

Randall P. Kane, Inc., d/b/a the Catalyst and Hotel, Motel, Restaurant Employees & Bartenders International Union Local 483. Case 32-CA-81 (formerly 20-CA-11333)

September 28, 1977

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND MURPHY

Pursuant to the Board's Supplemental Decision and Order dated February 23, 1979,¹ Administrative Law Judge Richard J. Boyce, on July 3, 1979, issued the attached Supplemental Decision in this proceeding.² Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a brief in support thereof.

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 has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board reaffirms its Order issued in this proceeding on June 21, 1977 (reported at 230 NLRB 355), and hereby orders that the Respondent, Randall P. Kane, Inc., d/b/a The Catalyst, Santa Cruz, California, its officers, agents, successors, and assigns, shall take the action set forth in said Order.

¹ Reported at 240 NLRB 904.

² The Board's original Decision and Order is reported at 230 NLRB 355 (1977).

³ Chairman Fanning, for the reasons set forth in his dissent in *Serv-U-Stores, Inc.*, 234 NLRB 1143 (1978), contrary to the Administrative Law Judge and his colleagues, would find not valid only the card of Fredrickson, who did not read the authorization card.

SUPPLEMENTAL DECISION

I. BACKGROUND

RICHARD J. BOYCE, Administrative Law Judge: On March 15, 1977, I issued a decision herein concluding, *inter alia*, that Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. Central to that conclusion was a finding that, in April 1976, the Union had obtained valid authorization

cards from a majority of Respondent's employees in an appropriate unit. The Board affirmed that finding and conclusion. 230 NLRB 355 (1977).

The Ninth Circuit Court of Appeals, however, declined enforcement of that portion of the proceeding, instead remanding it to the Board with instructions to take additional evidence of the circumstances surrounding the signing of 15 authorization cards found by me and the Board to have been valid, and then to reconsider whether the Union had obtained a valid card majority. 581 F.2d 215 (9th Cir. 1978). The Board, in turn, remanded the matter to me "to take any additional evidence which the parties may wish to present as to the validity of the 15 cards in question and to thereafter issue a Supplemental Decision in this matter." 240 NLRB 905 (1979).

Pursuant to the Board's remand order, a supplemental hearing was held before me in Santa Cruz, California, on May 15, 1979. Briefs thereafter were submitted by the General Counsel and by Respondent.

II. THE 15 CARDS IN QUESTION

The 15 cards in question are those signed by Samuel Casson, Jonathan Eckert, Lee Jackson, and Sue Phillips, all of whom testified to some extent of the circumstances of their signing in the original hearing; and by these 11, whose anticipated testimony of the circumstances of their signing was the subject of a stipulation by the parties: Darwin Clark, Judy Fredrickson, Randolph Jamal, Glenn Marks, Kenneth Miller, Glen Ortman, Joanne Petrovich, Robert Riegner, David Savalo, Gary Tighe, and Glen Weatherford. The Board stated in its Supplemental Decision that it "no longer accepts" the stipulation concerning the anticipated testimony of these 11. 240 NLRB No. 128, slip op. 3 fn. 5.

III. A SUMMARY OF FACTS PREVIOUSLY FOUND

As set forth in my earlier decision,¹ 51 employees signed authorization cards between April 1 and 13, 1976; the Union made a written demand for recognition, which went unanswered, on April 19. The election processes of the NLRB were never invoked. The unit, at relevant times, consisted of 86 employees. The cards, all identical, stated:

HOTEL, RESTAURANT EMPLOYEES AND
BARTENDERS INTERNATIONAL UNION LOCAL
#483

I, the undersigned, agree and respectively designate and authorize Local #483 separately and/or collectively through any of its affiliated Locals, agents or representatives to represent me, and as such representatives for me, and in my behalf of negotiate and conclude agreements as to hours of labor, wages and other employment conditions.

(Date) (Signature)
(Occupation) (Address) (City)
(Employer)

¹ See, generally, 230 NLRB at 362.

On April 2, to save the time of oral explanation, one of the employee-organizers, Tony Rice, drafted and duplicated a written addendum which was attached to most of the cards distributed thereafter. It read:

Once signed, this card gives the AFL-CIO permission to represent you as an unorganized worker, before the National Labor Relations Board. *This does not mean you are or have to join a union.* This is only the first step towards free and open discussion with regard to collective bargaining between Catalyst workers and the management.

There is absolutely no way for the owner or friends of the management to find out who has signed one of these authorization cards, and it is illegal for him to fire you for doing so.

PLEASE FILL OUT AND RETURN IMMEDIATELY TO YOUR UNION REP.

The solicitation of signatures was done by Rice and two coworkers, Peter Puhl and Frank Ryerson. The Union's business manager, Robert Gamberg, explained on April 1, when furnishing them with blank cards, that: (1) card solicitation was "the first step" in organizing; (2) if 30 percent of the employees signed, the Union could petition for an NLRB election; and (3) if 50 percent plus one cast ballots for the Union in the election, collective bargaining would follow. Rice recalled Gamberg as saying the purpose of the cards "basically . . . was to get an election."

The lion's share of the soliciting was done by Puhl. He estimated that he obtained about 50 signatures, and that, regardless of the presence of the stapled-on addendum after April 1, he engaged in explanatory conversation with all but 5 or 10 of those 50. Puhl testified that his standard explanation took this form:

I would tell them that this is the initial step in trying to organize a union for collective bargaining, that it's not joining a union when you sign the card, that when a percentage of 30 percent was reached that they would petition for an election, that it would be held secret ballot. In order to win the election it would take 50 percent plus one. Upon winning it then they would sit down, the union representatives, and negotiate over a contract

Similarly, Rice testified that he told prospective signers "that we're trying to get 30 percent of the people to sign so that we could have an election to decide whether or not we would have union representation"; and Ryerson testified of telling would-be signers "that they were not joining a union by signing that card, that it was leading towards an election."

To much the same effect, five of those signing—including four whose cards are now in question—testified that they were told, in essence, when asked to sign, that the purpose of the cards was to give the employees a chance to have an election to see if they wanted union representation. More specifically, Samuel Casson testified that Puhl told him that he "needed a certain percentage of people employed at The Catalyst to sign one of the cards, in order for there to be an election to determine whether or not the employees wanted the Union"; Jonathan Eckert testified that Puhl said "we

would vote on whether we wanted to have the Union or not have the Union"; Lee Jackson testified that Puhl told him that "essentially what we were doing was giving our okay to an election so that we could figure out whether or not we wanted a union"—"that was the only reason for signing these"; and Sue Phillips testified that Rice said "it would give us a chance to have an election to see if we wanted a union." The fifth signer to testify, Terri Beaudoin, testified that Puhl said "the only thing that it [signing] pertained to is that there would be an election as to whether or not we wanted a union."

IV. THE SUPPLEMENTAL HEARING

A. Evidence

Eight of the fifteen to sign the cards now in question testified in the supplemental proceeding. No other testimony was proffered. The eight were Phillips, who had testified previously as mentioned above, and seven who were covered by the now inoperative stipulation: Fredrickson, Jamal, Marks, Miller, Ortman, Riegner, and Weatherford.² As might be expected, given the 3-year lapse since the events of which they testified, and perhaps also because of their utter naivete concerning authorization cards and the process generally of obtaining union representation,³ their recitals often were hazy and confused, and seemingly interwoven with impressions, assumptions, and even guesswork, as distinct from objective evidence.⁴

The testimony, summarized:

Phillips: Phillips testified that she obtained her card from Rice at work on April 2, during a 15- to 20-minute conversation. She elaborated that only the final 5 to 8 minutes of the conversation pertained to the union drive, and that Rice told her, when tendering the card, that "it was just to see if we were going to have an election." Rice also stated, according to Phillips, that if enough employees signed cards, the employees could obtain more information from the Union. Rice did not show her the addendum that was attached to some of the cards.

Phillips continued that she took the card home, where she read and signed it, and returned it to Rice the next day.

Phillips further testified that: (1) she was a social friend of Rice's; (2) she had discussed the union situation with him previous to the time he tendered the cards; and (3) she signed not only because of the things he said when giving her the card, but "based on everything" he had told her in their several conversations on the subject. Expanding on the other conversations, Phillips related that Rice "was feeding [her] a lot of information," not all of which she absorbed, and that he "was generally saying good things

² Respondent assumed the burden of going forward with evidence. Its counsel represented that six of the signers in question—Clark, Casson, Eckert, Jackson, Petrovich, and Savalo—could not be located, and that it chose not to call Tighe.

³ In this regard, Jamal might well have been speaking for all when he testified: "I didn't know what I was doing. I didn't understand the ramifications."

⁴ This is not to impugn the witnesses' sincerity. With perhaps one exception, they were remarkably conscientious in the circumstances.

about the Union," such as its "improving the wages" and getting medical and dental plans for the employees.

Phillips concluded that she was not induced to sign by anything in particular that Rice had said, explaining that she "had a lot of information fed to [her] at the point," but that one of her reasons was that Rice was a friend and had asked her.

Fredrickson and Jamal: Fredrickson and Jamal testified that they obtained their cards from Rice, and signed them during a meeting at Fredrickson's and Jamal's home on April 8; Frank Ryerson also was present and participated.

Fredrickson testified that she signed after "about three hours' worth" of discussion among the four of them. She recalled Rice's stating, before she signed, that "this card meant only that it was going to allow . . . the . . . employees to have a democratic vote as to [whether] they even wanted to think about having any kind of union whatsoever"; that "all it would do was enable people to vote"; and that he "needed a certain amount of people to sign cards." Fredrickson reputedly replied that she "did not want to sign the card, did not want to vote, could care less, and was doing it to be left alone and have some peace and quiet."

Fredrickson testified at one point that she signed "in sympathy because he [Rice] said it was the democratic thing to do"; at another time she did it "to get [Rice] out of there"—"after three hours of listening to him, I wanted to get rid of him." She further testified that she did not read her card before signing, and that it was not accompanied by the addendum Rice had prepared.

Jamal testified that (1) "most of the conversation was devoted to Mr. Rice trying to persuade . . . that with the Union coming in, the Union would somehow improve what was happening at The Catalyst"; (2) "there was some glowing praise about what being in a union would do"; and (3) Rice said "signing this card will guarantee . . . an election by the entire group of employees that would determine whether or not we would be represented by the Union." Rice also stated, according to Jamal, that signing "didn't mean I was joining the Union."

Jamal testified that Ryerson said "essentially the same things" that Rice did—"it was a joint effort." Jamal recalled that one or the other said that: (1) a certain number of cards were needed "to secure an election"; (2) after the requisite number of cards had been obtained, the Union could come in and show the employees what it had to offer; and (3) "the Union would attempt to improve the wages and hours and working conditions of the people at The Catalyst."

Jamal testified that he read his card before signing, and that Rice's addendum was attached to it, which was "one of the reasons" he signed. He asserted that he also was influenced to sign, "to some degree," by all that had been said during the meeting, because he "wanted to get [Rice] out of my house" after so long a discussion, and because "I was guaranteed, presumably, that signing this blasted card would assure everyone else with whom I worked that they would have the opportunity to elect or not elect to have a union."

Marks. Marks testified that he obtained his card from Ryerson and signed it during a 15- to 20-minute conversation at Marks' home on April 11. Marks first asserted that

Ryerson said, "If we get enough signatures, we could have an election to see if we even wanted a union"; and, later Ryerson stated, "All this card means is so we can have an election." Ryerson further stated, according to Marks, that it was necessary to get a certain number of cards signed, and that, if enough were signed, "we'd get an election." Marks added that Ryerson "probably said" that the Union "could probably" improve the employees' benefits.

Marks testified that: (1) he read the card before signing; (2) he did not see Rice's addendum; and (3) he signed "for one reason—just to see if we could get a union and have an election."

Miller: Miller testified that he obtained his card from Peter Puhl while manning the dishwasher at work on April 2, and that he signed and returned it "right away."

He testified initially that Puhl said signing was "the first step towards maybe getting together and having a meeting about a union," and that he did not think Puhl said anything about an election. He later testified variously that Puhl said that: (1) "if the majority signed, then we could get together and have a meeting, and go ahead and have a real—after we talked [it] over, we could have a real election"; (2) "if we get a majority of the people signing these cards together, . . . we would get together, go over what they [the Union] could do for us and then have the election later"; and (3) after the cards were signed, "the Union would come and tell the people what they could do for them," after which the employees "would vote on whether they wanted what the Union had to offer."

Miller testified that he did not see Rice's addendum before signing.

Ortman: Ortman testified that he obtained his card from Puhl at work on April 9, and signed and returned it in a matter of minutes. Puhl told him in the accompanying conversation, according to Ortman, that, "by signing the card, I would open up bargaining for an election as the employees decided on The Catalyst for a possible union . . .—it was to allow the employees to have an election, and decide whether or not we would want a union in the club."

Ortman later testified that he believed Puhl said "that [an election] will be the result of signing of the cards, and of a majority signing the cards" and that the election "would be whether or not we wanted to have the Union in the club." He also testified of Puhl's saying that, if a majority of the employees signed cards, it would open "bargaining for an election," and there would be a meeting "between the employer and employees."

Ortman testified, finally, that: (1) he read the card before signing it; (2) he saw Rice's addendum the same day, but could not recall its being attached to the card; (3) he believed the purpose of the cards was "so that some bargaining . . . some meeting, would develop between the employees, the employer, and possible union, unions"; and (4) he could not remember if Puhl said that signing meant that Ortman would be represented by the Union, or that the Union would have power to speak for him.

Riegner. Riegner testified that he obtained his card from Puhl on April 10, during a break at work, and that, after a brief conversation—"it was a very quick kind of thing"—he signed and returned it. He testified that Puhl told him that, by signing, the employees "would have a meeting with Ran-

dall [Kane, the owner] to discuss getting more money and also health and dental kinds of benefits," and that "the Union would be represented there."

Puhl also stated, according to Riegner, that a "possible election would happen after we talked to Randall," and that it would be "about joining the Union," but that signing alone did not make one a member.

Riegner testified that he read the card "very quickly" before signing, and that he did not see Rice's addendum.

Weatherford. Weatherford testified that he obtained his card from Puhl on about April 5 in the early morning hours after work, in a parking lot near The Catalyst, and that he signed it on April 8.

Weatherford testified that Puhl stated, upon tendering the card, that "a certain number of signatures" were necessary "for the Union to be able to come down and represent themselves to us"—for it "to be able to come on the premises and hold a meeting," and that an election would follow the meeting "to decide whether we wanted the Union to represent us in bargaining or not." Weatherford asked in this some conversation if signing meant joining. Puhl replied that he was not sure, but would check.

Weatherford testified of a second conversation, on the 8th before he signed, in which Puhl assured him that signing did not mean joining, but "was merely to allow the Union to come on the premises." Puhl further stated, according to Weatherford, that, "after the Union talked to us and told us what they had to offer, then there would be an election amongst the employees to decide . . . whether we wanted the Union or not," and that the Union would improve working conditions.

Weatherford testified, finally, that: (1) he read the card before signing; (2) he could not recall seeing Rice's addendum; and (3) he signed as a consequence of everything Puhl had told him in the two conversations, "so union representatives could come on the premises."

B. Discussion

As stated in my earlier decision, "there can be no doubt that [Puhl, Rice, and Ryerson] were not thinking of card recognition as an alternative to an election" when they solicited signatures. 230 NLRB at 363. It is plain, moreover, that the eight testifying in the present supplemental hearing likewise were thinking primarily, if not only, in terms of some kind of an election when they signed their cards. The cards by their terms, however, expressly designated the Union to represent "the undersigned" in bargaining. Beyond that, again as stated in my earlier decision, Rice's addendum, "while not serving its elucidating purpose particularly well, cannot be said to have carried a message at odds with that on the cards." 230 NLRB at 363, fn. 24.

The legal principles that govern situations of this sort are fully set forth in the previous decision,⁵ and have undergone no subsequent modification of which I am aware.⁶ Worth

⁵ 230 NLRB at 363.

⁶ Respondent to the contrary, I fail to see *Serv-U-Stores, Inc.*, 234 NLRB 1143 (1978) as reflecting a shift in the law.

repeating is this language from *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 606-607 (1969):

[E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. . . . We cannot agree . . . that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else.

In conjunction with these principles, which are for the Board and not me to reorder, I am constrained to adhere to my earlier determination that the Union had a valid card majority at relevant times and that Respondent therefore violated Section 8(a)(5) and (1). Even ignoring the regrettable quality of the present testimony—by extracting just those shards most favorable to Respondent, and then giving them a weight beyond their deserts—only four of the eight witnesses told of remarks by the solicitors from which it might be inferred that the cards were solely for a purpose in opposition to their stated message.

Thus, Phillips testified that Rice said the cards were "just to see if we were going to have an election"; Fredrickson, that Rice stated that "this card meant only that it was going to allow" an election; Jamal, that Rice said signing "will guarantee" an election; and Marks, that Ryerson stated: "All this card means is so we can have an election." Of those seven who did not testify, there is arguable basis for invalidating only Jackson's card, he having testified previously that Puhl had said "the only reason for signing" was to give "our okay to an election so that we could figure out whether or not we wanted a union."

Treating the cards of Phillips, Fredrickson, Jamal, Marks, and Jackson as invalid, and also regarding that of Terri Beaudoin as a nullity,⁷ the Union still had a majority—45 valid cards (51, minus 6) in a unit of 86.

CONCLUSIONS OF LAW⁸

It is concluded that not more than 5 of the 15 cards now in issue—those of Phillips, Fredrickson, Jamal, Marks, and Jackson—are invalid; that the Union therefore had a valid majority at relevant times, whether or not Beaudoin's card is deemed invalid; and that Respondent therefore violated Section 8(a)(5) and (1) as described in the decision reported in 230 NLRB 355.

⁷ As stated earlier, Beaudoin testified in the original trial that Puhl told her "the only thing that it [signing] pertained to is that there would be an election as to whether or not we wanted a union."

⁸ All outstanding motions inconsistent with these Conclusions of Law hereby are denied. In the event no exceptions are filed, as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings and conclusions herein shall, as provided Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings and conclusions, and all objections thereto shall be deemed waived for all purposes.