

Wayne Trophy Corp. and Local 404, United Electrical, Radio and Machine Workers of America (UE), Cases 22-CA-7180, 22-CA-7347, 22-CA-7517, and 22-CA-7560

February 11, 1981

### SUPPLEMENTAL DECISION AND ORDER

On September 29, 1980, Administrative Law Judge Raymond P. Green issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

### 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 Respondent, Wayne Trophy Corp., Wayne, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> 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'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

### SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge: These consolidated cases were heard before me in Newark, New Jersey, on June 20 and 24, 1980, pursuant to a backpay specification and notice of hearing, which was issued by the Regional Director for Region 22 on October 19, 1979.

At the hearing, a partial settlement was executed by the parties pursuant to which Respondent agreed to pay to discriminatees Julio Tejado, Louis Torres, and Richard Redd, respectively, the sums of \$109.11, \$1,555.09, and \$747.60. On August 11, 1980, the General Counsel notified me that Respondent had complied with the settlement and moved to withdraw the allegations of the backpay specification relating to these employees. As it appears to me that the partial settlement is reasonable and fair, I hereby approve the settlement and grant the General Counsel's motion.

As to the remaining individuals encompassed by the backpay specification, a hearing was held to resolve certain disputed issues. At the hearing all parties were afforded a full opportunity to be heard and to present evidence on the issues. Upon consideration of the briefs

filed by the parties, the prior decisions of the Board, and my observation of the demeanor of the witnesses, I make the following:

### FINDINGS AND CONCLUSIONS

#### I. BACKGROUND

On May 24, 1978, the Board, at 236 NLRB 294 and 236 NLRB 299, issued Decisions and Orders directing, *inter alia*, Respondent to make whole Awilda Arroyo, Julio Tejada, Louis Torres, Charles Teevan, and Richard Redd for any loss of earnings they may have suffered by reason of Respondent's discrimination against them.<sup>1</sup> On April 17, 1979, the Court of Appeals for the Third Circuit entered a judgment enforcing the backpay provisions of the Board's Order. Thereafter, and as noted above, the backpay claims of Tejada, Torres, and Redd were settled.

#### II. THE BACKPAY CLAIM OF AWILDA ARROYO

Awilda Arroyo was initially discharged by Respondent on September 10, 1976. She was reinstated to her former job on November 17, but was again discharged on March 2, 1977. On June 28, 1978, Respondent offered her reinstatement, which she refused. Accordingly, the backpay period for this employee runs from September 10 to November 17, 1976, and from March 2, 1977, to June 28, 1978.

It was stipulated that, at the time of her discharge, Arroyo earned \$2.50 per hour, and that on January 1, 1978, by virtue of Federal and state minimum wage laws, Respondent would have been required to raise her rate of pay to \$2.65 per hour. The parties further stipulated to the number of hours per week she worked during her tenure of employment in 1976-77, which was used as the basis to project the average weekly hours Arroyo would have worked during the backpay period.<sup>2</sup>

The General Counsel contends, however, that the average weekly hours for Arroyo should not include those weeks in which she worked less than 24 hours. Therefore, the General Counsel argues that Arroyo's average weekly hours for the backpay period should be 31.89 hours per week. Respondent, on the other hand,

<sup>1</sup> In 236 NLRB 299, the Board found, *inter alia*, that Respondent had discriminated against Awilda Arroyo and Charles Teevan when it discharged them on September 10, 1976. In 236 NLRB 294, the Board held, *inter alia*, that Respondent discriminated against Awilda Arroyo when it discharged her a second time on March 2, 1977. After her discharge on September 10, 1976, Arroyo was reinstated to her former position of employment on November 17, 1976.

<sup>2</sup> There is no dispute about this general method of determining Arroyo's average weekly hours during the backpay period. In this connection, the record establishes that Arroyo worked the number of hours listed below on the corresponding dates:

8-18-76-32	12-29-76-16
8-25-76-40	1-5-77-24
9-1-76-39.5	1-12-77-32
9-7-76-31.5	1-19-77-31.5
11-24-76-32	1-20-77-none
12-1-76-24	2-2-77-16
12-8-76-40	2-9-77-24
12-15-76-32	2-16-77-32
12-22-76-32	2-23-77-16

contends that the weekly average should include those weeks that Arroyo worked **less** than 24 hours, unless due to a demonstrable illness, and that Arroyo's average should **be** 27.5 hours per week. The General Counsel also contends that in January 1978 Arroyo's hourly rate would have been \$2.75 per hour, whereas Respondent argues that her hourly rate would have been \$2.65 per hour. Finally, Respondent contends that for all or **part** of the **backpay** period Arroyo did not seek employment, and thereby incurred a willful loss of earnings.

As to the question of Arroyo's alleged willful loss of earnings, Respondent has the burden of proving facts negating either the existence of liability or the mitigation of liability. *Brotherhood of Locomotives and Enginemen and Brotherhood of Railroad Trainmen [Phelps Dodge Corp.] v. N.L.R.B.*, 313 U.S. 177, 190-200 (1941); *N.L.R.B. v. Brown & Root, Inc., et al.*, 311 F.2d 447, 454 (8th Cir. 1963); *Rice Lake Creamery Company*, 151 NLRB 1113, 1121 (1965). Moreover, the fact that a **discriminatee** has low or even nonexistent interim earnings does not, of itself, prove his or her failure to seek employment during the **backpay** period. *N.L.R.B. v. Miami Coca Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966); *Cornwell Company, Inc.*, 171 NLRB 342, 343 (1968).

In the instant **case**, Arroyo testified, **albeit** with some degree of hesitation and uncertainty, that she did seek employment at all **times** during the **backpay** period. In addition, the **General** Counsel offered into evidence, without objection by Respondent, a group of reports **filed** by Arroyo showing her **assertions made** prior to the **hearing** that she sought employment **et various companies** from September 17 to **November 15**, 1976, and again from **March 7**, 1977, to June 27, 1978.<sup>3</sup> Respondent did not offer **any affirmative** evidence that during the above **periods** of time Arroyo did not **seek** employment and did not, for example, **call** as **witnesses any** representative of the employers from whom Arroyo claimed to have sought employment, despite the fact that **these** reports were turned over to Respondent by the General Counsel before the hearing.<sup>4</sup> I, therefore, conclude that Respondent **has** not met its burden of proof regarding its claim that Arroyo did not seek employment during the periods from September 10 to November 17, 1976, and from March 2 to June 27, 1977.

Respondent **asserts**, nevertheless, that when Arroyo became pregnant in June 1977 she did not seek employment until well after the baby was **born**.<sup>5</sup> In this regard,

<sup>3</sup> Although the **reports filed** by Arroyo with the Regional Office of the National Labor Relations Board are **hearsay**, their introduction into evidence **was not objected** to by Respondent. Therefore, I received the reports and will **evaluate** them for the truth of the **assertions** made therein.

<sup>4</sup> While Arroyo testified that she did not **fill** out employment application forms at any of the companies where she sought employment, Respondent might have shown that **these companies** have a **practice** of having **applicants** fill out such forms and thereby sought to contradict Arroyo's testimony.

<sup>5</sup> The mere fact that Arroyo **became** pregnant in June 1977 would not warrant the conclusion that she **was** unavailable for work. *Midwest Hanger Co. and Liberty Engineering Corp.*, 221 NLRB 911, 925 (1975); *Awn Convalescent Center, Inc.*, 219 NLRB 1210, 1217 (1975). In this respect, although some women **may** choose to refrain from working during pregnancy, many others can and do work until shortly before delivery **unless** there is some specific **medical reason** to do **otherwise**. There was no showing in Arroyo's case that her condition during pregnancy would have precluded her from being employed. Accordingly, it is my opinion

Respondent offered into evidence interim earning reports submitted by Arroyo to the Regional Office on April 25, 1979, wherein Arroyo listed a variety of employers with whom she sought employment. These reports indicate on their face that **after** June 27, 1977, Arroyo recommenced her search for employment on October 2, 1978.<sup>6</sup> Thus, taking into account all **the** reports filed by Arroyo with the Regional Office concerning her search for employment there is a gap from June 27, 1977, to October 2, 1978. Therefore, despite **her** testimony in response to questions **posed** by the General Counsel to the effect **that** she sought employment during the period from June 1977 to October 1978, Arroyo could not remember any companies where she sought employment during that period, and the reports she submitted on April 25, 1979, are inconsistent with her testimony. Given this inconsistency and **also** because Arroyo's testimony concerning her search for employment was exceedingly vague and elicited through **leading** questions, I find that from the end of June 1977 and until October 2, 1978, she did not seek employment and had, in fact, withdrawn from the labor market. I **shall** therefore toll **backpay** as of the end of June 1977.<sup>7</sup>

Inasmuch as I have concluded that Arroyo did not seek employment from the end of June 1977 until **after** the **backpay** period would otherwise have expired (by virtue of the offer of reinstatement received on June 28, 1978), it, therefore, is not **necessary** to decide if her hourly **rate of earnings** would have **been** increased to \$2.75 on January 1, 1978.

The final question regarding Arroyo's **backpay** claim is whether in determining her average weekly hours for the **backpay** period, the **General** Counsel correctly excluded **those** weeks of her **prediscrimination** employment when she worked **less than 24 hours**. In **this respect**, we are talking about the **weeks** ending December 29, 1976, and January 26 and February 2 and 23, 1977, when Arroyo respectively worked 16, 0, 16, and 16 hours. It is apparent that, as to these weeks, the General Counsel takes the view that they were **aberrant** and not representative of Arroyo's general work pattern, and, therefore, should not be considered in computing her **base** average. When Arroyo was asked why she worked **so** few hours during **these** weeks she could not give any explanation, although she conceded that it was not due to **illness**. No evidence was presented to show that the lesser numbers of hours she worked during the weeks in question were due to temporary layoff, a decline in the company's business **at** such times, or any other **reason**, which would have resulted in Arroyo's involuntary **loss** of work. Indeed, an

that the critical question is not whether Arroyo **was** pregnant but whether she **was** available for and sought employment during her pregnancy.

<sup>6</sup> Arroyo's baby **was** born in March 1977 and the **General** Counsel **does not seek backpay** for the following 2 months as he concedes that Arroyo did not seek employment during that 2-month period.

<sup>7</sup> Although Arroyo **testified** that she registered with the New Jersey Employment Agency, the record is not clear as to when she registered or whether she kept her **registration** active during the **backpay** period. Also the **record** is not clear as to what extent she **was** referred to **jobs** by this state agency. The **fact** that she did register with that state agency is, in any event, not conclusive as to whether Arroyo made a diligent search for interim employment. *American Bottling Company*, 116 NLRB 1303 (1956); *Southern Silk Mills, Inc.*, 116 NLRB 769 (1956).

examination of Arroyo's **past** work record **tends** to establish a fairly high degree of voluntary absenteeism which occurred on a regular basis.

When the **formula** utilized is one which averages the actual prediscrimination hours of a discriminatee and projects that average into the **backpay** period, the **purpose** served is to account for absences, lost hours, or other factors which, because of a pattern, may reasonably be anticipated to recur during the **backpay** period. As such, this is a traditional formula utilized by the Board absent unusual circumstances. *DeLorean Cadillac Inc.*, 231 NLRB 329, 332 (1977). Although the General Counsel urges that I exclude from Arroyo's average any weeks during the base period in which she worked less than 24 hours, in what amounts to a *per se* rule, I have found no support for this proposition in the case law or logic when applied to the type of formula used herein. In *Winn-Duie*, 170 NLRB 1734 (1968), the Administrative Law Judge rejected the General Counsel's theory of excluding from the base period weeks in which a **discriminatee** worked **less** than 24 hours. The Board in that case basically agreed with the Administrative Law Judge's **approach** except as to any **part** of the base period where the **discriminatee's** absence was due to illness, a factor which cannot, of course, be reasonably expected to recur during the **backpay** period. In this **respect** the Board stated at footnote 2:

In computing **backpay due** claimants, the Trial Examiner concluded **that** the pattern of **absenteeism** which occurred during the base period was likely to recur **during** the **backpay** period and therefore should **be taken** into consideration in computing **backpay**. We agree with this **approach** except for the **inclusion** in the **base period** of absenteeism **caused** by demonstrable **illness**. Since **comparable** illness during the **backpay** period would remove **claimant** from the labor **market** and result in a **diminution of claimant's backpay**, to compute average pay during the **base period** upon a period of **illness** would amount to a double **reduction** of claimants **backpay**.

The two **cases** cited by the General Counsel in his brief, namely, *International Trailer Company, Inc. and Gibraltar Industries, Inc.*, 150 NLRB 1205, 1211 (1965), and *Harvest Queen Mill & Elevator Company*, 90 NLRB 320, 344 (1950), appear to be distinguishable. In both of **these cases** a 24-hour **rule** was **utilized**. However, the formulas used were different from the formula used herein and, in **essence**, **backpay** was based on the average weekly **hours** worked by comparable employees during the **backpay** period. Since, in those **cases** a group of comparable employees **was used** to compute the average weekly hours and therefore **backpay** was not based on the **discriminatees** own past work experience, it makes a good deal more **sense** to exclude from the average the work experience of particular individuals whose hours of work are not in fact **representative** of the group. As the Administrative **Law Judge** stated in *International Trailer Company, Inc.*, *supra* at 1211:

In arriving at the number of hours for which **backpay** is due, the Regional Director excluded any employee who worked fewer than 24 hours if, but only if, the department generally worked 24 hours or more. According to the Company, the hours for which the claimants should **be** compensated should be the average hours worked by all of the employees in the department I do not **agree**.

In **cases** in which a minority of the employees in a **department** worked fewer hours than the department generally, it is **reasonable** to assume that they did so for reasons not applicable to the group as a whole such as **illness** or because they were hired or fired in the middle of the week. Indeed, Respondents have not denied that the excluded employees worked fewer hours because of circumstances peculiar to themselves. Nor have they asserted that any of the claimants was in the habit of working fewer hours than the department generally nor did it present evidence indicating that any would in fact have worked fewer hours than the department generally. The **absence** of such evidence is, of course, significant since it is the kind of evidence which Gibraltar could and undoubtedly would have adduced had it existed.

If the hours worked by the employees who are the exceptions to the rule are included, they would reduce the hours (**by** lowering the average) for which **backpay** is due. This would mean that the claimants would be made whole for a fewer number of hours than, it is **reasonable** to conclude, they would have worked.

As the evidence herein establishes that Arroyo had a pattern of absenteeism prior to her discharges and that her absences during the disputed week were not attributable to a demonstrable illness, I see no **reason to apply** a 24-hour rule and exclude those weeks in which she worked fewer than 24 hours from her **base average**.<sup>8</sup> Accordingly, I find that, during the **backpay** period Arroyo would have worked **an average**, **backpay** was tolled as of the end of June 1977 **when** she left the labor market, **and** that her vote of pay during the period for which **liability** is due was **\$2.50** per hour. I therefore conclude that Arroyo is **entitled** to the sum of **\$1,828.75**, plus **interest**.<sup>9</sup>

<sup>8</sup> In *Awn Convalescent Center Inc.*, 219 NLRB 1210 (1975), and *Famet, Inc.*, 222 NLRB 1180 (1976), the **administrative law judges**, with approval of the **Board**, refused to **average past** weekly hours less than 40 hours where the regularly **scheduled** workweek for the **discriminatees** consisted of 40 hours per week and where the evidence **was insufficient** to establish a pattern of voluntary **absences** for **reasons other than illness**. In **each of those cases**, the **backpay** was based on a 40-hour week and no adjustment were **made** to take **into account** alleged **absences** which **Respondents asserted** reasonably could have been anticipated to recur in the **backpay** periods. In the instant **case**, however, the General Counsel in drawing up his **backpay specification**, decided to utilize a formula based on the average **hours** of both Arroyo and Teevan, and not one based on the **hours** they regularly were **scheduled** to work. In effect, this **concedes** that neither worked a regular schedule, and that account should be taken of their **past** patterns of voluntary absenteeism.

<sup>9</sup> Appendix A omitted from publication.

### III. THE BACKPAY CLAIM OF CHARLES TEEVAN

**Teevan** was discharged on September 10, 1976, and it was agreed that **Teevan** received an offer of reinstatement from Respondent on June 28, 1978. Therefore, the outer limits of the backpay period would be from September 10, 1976, to June 28, 1978. It was stipulated that at the time of **Teevan's** discharge he was earning \$5.25 per hour, and that his overtime rate of pay was \$7.87 per hour. There, also, was a stipulation concerning the number of hours per week **Teevan** worked prior to his discharge, and the parties agree that the use of his pre-discrimination weekly hours is a proper basis for determining the average weekly hours he would have worked during the backpay period.<sup>10</sup> In addition to the above, it is noted that in the prior case involving **Teevan**, 236 NLRB 299, it was concluded that, although he had been employed as a supervisor for a substantial period of time, **Teevan's** supervisory functions had been transferred to Allen Smith at the time of his discharge on September 10, and that he was then employed as a maintenance mechanic.

Date	Regular hours	Overtime hour
5-19-76	40	12.75
5-26-76	40	.50
6-2-76	36	0
6-9-76	40	1.25
6-16-76	40	6.50
6-23-76	40	7.00
6-30-76	40	.50
7-7-76	20.25	0
7-14-76	27	0
7-21-76	40	6.25
7-28-76	40	5.00
8-4-76	40	1.00
8-11-76	40	3.50
8-18-76	40	5.00
8-25-76	40	5.00
9-1-76	9	0
9-7-76	17.5	0

The General Counsel makes the following contentions regarding **Teevan**; (1) that as to the computation of **Teevan's** average weekly hours, those weeks when he worked less than 24 hours should not be counted; (2) that had **Teevan** continued being employed by Respondent he would have received a 25-cent raise on January 1, 1978; (3) that **Teevan** regularly worked overtime before his discharge and he, therefore, would have continued to work overtime had he not been discriminated against; and (4) that the only legitimate offer of reinstatement made by Respondent to **Teevan** was received on June 28, 1978.

The Respondent, for its part, makes the following contentions: (1) in computing **Teevan's** average weekly hours, the weeks when he worked less than 24 hours should be included; (2) no provision should be included for overtime hours because overtime was not available

<sup>10</sup> The number of hours per week worked by **Teevan** from May 19 to September 7, 1976, are as follows:

<sup>11</sup> As such. Respondent's contention that **Teevan's** discharge was not violative of the Act because of his supervisory status was rejected.

after September 10, 1976; (3) the inclusion of a 25-cent raise on January 1, 1978, is improper; (4) Respondent made unconditional offers of reinstatement to **Teevan** in November 1976 thereby tolling the backpay period and; (5) because **Teevan** had been demoted prior to his discharge and was only interested in reinstatement to a non-supervisory position, his rate of pay should be adjusted downward.<sup>12</sup>

Quarter	Interim Earnings
1976 III	50
IV	0
1977 I	1,052.39
II	3,289.76
III	2,642.97
IV	3,475.65
1978 I	3,475.65
II	3,475.65
III	267.36

With respect to the claimed offers of reinstatement (other than the one received on June 28, 1978), it appears that on November 16, 1976, shortly before the complaints were issued in Cases 22-CA-7180 and 22-CA-7347, a settlement conference was held at the offices of Region 22 of the Board. According to the testimony of William Crivelli, a labor relations consultant who represented the Company at that time, the meeting was held between himself, Jose Lugo for the Union and two Board agents.<sup>13</sup> He states that he went into this meeting looking for a settlement and that his main objective was to convince the Union and the Region to hold a quick election rather than having the Regional Office seek, through litigation, a bargaining order against Respondent. Crivelli testified that he was authorized by Battaglia to offer reinstatement to all five of the employees alleged as discriminatees at the "bottom line," and that he did make such an offer through Lugo to all five employees. Battaglia testified that he authorized Crivelli to make such an offer and that on the following day, pursuant to Crivelli's instructions, he sent mailgrams offering reinstatement to all five individuals, including **Teevan**.

Jose Lugo's version of this conference is substantially different. He testified that although Crivelli told him that Arroyo, Tejada, Torres, and Redd could go back to work, the offer explicitly excluded **Teevan**, as Crivelli took the position that **Teevan** was a supervisor. **Teevan** testified that at the end of the meeting Lugo and a Board agent told the other employees that they could go back to work, but that he, **Teevan**, was told that he was not offered reinstatement. As to the purported mailgram, **Teevan** testified that he never received the mailgram described by Battaglia.

<sup>12</sup> There is no dispute concerning **Teevan's** interim earnings, which were as follows:

As the General Counsel concedes that for the second and fourth quarters of 1977 and for all of 1978, **Teevan's** interim earnings exceeded the amounts of his backpay, the only quarterly periods in issue are the third and fourth quarters of 1976 and the first and third quarters of 1977.

Notwithstanding the assertion by Crivelli and Battaglia that an offer of reinstatement was made to **Teevan** through Lugo on November 16, 1976, and that this offer was confirmed by a mailgram sent the following day, I do not credit their testimony. In **this** regard, Crivelli, although testifying that **Battaglia** ultimately authorized an offer to **Teevan** if one had to be made, he conceded that just prior to that conference **Battaglia** was **opposed** to reinstating **Teevan**. **Also**, while Crivelli's testimony on **direct** examination was that he made an **offer** to reinstate all of the employees, including **Teevan**; his later testimony regarding an **offer** to **Teevan** was much more problematical and indicates to me a decided degree of ambiguity as to whether such an offer was in fact made. **Crivelli** testified:

Q. Well, do you recall either whether or not or to what extent, if at **all**, there **was** any discussion with **respect** to Mr. **Teevan's** status **as** an employee or not an employee during that **particular** meeting?

A. I don't **recall**, Your Honor, whether it **was** stated or just my conclusion drawn. But when I **said** that everyone **could** come tuck, **certain** people, and I don't recall who, whether it was everyone or **just Joe**, referring to Lugo, or a Board agent, but somebody there **was** surprised that I **was** including **Charlie Teevan**.

Q. You **say** somebody was surprised?

A. **Yes**. There was no question that when I then jumped to the bottom line and **said**, **well**, **in** that **case everybody can come back** to work tomorrow, there **was** . . . now, whether somebody **said**, you mean **Teevan, too**, I don't recall whether that **was** **said**. But it was. . . .

Q. What do you recall? First of all, do you know who **expressed** it to be a surprise?

A. I think it **was** Mr. Lugo who did. I'm not certain. I don't . . . think it was he; I think he was the one who **said** something to that effect. You **mean** everybody? **Like, wait** a minute, I thought, you know, you didn't want . . . but it wasn't said. **Joe says things** with . . . how can I say it? . . . two **words**, he **can** convey to me, and I understand what he is **saying**, and that **was** the **impression** I drew from what he had **said**.

That he **was** surprised that I willing . . . after this **discussion** about trying to make a **deal** and let's work it out and let's do this and let's do that, that **when** all **was** said and done that I actually **said** everybody could **come** back, rather than the juggling and, you know, that **sort** of thing.

Q. Well, when you said everybody can come back, was that different from an earlier position you had taken?

A. Oh, yes.

Q. Well, all right. Then you've got to tell me the earlier position that you took.

A. Well, the first position was something to the effect that everybody could come back to work, and no back pay, of course. I'm sure we said that Charlie could come back to work at one point as a

supervisor; you know, if he would reassume his supervisory duties. And then. . . .

Q. You're talking about Charlie **Teevan**?

A. Right; and then at another point we would have said, well, if he **comes** tuck without supervisory status, then we may **want** to **adjust** his rate somehow. I **mean**, in other words, we took both positions alternatively. It didn't work. It was in the framework of trying to **see** if **we** could **accommodate** the situation.

Q. All right; but I'm not **exactly** sure I quite understand. I want you to explain it, you know, very **clearly** to me. There were apparently a number of **positions** taken with respect to Mr. **Teevan's** coming back to work, **okay**? At **various** points during this **meeting**. Now, I want to know what your position **was** and the other **people's position** **was** and how it came about.

A. Your Honor. I **can't** really precisely tell you what my position **was**, **as** stated. I **know** I went into the meeting with a **great deal** of flexibility. What I was **faced** with, **unfortunately**, **was no** flexibility. That **became** very . . . that **happened** very quickly. **The other side said**, this is what we want. We're not **interested** in what you want to do. **This is** what **has** **to be**.

Q. Well, what did they **say**? How did they . . . .

A. Oh, everybody goes back to work including Mr. **Teevan**. Everybody goes back to work and pay the **backpay**, you know, to the penny, and we agreed to bargain with the union immediately.

Q. **All** right; now, you **had indicated** that at some point during **this** meeting you **offered** that Mr. **Teevan** come back **as** a **supervisor**? Is that right or is **that** . . . .

A. No, that's not my way. What I did was to attempt to show, **as** you do in negotiations, inclinations. Well, you know, what we're concerned **about** **here** are the people. If **possibly** we could get everyone back, wouldn't that really **go** a long way towards our getting this damn thing . . . excuse me . . . this **damn** thing resolved, and **after** all, if the people really want the union we **have** an election. We can have an election in two or three weeks, you know, and **resolve** this whole thing. And **then** turn to the union and say, isn't that what you **really** want to do, **Joe**, and, you know, that **kind** of . . . so it's never really a **firm** offer. It's like an indication with a hope that the other side will then say, well, maybe yes.

Q. All right; so what I want to know is what your indications were with respect to Charlie **Teevan**.

A. The indications were that even under some circumstances he could come back. That was going to . . . .

Q. Well, tell me.

A. . . . be my bottom line. I didn't reveal it. I don't think I would have **revealed** it. I don't remember the specificity. That was going to be the top one, as it were.

Q. Oh, so you never explained under what circumstances he could come back? Or it wasn't discussed or explored or finally said?

A. It was never absolutely offered and said in that fashion, no. The only bona fide absolute offer was at the bottom line. That was the only offer that was really made.

Q. All right, but notwithstanding that, you didn't say, at any time, apparently, that Charlie Teevan can come back to work?

A. By name, no.

As to the claim by Battaglia that he sent a mailgram to Teevan on the day after the conference, Teevan, who impressed me as a forthright and honest witness, denied that he ever received the mailgram. Moreover, Respondent could neither produce a copy of the mailgram nor find it. Thus, Battaglia, who claims he was told by his own counsel to send mailgrams to all five employees as confirmations of the offers of reinstatement made at the conference, testified that he did not request Western Union to furnish him with confirmation copies because he felt a "deal" had been made at the conference and because he did not want to spend an additional \$1.50 per telegram. Nevertheless, Battaglia also testified that he retains copies of all important letters or documents reflecting Respondent's business transactions, and I find it incredible that he would not have obtained and kept copies of these mailgrams, if in fact they were sent.

There is no dispute that about 2 weeks after the above-described conference, Teevan spoke with Battaglia on the phone. While Battaglia claims that he again offered reinstatement to Teevan during this conversation, I credit Teevan's testimony that Battaglia offered him a supervisory position outside the bargaining unit which Teevan did not accept because he desired reinstatement to his former position as maintenance mechanic.<sup>14</sup> As this offer to Teevan was not an offer to the position of employment he held at the time of his unlawful discharge on September 10, I conclude that the offer was not valid.<sup>15</sup> Therefore, based on the above, I conclude that the only valid offer of reinstatement made to Teevan was the one he received on June 28, 1978. Accordingly, I find that Teevan's backpay was not tolled at any time prior to June 28.

As to the contention that Teevan would have received a 25-cent raise on January 1, 1978, this issue is moot. Even if Teevan were to be credited with the wage increase, the amended backpay specification of the General Counsel, which takes into account the raise, shows that for each and every quarter after January 1, 1978, Teevan's interim earnings exceeded Teevan's backpay, even with the wage increase computed into the gross backpay obligation. Thus, the General Counsel in his amended specification concedes that there is no net backpay owing to Teevan for the first, second, and third quarters of 1978.

As noted above Respondent contends that the average weekly hours worked by Teevan should be computed on the basis of all the weeks set forth above in footnote 1 including the weeks ending July 7, September 1 and 1976. In this respect Battaglia testified, without contradiction, that Teevan took time off during these weeks take an unauthorized vacation. Accordingly, Teevan was voluntarily absent from work for reasons other than illness. I, therefore, am inclined to agree with Respondent's contention for basically the same reasons set forth in Aroyo's case, and I therefore conclude that Teevan's average weekly hours, exclusive of overtime hours, would have been 34.69.

With respect to the issue of overtime, the record establishes that Teevan, prior to his discharge, worked overtime on a regular basis. In this regard, Battaglia testified that Teevan's overtime generally encompassed work he did before the normal hours in setting up the machinery and maintenance work done after his normal hours. As to the situation after September 10, Battaglia testified that he took on the work of setting up the machinery before work, and that he also took over Teevan's function of doing hydrolic maintenance. He testified that after Teevan's discharge, electrical maintenance of the machinery, which is frequent and was done by Teevan after his normal hours, was contracted out because neither he nor any other employees were capable of doing such work. It therefore appears that the work which Teevan had done during his overtime hours before his discharge was still available had he continued his employment with Respondent and that he would have continued to work overtime as he had in the past. I therefore conclude that during the backpay period Teevan should be credited with an average of 3.87 overtime hours at the rate of \$7.87 per hour.<sup>16</sup>

Finally, I reject Respondent's contention that Teevan's rate of pay for backpay purposes should be somewhat less than his hourly rate of \$5.25 per hour at the time of his discharge. Respondent argues that because Teevan was not willing to come back to work as a supervisor, his rate of pay should be adjusted accordingly. However, the record discloses that when Teevan was demoted to the position of maintenance mechanic prior to his discharge on September 10, his rate of pay was not lowered. Moreover, the record indicates that Teevan was paid \$5.25 per hour not because of his supervisory function, which Respondent asserts did not comprise the majority of his work, but because of his technical expertise as a maintenance mechanic. In this respect, after Teevan was fired, his work had to be shared by three individuals including Battaglia, and even then some of the work he performed had to be contracted out because no one in the Company's employ had his skills.

Based on the above, I find that Teevan accrued backpay until June 28, 1978; that his hourly rate of pay for backpay purposes was \$5.25 per hour; that the average weekly hours he would have worked during the backpa

<sup>14</sup> Teevan testified that he told Battaglia "that the only way I would even think about coming back would be as a mechanic in the Union so I'd have some protection."

<sup>15</sup> *Wonder Markets, Inc.*, 236 NLRB 787 (1978).

<sup>16</sup> Inasmuch as no net backpay is claimed for 1978 even if the alleged January 1, 1978, wage increase were included to compute the gross backpay figure, it is not necessary to find that after January 1, 1978, Teevan's overtime rate would have been \$8.25 per hour.

period was 34.69; that his average overtime hours per week would have been 3.87; and that his overtime rate of pay would have been \$7.87 per hour. I further find that it is not necessary to determine whether Teevan would have received a wage increase in January 1978 inasmuch as it is conceded by the General Counsel in his specification that even with a wage increase, Teevan's interim earnings would have exceeded his backpay claim from the fourth quarter of 1977 to June 1978. Accordingly, I conclude that Teevan is owed the sum of \$5,232.83, plus interest.<sup>17</sup>

### ORDER<sup>18</sup>

Upon the entire record, and in accordance with the foregoing finding, I recommend that the Respondent,

<sup>17</sup> Appendix B omitted from publication.

<sup>18</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the

Wayne Trophy Corp., Wayne, New Jersey, its officers, agents, successors, and assigns, shall:

1. Make payment to Awilda Arroyo the sum of \$1,828.75, plus interest, less tax withholdings required by Federal and state law.

2. Make payment to Charles Teevan the sum of \$5,323.83 plus interest, less tax withholdings required by Federal and state laws.

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finding\* conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.