

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

May 24, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND PENELLO

On October 5, 1977, Administrative Law Judge Max Rosenberg issued the attached Decision in this proceeding. Thereafter, Respondent 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 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 brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge, to modify his remedy,² 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.

¹ 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), *enfd.* 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

² The Administrative Law Judge inadvertently specified interest to be paid at 7 percent; however, interest will be calculated according to the "adjusted prime rate" used by the U.S. Internal Revenue Service for interest on tax payments. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

DECISION

MAX ROSENBERG, Administrative Law Judge: With all parties represented, this proceeding was heard before me in Newark, New Jersey, on July 21 and 25, 1977, upon a complaint filed by the General Counsel of the National Labor Relations Board and an answer interposed thereto by Wayne Trophy Corp., herein called Respondent.¹ The is-

ssues raised by the pleadings relate to whether Respondent violated Section 8(a)(3) and (4) of the National Labor Relations Act, as amended, by discharging employees Awilda Arroyo and Julio Tejada on March 2, 1977, under circumstances to be detailed below. Briefs have been received from the General Counsel and Respondent which have been duly considered.

Upon the entire record made in this proceeding, including my observation of the demeanor of the witnesses as they testified on the stand, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent, a New Jersey corporation, maintains its principal office and place of business at 11 Railroad Avenue, Wayne, New Jersey, where, at all times material herein, it is engaged in the manufacture, sale, and distribution of trophies and related products. The Wayne location is the only facility involved in this proceeding. During the annual period material to this proceeding, Respondent manufactured, sold, and distributed at its Wayne place of business, products valued in excess of \$50,000 of which, products valued in excess of \$50,000 were shipped from said location in interstate commerce directly to States of the United States other than the State of New Jersey. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 404, United Electrical, Radio & Machine Workers of America (UE), herein called the Union, is a labor organization as defined in Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that Respondent violated Section 8(a)(3) of the Act by discharging Awilda Arroyo and Julio Tejada on March 2, 1977, because they joined and assisted the Union in its efforts to enlist the collective support of Respondent's work complement. It further alleges that these employees were terminated on this date in violation of Section 8(a)(4) of the statute because they gave testimony within the ambit of that legislation. Respondent denies the commission of any labor practices banned by the Act.

The scenario for this litigation commenced to unfold in August 1976 when the Union launched an organizational campaign to enlist the collective support of Respondent's production, maintenance, and shipping and receiving employees at its Wayne, New Jersey, location. According to the undisputed testimony developed in a prior proceeding before Administrative Law Judge Norman Zankel involv-

¹ The complaint, which issued on April 22, 1977, is based on charges filed and served in Cases 22-CA-7517 and 22-CA-7560 on March 3, 1977, and March 28, 1977, respectively.

ing the same parties.² Respondent's employees became interested in the prospect of unionization in August 1976 when employee Luis Torres visited the Union's office and obtained blank authorization cards which he distributed to the employees at the plant. On August 27, 1976, alleged discriminatee Awilda Arroyo and Julio Tejada, as well as employees Richard Redd and Luis Torres, executed the designations. Both Albert J. Battaglia, Respondent's president, and his wife Marilyn Battaglia, Respondent's vice president, acknowledged in their testimony in this proceeding and I find that they were aware of Arroyo's and Tejada's union adherence prior to their latest discharges on March 2, 1977.

On September 9, 1976, Union Representative Jose Lugo visited Respondent's parking lot where he was observed by Albert Battaglia talking to Torres and employee Louis Sanchez. Battaglia summoned Supervisor John Fulton and asked the latter whether he could identify Lugo. Fulton was unable to do so, whereupon Susan Acevedo, who also worked in the plant and was fluent in both the Spanish and English languages,³ sought out Awilda Arroyo and put the same question to her. Arroyo responded that Lugo was a union agent. It is uncontroverted and I find that Acevedo immediately conveyed this intelligence to Battaglia on September 9. On September 11, 1976, Union Representative Lugo mailed a certified letter to Respondent in which he requested exclusive recognition and collective-bargaining negotiations for a unit of all production, maintenance, and shipping and receiving employees at the Wayne plant.⁴ On September 13, 1976, the Union filed a representation petition with the Regional Director for Region 22 seeking an election in the above-described unit.

On the morning of September 13, 1976, Awilda Arroyo reported for work and was advised by Respondent's president, Battaglia, that she had been discharged on September 10 because she had violated company rules by wearing sandals in the plant, and by performing her work tasks while seated. However, on the evidence before him, Administrative Law Judge Zankel concluded in his decision of June 24, 1977, that Respondent had singled out Arroyo for termination because she was a known union adherent, and thereby violated Section 8(a)(3) of the Act. Julio Tejada, who had also signed a union card on August 27, at the behest of Luis Torres, was separated from Respondent's employment rolls on September 17, 1976. Battaglia testified in the earlier proceeding that Tejada was not discharged on that date but had voluntarily quit his job. In his decision, Administrative Law Judge Zankel found that Tejada was terminated in violation of Section 8(a)(3) because he had joined and assisted the Union in its efforts to unionize the plant.⁵

² Cases 22-CA 7180, 7347. I have taken judicial notice of the record made in that proceeding, as well as Administrative Law Judge Zankel's decision therein which issued on June 24, 1977, and which is currently pending before the Board on appeal. However, I have relied upon this recorded testimony only to the extent that it is undenied.

³ Some of Respondent's employees, including Arroyo, are Spanish-speaking.

⁴ The letter was returned to the Union bearing the notation "refused, 9/14/76."

⁵ Administrative Law Judge Zankel also found that Respondent discriminatorily discharged Luis Torres on September 10, 1976, and again on December 1, 1976, because he was the most prominent union protagonist at the

On November 17, 1976, Arroyo and Tejada were reinstated to their former positions and worked for Respondent until they were again discharged on March 2, 1977. Meanwhile, on September 13, 16, 21, October 21, and December 7, 1976, the Union filed charges and amended charges against Respondent alleging, *inter alia*, that Arroyo and Tejada had been separated from their employment on September 10 and 17, 1976, respectively, for reasons proscribed by Section 8(a)(3) of the Act. On January 14, 1977, the General Counsel issued a complaint against Respondent embodying the aforesaid charges. Upon appropriate notice given, a hearing thereon was conducted before Administrative Law Judge Zankel on January 31, February 1, 2, 3, 4, and March 3 and 4, 1977. It is undisputed and I find that Arroyo testified as a witness on behalf of the General Counsel on February 1 and March 4, and Tejada gave testimony on February 1 and 2. Respondent conceded at the hearing herein that both testified in a manner hostile to Respondent's interests.

Events abided until February 28, 1977. Awilda Arroyo, who worked for Respondent as a packer and racker in the plant since August 1976, felt ill that afternoon and so informed Susan Acevedo.⁶ According to Arroyo's undenied testimony, I find that Acevedo was authorized by Respondent to "give orders" to employees and when Acevedo learned of Arroyo's physical difficulties, the former told Arroyo that "If I felt ill I shouldn't come into work the next day."⁷ In conformity with Acevedo's instructions, Arroyo remained at home on March 1 and returned to her duties on the morning of March 2, the day before the resumption of the earlier hearing before Administrative Law Judge Zankel. When she arrived at the plant, she noticed that her timecard was missing from the rack. Arroyo sought out Battaglia and inquired as to the whereabouts of her timecard. In the presence of Acevedo, Battaglia asked Arroyo "what are you doing here," and added that "you is fired." Turning to Acevedo, Arroyo complained that "since I was ill the day before I shouldn't come to work, why hadn't she notified Mr. Battaglia like she had let me know she was going to do." Arroyo then informed Battaglia, in response to his question, that "I was there in Wayne Trophy to work," to which Battaglia retorted that "What I was there for was to fool him."⁸ At this juncture, according to

plant. He further found that Richard Redd had been discharged on September 17 in violation of Sec. 8(a)(3) due to his engagement in certain protected, concerted activities unrelated to the Union's organizational drive. He additionally concluded that Charles Teevan was terminated on September 10, 1976, because he advocated the Union's cause and had executed a union authorization card. Finally, he found that Respondent offended the provisions of Sec. 8(a)(5) when, on and after September 14, 1976, it refused to accede to the Union's recognitory demand of September 11, 1976, and recommended issuance of a bargaining order against Respondent.

⁶ At the hearing herein, Respondent asserted that Acevedo was a "senior employee" at its plant. In his decision of June 24, 1977, Administrative Law Judge Zankel found that Acevedo acted as an agent of Respondent in her work relationships with the other employees, and that it was legally responsible for her conduct.

⁷ Arroyo testified and I find that "When I told her [Acevedo] that I was feeling ill and that maybe the next day I was not coming to work . . . that if I was ill and I absented myself from work would I have any trouble she said that I could miss work confidently since Mr. Battaglia authorized her to give orders."

⁸ Arroyo rode to and from work with Luis Torres, the Union's mainstay

Continued

Arroyo, Battaglia "grabbed his genital organs and was offering them to me and he said, 'And take this, you Puerto Rican mother fucker.' He continued grabbing his genital organs and told me to, 'Take this to the Labor Board and to the people of the Union,' and he told me and my friends, what we really like was money and that that is what he had for us." Upon hearing these obscenities, Arroyo burst into tears. Battaglia thereupon moved closer to Arroyo and, brandishing his hand in front of her face, he asked "why didn't I do something, stupid." Battaglia continued that "he didn't want to see my face or my friends' faces any more in the building and he continued saying things which I couldn't understand since I do not speak perfect English." During their conversation, Battaglia offered Arroyo no other basis for her termination. At the conclusion of the discussion, Battaglia gave Arroyo permission to seek a ride home from another employee and she then left the premises.

Rounding out her testimony, Arroyo related that she had never been warned by Battaglia for being absent from duty, that she uniformly contacted Respondent whenever she was forced to miss work, and that, with the exception of her absences due to lack of transportation, illness, or attendance at the prior Board hearing, all of which were excused by Battaglia, she had not otherwise been absent from work during her employment stint.

When called to the stand by his counsel, Battaglia proclaimed that Arroyo's discharge on March 2, 1977, was occasioned solely by her persistent record of absenteeism. According to Battaglia, she had received frequent reports from his wife that Arroyo had failed to come to work at least 1 day a week. A few weeks before March 2, Mrs. Battaglia again notified her husband of Arroyo's derelictions in attendance. On this occasion, the vice president counseled her husband to "Forget about the Union situation. If she is not doing her work, fire her." Despite the fact that Battaglia testimonially acknowledged that other employees had a record of absenteeism which matched or exceeded Arroyo's, that Arroyo's alleged record dated from the inception of her employment, and that "nothing unusual" had occurred regarding Arroyo on March 2 to trigger her discharge, Battaglia claimed that he told Arroyo on that date that "You are not going to fool me any longer . . . you can go home, there is no work." When questioned as to whether he mentioned anything to Arroyo concerning the National Labor Relations Board or shouted any obscenities at her during their terminal dialogue, Battaglia initially replied in the negative. He then grudgingly admitted that "I think I was certainly talking at the—not at the top of my voice, but I was quite angry when she took the day off before because it loused up the plant production again" and he acknowledged that "I may have said I am tired of everybody making a God damn fool out of me."

On cross-examination, however, the real reason for

in the plant. I find that this happenstance was well known to Battaglia and that his statement to Arroyo, which is undenied, that she was working in the plant "to fool him" had reference to his conviction that she had been brought into the facility on the recommendation of Torres, a cousin of Union Business Agent Jose Lugo, to assist the Union in its organizational campaign.

Arroyo's discharge on March 2, 1977, spilled from the lips of Battaglia. After recounting the various efforts which he had expended to mold Arroyo into a productive employee, Battaglia suddenly confessed that "it became obvious that [Arroyo's] job was just a temporary thing and she was brought in to help organize the Union by Luis Torres who is [Union Business Agent] Lugo's cousin." When queried as to whether he believed that Arroyo was planted in the shop to enhance the Union's chances of acquiring exclusive representational rights for the employees, Battaglia responded that "It made no difference to me." He then made the following remarkable comment regarding his reason for discharging her on March 2, 1977:

I was more concerned, I was over liberal, I did not want to fire her, certainly did not want to fire Julio [Tejada] who in the beginning was quite a good worker.

I would have preferred not firing Awilda and I would have liked to have kept the situation status quo so I wouldn't expose the Company to any more loss of dollars, but it got to the point where it became obvious that she had the strength of the United States Government and the strength of Mr. Abrams [counsel for the General Counsel] behind her and the strength of the Union and that she was going to do whatever she damn pleased.

In sum, I find that, after Arroyo was hired in August 1976, Battaglia learned that she had signed a union authorization card and, because she rode to and from work with Luis Torres, the Union's most active supporter in the plant and a cousin of Union Business Agent Jose Lugo, Battaglia became convinced that Arroyo sought employment with Respondent solely to assist the Union in obtaining organizational and representational strength among its employees. On September 13, 1976, Arroyo was terminated by Respondent allegedly because she had violated certain plant rules. In his decision rendered on June 24, 1977, Administrative Law Judge Zankel concluded that the assigned reasons for her discharge were pretextual and that she was in fact separated due to her union activities in violation of Section 8(a)(3) of the Act. On November 17, 1976, Arroyo was rehired by Respondent and, on February 1 and March 4, 1977, she gave testimony on behalf of the General Counsel in the proceeding before Administrative Law Judge Zankel in a manner antithetical to Respondent's legal position.

On February 28, 1977, Arroyo became ill and so apprised Susan Acevedo who, as I have found, had been invested by Respondent with the authority to grant leaves of absences to employees who became sick while at work. I find that, when Arroyo informed Acevedo about her condition, Acevedo assured the employee that her absence from work on March 1 would be excused. When Arroyo returned to duty on March 2, I find that, in the presence of Acevedo, she was told by Respondent's president, Battaglia, that she had been terminated because she "was there to fool him," an obvious reference to his insistent belief that Arroyo had joined his work force as a Trojan Horse to aid in the entrenchment of the Union in the plant. In an obscene and cruel manifestation of his contempt for Arroyo's

participation in the Union's organizational campaign and in the Board proceeding before Administrative Law Judge Zankel, Battaglia shamelessly grabbed his private parts and thrust them toward the lady, exclaiming "Take this to the Labor Board and to people of the Union." Finally, in explanation for his discharge of Arroyo on March 2, 1977, a day before the resumption of the earlier hearing, Battaglia admitted and I find that he "would have preferred not firing Awilda [Arroyo] . . . but it got to the point where it became obvious that she had the strength of the United States Government and [the General Counsel] behind her and the strength of the Union." I further find, based upon the testimony of Arroyo which I credit, that she had not absented herself from work each week during the course of her employment, that she had never been warned by Respondent for the days which she took off because of illness, lack of transportation, or her appearances at the earlier Board proceedings, that she had Respondent's authorization to be absent due to sickness on March 1, 1977, and that her other prior absences had been excused.

Accordingly, I conclude that Respondent selected Arroyo for discharge on March 2, 1977, not because of any shortcomings in her work attendance, but solely because she was a known union supporter at the plant and because she had given testimony against Respondent under the Act. By the foregoing conduct, I conclude that Respondent thereby violated Section 8(a)(3) and (4) of the Act.

I turn next to a consideration of the separation of Julio Tejada from Respondent's employ on March 2, 1977. Tejada did not appear as a witness in this proceeding, although duly subpoenaed, and the evidence concerning his discharge was derived from the testimony of President Albert Battaglia. Tejada was hired by Respondent in August 1976 and was trained to thread the component parts of Respondent's trophies. As heretofore chronicled, he executed a union designation on August 27, 1976, at the solicitation of employee Luis Torres. On September 17, 1976, Tejada went off Respondent's payroll. In the proceeding before Administrative Law Judge Zankel, Respondent claimed that Tejada had voluntarily quit his job on that date. However, in his decision of June 24, 1977, Administrative Law Judge Zankel concluded that the employee had been terminated for union activities.

In his testimony, Battaglia stated that he decided to terminate Tejada on March 2, 1977, for the reason that "we had a large order come back that he had threaded up and they were all threaded bent and some were broken off and this man had been doing that job for quite a period of time and could be good at it and I surmised that either it was just absolute plain carelessness or it was deliberate." Although the order which Battaglia had in mind involved the rejection of some 1,000 items by the customer, he acknowledged that Tejada's alleged deficiencies in handling the order occurred in early January or early February 1977, and confessed that "nothing particularly happened" on March 2 which precipitated the termination. When pressed further on the matter of Tejada's work qualities, Battaglia responded that "In the beginning he [Tejada] was an excellent worker." Battaglia then made the surprising statement that Tejada's deficiencies began to crop up immediately "when Union problems started," which would have placed

the time when the work defects became evident in either August or early September 1976.

I do not credit Battaglia's testimony that he discharged Tejada on March 2, 1977, because of his faulty work performance, because I am convinced that that testimony is contrived. As in the case of Awilda Arroyo, Battaglia was aware that Tejada had joined the Union at the inception of its campaign in August 1976. Moreover, Battaglia observed that "in the beginning [Tejada] was quite a good worker" whom he "certainly did not want to fire," but that he quickly became disenchanted with Tejada because "the only time he would pop up was when it served the Union's purpose for Julio to be on the job" and because Battaglia was convinced that Tejada had the backing of the Union. Finally, Respondent admitted that Tejada gave testimony adverse to its interests in the prior proceeding before Administrative Law Judge Zankel.

Accordingly, I am persuaded and therefore conclude that Respondent discharged Julio Tejada on March 2, 1977, because he had joined and assisted the Union, and because he gave testimony under the Act against Respondent. By doing so, I conclude that Respondent thereby violated Section 8(a)(3) and (4) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

I have found that Respondent discharged Awilda Arroyo and Julio Tejada on March 2, 1977, because they joined and assisted the Union in its organizational campaign, and because they gave testimony under the Act in a Board proceeding. To remedy this violation, I shall recommend that Respondent offer immediate and full reinstatement to them in their former jobs or, if they no longer exist, to substantially equivalent employment, and make them whole for any loss of pay which they may have suffered as a result of the discrimination practiced against them. The backpay provided for herein shall be computed in accordance with the Board's formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon at the rate of 7 percent per annum in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the basis of the foregoing findings of fact and conclusions, and upon the entire record made in these cases, I hereby make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning

of Section 2(5) of the Act.

3. By discharging Awilda Arroyo and Julio Tejada, thereby discriminating in regard to their hire and tenure of employment, in order to discourage their adherence to and activities on behalf of the Union, and to interfere with their right to give testimony under the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (4) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the purview of Section 2(6) and (7) of the Statute.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER ⁹

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

1. Cease and desist from:

(a) Discharging employees, thereby discriminating in regard to their hire and tenure of employment, in order to discourage their engagement in union activities, or to interfere with their right to give testimony under the National Labor Relations Act, as amended.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which I deem is necessary to effectuate the policies of the Act:

(a) Offer to Awilda Arroyo and Julio Tejada immediate and full reinstatement to their former jobs or, if they no longer exist, to substantially equivalent employment, and make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records and reports, and all other records necessary to analyze the amounts of backpay due herein.

(c) Post at its plant in Wayne, New Jersey, in both English and Spanish, copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, on forms to be provided by the Regional Director for Region 22, after being

duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be 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 to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁹ In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, 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.

¹⁰ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge our employees, thereby discriminating in regard to their hire and tenure of employment, in order to discourage their engagement in activities on behalf of Local 404, United Electrical, Radio & Machine Workers of America (UE), or any other labor organization.

WE WILL NOT discharge our employees for exercising their right to give testimony under the National Labor Relations Act, as amended.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL make Awilda Arroyo and Julio Tejada whole for any loss of pay which they may have suffered as a result of our discrimination practiced against them, and WE WILL reinstate them.

All our employees are free to become, remain, or refrain from becoming or remaining, members of any labor organization.

WAYNE TROPHY CORP.