

Woodmere, Inc. and Carpenters Local 971, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and International Union of District 50, United Mine Workers of America, Party to the Contract and Intervenor. Case 20-CA-4994

April 18, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On January 2, 1969, Trial Examiner Herman Marx issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed a supporting brief; the Respondent filed exceptions and a supporting brief, and the Intervenor filed exceptions and a supporting brief.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

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 Trial Examiner, and hereby orders that the Respondent, Woodmere, Inc., Reno, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

HERMAN MARX, Trial Examiner: The complaint alleges, in material substance, that an employer, Woodmere, Inc. (herein the Respondent or Company), has unlawfully contributed support to a labor organization named International Union of District 50, United Mine Workers of America' (herein District 50) by entering into a collective bargaining agreement affecting employees of the Company at a time when a question of representation of the said employees existed; and has, by such conduct,

violated Section 8(a)(1) and (2) of the National Labor Relations Act, as amended (herein the Act).²

The Respondent has filed an answer which, in material substance, denies the commission of the unfair labor practices alleged in the complaint.³

A hearing on the issues was held before me as duly designated Trial Examiner on October 15, 1968, at Reno, Nevada. Upon unopposed motions, District 50 was added to this proceeding as "party to the contract", and was given leave to intervene. The General Counsel of the National Labor Relations Board, District 50, and the Respondent Company appeared through respective counsel, and all parties were afforded a full opportunity to adduce evidence, examine and cross-examine witnesses and submit oral argument and briefs. A motion for dismissal of the complaint, made by the Respondent after the close of the evidence, and reserved for disposition here, is denied on the basis of findings and conclusions set forth below.

The General Counsel has filed a motion for correction of the hearing transcript, and has submitted proof of due service upon all other parties. No opposition has been received, the motion is granted; and the transcript is corrected in the particulars set forth in the motion.⁴

Upon the entire record, from my observation of the demeanor of the witnesses, and having read and considered the briefs filed with me since the close of the hearing, I make the following findings of fact:

FINDINGS OF FACT

I. NATURE OF THE RESPONDENT'S BUSINESS, JURISDICTION OF THE BOARD

The Company is a corporation; maintains a place of business in Reno, Nevada, where it is engaged in the business of assembling and selling finished wood cabinets; and is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.

During the year preceding the issuance of the complaint, the Company, in the course and conduct of its business operations in Nevada, purchased and received goods valued in excess of \$50,000 from suppliers located outside the said state. By reason of such transactions, the Company is, and has been at all times material to the issues, engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Accordingly, the National Labor Relations Board has jurisdiction over the subject matter of this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

International Union of District 50, United Mine Workers of America and Carpenters Local 971, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein variously Local 971 or the Carpenters Union) are, and have been at all material times, labor

¹The caption appears as amended at the hearing in this proceeding

²29 U.S.C. 151, *et seq.*

³The complaint was issued on August 12, 1968, and is based upon a charge filed with the National Labor Relations Board on May 10, 1968. Copies of the charge, the complaint, and a notice of hearing have been duly served upon all parties entitled thereto, except District 50, which waived such service and notice at the hearing in this proceeding.

⁴The hearing transcript is garbled at a number of other points, but as the record adequately sets forth the material facts and issues, I deem it unnecessary, in the absence of a motion by any party addressed to such other particulars, to enter an order making the additional corrections.

organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Prefatory Statement

The Company's operations are under the overall supervision of its president, Abner S. Read, who is, and has been at all times material here, a supervisor within the meaning of Section 2(11) of the Act, and an agent of the Company.

As the complaint alleges, and as the parties stipulated at the hearing, "(a)11 employees of Respondent working at Respondent's plant in Reno, Nevada, excluding office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act." The unit has been thus appropriate at all times material here, and, as the parties agree, does not include "temporary employees."

The Respondent's business premises were formerly located in Santa Clara, California, operating there under the name of Pemline Manufacturing Company, and its employees at that location were subject to one or another of several collective bargaining contracts between Pemline and various unions.

The enterprise began to move to its present location, 2500 Valley Road, Reno, Nevada, on February 9, 1968, but had not yet completed the move at the time of the hearing in this proceeding some eight months later, although engaging in manufacturing operations at the new location. As Read testified, these operations got under way "very slowly", starting about the end of April 1968, and "did not gain momentum until the end of May or June."⁵

At some point between the start of the move and April 11, an attorney named George V. Gardner, of Washington, D.C., told a representative of District 50, Andrew J. Bananto, at some unidentified location in the East (perhaps Washington, D.C., where District 50, like Gardner, has headquarters) that the Company "is just getting a start . . . and would like to have a union" to make its products acceptable to unions, and suggested that Bananto "have a talk with Mr. Read about seeing whether the employees would like to have . . . them (District 50) represent the employees in a contract."⁶

Bananto came to the Reno plant on April 11.⁷ He did not testify, and the only evidence of what he did there on that occasion consists of Read's testimony to the effect that Bananto introduced himself as a representative of District 50, and "talked about the union and about our people" (employees, apparently); that Read said that "we had had unions in the past and were in favor of having a

union"; that he introduced Bananto to an employee, James Conklin, as "our senior man in the plant"; that, in response to a request by Conklin (apparently at some point on April 11 after the introduction of Bananto to Conklin, according to the sense of Read's testimony), Read gave Conklin leave to assemble the employees "outside the plant to discuss all of this" (not further elaborated); that following the "outside" meeting (which Read says he did not attend, and of which no details are given by anyone who did), Conklin came to him with Bananto, and stated that he and Bananto had had "a meeting of the minds", and that he (Conklin) had had "cards signed"; that Read "asked to see the cards", and "wanted to know what it was all about"; that Conklin said that "they (Conklin and Bananto) wouldn't let me see them (the "cards") but that they could assure me they had a majority of the people that were employed in the plant"; that Read said that he wished to have a "union shop", and would agree to one if that were the "will" of the employees; that Bananto and Conklin asked him to sign a "recognition agreement"; that Bananto gave him such a document for his signature; and that he agreed to the request

The Company, through Read, and District 50, through Bananto and another representative of the organization, did, in fact, execute an instrument, which is dated April 11, 1968, and states, in substance, that the Company "agrees to recognize" District 50, "as the designated and selected representative" of the Company's production, maintenance, shipping and receiving employees, for collective-bargaining purposes, and that the "parties agree to enter into a collective bargaining agreement as soon as possible."⁸

According to Read, on April 11, following execution of the recognition instrument, discussing a date for contract negotiations, he told Bananto that it would be "necessary for me to contact my counsel" (Gardner, as is evident from subsequent events), and at one point or another thereafter, April 25 was set as the date for such negotiations.

At the time of execution of the recognition document, the Company had in its employ a total of 15 or 16 employees, including 5 who then held a "temporary" status (helping in the move or preparing the Reno plant for operations). As is evident from his testimony, Read did not seek any verification of District 50's representative status beyond his alleged request of Conklin "to see the cards." Read does not say what "cards" he had in mind, but presumably his reference is to forms signed by employees and designating District 50 as bargaining representative. In any case, the alleged "cards" were not produced at the hearing, nor is there any probative evidence that District 50 was, in fact, the bargaining representative of a majority of the employees in any appropriate bargaining unit at the plant.⁹

⁵All dates mentioned herein occurred in 1968, unless otherwise indicated.

⁶The findings as to the meeting between Gardner and Bananto are based on undisputed evidence of a talk Gardner gave to the Company's employees at the Reno plant, in Read's presence, on May 6, 1968. On that occasion, Read introduced Gardner to the employees as the Company's attorney, and Gardner then proceeded to relate to them his conversation with Bananto in the East. Obviously, what Gardner told the employees may be treated as admissions by the Company. The precise date of the meeting between Gardner and Bananto is not established, but it is evident from Gardner's remarks to the employees and the sequence of events that the meeting took place between the start of the move to Reno and April 11, 1968, when, as will appear in more detail later, the Company recognized District 50 as bargaining representative of the Reno employees. The site of the conversation is not important.

⁷Read testified at one point that Bananto came to the plant "about April 10," but other portions of his testimony indicate that it was on April 11.

⁸The bargaining unit (production, maintenance, shipping and receiving employees) set forth in the recognition agreement is for all practical purposes the same as one defined in a later contract between District 50 and the Company (G.C. Exh 11). The parties stipulated at the hearing that the composition of that contractual unit is the same, for the purposes of this proceeding, as that of the unit described in the complaint (and found above to be appropriate).

⁹Read's claim to the effect that Conklin "assured" him that a majority of the employees had designated District 50 as bargaining representative is plainly hearsay, and is not proof of representation. Obviously, too, the alleged "cards" themselves would be the best evidence of their contents.

On April 30, Edmond Hansen, a representative of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein the Brotherhood), of which Local 971 is a local affiliate, and Primo Bertoldi, a business agent of Local 971, called on Read at the Reno plant, introduced themselves, and expressed interest in representing the Company's employees. Read stated that they were "late"; and that District 50 was already "in" the plant. The union representatives inquired how that had come about, and Read replied that he had consulted an industry association in California concerning union representation of the employees at the Reno plant, and that the organization had recommended that the Company "get District 50 in."¹⁰

On May 1, Conklin called on Hansen and Bertoldi at a union hall in Reno where Local 971 has its headquarters, told them that he and other employees were dissatisfied with working conditions at the Company's plant, and expressed interest in what the Brotherhood or its local affiliate had to offer in wage scales and other benefits. Hansen and Bertoldi gave him some information as to union standards in the area, and suggested that he and other interested employees meet with them at the union hall on the evening of May 2.

Such a meeting was held on that date under the auspices of Local 971, and was attended by 11 "permanent" employees, including Conklin, and by 2 who were "temporary." Following some discussion of union contractual provisions, each of the employees present executed a card containing language to the effect that the signatory was applying for membership in the Brotherhood, and authorizing it to act for him as collective-bargaining agent with respect to wages, hours and other conditions of employment. Hansen told the employees at the meeting that the cards would be used to secure an election, but either he or Bertoldi or another union representative present also told them that the cards were "for representation to present to the Company to negotiate for a contract." The 11 "permanent" employees who signed cards that night constituted a majority of the appropriate unit described above, which then numbered 16 employees.¹¹

Conklin told Hansen at the union hall that evening that a number of employees interested in representation had been unable to attend, and requested, and was given, some authorization forms for submission to them. He returned to the union hall on the following day and gave Hansen five cards purportedly signed by employees who had not been at the meeting.¹²

¹⁰Contrary to Hansen and Bertoldi, Read denies that he told them that the industry association had "recommended District 50," but the testimony of the union representatives in that regard is given corroborative weight by the evidence that Gardner, the Company's attorney, had previously suggested to Bananto that he talk to Read about a contract with District 50. I do not credit Read's denial.

¹¹I am satisfied from the circumstances surrounding the execution of the 13 cards at the meeting that they are authentic. See *Hunter Engineering Company*, 104 NLRB 1016, 1020, enf'd 215 F.2d 916 (C.A. 8). Moreover, the Respondent's brief concedes that "ten carpenter authorization cards were signed by permanent unit employees" at the meeting (Actually, as found above, 11 such employees signed. The brief erroneously treats an employee named Jarvis as "temporary.")

¹²The signatures on the five cards are not authenticated. They were offered and received in evidence not as proof of representation, but as part of the showing submitted to the Board's Region 20 in support of a petition for representation filed by Local 971 with the regional office on May 7, 1968. The five cards contribute nothing of substance to a resolution of the issues.

On May 3, a Friday, Local 971 mailed a representation petition, together with the 18 executed cards as a supporting showing of interest by the employees, to the office of the Board's Region 20 in San Francisco, where they were received on the following Tuesday, May 7.

About 3:20 p.m. on May 3, Hansen, on behalf of Bertoldi and Local 971, telephoned a message to Western Union in Reno for transmission to "Woodmere Corp. Mr. Reed"¹³ (as taken down by Western Union's message receiving operator), giving the operator the Company's correct telephone number and street address for transmission of the message; and the name of Primo Bertoldi as the message sender, identifying him as business agent of "Carpenter Local 971," and stating that organization's correct address. The message was, in substance, that a majority of the Company's employees had designated Local 971 as their bargaining agent, and that the organization was requesting that the Company recognize it and bargain with it regarding terms and conditions of employment.

Read denies that he received "a telegram" from Local 971 during the period between April 11, the date of the recognition agreement, and May 7, when, as will appear presently in more detail, District 50 and the Company entered into a contract prescribing terms and conditions of employment for the Company's employees. The weight of this denial will be considered at a subsequent point in the light of evidence of Western Union's procedures in transmitting messages in Reno to commercial enterprises by telephone and mailed confirmation copy.

B. The Execution of the Contract Alleged in the Complaint

On the morning of May 6, Read had a conversation at the plant with an employee named Isidor Hlavinka, telling the latter that the Company had recognized District 50 with a view to negotiating a contract with it, and that he would assemble the employees for a meeting with the management regarding the matter. In the course of the conversation, Hlavinka informed Read that employees of the Company had met at the union hall of the Carpenters Union the previous Thursday evening, that that organization had asked them to sign "papers" authorizing it to represent them, and that Conklin had then "called Bananto and told him" about this development.

Gardner was at the plant that morning, and as is evident from the sequence of subsequent events, at least one of his purposes was to meet with one or more representatives of District 50 to conclude an agreement affecting the Company's employees.

That same morning, shortly after his conversation with Hlavinka, Read convened a meeting at the plant, which was attended by Read and Gardner, among other management personnel, and by the Company's entire "permanent" and "temporary" labor force. Gardner and Read "did most of the talking," Read introducing Gardner as the Company's attorney, and stating, among other things, that Gardner would "represent [it] in negotiations."

Gardner then addressed the employees, relating his conversation with Bananto in the East, which has been described above, and then stating that the Company was obligated by its recognition agreement with District 50 to negotiate a contract with that organization, and that he

¹³The intended addressees, as is evident, were Woodmere, Inc., and Read.

had come "out here" (to Reno) to represent the Company in such negotiations.

Within a few minutes after the meeting ended, Bananto appeared at the plant, and Conklin and Hlavinka (who had entered the Company's employ on April 19, and had signed a bargaining authorization for District 50 about a week later, and still another for the Brotherhood at the May 2 meeting) requested and received permission from Read to hold a meeting of "union members" (employees holding membership in an affiliate of District 50, Local 14647, according to the sense of Hlavinka's testimony) and the other employees. The meeting was thereupon held out of the presence of management personnel. The record does not specify the number of employees who attended that meeting, nor the number who were "members" of District 50 or its local affiliate. In any event, as Hlavinka testified, Bananto suggested that a "negotiating committee" be designated, and the "members of Local 14647," by a show of hands, then agreed upon Hlavinka, Conklin, and an employee named Alice Cunningham as the committee.¹⁴

The three committee members and Bananto then proceeded to Read's office and told him and Gardner that they were ready to proceed with negotiations. These began almost immediately thereafter, Gardner representing the Company, and Bananto and the committee representing District 50 and its local affiliate, and the upshot was a contract between the Company and District 50, executed on the following day, May 7. The contract prescribes a wide range of terms and conditions of employment for the Company's employees, including provisions for wages, hours, seniority, checkoff of union dues and grievance and arbitration procedures; and provides that it is to remain in effect for three years, and thereafter "from year to year" until termination or modification in accordance with a specified notice procedure. According to Hlavinka, the negotiations took about "half a day" (although he also stated that they lasted from about 9:30 a.m. to 11 p.m. on May 6), but there are no details of any negotiations or of proposals or counterproposals varying in any manner from the contract as executed.

Notice of the filing of the representation petition was received by the Company at some point after May 7, but, as will presently appear, that does not affect the issue of the legality of the May 7 contract, which hinges on other facts

C. Discussion of the Issues; Concluding Findings

The General Counsel, asserting that the record warrants a finding that the message containing Local 971's claim of representation and bargaining demand, given Western Union by Hansen on May 3, was received by the Company before conclusion of the contract with District 50 on May 7, maintains that the message, "together with Respondent's knowledge of Local 971's organizational activities, created a real question concerning representation"; and that thus, by entering into the contract of May 7 with District 50, the Respondent unlawfully assisted that organization.

¹⁴The record does not establish how many of the employees held membership in District 50 or its local at any time Hlavinka holds four posts with the local, and there is some vague intimation in his testimony that he holds that many because the local's membership is small, but, in any case, for reasons that will appear later, the fact that an unspecified number of employees assented to the formation and composition of the negotiating committee does not affect any material issue here

The Respondent, on the other hand, contends that there is a failure of proof that it received the message of May 3; that the cards signed at the behest of the Carpenters Union were "procured for the limited purpose of obtaining a representation election", and were "not binding upon the company"; and that, in any case, the Company had validly recognized District 50 by force of the agreement of April 11, had entered into negotiations and the May 7 contract reasonably soon thereafter, and had a right to enter into the contract of that date under the doctrine of *Keller Plastics Eastern*, 157 NLRB 583. There the Board held (at p. 587) that where "a bargaining status (is) established as the result of voluntary recognition of a majority representative . . . the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining."¹⁵ Thus, so the argument runs, the representative status of Local 971 on May 7 has no bearing on the validity of the contract of that date.

Turning first to the question of the Company's receipt of the Western Union message, it is true that there is no direct evidence that it was actually received, but the record as a whole warrants an inference that the Company received Hansen's message at some point prior to the execution of the May 7 contract.

Under the regular operating procedures of Western Union's Reno office, a "business message" such as that telephoned by Hansen, together with the related telephone and address information given, is taken down by the receiving operator on a recording form called a "receipt copy," and duplicated on another such form. The duplicate is called a "delivery copy." A "message file" pertaining to the transaction is kept by the office for six months, and the "receipt copy" is retained for that period in the file, but this is not necessarily the case with the "delivery copy." Where, as in this case, there is an individual addressee, and the sender does not request "personal delivery" and supplies a telephone number by which to reach the addressee, the same or another operator, upon completion of the "delivery copy," makes as many as several attempts over a period of some hours to deliver the message to the individual addressee or, if he is unavailable, to another person at the given telephone number, who will accept the message for the addressee. The time and result of each attempt is noted on the "delivery copy." No other record of the attempt or resulting transmission is made. If telephone transmission is effected, the "delivery copy" will be mailed to the addressee, upon his request, usually before the end of the day of transmission (but the record does not establish, with any clarity, at least, what is done with the copy if no such request is made.)¹⁶ If the message is not transmitted for any reason, the "delivery copy," by then reflecting the time and results of transmission attempts, would be retained by the Reno office for six months, and the office would prepare a "service message" noting nondelivery, attach it to the "receipt copy", and notify the sender of nondelivery either by telephone or by mailed transmission of a copy of the "service message."

¹⁵Sec. also, *Sound Contractors Association*, 162 NLRB No. 45, *Allied Super Markets, Inc.*, 167 NLRB No. 48, *San Clemente Publishing Corporation*, 167 NLRB No. 2, *Universal Gear Service Corporation*, 157 NLRB 1169.

¹⁶The record reflects some confusion as to the disposition of the "delivery copy" after transmission of the message by telephone. Under direct examination, Joseph Norfleet (as the name appears in the amended transcript), manager of Western Union's Reno office, gave testimony to the effect that mailing of the "delivery copy" to the addressee routinely

As Joseph Norfleet, manager of Western Union's Reno office, testified, an examination he made of its records on June 20, about six weeks after the message was given the office for transmission, turned up the "receipt copy" (which is in evidence), but not the "delivery copy." He encountered no "service message," and none is attached to the "receipt copy."

About 2 or 3 days after Hansen gave Western Union the message, Bertoldi, named therein as the sender, received a confirmation copy in the mail from Western Union at Local 971's office, but, as he testified credibly, he has never received any notification from Western Union that it had been unable to transmit the message to the addressees.¹⁷

The evidence of Western Union's operating procedures, the results of Norfleet's investigation of its records, and the fact that Bertoldi has never been notified of nondelivery of his message fairly warrant an inference that Read, or someone at the Company's office in his behalf, received the message of May 3, at least by telephone, at some point before the execution of the May 7 contract, in the absence of a credible negation by the Company that it received the message, whether by Read or another.

I find no such negation. Read was the sole witness called by the Respondent on that subject (or on any other, for that matter, testifying as a "joint witness" for District 50 as well). He stated that the Company's mailing address is a "post office box," but that begs the question whether the message was received by telephone or by mail bearing the Company's correct street address. The post office box, obviously, has no connection with the Company's telephone number, and, plainly, mail addressed to the Company at its business location, 2500 Valley Road, Reno, Nevada, would, in the normal course of mail delivery, be delivered at that address, as, in fact, has been the case with copies of the representation petition, and of the charge, complaint and subpoena in this proceeding, all of them addressed to the Company at its correct street location. The nub of the matter is that substantially the total record made by District 50 and the Company on the question of receipt of the message consists of the following excerpt from Read's examination and testimony:

Q (By Mr Cefalo) . . . Did you ever receive a telegram from any labor union during the calendar period here, which is April 11 to May 7?

A. No.

This disclaimer has manifest ambiguity. One would think that if Read did not receive Hansen's message *in any form* at any time prior to the execution of the contract on May 7, it would be a simple matter to present that fact in evidence, but his denial that he received "a telegram" leaves one to guess whether he is alluding to "a telegram" in the widely understood sense of a message transmitted in writing to an addressee by Western Union, or whether his denial encompasses a disclaimer that he

follows telephone transmission, but then, under cross-examination, in a context immediately following interrogation on the subject of messenger delivery, which is made, following completed telephone transmission, only if requested by the addressee, Norfleet's testimony contains some indication that that is also the case with mail delivery. It may be that Norfleet at that point had in mind his prior testimony regarding messenger delivery and unwittingly left the impression that mail delivery is similarly optional with the addressee, but the record on that aspect lacks sufficient clarity to warrant a finding in the premises.

¹⁷Bertoldi's testimony that Western Union has not notified him of nondelivery is given corroborative support by the fact that the "receipt copy" turned up by Norfleet's investigation had no "service message" attached.

received a message over the telephone, or that another at the Company's premises relayed such a message to him.¹⁸

Summarizing the matter, the weight of the evidence persuades me, and I find, that Read and the Company received the message embodying Local 971's claim of representation and bargaining request prior to the execution of the May 7 contract.¹⁹

The Respondent's reliance upon *Keller Plastics* is misplaced, for its doctrine is obviously applicable only to recognition of a "majority representative" (*Keller Plastics* at p. 587). In its brief, the Respondent assumes such a status in the absence of an allegation and evidence by *the General Counsel* impugning the validity of the recognition agreement.²⁰ But this misconceives the location of the burden of proof regarding the viability of that agreement.

It has been long established that "an employer faced with conflicting claims of two or more rival unions which give rise to a real question of representation may not recognize or enter into a contract with one of these unions until its right to be recognized has finally been determined under the special procedures provided in the Act" (*Novak Logging Company*, 119 NLRB 1573, 1574, citing *Midwest Piping & Supply Co., Inc.*, 63 NLRB 1060, and other cases to the same effect). Applying that doctrine here, the General Counsel's *prima facie* case is, in essence, that Local 971's claim of representation, based on the execution of the authorization cards at the May 2 meeting, was "colorable," and that the Company, with

¹⁸Particularly in view of the fact that Hansen gave the Western Union receiving operator the Company's correct telephone number, I see no reason to believe that the slight variance between "Woodmere Corp." and "Reed," the addressees' names as taken down by the operator, and "Woodmere, Inc." and "Read," the respective correct names, resulted in a failure to transmit the message.

¹⁹The finding as to the receipt of the message is made without regard to the timing of the negotiations, but it is nevertheless noteworthy that Gardner and Bananto appeared at the plant for contract negotiations on Monday morning, May 6, hard on the heels of the weekend that followed the Friday afternoon on which Hansen gave Western Union the message, and that according to the information Hlavinka gave Read on the morning of May 6, Conklin had notified Bananto of events at the meeting held by the Carpenters Union on May 2 shortly after the meeting took place. One may accept Read's claim that negotiations had originally been scheduled for April 25, but the question still remains why they began so soon after the May 2 meeting and the message given on the following day to Western Union for transmission to the Company and Read True, Hlavinka testified that negotiations had been scheduled "around the third week in April," but that "Mr Gardner was out east on legal business and could not be there, so they postponed it until May 6," but it is evident that Hlavinka has no first hand knowledge of what "they" did. He entered the Company's employ on April 19, only a few days before the date on which negotiations were allegedly initially scheduled; and it is evident from his testimony that he is guessing about the date of the recognition agreement ("April 12 or April 20") and the alleged initial negotiating date, that his information about those dates is hearsay, and that he first learned of the recognition agreement and the impending negotiations on the morning of May 6 when Read mentioned these matters to him. His first connection with District 50, so far as appears, was when he signed an "authorization card or membership application" for it on April 26 or 28, according to his estimate, and, as his testimony establishes, he had no negotiating or other representative capacity for District 50 until the morning of May 6 when he became a member of its negotiating committee as a result of a show of an unspecified number of hands. Neither District 50 nor the Respondent, who are privy to their negotiating arrangements, offered any explanation why May 6 was selected for negotiations in preference to any other date, and in the absence of such an explanation, one may fairly believe, in the context of events, that the Company's receipt of Local 971's claim of representation triggered the negotiations that followed on May 6. However, as stated above, the conclusion that Read and the Company received the message does not hinge on the timing of the May 6 negotiations.

²⁰District 50 has filed no brief, but obviously shares the Company's position regarding the viability of the recognition agreement.

knowledge of Local 971's claim, communicated by the Western Union message, entered into the May 7 contract with District 50 in the face of Local 971's claim. The General Counsel must prevail upon proof of these facts unless the Company or District 50 establishes that they had a right to enter into the May 7 contract, notwithstanding the conflicting claims of representation. They assert such a right by force of the recognition agreement, or, in other words, they rest upon the agreement and its asserted effect under the *Keller Plastics* doctrine as an affirmative defense to the General Counsel's claim. The burden of sustaining that defense is theirs.

Much in the record supports a conclusion that District 50 was the Company's choice as bargaining representative for its employees rather than that of the employees. District 50 was recommended to Read by an industry association, and, as is evident from Gardner's conversation with Bananto prior to April 11, the Company was seeking a union to represent its employees so that its products would be regarded as "union made" and be acceptable to unions (which, as may be inferred, represent employees who might have occasion to handle the Company's products after manufacture). What is more, the Company itself was at the bottom of Bananto's visit to the plant on April 11 to discuss representation of the employees with Read. Gardner, acting as the Company's agent, had suggested the idea to Bananto.²¹ And, in addition, if the "outside" meeting between Bananto and any employees, to which Read refers, occurred, Read's own testimony indicates that he did much to facilitate the affair, first introducing Bananto to Conklin, and then, allegedly at Conklin's request, granting "time" for the meeting.

To cap the matter, Read agreed to recognition without any demonstration of District 50's representative status. To be sure, he claims that he asked to see the "cards", and that Conklin declined to show them, but one would think that the very refusal, if it occurred, would have led him to seek some assurance other than Conklin's word, such as, for example, an examination of the cards by a neutral person or agency, if not an election under the Board's auspices. It appears to me that Read's request to see the "cards", if it was made, was a charade aimed at giving the recognition agreement a gloss of regularity which it lacked.

That view of the matter is given added point by the fact that there is no evidence of what took place at the alleged "outside" meeting, nor of the number or identity of those who attended, apart from Conklin and Bananto, or that even so much as one employee signed a "card" or other document designating District 50 as bargaining representative prior to the execution of the recognition agreement. The failure to produce any such evidence is especially noteworthy in view of the fact that although Bananto is a representative of District 50, and that the organization and the Company presented Read as their "joint witness," neither party called Bananto as a witness or explained his absence.²²

²¹In the light of Read's introduction of Gardner to the employees on May 6 and Gardner's activities at the plant, I have no doubt that Gardner acted as the Company's agent in his discussion with Bananto, and that his suggestion on that occasion led to Bananto's visit to Read on April 11.

²²The unexplained failure to produce Bananto or any evidence of representation such as the alleged "cards" to which Read alludes, warrants application to District 50, at least, of the doctrine that ". . . where the party on whom rests the burden of evidence as to a particular fact has the evidence within his control and withholds it, the presumption is that such

On the basis of what has been said, I am convinced and find that the Company recognized District 50 without a good faith belief that the latter represented a majority of the unit employees, extending recognition to further its aim of dealing with a union in order to be in a position to represent that its products are "union made."

But even if one were to assume that the Company believed at the time of recognition that District 50 had majority status, the end result here would be the same, for the critical fact is that the Company and District 50 have failed to establish that such a representative status in fact existed. Proof of the recognition agreement alone will not suffice, and I hold, in short, that the *Keller Plastics* doctrine is inapposite here.²³

Finally, I find no merit in the Respondent's position that the cards signed at the Carpenters Union meeting of May 2 were "for the limited purpose of obtaining a representation election" and thus "not binding upon the company." The thrust of this position is not entirely clear, but I take it to be that the cards signed at the meeting did not have the effect of designating a bargaining representative and thus raised no question of representation.

In any case, the position is factually inaccurate, for the employees were not told that the cards would be used *only* to secure an election. The cards themselves unequivocally vest bargaining authority in the Brotherhood, which acted in concert with its local affiliate in seeking to organize the employees, and later sponsored its local's claim of representation and bargaining request; and although the employees were informed at the meeting that the cards "were to be used to get an election", they were also told there, as Hlavinka testified, that the cards were "for representation to present to the Company for a contract." There is no evidence that the employees were induced to sign the cards by misrepresentation, and they were, in effect, put on notice that the cards were usable by the Brotherhood or its local affiliate as bargaining authorizations, or to seek a formal certification of one or the other as bargaining representative by means of an election. The issues, moreover, require no determination whether the cards in question are "binding" on the Respondent in the sense of imposing a bargaining obligation upon it. It is enough in that regard that the claim of representation based on the cards is colorable. That it has that character is beyond cavil.

The claim and its assertion raised a real question of representation — a question underscored, incidentally, by the fact that Conklin, Hlavinka, and Cunningham, who purportedly joined, as a committee of employees, with Bananto in representing District 50 in negotiating the May 7 contract with Gardner, only a few days earlier attended the meeting held by the Carpenters Union and signed authorization cards there, designating the Brotherhood as their representative.

The sum of the matter is that by entering into the contract of May 7, while the question of representation existed, the Company contributed support to District 50, thereby violating Section 8(a)(2) of the Act; and interfered

evidence is against his interest and insistence." *N.L.R.B. v. Ohio Calcium Company*, 133 F.2d 721, 727 (C.A. 6). See also Wigmore, *Evidence*, section 285 (3d ed. 1940), and cases cited.

²³Comparably, an agreement recognizing a union may not act as a bar to a representation petition by a rival union unless it affirmatively appears that the employer has "extended recognition . . . in good faith on the basis of a previously demonstrated showing of majority" *Sound Contractors Association*, 162 NLRB No. 45, citing and applying the *Keller Plastics* doctrine

with, restrained, and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act, thus violating Section 8(a)(1) of the statute.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and (2) of the Act, I shall recommend that it cease and desist from its unfair labor practices and take certain affirmative actions designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following conclusions of law:

1. Woodmere, Inc., is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.
2. District 50 and Local 971 are, and have been at all material times, labor organizations within the meaning of Section 2(5) of the Act.
3. By contributing support to District 50, as found above, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(2) of the Act.
4. By interfering with, restraining, and coercing employees, as found above, in the exercise of rights guaranteed them by Section 7 of the Act, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that Woodmere, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Contributing support to International Union of District 50, United Mine Workers of America.
 - (b) Giving effect to its contract dated May 7, 1968, with International Union of District 50, United Mine Workers of America, or to any modification, extension or renewal of said agreement;
 - (c) Recognizing International Union of District 50, United Mine Workers of America, as the exclusive representative of any bargaining unit of its employees at its Reno, Nevada, plant for the purposes of collective bargaining, unless and until the said International Union of District 50, United Mine Workers of America shall have been certified by the National Labor Relations Board as the exclusive bargaining representative of such

employees.

(d) In any like or related manner interfering with, restraining, or coercing any of its employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

2. Take the following actions which, I find, will effectuate the policies of the Act:

(a) Withdraw recognition from International Union of District 50, United Mine Workers of America, as the representative of any employees at the said Reno, Nevada, plant for the purposes of collective bargaining unless and until the said International Union of District 50, United Mine Workers of America shall have been certified by the Board as aforesaid.

(b) Post at its plant and place of business in Reno, Nevada, copies of the attached notice marked "Appendix A." Copies of said notice, on forms provided by the Regional Director for Region 20 of the National Labor Relations Board, shall, after being duly signed by the Company's authorized representative, be thus posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notice is not altered, defaced, or covered by any other material.²⁴

(c) Notify the said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply therewith.²⁵

"In the event that this Recommended Order is adopted by the National Labor Relations Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the additional event that the Board's Order is enforced by a decree of the United States Court of Appeals, the words "a Decree of the United States Court of Appeals, enforcing an Order" shall be substituted for the words "a Decision and Order"

"In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply therewith"

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT contribute support to International Union of District 50, United Mine Workers of America.

WE WILL NOT give effect to our contract with the said International Union of District 50, United Mine Workers of America, or to any modification, extension or renewal of the said agreement.

WE WILL withdraw and withhold recognition from International Union of District 50, United Mine Workers of America, as the exclusive representative of any bargaining unit of our employees at this plant for the purposes of collective bargaining unless and until the said International Union of District 50, United Mine Workers of America shall have been certified by the National Labor Relations Board as the exclusive representative of such employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise

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of their right to self-organization; to form, join, or assist labor organizations; to join or assist Carpenters Local 971, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; and to refrain from any or all of such activities.

WOODMERE, INC
(Employer)

Dated _____ By _____ (Representative) _____ (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 13050 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California, Telephone 566-0335.