Northeastern Land Services, Ltd. d/b/a The NLS Group *and* Jamison John Dupuy. Case 1–CA–39447

June 27, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On June 27, 2002, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Charging Party and the General Counsel filed exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining in its employment contracts an overbroad confidentiality provision and by terminating employee Jamison Dupuy for breaching that confidentiality provision. The judge dismissed the complaint in its entirety. For the reasons set forth below, we reverse the judge's decision and find that the Respondent violated Section 8(a)(1) in both respects alleged.

I. FACTS

The Respondent is a temporary employment agency that supplies labor—including, as relevant here, right-of-way agents who perform various activities related to the acquisition of land rights—to companies in the natural gas pipeline and fiber optic telecommunications industries. Charging Party Jamison Dupuy was employed twice by the Respondent as a right-of-way agent. During the second period of employment, from July to October 2001,[3] the Respondent assigned Dupuy to a project undertaken by Respondent's client, El Paso Energy. At the outset of both employments, the Respondent required Dupuy to sign its temporary employment agreement. This agreement included the following confidentiality language:[4]

> Employee also understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.

Dupuy experienced delays in receiving his pay on the El Paso project. These delays caused a particular problem for Dupuy because he had to pay for his lodging expenses up front and was reimbursed later. Dupuy had several conversations about this problem with agents of the Respondent, including Executive Vice President and Chief Operating Officer Jesse Green. During one such conversation, Dupuy told Jesse Green that, if the problem could not be resolved, he would be forced to call El Paso Project Manager Rick Lopez[5] to tell him that he was quitting. Green responded that he would call Lopez. Green subsequently told Dupuy that Lopez would not alter their arrangement relating to Dupuy's lodging expenses.

In early October, Dupuy called Lopez. Dupuy told Lopez that he had not been getting paid in a timely manner, and he asked if it might be possible for him to work for El Paso through a different employment agency. Lopez said that would not be possible.

Also in early October, another pay-related issue arose for Dupuy. At the outset of his employment on the El Paso project, Dupuy arranged with Lopez to be reimbursed by the Respondent $15 per day for the work-related use of his personal computer. Dupuy notified the Respondent of this arrangement, and for a time the Respondent reimbursed Dupuy $15 per day. On October 2, however, Dupuy received an e-mail from the Respondent's coordinator of human resources, Susan Green, that referred to the computer usage reimbursement rate as $12 per day. Dupuy responded, stating that El Paso had authorized, and he had been receiving, $15 per day for computer usage, and questioning Green's reference to a $12-per-day rate. The substance of Green's reply was that tax-related reasons had increased the cost of the reimbursement, requiring an offsetting reduction of $3 per

[1] The Charging Party and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] Unless otherwise indicated, all dates herein are in 2001.

[4] The Respondent stipulated that the employment contracts for all of its right-of-way agents contained the same or similar language. In addition, this language was included in the employment letter sent to Dupuy by the Respondent's coordinator of human resources, Susan Green.

[5] The Respondent had previously employed Lopez. Dupuy knew Lopez and, in fact, had secured his employment on the El Paso Project by contacting Lopez directly.

day. Dupuy responded to Green, and copied Lopez at El Paso, in relevant part as follows:

> By copy of this email to Rick Lopez, I am asking El Paso to offset your surcharge and additional tax burden. Otherwise . . . I will no longer be using my computer for this job . . . , El Paso will have to furnish me with a digital camera, and I will no longer be available by email. . . . After today and until the matter has been resolved, my equipment is offline.

On October 11, by the happenstance of crossed telephone lines, Dupuy and Jesse Green found themselves speaking to one another on the phone. According to Green's credited testimony, he told Dupuy that, although the Respondent had done its best to accommodate him, it seemed that the Respondent could never make him happy and, consequently, the Respondent thought it best to terminate his employment. Dupuy answered that the Respondent could not fire him because he had filed a complaint against the Respondent with a State agency.[6] Green replied that the Respondent had cause to terminate Dupuy, as he had "not lived up to [his] end of the bargain with [the Respondent]." In response to a question from the General Counsel, Green confirmed that his statement regarding Dupuy's "failure to live up to his end of the bargain" was a reference to Dupuy's failure to comply with his contractual agreement—i.e., the confidentiality provision in the temporary employment agreement—not to disclose the terms of his employment to outside parties.

II. JUDGE'S DECISION

The judge dismissed the complaint. First, he found that the confidentiality provision did not violate Section 8(a)(1). Specifically, the judge found that the provision did not prohibit employees from discussing their terms and conditions of employment with one another. He further found that, although the provision *did* restrict the employees' right to discuss their terms and conditions of employment with third party clients, the Respondent proffered a legitimate and substantial business justification[7] that outweighed the restriction on employee rights. Second, the judge concluded that, as the confidentiality provision was not unlawful, the Respondent's termination of Dupuy for violating that provision consequently was not unlawful.

[6] The complaint concerned Dupuy's dispute with the Respondent over his delayed paychecks.

[7] The judge relied on the Respondent's testimony that it is engaged in a very competitive industry, and the wages and reimbursements that it provides to its employees comprise a significant portion of the bids that it submits to potential clients.

III. ANALYSIS

A. The Confidentiality Provision

In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board articulated the following standard for determining whether an employer's maintenance of a work rule violates Section 8(a)(1). If the rule explicitly restricts Section 7 activity, it is unlawful. Id. at 646. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. at 647. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights. Id. at 646.

Applying this standard here, we conclude that the Respondent's confidentiality provision is unlawful because employees reasonably would construe it to prohibit activity protected by Section 7.[8] Specifically, without passing on the judge's finding that the provision does not prohibit interemployee communications, the provision, by its clear terms, precludes employees from discussing compensation and other terms of employment with "other parties." Employees would reasonably understand that language as prohibiting discussions of their compensation with union representatives. See, e.g., *Bigg's Foods*, 347 NLRB 425, 425 fn. 4 (2006); *Cintas Corp*., 344 NLRB 943, 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007). Accordingly, the confidentiality provision is unlawfully overbroad at least in this respect, in violation of Section 8(a)(1).

B. Termination of Employee Dupuy

Under extant Board precedent, an employer's imposition of discipline pursuant to an unlawfully overbroad policy or rule constitutes a violation of the Act. See, e.g., *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006); *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001); *Opryland Hotel*, 323 NLRB 723 (1997); *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436 (1978); *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. 496 F.2d 484 (6th Cir. 1974). As described above, the Respondent's executive vice president, Jesse Green, testified that Dupuy was discharged due to his failure to comply with the confidentiality provision in his employment contract. As we have concluded that the confidentiality provision was unlawfully overbroad, we

[8] In light of this conclusion, we need not address whether the rule is unlawful under *Lutheran Heritage*'s other standards.

accordingly find that the Respondent's termination of Dupuy pursuant to that provision violated Section 8(a)(1) of the Act.[9]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent maintained an overbroad confidentiality rule in its employment contracts, we shall order the Respondent to rescind the rule and notify its employees that the rule is no longer in force. Further, having found that the Respondent unlawfully discharged Jamison Dupuy pursuant to the overbroad confidentiality rule, we shall order the Respondent to offer him reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job. We shall also order the Respondent to make him whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful action, in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), along with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also remove from its files all references to the unlawful discharge of Jamison Dupuy and notify him in writing that it has done so.

In addition, because the Respondent's right-of-way agents—and possibly other employees employed under the Respondent's temporary employment agreement—work in widely scattered locations, it is unlikely that a notice posted at the Respondent's Providence, Rhode Island facility would sufficiently inform those employees about the Board's Order in this case. Accordingly, in addition to our standard notice-posting remedy, we shall also require mailing of the notice. See *Technology Service Solutions*, 334 NLRB 116 (2001) (requiring employer to mail notices to employees who did not regularly report to one of its facilities). Specifically, we shall order the Respondent to mail copies of the notice to all current and former employees employed by the Respondent under its temporary employment agreement (including but not necessarily limited to its right-of-way agents) since July 23, 2001, the date from which the complaint alleged and we have found that the Respondent maintained the overbroad confidentiality provision in its temporary employment agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Northeastern Land Services, Ltd. d/b/a The NLS Group, Providence, Rhode Island, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, in its employment contracts or otherwise, an overbroad confidentiality rule prohibiting employees from disclosing to "other parties" their compensation or other terms of employment.

(b) Discharging or disciplining its employees for violating its unlawfully overbroad confidentiality rule.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the overbroad rule described in paragraph 1(a), and notify employees in writing that this has been done and that the rule is no longer in force.

(b) Within 14 days from the date of this Order, offer Jamison Dupuy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Jamison Dupuy whole for any loss of earnings and other benefits suffered as a result of the unlawful action taken against him, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Jamison Dupuy, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Providence, Rhode Island facility copies of the attached notice marked "Appendix."[10] Copies of the no-

[9] Chairman Schaumber agrees with his colleague that application of *Double Eagle Hotel & Casino* dictates a finding that Dupuy's termination violated Sec. 8(a)(1) of the Act. However, he questions the theory that an employer's imposition of discipline pursuant to an unlawfully overbroad rule is necessarily unlawful, such as in situations where the discipline imposed is for a lawful reason albeit under an overly broad, unlawful rule. Nonetheless, he applies precedent for institutional reasons for the purpose of deciding this case.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed

tice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Duplicate and mail, at its own expense, copies of the notice to all current and former employees employed by the Respondent under its temporary employment agreement (including but not necessarily limited to its right-of-way agents) since July 23, 2001.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED AND MAILED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post, mail, and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain in our employment contracts an overbroad confidentiality rule prohibiting employees from disclosing to "other parties" their compensation or other terms of employment.

WE WILL NOT discharge or discipline employees for violating the above-described confidentiality rule.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind the above-described overbroad rule and advise employees in writing that the rule is no longer in force.

WE WILL, within 14 days from the date of the Board's Order, offer Jamison Dupuy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jamison Dupuy whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Jamison Dupuy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

NORTHEASTERN LAND SERVICES, LTD. D/B/A THE NLS GROUP

Elizabeth Vorro, Esq., for the General Counsel.
Richard Wayne, Esq. (Hinckley, Allen & Snyder), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on May 8, 2002, in Providence, Rhode Island. The complaint herein, which issued on January 16, 2002, and was based upon an unfair labor practice charge and an amended charge that were filed on October 24 and December 17, 2001[1] by Jamison John Dupuy, an individual, alleges that Northeastern Land Services, Ltd. d/b/a The NLS Group (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing an unlawful confidentiality clause in his employment contract, and by terminating him on October 11 for violating the terms of that clause, and to discourage employees from engaging in protected concerted activities.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE FACTS

The Respondent is a temporary employment agency that supplies labor primarily to gas pipeline and fibre optic companies. The work of the employees involved generally relates to rights of way for the contracting company. Dupuy was hired by the Respondent as a right-of-way agent to perform services for Duke Energy in February 2000, and El Paso Energy in July. The usual work of right-of-way agents such as Dupuy was to perform title research to determine who owns the land, perform title abstracts, survey permitting and to negotiate for land

Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2001.

rights, whether easements or fee properties. The normal situation wherein an energy company would need such employees, and obtain them by calling the Respondent or a competitor, would be if it was planning a gas pipeline and had to purchase land or easements. The right-of-way agents perform the legal work and, to a lesser extent, the leg work. These are transitory jobs: "We go where the projects are."

Dupuy was employed by the Respondent on two different occasions; the first period was from February to November 2000. The second period was from about July 23 to October 11. It should be noted that there was a substantial amount of testimony regarding the difficulty that the parties experienced in having a portion of Dupuy's salary direct deposited into one of his bank accounts. Although the cause of this difficulty is unclear, it is clear that the Respondent did not purposely misdirect his direct deposits to punish him for engaging in protected concerted activities. Therefore there will be discussion of this issue only when it leads into a relevant issue.

Dupuy testified that in this field, employment is usual obtained by word of mouth. Somebody told him of the Respondent and he called and was hired to work on a project for Duke Energy in Tennessee and Virginia with one other employee of Respondent, Gene Teague. The work involved assisting in obtaining permits from the counties involved and acquiring temporary space along the roadways for the pipeline. He received a letter dated February 14, 2000 from Susan Green, the Respondent's coordinator of human resources, setting forth the terms of his employment. In addition to a salary of $200 a day and $85 per diem and mileage, it sets forth the medical and dental coverage. Near the end of the letter it states:

> Employee understands that the Employee will have direct access to and contact with NLS' various clients as Employee performs services hereunder and Employee agrees to keep all information obtained or utilized in the course of performing its services strictly confidential. Furthermore, Employee agrees not to solicit work or accept assignments from any of NLS' clients directly while engaged in services hereunder, or for a period of six (6) months after the termination of this agreement. *Employee also understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.* [Emphasis added.]

There were a number of documents that Dupuy received with this letter. A temporary employment agreement listed remuneration and medical and dental benefits as discussed above, and insurance obligations of the employee. In addition, this agreement repeated the confidentiality agreement, verbatim, as set forth above in Green's letter. Dupuy made a few corrections to this agreement, most notably regarding the insurance requirements, and mailed it back to the Respondent. Shortly thereafter, he received a call from Jessie Green, the Respondent's executive vice president and chief operating officer. After discussing these issues, Green acceded to Dupuy's insurance demands and sent him a new temporary employment agreement which he signed. Dupuy also completed a direct deposit form and returned that to the Respondent as well. In November 2000, at about the time that the job was completed, he received a call from someone he knew at Duke Energy telling him that they had another job coming up, and it would involve supervising five to seven employees, but they couldn't pay him any more than he was then receiving. When Dupuy asked why, he said that they were already paying the Respondent supervisor's wages for his and Teague's services. Dupuy then left the area and went out west where he worked as an independent contractor.

In about June, Dupuy returned to Massachusetts and called Teague, who told him that he was working on a pipeline job in Massachusetts. Dupuy then called Rick Lopez, who had been an employee of the Respondent employed at El Paso Energy, but had become an employee of El Paso. Lopez told him that he did not yet have a completed budget for the new job, but told Dupuy to call Susan Green and ask about working at that job. He called her and she told him that as soon as she heard from Lopez, she would call him. He began work on the El Paso Energy job, the Dracut Expansion Project, on July 23. On that day he signed another temporary employment agreement, again setting forth the terms of his agreement with the Respondent and containing the same confidentiality agreement as he executed the prior year.

Between that date and mid-September, Dupuy was having trouble with the direct deposit of his wages, and had a number of telephone conversations with Ann Ingham of the Respondent about it. In mid-September, he spoke to Susan Green and told her that the direct deposit difficulty was causing him a cash flow problem. During his employment with the Respondent the prior year he was receiving a flat per diem of $85 a day, but the hotels there only cost about $600 a month. In Massachusetts, the hotels cost $85 a day. He asked if the Respondent would pay the hotel bill directly, rather than later reimbursing him for the cost. He also asked if it was possible for the Respondent to have "a per diem arrangement" and she said that he should call Jessie Green about that. Shortly thereafter, he received a call from Jessie Green and they discussed the direct deposit problem that they were having, and the possible causes. Dupuy mentioned his cash flow problem caused by the fact that he was paying his hotel bill directly, but not receiving his pay in a timely fashion. He asked if the Respondent could pay the hotel directly and Green said that he couldn't do that. Dupuy then suggested that the Respondent combine the $84 and $33 a day that he was receiving for lodging and meals and give him a per diem of the same amount and Green said that he could not do that. Dupuy then said: "If I can't get paid on time you're going to leave me with no choice but to call Rick Lopez and tell him I'm going to quit because I am not getting paid on time." Green then said that he would call Lopez to see what they could do to ease his difficulty. About 3 or 4 days later Green called Dupuy and told him that he had spoken to Lopez and that they would not change his per diem, nor would they pay his hotel bill directly.

Green testified that he received a call from Dupuy who was upset about the difficulty with the direct deposit of his checks; Green told him that it was a problem that they had been unable to resolve, but they were working to correct the situation. Dupuy then brought up his per diem and whether the Respondent

would change its method of reimbursing him. Green told him that the Respondent's contract was very specific about that. Dupuy said that he used a bank debit card, which means that his payments come out of his account immediately, while the other employers use a credit card, which gives them some time to pay. Green "might have" suggested that Dupuy obtain a credit card. Dupuy requested a per diem of $140 a day and Green said that he would submit this request to the client and ask them if they would be willing to change their contract to accommodate him, which he did, but El Paso refused to do so. Green called Dupuy about a day later and told him of their response.

On October 6, Dupuy called Lopez and told him that his cell phone was not working. During this telephone call, he told Lopez that he was not being paid on time, and he asked Lopez if it would be possible for him to work through another service company. Lopez said that he couldn't do that, but he thought that Dupuy should call Norm Winters of the Respondent to try to straighten out the payroll situation. A day or two later, Dupuy called Winters and told him that he had spoken to Lopez about not being paid on time and that his cell phone was not working. Winters asked him if he told Lopez that he was not being paid on time, and Dupuy said that he did and Winters was upset that he had spoken to Lopez about the pay issue. He told Dupuy that he should call the cell phone company about the phone and Ingham about the direct deposit problem. Dupuy called the cell phone company, but could not straighten it out because he did not have the account number. He called Ingham on the morning of October 9 and told her of both problems, and she said that she would look into it. Later that day, when he spoke to her again, she said that she was too busy to check on his direct deposit, and Dupuy said that the company was in violation of Massachusetts law which requires that employees be paid within 6 days of the end of the pay period and that if he wasn't paid by the next day, he would file a complaint with the Massachusetts Attorney General's office. The money was posted to his account the following day.

Dupuy testified that at a "kick off meeting" for El Paso in about late July he determined that there were some errors in their documents. He called Lopez and told him of the errors. Lopez asked Dupuy to make the changes, and Dupuy said that he didn't mind making the changes, but he would like to be paid for the use of his computer. Lopez said that would not be a problem and in about mid-August, Lopez called him and told him that he and Teague would be reimbursed $15 a day for the use of their computers and digital cameras. Dupuy then called Susan Green and told her what Lopez said, and asked her where to put the charge on the Respondent's timesheet, and she told him what to do, and from that date until about October 1, Respondent reimbursed him $15 a day for the use of his computer. On October 2, Dupuy received an e-mail from Susan Green about some changes in the Respondent's payroll, including reducing the computer allowance to $12 a day. Later that morning Dupuy sent an e-mail to Susan Green asking why the change from $15 to $12 a day. On the following morning she responded that the rate was dropped to $12 a day for IRS and tax reasons. A few hours later Dupuy, as a protest to the $3 reduction in his computer allowance, responded by e-mail to Susan Green, with a copy to Lopez, objecting to the change and stating, inter alia:

> By copy of this email to Rick Lopez, I am asking El Paso to offset your surcharge and additional tax burden. Otherwise, like Dennis Moreau, I will no longer be using my computer for this job and Dal Beck will have to make all the necessary document corrections, El Paso will have to furnish me with a digital camera, and I will no longer be available by email.
>
> After today and until the matter has been resolved, my equipment is offline.

Late in the evening of October 3, Dupuy e-mailed all the people on his project,[2] and Lopez, stating: "Until further notice, my computer is offline and I will not be accepting email. I can still be reached by the contact telephone numbers that you have." Dupuy testified that on Thursday, October 4, or Friday, October 5, Teague told him that Jessie Green was trying to get in touch with him, and that he should call him by 4, but if he could not get in touch with him by then, to call him on Tuesday, as he would be away for the holiday weekend. He testified further, that he did not call Green at that time for a number of reasons: it was after 4 that he got the message from Teague, he was having cell phone problems and he didn't want to spend his money to call Green. On the afternoon of October 11, Ingham faxed Dupuy a handwritten payroll statement which indicates that he was paid $144 for 12 days' use of his computer. Later that day Dupuy faxed Ingham copies of laws of the State of Massachusetts stating that by reducing his computer allowance and not making his direct deposits in a timely manner, the Respondent was violating the laws of the State of Massachusetts.

Dupuy testified that on October 11, at about 6 p.m., he attempted to call a landowner whom he was scheduled to meet with and, as a result of crossed telephone lines, he heard Jessie Green's voice on the phone. They recognized each other's voice and Green told him, "Jamison, we tried our best to accommodate you, but we're going to have to let you go." Dupuy said, "I'm going to have to sue you" and Green said, "We're still going to let you go." Green then mentioned something about Dupuy being rude and there was some back and forth about Dupuy suing the Respondent and Green said that they had cause to fire him. When Dupuy asked what cause, Green said that he signed an employment contract that says that he was not to discuss his wages with other people and he had an e-mail that Dupuy sent discussing his wages with other people. Dupuy ended the conversation by telling Green that he was still going to sue him.

Green testified that beginning on about October 2, he called Dupuy and left messages on his voice mail, with the hotel he was staying at, and with other employees on the project for Dupuy to call him back. The first time that he heard from Dupuy was on October 11, when he answered his cell phone, Du-

[2] An example of the general tenor of Dupuy's testimony is the following from his cross-examination on this point:

> Q. Well, in regard to this memo, was there any reason why you excluded people from the NLS office in Providence?
>
> A. When you use the word "exclude", do you mean—why didn't I include them?

puy was on the other end asking to speak to a woman. When both figured out that they were speaking to each other, Green said that he had been trying to reach him, that the Respondent had been trying to accommodate him in his various requests, but they could never make him happy, and the only way that they could make him happy was by severing their relationship and he was terminating him. Dupuy responded that they couldn't fire him because he filed a complaint against the company with the State of Massachusetts. Green told Dupuy that he was firing him because he had not lived up to his bargain with the company. On cross-examination, Green testified that his attempts to call Dupuy since about October 2 were to tell him that he was being fired:

> Q. Now you—you said that you told him that you were—that he had not lived up to his end of the bargain, am I getting that right?
> A. Yes.
> Q. And was that a reference to his agreement in the contract that he would not disclose the terms of his employment to outside parties?
> A. Yes.

In addition to the confidentiality agreements contained in Dupuy's temporary employment agreements and Susan Green's February 14, 2000 preliminary letter to Dupuy, he also signed an eight paragraph confidentiality agreement with the Respondent on February 16, 2000.[3] This agreement contains eight paragraphs and binds the employee to hold in strict confidence all information obtained by working for the energy company. This confidentiality agreement does not refer to the employee's wages or other conditions of employment.

Jessie Green testified about the confidentiality agreement involved herein, the one contained in Susan Green's February 14, 2000 letter and in his two temporary employment agreements. He authored this provision and it was not meant to prohibit employees from discussing their terms and conditions of employment among themselves. He has overheard Respondent's employees discussing their wages and reimbursements among themselves and he has never disciplined employees for such actions. Green testified that the Respondent is engaged in a very competitive industry and its payments to its employees represents a substantial part of its bidding for contracts. The confidentiality agreement was meant to prevent its employees from dealing directly with its clients regarding terms of their employment. In answer to a question from me as to what Dupuy had done to violate the terms of the confidentiality agreement, Green testified:

> [W]e have very specific billing requirements from our client of what we can bill for and what we can't bill for and when individuals try to circumvent those contractual obligations that we have, of course it creates problems for us and not only that but our client hires us because they don't want these people as employees and when our employees approach our client with their—their problems, then we're not providing the services that we contracted to provide.

He testified further that the Respondent is similar to a glorified Kelly Services. If he contracted with Kelly Services to provide him with employees, he would find it inappropriate for a Kelly employee to approach him and say that she feels that she needs a raise, and if that happened, he would not use Kelly the next time that he needed employees.

III. ANALYSIS

I found Jessie Green to be a totally credible and believable witness herein, and Dupuy to be less credible. Green answered each question briefly, clearly, and directly even when it was not helpful, or was potentially harmful, to the Respondent's case. On the other hand it appeared to me that Dupuy was tailoring his testimony to best assist his case. As stated in footnote 2, above, his answers were rarely brief and direct, and he often explained or expanded on an answer even when not asked to do so. As an example of his lack of candor, in order to explain why he did not return Jessie Green's calls, he testified that he believes that he did not learn of the call until after 4 on October 4 or 5, and the message was that if he could not call by 4, then to call on Tuesday. However, the Tuesday in question was October 9, and the evidence establishes that Dupuy made no attempt to return Green's call even then, and when he finally did contact Green on October 11 it was by mistake, when their telephone lines got crossed. For all these reasons, I credit the testimony of Green over that of Dupuy.

The initial question is whether the clause in the temporary employment agreement is overly broad and in violation of Section 8(a)(1) of the Act. The clause states:

> Employee understands that Employee will have access to and contact with NLS' various clients as Employee performs services hereunder and Employee agrees to keep all information obtained or utilized in the course of performing its services strictly confidential. Furthermore, Employee agrees not to solicit work or accept assignments from any of NLS' clients directly while engaged in services hereunder, or for a period of six (6) months after the termination of this agreement. *Employee also understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.*

It is only the final two sentences above that are alleged to be unlawful. One of the lead cases in this area is *Lafayette Park Hotel*, 326 NLRB 824 (1998), wherein a number of rules contained in the employer's handbook were alleged to be unlawful. The one closest to the instant matter provided that the following was unacceptable: "Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information." The Board, in finding that the provision did not violate the Act, stated that the initial appropriate inquiry in cases such as this is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights:

> We do not believe that employees would reasonably read this rule as prohibiting discussions of wages and working conditions among employees or with a union. Clearly, businesses

[3] It is not clear if Dupuy signed an additional confidentiality agreement for his second term of employment with the Respondent in 2001.

> have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information. Although the term hotel-private is not defined in the rule, employees in our view reasonably would understand that the rule is designed to protect that interest rather than to prohibit the discussion of their wages. Thus, just as employees would not reasonably construe the rule as precluding them from disclosing their wage information in the normal course of events to banks, credit agencies and similar entities, they also would not reasonably construe the rule as precluding them from discussing their wage information with other employees.

In *Super K-Mart*, 330 NLRB 263 (1999), the rule in question barred the disclosure of "company business and documents." The Board stated that this provision was similar to the restriction in *Lafayette Park,* supra, in that it did not prohibit employees from discussing wages and working conditions. The Board stated: ". . . employees reasonably would understand from the language of the Respondent's confidentiality provision that it is designed to protect the Respondent's legitimate interest in maintaining the confidentiality of its private business information, not to prohibit discussion of wages or working conditions." The Board found that the provision did not violate the Act because it ". . . reasonably is addressed to protecting the Respondent's legitimate confidentiality interest and does not implicate employee Section 7 rights. . . ." In *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976), the court found that once it is determined that an employer's conduct adversely affects employees' protected rights, the burden is then on the employer to establish "legitimate and substantial business justification" for its conduct.

In a more recent case, *Caesar's Palace*, 336 NLRB 271 (2001), based upon the contents of an anonymous letter alleging that illegal activity including drug dealing, stolen company property, and threats to the lives of employees was occurring at the employer's premise, the employer began an investigation of the allegations and notified all employees questioned that they were prohibited from discussing the investigation with fellow employees. The employer fired two employees for violating this rule. The Board agreed with the judge that the employees had a Section 7 right to discuss discipline and disciplinary investigations of other employees and that this rule adversely affected that right, but stated:

> It does not follow however that the Respondent's rule is unlawful and cannot be enforced. The issue is whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweighs the Respondent's asserted legitimate and substantial business justifications.

The Board stated that it is necessary to strike a proper balance between employees' Section 7 rights and an employer's business justifications. Because of the alleged illegal drug activity, the threats of violence and alleged management cover-up in the work place, the Board found that the rule sought to ensure that witnesses were not put in danger, that evidence was not destroyed and testimony was not fabricated. The Board found that this was a substantial and legitimate business justification for the rule and outweighed the rules' infringement on employees' Section 7 rights. However, in *Phoenix Transit System*, 337 NLRB 510 (2002), the issue was the legality of a rule prohibiting the company's employees from discussing among themselves sexual harassment complaints against a supervisor. A year and a half later, an employee and union officer wrote articles in the union newspaper about the sexual harassment allegations and was fired for violating the rule prohibiting discussion of the issue. In finding that the rule against discussing the sexual harassment allegations and the discharge that resulted from the violation of the rule violated the Act, the Board distinguished *Caesar's Palace,* supra, stating that the rule prohibited employees from speaking among themselves and outsiders, and that the company had failed to establish a legitimate and substantial justification for the rule. In *Waco, Inc.*, 273 NLRB 746, 748 (1984), the Board, in deciding that by admonishing its employees not to discuss their wages among themselves the employer violated Section 8(a)(1) of the Act, stated:

> In assessing the lawfulness of the Respondent's rule, we are not concerned with the subjective impact of the rule on particular employees. Instead, we must determine whether the rule reasonably tended to coerce employees in the exercise of their Section 7 rights, and, if so, whether the employees' Section 7 rights are outweighed by any legitimate and substantial business justification for the rule. [Footnotes omitted.]

A reading of the rule herein convinces me that it restricted employees from discussing their terms of employment, including compensation, with anybody other than those employed by the Respondent. It does not restrict employees from discussing their terms of employment with other of Respondent's employees. I say this because the provision says that the terms of their employment are confidential to "Employee and the NLS Group" and that disclosure "to other parties" may be grounds for dismissal. In addition, Green testified that he has observed Respondent's employees discussing their wages and reimbursements among themselves and has not taken any action against them.

The initial question is whether restricting its employees' right to discuss the terms of their employment, including compensation, reasonably tended to coerce them in the exercise of their Section 7 rights. As counsel for the Respondent stresses in his brief, there was no restriction of the employees' ability to discuss, amongst themselves, their conditions of employment, including compensation. Whereas discussions with fellow employees constitutes the principal and most effective means of protected concerted activities, it is not the only means. Employees have a protected right (with some limits) to discuss their conditions of employment with outsiders as well. For example, in *Kinder Care Learning Centers, Inc.*, 299 NLRB 1171 (1990), the Board found that a prohibition on discussing terms and conditions of employment with parents of the children at the school violated the Act, and in *Handicabs, Inc.*, 318 NLRB 890 (1995), the Board similarly found a violation in a prohibition of discussing complaints or employment problems with its clients, who were "vulnerable adults," senior and disabled persons. The reason is simply that the Board has long found such

communications with third parties (as long as they aren't disloyal, reckless, or maliciously untrue) to be protected and therefore an employer cannot prohibit such communications without a sufficient reason. I therefore find that the Respondent's rule reasonably tended to coerce its employees in the exercise of their Section 7 rights. However, I find that there are different gradations in how seriously employees' Section 7 rights are affected by an employer's actions and because the Respondent did not prohibit discussions of terms and conditions of employment among fellow employees, I find the Respondent's restriction a less serious infringement upon its employees' Section 7 rights. The final issue therefore is whether the Respondent had a legitimate and substantial business justification for prohibiting its employees from discussing the terms of their employment, including compensation, with individuals who were not employed by the Respondent, and whether this right outweighed the restriction on the employees' Section 7 rights.

Green testified that the rule was instituted because of the competitive nature of the industry and that the wages and reimbursements to its employees are a substantial part of its bidding for contracts. In *International Business Machines Corp.*, 265 NLRB 638 (1982), the Board found that even though the employer's policy of classifying its wage information "muzzled" its employees by denying them this information to disseminate, thereby adversely affecting their Section 7 rights, it did not violate the Act. The employer did not bar its employees from compiling their own wage information, nor did it prohibit its employees from discussing their wages. The administrative law judge found that the employer operated this secret or "closed salary" basis for business and competitive considerations. He stated further:

> The General Counsel attempts to impugn these objectives, but it is unnecessary to answer each point specifically. It should be sufficient to say that the Board may not substitute its business judgment for that of Respondent, merely because it may be arguable that another approach is equally sound. On the other hand, a specious argument may be subject to attack if, by reason of other evidence, Respondent's alleged justification is patently false.

Based upon all of the facts herein, and especially the fact that the rule in question does not prohibit the Respondent's employees from discussing their terms of employment among themselves, I find that the Respondent had a legitimate and substantial business justification for the rule outweighing the restriction on the employees' Section 7 rights. In common with *Lafayette Park,* supra, the Respondent had ". . . a substantial and legitimate interest in maintaining the confidentiality of private information," in this situation, the compensation and reimbursements that it provided to its employees who were employed by its clients. In addition, even though the business justification for the rule is not as strong as in *Caesar's Palace,* supra, in striking a balance between it and the minor infringement of its employees' Section 7 rights, the Respondent's business justification prevails herein. I therefore recommend that the allegation that the confidentiality clause violates Section 8(a)(1) of the Act be dismissed and that the allegation that Dupuy was terminated unlawfully also be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Northeastern Land Services, Ltd. d/b/a The NLS Group, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent did not violate Section 8(a)(1) of the Act by maintaining and enforcing its confidentiality rule or by terminating Jamison Dupuy, as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]