

OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management

MEMORANDUM OM 93-78

December 22, 1993

To: All Regional Directors, Officers-in-Charge,  
and Resident Officers

From: William G. Stack, Associate General Counsel

Subject: Charging Party's Right to Litigate Remedial Issues  
Which Differ from the Remedy Sought By the General  
Counsel

On November 22, 1993 the Board issued an unpublished order finding that the General Counsel's determination not to seek a specific remedy in an unfair labor practice proceeding does not bar a charging party from independently seeking that remedy and litigating in support of it.

The Regional Director issued a Complaint and Notice of Hearing alleging that Kaumograph Corporation (the Respondent) had violated the Act by, inter alia, relocating its operations for discriminatory reasons. The Regional Director advised the United Steelworkers (the Charging Party) that because the plant in question had been unprofitable for several years, the normal remedy in such a case, i.e., a reinstatement and restoration remedy, would not be sought by the General Counsel. The Charging Party advised the Respondent's counsel that it intended to seek such a remedy before the administrative law judge.

Relying on the premise that the General Counsel controls the theory of the case, the administrative law judge ruled that the Charging Party could not introduce evidence in support of the restoration remedy at the hearing. However, the ALJ stated that the Charging Party could argue this matter in its brief after the hearing.

The Charging Party filed a request for Special Permission to Appeal to the Board arguing in essence that though the General Counsel controls the theory of the case, it is the Board which controls the remedy. The General Counsel and the Respondent argued to the Board that by failing to appeal the Regional Director's administrative determination not to seek a restoration remedy, the Charging Party had waived its right to raise it at the hearing. In addition, they argued that the Charging Party's attempt to litigate the remedial issue was analogous to a charging

party's attempt to pursue violations contrary to the General Counsel's theory.

The Board vacated the ALJ's ruling and directed the judge to permit the parties to introduce evidence bearing on whether reinstatement and restoration was the appropriate remedy. The Board acknowledged the General Counsel's exclusive authority under Section 3(d) of the Act to investigate and prosecute unfair labor practice charges. Relying on Section 10(c) of the Act, the Board found that the General Counsel's authority did not extend so far as to preclude litigation over the question of whether the Board's usual restoration and reinstatement remedy was appropriate.<sup>1</sup> The Board cited Schnadig Corp., 275 NLRB 247 (1982) and Dean General Contractors, 285 NLRB 573, fn.5 (1987) as precedent demonstrating that the General Counsel's remedial arguments did not limit or bind the Board in the exercise of its remedial authority. The Board also found that because the Regional Director's determination not to seek the restoration remedy was not binding on the Board, the Charging Party's failure to appeal that determination was irrelevant.

Please have your staff familiarize themselves with the Board's holding in this case. A copy of the Order is attached for your convenience.

  
W. G. S.

Attachment

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<sup>1</sup> Cf. NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO, 484 U.S. 112, 98 L.Ed 2d 429, 108 S.Ct. 412 (1987) wherein the Supreme Court held that the General Counsel's post-complaint, pre-hearing decision to dismiss an unfair labor practice complaint pursuant to an informal settlement is an exercise of the General Counsel's prosecutorial function and therefore not reviewable by the Board or the courts.

Wilmington, DE

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KAUMAGRAPH CORPORATION

and

Case 4-CA-20367

UNITED STEELWORKERS OF  
AMERICA, AFL-CIO-CLC

ORDER

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 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. . . ."<sup>1</sup> 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.<sup>2</sup>

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

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<sup>1</sup> Except 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.

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

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 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 appeal<sup>3</sup> 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.<sup>4</sup>

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<sup>3</sup> Both the General Counsel and the Respondent rely on *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989) and *Billion Dollars, Inc., d/b/a Billion Oldsmobile-Toyota*, 260 NLRB 745, fn. 2 (1982).

<sup>4</sup> In 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 post-trial 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.<sup>5</sup>

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 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 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

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<sup>5</sup> See *Lear Siegler*, *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."

. . . limit the Board's authority under Section 10(c) of the Act to fashion an appropriate make-whole remedy."<sup>6</sup> 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.

Dated, Washington, D.C., November 22, 1993.

By direction of the Board:

Joseph E. Moore

Deputy Executive Secretary

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<sup>6</sup> The 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.