

Super Toys, Inc. and Wholesale Delivery Drivers & Salesmen Local 848, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 31-CA-1682

November 19, 1970

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On August 10, 1970, Trial Examiner George Christensen 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 Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. The General Counsel filed an answering 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, Super Toys, Inc., North Hollywood, California, 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

GEORGE CHRISTENSEN, Trial Examiner: On January 7, 1970,¹ the Union filed a charge which caused the issuance on February 10 of a complaint alleging that Super Toys, Inc.,² violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (Act), by discharging Philip Calvaresi for engaging in activities on behalf of Wholesale

Delivery Drivers & Salesmen Local 848, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America³ and additionally violated Section 8(a)(1) of the Act by interrogating its employees concerning their union activities.

The Respondent admitted receipt of the charge, the correctness of the jurisdictional and labor organization allegations of the complaint, that its branch manager, Harold Boigan, its assistant branch manager, Harold Brown, and its supervisor, Berton Diamond, at all pertinent times were its supervisors and agents acting on its behalf, and that it discharged Calvaresi and has refused to reinstate him at all times subsequent. Respondent denied that it discharged Calvaresi for engaging in union activities and that it interrogated its employees regarding their union activities.

The issues are (1) whether the Respondent discharged Calvaresi for engaging in union activities and (2) whether it interrogated its employees regarding their union activities.

A hearing was held at Los Angeles, California, on March 31 at which the parties appeared by counsel and were afforded full opportunity to present evidence, examine and cross-examine witnesses, argue, and file briefs. Briefs have been submitted by the General Counsel and the Respondent. Based on his review of the entire record, observation of the witnesses, and perusal of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The jurisdictional facts, the qualification of the Respondent as an employer engaged in commerce in a business affecting commerce and the Union as a labor organization within the meaning of Section 2(2), (5), (6), and (7) of the Act is conceded by all parties and I therefore so find and conclude.

II. THE UNFAIR LABOR PRACTICES

A. The Facts

In October Diamond was working for the Respondent as a driver in the Los Angeles area. He had previously worked for the Respondent in Detroit. He and Calvaresi lived in the same apartment building and were acquainted. Sometime that month Diamond introduced Calvaresi to Boigan and the latter employed Calvaresi as a freelance salesman to solicit new accounts for the Company on the basis of \$25 commission for each new account secured (including one rack) plus \$5 for each additional rack. Calvaresi was reimbursed for car expense and used his own auto. He was latter permitted a draw against commissions.

The Respondent is essentially a rack jobber, installing racks and supplying them with small, cheap toys in various retail outlets. Respondent followed the practice each year of disposing of larger and more expensive boxed toys turned in by its customers and stacked in its warehouse

¹ Hereafter date references for the months between October and December refer to the year 1969 and the date references for January and February refer to the year 1970

² Hereafter referred to as the Company or the Respondent

³ Hereafter referred to as the Union

during the year through weekend sales meetings in November and December, at which meetings the toys were sold for whatever price they would command. These sales meetings were called swap-meets. Whatever toys were not sold by Christmas were donated to charity.⁴ Boigan authorized Calvaresi to attend the November and December swap-meets in 1969 and attempt to sell its accumulated boxed goods. It was agreed that 25 percent of the receipts derived were to go to the Company and the balance split between Calvaresi and the Company.

Calvaresi attended several swap-meets in November, sold a quantity of the toys, accounted for the proceeds to the Company, and turned over the requisite amount of money.

About December 1, Boigan made Calvaresi a driver at a salary of \$150 a week. It was made clear to Calvaresi, however, that the assignment was a temporary one because of the Christmas rush, and that he would revert back to his status as a freelance salesman on or about January 1. There were two regular drivers employed by the Company to service its accounts in the Los Angeles area at the time; namely, Diamond and Larry Epstein. Diamond was paid \$175 per week and Epstein \$150 per week. The duties of the drivers were to stock the racks at the various retail outlets on their respective routes and install racks as required. They left invoices for the amounts due to the Company, and with rare exception did not handle any money. They drove trucks supplied and serviced by the Company.

Sometime during the month Boigan was advised by the home office that he was over his budget and to lay off Calvaresi and one more employee. Boigan asked for and received permission to desist from any changes until January since he had to be in San Francisco during the month on a special project and needed all the current employees for the month. The home office agreed. Boigan offered Calvaresi a job as branch manager at the Company in Las Vegas, but Calvaresi declined because of his and his wife's reluctance to move and change their children's school enrollment without an employment contract, which Boigan could not offer.

In early December Calvaresi asked Boigan if he might take some of the merchandise unsold at the swap-meets to his apartment to try to sell it to neighbors and friends. Boigan consented. Calvaresi realized \$220 by such sales.

About a week later Calvaresi asked Boigan if he might borrow the Company's share of the \$220 in proceeds from his home sale, saying he needed money to pay back child support to his former wife, had some pressing bills and needed money for the holidays. Boigan told him it was company money, that the Detroit home office of the Company knew about the sale, and that he could not loan it to Calvaresi. He suggested that Calvaresi apply for a personal loan at a finance company. Calvaresi replied he had tried that, without success. Boigan then instructed Calvaresi to turn in the money owed the Company the following week.

Instead of following instructions, Calvaresi applied the money to his personal obligations. About December 18, Harold Brown, who was acting as manager of the branch during Boigan's absence that week in San Francisco, told

Calvaresi he had been holding back mailing the envelope to the home office containing the invoice accounting for the \$220 home sale awaiting the money and asked Calvaresi for the money so he could mail it in. Calvaresi confessed to Brown that he had used the money, stating that he could not get a personal loan and had to pay back child support to his ex-wife. Brown then sent in the envelope containing the invoice even though no money was enclosed.

On either the following Monday or Tuesday (December 22 or 23) Calvaresi sought out Boigan, who had returned from San Francisco, apologized for appropriating the Company's money for his own use, pleaded with Boigan not to fire him, promised not to repeat his action, and offered to endorse his next two paychecks back to the Company to satisfy the debt. Boigan accepted.

A day or so later, paychecks for the preceding week were distributed. Calvaresi asked Boigan to let him keep that check and not endorse it over, that he needed the money badly. He promised to pay the debt with his next paycheck plus his earnings as a waiter on New Year's Eve. Boigan agreed.

On the following Monday (December 29), Boigan announced that there were going to be some changes made in the operation of the branch and that there would be a general meeting of employees to outline them on Saturday, January 3. Diamond, Epstein, and Calvaresi lunched together after the announcement. Worried about possible job loss and/or income reduction, they decided to seek union representation. The three returned to the Company's offices and placed a telephone call to the Union wherein it was arranged for the three to meet with representatives of the Union at Calvaresi's apartment that evening. At that meeting the three expressed their fear of either job loss or income reduction or both, signed cards authorizing the Union to act on their behalf in bargaining collectively with the Company over their wages, hours, and working conditions, and asked the Union to notify the Company of its representative status before the January 3 meeting to forestall any changes in their job status or earnings. The three also agreed among themselves to deny any knowledge of the Union if questioned by the Company.

On receipt of his paycheck that week (covering the week of December 22-26), Calvaresi waited until the other employees had left and then endorsed his check over to the Company and gave it to Boigan (Boigan testified that Calvaresi was sensitive about the other employees knowing of his debt and wanted the matter kept in confidence). On December 31, Boigan passed out yearend bonus checks. Calvaresi received a check for \$50. He did not apply it to the debt, nor did Boigan request that he do so.

On January 2 Calvaresi informed Boigan he did not make anything on New Year's Eve. That same day (a Friday), Boigan held the meeting originally scheduled for Saturday, January 3, to announce changes in the branch operation. The meeting was moved ahead a day at the employees' request, so they would have their weekend free and not have to come in on Saturday. Boigan, Brown, Diamond, Epstein, Calvaresi, and Dale Day (the warehouseman) were present at the meeting. Boigan announced there would be

⁴ On December 20 the remaining unsold boxed goods in the warehouse were donated to Synanon.

some changes effective January 5, but that no one would lose his job, Brown was to become assistant branch manager, Diamond was to become supervisor over the warehouse and truck operations, Epstein was to remain a Los Angeles route driver and Calvaresi was to take over Diamond's former job as the other Los Angeles route driver;⁵ Day would continue to handle the warehouse. He further stated, however, that the drivers' compensation would be changed to between 8 and 10 percent commission of sales with a minimum guarantee in an amount he did not yet know (apparently the Detroit home office had not set or approved a figure). When Calvaresi and Epstein protested on the ground the existing routes did not generate sales sufficient to cover their existing salaries at the proposed commission rates during their busiest month, December, Boigan stated if they did not like the new arrangement, they could leave. Both subsided at that, and Diamond assured them he would work to increase the number of accounts so their income would not drop.

On opening the mail the next day (Saturday, January 3) at the office, Boigan found a letter from the Union dated December 30 asserting that it represented a majority of the Company's drivers and requesting recognition and bargaining. Boigan telephoned Diamond, (awakening him), told him he had received a letter from the Union stating it represented the drivers and asked what Diamond knew about it. Diamond replied that he would come down to the office and talk to Boigan about it.

Boigan also telephoned Calvaresi and told Calvaresi that he had received the union letter and asked Calvaresi what he knew about it, and had he authorized the Union to represent him. Calvaresi said that he knew nothing about the Union and had not authorized it to represent him.

Diamond subsequently appeared at Calvaresi's apartment and told Calvaresi that Boigan had telephoned him to

ask if he knew anything about the Union. Calvaresi told Diamond he also had received a call from Boigan and had told Boigan that he didn't know anything about the Union. Calvaresi then asked Diamond what he was going to do. Diamond replied that since he now was a supervisor, he would have to protect his job by going to the office and telling Boigan the truth about the union activities of all three of them—Calvaresi, Epstein, and himself.

Diamond went to the office and saw Boigan. Boigan asked Diamond if he had signed an authorization card for the Union. Diamond replied that he had, and related that he, Calvaresi, and Epstein all had signed cards.

Calvaresi followed Diamond to Boigan's office and saw Boigan and Diamond conversing there when he arrived. After Diamond left, Calvaresi entered Boigan's office and said that after hearing Diamond's story, he wanted Boigan to hear his. Boigan replied that it made no difference who started the Union or whether or not the employees wanted a union, he had orders to let Calvaresi go because Calvaresi had withheld company funds.⁶ Calvaresi then left Boigan's office.

Later that day Boigan also asked Epstein if he knew anything about the Union. Epstein replied that he did, that he had signed an authorization card for the Union.

The balance of Calvaresi's debt to the Company was paid by deduction from Calvaresi's paycheck on January 8 paying him for the preceding week. Subsequent to Calvaresi's discharge, Diamond carried his former route with the assistance of Day for a few weeks, after which a new driver was employed on the route.

Epstein has been continuously employed by the Company since the Calvaresi discharge.

⁵ Epstein and Diamond corroborated Calvaresi's testimony to this effect. Boigan denied making the statement. Brown neither confirmed nor denied that Boigan made the statement. Day did not testify. Boigan's denial is discredited in view of his failure to deny the earlier statement that no one would lose his job and his corroboration of Calvaresi's testimony that Boigan sought to employ Calvaresi as a branch manager for the Company in Las Vegas and his further testimony that he made that offer because he wanted to retain Calvaresi in the Company's employ, which is consistent with his filling of the vacancy created by Diamond's promotion with Calvaresi.

⁶ Boigan testified that he had been ordered by the Detroit home office the previous evening (Friday, January 2) to discharge Calvaresi because of his misappropriation of company funds previously set forth, that this order came by telephone from the president of the Company, who had learned of the misappropriation from an employee who had gone to Detroit from Los Angeles just previous to the holidays. Brown testified that Boigan informed him of the impending discharge before he opened the union letter requesting recognition. Diamond testified that Boigan informed him that he was going to discharge Calvaresi for misappropriating company funds before he told Boigan that he, Epstein, and Calvaresi had authorized the Union to represent them, and Epstein testified that Boigan informed him at Boigan's office about 10 a.m. on the day of the discharge (before it occurred) that he was going to discharge Calvaresi for misappropriating company funds. While there is no question that Calvaresi appropriated company funds for his own use, Boigan accepted Calvaresi's excuses and promise not to repeat, and continued Calvaresi in the Company's employ. I discredit Boigan's testimony as set out above, the home office knew of the misappropriation at or shortly after it occurred and not only failed to countermand Boigan's decision to condone the matter, but also accepted the fruits of that condonation. On or about December 8, Boigan informed Calvaresi that the home office knew of the home sale proceeds as justification for his refusal to treat Calvaresi's withholding of such proceeds

as a loan, on or about December 18, Brown mailed the invoice showing such proceeds to the home office without enclosing the moneys due thereunder, on or about December 31, Calvaresi endorsed his paycheck over to the Company in partial satisfaction of the amount due. In these circumstances it appears both illogical and unreasonable, particularly in view of the fortuitous timing thereof, that the home office would suddenly order Boigan to discharge Calvaresi for the misappropriation. This conclusion is additionally strengthened by Boigan's announcement (obviously with the approval of the home office) the very afternoon preceding the evening the alleged order was given that no one was to lose his job in the reorganization of the Los Angeles branch, that Calvaresi was to be promoted to fill the vacancy created by Diamond's promotion. With regard to the testimony of Brown, Diamond, and Epstein that Boigan announced to them that Calvaresi was to be discharged for misappropriating company funds prior to his acquisition of the information that Calvaresi had lied to him about the Union, this just does not appear reasonable. Boigan failed to mention any intent to discharge Calvaresi when he telephoned him prior to conversing with Diamond to inquire into his knowledge of the Union. Epstein's testimony appears suspect inasmuch as the whole purpose of the *Friday* general employee meeting was to excuse the employees from going to Boigan's office on Saturday, yet Epstein relates an alleged conversation at 10 a.m. on Saturday morning at Boigan's office. Diamond was evasive and contradictory on the stand and appeared anxious to avoid any testimony which could reflect adversely on the Company, which coincides with his admitted statement to Calvaresi on January 4 that he wasn't going to risk his job as a supervisor. Brown demonstrated the same anxiety. For these reasons and based on my observation of their demeanor on the stand, he discredits the testimony of Epstein, Brown, and Diamond of statements by Boigan prior to his receipt of the Union's letter and knowledge of Calvaresi's union activities that he was going to discharge Calvaresi for misappropriating company funds on orders from Detroit.

B. Conclusions

I find and conclude that the stated reason for Calvaresi's discharge was pretextual and that the moving factor precipitating his January 3 discharge was his support of the Union.

On the day before the discharge Boigan had succeeded in his effort to retain Calvaresi in the Company's employ; he had secured authority to employ Calvaresi as a full-time route driver, after failing to secure his employment as a Las Vegas branch manager on mutually acceptable terms. He had accepted Calvaresi's pleas and promises and condoned an earlier misappropriation of the Company's funds. Yet one day after announcing Calvaresi's promotion (he had been scheduled to revert back to his former position as a freelance salesman from his temporary position as an extra driver on January 5), Boigan discharged Calvaresi.

The only changes between the time Boigan promoted Calvaresi and the time he discharged him were: (1) Boigan learned that the Union had organized his drivers; (2) that both the remaining local drivers, Epstein and Calvaresi (plus Diamond, the newly made supervisor) had authorized the Union to represent them; and (3) Calvaresi denied, while Epstein and Diamond admitted, that they had so authorized the Union.

Boigan undoubtedly was outraged that the employee for whom he had done so much—saved his job, condoned his misappropriation of company funds, gave him an opportunity for extra income (the swap-meets)—not only brought the Union, but also lied about the fact he had done so. It is also clear that with Calvaresi discharged, the Union's support in the original supposed three-man unit would dwindle to one—Epstein—thereby dissipating the Union's majority within the unit.

I therefore find and conclude that Boigan discharged Calvaresi on January 4 for authorizing the Union to represent him and not because he had misappropriated company funds, which Boigan had condoned, and therefore violated Section 8(a)(3) and (1) of the Act.

It is undisputed that Boigan on January 4 polled Epstein and Calvaresi (and Diamond) concerning the Union's claim of majority representative status. Even though unaccompanied by any threat of reprisal or promise of benefit, such polling has repeatedly been held to be inherently coercive inasmuch as the interrogated employees necessarily (and correctly, in Calvaresi's case) reason that admission of union support jeopardizes their employment status. The Board has held such polling is unlawful unless accompanied by assurances against interference with the employees' Section 7 rights and reprisal, an absence of coercion and a declaration that the purpose of such inquiry is merely to inquire into the validity of the Union's assertion of majority representative status. *Struksnes Const. Co.*, 165 NLRB 1062; also see *N.L.R.B. v. Camco, Inc.*, 340 F.2d 803, (C.A. 5). All of these safeguards were absent in these interrogations.

I therefore find and conclude that by Boigan's January 4 poll of Epstein and Calvaresi concerning their support of the Union the Company interfered with, restrained, and coerced Calvaresi and Epstein in the exercise of their Section 7 rights under the Act and thereby violated Section 8(a)(1) of the Act.

The General Counsel alleges that the Respondent additionally violated Section 8(a)(1) by Diamond's January 3 statements to Calvaresi that he was going to tell Boigan the truth about his union activities and those of Calvaresi and Epstein. I find and conclude that Diamond's declaration was not intended to interfere with, coerce or restrain Calvaresi in the exercise of his Section 7 rights but rather to alert Calvaresi to Diamond's personal renunciation of his earlier commitment to deny any knowledge of the Union and therefore fell outside the scope of his agency powers vis-a-vis the Respondent.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce and the Union is a labor organization within the meaning of Section 2(2), (5), (6), and (7) of the Act.

2. The Respondent discharged Calvaresi for authorizing the Union to represent him and thereby violated Section 8(a)(3) and (1) of the Act.

3. The Respondent interfered with, coerced, and restrained Calvaresi and Epstein in the exercise of their Section 7 rights under the Act by polling them concerning their support of the Union and thereby violated Section 8(a)(1) of the Act.

4. The above unfair labor practices affect commerce as defined in Section 2(6) and (7) of the Act.

5. The Respondent did not otherwise violate the Act.

Having found that the Respondent has committed unfair labor practices, I shall recommend that the Respondent be ordered to cease and desist therefrom, to post notices as specified hereafter, to offer Calvaresi reinstatement to his former position, and to make him whole for any loss of earnings he suffered by reason of his discriminatory discharge for a period dating from the date of his discharge to the date he is offered reinstatement by the Respondent, calculated in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, with interest at the rate of 6 percent per annum as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

RECOMMENDED ORDER

The Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

(b) Refusing to reinstate Philip Calvaresi to his former position or, if that position no longer exists, to a substantially equivalent one.

(c) Polling or otherwise coercively interrogating employees concerning their support of the Union.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer to Philip Calvaresi immediate and full reinstatement to his former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole financially in the manner set forth in "The Remedy" for any loss in earnings he has suffered because of the discrimination against him.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, pension records, personnel records and reports, and all other records necessary or appropriate for the purpose of ascertaining the backpay due under this Recommended Order.

(c) Post at its North Hollywood, California, premises, copies of the attached notice marked "Appendix."⁷ Immediately upon receipt of copies of the notice on forms furnished by the Regional Director for Region 31, the Respondent shall cause copies to be signed by an authorized representative and posted and maintained in conspicuous places, including all places where notices to employees are customarily placed, for 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 31, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.⁸

The complaint allegations that Respondent violated Section 8(a)(1) of the Act by Diamond's January 3 statement to Calvaresi that he was going to tell Boigan the truth about his union activities and those of Calvaresi and Epstein shall be, and are, dismissed.

⁷ 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 findings, conclusions, recommendations, 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. In the event that the Board's 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 be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals. Enforcing an Order of the National Labor Relations Board."

⁸ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 31, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

APPENDIX

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

After a trial in which all sides had the opportunity to present their evidence, the National Labor Relations Board found that we violated the law and ordered us to post this notice; we intend to carry out its order and do the following:

WE WILL NOT discharge or otherwise discriminate against you for supporting or assisting Wholesale Delivery Drivers & Salesmen Local 848, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other union.

WE WILL NOT coercively question or poll you about your support of the above Union, or any other union.

Since the Board ruled that we discharged Philip Calvaresi for supporting the above Union,

WE WILL offer him his old job back and give him backpay for any financial losses he suffered since we discharged him.

SUPER TOYS, INC.
(Employer)

Dated _____ By _____
Representative Title

This is an official notice and must not be defaced by anyone.

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.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 824-7357.