

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NORTHEASTERN LAND SERVICES, LTD.,
d/b/a/ THE NLS GROUP

AND

CASE 01-CA-039447

JAMISON JOHN DUPUY, an Individual

**REGIONAL DIRECTOR'S OPPOSITION TO CHARGING PARTY'S REQUEST
FOR BOARD REVIEW**

Overview

Following a lengthy compliance investigation, the Regional Director issued a compliance determination in this matter on February 28, 2012, accepting over the objections of the charging party a compromise settlement. An appeal to the Acting General Counsel was filed, and on March 26, 2013, the Acting General Counsel dismissed the charging party's appeal. This Request for Review followed.

This Request for Review poses an important issue with respect to compliance following a Board Order and Court enforcement: Does the Regional Director have the discretion to accept a compromise settlement of complex compliance issues over the objection of the charging party? For the reasons set forth at length below, the Region asserts that the compliance determination at issue represents an appropriate exercise of discretion and the settlement effectuates the Board's Order and the purposes of the Act. Consequently, the Region urges the Board to deny the Request for Review. At issue is whether, following a Board determination of liability and Court Enforcement, a charging party or discriminatee may compel litigation of complex compliance matters, notwithstanding a good-faith and well-founded determination by the Regional Director that, considering all the circumstances, a negotiated settlement is warranted.

To promote clarity, this Response will address the compromise settlement accepted in the Compliance Determination, and the Region's rationale for accepting it. A detailed response to specific objections raised by the charging party will follow.

Procedural Background

The charge in this case was filed by Jamison Dupuy (Dupuy) on October 24, 2001, alleging that the Employer (NLS) unlawfully terminated Dupuy for discussing his compensation with a client of NLS. A complaint issued on January 16, 2002, and a trial was held May 8, 2002. On June 27, 2002, the Administrative Law Judge (ALJ) issued his decision recommending dismissal of the charge because there was no aspect of concert in Dupuy's discussion of wages. A two-member Board reversed the ALJ and found a violation, finding that a rule prohibiting discussion of compensation is unlawful, and a discharge pursuant to such a rule is unlawful even in the absence of concerted action.¹ The Court of Appeals enforced the Board Order.² NLS sought certiorari to the Supreme Court and while that request was pending, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). This case was remanded to a three member panel of the Board, which affirmed the previous panel's finding of violation, incorporating the earlier rationale by reference.³ NLS appealed, but the Court again enforced the Board's Order.⁴

Following exhaustion of appellate challenges to the Board's Order, Region 1's Compliance Officer, Claire Powers, commenced an investigation to ascertain the requirements of compliance with the Board's Order. At this stage of the proceedings, NLS replaced its former legal representative with new counsel, who expressed willingness to explore a negotiated resolution of disputed back pay issues without resorting to additional litigation. Based on her review of NLS's financial data, Powers concluded, with Regional management's concurrence, that a negotiated compromise of the back pay issues reached by NLS and the Region promised a better compliance result to Dupuy than might be achieved through additional litigation.⁵

¹ 352 NLRB 744 (2008)

² 560 F.3d 36 (1st Cir. 2009)

³ 355 NLRB No. 169 (2010).

⁴ 645 F. 3d 475 (1st Cir. 2011).

⁵ Because of the evidentiary privilege applicable to communications relevant to settlement discussions, the Region is not, at this stage of the proceedings, at liberty to disclose records voluntarily produced in conjunction with settlement discussions or representations made on behalf of Respondent with respect to its financial condition and intentions. At this stage of the proceedings, the Board must evaluate the Region's acceptance of the Compliance Determination based on its confidence in the experience and judgment of the Regional Compliance Officer, her supervision, and Regional Management to make an appropriate assessment of the compliance issues presented.

Dupuy was advised of the terms of the negotiated compromise and invited to become a party; he was sent papers relevant to joining the compromise settlement agreement (CSA), but declined to sign them. Upon declining to join the settlement, the Regional Director issued a compliance determination proposing to unilaterally accept the terms negotiated with NLS. Dupuy appealed to the Acting General Counsel, who upheld the Region. This request for review followed.

Rationale for the Region's Compliance Determination

The Region's compliance investigation was undertaken by Region One Compliance Officer Claire Powers, an employee with over thirty-five years experience in the Agency. Ms. Powers has served as Regional Compliance Officer for ten years; prior to becoming Compliance Officer, Ms. Powers had extensive experience processing complex compliance cases. She has been invited to participate as trainer in a number of nationwide compliance programs offered within the Agency, and has been assigned to perform the compliance work in a number of complex cases originating in other Regions within the Agency.

Over a period of months, Ms. Powers engaged in a review of NLS's payroll and employment records for the period following the unlawful discharge. During this period, the Compliance Officer was in regular contact with Dupuy. The nature of Dupuy's employment with NLS posed challenges in the determination of backpay for a number of reasons: employment was intermittent and on a contract basis; reemployment was not guaranteed; and hiatuses between jobs were of varied lengths. To account for the variability in the award of new jobs, and account for the indeterminate periods between the awards of jobs, the Compliance Officer chose to calculate backpay on the basis of comparators who were employed throughout the backpay period. This method provided a fair way to account for the indeterminacy of many issues related to the timing and length of employment, while assuring that Dupuy's backpay was representative of other NLS employees regularly doing the same work through this period.

Based on the Compliance Officer's determination of backpay, she entered into settlement discussions with NLS's legal representative based on her judgment of 100% of the principal amount owed to Dupuy. Although counsel for NLS expressed a desire to reach a resolution of this case without further litigation, it is important to note that NLS

has never conceded that the backpay amount claimed by the Compliance Officer is correct, and has asserted that if litigated, the amount of backpay owed to Dupuy would be substantially less than the amount asserted by the Region. Based on her examination of NLS records, Compliance Officer Powers concluded that there was no colorable basis for asserting derivative liability beyond Respondent. Stated differently, Ms. Powers concluded that, under existing law, NLS's backpay obligations could be satisfied through legal process exclusively out of NLS's assets.

NLS is essentially a specialized employment agency of skilled professional employees; as such, it possesses no significant real property or equipment. The principal asset of NLS is the good will of its principal Jeffrey Deuink, who has operated NLS for approximately 27 years, and although in good health, has sufficient personal means to permit his retirement at any time. NLS's marketing consists almost exclusively in Deuink's leveraging of his personal contacts in industries that regularly develop rights of way. Indeed, Dupuy concedes in his request for review (p. 12) that NLS's principal asset is Jeffrey Deuink's goodwill, and that there is no assurance that upon Deuink's death, disability, or retirement, the corporate entity will continue. For the purpose of satisfying NLS's backpay obligation, Compliance Officer Powers correctly concluded that the principal available resource was the stream of accounts receivable in NLS's ongoing operations.

The compromise settlement was as follows: NLS was to make a valid offer of reinstatement to Dupuy. As of the date of reinstatement, future backpay would be tolled. The principal amount of backpay, \$124,115.33, was established as 100% of the backpay (less the usual adjustments for interim earnings and mitigation expenses). Compound daily interest, \$77,673.17, was added to backpay from the date of the unfair labor practice to the offer of reinstatement. The resulting sum of \$201,788.50 represented 100% of NLS's backpay liability as of the date of reinstatement. In the judgment of Compliance Officer Powers, NLS lacked the assets to make an immediate payment of this amount without jeopardizing its financial viability.⁶ Therefore, a mutually agreeable installment payment plan was negotiated. The negotiated payment plan waived the continued accrual

⁶ In fact, Compliance officer Powers concluded that NLS lacked the assets to satisfy this obligation even if forced into liquidation.

of interest following the date of the offer of reinstatement, provided that all installment payments were timely made. The obligation was secured by a security agreement covering NLS's fixtures, equipment, machinery, vehicles, inventory, accounts receivable, and bank accounts.⁷ Since the date of the offer of reinstatement, as a show of good faith not withstanding Dupuy's challenge to the compliance determination and the possibility it will be set aside, NLS has regularly tendered checks for its monthly installment payments. These checks have been held in escrow by the Region.⁸ If sustained by the Board, and all installment payments are timely paid, the Compliance Determination will yield Dupuy 100% of the backpay and interest as of the date of his reinstatement.⁹

In evaluating whether a compromise settlement was warranted, the Compliance Officer considered the following: 1) the potential delay inherent in additional litigation in a contested compliance hearing before an Administrative Law Judge, the Board, and the Court of Appeals; 2) the risk of adverse outcomes in litigation with respect to numerous of the determinants of backpay and the low probability that further litigation would yield derivative or individual liability of a solvent individual; 3) the fact that the principal asset of NLS was its stream of future revenue; and 4) the risk that the death, incapacity, or retirement of Jeffrey Deiunk posed a substantial risk of NLS becoming insolvent as an entity, with no assets to meet its backpay obligation to Dupuy.

In light of all the above, the Compliance Officer decided it best effectuated the purposes of the Act and was clearly advantageous to Dupuy to reach a compromise agreement with respect to backpay premised as follows: 1) the principal amount of backpay due would be the full 100% backpay determined by the Compliance Officer using selected comparator employees; 2) payment would be in installments, over time;¹⁰ 3) as an inducement to settlement, interest accrual would toll as of the first installment

⁷ Admittedly of nominal value, but encompassing all significant assets of NLS.

⁸ The checks have not been cashed, as the Region was not granted permission to establish an escrow account.

⁹ The Region concedes, as it must, that the settlement represents a compromise in numerous respects. Dupuy asserts that his actual backpay is higher than provided for in the Compliance determination, that he is entitled to additional interest during the full term of the installment period, and that assets of various individuals are reachable to satisfy NLS's backpay liability; the Region's compliance determination rejects these claims.

¹⁰ The amount of installment payments and the length of the payment period were negotiated. Because of evidentiary privilege, the Region is not at liberty to disclose the substantive details of the settlement negotiations, including matters such as whether personal guarantees or pledges of personal property were discussed.

payment and, assuming timely payment of all installment payments, the final installment of accrued interest would be forgiven.

Since the Regional Director's issuance of the compliance determination in this case, NLS has regularly paid its monthly installment into escrow with the Region.¹¹

The Region's Compliance Determination is an Appropriate Exercise of Administrative Discretion Representing a Reasonable Compromise under Settled Law

The Compliance Determination is a fair and appropriate resolution of the compliance issues arising from the Board's Order in 355 NLRB No. 169 (2010), as enforced by the Court of Appeals, and is by far a preferable resolution to this matter than is likely to result from further litigation of the compliance obligation in this case.

The propriety of the Region's compliance determination is governed by the well settled principles articulated in *Independent Stave*, 287 NLRB 740 (1987). In *Independent Stave*, the Board returned to a case-by-case approach to evaluating settlements. While acknowledging the impossibility of identifying every possibly relevant factor in advance, the Board stated that it would generally look to 1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; 2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; 3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and 4) whether the Respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes. 287 NLRB at 743.

A balanced consideration of these factors supports the Region's compliance determination.

¹¹ Although Dupuy's appeal and request for review relieve NLS from the legal responsibility to abide by the terms of the compliance determination until upheld by the Board, Respondent, apparently as a sign of good faith, has voluntarily submitted checks into escrow. Although Dupuy asserts in his Request for Review that these sums should be immediately deliverable to him, that claim is unfounded unless the Board rejects his Request for Review or until the correct amount of backpay is determined through further litigation. The checks have not been cashed because the Region has not been authorized to establish an escrow account for this purpose.

With respect to the first factor, Respondent has agreed to be bound by the terms of the settlement agreement and installment payment plan, and the Region has determined that the settlement is a fair and reasonable resolution of a complex, contested compliance matter. Obviously, Dupuy objects.¹²

With respect to the second factor, the Compliance Officer, with the concurrence of Regional Supervision, the Regional Director, and the Acting General Counsel on appeal, has determined that the settlement agreement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation. This determination is not only reasonable, but in the circumstances of this litigation, inescapable. Although liability has been established in the previous stages of this litigation and Dupuy is presumed to be owed backpay, the actual amount of backpay is contested, and the determination of the backpay period and the amount of backpay owed is subject to considerable litigation risk. The length of the backpay period and the amount of backpay are both complex issues. NLS does not continuously retain employees. Instead, employees are hired for the term of specific contracts, and rehired for subsequent contracts. There is no guarantee that any employee will be rehired for subsequent employment, or, if rehired, in what interval. In order to determine these variables for the purpose of the compliance determination, the Compliance Officer employed an approach endorsed by the Compliance Manual for such circumstances. She assumed that the average earnings of a group of comparator employees with the most nearly continuous employment performing assignments similar to Dupuy is a reasonable approximation of what Dupuy's earnings would have been during the backpay period. It is by no means certain that the amount of backpay claimed in the compliance determination would be sustained if the matter were fully litigated. Although Respondent would have the burden of proof on the issue, proceeding to a litigated compliance specification raises substantial risk of adverse determinations, both as to Dupuy's continuing employment and as to the appropriate manner to liquidate backpay. Even more substantial litigation risks exist in any attempt to establish derivative or individual liability beyond NLS. The nature of these risks is discussed in greater detail below.

¹² Dupuy's objections to the settlement agreement are addressed in detail below.

The litigation risk does not end, however, with the issue of the amount of backpay. Once liquidated, additional challenges are posed in collecting an enforced judgment. In the First Circuit, it does not appear that backpay obligations under the Act are regarded as debts to the United States. *U.S. v. Bongiorno*, 106 F.3d 1027, 1036-1040 (1st Cir. 1997). Therefore, the Federal Debt Collection Procedure Act is unlikely to be available to collect any liquidated obligation. Within the jurisdiction of the First Circuit, State collection law and procedures are available to enforce backpay obligations, but in the absence of real or personal property upon which to execute, it is unrealistic to assume that a liquidated judgment against NLS for backpay will in fact be collectible. To the extent that liability of other entities or individuals were established, their assets could be pursued, but establishing such liability involves substantial litigation risk, costs, and delay. The authority of the Board to approve the compliance determination over the objection of the Charging Party is implicit in the structure of Section 102.53(d), which recognizes the Board's authority to affirm the Region's compliance determination through denial of the Request for Review.

Independent Stave dealt with the question of deference, over the objection of the General Counsel, to a non-Board settlement entered prior to hearing of the unfair labor practice allegations. Obviously, the stage of this case, following a Board Order and Court judgment enforcing it, must be taken into account in applying the *Independent Stave* analysis, and to some degree, the fact that liability is established militates against taking the compliance determination over Dupuy's objection. The Region contends that notwithstanding the stage of litigation, the compromise embodied in the compliance determination is an appropriate resolution of this case. This is so both because of the remaining litigation risk as to the complex compliance issues identified above, and practical considerations as to collectability of backpay which became apparent during the compliance investigation.

The Compliance Officer's careful review of Respondent's financial records, which included a review of Deuink's personal financial interactions with NLS, disclosed that the resources and assets available to satisfy the backpay liability would under existing law almost certainly be limited to the assets of NLS, which in liquidation are clearly inadequate to meet a meaningful fraction of the actual liability. Respondent is an

incorporated entity, and although Deuink is an officer, director, and substantial owner, the corporate formalities have been observed. The ordinary presumption is that Deuink is not personally liable under these circumstances, and the Compliance Officer found no evidence that made a determination of personal liability plausible. Therefore, Dupuy's correct observation that Deuink has considerable personal wealth is unavailing with respect to the payment of backpay. Although Dupuy suggests the Board should assert personal liability of Jeffrey Deuink and pursue his personal assets, the facts as they are known to the Region do not support a basis adequate under Board law to support a finding of personal liability. At the very least, an attempt to pursue personal liability for Deuink would involve substantial time and expense, as well as enormous litigation risk. Dupuy advances a number of theories for personal liability, none of them persuasive.

Dupuy invokes *Domsey Trading Co.*¹³ in support of his assertion of Deuink's personal liability, but the Region views *Domsey* as distinguishable in critical respects. *Domsey* involved a corporate Respondent engaged in unfair labor practice litigation before the Board. The corporation owned substantial real property. During the course of the litigation, the corporation sold its real property assets and distributed the proceeds to its individual owners without making provisions to cover a potential backpay award in the pending Board litigation. The Board viewed the corporation's actions as tantamount to a fraud on creditors of the corporation that justified reaching the personal assets of the owners. Dupuy suggests we have an identical situation here, but he is mistaken. On surmise, Dupuy asserts that the 2009 liquidation of Respondent's employee pension plan resulted in the distribution of several hundred thousand dollars of unvested plan benefits to the corporation and then to Deuink, the principal owner. Contrary to Dupuy's surmise, however, the Compliance Officer identified no unvested participants in the plan, and all the proceeds were distributed to plan participants. As an ERISA trust, vested plan funds were never reachable by the Respondent's creditors, and the distribution of these funds to plan participants created no windfall for Deuink at the expense of NLS's creditors.

Dupuy further argues that Respondent's intransigent litigation of this matter warrants assertion of personal liability against its officers and directors. Litigation of this matter has indeed been protracted: in addition to the unfair labor practice hearing and

¹³ 357 NLRB No. 180 (2011).

exceptions to the Board, the case was argued before the 1st Circuit, resulting in Judgment in favor of the Board, subsequently vacated after the Supreme Court's *New Process Steel* decision, necessitating a remand to a three member panel of the Board and a second appearance before the First Circuit, where judgment in favor of the Board was again granted. Dupuy is undoubtedly correct that the total litigation expenses of Respondent expended in its resistance to Dupuy's charge would more than cover NLS's backpay liability to him, but the observation does not support Dupuy's argument in the absence of a finding that Respondent litigated in bad faith. While Respondent has been unsuccessful in its litigation of its matter, there is no colorable argument that NLS's litigation has been frivolous or in bad faith. See *B E & K Construction Co. v. NLRB*, 536 US 516 (2002).

Dupuy further claims that individual liability should be asserted against Deuink because Respondent's low capitalization burdens its creditors. This is simply not the law. Undercapitalization will result in assertion of personal liability against corporate owners when, as in *Domsey*, it appears that the owners have converted corporate assets to their benefit at the expense of creditors or substantially departed from the norm of capitalization in an industry, thereby defeating reasonable expectations of investors and creditors. It has never been the case, however, that courts will pierce the corporate veil simply because a corporate Respondent's capital is insufficient to cover its debts, even if that insufficiency was foreseeable. Indeed, such a position would negate the corporate form. Adequate capitalization has to be assessed in terms of the nature of the enterprise. Respondent here operated a recruitment and referral service, relying basically on the personal contacts of its owner. The capital needs of such an enterprise are minimal. As a result, the principal asset of this corporation – that which may be reached by judgment creditors -- is its good will as represented in its stream of future earnings. The compliance determination recognizes this reality. Of course, this asset is only valuable to the extent that Respondent remains in operation, a factor which supports the Compliance Officer's strategy to negotiate a solution that began payments towards NLS's backpay liability at the earliest possible time.

Dupuy surmises that NLS is a Subchapter S corporation and for tax purposes, income of the Respondent is treated as personal income of Deuink. Because Deuink receives this assumed tax benefit, Dupuy asserts that Deuink's personal assets should be

available to cover corporate liability. Deuink cites no legal authority for this proposition; in the Region's judgment, even assuming Dupuy's surmise about NLS's tax status is correct, the litigation risks, costs, and delays inherent in establishing such a proposition outweigh any value in trying to assert this position before the Board and Courts.

Dupuy protests the amount of installment payments and the length of the payment period. The individual installment amount was a negotiated sum. For reasons discussed previously, the substantive details of negotiations cannot be disclosed. However, a measure of the reasonableness of the amount of individual installment payments may be taken from the following: Deuink allows himself a salary as principal of Respondent of approximately \$150,000 annually. In a zero sum fashion, payments to Dupuy could be increased by equal diminishment of Deuink's compensation. The Region believes a continued salary in the present range is a necessary inducement to Deuink's continuing operation of and engagement with Respondent. As suggested earlier, without Deuink's continued participation in and operation of NLS, the corporate entity is essentially judgment proof. Objectively, the Region has no basis to question the appropriateness of Deuink's compensation when the nature and size of Respondent's enterprise is considered, along with the substantial ongoing contribution Deuink makes to the operation of Respondent.¹⁴

With respect to the third factor in the *Independent Stave* analysis, there has been no fraud, coercion, or duress in reaching the settlement agreement. Although Dupuy asserts that NLS has misrepresented its assets and improperly liquidated unvested employee retirement accounts, the Region has found no factual basis in these claims. Dupuy objects to the fact that the Region invited his participation in the resolution of this case by tendering to him a compliance settlement agreement which recited his assent to it. There is, of course, no confusion as to the fact that Dupuy did *not* assent to the agreement, and the tendered recitals are a nullity. The unsuccessful presentation to Dupuy of a document which, if signed, would have effectuated an all-party settlement, provides no basis under the third facet of *Independent Stave* to reject this settlement.

¹⁴ Dupuy objects to the lack of a personal guarantee by Deuink insuring payment of the installment obligation. The negotiated compliance determination makes no provision for such a guarantee, so obviously there was no agreement as to such a term. It does not follow from the absence of the term, however, that such a term was not actively sought in the course of negotiations. Absent establishing individual liability, a personal guarantee of this nature cannot be compelled.

Similarly, Dupuy contends that the Region improperly coerced him by Deputy Regional Attorney Burson's advising him that he could receive the escrowed instalment payments only by joining the compliance settlement agreement; this statement was no more than an accurate characterization of the status of the escrow payments at the time.

Finally, on the fourth factor, there is no history of violations of the Act with this Employer beyond the present case. The violation at issue in this case (termination for discussing compensation with a customer) is the only unfair labor practice ever found to have been committed by this Employer.

Without question, the Settlement agreement includes compromises, the most significant being that if timely payments under the installment plan are made, further interest during the installment period is waived; in addition, the settlement includes no significant tangible security or guarantees of performance, as none were agreed to during negotiations. Nevertheless, the totality of relevant factors identified in *Independent Stave* strongly favors Board approval of the compliance determination. The alternative to the compliance determination is even more litigation. Further litigation heaps risk upon risk. Perhaps the least of these risks is to establish that the backpay amount is equal or greater to that claimed in the compliance determination. Even if that amount is liquidated and enforced by Court judgment, the collection issues are formidable: NLS has no assets of significant value to seize other than its stream of operating revenues, provided that it continues in operation. Although Dupuy urges the Region to pursue theories of individual or derivative liability, no substantial factual or legal basis exists for such claims. While such claims may not be frivolous, the scant probability of their prevailing and the certainty of additional delay in pressing them, surely argue against continued litigation of this matter. In the Region's judgment, it gains nothing to litigate the backpay in this matter rather than accept the compliance determination. An uncollectible judgment three to five years in the future, even if it could be obtained, is worth much less to Dupuy than the compromise amount obtained in the compliance determination.

In summary, the totality of relevant considerations strongly favors denial of Dupuy's Request for Review. A more detailed response to a number of Dupuy's contentions follows.

RESPONSES TO SPECIFIC OBJECTIONS

Dupuy raises myriad issues in his Request for Review.¹⁵ While the Region urges the Board to view this matter in the overall context of an appropriate compromise settlement of a complex matter, as detailed above, the Region offers the following responses to the specific issues raised by Dupuy.

I. DUPUY'S PROCEDURAL DUE PROCESS RIGHTS HAVE BEEN PRESERVED (RR, PP. 3-11)

The Region's processing of this case has been in full accord with Section 102.53 of the Board's rules. At each stage, Dupuy has been consulted, and his participation has been considered. The substantive rationale for accepting a compromise settlement reached in the compliance determination has been outlined above, and Dupuy has had an opportunity to challenge the propriety of the settlement before the Acting General Counsel and the Board. Dupuy mischaracterizes recitations in a draft Compliance Settlement Agreement (CSA) forwarded to him, when his participation in a bilateral settlement was solicited, as false statements of material fact. On the contrary, they are evidence of the Region's attempts to engage Dupuy in a satisfactory conclusion of the compliance process. Dupuy's refusal to become a party to the CSA moots his objection to the waivers recited within it.¹⁶

II. THE TERMS OF THE COMPLIANCE DETERMINATION ARE APPROPRIATE GIVEN THE PARTICULAR CIRCUMSTANCES OF THIS CASE (RR, PP. 20-34)

Dupuy objects to the sufficiency of the collateral securing NLS's obligations under the Compliance Determination. As noted above at note 6, the obligations are secured by a security interest in NLS's identifiable assets. Dupuy complains that this security is insufficient to guarantee the indebtedness, but NLS cannot pledge assets it does not have. Dupuy attempts to circumvent this by asserting, on various theories, the personal liability of various individuals, including Jeffrey Deuink. For the reasons

¹⁵ Hereafter, "RR".

¹⁶ Dupuy frames his objection as one to the "CSA." However, given Dupuy's refusal to join the CSA, his actual objection is to the Region's compliance determination, which adopted the substantive terms of the CSA. As Dupuy did not join the CSA, he is not bound by any of the waivers or affirmative undertakings of the Charging Party contained in the original CSA.

discussed earlier in this opposition, the Region concluded, based on its investigation, that an assertion of individual liability could not be sustained under existing law. An element of the compromise in the compliance determination is the abandonment of the assertion of individual liability. As previously discussed, the reason for this decision was the Region's judgment that such liability was unsupported by the facts and the current state of the law, and that the delay, costs, and litigation risks in pursuing such liability as well as the threat to actually obtaining any recovery justified the compromise of the compliance determination.

The Region urges the Board to reject Dupuy's attempt to engage in a fishing expedition through subpoena for evidence an experienced Compliance Officer has not found, in order to urge upon the Board and ultimately the Court of Appeals a theory of liability not yet in existence. Dupuy *might* succeed in this attempt, but the prospect of success is vanishingly small. The purpose of the Compliance Determination process is to permit the Board to avoid quixotic litigation and accept resolutions of matters that, while not ideal, are reasoned attempts to arrive at the best resolution under the circumstances.

III. THE COMPLIANCE OFFICER'S CALCULATION OF BACKPAY IS CONSISTENT WITH BOARD PRECEDENT, THE COMPLIANCE MANUAL, AND THE OBJECTIVE FACTS OF EMPLOYMENT (RR, PP. 34-43)

Dupuy asserts that the Compliance Officer used an improper formula to calculate backpay. Consistent with Compliance Manual Sections 10508.9 and 10540–10566, Compliance Officer Powers calculated the net backpay due Dupuy. Dupuy was a "right of way agent" who had previously worked under two separate noncontinuous temporary employment contracts for Respondent. Given these facts, the Compliance Officer could not assume Dupuy would have been employed continuously for the entire backpay period. Indeed, no other right of way agent of Respondent was so employed. Therefore a model was constructed based on Respondent's actual payroll records.

Gross backpay was calculated in accordance with Formula 2 of Compliance Manual Section 10640.3 using Respondent's payroll records for the 234 pay periods ending October 15, 2001, through June 30, 2011. During that period, Respondent employed ninety-two (92) individuals in similar right of way positions as formerly held Dupuy. Analysis of the records revealed many were paid lesser wages or did not work

for significant periods. Therefore, a group of twenty-nine (29) individuals was determined to be the sample group for the purposes of backpay calculations. The selection parameters were that each earned *at least* the same pay as Dupuy at the time of his discharge and each worked for at least a one year contract. Further analysis of the sample group revealed that none of the employees were employed during the entire period due to the contractual nature of their employment relationship. Therefore the average number of pay periods worked by the sample group during the 234 week period was calculated to be 65 pay periods. The 65/234 week template was then applied to the backpay calculation model as the contract periods Dupuy would have been entitled to work. At the end of the 234 weeks, the 65 week period repeats. This method is consistent with Compliance Manual Section 10542.5 as it addresses any reduction in employment during the backpay period due to the temporary nature of Dupuy's employment contract. Although it represents an approximation of what Dupuy's actual earnings would have been, given the nature of the industry, actual earnings cannot be determined, and all of the assumptions upon which the model used were based are favorable to Dupuy.

Dupuy's interim earnings are based on his personal records of his actual interim employment.

Net backpay is the difference between net backpay and interim earnings. The backpay calculation prepared by the Region is the most accurate and reasonable interpretation of the payroll data.

Dupuy contends that the Region's basis for determining the backpay owed, what he refers to as statistical sampling method, is not the most accurate method. Citing *Aneco, Inc.*, 333 NLRB 691 (2001), *Dean General Contractors*, 285 NLRB 573, 575 (1987), and *Boland Marine & Mfg. Co.*, 280 NLRB 454, 460-461 (1986), Dupuy maintains that he should be accorded backpay during the entire backpay period. This argument fails, as the Region conducted the "factual inquiry" discussed in *Dean*, and it does not support Dupuy's position. While Dupuy's temporary contract position is considered akin to a construction industry employee and is entitled to a make whole remedy, the facts of this case do not support the finding that Dupuy would have been employed continuously during the entire backpay period; *no* comparable employee of the

employer enjoyed continuous employment. Dupuy contends that John Gavin should have been included in the sample group. Respondent identified Gavin as a supervisor and his wage history supports this characterization. Therefore, the Region excluded Gavin from the sample group.

Dupuy mistakenly asserts that four employees in the sample group worked what appear to be four years during the backpay period, and this compels a finding that he would have been employed during the *entire* backpay period. The review of the payroll of the sample group clearly shows that no employee was employed the entire time. An average of the employees' work weeks shows that the 65/234 model is clearly representative of the actual employment situation.

Dupuy asserts that increases in the work force in 2008 and 2009 indicate that he should have been employed during that time. There is no basis to suggest that Dupuy would have been employed at that time. Dupuy misunderstands the 65/234 model, which works in his favor. Under this model, Dupuy receives backpay at the earliest times and thus accrues interest for the longest periods. Dupuy argues that he should be allowed to pick and choose when he would have been employed based on his lack of interim employment. The Region maintains that the method used to calculate backpay is a preferable approach, objectively based on Respondent's actual records. Contrary to Dupuy's assertion, it is not arbitrary. The make whole remedy commences with Dupuy's unlawful discharge and follows the 65/234 model. The model represents the best approximation of a make whole remedy based on the record evidence. There is no basis to set it aside. This model meets the compliance requirements as the backpay carefully approximates the backpay owed in an evenhanded fashion and is not unreasonable or arbitrary. At best the model presented by Dupuy is contrary to the Board's policies – he is seeking to receive backpay for those periods in which he had the lowest interim earnings. While he would have been available for employment during those periods, there is no basis to assume that he would have been selected over equally qualified and available employees and approved by the client. There is no case law or manual section that supports Dupuy's approach.

Dupuy's own testimony from the underlying ULP hearing concerning his employment stints with Respondent further support the Region's formula. Dupuy

admitted that he initially solicited Respondent for work, that in his first employment contract he was contracted for a three month period but actually worked nine months until the project was completed, that he refused an offer of continued employment to accept a more lucrative offer elsewhere, that for personal reasons he personally solicited Respondent for employment which lead to his second term of employment, and that he was terminated during the second employment period. As discussed above, the Respondent provided its payroll records for the backpay period. The Region's 65/234 model is based on Respondent's actual employment records of the period which clearly demonstrate that no similar employee was continuously employed and the norm was for significant gaps between contract periods. Thus, the Region concluded Dupuy would not have been employed during the entire backpay period. Here, as posited in *Aneco*, Respondent presented evidence which bridged the "gulf from *could* to *would*." The Region determined that Dupuy, like the other contract employees in the sample group, was not guaranteed continuous employment during the backpay period. Dupuy was therefore treated like the sample group employees and accorded 65 weeks of backpay in the 234 week of payroll evidence (payroll period ending June 20, 2011) and then the 65.10 weeks repeated at the beginning of the next 234 week period (beginning payroll period ending July 15, 2011, and continuing through payroll period ending December 30, 2011). This premise is fully consistent with Compliance Manual Section 10542.5 which addresses reductions in available employment.

In short, Dupuy asserts an approach to calculating his backpay that would result in a pattern of employment unlike that of any comparable employee, including himself, employed by NLS. Board law governing backpay does not countenance so improbable a result.

IV. THE BOARD HAS THE AUTHORITY TO ACCEPT THIS COMPROMISE SETTLEMENT (RR, PP. 44-55)

A number of Dupuy's objections to the Compliance Determination appeared rooted in a confusion about the Board's bifurcated procedures in unfair labor practice cases. While *liability* of NLS had been established, the amount and nature of backpay has not.

Dupuy insinuates that NLS has reduced its volume of business in a conscious attempt to deny him backpay. Absent some showing that NLS has diverted this work to an alter ego, the reduction in NLS's revenue is not relevant to the issue of liability for backpay.

Many of Dupuy's arguments are predicated on the assumption that he has a liquidated Court Judgment as to backpay and interest. He does not. For the reasons stated previously, the compromise reached in the compliance determination is warranted, and represents no deviation from Board policy.

V. DUPUY WAIVED REINSTATEMENT (RR, PP.56-62)

Dupuy contends the December 20, 2011, offer of reinstatement¹⁷ was conditional, incomplete, omitted material terms, and the compensation for the proffered job was materially less than what the Charging Party had been previously paid by the Respondent on the job from which he had been unlawfully fired. The Region considered the offer of reinstatement in accordance with Compliance Manual Section 10530 and case law and found the offer to be valid, specific, unequivocal, and unconditional, noting that the offer was an unconditional offer of reinstatement to Dupuy's former position under the terms then applicable to all NLS employees in similar positions.

The Region considered the offer against the standards set forth in the Compliance Manual at 10534. The Region determined the offer to be valid as it offered full reinstatement to his former position at the terms and conditions in effect for other

¹⁷ By this letter, The NLS Group unconditionally offers you reinstatement to the position of land agent under the NLS Group standard "Temporary Employment Agreement" for a project commencing the week of January 2, 2012. The exact date and location are to be determined for the kickoff meeting. The project will require all staff to report to the project site and attend the kickoff meeting to be scheduled for the first week of January 2012. The location of the project will be Eastern NY State and Northeastern PA. The Pay Rate for the labor will be \$250.00 a day based on a 5 or 6 day contract to be determined. The Per Diem Rate will be the standard GSA Rate of \$132 a day. The mileage will be reimbursed at the IRS approved Rate presently \$.555 per business mile. Project business use for agent cell phones and computers will be reimbursed at \$5.00 per day for days worked. The mobilization and demobilization allowance for the project is one travel day and a maximum 500 miles. If you accept this offer, we will present your resume to the client for their consideration. Your participation on the project will, of course, be subject to the approval of the client as is industry practice. Please accept or decline this offer by January 3, 2012. If you accept our offer to return to work, please check the appropriate response, sign the copy of this letter, and return it to me in the enclosed, stamped envelope. Please forward an updated copy of your resume to us so that we may include it in our submission to the next client. If you decline this offer, please check the appropriate response, sign the copy of this letter, and return it to me in the enclosed, stamped envelope. If we do not receive this form back from you by January 3, 2012, we will assume that you are not interested in returning to work for The NLS Group and this offer will automatically expire.

similarly situated employees. The Region considered whether the offer would return Dupuy to conditions that would exist in the absence of the unlawful action and found that it would. The Region found no reason to find the offer of reinstatement invalid because the third party employer retains the right to accept or reject the referred individuals. While Dupuy claims this is a new practice, it is clear from record testimony and admitted in his Brief in Support of Appeal to the Acting General Counsel that he approached a third party to obtain his last position with Respondent, which indicates that third party's tacit approval of him. In any event, at the date of the offer of reinstatement, such a term is routine for all similar employees. The Region also found the time period in which to accept or reject the offer to be reasonable.

Therefore, the Region determined the offer tolled the backpay period. In the circumstances of this case, Respondent received a work order and was required to fill it in a short period of time – which is a standard operating practice in this industry. Respondent communicated this information to Dupuy. The Region notes that Dupuy never responded to Respondent's offer of reinstatement. Moreover, Dupuy's objections to the substantive terms of the offer of reinstatement make clear that he would have rejected *any* offer containing these terms, regardless of the offer date. At RR, pp. 60-61, Dupuy makes clear his expectation that NLS's offer of compensation must equal his previous compensation. In fact, NLS's obligation was to offer Dupuy financial compensation equal only to what it would have offered Dupuy in the absence of his unlawful termination. A review of offers to similarly situated employees established that NLS met this obligation in its offer of reinstatement. Dupuy's rejection of this constitutes a waiver of his right to reinstatement.

CONCLUSION

For entirely understandable reasons, Dupuy seeks to extract a remedy from the individual he holds responsible for his unlawful termination and endlessly protracted litigation. The personal wealth of this individual makes an attractive target. As a matter of law, however, the personal wealth of Jeffrey Deuink is not reachable. While it might personally satisfy Dupuy to seek to extract a recovery from Deuink – even if unsuccessful -- this potential satisfaction offers no basis for prolonging this already extended matter, when a substantial remedy is on offer.

The question before the Board posed by this request for review may be reduced to simple terms: in the face of a settlement that the Region and the Acting General Counsel reasonably and in good faith believe effectuates the Board's Order in a complex compliance case, does the charging party have a right to compel litigation on issues and theories that have been administratively considered and discounted, especially where a reasonable determination has been made that litigation risk is high and that prolonged proceedings, even if successful, risk the Pyrrhic possibility of an uncollectable judgment?

Further litigation of this matter is likely to accomplish nothing beyond additional delay and substantial costs. Dupuy's aggressive theories of enterprise and individual liability are unlikely to prevail, and, even if they did prevail, face a substantial risk of being uncollectable. This case has already seen far too much litigation for its own sake. The Region therefore urges the Board to take a pragmatic view of the realities of this case and deny the Request for Review. The compromise settlement before the Board is not a perfect vindication of the unfair labor practice committed, but it is a fair and reasonable resolution of the case, and perhaps the best outcome likely to be realized in any event.

Dated: June 3, 2013

Respectfully Submitted,

/s/ Scott F. Burson

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