

Kaumagraph Corporation and United Steelworkers of America, AFL-CIO-CLC. Case 4-CA-20367

January 18, 1994

ORDER

The National Labor Relations Board has decided to include in the bound volumes the attached Order, which issued on November 22, 1993.

By direction of the Board: Joseph E. Moore, Deputy Executive Secretary.

ORDER

November 22, 1993

On October 30, 1992, the Regional Director for Region 4 issued a complaint and notice of hearing in the above proceeding, alleging that the Respondent has engaged in violations of Section 8(a)(1), (3), and (5) of the Act by, inter alia, transferring unit operations from its Wilmington, Delaware facility to Flint, Michigan. During the investigation of the alleged violations, the Charging Party requested that the General Counsel seek a restoration and reinstatement remedy in this case. By letter dated December 1, 1992, the Regional Director advised the Charging Party that "the Wilmington plant had been unprofitable for several years"¹ and that it would not seek such a remedy. The Regional Director also informed the Charging Party that it could seek review of the Region's determination by filing an appeal with the General Counsel in Washington.²

By letter dated October 1, 1993, the Charging Party advised Respondent's counsel that it intended to "advocate for a restoration remedy . . . at the ALJ hearing commencing October 20, 1993." On October 20, 1993, a preliminary hearing opened before Administrative Law Judge Claude R. Wolfe to consider whether Charging Party would be permitted to seek a restoration remedy. At the commencement of the hearing, the General Counsel announced that it would be seeking a full backpay remedy but would not seek restoration and reinstatement. After hearing from all concerned, Judge Wolfe ruled that he would not permit the Charging Party to introduce evidence in support of the restoration remedy at the full hearing, scheduled for December 15, 1993, but would permit the Charging Party to argue this matter in its brief to the judge.

On October 26, 1993, the Charging Party filed a Request for Special Permission to Appeal from Ruling of

¹Except to the extent that the Charging Party was notified that the General Counsel would not seek a restoration remedy in the December 2, 1992 letter, the evidence and information uncovered during the administrative investigation was not available to the Charging Party.

²The Charging Party did not appeal from the Regional Director's decision not to seek restoration as a remedy.

the Administrative Law Judge. The Charging Party contends that the judge based his ruling on the ground that the General Counsel controls the theory of the case, that since the General Counsel has made an affirmative decision *not* to seek restoration, the General Counsel must have decided that there is no evidence to support a restoration remedy and that restoration is not warranted. The Charging Party concedes that the General Counsel controls the theory of the complaint but argues that such control is limited to the violations alleged and that it is the Board, through the administrative law judge, which controls the remedies which will be ordered.

The Charging Party further contends that it is entitled to exercise its right to introduce independent evidence in order to support a restoration remedy which is in the power of the judge and the Board to order. Accordingly, the Charging Party urges the Board to grant its appeal, reverse the judge's ruling, and permit the Charging Party to introduce evidence in support of its contention that restoration is an appropriate remedy for the unfair labor practices alleged.

On November 8 and 9, 1993, respectively, the General Counsel and the Respondent each filed statements in opposition to Charging Party's appeal³ and the Respondent filed a cross-appeal. The General Counsel and the Respondent concede that the normal remedy in discriminatory relocation cases is restoration of the operations and reinstatement of the discriminatorily terminated employees, unless the Respondent established that restoration would be unduly burdensome, that the question of a restoration remedy has already been decided, and that although provided an opportunity to do so, the Charging Party failed to appeal the Regional Director's determination not to seek restoration.

They further contend that the Charging Party's attempt to relitigate the restoration issue is analogous to a charging party's attempt to amend the complaint or pursue a violation contrary to the General Counsel's theory of a violation, and that to permit the Charging Party to introduce evidence in support of restoration "would create the undesirable situation of allowing the Board to consider a portion of the charge which the General Counsel has already determined lacked merit and thought it proper to dismiss." The General Counsel moves the Board to affirm the judge's ruling.⁴

³Both the General Counsel and the Respondent rely on *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989), and *Billion Oldsmobile-Toyota*, 260 NLRB 745 fn. 2 (1982).

⁴In its request for special permission to appeal, the Respondent contends that Judge Wolfe left open the possibility that the Charging Party could raise the issue of restoration in supplementary proceedings or in posttrial briefs. The Respondent argues that the Board should review Judge Wolfe's ruling because "it involves unique and novel issues of law" and "leaves Respondent in an anomalous position." Therefore, the Respondent urges the Board to grant its cross-appeal and preclude consideration of a restoration remedy.

Having duly considered the matter, the Board has decided to grant the Charging Party's and the Respondent's requests for special permission to appeal and, on the merits, the administrative law judge's ruling is vacated, and the judge is directed to permit the parties to introduce evidence bearing on whether restoration and reinstatement is an appropriate remedy under Board precedent.⁵

Section 3(d) of the Act vests the General Counsel with exclusive jurisdiction with respect to the investigation and prosecution of unfair labor practice complaints on behalf of the Board, including the decision whether to issue a complaint. Once a complaint has issued, however, responsibility for fashioning an appropriate remedy for the alleged unfair labor practices rests with the Board. See Section 10(c) of the Act. The General Counsel's authority under Section 3(d) does not extend so far as to preclude litigation over the question of whether the Board's usual restoration and reinstatement remedy is appropriate here with the result being that this issue is resolved via an administrative investigation. Indeed, the extent of the Board's

⁵See *Lear Stegler*, supra, cited by both the General Counsel and the Respondent for a description of the Board's "usual practice" in cases alleging a "discriminatory relocation of operations."

control over the remedy is clearly demonstrated in *Schnadig Corp.*, 265 NLRB 147 (1982): "Whether Counsel for the General Counsel seeks a backpay remedy is immaterial since we have full authority over the remedial aspects of our decisions." Similarly, in *Dean General Contractors*, 285 NLRB 573 fn. 5 (1987), the Board stated that the General Counsel's indication at the hearing that reinstatement "probably" would not be sought "does not . . . limit the Board's authority under Section 10(c) of the Act to fashion an appropriate make-whole remedy."⁶ Accordingly,

IT IS ORDERED that the Charging Party's and the Respondent's requests for special permission to appeal the judge's ruling are granted, the administrative law judge's ruling is vacated, and the above proceeding is remanded to Administrative Law Judge Claude R. Wolfe with instructions to permit the parties to introduce evidence regarding the appropriateness of a restoration and reinstatement remedy.

⁶The General Counsel and the Respondent contend that by failing to pursue its opportunity to appeal from the Regional Director's ruling, the Charging Party waived its right to seek a restoration remedy. Because the Regional Director's administrative disposition of the remedial issue is not binding on the Board, the Charging Party's failure to appeal is irrelevant.