

Van Dorn Plastic Machinery Co., Division of Van Dorn Company and District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO and Thomas W. Vale. Case 8-CA-11669, 8-CA-11842, 8-CA-12243, and 8-CA-12205

November 12, 1980

**ORDER REMANDING PROCEEDING TO
THE ADMINISTRATIVE LAW JUDGE**

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO

On March 31, 1980, Administrative Law Judge Robert G. Romano issued his Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondent filed exceptions and supporting briefs, and Respondent filed a brief in opposition to the General Counsel's exceptions. For the reasons explained below, the Board has decided to remand this proceeding to the Administrative Law Judge for a further hearing and for a supplemental decision.

The amended consolidated complaint in this proceeding alleged, *inter alia*, that since February 22, 1978, Respondent had refused to meet and bargain with the Union as the certified bargaining representative of certain of Respondent's employees in an appropriate unit and that this refusal to meet and bargain violated Section 8(a)(5) and (1) of the Act. However, since he found that the Union was not entitled to certification based upon the related representation proceeding,¹ the Administrative Law Judge concluded that Respondent's refusal to bargain was not a violation of Section 8(a)(5) and (1) of the Act.

In reaching this conclusion, the Administrative Law Judge noted the following facts from the representation proceeding in Case 8-RC-10830. In its Objection 8, Respondent alleged that, on the day of the election, which the Union won, the Union had distributed a flyer

. . . containing what purported to be a copy of one of the Union's contracts, containing provisions for wage rates for various job classifications, pension and premium pay. . . . In fact, such "contract" was a forgery in that there are no fixed wage rates contained in the actual contract, and there are no provisions for set-up, leadman, or instructional premiums.

The Regional Director applied the then-prevailing law of *Shopping Kart Food Market, Inc.*,² and found that, because the flyer did not involve a forgery or

an improper involvement of the Board and its processes, it was not objectionable. On January 17, 1978, following exceptions by Respondent, the Board (by a panel of Chairman Fanning, Member Jenkins, and then Member Walther) adopted the Regional Director's recommendations, which resulted in a certification being issued to the Union.³

Thereafter, Respondent refused to bargain with the Union as the certified bargaining representative of certain of its employees. This refusal along with other of Respondent's actions was alleged to be an unfair labor practice in the amended consolidated complaint in this proceeding. A hearing on this complaint was held on dates in October and December 1978. At the hearing in the instant proceeding, Respondent attempted to relitigate the issue of the leaflet, but, upon objection, the Administrative Law Judge ruled that Respondent was precluded from raising in this unfair labor practice proceeding issues which were raised and disposed of in the representation proceeding in Case 8-RC-10830. Accordingly, no additional evidence involving the leaflet was introduced.

Thereafter, on the last day of the hearing and without the parties' knowledge, the Board issued its Decision in *General Knit of California, Inc.*,⁴ overruling *Shopping Kart*, and returning to the standard of review for alleged misrepresentations set out in *Hollywood Ceramics Company, Inc.*⁵ That standard indicated, *inter alia*, that a misrepresentation which may reasonably be expected to have a significant impact on the election will cause it to be set aside. The Administrative Law Judge analyzed what effect the Board's reversal of *Shopping Kart, supra*, in *General Knit, supra*, had on the unfair labor practices alleged in this proceeding. He determined, and we agree, that *General Knit* is controlling.

The Administrative Law Judge then analyzed Objection 8 under the criteria of *General Knit, supra*, but he did so based only on the formal papers submitted in the representation proceeding. As set out in his Decision, these papers include the formal objection itself, with exhibits attached; the

³ With regard to the campaign flyer, Chairman Fanning and Member Jenkins stated at fn. 2 of the January 17 Decision:

Chairman Fanning and Member Jenkins agree with the Regional Director that when viewed in light of the Board's recent decision in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), the alleged misrepresentations do not warrant setting aside the election. Although Chairman Fanning and Member Jenkins dissented in *Shopping Kart, supra*, and continue to subscribe to the views stated in their dissenting opinion, they nevertheless recognize that the majority opinion in that case represents current Board policy and will, therefore, apply that policy in this proceeding.

⁴ 239 NLRB 619 (1978) (Members Penello and Murphy dissenting separately)

⁵ 140 NLRB 221 (1962).

¹ Case 8-RC-10830.

² 228 NLRB 1311 (1977).

Regional Director's comments in his report on the objection; Respondent's exceptions to the Regional Director's report; and the Board's Decision adopting the report.⁶ From this material, the Administrative Law Judge concluded that there were material misrepresentations in the flyer, involving wage rates, which warranted the setting aside of the election under *General Knit*. He accordingly dismissed the allegation of the complaint alleging an 8(a)(5) violation.

Both the General Counsel and the Charging Party have excepted to this portion of the Administrative Law Judge's Decision and they urge that the issue be remanded for a full hearing.⁷ They argue that the Administrative Law Judge was in error in relying solely on the papers in the representation proceeding in analyzing the objection. They note that, notwithstanding the Regional Director's comments on the alleged misrepresentations in the flyer, he resolved the case based on the application of *Shopping Kart*.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board, having duly considered the matter, is of the opinion that there exist material issues of fact and law concerning Objection 8 which warrant a remand of this proceeding to the Administrative Law Judge for the purposes of conducting a further hearing on that objection under *General Knit*, *supra*. The Board is not satisfied that the representation proceeding in Case 8-RC-10830, which was conducted entirely under the standard set out in the now-overruled *Shopping Kart* Decision, was sufficient to resolve the objection.⁸

Accordingly, it is hereby ordered that this proceeding be remanded to Administrative Law Judge Robert G. Romano for the purpose of conducting a further hearing with regard to Respondent's Objection 8 in Case 8-RC-10830 in light of the Board's Decision in *General Knit of California, Inc.*, 239 NLRB 619. At the hearing, all parties shall be allowed to adduce whatever evidence they deem pertinent on that objection.

⁶ There was no hearing on any of the objections in the representation proceeding.

⁷ As an alternative argument, the Union claims no hearing is necessary to find in its favor.

⁸ In this regard, the Board does not find it significant that the Union did not except to certain of the Regional Director's comments. As the then-prevailing law of *Shopping Kart* did not call for such comments, the Regional Director's observations there were in the nature of *dicta*. And, given the law under *Shopping Kart*, the Board finds the Union was not duty bound to respond to these comments which were not an essential element of the Regional Director's report.

It is further ordered that, upon the conclusion of the hearing, the Administrative Law Judge shall prepare and serve on the parties a Supplemental Decision containing findings of fact, conclusions of law, and recommendations based on the evidence received at the reopened hearing and that, following service of such Supplemental Decision on the parties, the provisions of Section 102.46 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, shall be applicable.⁹

MEMBER PENELLO, dissenting:

Once again, the *General Knit*¹⁰ majority upsets a certification validly issued under *Shopping Kart*. Once again, the employees' desires as expressed at the ballot box are frustrated. Once again, I must dissent.

The facts tell the all too familiar story of delay, delay, delay. On April 22, 1977, the employees voted for union representation in a secret-ballot election. From that time to the present day, the parties have been locked in litigation over the status of the bargaining agent and related issues, and the employees have been deprived of the services of their duly elected representative. My colleagues' decision serves only to exacerbate the problem by remanding this seemingly endless proceeding for yet further litigation concerning Respondent's misrepresentation objection that was properly overruled under *Shopping Kart* when the Board certified the Union almost 3 years ago. I find this result intolerable.

Even should the Union eventually prevail, the eroding effects of time and employee turnover would render the certification virtually worthless in terms of effective collective bargaining.

I would direct Respondent to the bargaining table now.

⁹ The Board is aware that, in addition to the general refusal to meet and bargain allegation of the complaint, Respondent is alleged to have violated Sec. 8(a)(5) and (1) of the Act in various other respects. The Board is also aware that the Administrative Law Judge recommended dismissal of these allegations based on his finding no general duty to bargain on Respondent's part. However, the Board is further cognizant that the Administrative Law Judge made certain alternative findings on these 8(a)(5) allegations; i.e., assuming a valid certification of the Union, the Administrative Law Judge then passed on each 8(a)(5) violation alleged. He found certain violations and dismissed others. The parties have excepted to those findings which are adverse to them as well as to certain findings on 8(a)(1) allegations. The Board reserves ruling on all these additional allegations, many of which may be dependent on the validity or lack thereof of the certification in Case 8-RC-10830. When the Administrative Law Judge has ruled in his Supplemental Decision on the issue remanded, his recommended Order will reflect that Supplemental Decision and the Board will then pass on any exceptions raised to that Supplemental Decision.

¹⁰ *General Knit of California, Inc.*, 239 NLRB 619 (1978). As I stated in my *General Knit* dissent, I adhere to the sound principles of *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977).