



In the Matter of:

THOMAS E. CLEMMONS,

ARB CASE NO. 11-061

COMPLAINANT,

ALJ CASE NO. 2004-AIR-011

v.

DATE: April 27, 2012

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

In a January 14, 2005 decision and order,¹ an Administrative Law Judge (ALJ) concluded 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)² when Ameristar fired Thomas E. Clemmons after he complained about air safety issues. Ameristar appealed to the Administrative Review Board (ARB), which vacated the ALJ's recommended decision and remanded the case for further consideration.³

On remand, the ALJ again concluded in a February 20, 2008 decision and order that Ameristar had violated AIR 21.⁴ Ameristar appealed, and the ARB affirmed the ALJ's decision on May 25, 2010.⁵ Ameristar appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the ARB's conclusion that Ameristar had violated AIR 21 but remanded the case for additional findings on the appropriate amount of back pay.⁶

On January 5, 2011, the ARB awarded Clemmons attorney's fees of \$55,328.00 and costs of \$1,252.04, totaling \$56,580.04 for services before the ARB.⁷ We instructed Clemmons's attorney to petition the ALJ for additional fees for services rendered on remand and for reinstatement of the ALJ's initial award of attorney's fees.⁸ On June 23, 2011, the ALJ ordered reinstatement of the initial award of \$225,293.19 for pretrial and

¹ *Clemmons v. Ameristar Airways, Inc.*, ALJ No. 2004-AIR-011 (ALJ Jan. 14, 2005).

² 49 U.S.C.A. § 42121 (Thomson/West 2011). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2011).

³ *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, -096; ALJ No. 2004-AIR-011 (ARB June. 29, 2007).

⁴ *Clemmons v. Ameristar Airways, Inc.*, ALJ No. 2004-AIR-011 (ALJ Feb. 20, 2008).

⁵ *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB May 26, 2010).

⁶ *Ameristar Airways, Inc. v. Admin. Review Bd.*, --- F.3d. ---, 2011 WL 3505466 (5th Cir. 2011).

⁷ *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB Jan. 5, 2011), *recon. denied*, June 7, 2011.

⁸ *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 5 (ARB June 7, 2011).

trial work and an additional \$4,792.50 for services rendered on remand for a total of \$230,085.69. Ameristar has appealed this award. We now consider the attorney's fee award.

DISCUSSION

Under AIR 21, the Secretary of Labor shall, at the complainant's request, assess against a person who violated the employee protection provision the costs of bringing the case, including attorney's fees the complainant reasonably incurred.⁹ The regulations governing AIR 21 provide for an award of attorney's fees incurred by a complainant who prevails before the ALJ and before the ARB.¹⁰

In *Evans v. Miami Valley Hosp.*,¹¹ the ARB laid out the principles governing the award of an attorney's fee under AIR 21. A successful complainant is entitled to receive all costs and expenses, including attorney's fees, reasonably incurred in bringing the complaint. A prevailing party is entitled to reimbursement for attorney's fees and legal expenses and costs, including expert witness fees.¹²

The ARB has endorsed the lodestar method to calculate attorney's fees. This requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.¹³ 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.¹⁴

⁹ 49 U.S.C.A. § 42121(b)(3)(B)(iii).

¹⁰ 29 C.F.R. § 1979.109(b) ("At the request of the complainant, the administrative law judge 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) ("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).

¹¹ ARB Nos. 08-039, -043; ALJ No. 2006-AIR-022 (ARB Aug. 31, 2009).

¹² *Id.* at 3.

¹³ *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).

¹⁴ 461 U.S. 424, 433 (1983). The Fifth Circuit, in whose jurisdiction this case arises, uses 12 factors enunciated in *Hensley* to adjust the lodestar as warranted. *Johnson v. Ga.*

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. 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.¹⁵ If the documentation of hours is inadequate, the award may be reduced accordingly.¹⁶

Initially, we note that the attorneys for both parties engaged in extensive written discovery and participated in five depositions. Ameristar filed a motion for summary decision with multiple exhibits. During the six-day trial, the parties presented eight witnesses, entered 110 exhibits, and generated a 1,616-page transcript as well as submitting pre-and post-hearing briefs.

Ameristar argues that the \$230,085.69 fee award is “wholly unreasonable” due to “Clemmons’ conscious choice to retain five expensive Washington D.C. attorneys to litigate a claim with the prospect of small damages.”¹⁷ Ameristar challenges the rates charged, the billing records, overhead and research costs, and the disparity between the fee award and the damages.

First, Ameristar argues that the hourly rates charged by Clemmons’s attorneys, whose firm is located in Washington, D.C., do not reflect the rates prevailing in the Dallas-Fort Worth area where the complaint was heard. Ameristar claims that the rates must be reduced to \$255.00 an hour and lower proportionately because Clemmons’s attorneys did not meet their burden of proof to show that their requested rates align with those of Dallas attorneys.¹⁸

Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); *see Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993).

¹⁵ *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161; ALJ No. 2003-STA-055, slip op. at 3 (ARB Apr. 3, 2008).

¹⁶ *Pollock v. Cont’l Express*, ARB Nos. 07-073, 08-051; ALJ No. 2006-STA-001, slip op. at 19 (ARB Apr. 7, 2010).

¹⁷ Respondent’s Brief at 1. The ALJ rejected Ameristar’s argument that Clemmons’s complaint involved only employment retaliation. He found instead that the issues also involved the requirements and standards of performance under various FAA regulations and concluded that Clemmons’s hiring of specialists to represent him was reasonable. Supplemental (S) D. & O. at 4.

¹⁸ Brief at 1-3. Ameristar does not directly challenge the number of attorneys, just the hourly rates. Two partners at the firm of James & Hoffman rendered most of the legal services during this protracted litigation. Three associates performed work on specific

The ALJ fully considered this argument in his first order awarding fees, which he reinstated in his June 23, 2011 decision. The ALJ acknowledged that the relevant market community for determining a reasonable hourly billing rate is the place where the case was filed and that the fee petitioner must prove that non-local rates should be awarded by showing a lack of local attorneys equally willing and able to handle the claim. The ALJ determined that Clemmons had not proven a lack of similarly situated specialists in the relevant community, Dallas-Fort Worth, and therefore decided to award hourly rates based on the prevailing rates in the local area.

However, the ALJ rejected Ameristar's argument that its own attorney's rate of \$255.00 an hour was the best evidence of local rates. Citing a recent federal district court case that awarded \$355.00 an hour as the customary billing rate for attorneys in the Dallas division,¹⁹ the ALJ found that Hoffman's "impressive presentation at trial, demonstrated litigation skills, the number and complexity of the issues, and the sheer length of the litigation" warranted the attorneys' hourly rates originally requested. Thus, the ALJ awarded hourly rates as follows: Steven Hoffman, \$390.00; Marie Chopra, \$280.00; Sean Bajkowski, \$225.00; Amy Fettig and Katie Feiock, \$185.00; and Kimberly Hotchkiss, a paralegal, \$110.00.²⁰ Based on our review of the record, we conclude that the ALJ's determination of the attorneys' hourly rates was reasonable

Second, Ameristar argues that the attorneys' billing records contain time-and-task entries expended on another case, specifically the \$17,220.00 in fees billed for 61.5 hours by attorney Marie Chopra, who represented Clemmons's colleague in a related complaint against Ameristar.²¹ Ameristar asserts that none of Chopra's fees for trial and pre-trial

research and writing projects. Steven Hoffman charged for 434.25 hours, Marie Chopra charged for 64.25 hours as second chair, Sean Bajkowski charged for 40 hours, Amy Fettig charged for 36.25 hours, and Katie Feiock charged for three hours. A paralegal billed 25.5 hours. See Appendix to Complainant's Reply Brief at 2-5, 7.

¹⁹ *Butler v. MBNA Tech.*, 2004 WL 389101 (N.D. Tex., Mar. 1, 2004).

²⁰ S. D. & O. at 3-4. The ARB, which is located in the District of Columbia, approved these rates for work before it after examining Hoffman's declaration containing information supplied by the United States Attorney's Office for the District of Columbia. The Lafferty Matrix 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 sought \$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. See *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB June 7, 2011).

²¹ *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-012 (ARB Dec. 31, 2007) (dismissing the complaint).

preparation should be reimbursed because she did not participate in the Clemmons hearing.²²

In his April 11, 2005 fee award, the ALJ dismissed Ameristar's argument that Chopra's services benefitted another client as "pure speculation." The ALJ found no proof that Clemmons's attorneys were double billing for work on the *Barker* litigation and noted that attorney Hoffman refuted such a claim in his affidavit, stating that the two cases had different file numbers and separate billings. Also, the ALJ stated that courts will permit partner/associate, first/second chair staffing, particularly at trial, and that the ARB has approved a team approach to litigation, using partners and associates, as a cost-effective way of providing legal services.²³

Our review of Clemmons's fee petition shows that attorney Hoffman spent 5.75 hours on July 6, 2004, working on witness outlines for Clemmons, B. Spratt, and B. Barker and that attorney Chopra spent 3.5 hours on July 8 in a telephone conference with Spratt, drafted a summary of that call and conferred with Hoffman, and completed the witness outline for Barker, who testified at the hearing on Clemmons's behalf.²⁴ Further, attorney Chopra's time entries for July 24-30, 2004, show that she participated in the trial and witness preparation for cross examination as well as organized trial documents, with five hours written off on July 29. On January 20-21, attorney Chopra spent 2.75 hours reviewing the ALJ's 74-page decision favorable to Clemmons and conferring with Hoffman about attorney's fees and the appeal process.²⁵ We agree with the ALJ that attorney Chopra's time-and-task entries reasonably complemented attorney Hoffman's and were "an efficient delivery of legal services."²⁶

Third, Ameristar argues that the fee petition contains multiple entries for services that constitute overstaffing, attorney conferences, and unnecessary editing that should be disallowed. Also, Ameristar requests that 20 percent be deducted from the overall fee petition because of multiple block-billed charges.²⁷

The ALJ noted that attorney Hoffman had reduced the overall fee by 29 hours for a total of \$6,387.50, "thus exercising sound billing judgment." The ALJ rejected

²² Respondent's Brief at 3-5.

²³ April 11, 2005 order at 5.

²⁴ Respondent's Brief, Exhibit B at 4.

²⁵ *Id.* at 7.

²⁶ S. D. & O. at 6.

²⁷ Respondent's Brief at 6-8.

Ameristar's contention that the time-and-task entries were vague or block-billed and found the entries to be reasonably detailed.²⁸

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.²⁹

However, the June 2004 entries that Ameristar challenges show that attorneys Hoffman and Bajkowski shared the tasks of researching, drafting, and revising the pre-hearing statement for the ALJ and Clemmons's brief in opposition to Ameristar's motion for summary decision. These tasks required 30 hours of Hoffman's time and 8.5 hours of Bajkowski's. We agree with the ALJ that this time was reasonably necessary to produce a 22-page, pre-hearing statement and a 56-page brief opposing Ameristar's lengthy motion. Further, the entries for Hoffman, Bajkowski, Fettig, and Chopra, 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 complaint against Ameristar. Therefore, we decline to make an across-the-board reduction in the overall fee award.

Fourth, Ameristar argues that total fee requested is "wildly disproportionate" to the amount of damages awarded, which was \$37,995.09 plus interest. Ameristar urges that the fee and costs be cut to no more than \$100,000.00.³⁰

The ALJ found that Clemmons requested only back pay, the amount of which he voluntarily mitigated by accepting employment with the FAA (Federal Aviation Administration); did not seek compensatory damages; and was successful on every issue raised, including Ameristar's defenses of collateral estoppel and alleged fraud. Noting that Ameristar's "aggressive litigation strategy" undoubtedly increased costs for both sides, the ALJ rejected Ameristar's argument.³¹

The ARB has routinely declined to reduce attorney's fee awards solely because the amount requested is larger than the damages recovered.³² In *Hoffman*, the ARB

²⁸ April 11, 2005 order at 5.

²⁹ *Evans*, ARB Nos. 08-039, -043, slip op. at 8-9.

³⁰ Respondent's Brief at 8-9.

³¹ S. D. & O. at 6-7.

³² *Clemmons*, ARB No. 08-067, slip op. at 6; *Furland v. Am. Airlines, Inc.*, ARB Nos. 09-102, 10-130; ALJ No. 2008-AIR-11, slip op. at 11-12 (ARB July 27, 2011).

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."³³ In this case, Clemmons's attorneys achieved essentially complete relief under AIR 21. Therefore, we reject Ameristar's request.³⁴

Fifth, Ameristar objects to Clemmons's request for reimbursement for copying costs, computer research fees, and mailing, facsimile, and delivery charges because these are appropriately considered as part of a firm's overhead. Ameristar also requested that the ALJ reject the attorneys' travel costs because Clemmons should have retained a local attorney.³⁵

With respect to incurred costs for which Clemmons seeks reimbursement, attorney Hoffman submitted a declaration from the law firm's administrative director, who indicated that the law firm generates monthly reports of incurred litigation costs for each client such as Clemmons, who is responsible for the payment of such costs under the terms of his retainer agreement with the firm. The administrative director noted that she maintained on the firm's computer system all receipts and related information regarding litigation expenses, including case-related photocopying costs, postage, facsimile charges, telephone charges, court reporter costs, legal research charges, and travel-related expenses.³⁶ Individual billing records for Clemmons's case detailed these costs, which totaled \$19,277.85 from February 2004 through the date of the ALJ's initial decision on February 10, 2005.

The ALJ awarded \$13,767.82 in litigation costs because attorney Hoffman submitted documentation showing that the costs were billed directly to Clemmons who as the prevailing party was entitled to recover all costs.³⁷ The ALJ, however, deducted travel costs of \$5,510.02 because he found that Clemmons did not establish a lack of

³³ *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).

³⁴ *Patino v. Birken Mfg. Co.*, ARB No. 09-054, ALJ No. 2005-AIR-023, slip op. at 5-6 (ARB Nov. 24, 2009).

³⁵ Respondent's Brief at 9.

³⁶ Appendix to Complainant's Reply Brief, Exhibit 2.

³⁷ 29 C.F.R. § 1979.109(b) ("At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred.").

qualified attorneys in the Dallas area.³⁸ Given this record, we can find no abuse of discretion in the ALJ's award of \$13,767.83 for costs to Clemmons.

Finally, Ameristar argues that the ALJ erred in issuing his fee order on remand without permitting Ameristar to respond to Clemmons's petition for reinstatement of his 2005 award. However, Ameristar challenges only 4.5 of the 12.5 hours that attorney Hoffman charged for filing a brief on remand.³⁹

The ALJ received Clemmons's petition for reinstatement on June 16, 2011, and issued his order on June 23 ordering an additional \$4,792.50 in legal fees for attorney Hoffman's services on remand before the ALJ. The ALJ permitted a full round of briefing in 2005 on the same issues that Ameristar raised then and in its initial appeal to the ARB. Permitting further briefing in response to the Clemmons petition for reinstatement of his attorney's fee request could only have resulted in needless duplication. Further, in his initial decision the ALJ thoroughly considered Ameristar's arguments in opposition to Clemmons's fee petition. Nonetheless, in the interests of affording due process to Ameristar, we will reduce the overall fee award by \$1,672.50.

CONCLUSION

Clemmons's attorneys have submitted an appropriately itemized and documented attorney's fee application and petition for reinstatement for services before the ALJ. We find that the hours expended and the hourly rates charged are reasonable, that the ALJ reasonably exercised his discretion in determining the award, and that substantial evidence supports his determinations. Thus, we order Ameristar to pay Clemmons's attorneys a total of \$228,413.19 in fees and costs.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

³⁸ S. D. & O. at 7-8.

³⁹ Respondent's Brief at 1, 7. This amount consisted of 3.75 hours for attorney Hoffman at \$390.00 an hour and 0.75 hours for attorney Chopra at \$290.00 an hour.