

Review of Compliance Actions

Report No. OIG-AMR-35-03-02

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INSPECTOR GENERAL

NATIONAL LABOR RELATIONS BOARD

WASHINGTON, DC 20570

March 20, 2003

I hereby submit a Review of Compliance Actions, Report No. OIG-AMR-35-03-02. This review was conducted to evaluate information utilized to manage compliance with orders issued by the National Labor Relations Board (NLRB or Agency) and evaluate compliance activity in Regional offices.

Board orders were generally recorded in monthly compliance reports in a timely manner and cases were correctly classified for impact analysis. Compliance reports generally contained accurate data, with a few exceptions. Each of the four Regions reviewed, generally, pursued achieving compliance with Board orders in accordance with stated Agency policies.

As of September 30, 2002, there were 443 formal compliance cases active in the Regions. A majority of NLRB's overage cases are excused and the Agency's overage situation is not fully disclosed. In FY 2001 and FY 2002, just over 70 percent of the cases in the four Regions reviewed were not completed within the Agency's established operational goals. The percentage of unexcused cases increased from 3 percent in FY 2001 to 10 percent in FY 2002, but a large number and percentage of overage cases were not included in the overage rate.

The 3 percent rate did not reflect that compliance actions in an additional 69 percent of the cases were similarly not completed in a timely manner. In actuality, 72 percent of the monthly compliance cases in the four Regions were not completed within the Agency's established operational goals. The FY 2002 percentage of overage cases to pending cases showed almost no difference from the FY 2001 numbers at just over 70 percent.

NLRB's monthly compliance reports did not provide sufficient information to allow for an informed determination as to why compliance actions were not completed within the Agency's established timeframes and why cases should be excused. Review of FY 2001 compliance reports in the four Regions disclosed that in nearly half of the cases reviewed, the Division of Operations-Management did not have adequate information in monthly Regional justifications to evaluate whether an excuse was warranted; nevertheless, 69 percent of overage cases were excused. In FY 2002, 53 of the 99 cases (53 percent) reviewed did not have adequate information for Operations-Management to excuse the overage case; nevertheless, 61 percent of overage cases were excused.

We recommend that the Associate General Counsel include all compliance cases in external reports or modify external reporting to fully disclose that the overage compliance rate does not include all overage compliance cases. We also recommend that he inform appropriate officials to adhere to the Compliance Manual when determining whether to excuse overage compliance cases and maintaining contact with discriminatees and settling cases.

An exit conference was conducted on February 6, 2003, with representatives from the Division of Operations-Management and the Contempt Litigation and Compliance Branch. A draft report was sent to the Division of Operations-Management Associate General Counsel and the Contempt Litigation and Compliance Branch Acting Assistant General Counsel on February 14, 2003 for review and comment. Management's comments are presented in their entirety as an appendix to this report.

Generally, management agreed with our findings and recommendations related to the reporting of compliance cases and compliance actions. Operations-Management met with staff to emphasize the importance of adhering to the Compliance Manual when scoring monthly compliance reports, developed a draft memorandum regarding the scoring of compliance reports, and added language to a draft performance report that states that the overage compliance rate does not include all overage compliance cases.

Management did not agree that a Region has not accurately completed the compliance report if it listed the same or similar excuse for a number of consecutive months. Management also disagreed with our conclusion and the related recommendation that Operations-Management should not excuse cases reported in a manner that does not fully comply with the Compliance Manual. We believe that our recommendation to not excuse cases without complete information is valid and, if adopted, will increase the integrity of data used to manage cases.

Jane E. Altenhofen
Inspector General

BACKGROUND

The National Labor Relations Board (NLRB or Agency) administers the principal labor relations law of the United States, the National Labor Relations Act (NLRA) of 1935, as amended. The NLRA is generally applied to all enterprises engaged in interstate commerce, including the United States Postal Service, but excluding other governmental entities as well as the railroads and the airline industries. The Fiscal Year (FY) 2003 appropriation authorizes 1,904.8 full-time equivalents that would be located at Headquarters, 51 field offices throughout the country, and three satellite offices for Administrative Law Judges. NLRB received an appropriation of \$238,982,000 for FY 2003, less an across-the-board reduction of .65 percent, leaving a net spending ceiling of \$237,428,617.

In FY 2000, the last year that published figures are available, the Board issued approximately 530 unfair labor practice decisions, which are the source of formal compliance cases. Compliance involves carrying out remedial action as: agreed upon by the parties in writing; recommended by the administrative law judge in the decision; ordered by the Board in its decision and order; or decreed by the court.

Achieving compliance necessitates the following tasks by the Regions: assessing appropriate remedies, maintaining contact with the discriminatees and other parties, and securing and monitoring actual compliance. A Compliance Officer mostly performs these functions. Depending on the caseload and resources available, the Compliance Officer may be assisted by Board Agents and other staff on a full or part-time basis. A Supervisory Compliance Officer may

also supervise Agents performing non-compliance type work such as investigating unfair labor practices or conducting elections.

Compliance statistics are prepared by Regional Offices (Region or RO) and scored by the Division of Operations-Management (Operations-Management). These statistics incorporate the Agency's Impact Analysis program that categorizes cases based on their potential impact on the public and their significance in achieving the NLRB's mission. Cases are designated as Category III, II, and I with time standards of 91, 119, and 147 days depending on the remedial action in the Board or court order. A system for excusing overage cases was developed to acknowledge that there are valid reasons that cases cannot be completed within operational time goals but, based on the circumstances, the case is being processed in a timely manner. These include cases in bankruptcy, with a schedule of installment payments, with initial bargaining orders, and being held open due to related charges. As of September 30, 2002, there were 443 formal compliance cases active in the Regions, of which 320 were overage.

OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives of this audit were to evaluate information utilized to manage compliance with Board orders and evaluate compliance activity in the Regions. We conducted the audit at NLRB Headquarters and the following Regional Offices: Region 4 - Philadelphia, Region 8 - Cleveland, Region 12 - Tampa, and Region 32 - Oakland.

COMPLIANCE REPORTING

Board orders issued in FY 2001 were traced to monthly compliance reports to determine whether the reports included all Board order cases. We evaluated FY 2001 compliance reports to determine whether cases were correctly classified for impact analysis, cases exceeding established timeframes were appropriately reported, and corroborating information was reviewed to support cases identified as being out of the Region's control, thus not included in the performance statistics. We also evaluated the total cases used to calculate the percentage of overage compliance cases in FY 2001 for the four Regions visited and four additional Regions: Region 3 - Buffalo, Region 10 - Atlanta, Region 28 - Phoenix, and Region 31 - Los Angeles.

We reviewed FY 2001 and FY 2002 compliance reports for the number of excused overage compliance cases and the explanations provided to determine whether Operations-Management had sufficient information to excuse the case. We also reviewed Operations-Management scoring of monthly compliance reports and the responsiveness of Regional Offices to requests for additional information from Operations-Management.

COMPLIANCE ACTIONS

We reviewed files for cases closed during FY 2001 to evaluate actions taken in Regional Offices to achieve compliance and to determine whether they were performed in accordance with Agency policy. We reviewed nine cases in Region 4 and five cases each in Region 8, Region 12, and Region 32.

We evaluated actions taken to maintain contact with discriminatees and respondents. We determined whether backpay was calculated in accordance with Agency policy. We reviewed actions taken to protect backpay for cases that involved respondents in bankruptcy or claiming an inability to pay. We determined whether the remedy the Region achieved was consistent with the Board or court order and steps taken and results achieved were documented.

This audit was performed in accordance with generally accepted government auditing standards during the period October 2001 through March 2003.

FINDINGS

Compliance reports generally contained accurate data, but we identified one Region that did not move data from Section II of the compliance report to Section I of the compliance report when established timeliness goals were exceeded, and

two Regions included cases recorded in Section III (outside the Region's control) of the compliance report in the total number of cases used to calculate the overage rate. The overage rate excludes most overage cases that are active in the Regions. The Agency's monthly compliance status reports did not provide sufficient information to allow for an informed determination as to why compliance actions that were not completed within the Agency's established timeframes should be excused.

Generally, each of the four Regions reviewed pursued achieving compliance with Board orders in accordance with stated Agency policies. We did, however, identify one Region that did not perform functions identified in the Compliance Manual to maintain contact with discriminatees and settled two cases for less than 80 percent of the amount due without proper approval from Operations-Management.

COMPLIANCE REPORTING

Report Accuracy

The Regions are required to prepare monthly compliance reports that present data on compliance cases in three sections. Section I includes cases that exceeded established operational time goals (overage), includes a brief status on each case, and a request that the case be excused if circumstances warrant. Section II includes cases that are within operational time goals (timely). Section III includes cases that are pending at Headquarters, including the Division of Enforcement Litigation or the Division of Advice, and are not under the control of the Region. The overage rate is based on the number of cases in Sections I and II of the report.

Generally, Board orders were recorded in monthly compliance reports in a timely manner, correctly classified for impact analysis, and accurately reported in correct Sections of the report. Compliance reports generally contained accurate data, with a few exceptions:

- Region 3 and Region 28 incorrectly included cases recorded in Section III in the total number of cases used to calculate the overage rate, thereby understating their overage rate throughout FY 2001.
- Region 8 did not move 5 of the 20 (25 percent) cases from Section II to Section I of the compliance report until the month after time goals were exceeded. Operations-Management confirmed that the cases should have been reported in Section I of the report in the month in which the case became overdue.
- Region 28 did not report any overage compliance cases even though it had 11 overage cases that would have been reported 75 times in the 12 monthly reports. The table below contains a summary of the original reports and reclassified figures based upon our analysis.

| | Section I | Section II | Section III | Total |
|-----------|-----------|------------|-------------|-------|
| Reported | 0 | 32 | 141 | 173 |
| Corrected | 75 | 27 | 70 | 172 |

Note: The total reported cases included an extra case due to a math error.

Reporting cases in the wrong section should no longer occur. The Case Activity Tracking System (CATS) began generating reports in FY 2003 based on the electronic database.

Overage Compliance Rate

GC Memorandum 98-4, *Impact Analysis for Compliance Cases* (February 20, 1998) requires that compliance actions be completed in 91/119/147 days based on whether cases are Category III, II, or I. Cases that exceed these goals are overage and are either excused or unexcused. The overage rate is the number of unexcused cases divided by the number of pending cases in the Region (as identified in Sections I and II of the compliance report).

The overage rate excludes a large number of overage cases in the Regions. The four Regions reviewed reported a 3

percent overage rate for FY 2001. The rate did not reflect that compliance actions in an additional 69 percent of the cases were similarly not completed in a timely manner. In actuality, 72 percent of the monthly compliance cases in the four Regions were not completed within the Agency's established operational goals.

A majority of NLRB's overage cases are excused; therefore, the Agency's overage situation is not fully disclosed. In FY 2001 and FY 2002, just over 70 percent of the cases in the four Regions reviewed were not completed within the Agency's established operational goals. The percentage of unexcused cases increased from 3 percent in FY 2001 to 10 percent in FY 2002, but a large number and percentage of overage cases were still not included in the overage rate.

The overage rate shown in Budget and Government Performance and Report Act (GPRA) reports excludes a large number of overage cases. FY 2003 Budget Justification and FY 2003 GPRA Annual Program Performance Plan only included unexcused cases and not the percentage of excused cases as discussed previously. The FY 2003 Budget Justification specifically states that the Agency's goal for formal compliance cases (Goal 2-11) was to "Allow no overage compliance cases to exceed processing time targets ..." Even though over 70 percent of the compliance cases in the 4 Regions reviewed were overdue, the Agency's GPRA plan calls for additional reductions in the number of days to process compliance cases. The following targets were provided in the FY 2003 Annual Program Performance Plan and FY 2001 Annual Performance Report:

| Category | FY 2002 | FY 2006 |
|----------|----------------|----------------|
| III | 91 days - 91% | 91 days - 95% |
| II | 119 days - 88% | 91 days - 88% |
| I | 147 days - 90% | 119 days - 90% |

According to Operations-Management, the Agency's management philosophy has always been to establish time targets for required actions and this is an attempt to improve on those standards. The official noted that Regions have risen to the challenge when this was done. Proposals to reduce the processing time targets and then excusing a majority of overage compliance cases would achieve little in terms of assisting the Agency in completing formal compliance actions in a timely manner.

In addition, the GPRA FY 2001 Annual Performance Report provided NLRB accomplishments for the percentage of cases that met time goals as follows:

| Category | FY 2001 Actual | FY 2000 Actual | FY 1999 Actual |
|----------|----------------|----------------|----------------|
| III | 95.3% | 89.6% | 90.2% |
| II | 96.9% | 87.1% | 85.7% |
| I | 98.5% | 92.0% | 90.9% |

The FY 2001 GPRA Annual Performance Report and FY 2003 Budget Justification do not provide any information on the large number of overage cases that are excused. Further, no mention or reference that NLRB has a system for excusing overage compliance cases is in either the Agency Budget Justification or GPRA Report. Thus, the Agency's reports did not fully disclose the NLRB's actual overage compliance situation.

Overage Case Justifications

Section 10674 of the Compliance Manual states, "The explanation provided in a footnote for each case in the monthly compliance status report should provide sufficient information to allow for an informed determination by the Statistical Services Unit and/or the Division of Operations-Management as to whether an excuse is warranted. The footnotes should be reviewed and updated in each monthly report to reflect actions taken to secure compliance during the month."

The Compliance Manual gives examples of explanations for various situations that would generally constitute a basis for excusing an overage case. In many cases, specific dates are required to be given for certain actions justifying

overages. These examples include cases involving: bankruptcy proceedings, backpay distribution in installments, guidance or clearance from Operations-Management or Division of Advice, and newly filed charges alleging noncompliance or new violations.

NLRB's monthly compliance reports did not provide sufficient information to allow for an informed determination as to why compliance actions were not completed within the Agency's established timeframes and why cases should be excused. Review of FY 2001 compliance overage reports in the four Regions disclosed that in 43 of the 91 (47 percent) cases reviewed, reports did not provide adequate information to permit an evaluation of whether an excuse was warranted; nevertheless, 69 percent of overage cases were excused. In 53 of the 99 cases (53 percent) reviewed for FY 2002, reports did not have adequate information for Operations-Management to excuse the overage case; nevertheless, 61 percent of overage cases were excused.

The Regions provided the same or similar excuse for 4 to 12 months justifying overages, did not timely update the status of compliance actions when requested by Operations-Management, and/or did not provide specific dates required in the overage justifications. In a majority of these cases, Operations-Management excused the overage.

Analysis of Insufficient Information

| Reason | FY 2001 Cases | FY 2002 Cases |
|--------------------------|---------------|---------------|
| Sufficient information | 48 (53%) | 46 (47%) |
| Insufficient | 43 (47%) | 53 (53%) |
| Same/similar excuse | 17 | 7 |
| No update when requested | 1 | 8 |
| No required date | 0 | 10 |
| Combination of reasons | 25 | 28 |
| Total | 91 (100%) | 99 (100%) |

The statistics shown above were generated by a system relying on hard copy reports prepared by Regional Office personnel. The reports were sent to the Statistical Services Unit, which compiled the reports and provided them to Operations-Management for scoring. According to Operations-Management, reports were not provided in a timely manner and several monthly reports were frequently received at one time, negatively impacting their ability to provide timely feedback to the Regions. Without timely feedback, Regions were unaware that reporting issues identified above needed to be addressed.

Operations-Management did not have Regions redo reports that were several months old because that would not be a sound use of resources and excused cases based on verbal information provided by the Regions that supplemented the monthly reports.

In October 2002 CATS was used to automated the process. CATS reports are electronically generated based on the electronic database and are available online by the officials in Operations-Management who score the reports. CATS was designed with features to assist in scoring monthly compliance reports. Features include screens that display the Region's prior month justification as to why the case should be excused, the scoring official's narrative response, and whether the case was excused. CATS also provides the Regions with the scoring officials' current month narrative information and whether or not the case was excused. The Regions then have an opportunity to provide additional information justifying the excuse before the final scoring is performed.

Same/similar excuse

In FY 2001, 42 of the 91 cases (46 percent) had the same or similar excuse for 4 to 12 months. In FY 2002, the number of overage cases with the same or similar excuse for 4 to 12 months decreased to 29, or 29 percent of the cases. The tables below also show that the percentage of excused cases with the same or similar excuses for more than 8 months

decreased from 26 percent of the cases in FY 2001 to 8 percent in FY 2002.

FY 2001 Overage Cases

| | Number of Months with the Same or Similar Excuse | | | | | | | | |
|--------------------|--|-----|-----|-----|-----|-----|-----|-----|-----|
| | 12 | 11 | 10 | 9 | 8 | 7 | 6 | 5 | 4 |
| Cases | 16 | 2 | 2 | 3 | 0 | 2 | 4 | 9 | 4 |
| % with same excuse | 18% | 2% | 2% | 3% | 0% | 2% | 4% | 11% | 4% |
| Cumulative % | 18% | 20% | 22% | 25% | 25% | 27% | 31% | 42% | 46% |

FY 2002 Overage Cases

| | Number of Months with the Same or Similar Excuse | | | | | | | | |
|--------------------|--|----|----|----|----|-----|-----|-----|-----|
| Months | 12 | 11 | 10 | 9 | 8 | 7 | 6 | 5 | 4 |
| Cases | 1 | 2 | 0 | 1 | 4 | 8 | 4 | 6 | 3 |
| % with same excuse | 1% | 2% | 0% | 1% | 4% | 8% | 4% | 6% | 3% |
| Cumulative % | 1% | 3% | 3% | 4% | 8% | 16% | 20% | 26% | 29% |

Updated status

In 18 of the 91 cases (20 percent) in FY 2001, the Region did not provide a timely update on the status of compliance actions when specifically requested by Operations-Management. In these cases, Operations-Management had requested updates from 1 to 6 different months but continued to excuse the overage even when updates were not forthcoming.

According to Operations-Management, the Regions likely did not timely update the status of compliance actions when requested by Operations-Management because they did not always receive Operations-Management's comments from prior months in a timely manner. According to officials, there were time periods during FY 2001 when Operations-Management would receive two or three monthly compliance status reports from Statistical Services at the same time and the reports would be all scored and returned to the Regions at the same time. The officials also stated that they would often excuse overage cases, with the same written excuse, because oral updates had been provided by the Region.

The lack of Operations-Management comments does not preclude Regions from taking the initiative to update their compliance efforts when they have not done so in months. In most cases, Operations-Management did not ask for updates unless the same excuse had been given for numerous months, as indicated by the fact that in FY 2001, 46 percent of the cases had the same or similar excuse for 4 to 12 months and 18 percent of these cases were not updated for the entire year. When Operations-Management obtained oral updates from the Regions to excuse cases, these additional compliance actions needed to be documented in the Region's reports for the following month as required by Section 10674 of the Compliance Manual.

Specific dates

In 14 percent of the cases in FY 2001 and 27 percent of the cases in FY 2002, justifications did not include specific dates as required by the Compliance Manual and/or OM-13 guidance. Specifically, dates were not provided for when (1) cases were referred to Operations-Management or Contempt Litigation and Compliance Branch for advice or clearance, (2) proof of claims under bankruptcy proceedings were filed, (3) charges were filed for related violations, or (4) backpay is being paid in installments. Operations-Management would usually excuse an overage case even when the Region did not provide a date specifically required by Section 10674 of the Compliance Manual. OM 02-102, Guide to Statistical Reports Generated in the Agency's Case Activity Tracking System, was issued on September 18, 2002, and contains instructions to address the data reporting issues identified.

Although obtaining compliance with Board orders and court judgments is a critical part of the Agency's mission, there are factors beyond the Agency's control that can block timely compliance. Of the 91 cases reviewed in FY 2001, compliance was blocked in 18 cases (20 percent) by bankruptcy proceedings and another 11 cases (12 percent) by related charges. Of the 99 cases reviewed in FY 2002, 18 cases (18 percent) were in bankruptcy and 13 cases (13 percent) were open due to related charges. Additional issues that can block timely compliance include early bargaining orders, installment payments, and missing discriminatees. In these situations, Regions are still required to periodically update the status of these cases with a bankruptcy court or check the status of the related charges pending against the respondents. According to Operations-Management, bankruptcy cases should ideally be updated quarterly.

The Regions must take the initiative to secure compliance in overage cases and to update those actions in the monthly compliance status reports. Similarly, Operations-Management must follow established Agency procedures in determining whether an excuse is warranted. When over 60 percent of overage compliance cases are excused, sufficient information must be available in writing to adequately justify and document Agency decisions.

Unexcused Cases

Compliance case accomplishments are a factor used in rating a Regional Director's effectiveness and efficiency of performance for the year. The performance standard is that the number of unexcused overage compliance cases not exceed 10 percent. Specifically, this performance standard states:

COMPLIANCE CASES WITHIN CONTROL: This assessment will be based upon the Region's success in meeting the General Counsel's Impact Analysis standards for Compliance (If the Regional Director meets the standard for Category III cases and the standard for either Category II or Category I, with no significant deficiency in the other the standard will be met).

Our review of FY 2001 overage cases in four Regions showed that for 47 percent of the cases, reports did not document information required by the Compliance Manual to allow for an informed determination as to whether an excuse was justified. This raises a question as to the validity of the data and Regional Director performance ratings.

According to Operations-Management, the overage rate decreased since they assumed the responsibility for scoring the reports in May 2000 because they accepted oral Regional updates to supplement information provided in the reports, which provided them information used to excuse the case. For example, Operations-Management would excuse a case in bankruptcy if they were informed orally that it was updated quarterly even though the written case justification had the same excuse for an entire year with no indication of such actions. Operations-Management would usually excuse an overage case even when the Region did not provide a date specifically required by Section 10674 of the Compliance Manual. In both of these situations, minimal efforts would be required to update the monthly reports to be in full compliance with Agency policy.

Because the unexcused overage percentage data is used as a standard for evaluating Regional Director annual performance and included in GRPA reports to OMB and Congress during the Agency's annual budget justifications, it is imperative that the reported figures are supportable and fully documented and derived based on the Agency's established procedures. Otherwise, Regional Directors could possibly achieve their performance standard undeservingly, perhaps receiving a performance award, and compliance accomplishments reported to OMB and Congress could be overstated.

Management's Comments and OIG Response

Generally, management agreed with our findings and recommendations related to the reporting of compliance cases. Operations-Management met with staff to emphasize the importance of adhering to the Compliance Manual when scoring monthly compliance reports, developed a draft memorandum regarding the scoring of compliance reports, and added language to a draft GPRA report that states that the overage compliance rate does not include all overage compliance cases.

Management did not agree that a Region has not accurately completed the compliance report if it listed the same or

similar excuse for a number of consecutive months. Our conclusion was not that the report was inaccurate, but that sufficient information was not available to excuse the case. Also, section 10674 of the Compliance Manual states that the footnotes describing the excuse should be reviewed and updated in each monthly report to reflect actions taken to secure compliance during that month. If no action had been taken Regions could so state.

Management also disagreed with our conclusion and the related recommendation that Operations-Management should not excuse cases reported in a manner that does not fully comply with the Compliance Manual. Operations-Management stated it could excuse cases based on discussions with the Region and does not require Regions to rewrite reports. This may have been understandable in the prior reporting system, but not in CATS that currently generates the compliance reports. CATS was designed to allow Operations-Management to provide Regions with feedback regarding excuses and an opportunity to make changes before the final scoring of monthly compliance reports. This feature provides an efficient way to communicate and should eliminate the need to rely on undocumented discussions to excuse a case.

COMPLIANCE ACTIONS

Each of the four Regions reviewed, generally, pursued achieving compliance with Board orders in accordance with stated Agency policies. Casehandling files contained detailed notes or memoranda documenting efforts to achieve compliance. Backpay was calculated in accordance with Agency policy and files contained appropriate supporting documentation. Files documented the receipt and distribution of backpay and other affirmative provisions of Board orders such as offering reinstatement, removing from files references to unlawful discharge, and posting of notices. We did, however, identify one Region that did not perform functions identified in the Compliance Manual to maintain contact with discriminatees and settled two cases for less than 80 percent of the amount due without approval from Operations-Management.

Section 10540.2 of the Compliance Manual identifies Agency policy for maintaining contact with discriminatees, who are described as the fundamental source of information regarding interim earnings and adjustments to gross backpay needed to determine net backpay. The Compliance Manual states that the following forms should be sent to all identified discriminatees at the time the Region issues a complaint or administratively determines that a charge has merit:

- NLRB-916 -- Backpay Claimant Identification,
- NLRB-4180 -- Authorization to Social Security Administration to Furnish Employment and Earnings Information,
- NLRB-4288 -- Information on Backpay for Employees,
- NLRB-4685 -- Notification of Change of Address,
- NLRB-5224 -- Claimant Expense and Search for Work Report.

Of the five cases reviewed in Region 32, four cases had employees as the discriminatee and none of the case files contained documentation that the above-listed forms were mailed to discriminatees. A quality review report issued by Operations-Management on August 6, 2001 notes that in response to issues raised, the Region intends to make it a regular practice to send an alleged discriminatee, at the time a complaint issues, appropriate forms to assist in documenting expenses and search for work. The Supervisory Compliance officer said that forms are not routinely sent to discriminatees due to more pressing tasks and that he achieves results without them.

Section 10564 of the Compliance Manual provides Regional Directors the authority to accept settlements of backpay without Operations-Management authorization when a series of conditions are met. These include that the backpay computation is based on an appropriate method and the backpay settlement is at least 80 percent of full backpay due. In two of the cases reviewed, the Region settled a case for less than 80 percent without authorization from Operations-Management.

In the first case, the file contained a letter to discriminatees informing them that the latest backpay calculation was about \$2.4 million and that the tentative settlement was for \$1.6 million. The case was eventually settled for \$1.6 million. The file did not contain a calculation in support of the \$2.4 million or authorization from Operations-Management even though the settlement was for 66 percent of the claimed amount due.

In the second case, a settlement for 48 percent of the amount due was accepted without authorization from Operations-Management. The latest calculation available identified backpay due of \$1,337,392.08 and interest of \$495,120.41 for a total of \$1,832,512.49. The case settled for \$876,500.

Management's Comments and OIG Response

Management agreed with our conclusions that Region 32 accepted settlements of less than 80 percent of the amount due and should have contacted Operations-Management for approval, and that the Region should have been following Agency procedures for maintaining contact with discriminatees. Management discussed these issues with the Regional Director and Supervisory Compliance Officer.

AUDIT FOLLOW-UP

We issued two audit reports with recommendations applicable to this audit. Audit Report OIG-AMR-17, *Review of the Quality Control Program Over Casehandling*, March 29, 1995, recommended that Operations-Management include backpay in the criteria used to select cases for quality review and that they utilize the information system to generate lists of closed cases to be reviewed. Audit Report OIG-AMR-25, *Audit of Backpay*, September 14, 1998, recommended that Operations-Management assess backpay calculations and the accuracy of closed case reports in their annual review of closed cases. Operations-Management has implemented these recommendations.

RECOMMENDATIONS

We recommend that Operations-Management Associate General Counsel:

1. Include data on all compliance cases in external reports. If not, modify external reporting to fully disclose that the overage compliance rate does not include all overage compliance cases.
2. Inform officials responsible for scoring monthly compliance reports to adhere to the Compliance Manual when determining whether or not to excuse overage compliance cases.
3. Select a date on which no excuses will be granted without all information required by the Compliance Manual.
4. Inform field office personnel responsible for performing and managing compliance activities that they are to adhere to Agency policies including those for maintaining contact with discriminatees and settling cases.

APPENDIX

UNITED STATES GOVERNMENT National Labor Relations Board

Memorandum

TO: Jane E. Altenhofen
Inspector General

FROM: Richard A. Siegel
Associate General Counsel

DATE: March 18, 2003

SUBJECT: Draft Report "Review of Compliance Actions" OIG-AMR-35

Thank you for the opportunity to respond to the draft report of the "Review of Compliance Actions".

Initially, as indicated in our exit conference on February 6, 2003, this review covers a system that for all practical purposes is no longer in place. Many of the flaws that you found in the compliance program have been addressed by the Case Activity Tracking System (CATS).

We are very pleased with the report's finding that compliance reports generally contained accurate data and that each of the four Regions reviewed pursued achieving compliance with Board orders in accordance with stated Agency policies. This is a significant endorsement of the field's work in the compliance area.

BACKGROUND

Under the old system, all regions were to submit Compliance Reports to Statistical Services on a monthly basis. Primarily because of staffing issues in Stat Services, the reports were consistently delivered to Operations-Management two to three months after the Regions had submitted them. The scoring used to be completed by personnel in Statistical Services, then the Contempt Branch and most recently the Division of Operations. The scoring would indicate whether an overage case was "excused" as beyond the control of the Region. During the scoring process, the Division of Operations managers would discuss the cases with regional personnel. Often these discussions would be over reports that had been submitted several months before. These discussions supplemented the written reports. Often the information on the reports had been superseded by later filed reports. After the reports were scored, a process that took 5-7 days, they were returned to Stat Services. This background is important in order to address some of the comments made in your report.

Under CATS, compliance reports are timely forwarded electronically to Division managers. They are then scored and the national reports can be prepared shortly thereafter. Thus, the information provided by the Regions through CATS is discussed with the Regions in a timely manner when the discussion is meaningful and it makes sense to require written updates and clarifications.

COMPLIANCE REPORTING

Report Accuracy: We were pleased that the report found that Board orders were generally recorded in monthly compliance reports in a timely manner, cases were correctly classified under Impact Analysis and cases were accurately reported in correct sections of the report. With regard to the exceptions to this finding, we have discussed this with the managers in Operations and they will be monitoring the compliance reports to ensure that cases are reported in the correct sections. To the extent that the report criticizes Region 28 for misreporting on 75 occasions, we appreciate the clarification that this involved only 11 overage cases. As noted in the report and the exit conference as the system won't "accept" cases outside the appropriate Impact Analysis timeframe in sections 2 and 3, reporting cases in the wrong section should no longer occur under CATS.

Overage Compliance Rate: The report notes that a majority of the NLRB's overage cases are excused. This is correct. The timeframes established for the timely processing of compliance cases reflect the time in which a case should be processed when there are no disputes regarding compliance with the Board's order. Unfortunately, the reality is that in most of our cases there are disputes regarding compliance, there are matters outside of the Regions' control and/or there are obstacles to timely compliance. Nevertheless our reporting system allows us to monitor every compliance case in the region and the system of excusing cases which are beyond the control of the regions is a good management tool for handling these cases. However, we agree that this should be clarified in the GPRA and Budget Justification reports and in fact the GPRA report currently circulating has been modified to reflect that reality.

Overage Case Justifications: The report notes that the Agency's monthly reports did not provide sufficient information to allow for an informed determination as to whether the case should be excused. As noted in the background section of the report, cases under the old system were often excused based on oral discussions with the regional personnel. Given the time lag, AGCs and Deputies made the judgment call that it was not a good use of resources to require regions to rewrite reports and resubmit them. Thus, the Division managers may well have been satisfied with the region's explanations but the reports may not always reflect that additional information was provided. Moreover, as noted in

your report and the exit conference we do not agree that the fact that a region has listed the same or similar excuse for a number of consecutive months means that the region has not accurately completed the report. There are cases where very little happens for a significant period of time and further action is outside the control of the region. Some examples are installment payments, ongoing bargaining or some bankruptcy proceedings.

In any event, CATS will provide timely information. Correcting or updating excuses can now be done at a meaningful time in a much more efficient manner and we anticipate that the excuse information will be more specific and updated in accord with the compliance manual. In addition, where the reporting of cases does not fully comply with the requirements in the Compliance Manual, that does not mandate that the case should be unexcused. The fact that a procedural requirement has not been met does not mean that substantively the excuse is without merit. For example, if a compliance report does not indicate that an installment payment has been made but based on discussions with the Region, the AGC has been informed that the payment has been made, the fact that the report is not accurate does not mean that the case is not legitimately reported as excused. The significant aspect of the case is that the Region has taken all actions within its control. However, we anticipate that there will be fewer of these discrepancies under CATS.

COMPLIANCE ACTIONS

The report discussed two situations wherein Region 32 had accepted settlements of less than 80% of the amount due without proper approval from Operations-Management. Our review of that situation confirmed that the region had aggressively pursued settlement in these two difficult cases and that these settlements would have been approved by Operations-Management. In addition, our inquiry indicated that though the settlements were probably less than 80% of the full amount due, they were most certainly more than your report indicated (66% and 48%). Keeping in mind that the figures that your report relied upon for full backpay were tentative figures that the Region designated as tentative and would have been the full backpay figures if the Region had prevailed regarding all issues, these figure were not the proper starting point from which to determine the percentage the settlement represented. Regions consistently propose the highest defensible figure in their attempts to initiate settlements even though investigation and litigation might result in these figures being reduced. Nevertheless, we agree that the Region should have contacted Operations-Management and we have discussed that issue with the Region. We have also discussed with the Region the importance of sending the appropriate forms to discriminatees to maintain contact and to ascertain backpay and interim earnings during the backpay period.

RECOMMENDATIONS

The Report recommended the following:

1. Include data on all compliance cases in external reports. If not modify external reporting to fully disclose that the overage compliance rate does not include all overage cases.

As indicated above, the Division has already taken steps to clarify in the GPRA and Budget Justification reports that the compliance overage cases do not include cases that are considered outside the Agency's control.

2. Inform officials responsible for scoring monthly compliance reports to adhere to the Compliance Manual when determining whether or not to excuse overage compliance cases.

This report will be shared with the Operations-Management staff and has been the subject of a staff meeting wherein the importance of adhering to the scoring procedures as set forth in the Compliance Manual has been emphasized. We also have in draft form an OM memorandum which sets forth the procedure for excusing a compliance case and, in particular, the information that must be provided in the compliance reports.

3. Select a date on which no excuses will be granted without all information required by the Compliance Manual.

This is a recommendation we decline to follow. After due consideration, the Division determined that the reports are to inform the reader of the status of compliance cases. In the final analysis, the system is a management system that functions to assist us in the management of our workload. Thus, the fact that a case was untimely reported or not fully explained does not warrant a finding that the case was not properly excused. Accordingly, if the Division representative

is satisfied that the case is properly excused, we would not consider it unexcused because of a technicality. Nevertheless, we certainly agree that the reports should be timely submitted and completely explained, and we will criticize the failure to provide such in the Regional Director's appraisal (Critical Element #3) should that be a consistent problem in any RDs performance.

4. Inform field office personnel responsible for performing and managing compliance activities that they are to adhere to Agency policies including those for maintaining contact with discriminatees and settling cases.

As noted above, the investigation revealed that a region failed to contact the Division of Operations-Management prior to accepting a settlement at less than 80% of full backpay and failed to maintain contact with discriminatees during the backpay period. The AGC has already discussed this with the Regional Director and the supervisory compliance officer. Although we do not believe that the incidents in one Region reflect a serious national problem. We will also tell the staff to direct their Regional Directors to be vigilant in these areas as well.

Again, thank you for the opportunity to respond to your report. This response also constitutes our action plan.

/s/

R.A.S.

cc: Shelley Korch
Stan Zirkin
Ken Shapiro