



**In the Matter of:**

**THOMAS E. CLEMMONS,**

**ARB CASE NO. 08-067**

**COMPLAINANT,**

**ALJ CASE NO. 2004-AIR-011**

**v.**

**DATE: January 5, 2011**

**AMERISTAR AIRWAYS, INC.,**

**and**

**AMERISTAR JET CHARTER, INC.,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Steven K. Hoffman, Esq., *James & Hoffman, P.C.*, Washington, District of Columbia**

*For the Respondent:*

**Chris E. Howe, Esq., *Kelly, Hart & Hallman, LLP*, Fort Worth, Texas**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Luis A. Corchado, *Administrative Appeals Judge***

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

Thomas E. Clemmons alleged that Ameristar Airways, Inc. and Ameristar Jet Charter, Inc. 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 Ameristar terminated his employment after he complained about air safety issues. A United States Department of Labor (DOL) Administrative Law Judge (ALJ) concluded that Ameristar violated AIR 21. Ameristar appealed to the Administrative Review Board (ARB), which vacated the ALJ's recommended decision and remanded the case for further consideration.<sup>2</sup> On remand, the ALJ again concluded that Ameristar had violated AIR 21, and Ameristar appealed. The ARB affirmed the ALJ's decision and permitted Clemmons's attorney 30 days in which to submit a petition for attorney's fees and other litigation expenses for work done before the ARB.<sup>3</sup>

On June 23, 2010, Clemmons's attorney submitted to the ARB a Petition for Attorney's Fees and Costs seeking \$62,822.50 in fees for 244.75 hours of work defending Ameristar's appeals of the ALJ's decisions before the ARB. The fee petition covers services rendered from March 3, 2005, through June 22, 2010, and includes declarations from Attorney Steven K. Hoffman and his firm's administrative director, Christine M. Jozwick. Costs of \$1,252.04 were also claimed. Ameristar filed an opposition to the fee petition, and Clemmons filed a reply. The ARB reviews the fee petition for compliance with applicable standards.

## DISCUSSION

Under AIR 21, if the ALJ finds that a person violated the employee protection provision, the Secretary of Labor shall assess against that person, at the complainant's request, the costs of bringing the case, including attorney's fees the complainant reasonably incurred.<sup>4</sup> The regulations governing AIR 21 also provide for an award of attorney's fees incurred by a complainant who prevails in appealing his or her case to the Board.<sup>5</sup>

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<sup>1</sup> 49 U.S.C.A. § 42121 (Thomson/West 2010). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2010).

<sup>2</sup> *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, -096; ALJ No. 2004-AIR-011 (ARB June 29, 2007).

<sup>3</sup> *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB May 26, 2010).

<sup>4</sup> 49 U.S.C.A. § 42121(b)(3)(B)(iii); *see also* 29 C.F.R. § 1979.109(b).

<sup>5</sup> 29 C.F.R. § 1979.110(d) ("If the Board concludes that the party charged has violated the law, . . . the Board shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred."). *See generally Jackson v. Butler & Co.*, ARB Nos. 03-116, -144; ALJ No. 2003-STA-026 (ARB Aug. 31, 2004).

In calculating attorney's fees, the ARB uses the lodestar method, which requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.<sup>6</sup> Reasonableness is the key. The party seeking a fee award must submit "adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area,' as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs."<sup>7</sup> The attorney has the burden of proving 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>8</sup>

We have previously adopted the Supreme Court's explanation in *Hensley v. Eckerhart*, where it defined unreasonably expended hours to 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>9</sup> If the documentation of hours is inadequate, the award may be reduced accordingly.<sup>10</sup>

Initially, we note that Clemmons's fee petition requests payment for services attorney Hoffman and another partner, Marie Chopra, rendered from July 2, 2007, through February 22, 2008.<sup>11</sup> We strike these requests because the hours and services occurred before the ALJ and not before the Board.<sup>12</sup> Thus, 13 hours, constituting

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<sup>6</sup> *Evans v. Miami Valley Hosp.*, ARB Nos. 08-039, -043; ALJ No. 2006-AIR-022, slip op. at 3 (ARB Aug. 31, 2009).

<sup>7</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).

<sup>8</sup> *Evans*, ARB Nos. 08-039, -043, slip op. at 3.

<sup>9</sup> 461 U.S. 424, 433 (1983).

<sup>10</sup> *Id.*

<sup>11</sup> Chopra requested \$210.00 for 0.75 hours of service on July 2 and August 1, 2007, to review Ameristar's reply brief and to review the ALJ's decision and confer with Hoffman.

<sup>12</sup> Pursuant to 29 C.F.R. § 1979.110(d), the ARB is limited in its jurisdiction to the award of attorney's fees and costs to a prevailing complainant for legal services rendered before the ARB on appeal. See n.4.

\$4,987.50 in requested fees, will be deducted from the total awarded for services before the ARB.<sup>13</sup>

On appeal, Ameristar does not contest the hourly rates of Clemmons's five attorneys, intern, or paralegal. We have examined Hoffman's declaration concerning the hourly rates and the information supplied by the United States Attorney's Office for the District of Columbia, in the jurisdiction where the attorneys practice.<sup>14</sup> The data show that for attorneys with 10-20 years of experience the hourly rate ranges from \$335.00 to \$475.00 an hour. Hoffman with more than 20 years' experience seeks \$390.00 an hour. The rates of Attorneys Marie Chopra (\$280.00), Sean Bajkowski (\$225.00), Emilie Kraft (\$215.00), and Amy Fettig (\$185.00) are also within the matrix for practice in the District of Columbia area. As these rates are uncontested and consistent with practice in the geographical area, we approve them.<sup>15</sup>

Ameristar also does not dispute the number of hours or the amounts Hoffman requested for preparing the fee petition in June 2010. Accordingly, we award a total of \$4,990.00 for this task. Similarly, Ameristar does not challenge the 13.25 hours submitted by paralegal Kimberly A. Hotchkiss at an hourly rate of \$110.00. Accordingly, we will award \$1,457.50 for her services.

Ameristar argues that (1) assigning five attorneys plus a summer intern<sup>16</sup> to this case is unreasonable and excessive; (2) a substantial number of time entries are block billed and should be discounted; (3) the total fee requested is disproportionate to the damages awarded; and (4) all expenses should be disallowed.<sup>17</sup> We address these arguments in turn.

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<sup>13</sup> We also note that on April 11, 2005, the ALJ awarded Clemmons \$225,293.19 in attorney's fees for services before him. Ameristar challenged the award, but the ARB vacated that order in remanding the case for further consideration on June 29, 2007. *Clemmons*, ARB Nos. 05-048, -096, slip op. at 11 n.27. The fee award for services before the ALJ may be reinstated or modified as appropriate on petition to the ALJ.

<sup>14</sup> Tab 3 to Hoffman Declaration.

<sup>15</sup> See *Florek v. Eastern Air Central, Inc.* ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 12 (ARB May 21, 2009).

<sup>16</sup> Summer intern Daniel M. Rosenthal requests \$125.00 an hour for 9.50 hours of services performed on June 2-4, 9, 17, and 22, 2010, for a total of \$1,187.50. We grant this request because the tasks of reviewing the record, researching the law on fees and costs, drafting the fee petition, and cite-checking the final petition are necessary and reasonable services. *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>17</sup> Respondent's Opposition to Complainant's Petition at 2-4.

*Number of attorneys*

Ameristar argues that many of the time and task entries are too vague and that no more than two attorneys were reasonably required to respond to its appeals to the ARB; therefore, the ARB should disallow all of the time submitted for attorneys Chopra and Fettig.<sup>18</sup> Hoffman explained that he engaged three associates on specific research and writing projects “to conserve costs” because their hourly rates were lower than his.<sup>19</sup> In *Hensley*, the Court emphasized that fee awards may be reduced for inadequately documented hours or for hours that were not “reasonably expended” due to overstaffing or inexperience.<sup>20</sup> Also excluded is time attributed to office conferences, supervision, and training, and review and revision, since such time is not normally billable to private clients.<sup>21</sup>

A review of the fee petition shows three office conferences among Hoffman, Bajkowski, and Fettig during Ameristar’s first appeal to the ARB in March 2005, some duplication of effort in researching and drafting the brief, and an excessive number of hours for revising and editing the response brief.<sup>22</sup> For example, the March 14 and 21 entries for Bajkowski are non-specific and the March 28 entry for Hoffman appears to be duplicative of the work of attorneys Bajkowski and Fettig. Accordingly, we will deduct 22.25 hours and award Hoffman 28 hours at \$390.00 an hour for a total of \$10,920.00; Bajkowski 48 hours at \$225.00 an hour for a total of \$10,968.00; and Fettig 29.5 hours at \$185.00 an hour for a total of \$5,457.50.

During Ameristar’s second appeal, Attorney Hoffman sought 28.5 hours and Attorney Kraft sought 37.5 hours for preparing the brief in May and June 2008. Again we note some duplication of effort and many hours spent reviewing and revising by both attorneys on June 4-9. Further, we find that spending more than 60 hours to draft a response brief in a second appeal with issues similar to those in the first appeal is excessive. Accordingly, we will deduct 8.25 hours (for excessive editing and revising of the brief) and award Hoffman 20.25 hours for a total of \$7,897.50 and Kraft 37.5 hours for a total of \$8,062.50.

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<sup>18</sup> Opposition Brief at 2-3.

<sup>19</sup> Hoffman Declaration at 2-3.

<sup>20</sup> 461 U.S. at 434. See *Pollock v. Continental Express*, ARB Nos. 07-073, 08-051; ALJ No. 2006-STA-001, slip op. at 19 (ARB Apr. 7, 2010).

<sup>21</sup> *Jackson*, ARB Nos. 03-116, -144, slip op. at 11.

<sup>22</sup> See *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161, ALJ No. 2003-STA-055, slip op. at 3 (ARB Apr. 3, 2008).

*Block billing, proportionality, and expenses*

Ameristar asks the ARB to reduce Clemmons's requested fee by ten percent because a substantial number of the time and task entries were block billed and thus lacked adequate detail.<sup>23</sup>

The ARB requires that an attorney's time and task entries be sufficiently detailed to demonstrate their reasonableness. Thus, we disfavor the use of block billing (the practice of grouping multiple tasks into a single time entry), and may make a percentage reduction of the requested fees in lieu of attempting to excise surgically those that are not properly billed.<sup>24</sup>

However, the entries for Hoffman, Bajkowski, Fettig, and Kraft, 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 Clemmons's defense against Ameristar's two appeals.<sup>25</sup> Therefore, we decline to make an across-the-board reduction in the overall fee award.

Ameristar next argues that the fees Clemmons's attorneys requested are disproportionate to the amount of damages awarded to Clemmons and asks that the total award be reduced to \$20,000.00.<sup>26</sup>

The ARB has declined to reduce attorney's fee awards solely because the amount is larger than the damages recovered. In *Hoffman*, the ARB reversed an ALJ's finding that the requested attorney's fee was unreasonable in light of the small amount of back pay at issue. Such a standard, the ARB stated "would chill attorneys from taking moderately complicated cases where the complainant earned modest wages and hence the back pay sought would be small in relation to the attorney time expended."<sup>27</sup> Moreover, *Hensley* clarified "the proper relationship of the results obtained to an award of attorney's fees" and explained that the degree of a plaintiff's success is "a crucial factor" to be considered in awarding an attorney's fee.<sup>28</sup> In this case, Clemmons's attorneys achieved essentially complete relief under AIR 21.<sup>29</sup> Therefore, we reject Ameristar's request.

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<sup>23</sup> Opposition Brief at 3.

<sup>24</sup> *Evans*, ARB Nos. 08-039, -043, slip op. at 8.

<sup>25</sup> See, for example, entries for March 17, June 29, 2005, and May 16, 2008.

<sup>26</sup> Opposition Brief at 3-4.

<sup>27</sup> *Hoffman v. Boss Insulation & Roofing, Inc.*, ARB Nos. 96-091, 97-128; ALJ No. 1994-CAA-004, slip op. at 5 (ARB Jan. 22, 1997).

Finally, Ameristar argues that Clemmons's request for \$1,252.04 in costs should be rejected because photocopying, postage, research, and delivery expenses are part of the attorney's hourly fee and are not compensable.<sup>30</sup>

The ARB has generally affirmed an ALJ's deduction of expenses associated with on-line legal research, photocopies, and postage because they are normally part of a firm's overhead and reflected in an attorney's hourly rate.<sup>31</sup> Clemmons's attorney points out, however, that his firm bills its clients directly for such expenses.<sup>32</sup>

Administrative director Jozwick submitted a declaration that shows that Clemmons was billed \$736.11 for on-line research, \$392.00 for photocopying, \$40.94 for postage, \$72.99 for delivery charges, and \$10.00 on facsimile charges.<sup>33</sup> Jozwick stated that she is in charge of allocating these costs to individual clients and that she did so for Clemmons's case. Inasmuch as Clemmons has provided evidence of his out-of-pocket expenses and is entitled to recover his costs, we approve the request for \$1,252.04.

Hoffman seeks additional fees for preparing a reply brief to Ameristar's opposition to his fee petition. We have reviewed the charges for drafting and revising the brief and a supplemental declaration and find that 11.25 hours is a reasonable amount of time for this work. Ameristar has filed no objection to this additional fee and has thus waived the issue.<sup>34</sup> Thus, Hoffman is entitled to an additional \$4,387.50 fee.

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<sup>28</sup> *Hensley*, 461 U.S. at 432, 440 n.14; *see City of Riverside v. Rivera*, 477 U.S. 561, 574 (1968) (court approves a fee award seven times the amount of damages awarded). *See also Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1221 (3d Cir. 1995).

<sup>29</sup> Clemmons did not seek reinstatement but was awarded back pay of \$55,946.23 plus interest from 2003.

<sup>30</sup> Opposition Brief at 4.

<sup>31</sup> *See e.g., Fleeman v. Nebraska Pork Partners*, ARB Nos. 09-059, -096; ALJ No. 2008-STA-015, slip op. at 8 n.9 (ARB May 28, 2010).

<sup>32</sup> Complainant's Reply Brief at 5-6.

<sup>33</sup> See Tabs 1-3, Declaration of Christine M. Jozwick.

<sup>34</sup> *Walker v. American Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 7 (ARB Mar. 30, 2007).

**CONCLUSION**

Accordingly, we award attorney's fees for work performed before the ARB in the amount of \$55,328.00 to Clemmons's attorneys as well as costs of \$1,252.04 for a total of \$56,580.04.

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**