Jack L. Williams, D.D.S. *and* Terry Eggleston, Petitioner, and Dental Technicians Union of Northern California, Local 99, International Jewelry Workers Union, AFL–CIO. Case 20–RD–1141

August 30, 1977

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY MEMBERS JENKINS, PENELLO, AND WALTHER

On March 23, 1977, the Regional Director for Region 20 issued her Decision and Order in the above-entitled proceeding, finding that the Employer had voluntarily recognized the Union as the bargaining agent for the Employer's lab employees, and that the two parties had not been afforded a reasonable time to bargain, citing *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). Accordingly, the Regional Director dismissed the instant petition as untimely filed. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's decision on the grounds, *inter alia,* that in applying *Keller Plastics,* she departed from Board precedent.

By telegraphic order dated April 29,1977, the National Labor Relations Board granted the Employer's request for review.

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 entire record in this case[1] with respect to the issues under review and makes the following findings:

On March 1, 1973, the Union was certified as the bargaining representative for the Employer's lab technicians located at the Employer's Santa Rosa, California, facility. Bargaining commenced and continued until March 30, 1973, when the Employer contracted out its lab work and terminated the lab technicians. On April 12, 1973, the Union filed unfair labor practice charges alleging that the Employer violated Section 8(a)(1), (3), and (5) of the Act. Subsequently, the Employer reopened its lab on October 15, 1973, and by July 1974 had hired a full complement of new employees.

In *Jack L. Williams, D.D.S., d/b/a Empire Dental Co.,*[2] the Board affirmed an Administrative Law Judge's findings that the Employer had violated the Act by making certain statements, dismissing certain employees, and closing the lab without bargaining with the Union regarding the effects of that closing. However, the Board specifically found that the closing of the lab was economically motivated. Therefore, the Board modified the Administrative Law Judge's proposed remedial order which would have required the Employer to (1) offer full reinstatement and backpay to discharged employees; (2) engage in collective bargaining with respect to wages, hours, and other conditions of employment; and (3) restore the laboratory operation. In view of the Employer's financial situation and the poor quality of the technicians' work, which prompted the Employer to contract out the lab work, the Board's order was limited to requiring the Employer to bargain concerning the effects of the contracting out of the lab work and was accompanied by a limited backpay requirement to restore losses suffered by the discharged employees, and "to recreate in some practicable measure a situation in which the parties' bargaining position is not entirely devoid of economic consequence for [the Employer]."[3]

Thereafter, on January 30, 1976, the Ninth Circuit Court of Appeals enforced the Board's order directing backpay and requiring the Employer to bargain over the effects of the contracting out of the lab work. The Employer was not required to reopen the lab or reinstate the terminated employees.

As required by the order and pursuant to a demand by the Union, the Employer met with the Union on February 26, 1976. It appears that at that meeting the parties agreed to refer the issue of backpay to the compliance division of the Regional Office. The parties further agreed to bargain over substantive contract terms affecting the unit of lab technicians. Six bargaining sessions[4] were held between February 26 and April 22, 1976, when the parties learned that the instant petition had been filed. There was one further meeting between the parties on June 10, 1976, under the aegis of a California state conciliator.

As indicated, the Regional Director found that on February 26, 1976, the date the parties met pursuant to the Union's demand, the Employer voluntarily recognized the Union as the bargaining representative for the lab technicians. The Regional Director invoked the principle of *Keller Plastics, supra;* which requires that an employer and a union must bargain

[1] No briefs were filed after review was granted. However, the Board has considered the briefs submitted to the Regional Director.

[2] 211 NLRB 860 (1974). The facts relating to the closing of the lab and the subsequent unfair labor practice litigation are fully set forth in that decision, and official notice of that case is taken for purposes of deciding the instant case.

[3] 211 NLRB at 861.

[4] The negotiating team for the Union included several of the discharged employees.

for a reasonable period of time when the employer voluntarily extends recognition to the union. The Employer contends that it did not validly extend recognition to the Union and the petition should not be dismissed. We find merit in the Employer's argument.

The issue involved in *Keller Plastics*, an unfair labor practice case, was whether a bargaining relationship established by an employer's voluntary recognition of a union representing a majority of its employees can be disrupted by the union's subsequent loss of majority status prior to the execution of a contract. Later cases have explicated the criteria required to invoke the *Keller Plastics* principle in representation proceedings.[5] These cases indicate that there must be a clear and positive demonstration by the union to the employer that the union represents a majority of the employees employed by the employer. Conversely, the employer must extend recognition to the union in good faith, on the basis of this demonstrated showing of majority, at a time when only the union is organizing employees.[6]

In the instant case, the Employer has recognized a previously certified union as the bargaining representative of certain lab technicians. The issue raised relates to the propriety of that recognition in the attendant circumstances. When analyzed against the applicable criteria, the record in the instant case does not reveal such a clear, good-faith extension of recognition by the Employer based on a majority showing by the Union. Although, as the Regional Director noted, the Employer stated in its brief to the Region that its recognition was "purely voluntary," the application of *Keller Plastics* requires more than a statement unaccompanied by record proof of a valid recognition.[7] Indeed, the Employer at the hearing attempted to question the Union's business agent on the issue of whether the Union had contacted the present complement of employees after April 26, 1976, the date the Employer sent a copy of a letter to the business agent which included the names and addresses of the current lab employees. The business agent admitted that he had not contacted these employees after that date. The Employer then inquired if the business agent, after commencement of negotiations on February 26, 1976, had attempted to contact the present employees.[8] Objections were made, and the Hearing Officer sustained these objections stating:

> It is my understanding that after the 9th Circuit Decision that there is a presumption of continuing union majority at the plant, and the question of whether or not they [i.e., the Union] really made an attempt to reach any additional employees, I think, would be irrelevant.

It seems likely that in fact the Union never contacted the present employees. Aside from the aforementioned colloquy, the record discloses that the names and addresses of the current employees were apparently not formally sent to the Union until April 26, 1976, after negotiations ceased. Further, the business agent testified that the Employer had agreed to a union-shop provision, but that it retracted on the issue "because they weren't sure about the employees who are presently employed there." In any event, since no party has attempted to establish, and the record does not reflect, that recognition was extended in good faith based on a demonstrated showing of majority, we do not find the petition barred by the *Keller Plastics* principle.

There remains the issue of whether *Mar-Jac Poultry Company, Inc.*,[9] is applicable in the instant case. In *Mar-Jac,* the Board held that, where an employer, because of its refusal to bargain with the union, takes from the union a substantial part of its 1-year certification period, it should not be permitted to take advantage of its failure to perform its statutory duty. In the instant case, the Union asserts that it has not had the benefit of its certification for 1 year. It maintains that, because of the pendency of its unfair labor practice charge and the enforcement proceedings, the Union has been limited to at most 3 months of bargaining under its certification.[10] The Employer contends that the *Mar-Jac* rule should not apply here because the Board and the court did not require the Employer to reopen its lab or bargain with the Union except with respect to the effects of the closing of the lab and backpay.

[5] See, e.g., *Josephine Furniture Company, Inc.*, 172 NLRB 404 (1968), and *Sound Contractors Association*, 162 NLRB 364 (1966).

[6] See fn. 5, *supra*; *Dale's Super Valu, Inc.*, 181 NLRB 698 (1970). The mere filing of an RD petition does not serve as evidence on the issue of whether or not the union represented a valid majority at the time recognition was extended. See, e.g., *Paramount Metal & Finishing Co., Inc. and Paramount Plating Co., Inc.*, 223 NLRB 1337 (1976).

[7] *Josephine Furniture Company, Inc., supra.* That case involved an RM petition. The employer sent a letter to the union stating that "the Company has no doubt that you represent a majority" of the employees and thus granted recognition to the union. An examination of the record revealed no evidence that cards or other indications of majority status were checked. The Board thus found that the employer's petition was timely filed and a question concerning representation was raised. Compare *Montgomery Ward & Co., Incorporated*, 162 NLRB 369 (1966).

[8] It appears that the parties were concerned with the continued presumption of majority status of the Union, and that the issue of whether *Keller Plastics* was applicable to the case was first raised by the Regional Director's decision. See *infra*, fn. 9.

[9] 136 NLRB 785 (1962). Although the Regional Director did not confront this issue, deciding that the application of *Keller Plastics* obviated the need to consider *Mar-Jac*, the parties were concerned with only that issue at hearing and addressed it in their briefs to the Region, which we have carefully considered. In these circumstances, we believe that the facts with respect to this issue have been adequately presented and developed, and the issue should now be decided.

[10] There were two bargaining sessions in March 1973 and six sessions in February–April 1976.

We believe that, in the circumstances of this case, extension of the certification year is not warranted. As noted, the Board previously found that the closing of the lab was economically motivated. Thus, much of the hiatus in bargaining since 1973 did not result from the Employer's unfair labor practice conduct, but rather stemmed from the fact that the Employer, for valid economic reasons, closed the lab and terminated the employees. Moreover, the Employer did not reopen the lab for appoximately 6 months after the closing, and the hiring of a full complement of new employees was not completed until about a year later. It does not appear that the Union attempted to bargain with the Employer after the lab was opened and the new employees hired, during the pendency of the unfair labor practice litigation. In these rather unusual circumstances, particularly the long period of time which has elapsed since the Employer closed down for economic reasons, we do not think that the certification year is properly tolled.[11] Rather, the present employees are entitled to determine whether they wish to be represented for the purposes of collective bargaining.[12]

We therefore find that the following unit of employees constitute an appropriate unit for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All lab technicians employed by the Employer, excluding all other employees, professional employees, guards and supervisors as defined in the Act.

[Direction of Election and *Excelsior* footnote omitted from publication.]

[11] Compare *Southern Manufacturing Company*, 144 NLRB 784 (1963).

[12] Compare *Down River Forest Products, Inc.*, 205 NLRB 14 (1973). There remains the issue of which individuals are in the unit. Petitioner urges that the former lab employees should be permitted to vote and alleges that the Employer, during negotiations, told the terminated employees that they could consider reemployment with the Employer after the collective-bargaining agreement was reached. The Employer denies that it made such promises, or in the alternative that it may have made such an offer to only three former employees. The record shows that the Employer, in March 1976, sent registered letters to all former employees unconditionally offering them their former jobs. However, only one discharged employee responded to that letter, indicating that he would accept a job. That employee apparently never responded to a subsequent letter from the Employer. The record also shows that several of the discharged employees have secured employment elsewhere. Arguably, former employees who await the result of contract negotiations before accepting explicit offers of reemployment are most accurately described as prospective employees. In any event, if there remains an issue as to any particular employee, he or she may cast a challenged ballot.