

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
v.)	No. 17-2250
)	
DEEP DISTRIBUTORS OF GREATER N.Y., INC.)	
DBA THE IMPERIAL SALES, INC.)	
)	
Respondent)	

**OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD
TO THE MOTION TO SUPPLEMENT THE RECORD**

To the Honorable, the Judges of the United States
Court of Appeals for the Second Circuit:

The National Labor Relations Board opposes Deep Distributors of Greater N.Y., Inc.’s motion to supplement the record, because the material that it seeks to submit is not relevant to any issue before the Court.

1. On June 20, 2017, the Board issued a Decision and Order finding that Deep Distributors committed numerous unfair labor practices, including repeatedly threatening employees and discharging eight employees, in violation of the National Labor Relations Act. The Board’s Order requires Deep Distributors to cease and desist from those violations and from “in any other manner interfering with, restraining, or coercing employees in the exercise of the[ir] rights” under the NLRA, as well as to offer reinstatement and backpay to the eight discharged employees, rescind an unlawful rule, furnish requested information, and post, read,

and publish a remedial notice. On July 21, the Board filed an application for enforcement of its Order with the Court.

2. Deep Distributors acknowledges (Mot. 8) that the material it seeks to submit is not relevant to an evaluation of the facts underlying the Board's Order. Nor could it be. The material was not before the Board in the underlying administrative proceeding, and extra-record material by its nature has no bearing on the Court's review of whether the factual findings underlying the Board's unfair-labor-practice determinations are "supported by substantial evidence *on the record*," 29 U.S.C. § 160(e) (italics added); *TNT USA, Inc. v. NLRB*, 208 F.3d 362, 365 (2d Cir. 2000). Deep Distributors further states that it "does not oppose the underlying basis for the NLRB's June 20, 2017 Order." (Mot. 8.)

3. Deep Distributors' primary stated purpose for seeking to supplement the record is to "demonstrate its compliance" with the Board's Order. (Mot. 1.) But it is well-established that compliance is not a defense to enforcement. As the Supreme Court has explained, "the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court." *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950); *see also William J. Burns Int'l Detective Agency v. NLRB*, 441 F.2d 911, 914 (2d Cir. 1971) ("The fact ... that the employer is willing to comply does not render the cause moot; the Board may still seek and secure

enforcement from the courts.”), *affirmed on other grounds*, 406 U.S. 272 (1972); *NLRB v. Seltzer*, 296 F.2d 125, 125 (2d Cir. 1961) (same). That is so because a Board order’s cease-and-desist language “imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree.” *Mexia Textile*, 339 U.S. at 567. Accordingly, the Supreme Court has noted that “the issue of compliance” is “clearly irrelevant in the ordinary course of review.” *Id.* at 569. Because the evidence of purported compliance thus has no bearing on whether the Court should enforce the Board’s Order in this case, there is no warrant for supplementing the record with such evidence.¹

4. No more availing is Deep Distributors’ contention (Mot. 9, 11-12) that extra-record material is needed to support its argument that the discharged employees either waived their right to relief or are ineligible for relief under *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). Those arguments are premature, as they should be raised in a Board compliance proceeding rather than to the Court in the first instance. The Supreme Court has approved the Board’s practice of “order[ing] the conventional remedy of reinstatement with backpay” upon finding an unlawful discharge, and “leaving until the compliance proceedings more specific calculations as to the amounts of

¹ The Board does not agree that Deep Distributors has complied with the Board’s Order, but the Court need not address that issue. Whether or not there actually has been compliance is not relevant to the propriety of enforcement.

backpay, if any, due.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984).

Through compliance proceedings, the Board can “modify[] its general reinstatement and backpay remedy ... as a means of tailoring the remedy to suit the individual circumstances of each discriminatory discharge.” *Id.* Thus, “compliance proceedings provide the appropriate forum where the Board and petitioners will be able to offer concrete evidence as to the amounts of backpay, if any, to which the discharged employees are individually entitled.” *Id.* Such individualized compliance determinations “are routinely made ‘after entry of a Board order directing remedial action, or the entry of a court judgment enforcing such [an] order.’” *NLRB v. Katz’s Delicatessen, Inc.*, 80 F.3d 755, 771 (2d Cir. 1996) (quoting 29 C.F.R. § 102.52).

Under that established process, issues regarding whether a discharged employee’s immigration status affects the remedy are litigated in compliance proceedings. *Tuv Taam Corp.*, 340 NLRB 756, 760-61 (2003); *see also Sure-Tan*, 467 U.S. at 902-03 (“approv[ing]” the compliance-proceeding process in context of evaluating immigration-status issues). Indeed, both *Hoffman Plastic*, 535 U.S. at 141, and *Palma v. NLRB*, 723 F.3d 176, 178 (2d Cir. 2013), which *Deep Distributors* cites (Mot. 6-7, 11), arose from Board compliance proceedings in which the employees’ immigration status had been determined. There has been no such determination here. *Deep Distributors’* proposed course would short-circuit

that process and have this Court examine the issue in the first instance, absent litigation before or a finding by the Board. And that departure would serve no purpose—because “an individual’s immigration status is irrelevant to [an employer’s] unfair labor practice liability under the Act,” the discharged employees’ status has no bearing on whether the Board’s Order should be enforced. *Tuv Taam*, 340 NLRB at 760.

A similar analysis applies to Deep Distributors’ effort (Mot. 9) to introduce extra-record material regarding the Fair Labor Standards Act case. Whether or how a settlement in that case impacts the remedy here is likewise a matter for compliance, because Deep Distributors’ position is essentially an argument as to “the amounts of backpay, if any, due,” *Sure-Tan*, 467 U.S. at 902.² The Board has an established test for evaluating the impact on Board remedies of private settlements to which it was not a party, *see American Pacific Pipe Co.*, 290 NLRB 623, 623-24 (1988); *Independent Stave Co.*, 287 NLRB 740, 743 (1987), and introducing evidence regarding such a settlement to the Court at this stage would serve only to circumvent that process.

² Alternatively, even assuming that the FLSA settlement could be considered in the merits phase of the case, Deep Distributors did not ask the Board to reopen the record or otherwise bring the settlement to the Board’s attention even though the settlement predated the Board’s decision. Thus, the Court would lack jurisdiction to consider it because a party is barred from raising an issue before the Court that was not raised before the Board. 29 U.S.C. § 160(e); *Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 116 (2d Cir. 2001).

WHEREFORE, the Board asks the Court to deny Deep Distributors' motion to supplement the record.

Respectfully submitted,

s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

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Dated at Washington, DC
this 13th day of November, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that this document contains 1,155 words of proportionally spaced, 14-point type, and that the word-processing system used was Microsoft Word 2010.

/s/Linda Dreeben
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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that the foregoing document will be served via the CM/ECF system on all parties or their counsel of record.

/s/Linda Dreeben
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Dated at Washington, DC
this 13th day of November, 2017