



**In the Matter of:**

**RICHARD PAUL EVANS,**  
**COMPLAINANT,**

**ARB CASE NOS. 08-039**  
**08-043**

**ALJ CASE NO. 2006-AIR-022**

**v.**

**DATE: August 31, 2009**

**MIAMI VALLEY HOSPITAL,**

**and**

**CJ SYSTEMS AVIATION GROUP, INC.,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Robert M. Lamb, Esq., Robert A. Klinger, Esq., Robert A. Klinger Co., LPA,  
Cincinnati, Ohio**

***For the Respondents:***

**Wayne Waite, Esq., Freund, Freeze & Arnold, Dayton, Ohio  
Avrum Levicoff, Esq., and Edward I. Levicoff, Esq., Levicoff, Silko &  
Deemer, PC, Pittsburgh, Pennsylvania**

**ORDER AWARDING ATTORNEY'S FEES AND COSTS**

This case arose out of a complaint Richard Evans filed with the United States Department of Labor alleging that his employers, Miami Valley Hospital (MVH) and CJ

Systems Aviation Group, Inc. (CJ) violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act)<sup>1</sup> when they fired him after he raised concerns about air safety issues. Following a formal hearing, a Labor Department Administrative Law Judge (ALJ) concluded that MVH and CJ violated AIR 21; he awarded Evans reinstatement, back pay, and compensatory damages. MVH and CJ appealed to the Administrative Review Board (ARB). The ARB issued a Final Decision and Order affirming the ALJ's rulings and noting that we would address the ALJ's award of attorney's fees separately.<sup>2</sup>

The ALJ issued an Attorney Fee Order on January 14, 2008, awarding a total fee of \$194,188.75 and costs of \$37,713.00 to the four attorneys who represented Evans in this matter. MVH and CJ appealed the awards to the ARB.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the ARB.<sup>3</sup> In cases arising under AIR 21, the ARB reviews the ALJ's findings of fact under the substantial evidence standard<sup>4</sup> and his or her legal conclusions de novo.<sup>5</sup>

### DISCUSSION

A successful AIR 21 complainant is entitled to receive all costs and expenses, including attorney's fees, reasonably incurred in bringing the complaint.<sup>6</sup> A prevailing

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<sup>1</sup> 49 U.S.C.A. § 42121 (West 2008). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2008).

<sup>2</sup> *Evans v. Miami Valley Hosp. & CJ Sys. Aviation Group, Inc.*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-022, slip op. at 2 n.2 (ARB June 30, 2009).

<sup>3</sup> See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110.

<sup>4</sup> 29 C.F.R. § 1979.110(b); *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4-5 (ARB Dec. 30, 2004).

<sup>5</sup> *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

<sup>6</sup> 49 U.S.C.A. § 42121(b)(3)(B). When an AIR 21 complainant establishes that his employer retaliated against him for whistle-blowing activities, the Secretary of Labor shall

order the party charged to take appropriate affirmative action to abate the violation, including, where appropriate,

party is entitled to reimbursement for attorney's fees and legal expenses and costs, including expert witness fees.<sup>7</sup>

The ARB has endorsed the lodestar method to calculate attorney's fees.<sup>8</sup> This requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.<sup>9</sup> As the Supreme Court explained in *Hensley v. Eckerhart*, *unreasonably* expended hours include those that are (1) excessive in relationship to the task performed, (2) redundant or duplicative because multiple attorneys performed the same task, or (3) unnecessary or inappropriate because the task is not properly billed to clients.<sup>10</sup>

An attorney seeking a fee award must submit evidence documenting the hours worked and the rates claimed, as well as records identifying the date, time, and duration necessary to accomplish each specific activity and all claimed costs.<sup>11</sup> The burden of proof is also on the attorney to demonstrate the reasonableness of his hourly fee by producing evidence that the requested rate is in line with fees prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.<sup>12</sup> If the documentation of hours is inadequate, the award may be reduced

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reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the Board shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred.

29 C.F.R. § 1979.110(d).

<sup>7</sup> *Florek v. Eastern Air Central, Inc.* ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 12 (ARB May 21, 2009).

<sup>8</sup> *Eash v. Roadway Express, Inc.*, ARB Nos. 02-008, 02-064, ALJ No. 2000-STA-047, slip op. at 7 (ARB June 27, 2003).

<sup>9</sup> *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161; ALJ No. 2003-STA-055, slip op. at 2 (ARB Apr. 3, 2008); *Jackson v. Butler & Co.*, ARB Nos. 03-116, -144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004).

<sup>10</sup> 461 U.S. 424, 433 (1983). *See Coulter v. Tennessee*, 805 F.2d 146, 150-51 (6th Cir. 1986).

<sup>11</sup> *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 2 (ARB Mar. 7, 2006).

<sup>12</sup> *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 2 (ARB Feb. 6, 2004).

accordingly.<sup>13</sup> Further, hours that are not properly billed to a client are also not properly billed to an adversary.<sup>14</sup>

Initially, we note that, while the ALJ thoroughly discussed his reduction of the attorneys' requested hourly rates, he did not provide sufficient support for his conclusion that the time-and-task entries of the four attorneys were sufficiently detailed and represented time reasonably expended in furtherance of Evans's case. Nor did the ALJ address the Respondents' arguments that he should reduce the number of hours submitted by 32 percent because the attorneys engaged in "block" billing.<sup>15</sup>

Given these omissions, we will first examine the ALJ's findings regarding the requested hourly rates and will then address the time entries to determine whether they represent time reasonably expended by Evans's attorneys in this case.<sup>16</sup> Finally, we will consider the arguments of CJ and MVH regarding block billing.

#### *The hourly rates*

The ALJ analyzed each of the attorney's requested hourly rates separately and in some detail. The ALJ reduced the requested rates of Attorneys Klinger (\$325.00), Lamb (\$300.00), Braun (\$175.00), and Butler (\$125.00) by \$25.00 an hour respectively.<sup>17</sup> He concluded, based on the attorneys' affidavits Evans submitted, that these figures represented reasonable market rates in the Cincinnati, Ohio area.<sup>18</sup>

Both MVH and CJ argue that the ALJ should have further reduced the hourly rates for Klinger and Lamb because neither attorney submitted enough information for the ALJ to determine the prevailing market rate in the Cincinnati, Ohio area.<sup>19</sup> MVH

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<sup>13</sup> *Hensley*, 461 U.S. at 433.

<sup>14</sup> *Id.* at 434.

<sup>15</sup> Block billing, or "lumping multiple tasks into a single entry of time," is the practice by which attorneys record the total number of hours spent on multiple tasks during one day, rather than allocating specific times to specific tasks. *See* discussion *infra*; *see also* *Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1214 (10th Cir. 2000).

<sup>16</sup> Fee Order at 2.

<sup>17</sup> *Id.* at 2-4.

<sup>18</sup> *Id.* On appeal, none of Evans's attorneys disputes the ALJ's reduction of their requested hourly rates.

<sup>19</sup> CJ Brief 10-16; MVH Brief at 9-11.

argues that its expert on fees provided the only evidence of the prevailing market rates but that the ALJ set the attorneys' rates at the upper end or in excess of that evidence.<sup>20</sup>

CJ contends that the attorneys' normal billing rates should have been the focal point in determining the correct hourly rate and that the ALJ erred in denying its motion to compel Klinger and Lamb to disclose their actual normal billing rates.<sup>21</sup> MVH also argues that the attorneys' reliance on their expert witness on liability demonstrates that the rates awarded are too high for their lesser level of expertise in aviation law.<sup>22</sup>

The ALJ thoroughly discussed the hourly rates of the two principal attorneys and their associates, and the arguments that MVH and CJ made.<sup>23</sup> He relied on the affidavits of two other attorneys, Richard R. Renner and Paul H. Tobias, both of whom practice in the Cincinnati area. After detailing his experience with and knowledge of Klinger's and Lamb's employment law practice, Renner averred that he charged \$325.00 an hour and that the fair market rates in the Cincinnati area for Klinger and Lamb would be \$325.00 and \$300.00 an hour, respectively.<sup>24</sup> Tobias, a specialist in labor and employment law for 48 years, declared that he was also familiar with the legal fees charged in the Cincinnati area and knowledgeable about the abilities and reputations of Klinger and Lamb; he added that hourly rates of \$300.00 for Lamb and \$325.00 for Klinger, based on their skills, experience, and expertise, were commensurate with rates in the Cincinnati legal community.<sup>25</sup>

Noting that MVH submitted evidence that attorneys with Klinger's level of experience charge between \$250 and \$300.00 an hour, the ALJ concluded that \$300.00 was a reasonable hourly rate for Klinger. MVH also submitted evidence that attorneys with Lamb's experience charge between \$225.00 and \$275.00 an hour; the ALJ thus concluded that \$275.00 was a reasonable rate for Lamb.<sup>26</sup>

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<sup>20</sup> MVH Brief at 9-10.

<sup>21</sup> CJ Brief at 11. *See* discussion, *infra*.

<sup>22</sup> MVH Brief at 10-12.

<sup>23</sup> Fee Order at 2-4.

<sup>24</sup> Exhibit C, Complainant's Petition for Fees and Costs.

<sup>25</sup> Exhibit D, Fee Petition. In addition, the ALJ had before him two other declarations of employment law attorneys in Ohio whose practices represent defendants. Both stated that reasonable market rates in the Cincinnati area for Klinger and Lamb were \$325.00 and \$300.00 an hour respectively. *See* Exhibits A and B attached to Evans's Reply Brief to Respondents' Objections to Fee Petition.

<sup>26</sup> Fee Order at 3-4.

CJ objected to these hourly rates but suggested no alternatives. MVH's own expert on prevailing market rates provided evidentiary support for the hourly rates the ALJ set.<sup>27</sup> Further, the ALJ actually presided at the hearing and had the opportunity to evaluate the ability and expertise of both Klinger and Lamb in presenting this fairly complex case. Therefore, we conclude that substantial evidence supports the ALJ's findings with regard to prevailing market rates and that he acted within his discretion in awarding an hourly rate to Klinger and Lamb at the higher end of the spectrum that MVH suggested.<sup>28</sup>

CJ contended that Braun and Butler deserve no fees,<sup>29</sup> but MVH's attorney's fee expert submitted evidence that new attorneys generally charge between \$120.00 and \$150.00 an hour in the Cincinnati area. In Braun's case, the ALJ split the difference between the requested rate of \$175.00 an hour and the \$125.00 rate MVH's fee expert proposed. The ALJ relied on the opinion of MVH's fees expert and the fact that Braun had three years of legal experience. Thus, he found a \$150.00 an hour rate to be reasonable.<sup>30</sup>

MVH argued that Butler was entitled to only \$65.00 an hour because law school clerks in the Cincinnati area generally billed at \$50.00 to \$90.00 an hour. However, the ALJ considered the fact that Butler had graduated and found that \$100.00 an hour was reasonable for an unlicensed attorney. The evidence supports the ALJ's findings with regard to local prevailing rates and his selection of an hourly rate of \$150.00 for Braun and an hourly rate of \$100.00 for Butler were within his discretion. Therefore, we affirm them.

#### *The time entries*

The ALJ stated that he had reviewed the time-and-task entries submitted by Evans's attorneys and found them to be

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<sup>27</sup> MVH's fee expert, Michael W. Hawkins, stated that \$300.00 an hour for Klinger and \$275.00 an hour for Lamb were within the range "generally charged" by attorneys "in small-sized firms representing individuals in employment-related matters." Exhibit A to MVH's Opposition to Complainant's Petition for Fees and Costs.

<sup>28</sup> See *Fuhr v. School Dist. of City of Hazel Park*, 364 F.3d 753, 762 (6th Cir. 2004) (district court has broad discretion to determine what constitutes a reasonable hourly rate for an attorney).

<sup>29</sup> CJ Brief at 14-15.

<sup>30</sup> Fee Order at 4.

sufficiently detailed and [to] represent time reasonably expended in furtherance of Complainant's case. Complainant has agreed that several questionable entries should be excluded and has also submitted evidence that many potentially compensable hours were not included in the fee. Therefore, no additional reductions will be made.<sup>31</sup>

The ALJ did not provide further elaboration for Evans's attorneys' many time entries, but noted that they had provided "excellent representation" in a "difficult case."<sup>32</sup> The ALJ awarded a total of \$194,188.75 in fees to the attorneys, compared to the \$214,668.75 requested.<sup>33</sup>

CJ and MVH argue that the ALJ's award of attorney's fees represents a windfall for Evans's attorneys.<sup>34</sup> They contend that the attorneys' block-billing warrants an across-the-board, 32-percent reduction of their total fees to \$119,188.75 because the reasonableness of the time spent and the specific tasks performed cannot be determined from the evidence they presented in their fee petition.<sup>35</sup> The Respondents also argue that the ALJ erred in finding that the entries submitted were sufficiently detailed and represent time reasonably spent because "an alarming number" of them are vaguely described, do not identify the subject matter of the task, were duplicative, and included items not properly billed to private clients.<sup>36</sup> MVH urges the ARB to reduce the total of 717.20 hours requested to 487.06 hours.<sup>37</sup>

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<sup>31</sup> Fee Order at 2. Lamb initially requested a total of 569.95 hours, which he later reduced to 561.45 hours.

<sup>32</sup> Fee Order at 5-6. The ALJ noted that Evans's case was complex but not rare and exceptional, and concluded that the lodestar calculation fully accounted for the time spent working on the case and the significant fee awarded; he thus denied Evans's request for an enhancement of the fee. Fee Order at 5-6. Evans did not raise this issue on appeal and has therefore waived it.

<sup>33</sup> Fee Order at 4. The individual awards were: Klinger, a total of \$33,330.00 at \$300.00 an hour for 111.10 hours of services; Lamb, \$154,398.75 at \$275.00 an hour for 561.45 hours of services; Braun, \$5,985.00 at \$175.00 an hour for 39.9 hours of services; and Butler, \$475.00 at \$100.00 an hour for 4.75 hours of clerking services.

<sup>34</sup> CJ Brief at 2; MVH Brief at 3.

<sup>35</sup> CJ Brief at 5-9; MVH Brief at 3-7, n.1. CJ argues that at least 165 of the 259 overall entries (64 percent) are block billed. CJ Brief at 7.

<sup>36</sup> CJ Brief at 7-8, MVH Brief at 6-7.

<sup>37</sup> MVH Brief at 7.

In this case, the ALJ failed to make specific findings of fact regarding the reasonableness of the block-billed, time-and-task entries for services that Evans's attorneys submitted, thus not complying with the regulations governing an ALJ's requirements for rendering a decision.<sup>38</sup> Rather than remand this case for the ALJ to render the requisite findings of fact, we will proceed to examine the time-and-task entries to determine whether the four attorneys have met their burden of proof to demonstrate, through records identifying the date, time, and task, that the hours worked were reasonably expended in litigating Evans's case.

Block billing is a time-keeping method by which a lawyer enters "the total daily time spent working on a case, rather than itemizing the time expended on specific tasks."<sup>39</sup> Such billing can make it difficult to determine the reasonableness of the hours expended, but the use of block billing does not justify an across-the-board reduction or rejection of *all* hours.<sup>40</sup> Rather, a fixed reduction can be appropriate if a significant number of entries lack adequate detail or are not properly billable to clients.<sup>41</sup>

While block billing does not necessarily deprive a court of a basis upon which to determine the reasonableness of the hours an attorney expended on specific tasks,<sup>42</sup> such bundled or batch billing does impede a court's ability to discern the time spent on tasks that are properly billable and discount the time spent on those that are vaguely described, duplicative, or not compensable at all.<sup>43</sup> For example, entries that describe the service

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<sup>38</sup> See 29 C.F.R. § 18.57(b) (The decision of the administrative law judge shall include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record.). See also 5 U.S.C.A. § 557(c)(A) (West 1996) (Administrative Procedure Act requires the fact-finder to render "findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record"); *Ecolab, Inc. v. FMC Corp.*, 569 F.3d 1335, 1351 (Fed. Cir. 2009) (holding that failure to render findings of fact constitutes an abuse of discretion).

<sup>39</sup> *Welch v. Met. Life Ins. Co.*, 480 F.3d 942, 945 n.2 (9th Cir. 2007) (internal quotation marks omitted).

<sup>40</sup> *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1128-9 (9th Cir. 2008).

<sup>41</sup> *Role Models Am., Inc. v. Brownlee*, 353 F.3d 902, 971-73 (D.C. Cir. 2004).

<sup>42</sup> *Imwalle v. Reliance Med. Prod., Inc.*, 515 F.3d 531, 554 (6th Cir. 2008) (affirming the district court's refusal to reduce the hours requested by ten percent because the documentation of multiple-task entries in the fee petition was of sufficient detail and probative value to determine the reasonableness of the hours).

<sup>43</sup> *Cf. Florek v. Eastern Air Cent., Inc.* ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 12-13 (ARB May 21, 2009) (affirming ALJ's conclusion that, despite the absence of itemized hours and services, the fee petitions provided sufficient evidence to determine the objectively reasonable amount of time spent on legal tasks).



rendered as “office conference” may involve duplication of attorney work or training time and, without justifying detail, are not normally billable to private clients.<sup>44</sup> Also, an unusually large amount of time billed as telephone conferences or internal meetings is not recoverable.<sup>45</sup> In *Welch*, the Sixth Circuit affirmed the district court’s reduction of 5.75 hours spent in intra-office conferences as unnecessary given counsel’s experience and the petition’s lack of justification for such conferences.<sup>46</sup>

Finally, while the mere fact of attorneys conferring with each other does not necessarily constitute duplication of services,<sup>47</sup> the number of hours requested may be reduced when two or more attorneys work on a case because their involvement necessarily tends to generate a certain amount of overlap.<sup>48</sup> For example, a local rule for the Maryland district court provides that only one lawyer is to be compensated for intra-office conferences except those that are reasonably necessary for proper management of the litigation.<sup>49</sup> Thus, a party may only recover time that a single, participating attorney spent at intra-office conferences, client and third-party meetings, and in hearings.<sup>50</sup>

In this case, each of the two Respondents engaged two attorneys to defend against Evans’s complaint. Therefore, Evans’s representation at trial by two principal attorneys, Klinger and Lamb, is not unreasonable, given the length of the trial, the multiple issues presented, and the defenses the Respondents asserted.

Nonetheless, as we have said, the attorney seeking fees bears the burden of proof to show that the claimed hours of compensation are adequately demonstrated and

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<sup>44</sup> *Jackson*, slip op. at 11.

<sup>45</sup> *In re Olson*, 884 F.2d 1415, 1429 (D.C. Cir. 1989). *See Thornton v. Kaplan*, 958 F. Supp 507, 511 (D. Col. 1996) (20 percent across-the-board reduction justified to account for an unusually high amount of time billed for “telecon” or office conferences).

<sup>46</sup> *Welch.*, 480 F.3d at 946.

<sup>47</sup> *Glover v. Johnson*, 138 F.3d 229, 252-53 (6th Cir. 1998).

<sup>48</sup> *Goodwin v. Metts*, 973 F.2d 378, 384 (4th Cir. 1992). *See Hudson v. Reno*, 130 F.3d 1193, 1209 (6th Cir. 1997) (court affirmed a 25 percent across-the-board reduction of lead counsel’s fees to account for duplication of effort by him and an assistant despite the fact that the other side was represented by four attorneys).

<sup>49</sup> *Greenspring Racquet Club, Inc., v. Baltimore County*, 77 F. Supp. 2d 699, 704 (D. Md. 1999).

<sup>50</sup> Appendix B, *Rules and Guidelines for Determining Lodestar Attorneys’ Fees in Civil Rights and Discrimination Cases* for the United States District Court (Md.). *See Obifuele v. 1300, LLC*, 2006 U.S. Dist. LEXIS 60043, 14-15 (D.Md. Aug. 23, 2006) (court reduced by 50 percent all time entries containing multi-attorney teleconferences).

reasonably expended.<sup>51</sup> Where the billing descriptions do not provide sufficient documentation to determine the reasonableness of the hours claimed, a reviewing body need not engage in an item-by-item reduction of the hours, but may instead reduce the lodestar fee by a set percentage.<sup>52</sup> We shall do so here.

The petition for fees and costs submitted by Evans's attorneys consists of declarations from Klinger and Lamb in support of the fee amounts requested, a chronological list of the attorneys' 259 time-and-task entries, a similar list detailing the individual entries of the four attorneys separately, and a list with invoices and records for costs and expert witness fees. Overall, the four attorneys expended a total of 717.20 hours from the initial meeting with Evans on February 9, 2006, to the preparation of the fee petition on September 28, 2007.

The majority of Klinger's time entries, when read in the context of the billing statement as a whole and in combination with the timeline of the litigation, do provide enough specificity to determine that the services rendered are compensable and in furtherance of Evans's complaint.<sup>53</sup> However, Klinger's fee petition contains a number of entries that are not sufficiently detailed for us to determine the reasonableness of the hours claimed<sup>54</sup> or that reveal duplicative efforts with Lamb in the review and revision of the post-hearing briefs and preparation of the fee petition.<sup>55</sup>

Specifically, in reviewing the 63 entries for Klinger, we find an unusually high number that include office conferences and meetings with Lamb,<sup>56</sup> some of which fail to state any topic of discussion or provide a basis upon which to conclude that this time was reasonably expended.<sup>57</sup> We are unwilling to assume that all of these conferences were

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<sup>51</sup> *Jackson v. Butler & Co.*, ARB Nos. 03-116, -144, ALJ No. 2003-STA-026, slip op. at 10 (ARB Aug. 31, 2004).

<sup>52</sup> *Id.* at 11. *See Hagman v. Washington Mut. Bank, Inc.*, ALJ No. 2005-SOX-073, slip op. at 47 (ALJ Dec. 19, 2006) (reducing counsel's fees by 25 percent because block billing prevented a meaningful review of the reasonableness of the time spent on each task).

<sup>53</sup> *Imwalle*, 515 F.3d at 533-34.

<sup>54</sup> *See* July 25, 27, and 28, October 18 and 23, 2006; November 20-21, 2007 entries, Exhibit F, Fee Petition.

<sup>55</sup> *See e.g.*, entries for March 13, 16, and 23, September 28, 2007, Exhibit F, Fee Petition.

<sup>56</sup> *See* October 18, 20, and 23, November 15-17, 20-22, December 12-13, 20-21, 2006; January 14-15, February 13, 19, March 13, 19-21, 2007 entries, Exhibit F, Fee Petition.

<sup>57</sup> *Compare* October 18, 2006 with October 20, 2006; *see also* July 27, October 4, 23-24, 2006; January 8, March 7, 19, and 27, 2007, Exhibit F, Fee Petition.

inextricably linked to advancing Evans's case.<sup>58</sup> Moreover, because most are batched together with other services there is no definitive way of determining the time actually spent on conferencing or whether both attorneys charged duplicative time for their conferences.

Therefore, we will apply a minimal across-the-board reduction of five percent to the 111.10 hours Klinger requested. This results in 105.55 compensable hours at \$300.00 an hour or a total fee of \$31,663.50 for Klinger.

Lamb's fee petition is similarly flawed in its lack of specific times spent on specific tasks. A number of block entries reflect non-compensable time spent interacting with the media.<sup>59</sup> Numerous other entries reflect general background reading, e.g., checking out a web site and posts involving helicopters, and news reports of helicopter crashes.<sup>60</sup> We do not regard this time as compensable.

Entries on July 28, August 4 and 18, September 26, and October 19 and 25, 2006, demonstrate the problem in block billing of distinguishing compensable services from the non-billable tasks. Of the total 11 hours claimed on these days, we cannot determine the amount of time spent on compensable services such as discovery requests and review of Evans's comments on MVH documents and the non-compensable hours spent on reviewing and exchanging e-mails on new posts to a helicopter web site.

In addition, Lamb's fee petition reveals several examples of duplication of services with Klinger. Lamb claimed a total of 25.25 hours on December 26-27, 2006, and January 2-4, 2007,<sup>61</sup> and stated in his declaration that he was responsible for the depositions in the case.<sup>62</sup> We cannot determine the number of hours actually spent on telephone conferences with, and the preparation of, Tamyka Evans for her deposition, but Klinger also claimed 2.25 hours on January 4, 2007, preparing for and defending the deposition of Mrs. Evans. Further, Lamb requested three hours on July 25-26, 2006, for researching experts, but Klinger requested a total of seven hours on July 25 and 28,

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<sup>58</sup> See *Clark v. Board of Educ. of Neptune*, 907 F. Supp. 826, 831 (D.N.J. 1995) (court denies fees that are inadequately described in block-billed entries).

<sup>59</sup> See e.g., May 4, May 10, May 11, June 6, and June 13, Exhibit F, Fee Petition. See *Gratz v. Bollinger*, 353 F. Supp. 2d 929, 941 (E.D. Mich. 2005) (plaintiffs not entitled to fees for time expended on media and public relations efforts).

<sup>60</sup> Exhibit F, Fee Petition at 4-7.

<sup>61</sup> Exhibit F, Fee Petition at 2, 10.

<sup>62</sup> Exhibit B, Fee Petition at 3-4.

August 1-4 and 7, 2006, for a similar search.<sup>63</sup> This duplication of effort requires a reduction in the hours claimed.<sup>64</sup>

Finally, while a number of Lamb's entries are sufficiently detailed to demonstrate the reasonableness of the services performed, we have found at least a dozen that are vague or too sketchily described; these include hours claimed for "research," "document review," and numerous "telephone conferences," none of which described the topic of such research, review, or conference.<sup>65</sup>

Again, based on the number of entries that lack sufficient detail or are duplicative and because the nature of block billing prevents discerning compensable services from non-compensable, we will apply a 15 percent across-the-board reduction to the 561.45 hours requested by Lamb.<sup>66</sup> This results in 477.23 hours at \$275.00 an hour or a total of \$131,238.25 in fees.

CJ argues that the ALJ should have rejected Braun's and Butler's requests for fees outright because their services were mostly clerical in nature or were not properly billable.<sup>67</sup> MVH argues that their fees should be reduced by 32 percent because of block billing.<sup>68</sup> The ALJ provided no discussion of the fees he awarded to Braun and Butler.

We have reviewed the hours and services claimed by Braun from February 12 through March 12, 2007, and find that they are sufficiently detailed to show that her services are compensable tasks. She researched the legal issues in the case, reviewed and

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<sup>63</sup> Exhibit F, Fee Petition at 1, 6.

<sup>64</sup> See *Hudson v. Reno*, 130 F.3d 1193, 1209 (6th Cir. 1997) (court affirmed a 25 percent across-the-board reduction of lead counsel's fees to account for duplication of effort by him and an assistant despite the fact that four attorneys represented the other side); *In re Olson*, 884 F.2d at 1430 (court combined the intra-firm conferences that were excessive or redundant with those that were insufficiently documented and reduced the fee request by ten percent of all fees incurred). See also, *Jackson*, slip op. at 11.

<sup>65</sup> Compare February 9, 2006 (research) with February 10, 2006 (research administrative requirements) and October 20, 2006 (telephone conference with Evans) and November 9, 2006 (telephone conference with Levicoff regarding discovery). See e.g., September 21, November 8, 21, and 27, December 13, 15, and 19, 2006, January 2, 5, 8, 10, and 12, 2007.

<sup>66</sup> See *Smith v. Esicorp, Inc.*, ARB No. 97-065, ALJ No. 1993-ERA-016, slip op. at 6 (ARB Aug. 27, 1998) (affirming the ALJ's across-the-board reduction of 15 percent of the fee request due to repetition and work on irrelevant issues).

<sup>67</sup> CJ Brief at 14-16.

<sup>68</sup> MVH Brief at 3, n.1.

indexed the transcript of the four-day hearing, drafted a research memo, and met with Klinger and Lamb regarding her work in helping them to write the post-hearing briefs. Therefore, we will affirm the ALJ's award of \$5,985.00 at \$175.00 an hour for 39.9 hours of services.

Similarly, Butler's time entries reflect cite-checking for the findings of fact in the post-hearing brief on March 16, 2007, and research of ALJ decisions and standards for awarding and calculating attorney's fees. These too are tasks properly billable to clients. Accordingly, we will affirm the ALJ's award to Butler of \$475.00 at \$100.00 an hour for 4.75 hours of services as an unlicensed attorney.

#### *Expert witness costs*

The ALJ granted Evans's request for \$37,713.00 in costs, including \$21,643.53 in liability expert witness fees to Grady Wilson and \$2,345.83 for travel reimbursement.<sup>69</sup>

Both CJ and MVH argue that the ALJ erred in awarding a fee and costs to Wilson as an expert witness because his testimony did not relate in any meaningful way to any of the relevant issues in Evans's complaint.<sup>70</sup> The Respondents point out that Wilson testified on whether MVH was a covered employer, but the ALJ stated the Wilson was not helpful on this legal issue.<sup>71</sup> They also aver that Wilson testified about the crash of a helicopter that Evans once flew, but the ALJ found this testimony to be irrelevant.<sup>72</sup> Therefore, the Respondents contend that Wilson is not entitled to any reimbursement.

It is true that the ALJ did not rely on parts of Wilson's testimony. However, he found that, given the technical complexity of the case, Wilson's testimony was essential in establishing that Evans engaged in protected activity, a necessary element of his complaint. The ALJ stated that Wilson provided invaluable assistance to counsel in understanding the significance of the safety issues involved in the case. The ALJ added that he had placed great weight on Wilson's testimony because of his superior qualifications and concluded that his services were necessary and his fee reasonable. Thus, the ALJ awarded Wilson a fee of \$21,643.53 and travel expenses of \$2,345.83.<sup>73</sup>

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<sup>69</sup> Fee Order at 5-6.

<sup>70</sup> MVH Brief at 12; CJ Brief at 17-18.

<sup>71</sup> *Id.* at 17.

<sup>72</sup> *Id.*

<sup>73</sup> Fee Order at 6.

The fee petition contained an invoice showing Wilson's services to Evans in August 2006 and payment of his witness fee and expenses on July 2, 2007.<sup>74</sup> Lamb pointed out in his declaration that MVH insisted on deposing Wilson in person, requiring Lamb's travel to Tupelo, Mississippi, instead of conducting a telephone deposition.<sup>75</sup>

Wilson's testimony at the hearing supports the ALJ's finding that Wilson's expertise on technical issues involving aircraft safety was essential to the case. Wilson testified that both the hydraulic leak and the windscreen vibration that the mechanics found on August 25, 2005, were or could have become serious air safety concerns. His testimony supported the ALJ's conclusion that Evans proved an essential element of his case. Based on this record, we can find no abuse of discretion in the ALJ's award of an expert witness fee and costs.

The ALJ also denied the Respondents' requests for an evidentiary hearing to determine the customary billing rates of Klinger and Lamb, an extension of briefing time, and additional discovery.<sup>76</sup> CJ argues that the ALJ abused his discretion because a hearing is mandated when the facts regarding a fee petition and an hourly rate are disputed.<sup>77</sup> We reject these arguments.

First, the United States Supreme Court case CJ cites does not mandate a right to an evidentiary hearing when attorney's fees and hourly rates are challenged.<sup>78</sup> Rather, the Court merely noted the case of *City of Detroit v. Grinnell Corp.*, which stated that a hearing was "imperative" in that case involving local rules that required an evidentiary hearing to determine fees in class actions and derivative suits.<sup>79</sup> Second, the Court held that reasonable fees are to be calculated according to the prevailing market rates in the relevant community, not according to the cost of providing legal services, regardless of whether the prevailing party is represented by private profit-making attorneys or nonprofit legal aid organizations.<sup>80</sup>

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<sup>74</sup> Exhibit G, Fee Petition.

<sup>75</sup> Exhibit B, Fee Petition at 3.

<sup>76</sup> *Id.* at 6.

<sup>77</sup> CJ Brief at 16-17; Reply Brief at 6-7.

<sup>78</sup> *Blum v. Stenson*, 465 U.S. 886 (1984).

<sup>79</sup> *Id.* at 892 n.5; 495 F.2d. 448, 471-72 (2nd Cir. 1974).

<sup>80</sup> *See Blum*, 465 U.S. at 895.

While an attorney's usual hourly rate can constitute evidence of the prevailing market rate,<sup>81</sup> we have held that the prevailing market rate, as established by the attorney seeking a fee, is the key factor in determining a reasonable billing rate under the lodestar method, not the attorney's usual hourly rate or his fee arrangement with other clients.<sup>82</sup> Indeed, the *Imwalle* case, which CJ cited in its brief and in which Klinger was one of the attorneys, did not discuss the attorneys' usual billing rates at all, but, rather, awarded Klinger \$275.00 an hour as the prevailing market rate for services performed in 2003-04.<sup>83</sup> Accordingly, we reject CJ's arguments and affirm the ALJ's finding.

## CONCLUSION

We have reviewed the fee petition submitted by Evans's attorneys and considered the arguments advanced by the Respondents. Based on this record, we conclude that across-the-board percentage reductions are warranted for Klinger and Lamb. Therefore, we order the Respondents to pay a total attorney's fee of \$169,361.75, consisting of \$31,663.50 to Klinger, \$131,238.25 to Lamb, \$5,985.00 to Braun, and \$475.00 to Butler. In addition, the Respondents shall pay costs in the amount of \$37,713.00, including \$21,643.53 for Evans's expert witness and travel expenses of \$2,345.83.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Chief Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

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<sup>81</sup> See *Kelly v. Metropolitan County Bd. of Educ.*, 773 F.2d 677, 683 (6th Cir. 1985) (en banc) (table) (attorney's normal hourly rate is a key factor in determining the correct billing rate).

<sup>82</sup> *Pierce v. U.S. Enrichment Corp.*, ARB Nos. 06-055, -058, -119, ALJ no. 2004-ERA-001, slip op. at 2 (ARB Feb. 27, 2009); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 3 (ARB Mar. 7, 2006); *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 12 (ARB May 21, 2009); *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161; ALJ No. 2003-STA-055, slip op. at 2 (ARB Apr. 3, 2008); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 11 (ARB Feb. 6, 2004). See *Eddleman v. Switchcraft, Inc.*, 965 F.2d 422, 424 (7th Cir. 1992) (market rate is that normally charged by lawyers of similar ability and experience in the community to their paying clients for the type of work in question).

<sup>83</sup> *Imwalle v. Reliance Med. Prod.s, Inc.*, Case No. C-1-04-275, 2006 U.S. Dist. LEXIS 82138 (S.D. Ohio 2006).