

Alex Edelman, Zev Parness, Nash Kestenbaum and Ilone Friedman, a Copartnership d/b/a Wavecrest Home for Adults and Local 1115, Joint Board, Nursing Home and Hospital Employees Division

Local 4, Medical and Health Employees Union and Local 1115, Joint Board, Nursing Home and Hospital Employees Division. Cases 29-CA-3793 and 29-CB-1757

March 31, 1975

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

On November 29, 1974, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, Respondent Employer, Charging Party, and General Counsel filed exceptions and supporting briefs.

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 Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

In the last sentence before the section entitled "B. Conclusion," of his Decision, the Administrative Law Judge inadvertently referred to "Local 1115" instead of "Local 4."

² Our finding that the complaint should be dismissed is based on the special circumstances of this case. It is clear from employee Alexander's testimony and the entire record herein that the employees who signed authorization cards on behalf of Local 4, subsequent to indicating support for Local 1115, did so because of the failure of Local 1115 promptly to demand recognition or take some immediate action on their behalf. Accordingly, we agree with the Administrative Law Judge that the employees, by signing cards for Local 4, intended to repudiate the authorization cards they had previously signed on behalf of Local 1115, and thereby manifested their desire for exclusive representation by Local 4.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in these cases was held on September 30, 1974, and is based upon unfair labor practice charges filed by Local 1115, Joint Board, Nursing Home and Hospital Employees Division, herein called the Charging Party or Local 1115, on April 3, 1974, and a consolidated complaint issued on July 25, 1974, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director of the Board, Region 29, alleging that Wavecrest Home for Adults, herein called the Respondent Employer, has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), and (3) of the National Labor Relations Act, herein called the Act, and that Local 4, Medical and Health Employees Union, herein called Respondent Union, has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and 8(b)(2) of the Act. The Respondents filed answers denying the commission of the alleged unfair labor practices.

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT EMPLOYER

Respondent Employer is a partnership composed of Alex Edelman, Zev Parness, Nash Kestenbaum, and Ilone Friedman, copartners, which does business using the trade name, Wavecrest Home for Adults. It maintains its principal office and place of business in Far Rockaway, New York, where it provides convalescent care, and operates a resident home, for aged and infirm persons. In the course of this business operation, Respondent Employer annually receives gross revenues exceeding \$100,000 and purchases over \$50,000 worth of supplies which originate outside the State of New York. The Respondents admit and I find, that Respondent Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Local 1115, Joint Board, Nursing Home and Hospital Employees Division, the Charging Party, and Local 4, Medical and Health Employees Union, the Respondent Union, each are admittedly labor organizations within the meaning of Section 2(5) of the Act.

III. THE QUESTIONS TO BE DECIDED

On December 9, 1973,¹ Respondents entered into a written recognition agreement wherein the Respondent Employer agreed to recognize the Respondent Union as its employees' exclusive bargaining representative. Shortly thereafter, Respondents entered into a collective-bargaining agreement containing a union-security agreement requiring membership

¹ Unless otherwise specified, all dates herein refer to 1973.

in the Union after 30 days of employment as a condition of continued employment. General Counsel and the Charging Party contend that by entering into the recognition agreement and executing and maintaining the collective-bargaining agreement Respondents violated the Act. Specifically, it is urged that on the day the recognition agreement was executed Respondent Union did not represent a majority of the employees involved and that a question existed concerning the Respondent Union's representative status.

IV THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent Employer, a partnership, operates a home for the aged and infirmed. One of the partners, Alex Edelman, is the Employer's Administrator and supervises its day-to-day operations.

In November employee Haywood Alexander and Keith McKen, a business representative for Local 1115, met at the Employer's premises sometimes called the Home, at which time McKen explained the benefits of representation by Local 1115 and gave Alexander membership application forms which unambiguously designate Local 1115 as the signer's collective-bargaining representative. On or about November 12, Alexander signed and solicited, with success, eight employees to sign membership application forms, which are referred to hereafter as Local 1115 authorization cards or simply as cards. In other words, nine employees on or about November 12 signed cards designating Local 1115 as their collective-bargaining representative.² Alexander, on or about November 14, gave these cards to McKen. It is undisputed that Local 1115 for 1 month took no action regarding the employees' request that it represent them. No petition for an election was filed and it was not until December 14 that Local 1115, by telegram, requested Respondent Employer to recognize it as the employees' bargaining representative.

McKen testified that in the middle of November, after receiving the authorization cards from Alexander, he visited the Respondent Employer's Administrator, Edelman. McKen testified he introduced himself to Edelman and asked if the Home's employees were represented by a labor organization, and indicated that Local 1115 was interested in organizing the employees. Edelman stated that the employees were organized by another union and, because of this, it would be futile for Local 1115 to organize them. McKen, in general, was not an impressive witness. In particular, his testimony about the events which supposedly took place between Local 1115's receipt of the cards and its recognition demand was

not presented in a convincing manner. Moreover, his story sounds false. McKen had been notified by employee Alexander that the Home's employees were not unionized and, after getting the signed cards from Alexander, McKen testified that he felt that Local 1115 represented a majority of the Home's employees. Under the circumstances, it strains credulity to understand why McKen would visit Edelman and tell him that Local 1115 was interested in organizing his employees and ask if the employees were already organized by another labor organization. I am of the opinion that McKen fabricated this episode to support an inference that Respondent Employer was aware of Local 1115's interest in the employees when it entered into the Recognition Agreement with Respondent Union. This conclusion is bolstered by the fact that the Board Agent, who investigated the instant unfair labor practice charges, which were filed by McKen, was not notified by McKen about his alleged middle of November meeting with Edelman. The affidavit which McKen submitted to the Board does not mention this meeting even though McKen regarded it as important to his unfair labor practice charges and even though the Board Agent, who took the affidavit, asked McKen when he first met Edelman. For these reasons, as Edelman credibly testified, I find that McKen did not speak or visit with Edelman in the middle of November or have any contact with Edelman at any time before Local 1115's demand for recognition.

Nor was McKen telling the truth when he testified that on several occasions after receiving the cards from Alexander he visited Alexander at the Home and told him Local 1115 would shortly make a demand upon the Respondent Employer that it recognize Local 1115 as the employees' bargaining representative. His testimony was not given convincingly and does not jibe with Alexander's testimony. In substance, Alexander testified that there was no contact between himself and McKen from the time Alexander handed over the cards to McKen until February 1974, except once when Alexander, mad because Local 1115 had not taken any action to represent the employees, phoned McKen and asked if Local 1115 intended to do anything about representing the employees. At another point, however, Alexander testified that McKen came to the Home and asked "about the Union" and assured Alexander that "everything is going to be all right." But in later testimony, Alexander indicates that this occurred after Respondents had entered into the December 9 recognition agreement at which time McKen came to the Home to determine whether the employees signed cards for the Respondent Union. Alexander's testimony about his conversations with McKen is not consistent with McKen's testimony and, like McKen's testimony, was not presented in a convincing manner and in content was largely incoherent and loaded with contradictions and inconsistencies. In short, neither Alexander nor McKen appeared to be trustworthy or reliable when testifying about events which supposedly occurred between McKen's receipt of the authorization cards from Alexander and Local 1115's demand for recognition. Based on the foregoing, the evidence when viewed most favorably to the General Counsel and Charging Party establishes that during this period of time the only communication between the Home's employees and Local 1115 was when Alexander, unhappy over the lack of action by Local 1115, in November contacted McKen and asked whether Local 1115 intended to

² This finding is based upon Alexander's testimony that he signed a card and witnessed the eight other cards filled out and signed by the respective card signers. I reject Respondents' contention that Alexander was not an honest witness in this regard and the further contention of Respondent Union that Local 1115's cards were signed after Respondents entered into their recognition agreement, and predated. Although Alexander expressed a degree of uncertainty about the exact location where some of the Local 1115 cards were signed and indicated one of the cards was probably signed November 13 rather than November 12, I believe he was telling the truth when he testified about these cards. Alexander's testimony, on this subject, was given with conviction with every indication that it was truthful. Nor was there anything in his testimony or demeanor to suggest that his version of the manner in which the cards were secured and the date they were secured was fabricated.

do anything about representing the employees, and was apparently informed that Local 1115 would shortly demand that the Employer recognize it as the employees' bargaining representative. It is undisputed, however, that Local 1115 did not demand recognition from the Employer until December 14 and that from November 14 to December 14 Local 1115 made no other efforts to secure union representation for the employees. I further find that because of Local 1115's failure to act, employee Alexander, the leading union advocate among the employees, acting on behalf of the employees, decided to secure representation through Respondent Union.

Alexander's credible testimony is to the effect that since Local 1115 had not taken any steps to secure union representation for the employees Alexander decided to get such representation through Respondent Union. On or about December 2, Alexander met with Robert Gordon, the President of Respondent Union, and, in response to Gordon's inquiry, told him that the employees were not represented by a labor organization, but that Local 1115 had previously spoken to the employees but had failed to do anything. Gordon, the next day, explained to Alexander the benefits provided by Respondent Union and gave him a number of authorization cards to distribute. It is undisputed that these cards unambiguously designate the Respondent Union as the signer's exclusive bargaining representative. It is admitted that on December 3, Alexander signed one of the cards and successfully solicited 10 other employees to sign cards, and on December 6 successfully solicited another employee to sign one. Alexander immediately transmitted the signed cards to the Respondent Union.

On December 4, by letter, the Respondent Union informed the Respondent Employer that it represented its employees, asked for a meeting to negotiate a contract covering the employees, and asked that a representative of the Home contact the president of the Respondent Union, Gordon, to arrange for a meeting. A meeting was scheduled for Sunday, December 9, between the representatives of Respondents at which time Gordon informed the Home's Administrator, Edelman, that Respondent Union represented a majority of his employees and gave Edelman the 12 authorization cards signed by the employees. Edelman, using the authorization cards, verified that a majority of the service and maintenance employees had designated the Respondent Union as their bargaining representative. After verifying Local 4's majority status, Edelman consulted with his partners, and they agreed that the Employer would recognize Local 4, the Respondent Union, as the employees' bargaining representative. At this point, on December 9, the representatives of Respondents entered into a written recognition agreement wherein the Respondent Employer recognized the Respondent Union as the sole exclusive bargaining representative of all of the Home's employees except for the "office," "clerical," "guards," and "supervisory," employees.³

The Respondent Employer's Administrator, Edelman, credibly testified that on the date recognition was granted, December 9, the Respondent Employer had no knowledge of the organizing efforts of Local 1115 or that Local 1115 was

interested in representing the employees, nor does the evidence otherwise establish that Respondent Employer had such knowledge on December 9.⁴

On Sunday, December 16, representatives of Respondents met to negotiate the terms of a collective-bargaining agreement and by the end of the day had agreed upon the terms of the agreement which was reduced to writing and signed the next day, December 17. The agreement is effective from January 1, 1974, until December 30, 1976, and contains, among other provisions, a lawful union-security clause requiring membership in Respondent Union for continued employment.

Between Respondents' execution of the recognition agreement on December 9 and the collective-bargaining agreement on December 17, Local 1115, on Friday, December 14, by telegram, advised Respondent Employer that Local 1115 represented a majority of its employees and was prepared to demonstrate its majority status and requested that the Respondent Employer recognize it as the employees' exclusive bargaining agent. This telegram was addressed to the Home's Administrator, Edelman, and as evidenced by the Western Union report of delivery, was delivered December 14 at 3 p.m. Edelman testified that he left the Home on this date at 2 p.m. and that the telegram did not come to his attention until Monday, December 17, after Edelman had affixed his signature to the collective-bargaining agreement. I do not believe Edelman, and find that Respondent Employer knew of this telegram and its contents no later than Sunday, December 16. Edelman, who otherwise impressed me as a credible witness, did not so impress me when he testified about his knowledge of the telegram. In demeanor, he was not a convincing witness. Moreover, his testimony sounds false. He admitted that the receipt of a telegram was an unusual occurrence and that during the normal course of business it would have been delivered to the receptionist, who would have given it to Edelman or left it on his desk if he was not available. Despite its importance and unusual nature, Edelman testified he had no recollection of how the telegram came into his possession but believed he found it on his desk after the contract with Respondent Union had been signed on Monday, December 17. I cannot believe that Edelman, who was at the Home on Sunday, December 16, negotiating with representatives of the Respondent Union, failed to see the telegram or that such an important matter was not brought to his attention. I am of the opinion that, under the circumstances, it would be naive of me to believe that Edelman discovered this telegram for the first time immediately after signing the contract with the Respondent Union on Monday, December 17, even though it had been delivered to the Home on December 14 at about 3 p.m.

⁴ I have considered the General Counsel's and Charging Party's argument that the small size of the Home warrants an inference that the activity on behalf of Local 1115 in November was brought to the attention of the Respondent Employer. But, as indicated previously, the only union activity involved on behalf of Local 1115 was the signing of union cards which took place in the space of about 1 day and in all but about three instances occurred clandestinely away from the Home. These circumstances, and the lack of evidence other than the small size of the Home to support an inference of Employer knowledge, plus Edelman's credible denial that he had such knowledge, lead me to conclude that on December 9, Respondent Employer was not aware of Local 1115's interest in representing its employees.

³ The General Counsel, at the hearing, admitted that a majority of the Respondent Employer's employees in the unit involved herein on December 9 had signed authorization cards designating the Respondent Union as their exclusive bargaining representative.

On December 9, when Respondents entered into their recognition agreement, of the 17 employees involved herein,⁵ 11 had signed cards authorizing the Respondent Union to represent them,⁶ of whom 7 had signed duplicate cards for Local 1115.⁷ The record also establishes that on December 9, of the 17 unit employees, 8 had signed cards designating Local 1115 as their bargaining representative.⁸

One last point which should be noted is the variance between the unit encompassed by the Respondents' recognition agreement and the collective-bargaining agreement. The collective-bargaining agreement includes, whereas the recognition agreement excludes, the clericals employed at the Home. This variance does not affect the majority status of Local 1115, which with the inclusion of the three clericals, still represents a majority of the unit employees having authorization cards from 11 of the 20 unit employees.

B. Conclusions

General Counsel and the Charging Party argue that at all times Respondent Union has been a minority union because 7 of the 11 employees who signed cards designating Respondent Union as their bargaining representative had previously signed identical cards for Local 1115, thus invalidating the 7 cards which leaves Local 1115 with only 4 valid cards out of a unit of 17 employees.

In situations where an employee signs an authorization card for each of two unions, it is settled that the card of neither union will be regarded as a valid designation because it is impossible to determine which union the employee is designating as his exclusive bargaining representative.⁹ But, an authorization card which is otherwise valid is not conclusively tainted by the fact that it is a duplicate card. The card signer's intent is the question involved in such a situation and, absent evidence which sheds light on the conduct involved, it is impossible to determine which union the signer intended to designate as exclusive bargaining representative. However, if the circumstances demonstrate that in signing a duplicate card, the signer intended to designate this labor organization as exclusive bargaining representative rather than the union previously designated, the so-called duplicate card is a valid one and can be used to determine the union's majority status. See *Harry Stein and Arthur Calder d/b/a Ace Sample Card Company*, 46 NLRB 129, 130-131 (1942) (card of Pfeffer). In the instant case, the circumstances establish that the seven employees who signed duplicate cards intended to designate Respondent Union rather than Local 1115 as their exclusive bargaining representative. Thus, as found, *supra*, the em-

ployees signed cards designating the Respondent Union as their exclusive bargaining representative because Local 1115 had failed to act to represent them. The employees signed their duplicate cards with the intent to repudiate Local 1115 and to switch their allegiance to Respondent Union. For these reasons, I find that on the date the Respondents entered into their recognition agreement, December 9, the seven employees who signed duplicate cards desired exclusive representation from Respondent Union rather than by Local 1115.

It is undisputed that a majority of the employees involved herein signed authorization cards designating the Respondent Union as their exclusive collective-bargaining representative and that, based upon these cards, the Respondent Union requested recognition as the employees' exclusive representative. Respondent Employer agreed to recognize the Union if a check of its authorization cards revealed that it was the employees' majority representative and when a check of the cards verified the Union's majority status, the Respondents entered into written recognition agreement wherein the Respondent Employer recognized the Respondent Union as its employees' exclusive bargaining representative. The recognition agreement was entered into at a time when the Respondent Employer was without knowledge that another labor organization, Local 1115, had an interest in representing its employees, nor did the Respondent Employer have an inkling that a substantial number of the employees had previously designated Local 1115 as their bargaining representative, or that its employees were otherwise interested in being represented by Local 1115. It would thus appear that the Respondent Employer's agreement to recognize the Respondent Union on the basis of the card check was required by the Act. Under these circumstances, it is my view, as contended by Respondents, that the *Keller Plastics*¹⁰ principle is here applicable to immunize the Respondent Employer and the Respondent Union from the violations alleged in the consolidated complaint, namely, the grant and acceptance of voluntary recognition on December 9 and the entering into the maintaining of the collective-bargaining agreement reached on December 16. Under *Keller Plastics*, a request for recognition by a rival union, following the execution of a recognition agreement, will not raise a question of the representative status of the recognized union provided that such recognition has been granted "in good faith on the basis of a previously demonstrated showing of majority and at a time when only that union was actively engaged in organizing the unit employees." *Sound Contractors Association*, 162 NLRB 364, 365 (1966). In the instant case, recognition was granted in good faith on the basis of a previously demonstrated showing of majority and at a time when only Respondent Union was actively engaged in organizing the unit employees¹¹ and

⁵ The figure 17 excludes the chef, Priva Thaler, a supervisory employee, and excludes clerical employees Parnes, Sevetar, and Finkelstein.

⁶ Jenkins, Travers, Roberts, Rizzo, Benrubi, Laufer, Aponte, Williams, Alexander, Ethel and Mattie Pough. The card of a twelfth signer—Samantha Leiner—does not appear on Respondent Employer's payroll record as read into the record.

⁷ Jenkins, Aponte, Roberts, Alexander, Williams, Ethel and Mattie Pough.

⁸ The employees named in fn 7 *supra*, plus Mary Davis.

⁹ See *Hi Temp Inc., a Division of Beatrice Foods Co., Tru Temp Inc., Steel Treating Inc.* 203 NLRB 753 (1973); *Intalco Aluminum Corp.*, 169 NLRB 1034 (1968), *Allied Supermarkets, Inc.*, 169 NLRB 927 (1968), *J.W. Mortell Company*, 168 NLRB 435, 453, (1967), and cases cited therein, *Harry Stein and Arthur Calder d/b/a Ace Sample Card Company*, 46 NLRB 129, 130-131 (1942).

¹⁰ *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), where the Board held that a validly recognized union is entitled to a continuing representative status for a reasonable period of time during which it may negotiate a contract notwithstanding the fact that the union may have lost its majority status during the interim.

¹¹ Local 1115's campaign to organize the employees took place about one month before Respondents entered into their recognition agreement. Its campaign consisted of the solicitation of the employees on November 12 to sign union authorization cards. Thereafter, Local 1115 engaged in no other organizational activity among the employees who because of its failure to take steps to represent them repudiated Local 1115 and signed cards for the Respondent Union early in December. These circumstances demonstrate

when the Respondent Employer was not aware of Local 1115's interest in representing the employees. Accordingly, under the circumstances herein, I conclude that the Respondents did not run afoul of the Act by respectively granting and accepting recognition, or by entering into a collective-bar-

that recognition was granted by the Respondent Employer "at a time when only [Respondent Union] was actively engaged in organizing the unit employees."

gaining agreement following Local 1115's demand for recognition. Cf. *Ridge Care, Inc. t/a Whitemarsh Nursing Center*, 209 NLRB 873 (1974), and *Mojave Electric Cooperative, Inc.*, 210 NLRB 88 (1974). For these reasons, I shall recommend that the consolidated complaint in this matter be dismissed in its entirety.

[Recommended Order for dismissal omitted from publication.]