No. 04-714

In the Supreme Court of the United States

TRIPLE A FIRE PROTECTION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA J. DREEBEN
Assistant General Counsel

ANNE MARIE LOFASO
Attorney
National Labor Relations Board
Washington, D.C. 20570

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the petition is jurisdictionally out of time.

2. Whether the court of appeals was required to issue a written opinion when it denied a request for an award of fees and expenses under the Equal Access to Justice Act, 28 U.S.C. 2412.

3. Whether the court of appeals erred by treating petitioner's petition for rehearing en banc of its fee motion as a motion for reconsideration, in accordance with the court's local rules, and denying that motion after panel reconsideration but without submitting it to the en banc court.

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OPINIONS BELOW

The order of the court of appeals denying petitioner's application for attorney fees (Pet. App. A1) was entered on April 29, 2004, and is unreported. The order of the court of appeals construing petitioner's petition for rehearing en banc as a motion for reconsideration of the April 29, 2004, order and denying that motion (Pet. App. C1-C2) was entered on July 20, 2004, and is unreported. The order of the court of appeals denying petitioner's motion to correct the July 20, 2004, order (Pet. App. D1) was entered on August 25, 2004, and is unpublished.

JURISDICTION

The order of the court of appeals was entered on April 29, 2004. A motion for reconsideration was denied on July 20, 2004 (Pet. App. C1-C2). An order of the

court of appeals denying petitioner's motion to correct the July 20, 2004, order was entered on August 25, 2004 (Pet. App. D1). The petition for a writ of certiorari was filed on November 23, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATEMENT

1. On October 31, 1994, the National Labor Relations Board (NLRB) issued a decision and order finding that petitioner violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), when, during negotiations with the Road Sprinkler Fitters Local Union No. 669 for a new collective-bargaining agreement, petitioner unilaterally ceased making payments to the Union's fringe benefit funds and reduced employees' wage rates. See *Triple A Fire Prot., Inc.*, 315 N.L.R.B. 409 (1994). The NLRB ordered petitioner to resume making contributions to the Union's funds, to rescind the reduction in wage rates, and to bargain with the Union for a new agreement. *Id.* at 422-423. On March 3, 1998, the United States Court of Appeals for the Eleventh Circuit enforced the NLRB's order. *NLRB* v. *Triple A Fire Prot., Inc.*, 136 F.3d 727 (1998 Judgment). Thereafter, the court of appeals denied petitioner's petition for rehearing en banc. *NLRB* v. *Triple A Fire Prot., Inc.*, 149 F.3d 1197 (11th Cir. 1998). This Court denied petitioner's petition for a writ of certiorari. *Triple A Fire Prot., Inc.* v. *NLRB*, 525 U.S. 1067 (1999).

2. Thereafter, the NLRB filed a petition in the court of appeals to adjudicate petitioner in civil contempt for failing and refusing to comply with the 1998 Judgment.

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[1] For the reasons stated at pp. 6-7, *infra*, the petition for a writ of certiorari was not timely filed, and therefore this Court lacks jurisdiction.

Pet. 5; Pet. App. B1-B2. Specifically, the NLRB alleged that petitioner had failed to resume making contributions to union health and welfare and pension funds and had failed to rescind the wage rate reduction. Pet. App. B2. In its answer, petitioner admitted those allegations, but asserted, among other things, that it was financially unable to comply with the requirements of the court's judgment. Pet. 5.

The district court referred the NLRB's contempt motion to a Special Master. Pet. App. B2. After the Special Master issued his first report, the court remanded the case for the Special Master to answer certain questions. *Ibid.* Over the NLRB's objections, the Special Master issued a second report finding that petitioner "could not comply with this court's order because they did not have the money to comply nor do they have a present ability to comply." *Ibid.* In a decision issued on August 21, 2003, the court of appeals found that the Special Master's findings had record support, and denied the NLRB's petition to adjudicate petitioner in civil contempt. *Id.* at B2-B3.

3. Petitioner timely filed an application under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), for attorney fees and expenses incurred in opposing the NLRB's contempt petition.[2] Pet. App. I1-I14, J1-J7. The NLRB opposed the EAJA application on the ground that its position was "substantially justified." Pet. 6-7. The NLRB also objected to the amount of fees re-

[2] EAJA, 28 U.S.C. 2412(d)(1)(A), provides for a court award of attorney fees and other expenses to certain classes of private parties prevailing in any civil action brought by or against the United States, unless the court finds that the position of the government was "substantially justified" or that "special circumstances make an award unjust."

quested, arguing that the number of hours and the hourly rate claimed by petitioner were unreasonable, and requesting that the court of appeals substantially reduce the fee amount should the court find that an EAJA award was appropriate. Pet. App. K1-K2.

On April 29, 2004, the court of appeals denied petitioner's EAJA fee application without opinion. Pet. 7; Pet. App. A1. On or around June 10, 2004, petitioner filed a pleading styled as a petition for rehearing en banc. Petitioner argued that the court had inappropriately rejected its application by stating "Denied" without making a finding to explain the denial, citing Eleventh Circuit decisions reviewing district court awards of EAJA fees. Petitioner also suggested that the court of appeals remand its application for EAJA fees to the Special Master who considered the contempt petition. Pet. 7-9.

Relying on Eleventh Circuit Rule 35-4, which provides that certain "[a]dministrative and interim matters (such as stay orders, injunctions pending appeal, appointment of counsel, leave to appeal in forma pauperis, and leave to appeal from a non-final order) are not subject to en banc consideration," the court of appeals issued an order on July 20, 2004, in which it construed the petition as a motion to the panel for reconsideration of its April 29, 2004, order. Pet. App. C1. The court found petitioner's motion to be untimely under its Rule 27-2 because "it was filed more than twenty-one days after April 29, 2004," but, sua sponte, "allow[ed] the

filing of the motion out of time." *Id.* at C2.[3] The court denied the motion. *Ibid.*

On August 2, 2004, petitioner filed a "Motion to Correct" the July 20, 2004, order, requesting that the court "strik[e]" from that order the following:

> Pursuant to Eleventh Circuit Rule 27-2, this motion, construed as a motion for reconsideration, is untimely inasmuch as it was filed more than twenty-one days after April 29, 2004. The panel, however, sua sponte, allows the filing of the motion out of time.

Pet. App. L3. In support, petitioner argued that the court's denial of the EAJA application amounted to a "judgment" for the NLRB, and that the applicable rule for assessing the timeliness of the motion was Federal Rule of Appellate Procedure 40(a)(1), not the Eleventh Circuit's Rule 27-2.[4] Petitioner further asserted that the document it styled "petition for rehearing" was timely filed under Federal Rule of Appellate Procedure 40(a) (1).

On August 25, 2004, the court denied petitioner's motion to correct the August 2, 2004, order. Pet. App. D1. Petitioner filed its petition for a writ of certiorari 90 days thereafter, on November 23, 2004.

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[3] Eleventh Circuit Rule 27-2 provides, in pertinent part: "[A] motion to reconsider, vacate, or modify an order must be filed within 21 days after the entry of such order. No additional time shall be allowed for mailing."

[4] Rule 40(a)(1) provides: "Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time." Fed R. App. P. 40(a)(1).

ARGUMENT

This Court lacks jurisdiction to review the court of appeals' April 29, 2004, order denying petitioner EAJA fees, because the petition for a writ of certiorari was not timely filed. The case does not merit review in any event, because petitioner's contentions that the court acted improperly in denying its EAJA claim without opinion and erred in failing to circulate its petition for rehearing en banc are without merit.

1. In a civil case, a petition for certiorari (absent an extension) must be filed within 90 days of the court of appeals' entry of judgment. 28 U.S.C. 2101(c); see Sup. Ct. R. 13.1. This Court's rules further provide that "if a petition for rehearing is timely filed in the lower court," the time to file "runs from the date of the denial of the petition for rehearing." Sup. Ct. R. 13.3. This Court has recognized that in civil cases (in which the 90-day limit is prescribed by statute), "[t]his 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits." *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990).

Here, petitioner filed its petition for a writ of certiorari on November 23, 2004, more than 90 days after the court of appeals' April 29, 2004, order denying EAJA fees, and also more than 90 days after the court's July 20, 2004, order construing petitioner's "Petition for Rehearing En Banc" as a motion for reconsideration and denying that motion. Accordingly, the petition for a writ of certiorari is jurisdictionally out of time and should not be considered.

That the petition was filed 90 days after the court of appeals denied petitioner's "Motion to Correct" does not change the result. See Pet. App. D1. That motion was

not in form or substance a petition for rehearing, nor did it seek to change the result of any part of the case. It simply asked the court of appeals to strike the portion of the July 20, 2004, order stating that petitioner's motion for reconsideration was untimely, but that the court would consider the motion out of time. See *id.* at L1-L3.[5] The motion did not propose to strike the portion of the July 20, 2004, order construing the petition for rehearing en banc as a motion for reconsideration, pursuant to Eleventh Circuit Rule 35-4, or the court's denial of the reconsideration motion. Pet. App. L3. Accordingly, the motion to correct did not extend the time within which petitioner could apply for certiorari. See *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942) (dismissing petition for certiorari as untimely filed, because motion asked state court to amend its judgment in a manner that did not seek to alter court's adjudication of the rights of the parties, and therefore did not toll the running of the period for filing petition for certiorari).

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[5] Whether the motion for reconsideration was itself timely filed in the court of appeals (a question suggested by petitioner in its Motion to Correct, Pet. App. L1-L3) is not relevant here. The court of appeals sua sponte allowed the filing of the motion for reconsideration out of time, and then considered that motion on the merits. *Id.* at C2. Because the court permitted the filing of the motion out of time (and assuming *arguendo* that the pendency of the motion would have tolled the running of the period for seeking review by this Court), the time for filing a petition for a writ of certiorari would have run from the date the court of appeals denied that motion. See *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940) (recognizing, in context of an appeal to a circuit court, that where the trial court allows the filing of an untimely petition for rehearing and, after considering the merits, denies the petition, "the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof").

2. In any event, petitioner has presented no basis warranting this Court's review of asserted procedural defects in the manner in which the court of appeals ruled on petitioner's application for attorney fees under EAJA.

a. Petitioner contends (Pet. 9, 10-12) that the court of appeals was required to issue a written opinion when it denied petitioner's request for an award of fees and expenses under the EAJA, 28 U.S.C. 2412. That contention is meritless.

It has long been the accepted practice of appellate courts, including this Court, to dispense with the writing of opinions in certain cases. See Fed. R. App. P. 36 (recognizing practice). See generally *NLRB* v. *Amalgamated Clothing Workers*, 430 F.2d 966, 967 (5th Cir. 1970) (justifying its one-word disposition of the case, without opinion, based on the ever-increasing docket and the need to conserve scarce judicial resources); *Survey of the United States Courts of Appeals*, 42 F.R.D. 247, 271 (1967) (table of number of dispositions per circuit without opinion in 1966). The courts of appeals "have wide latitude in their decisions of whether or how to write opinions." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972). That latitude is necessary, because the determination of whether preparing an opinion to explain the basis for a particular order is a wise expenditure of limited judicial resources depends heavily on factors peculiarly within the knowledge of the court involved. Any requirement that the basis for those determinations be explained would quickly consume the

very judicial resources that the court was trying to conserve.[6]

Nor is there any reason to question the decision of the court below that the denial of attorney fees and expenses in this case did not merit an explanation.[7] The local rules defining the circumstances in which decisions on the merits need not be accompanied by written opinions typically refer to circumstances in which an opinion would have little or no precedential value. See 11th Cir. R. 36-1; 5th Cir. R. 47.6; see also 1st Cir. 46(a); 2d Cir. R. 0.23. An opinion explaining this collateral order, which evidently turned on the court's conclusion that the agency's position was substantially justified on the particular facts of this case, would certainly fall within that category. Cf. *Taylor*, 407 U.S. at 195 n.4 (remanding for the preparation of an appellate opinion

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[6] The Eleventh Circuit, like many other circuits, has adopted a local rule to define the circumstances in which the need to conserve scarce judicial resources outweighs the benefits of a written opinion on the merits of an appeal. 11th Cir. R. 36-1; see 5th Cir. R. 47.6; 1st Cir. R. 36(a) (noting that "[t]he volume of filings is such that the court cannot dispose of each case by opinion. Rather it makes a choice, reasonably accommodated to the particular case, whether to issue an order, memorandum and order, or opinion."); 2d Cir. R. 0.23 (noting that "(t)he demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively"); 3d Cir. I.O.P. 6; 6th Cir. R. 36; 9th Cir. R. 36-1, 36-2; 10th Cir. R. 36.1; D.C. Cir. R. 36(b).

[7] The courts of appeals routinely have denied EAJA applications without written opinions. See, *e.g.*, *Univ. of Great Falls* v. *NLRB*, No. 00-1415 (D.C. Cir. June 4, 2002); *NLRB* v. *IWG, Inc.*, No. 96-9548 (10th Cir. Oct. 16, 1998); *Architectural Glass & Metal Co.* v. *NLRB*, No. 95-5421 (6th Cir. July 15, 1997); *NLRB* v. *Vemco, Inc.*, No. 92-5257 (6th Cir. Jan. 26, 1994); *NLRB* v. *Durham*, No. 91-3080 (8th Cir. Dec. 1, 1992); *Thomas R. Harberson* v. *NLRB*, No. 84-2488 (10th Cir. Mar. 15, 1988).

in a legislative reapportionment case, because the Court was unwilling "to impute to the Court of Appeals reasoning that would raise a substantial federal question when it is plausible that its actual ground of decision was of more limited importance").[8]

Citing cases where the courts of appeals, in the EAJA context, have remanded cases to the district court for findings that explain the reasons for their decisions, petitioner contends that EAJA requires "any court denying an award of fees * * * to write an opinion regarding its findings of fact and reasons for denying an award" so that the party will "know the reason it was denied fees." Pet. 11, 12. That argument—that courts of appeals, like district courts, must give written reasons for denying fee awards under EAJA—overlooks the fundamental distinction between the losing party's right to appellate review of a district court determination and the discretionary nature of en banc and certiorari review. Because the court of appeals *must* review a district court's fee ruling at the request of the losing party whether or not that ruling involves issues that have any importance beyond the particular case, the court of appeals may appropriately insist on a record that is sufficient to permit informed review. But review of appellate court rulings is entirely discretionary. Unless there are issues of importance beyond the par-

[8] Petitioner's suggestion (Pet. 12) that it "does not know the reason it was denied fees" is disingenuous in light of its admission (Pet. 6-7) that the NLRB objected to its EAJA application on the *sole* ground that the NLRB's position was "substantially justified."

ticular case, there is no legitimate basis for seeking further review.[9]

b. Petitioner also challenges the court of appeals' decision, pursuant to its local rules, to construe petitioner's petition for rehearing en banc of the denial of the application for EAJA fees as a motion for reconsideration addressed to the panel that denied the fees. Contrary to petitioner's assertion (Pet. 13), the court of appeals did not thereby improperly "deprive[] petitioner of [its] right to have its petition for rehearing en banc considered by any member of the en banc court."

In *Western Pacific Railroad Corp.* v. *Western Pacific Railroad*, 345 U.S. 247, 250 (1953), this Court explained that 28 U.S.C. 46(c) is a grant of power addressed to the court of appeals.[10] That statute "vests in the courts [of appeals] the power to order hearings *en banc*," while leaving to each court of appeals "a wide latitude of discretion to decide for itself just how that power shall be exercised." 345 U.S. at 250, 259. At the

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[9] The burden of demonstrating substantial justification in an EAJA case is on the government. *Spencer* v. *NLRB*, 712 F.2d 539, 557 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984); *Enerhaul, Inc.* v. *NLRB*, 710 F.2d 748, 750 (11th Cir. 1983). In its brief to the court of appeals, the Board explained why its position was substantially justified and why petitioner was not entitled to a fee award. Petitioners were not deprived of an opportunity to challenge that position because of the lack of a written opinion. However, they chose not to do so.

[10] Section 46(c) provides: "Cases and controversies shall be heard and determined by a court or panel of not more than three judges * * *, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service." 28 U.S.C. 46(c). Rule 35 establishes the procedures by which a party may suggest the appropriateness of convening the court en banc. Fed. R App. P. 35.

same time, the Court recognized that Section 46(c) does not create "a right in litigants to compel such hearings or rehearings or even to compel the court to vote on the question of hearing or rehearing." *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 624-625 (1974); see *Western Pac. R.R.*, 345 U.S. at 250 (Section 46(c) "is not addressed to litigants").

This Court's statement in *Western Pacific Railroad*, 345 U.S. at 260, that the en banc power is "necessary and useful," and that a court cannot "ignore the possibilities of its use in cases where its use might be appropriate," does not, contrary to petitioner's suggestion (Pet. 12), establish that petitioner was deprived of any cognizable right here. Petitioner filed a "Petition for Rehearing En Banc," arguing only that the panel should have made findings to explain its denial of fees, and suggesting that petitioner's application for fees should be referred to the Special Master who considered the contempt petition. See Pet. 7-8. The court of appeals construed that petition as a motion for reconsideration, relying on its local Rule 35-4, which provides that en banc petitions will not be entertained in "administrative and interim matters," but will instead be "referred as a request for rehearing or reconsideration" to the panel that entered the order sought to be reheard.[11] In those

[11] The court's rule is consistent with the general reservation of en banc consideration to "precedent-setting error of exceptional importance" or "in direct conflict with precedent of the Supreme Court or of this circuit." 11th Cir. R. 35-3; See *United States* v. *Nixon*, 827 F.2d 1019, 1023 (5th Cir. 1987); see also 6th Cir. I.O.P. 35(e) ("Petitions seeking rehearing en banc from an order of the court that disposes of the case on the merits or on jurisdictional grounds will be circulated to the whole court. Petitions seeking rearing en banc from an order of the court that does not dispose of the case either on the merits or on jurisdictional grounds will be treated in the same manner as a petition

circumstances, the court's treatment of petitioner's motion presents no issue warranting this Court's review.

Although petitioner suggests in its question presented (Pet. i) that the court of appeals deprived it of due process of law, petitioner neither elaborates nor develops that claim in its argument. Petitioner has clearly received all the process that is due. As this Court has observed, due process "is flexible and calls for such procedural protections as the particular situation demands." *Greenholtz* v. *Inmates of Neb.*, 442 U.S. 1, 12-13 (1979) (citations omitted); see *Matthews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976). The court received briefing from the parties on petitioner's EAJA application before deciding it; the court then considered petitioner's request for reconsideration in accordance with its local rules, and even though that request for reconsideration was untimely. Nothing in this Court's decision in *Western Pacific* suggests that the Due Process Clause entitled petitioner to any further consideration of its challenge to the order denying its application for EAJA fees.

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for panel rehearing, i.e., they will be circulated only to the panel judges."); 10th Cir. Rule 35.7 ("The en banc court does not consider procedural and interim matters * * *. En banc requests in these matters are referred to the judge or panel that entered the order, in the same manner as a petition for rehearing."). See generally *Western Pacific R.R.*, 345 U.S. at 261 (explaining that courts of appeals may use their power of en banc review "sparingly," but not "indiscriminately").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA J. DREEBEN
Assistant General Counsel

ANNE MARIE LOFASO
Attorney
National Labor Relations Board