

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PETER W. HIRSCH, Regional Director	:	CIVIL ACTION
of the Fourth Region of the	:	
NATIONAL LABOR RELATIONS BOARD	:	
for and on behalf of the	:	
NATIONAL LABOR RELATIONS BOARD,	:	
	:	
Petitioner,	:	
	:	
VS.	:	NO. 96-6470
	:	
CORBAN CORPORATION, INC.,	:	
d/b/a ENCOR COATINGS, INC.,	:	
	:	
Respondent.	:	

**MEMORANDUM**

**JOYNER, J.**

**JUNE , 1997**

On September 24, 1996, Peter W. Hirsch, Regional Director of the Fourth Region of the National Labor Relations Board, filed a petition for and on behalf of the National Labor Relations Board (the "Board") seeking interim injunctive relief pursuant to section 10(j) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(j), against Respondent Corban Corporation, Inc., d/b/a Encor Coatings, Inc. ("Encor"). The Board sought this relief pending its adjudication of an unfair labor practices complaint filed by Local 365, International Union of United Automobile, Aerospace and Agricultural Implementation Workers of America (the "Union") regarding Encor's treatment and ultimate discharge of a former employee, Jeremiah Mahoney ("Mahoney"). Pursuant to an Order to Show Cause, this Court conducted an evidentiary hearing on October 10, 17 and 18, 1996. Based on the evidence presented at this hearing, pre-hearing and post-hearing

memoranda, and proposed findings of fact and conclusions of law, this Court entered an Order on December 5, 1996, denying the relief sought by the Board. See Hirsch v. Corban Corporation, Inc., 949 F.Supp. 296 (E.D.Pa. 1996). The Union's underlying administrative unfair labor practices complaint subsequently settled.

Today we resolve Encor's Application for Attorneys' Fees and Costs Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, to recover the fees and costs incurred in connection with this action. For the following reasons...

#### **BACKGROUND**

The reasons we denied the Board's petition were fully set forth in the Memorandum accompanying our Order of December 5, 1996, see id., so we only briefly summarize that decision here. In order to secure § 10(j) injunctive relief, the Board was required to establish (1) that there was "reasonable cause" to believe that an unfair labor practice had occurred and (2) that an injunction would be "just and proper." Id. at 298. In its petition, the Board contended that there was reasonable cause to believe that Encor's management had (1) violated section 8(a)(1) of the NLRA by imposing disciplinary measures on Mahoney and threatening to discharge him, and (2) violated section 8(a)(3) by discharging him. The Board sought an order rescinding the disciplinary measures imposed on Mahoney and reinstating him to his former position. The Board argued that such injunctive

relief would be "just and proper" because it would cure the alleged "chilling effect" that Encor's actions had on unionization at the plant.

We denied the Board's petition because we found no reasonable cause to believe that Encor's management violated section 8(a)(3) by discharging Mahoney. Id. at 301-303. Rather, we concluded that the evidence established that Mahoney had been justifiably discharged for a costly paint-mixing error. Id. We did not decide whether there was reasonable cause to believe that the section 8(a)(1) violations had occurred because we held that, assuming they had, Encor had demonstrated that Mahoney "would have been discharged absent the protected conduct." Id. at 301 n. 4. We also held that, even if the Board had demonstrated the requisite reasonable cause, awarding the injunctive relief requested would not have been "just and proper" because the Board had failed to demonstrate (1) sufficient evidence of a "chilling effect" or (2) that the public interest in peaceful labor negotiations required the relief. Id. at 303-304.

Based on these conclusions, Encor now argues that it is entitled to attorney's fees under the EAJA.

## **DISCUSSION**

### I. Standard for Award of Fees and Costs Under the EAJA

Section 2412(d)(1)(A) of title 28 of the United States Code provides that:

[e]xcept as otherwise specifically provided by statute, 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 ... brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (West 1994 & Supp. 1997). "Thus, eligibility for a fee award in any civil action requires: (1) that the claimant be a prevailing party; (2) that the government's position was not substantially justified; (3) that no special circumstances exist to make an award unjust; and, (4) pursuant to 28 U.S.C. § 2412(d)(1)(B), that any fee application be submitted to the court within 30 days of final judgment in the action and be supported by an itemized statement." Commissioner, Immigration and Naturalization Service, 496 U.S. 154, 158 (1990). The only issue in the instant case is whether the Board's position in seeking section 10(j) relief was "substantially justified."

The Supreme Court has defined substantial justification under the EAJA as "justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). As the Court explained, "a position can be justified even though it is not correct, and ... it can be substantially (for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." Id. at 566 n. 2.

The burden of demonstrating substantial justification rests with the government agency. Hanover Potato Products, Inc. v. Shalala, 989 F.2d 123, 128 (3d Cir. 1993). Thus, our Court of Appeals has held in light of Pierce that an agency satisfies its burden if it demonstrates that it had (1) a reasonable basis for the truth of the facts alleged; (2) a reasonable basis in law for the theory it propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. Id.

## II. Application of Standard to this Case

We explicitly held in our December 5 Memorandum that the Board's legal theory was "substantial and not frivolous," id. at 299, thus we agree with the Board that it has met its burden with respect to the second prong of the three-part Hanover test.

### A. Basis for the Truth of the Facts Alleged

### B. Basis in Law for the Theory Propounded

### C. Connection Between Facts Alleged and Theory Advanced

An appropriate Order follows.

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d/b/a ENCOR COATINGS, INC.,	:	
	:	
Respondent.	:	

**ORDER**

AND NOW, this                    day of June, 1997, upon consideration  
of

BY THE COURT:

\_\_\_\_\_  
J. CURTIS JOYNER, J.