

**Fairmont Hotel, et al. and Melissa (Hale) Forbes
Teamsters Local 856 and Melissa (Hales) Forbes.**
Cases 20-CA-22948 and 20-CB-8167

July 27, 1994

ORDER DENYING APPEAL

BY CHAIRMAN GOULD AND MEMBERS STEPHENS,
DEVANEY, BROWNING, AND COHEN

On August 23, 1991, the Regional Director for Region 20 of the National Labor Relations Board issued an order consolidating cases, consolidating complaint and notice of hearing in the above entitled proceeding and the hearing was scheduled for January 7, 1992. On January 3, 1992, the Acting Regional Director issued an order postponing hearing and subsequently approved a unilateral settlement agreement in both cases over the Charging Party's objections. On February 4, 1994, the office of appeals denied the Charging Party's appeal from the Regional Director's approval of the settlement agreement. On May 25, 1994, the office of appeals denied Charging Party's request for reconsideration of the February 4, 1994 action.

On June 1, 1994, the Charging Party filed with the Board in Washington, D.C., a document entitled "*Kaumagraph* Appeal of the Deficient Remedies Provided in Post-Complaint Unilateral Settlement." The Charging Party contends that the Board should review the propriety of the remedies the General Counsel accepted over the Charging Party's objections.¹ More specifically, the Charging Party contends that the remedies accepted by the General Counsel "are fatally flawed by their failure to provide the Board's 'usual' make whole remedies," and that the Board's order in *Kaumagraph Corp.*² conferred absolute jurisdiction

¹ The Respondent Union and counsel for the General Counsel filed oppositions to the Charging Party's appeal on July 5 and 11, 1994, respectively. The Charging Party filed a response to the Respondent Union's opposition.

² 313 NLRB 624 (1993). Briefly, *Kaumagraph* came to the Board as an interlocutory appeal of the administrative law judge's ruling at the hearing about whether the charging party union would be permitted to seek a restoration remedy. At the commencement of the hearing, the General Counsel announced that he would not seek restoration and reinstatement as a remedy. The administrative law judge then considered whether the charging party would be permitted to seek such a remedy. The administrative law judge ruled that he would not permit the charging party to introduce evidence in support of restoration at the hearing, but would permit the charging party to argue this matter in its brief.

On appeal, the Board granted the charging party's appeal, vacated the administrative law judge's ruling, and directed the judge to per-

over remedies to the Board. In support thereof, the Charging Party relies on the following statement in *Kaumagraph*: "Once a complaint has issued, however, responsibility for fashioning an appropriate remedy for the alleged unfair labor practices rests with the Board."

The appropriate starting point for consideration of this matter is the Supreme Court's decision in *NLRB v. Food & Commercial Workers, Local 23*, 484 U.S. 112 (1987). The Federal judiciary has authority to review only those Board orders which are *final*. See Section 10(f) of the Act. In *Food & Commercial Workers*, supra, the Supreme Court made clear that the judiciary's "final" authority covers only the adjudication of complaints:

The words, structure, and history of the . . . NLRA clearly reveal that Congress intended to differentiate between the General Counsel's and the Board's "final authority" along a prosecutorial versus adjudicatory lines.³

Accordingly, if the General Counsel, exercising his "prosecutorial discretion," decides to withdraw a complaint, pursuant to a prehearing settlement, such a determination is not subject to court review.⁴ On the other hand, where withdrawal of the complaint was a matter for "adjudication" before an administrative law

mit the parties to introduce evidence bearing on whether restoration and reinstatement is an appropriate remedy. In its order, the Board, discussing the General Counsel's jurisdiction in this area, observed:

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. [Id.]

³ 484 U.S. at 124.

⁴ The General Counsel's authority not to prosecute includes settlement of a case over the Charging Party's objections where a complaint has issued but the hearing has not opened. See also Sec. 102.18 of the Board's Rules and Regulations and Sec. 101.9 of the Statements of Procedure. On the other hand, if the General Counsel *rejects* a proffered settlement and wishes to continue to prosecute the case, the Board will be called on to exercise its adjudicatory function. In that connection, the Board may rule on the adequacy of the proffered settlement, pursuant to a respondent motion to dismiss. See *Independent Stave Co.*, 287 NLRB 740 (1987).

judge, the Board has the authority to determine whether withdrawal of the complaint is appropriate.

Having duly considered the matter, the Board notes that the Charging Party does not dispute that here, unlike *Kaumagraph*, supra, the hearing had not opened. In these circumstances, whether to (1) proceed with the case, or (2) settle the case over the Charging Party's

objections falls under the General Counsel's jurisdiction.⁵

Accordingly,

IT IS ORDERED that the Charging Party's appeal is denied.

⁵To the extent that there is any ambiguity in the Order in *Kaumagraph*, supra, we clarify the penultimate paragraph, second sentence and hold: Once a complaint has issued, however, and the hearing has opened, responsibility for fashioning an appropriate remedy for the alleged unfair labor practices rests with the Board.