half of the 14,000 agency adversary adjudica-
tions were Board cases.368 This pattern follows the Board's greater use of
its adjudicative over its rule making powers.369

The costs of litigating the fee question have come, in part, from use
of Board attorneys' time. According to Deputy General Counsel John

362. Id. at 120.
363. Id.
364. Id.
365. In Enerhaul, Inc. v. NLRB, 710 F.2d 748 (11th Cir. 1983), the Eleventh Circuit awarded
attorneys' fees under the EAJA, in a case which censures the Board for refusing to interpret "pro-
tected concerted activities" in accordance with conservative Eleventh Circuit precedent. In the under-
lying case, the ALJ dismissed the complaint alleging that the charging party employee had been
discharged for his complaints about job conditions. Id. at 749-50. Both the ALJ and the Board found
that under the EAJA the General Counsel was substantially justified, as the General Counsel had
established a prima facie case, though the allegations had not ultimately been proven. The Circuit
Court, however, awarded fees based on its precedent, holding that individual griping and complain-
ing are not protected concerted activity. Id. at 751, citing NLRB v. Charles H. McCauley Assocs., 657
F.2d 685, 688 (5th Cir. 1981); NLRB v. Datapoint Corp., 642 F.2d 123, 128-29 (5th Cir. 1981);
367. Id. at 112.
368. Id.
Higgins, the costs incurred from loss of staff efforts on other Board work have had "[t]he most substantial impact this Agency has experienced thus far with respect to [EAJA]. . ." 70 Other costs are incurred from hiring experts on issues of determining the net worth of the prevailing respondent. For example, in one case described by Lubbers in his memorandum reviewing the NLRB's first year experience under the EAJA, an outside accountant was hired for advice on the net worth issue, which was being strongly contested by both parties. 371 The employer in that case claims a net worth of 4.7 million dollars. 372 The new layer of litigation on the net worth issue includes questions about the method of employer's computation of net worth. 373

Issues of pre-trial discovery present areas of conflict between the EAJA and Board procedures. In one case, the ALJ ordered broad discovery, including interrogatories and depositions of Board agents concerning the General Counsel's claim that the respondent had refused to cooperate during the initial unfair labor practice investigation. 374 The NLRB subsequently ruled that the Board's rule prohibiting discovery also applies to EAJA proceedings. 375 Since a respondent's willingness to supply evidence in an investigation is often important in determining whether a prima facie case exists warranting issuance of a complaint, such discovery procedures could foreseeably result in swearing contests between Board

372. Id.
373. Id.
374. Id. Lubbers described the litigation over this issue in his memorandum. The ALJ relied solely on Section 102.152 of the NLRB's EAJA rules in ordering pre-trial discovery. Id. Section 102.152, states, in relevant part: "(a) Ordinarily the determination of an award will be made on the basis of the documents in the record. The administrative law judge, however . . . may order further proceedings, including an informal conference, oral argument, additional written submissions or an evidentiary hearing." 29 C.F.R. §102.152 (1983).
375. Memorandum GC 83–11, supra note 16, at 113. The Board order was issued after granting special permission to appeal. The Board relied on Section 102.118 of the Board's rules which provides in relevant part:

(a)(1) Except as provided in section 102.117 of these rules respecting requests cognizable under the Freedom of Information Act, no regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent of the Board . . . or of the general counsel. Nor shall any such person testify in behalf of any party to any cause pending in any court or before the Board . . . with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any . . . records of the Board or the general counsel, whether in answer to a subpoena or otherwise, without the written consent of the Board . . . or the general counsel. . . .
agents and a respondent's attorneys. Further, the general continuance of Board policies protecting the confidentiality of witnesses who give affidavits to the General Counsel must be kept intact for the reasons approved by the Supreme Court in Robbins Tire.

Another area of interpretation of the EAJA which has resulted in confusion, and which affects all agencies and courts is the search for the meaning of the government's "position." The recurring issue is whether Congress intended to examine the reasonableness of government's position underlying the cause of action or whether the term refers only to the government's position during the course of litigation. The federal courts which have addressed the issue have split on the proper definition.

The District Court for the District of Columbia decided that the government's "position" referred to the underlying facts of the cause of action, as well as the government's legal theories in litigating the issues. The district court in Maryland concluded "that the statute refers to the Government's actions or position in prosecuting or defending litigation, not to its actions upon which suit is based." A federal district court in Utah agreed with this interpretation of the meaning of "position," finding that this definition would carry out the intent of Congress to compensate only certain parties in litigation against the government.

The issue of the government's position under the EAJA has also been addressed by the Fourth Circuit Court of Appeals in Tyler Business Services v. NLRB. Part of the court's analysis in granting the employer's application for attorneys' fees concerned the definition of the government's position, which the court decided "should be read to mean the government's position as a party in prosecuting or defending the litigation at whatever level is under review for the awarding of attorneys'

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376. One commentator on the EAJA and NLRB procedures argues that the burden of proof on the General Counsel in EAJA cases requires the General Counsel to produce evidence of the reasons for a respondent's refusal to supply evidence in the form of affidavits. Peterson, supra note 244, at 274.

377. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978). In criticizing the Board's refusal to disclose affidavits of witnesses with regard to EAJA cases, Peterson, an attorney commenting on EAJA, completely ignores the Robbins Tire decision. Peterson, supra note 244, at 271.

378. See Equal Access, supra note 244, at 320–21.

379. Photo Data, Inc., v. Sawyer, 533 F. Supp. 348, 352 (D.D.C. 1982). See Equal Access, supra note 244, at 321 n.129, for discussion of cases from federal district courts in Pennsylvania, Idaho and Oklahoma, applying this definition of "position." See also Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983) (examination of both the underlying facts and litigation theories "seems more sensible and consistent with the purposes of the EAJA ..." Id. at 556).


382. 695 F.2d 73 (4th Cir. 1982).
fees.\textsuperscript{383} Thus, the court awarded fees based on its review of the government's position in petitioning the court for enforcement of the prior Board order finding the employer guilty of an unlawful discharge.\textsuperscript{384} The court also noted that it would review only the reasonableness of the General Counsel's litigation position as the prosecuting arm of the NLRB, and not the position of the Board as adjudicator.\textsuperscript{385} Examination of the court's decision, however, shows that the court was in fact reviewing the Board's position. In \textit{Tyler}, the ALJ had dismissed the complaint in its entirety, which consisted of allegations of threats in violation of Section 8(a)(1) and a discharge in violation of Sections 8(a)(3) and (1).\textsuperscript{386} The NLRB affirmed the ALJ's recommendation in part, reversing the dismissal of the discharge case, having found that the employee had been discharged because of his protected concerted activity apart from union activity.\textsuperscript{387} The Circuit Court denied enforcement sought by the General Counsel because his position did not adequately explain the employee's own disclaimer of engaging in the concerted activity.\textsuperscript{388} Thus, despite the court's stated restriction of its review only of the position of the General Counsel, the court was necessarily reviewing the reasonableness of the Board's position in adopting a theory different from the General Counsel's initial theory of a discharge based on union activities.\textsuperscript{389} Thus, after the court's decision in \textit{Tyler}, the question of which position was intended by Congress is still confusing and is further complicated by the question of whose position is under review.\textsuperscript{390}

Other problems with applying the Fourth Circuit's definition of the government's "position" can be envisioned. One problem may arise concerning an employer who has refused to cooperate in producing evidence during the investigation of an unfair labor practice charge. If this occurs in a case such as an alleged unlawful discharge, is the government's position in litigation not substantially justified if the employer produces business records at the trial which show that the employee would have been discharged regardless of the union activity? Another situation which may arise is the disappearance of a witness whose testimony was essential

\textsuperscript{383} \textit{Id.} at 75.
\textsuperscript{384} \textit{Id.} at 76.
\textsuperscript{385} \textit{Id.}
\textsuperscript{386} \textit{Id.}
\textsuperscript{388} 695 F.2d at 76. The federal circuit court denied enforcement at 680 F.2d 338 (4th Cir. 1982).
\textsuperscript{389} \textit{Id.} at 75.
\textsuperscript{390} In contrast to the review of the General Counsel's litigation position in \textit{Tyler}, the ALJ in \textit{Lion Uniform, Janesville Apparel Division, JD-(ATL)-76-83} (Sept. 13, 1978), examined the facts and evidence underlying the issuance of the complaint. The ALJ concluded that the General Counsel's position was not substantially justified and recommended that the respondent employer be awarded attorneys' fees under the EAJA in the amount of $90,564.65.
to prove an allegation. For example, if the General Counsel cannot locate an individual who is the sole witness to an illegal statement, at that point in the litigation, is the government’s position without substantial justification, even though the allegation was based on that witness’ affidavit during the investigation? These issues will undoubtedly be presented in future cases interpreting the EAJA, and may conceivably lead to varied and confusing interpretations of the statute by different tribunals.

**Conclusion: A Comparison of Section 10(c) and the EAJA**

Juxtaposition of the standards for awarding attorneys’ fees under Section 10(c) of the NLRA with the fee provisions of the EAJA demonstrates the ineffectiveness of Board fee shifting policy under Section 10(c) and illuminates the validity of the general objections made in the congressional hearings that enactment of the EAJA standards would result in illogical and inequitable fee shifting policies.

The foregoing discussion has shown the extreme difficulty facing a charging party seeking attorneys’ fees under Section 10(c), because of the stringent standards established in *Tiidee Products* and *Heck’s*. Though the remedial policies under Section 10(c) weigh in favor of the Board’s power to award fees, the Board has applied the frivolous/debatable standard narrowly and reluctantly. Thus, where fee awards under the common law exceptions are extraordinary in general, by the NLRB’s standards such awards become almost mythical. The overly restrictive application of the Board’s fee shifting standards is demonstrated by comparison with federal court fee awards. Even assuming that the Board is not empowered to award attorneys’ fees beyond the parameters of the common law exceptions, the Board has refused to order fees in cases which would have easily fallen within the bad faith exception to the American Rule as applied by the federal courts. Under its conservative approach, the Board has refused to award fees both in cases involving bad faith conduct underlying the lawsuit as well as bad faith conduct during the actual litigation.

The Board has applied its overly stringent standards for fee shifting even in cases involving recidivist violators, with the narrowest exception for rare respondents such as the notorious J.P. Stevens Company. Furthermore, under the current Board approach recidivism has become a double edged sword. On the one hand, recidivism without the most frivolous defenses will result in a denial of attorneys’ fees. However, the

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391. *See supra* notes 184-241 and accompanying text.
393. *Id.*
394. *See supra* notes 205-13 and accompanying text.
Board has recently denied attorneys’ fees where the defenses were frivolous but the respondent was not yet a repeat offender. Such Board policy gives a respondent one free round of frivolous litigation.

The Board’s reluctance to award attorneys’ fees against respondents who act in bad faith, either in conduct leading to the lawsuit, or in conduct during the course of litigation, results in the ineffective use of a potentially strong remedial measure under a statute which provides primarily weak remedies. Enforcement of the NLRA relies solely on the initiation and litigation of charges by a charging party. Lengthy litigation of unfair labor practice complaints against respondents who take advantage of the delay inherent in Board processes becomes expensive and drains the resources of a union, particularly in litigation against repeat violators. Thus, the award of attorneys’ fees, at least within the bad faith exception, would encourage charging party unions to file charges and follow through with the litigation process. The Board’s present fee shifting policies achieve the opposite result by adding obstacles to awarding attorneys’ fees. Unions with limited litigation resources will, therefore, be deterred from pursuing lengthy and expensive litigation of unfair labor practice charges.

By contrast, the EAJA creates relaxed standards for fee shifting unprecedented in the history of the American Rule and its exceptions. Not only is the burden of proof placed on the government, but the construction of the statute creates a presumption against the government, triggered by the simple allegation that the government’s actions were not substantially justified. As a result, the EAJA standards make it easier for prevailing defendants to win attorneys’ fees than in any other statutory scheme short of automatic awards. Prior to the EAJA, fee shifting statutes took a pro-plaintiff bias, as an outgrowth of the underlying “private attorney general” theory of encouraging litigation to enforce important public policies. Criticism of the EAJA’s major change in fee shifting policy has been based on the lack of justification for such major revisions as well as the potential chilling effect that such anti-government, pro-defendant legislation may have on enforcement of public policies.

The problems identified with the EAJA also stem from its overly broad and ambiguous terms. The provisions for eligibility of parties are so broad as to exclude very few of the millions of businesses in the United States, despite the stated legislative purpose of encouraging small businesses to litigate against the government where they might otherwise be

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395. See supra notes 216–24 and accompanying text.
396. See supra notes 79–86 and accompanying text.
397. See supra notes 308–25 and accompanying text.
398. See supra notes 280–84, 298–307, 328–32 and accompanying text.
deterred by litigation expenses. Further, the actual wording of the eligibility provisions is broader than indicated by the legislative history, creating ambiguity as to proper interpretation. Other ambiguities are found in the meaning of the government's "position"; courts have diverged on examining either the government's position underlying the action or its litigation position.

Comparison of fee shifting under Section 10(c) with the EAJA standards demonstrates the resulting problems and inequities. As a result of the pro-defendant bias of the EAJA, the prevailing charging party before the NLRB must shoulder a far greater burden of proof on the issue of fee shifting than the prevailing respondent. Specifically, the prevailing charging party bears the heavy burden of showing that the respondent has litigated "frivolous" defenses as defined by *Tiidee Products*, while the prevailing respondent's burden of going forward is met with its allegation that the government's action was not substantially justified. This disparity is insupportable. First, the different standards of proof for the charging party and the respondent do not comport with notions of logic or justice. Where the charging party furthers public policy by filing and litigating charges under the NLRA, it is inequitable to place a higher standard of proof for fee shifting on the charging party, than on the respondent whose litigation against the NLRB and the charging party fulfills more personal interests in successfully defending against the charge and remaining union-free. These inconsistencies are highlighted by comparison with the Supreme Court's interpretation of the fee shifting provisions of Title VII of the Civil Rights Act of 1964 in *Christiansburg Garment Co.* as applying a higher standard of proof for prevailing defendants than for prevailing plaintiffs. While this example is different from fee shifting for parties before the NLRB in that Title VII contains explicit fee shifting provisions, the "equitable considerations" which support the disparate standards in *Christiansburg Garment Co.* are valid considerations for Board litigation as well. The equities stemming from the position of the charging party under the NLRA as the sole initiator of enforcement of national labor policy demand that the charging party's burden of proof under Section 10(c) should not be so disproportionate to the burden of the prevailing respondent under the EAJA. The unequal treatment of the parties is even less justifiable in light of the fact that there has been absolutely no objective evidence that the NLRB has a pattern of bad faith or unreasonable prosecutions which would support the general accusa-

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399. *See supra* notes 288–97 and accompanying text.
400. *See supra* notes 379–90 and accompanying text.
401. *See supra* notes 83, 132–33 and accompanying text.
402. *See supra* notes 71–74 and accompanying text.
tions of governmental harassment made by the proponents of the EAJA.403

The disparate treatment of the charging party and the respondent also works both to encourage and discourage litigation in a manner inconsistent with vigorous enforcement of the NLRA. Because of the delay factor inherent in Board litigation at all stages, litigation by a charging party union against a respondent employer taking advantage of all appellate routes becomes extremely expensive. Instead of encouraging charging parties to pursue such litigation, however, the current fee shifting standards under Section 10(c) discourage a union with limited litigation resources from carrying through with charges against an employer resisting enforcement, with a resulting chilling effect on vigorous enforcement of national labor policy. On the other hand, the relaxed standards of the EAJA will fulfill the legislative intent of encouraging respondents to litigate against the General Counsel and the charging party. However, as noted in the previous discussion of the weaknesses in Board remedies, the benefits from the delay in Board litigation already induce some respondent employers to litigate through the entire appellate route.404 Therefore, the attorneys’ fees award under the EAJA is an unnecessary inducement to litigation, and in some cases, may reward employers whose principal purpose for defending against unfair labor practice charges was to weaken support for the union. These realities of litigation before the Board may provide a double inducement to the employer to litigate unfair labor practice cases; the first from the time involved in litigation, and the second from potential payment for that same litigation time. The fee award under the EAJA thus may result in a windfall to certain employers. The windfall factor is even more inequitable in light of the overly broad eligibility standards, which do not identify parties who would be deterred from litigation without the potential for fee awards. Further, the time spent by Board personnel in litigating the fee questions exacerbates the chilling effect on actual enforcement of the NLRA.405

Another area fraught with potential problems of enforcement of the EAJA in Board proceedings is the well-known conflict between the Board and federal appellate courts regarding interpretation of labor policy.406 The EAJA provisions authorize the circuit courts of appeals to award attorneys’ fees to respondents following review of the merits of a Board order in unfair labor practice cases. Thus, the EAJA may be used as a tool to create Board policy consistent with the views of the federal courts.407 Where the federal courts’ interpretation of the NLRA results in

403. See supra notes 328–32 and accompanying text.
404. See supra notes 79–86 and accompanying text.
405. See supra notes 285–87, 370–73 and accompanying text.
406. See supra notes 345–65 and accompanying text.
407. Id.
less expansive views of employee rights, however, the EAJA may again
discourage vigorous enforcement of the NLRA.

The result of applying both the Board's Section 10(c) fee shifting
standards and those of the EAJA is to "turn[ ] the American Rule on its
head." Under present Board policy, it is almost impossible for a prevail-
ing charging party to successfully seek attorneys' fees. By contrast, the
EAJA creates relaxed standards for a prevailing respondent unprece-
dented in the history of fee shifting policy. Taken alone, either the Section
10(c) or the EAJA standards violate the traditional use of attorneys' fees
awards to encourage enforcement of important public policies. In combi-
nation, the standards misapply fee shifting concepts with the inevitable
result of deterring vigorous enforcement of the NLRA.

In general, the Christiansburg Garment standard proposed by the
Department of Justice could provide the vehicle for deterring the
government from bad faith prosecutions, while preserving the pro-
plaintiff tradition of American fee shifting policy. In particular, with
regard to the NLRB processes, the Christiansburg Garment standard is
far more equitable in light of the stringent Tiidee Products standard for
prevailing charging parties. Furthermore, the pro-plaintiff tradition of fee
shifting requires the NLRB to fully exercise its fee shifting authority to
courage the enforcement of national labor policy.

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408. Hearings on S. 265, supra note 278, at 80 (statement of Armand Derfner, Lawyer's
   Committee for Civil Rights Under Laws).
409. See supra notes 278-82, 333 and accompanying text.