



In the Matter of:

COLIN W. YATES,

ARB CASE NO. 2017-0061

COMPLAINANT,

ALJ CASE NO. 2015-AIR-00028

v.

DATE: May 28, 2021

**SUPERIOR AIR CHARTER LLC
d/b/a JETSUITE AIR,**

RESPONDENT.

Appearances:

For the Complainant:

Gary M. Gilbert, Esq.; Cori M. Cohen, Esq.; and Elizabeth N. Moran, Esq.; *Gilbert Employment Law, P.C.*; Silver Spring, Maryland; George A. Shohet, Esq.; *Law Offices of George A. Shohet*; Beverly Hills, California

For the Respondent:

John F. McCarthy, Esq.; and Charles Cannizzaro, Esq.; *Little Mendelson, P.C.*; Irvine, California

Before: James D. McGinley, *Chief Administrative Appeals Judge*, James A. Haynes and Stephen M. Godek, *Administrative Appeals Judges*

ORDER AWARDING ATTORNEY'S FEES

PER CURIAM. This matter arises under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century.¹ In

¹ 49 U.S.C. § 42121 (2020) (AIR 21); 29 C.F.R. Part 1979 (2020).

a complaint filed with the Department of Labor's Occupational Safety and Health Administration (OSHA), Colin Yates (Complainant) alleged that Jetsuite Air (Respondent) terminated his employment in retaliation for raising air transportation safety concerns. OSHA dismissed the complaint. Subsequently, an administrative law judge (ALJ) issued a Decision and Order Granting Relief in which the ALJ concluded that Complainant proved his case by a preponderance of the evidence, and that Respondent failed to prove by clear and convincing evidence that it would have taken the same unfavorable personnel action absent Complainant's protected activity. The ALJ ordered back wages plus interest and other damages. We affirmed with one modification of the ALJ's damages award.

We now consider Complainant's Request for Attorneys' Fees and Costs regarding his attorneys' work before the Administrative Review Board (ARB or Board).²

BACKGROUND

Complainant worked for Respondent as a pilot. On May 25, 2011, Complainant was second-in-command on an aircraft that crash landed in Sedona, Arizona.³ On July 2, 2013, Respondent terminated Complainant's employment. The ALJ found that Complainant engaged in protected activity (1) on May 26, 2011, when he expressed safety concerns to the National Transportation Safety Board (NTSB), and (2) on June 26, 2013, when Complainant emailed NTSB to express concerns with the NTSB report about the crash. In addition, the ALJ found the protected activity was a contributing factor to Complainant's termination of his employment.

On July 7, 2017, the ALJ awarded Yates \$143,834.55 in damages. On September 26, 2019, the ARB affirmed the ALJ's award of monetary damages, while modifying the non-monetary relief. On April 28, 2020, Jetsuite filed for bankruptcy. On January 14, 2021, the U.S. Bankruptcy Court for the District of Delaware granted Yates relief from the automatic stay and allowed him to pursue his attorneys' fees.

On February 12, 2021, Yates filed his Request for Attorneys' Fees and Costs for the appellate proceedings before this Board. Complainant seeks a total of \$127,865.50 in attorneys' fees at rates under the USAO *Laffey* Matrix, and

² 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. Any fees for legal services rendered before the ALJ shall be assessed by the ALJ. 29 C.F.R. § 1979.109(b).

³ *Yates v. Superior Air Charter LLC*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 2 (Sep. 26, 2019).

\$1,072.01 in expenses for work from two law firms: (1) Gilbert Law Firm, P.C. (Gilbert), a Maryland based law firm; and (2) Law Offices of George A. Shohet (Shohet), a Los Angeles, California based law firm.⁴ Gilbert seeks \$102,462.50 in fees and \$279.56 in costs for the work of several attorneys and staff.⁵ Shohet is the sole biller for his firm and seeks \$25,403.00 in fees and \$792.45 in costs.⁶ The matter of the appropriate fees in this case has been fully argued by the parties before us.

DISCUSSION

The issue before us is whether Complainant’s attorneys’ fees request is reasonable. The Board is committed to upholding workplace safety, and recognizes that whistleblowers with adequate counsel do a better job of policing bad activity. To facilitate access to capable counsel for whistleblowers, the Board carefully considers fee requests to ensure successful whistleblowers receive reasonable attorney’s fees.⁷ It is within this context that we consider the specifics of the fees presented to us.

A successful AIR 21 complainant is entitled to receive all costs and expenses, including attorney’s fees, reasonably incurred in bringing the complaint.⁸ The ARB has endorsed the lodestar method for calculating attorney’s fees. This method requires multiplying a reasonable hourly rate by the number of hours reasonably expended in bringing litigation.⁹ An attorney seeking a fee award must 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.¹⁰ In addition, the attorney must submit evidence documenting the hours worked and the rates claimed, as well

⁴ The requested fees are based on the hours and rates represented in the Complainant’s exhibits (CX), including CX-1A for Gilbert’s condensed “fee summary” and CX-1B for Gilbert’s detailed account of his timesheets; CX-1G for Shohet’s time and billing; and CX-4 for the USAO Attorney’s Fee Matrix – 2015-2021.

⁵ Gilbert lists staff hours and requested rates in CX-1A. In addition, \$279.56 is the sum of Gilbert’s expenses listed on CX-1A.

⁶ \$792.45 in costs is for Shohet’s travel from California to D.C. for mediation.

⁷ See *Lively v. Flexible Packaging Ass’n*, 930 A.2d 984, 988 (D.C. 2007) (“It is important that attorneys who are willing to take on civil rights and other public interest work are adequately compensated, or it will be difficult to find competent counsel to handle this important job.”).

⁸ 49 U.S.C. § 42121(b)(3)(B); 29 C.F.R. § 1979.110(d).

⁹ *Clemmons v. Ameristar Airways, Inc.*, ARB No. 2011-0061, ALJ No. 2004-AIR-00011, slip op. at 3 (ARB Apr. 27, 2012).

¹⁰ *Id.* at 4.

as records identifying the date, time, and duration necessary to accomplish each specific activity and all claimed costs.¹¹ If the documentation of hours is inadequate, the award may be reduced accordingly.¹²

Respondent contests both the reasonableness of the hourly rate and the number of hours expended, proposing a remedy to reduce the fee request by at least 40%.¹³ First, Respondent challenges the reasonableness of Complainant's use of the *Laffey* Matrix, which provides a schedule of hourly rates prevailing in Washington, D.C. for attorneys at various levels of experience. Respondent argues that rates based on the *Laffey* Matrix are inappropriate because the reasonable rate must be based on prevailing rates in the Central District of California, which Respondent claims is the relevant community, not Washington, D.C. Second, Respondent argues that the hours expended are unreasonable because Complainant included block-billed time entries; failed to identify certain timekeepers; and billed duplicative work and administrative time.

Respondent's proposed remedy to reduce the fee request by 40% is excessive and unsupported by Complainant's submitted timesheets. Shohet's fee request is clear and thoroughly demonstrates the reasonableness of his fee request. Thus, we fully award his request for \$25,403.00 in fees and \$792.45 in costs. However, Gilbert's fee request suffers certain deficiencies, including rates not reasonable for a law clerk; block billing; and unidentified billers. Therefore, we reduce Gilbert's request and award him \$90,107.10 in fees and \$279.56 in costs.

We address the reasonableness of the requested hourly rate, followed by the reasonableness of the hours expended.

1. Reasonableness of Hourly Rate

The burden is 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.¹⁴

Respondent contests the reasonableness of the proposed hourly rates based upon the *Laffey* Matrix, which is used to evaluate requests for attorney's fees in

¹¹ *Id.*

¹² *Id.*

¹³ Complainant's Brief (Comp. Br.) at 1.

¹⁴ *See Cefalu v. Roadway Express, Inc.*, ARB Nos. 2004-0103, -0161, ALJ No. 2003-STA-00055, slip op. at 3 (ARB Apr. 3, 2008) (Order on Attorney's Fees).

D.C. courts.¹⁵ Respondent argues that Yates failed to connect his requested rates to the relevant community of the Central District of California. Respondent emphasizes that the relevant community is in the Central District of California because Yates worked for Jetsuite in Santa Clarita and filed a “companion case” in Orange County Superior Court.¹⁶ Respondent claims that the requested rates are not reasonable because the *Laffey* Matrix is based on prevailing rates in Washington, D.C., not the Central District of California.

The Board agrees with Respondent that the relevant community is the Central District of California.¹⁷ However, the Board disagrees with Respondent’s contention that Complainant has failed to connect his requested rates to the relevant community. Complainant has provided evidence that the *Laffey* Matrix rates are lower than rates in the Central District of California, thus tending to show that the requested rates are reasonable.

In *Barrett v. e-Smart*, the ARB found *Laffey* Matrix rates to be reasonable for a community outside of Washington, D.C.¹⁸ The relevant community was San Francisco, and the petitioner successfully argued that the fee should be based on the *Laffey* Matrix because the *Laffey* Matrix fee is “much less than the rate corresponding to San Francisco.”¹⁹

Here, Complainant met his burden that the rates requested are in accord with the prevailing rates in the relevant community of the Central District of California. In his affidavit, Shohet states that in August 2016 the Los Angeles Superior Court approved Shohet’s requested rate of \$600 as reasonable in a wage and hour class action, while the *Laffey* Matrix rate at the time was \$581 per hour for an attorney of his experience.²⁰ Thus, like in *Barrett*, Complainant has met his burden to show that the *Laffey* Matrix is a reasonable rate, because Complainant has demonstrated that the requested rate is lower than the prevailing rates in the community in the Central District of California.

¹⁵ Complainant requests current hourly rates rather than interest to offset the fees incurred since April 2013, which Respondent does not dispute. Comp. Br. at 16.

¹⁶ Respondent’s Brief (Resp. Br.) at 13.

¹⁷ Complainant’s brief also supports this conclusion because Complainant notes that “Southern California” is “where the relevant conduct occurred and where the parties were located during the relevant proceedings.” Comp. Br. at 10.

¹⁸ *Barrett v. e-Smart, Techs., Inc.*, ARB Nos. 2011-0088, 2012-0013, ALJ No. 2010-SOX-00031, slip op. at 10 (ARB Apr. 25, 2013).

¹⁹ *Id.*

²⁰ CX-5, Shohet Aff. ¶ 4.

However, we apply one adjustment to the requested rate. Gilbert has requested a fee for a staffer listed as “KXB.” KXB is not clearly identified, but we find she is likely Katherine Black, “a law clerk at the time.”²¹ Therefore, the requested rate of \$333 per hour is excessive for KXB because the *Laffey* Matrix’s rate for law clerks is \$180. Therefore, we reduce KXB’s rate from \$333 to \$180 to reflect her position as a law clerk.

2. Number of Hours Reasonably Expended

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.²²

A. Block-Billed Time Entries

The ARB requires that “time and task entries be sufficiently detailed to demonstrate their reasonableness.”²³ The ARB “disfavor[s] the use of block billing,” which is “the practice of grouping multiple tasks into a single time entry.”²⁴ “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.”²⁵

i. *Block Billing – Gilbert’s Time Sheets*

Gilbert’s time entries include block billing, which makes it difficult to determine the reasonableness of the time expended. Therefore, the hours in Gilbert’s fee request are reduced by 10% as explained more fully below.

²¹ Comp. Br. at 20.

²² *Clemmons*, ARB No. 2011-0061, slip op. at 4 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

²³ *Cefalu*, ARB Nos. 2004-0103, -0161, slip op. at 4 (ARB Jan. 6, 2010) (Further Decision and Order on Attorney’s Fees).

²⁴ *Id.*

²⁵ *Evans v. Miami Valley Hosp.*, ARB Nos. 2008-0038, -0043, ALJ No. 2006-AIR-00022, slip op. at 10 (ARB Aug. 31, 2009).

Respondent argues that Gilbert’s time should be reduced because Gilbert engaged in block billing for the majority of his entries.²⁶ In his Reply Brief, Complainant claims that Respondent’s examples of block billing include entries that “contain[ed] several minor tasks related to one overarching task,” which do not count as block billing.²⁷ Complainant argues the fee request should not be reduced for block billing because no actual block billing has occurred.

In *Green v. Monrovia Nursery Co.*, the Central District Court of California found that a 5.5 hour block billing entry constituted unreasonable block billing because it lacked sufficient specificity to assess the validity of the entry.²⁸ The Court also explained how the “courts have discretion to reduce block-billed hours.”²⁹

Complainant has submitted numerous entries that list multiple tasks, including entries of both a short and long duration. The short entries that list multiple tasks tend to contain minor tasks related to one overarching task. Therefore, the reasonableness of the hours billed is ascertainable. For example, on July 25, 2017, Cori Cohen billed 0.9 hours to “Research the standard of review for Appeal; Email litigation team re same.” Here, Cohen handled an overarching task of researching the standard of review, which was followed with a related minor task of e-mailing the litigation team. The entry lists multiple tasks, but the amount of time spent is reasonable.

However, Complainant also submitted numerous large time entries that list multiple tasks, which are more difficult to assess for reasonableness.³⁰ For example, on March 12, 2018, Elizabeth Moran billed 7.1 hours. The entry stated:

Confer w/CC re status of draft response to the appeal brief, CC edits to same, G Shohet final review of same, conducting final sufficiency

²⁶ Respondent marked the entries it considered block billing. See Respondent’s exhibits (RX) RX-A and RX-B. Respondent also claims that “at least 50% of the entries are block-billed” for Complainant’s fee request. Resp. Br. at 12.

²⁷ Comp. Reply Br. at 2. See *Hernandez v. Chipotle Mexican Grill, Inc.*, 257 F. Supp. 3d 100, 112 (D.D.C. 2017) (finding it is not block billing when “detailing the specific tasks performed related to a larger overarching task.”).

²⁸ *Green v. Monrovia Nursery Co.*, No. 2:18-CV-05257-RGK-GJS, 2020 WL 861807, * at 6 (C.D. Cal. Jan. 23, 2020).

²⁹ *Id.*

³⁰ The larger entries include: 4.8 hours (9/19/17); 1.3 hours (9/20/17); 2.6 hours (9/20/17); 5.6 hours (9/27/17); 3.8 hours (9/28/17); 3.8 hours (9/29/17); 2.5 hours (10/1/2017); 2.8 hours (10/2/17); 5.1 hours (10/2/17); 7 hours (10/3/17); 3.8 hours (2/26/18); 7.4 hours (3/9/18); 3.4 hours (3/9/18); 6.8 (3/11/18); 2.9 hours (3/12/18); 4 hours (3/12/18); 3.9 hours (3/12/18); 10.2 hours (3/12/18); 7.1 hours (3/12/18); 2.8 hours (3/14/18); 6.1 hours (1/21/21); 5.7 hours (1/28/21); 5.6 hours (2/10/21).

review to ensure addressed each of Respondent’s arguments, and final review of same prior to service (multiple meetings); Related emails w/ G Shohet/CC/GMG/CB; Confer with CC/CB re cite checking same and preparing exhibit index re same; conduct final review of same; review and revise exhibits and appendix to same.

As with *Green*, we are compelled to find that Complainant’s 7.1 hour entry contains too many vaguely described tasks to determine its reasonableness. This includes several meetings of uncertain length. Likewise, Complainant has included several other large time entries that constitute block billing, which make it difficult to assess the reasonableness of the time expended.

To account for Gilbert’s block billing, the Board exercises its discretion to reduce Gilbert’s hours expended by 10% for all his entries.³¹

ii. Block Billing – Shohet’s Time Sheets

Shohet’s time sheets have entries that total of 38.2 hours. Each entry on Shohet’s timesheets reflects a particular day. Respondent argues that several of Shohet’s entries amount to block billing because many of Shohet’s entries list numerous activities per day. However, Shohet listed the time spent on each activity of the day. This avoids the usual problem created by block billing – that it is difficult to determine the reasonableness of time expended. Therefore, we decline to reduce Shohet’s fee request for block billing.

B. Unidentified Billers

Respondent argues that fees for the biller listed as “JWC” should be disregarded because Gilbert’s fee request has neither identified JWC, nor explained why JWC’s rates are reasonable.³² In addition, Gilbert does not identify other billers in his fee request. Therefore, we exclude from Gilbert’s total fees the entries for the unidentified billers listed as JWC, BLT, and MYF.

³¹ *Evans*, ARB Nos. 2008-0038, -0043, slip op. at 12 (applying a 15 percent “across-the-board reduction” to an attorney’s fee request “based on the number of entries that lack sufficient detail or are duplicative and because the nature of block billing prevents discerning compensable services.”) *See also Gonzalez v. City of Maywood*, 729 F.3d 1196, 1203 (9th Cir. 2013) (“The district court can impose a small reduction, no greater than 10 percent—a ‘haircut’—based on its exercise of discretion and without a more specific explanation.”) (citations omitted).

³² Resp. Br. at 14, n.6. Respondent also stated that “KXB” was unidentified, but it seems KXB is Katherine Black, as noted previously.

Courts can exclude time entries for unidentified timekeepers because the unidentified entry provides no basis for determining the reasonableness of the fees.³³ Moreover, “[t]he Court is not obligated to research the name and qualifications of timekeepers for the benefit of the fee applicant.”³⁴

JWC,³⁵ BLT, and MYF are unidentified billers in Gilbert’s fee request and they each have requested rates of \$180.00.³⁶ Gilbert has not identified the timekeepers, explained their roles, or clarified why they are entitled to the rates requested. In the absence of this information, the Board cannot discern the reasonableness of the time expended for the tasks (or the reasonableness of the rates). As explained in *Natures Way Marine, LLC*, the burden is not on the Board to research the name and qualifications of the timekeepers for the Complainant’s benefit. Accordingly, we reduce Gilbert’s total fees by \$1,944 to remove the request for the unidentifiable billers.

C. Attorney’s Conferences and Other Duplicative Work

Duplicative time can be excluded, including “where two or more attorneys unnecessarily attend hearings and depositions, and perform the same tasks.”³⁷ Attorneys “conferring with each other does not necessarily constitute duplication of services,” but “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.”³⁸

Respondent argues that Complainant’s request should be reduced to exclude attorney conferences and other duplicative work, such as work preparing for mediation. Respondent points out that Cohen served as the “primary attorney,” who “was responsible for the day-to-day litigation,” yet other attorneys “performed

³³ *Strand v. Automotive Machinists Pension Tr.*, No. 06-1193-PK, 2007 WL 2029068, * at 8 (D. Oregon July 11, 2007) (excluding an entry for an unidentified timekeeper because there was “no basis for determining the skill, experience, or reputation of the timekeeper.”).

³⁴ *Natures Way Marine, LLC v. Everclear of Ohio, Ltd.*, No. 12-316-CG-M, 2015 WL 1757116, * at 5-6 (S.D. Ala. Apr. 17, 2015) (excluding fees for unidentified timekeepers). *See also Hahn v. Hunt*, No. 15-2867, 2016 WL 11432411, * at 3 (E.D. La. June 6, 2016) (excluding an entry for an unidentified timekeeper).

³⁵ Complainant does not clarify the identity of JWC in its Reply Brief.

³⁶ JWC billed 3.1 hours for a total of \$558.00, BLT billed 1.2 hours for a total of \$216.00, and MYF billed 6.5 hours for a total of \$1,170.

³⁷ *See Cefalu*, ARB Nos. 2004-0103, -0161, slip op. at 2 (ARB Apr. 3, 2008) (Order on Attorney’s Fees).

³⁸ *Evans*, ARB Nos. 2008-0038, -0043, slip op. at 9.

overlapping work” on the same tasks.³⁹ Accordingly, Respondent contends that Complainant’s hours should be reduced.

We recognize that this case dealt with complex issues and had a protracted appeal, which included extensive settlement discussions.⁴⁰ We find that Complainant’s internal conferences and discussions were necessary and reasonable. Moreover, the Respondent employed numerous attorneys at any given time and it was reasonable for Complainant to similarly employ several attorneys.⁴¹ Complainant also “no charged” a significant portion of time to ensure time spent was not excessive or duplicative, including all of Elizabeth Moran’s work related to the settlement negotiations.⁴² Therefore, the fee request is not reduced because of duplicative work or attorney’s conferences.⁴³

D. Clerical Time

Respondent argues that the billing request should be reduced to exclude the billing of “clerical time.” However, the activities highlighted by Respondent are not “purely clerical.” Thus, the fee request is not reduced for these activities.

Clerical duties can be excluded as non-compensable.⁴⁴ However, if the activity is not “purely clerical” and “requires a certain level of legal understanding in order to transact effectively,” then it is billable.⁴⁵

Respondent identifies the September 29, 2017 time entry of Christopher Byrd as an example of excludable clerical work because the entry includes compiling

³⁹ Resp. Br. at 8-9.

⁴⁰ Comp. Br. at 3-4.

⁴¹ Comp. Br. at 6.

⁴² Comp. Br. at 18-19. In fact, Complainant indicates Gilbert “no charged approximately \$35,331.60 in attorneys’ fees and costs. Comp. Br. at 3.

⁴³ Respondent also argues that Shohet’s total expenses of \$792.45 for travel from California to mediation in D.C. costs are not recoverable because Complainant has not demonstrated they are reasonable, and Complainant already had representation at the mediation by Mr. Gilbert, Ms. Moran, and others. Resp. Br. at 14-15. However, Shohet is one of the leading attorneys for Complainant, and practices in the locality where the events related to the litigation occurred. Thus, the travel was reasonable.

⁴⁴ See *Cefalu v. Roadway Express, Inc.*, ARB Nos. 2004-0103, -0161, ALJ No. 2003-STA-00055, slip op. at 3 (ARB Apr. 3, 2008) (Order on Attorney’s Fees).

⁴⁵ *Green v. Monrovia Nursery Co.*, No. 2:18-CV-05257-RGK-GJS, 2020 WL 861807, * at 6 (C.D. Cal. Jan. 23, 2020) (finding that creating a “new discovery database and process[ing] initial documents to be reviewed” required “specific training on the use of e-discovery platforms, and is therefore not ‘purely clerical.’”)

mediation exhibits and drafting a table of contents for mediation.⁴⁶ However, the activities are not “purely clerical,” but require a certain level of legal understanding to effectively complete. The entry also details that Byrd updated “Complainant’s mediation statement to include dates for referenced motions and citations.” Byrd’s mediation preparation activities required some knowledge of the legal process, the current posture of the case, and the mediation itself. Thus, it was not “purely clerical,” and Complainant’s entries are not reduced for clerical work.⁴⁷

CONCLUSION

We have reviewed the fee petition submitted by Yates’ attorneys and considered the arguments advanced by the Respondent. We conclude that Shohet’s fee request is reasonable, but we reduce Gilbert’s fee request to reflect KXB’s role as a law clerk, to account for block billing, and to remove fee requests for unidentified billers. Therefore, we order the Respondent to pay total attorneys’ fees of \$115,510.10 and costs of \$1,072.01, which consists of \$90,107.10 in fees and \$279.56 in costs to Gilbert, and \$25,403.00 in fees and \$792.45 costs to Shohet.

SO ORDERED.

⁴⁶ Resp. Br. at 10-11.

⁴⁷ Respondent also argues that Complainant’s request should be reduced to exclude excessive time charges for peripheral tasks, including strategizing, communicating, and researching. Resp. Br. at 9. However, Respondent does not define or cite to authority for what constitutes “peripheral work.” Therefore, the argument is unpersuasive.