Walt Disney World Co. *and* Harry E. Winkler *and* Henry W. Davis. Cases 12-CA-6396 and 12-CA-6396-2

March 4, 1975

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND KENNEDY

Upon charges duly filed, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued a complaint and notice of hearing on July 24, 1974, against Walt Disney World Co., Respondent. The complaint alleged that the Respondent had engaged in, and was engaging in, certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (4) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges and of the complaint and notice of hearing were duly served on the parties. On August 1, 1974, the Respondent filed its answer to the complaint denying the commission of unfair labor practices and requesting that the complaint be dismissed.

Thereafter, the parties entered into a stipulation of facts and jointly moved to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and order. The parties waived a hearing before, and the making of findings of fact, conclusions of law, and issuance of a decision by, an Administrative Law Judge, and stipulated that no oral testimony is necessary or desired by any of the parties.[1] The parties also agreed that the charges, complaint, answer, and stipulation constitute the entire record in this proceeding.

On September 4, 1974, the Board issued its order approving the stipulation and transferring the proceeding to the Board. Thereafter, the General Counsel, the Charging Parties, and the Respondent filed briefs.

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

The Board has considered the stipulation, including exhibits, and the entire record in this proceeding,[2] and hereby makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, a Florida corporation, has its principal place of business in Orange and Osceola Counties, Florida, where it is engaged in the operation of a vacation and entertainment complex. During the past 12 months, Respondent had gross revenues in excess of $500,000, and in the course and conduct of its business, purchased and received goods and materials valued in excess of $50,000, directly from points located outside the State of Florida.

The complaint alleges, Respondent admits, and we find that Walt Disney World Co. is, and has been, engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We find that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE UNFAIR LABOR PRACTICES

A. *Facts*

At approximately 2:30 p.m. on June 3, 1974, employee Harry E. Winkler was served by the Union with a Board *subpoena ad testificandum* requiring his attendance at a representation hearing scheduled on June 4, 1974.[3] Upon receipt of the subpena, Winkler went to his immediate supervisor, Loren Greenwood, and told him that he had received an NLRB subpena that required him to attend the June 4 hearing and asked Greenwood what to do. Greenwood, after consulting with Respondent's counsel, told him that he was to report to work the following day and, failing to do so, he would be subject to disciplinary action. Winkler was also advised by Greenwood that he had 5 days in which to petition the Board to revoke the subpena.

Between 6 and 7 p.m. on June 3, 1974, Davis was also served with a Board *subpoena ad testificandum* requiring his attendance at the representation hearing scheduled for June 4, 1974. Prior to the hearing, on the morning of June 4, Davis tried unsuccessfully to contact his supervisor to advise him of the subpena and his absence from work that day.

Winkler and Davis both attended the hearing on June 4, 1974, and Davis attended also on June 5, 1974, but neither was called as a witness to testify by the Union. However, they appeared at the counsel table and assisted the union attorney. During the hearing, Respondent's manager of labor relations, Reudebusch, informed both men that because of

[1] The parties agreed that the stipulation was made without prejudice to any objection that any party may have as to the materiality or relevancy of any facts stated therein

[2] Respondent's request for oral argument is hereby denied, as the record and the briefs adequately present the issues and positions of the parties. The General Counsel's request to strike what is referred to as "Attachment A" of the Respondent's brief is hereby granted since the purported exhibit is clearly outside the record which the parties had agreed to.

[3] *Walt Disney World Company*, 215 NLRB No. 89 (1974).

their absence from work without authorization they were placing their jobs in jeopardy and were subject to severe disciplinary action.

Davis was suspended by Respondent for investigation from Thursday, June 6, until Tuesday, June 11, 1974. He was subsequently paid for the days of missed work during his suspension, but a written reprimand was placed in and remains in his personnel file.

Winkler was suspended by Respondent for investigation from Friday, June 7, through Friday, June 14, 1974. He also was given a written reprimand which was placed in and remains in his personnel file. Winkler was reinstated to his job, but he was not reimbursed for the period of his suspension from employment.

Winkler and Davis were scheduled to work June 4 and 5, 1974, as per their respective work schedules—Winkler as a pageant host and Davis in the print shop. The workweek and workday for pageant host/hostesses consists of a 7-day workweek with a single shift workday commencing at 9 a.m. and ending at 6 p.m. Print shop employees work an 8 a.m.–5 p.m. workday and a 5-day Monday to Friday workweek. On the days in question 29 pageant host/hostesses were scheduled to work and 29 pageant host/hostesses were scheduled off.

B. *Issue*

The parties have stipulated that the issue to be decided in this case is whether Respondent's action in disciplining its employees Winkler and Davis for absenting themselves from work without authorization from the Company in response to a subpena to testify at a National Labor Relations Board representation hearing, taken in the factual circumstances of this case, constitutes an unfair labor practice as alleged in the complaint.

C. *Contentions of the Parties*

Respondent contends: (1) it did not violate Section 8(a)(1) of the Act by its nondiscriminatory enforcement of existing work for rules unauthorized absences;[4] (2) it did not violate Section 8(a)(3)of the Act inasmuch as its bona fide efforts to maintain employee discipline and efficiency by its nondisparate insistence that the employees adhere to standard published rules and procedures did not encourage or discourage membership in a labor organization; and (3) it did not violate Section 8(a)(4) of the Act by the prudent exercise of its rights under the Act and it did not discipline or discriminate against its employees due either to their attendance at an NLRB proceeding or for responding to an NLRB subpena.

The General Counsel argues that Respondent attempted to coerce Davis and Winkler into not honoring the subpenas and not attending the hearing, thereby interfering with the effectiveness of the Board's processes. He asserts that Respondent's true obligation with respect to subpenaed witnesses is one of noninterference, nonrestraint, and noncoercion as to an employee's right and obligation to attend scheduled hearings as a subpenaed witness, and one of nonreprisal against such employees because they are subpenaed witnesses. Accordingly, the General Counsel requests that the Board find that Respondent illegally threatened, coerced, and disciplined Winkler and Davis for attending an NLRB representation hearing in response to a Board subpena.

D. *Discussion*

The Act and the Rules and Regulations of the Board clearly provide that a person served with a subpena is *required* to appear and to give testimony pursuant to the subpena.[5] Until the person served with the subpena petitions to have the subpena revoked, he continues to be under an obligation to appear pursuant to the subpena.[6] A respondent employer's "obligation, with respect to subpoenaed employee witnesses, is one of noninterference, nonrestraint, and noncoercion as to such employees' right and obligation to attend scheduled hearings as subpoenaed witnesses, and one of nonreprisal to such employees because they are subpoenaed witnesses."[7] "Once an employee has been subpoenaed," the Supreme Court has said, "he should be protected from retaliatory action regardless of whether he has filed a charge or has actually testified."[8]

Respondent contends that it disciplined Davis and Winkler not because of their attendance at the NLRB hearing or for responding to an NLRB subpena, but because they violated established and recognized company rules concerning the proper procedures for seeking an authorized leave of absence. But Respondent's rules of procedure cannot

[4] In support of this argument Respondent cites two cases, *John Wanamaker, Philadelphia, Inc.*, 199 NLRB 1266 (1972) (Member Fanning dissenting in relevant part), and *Iowa Beef Processors, Inc.*, 186 NLRB 521 (1970), where the Board found that employers had not violated the Act by disciplining employees who attended Board hearings without permission from a supervisor. However, neither case is apposite because in *Wanamaker* the employees did not attend pursuant to subpena, and in *Iowa Beef* the employee was disciplined for unexcused absences unrelated to the subpena before the employer learned that he had been subpenaed.

[5] *Winn-Dixie Stores, Inc., and Winn-Dixie Greenville, Inc.*, 128 NLRB 574, 579 (1960).

[6] *Ibid.*

[7] *Neptune Meter Company*, 212 NLRB 87 (1974), par 5 of "Contentions and Conclusions."

[8] *N.L.R.B* v. *Scrivener*, 405 U.S. 117, 124 (1972), citing with approval *Eugen Pederson* v. *N.L.R.B.*, 234 F.2d 417, 420 (C.A. 2, 1956), where the court stated. "It is, we think, a permissible inference that Congress intended the protection [of Section 8(a)(4)] to be as broad as the [subpena] power."

limit or restrict an individual's obligation to respond to a Board subpena. The stipulated facts show that Respondent was aware that Winkler and Davis had been subpenaed and that its conduct could only have had the effect, if successful, of dissuading the two employees from responding to their subpenas. Thus, when Winkler upon receiving his subpena told his supervisor, Greenwood, that he had received a subpena requiring him to attend the hearing on the following day, and asked what he was to do, Greenwood replied, after consulting Respondent's counsel, that he was to report for work and, if he failed to do so, he would be subject to disciplinary action. During the hearing, Manager of Labor Relations Ruedebusch also informed both employees that because of their absence from work they were subject to severe disciplinary action.

The written reprimand served on employee Davis recited:

> This investigation reveals that on June 4, 1974, at approximately 6:00 A.M., you telephoned the Lead of the Print Shop, Jim Thompson, stating to him that you had been served with a subpoena the night before, ordering your appearance before the National Labor Relations Board regarding a hearing between the Union (I.A.T.S.E.) and Walt Disney World. At this time, Jim informed you that he could not authorize your absence from work since he was not a supervisor and advised you to contact Lon McCabe, Assistant Manager-Merchandising, in order to obtain approval to be absent from work. You stated that you called Lon's office, however, he was not available and you left word with his secretary that you would not be in to work due to the fact you were subpoenaed.
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> At approximately 10:00 A.M., on June 4th, at the National Labor Relations Board Hearing Room, you were advised by John Ruedebusch, Manager, Labor Relations, that you were placing your employment in serious jeopardy by being away from work without authorization. At this time you consulted with Mr. Frank Hamilton, attorney for the Union, and according to you, he advised you to honor the subpoena as it stands or face the possibility of having it enforced against you as an alternative for violating the "due process of law." You stated that because Mr. Hamilton had advised you to remain at the hearing and, not being familiar with the legal aspect of a subpoena, you felt obligated to remain away from work without permission and honor the subpoena rather than face the possibility of legal action against you.

The written reprimand served on employee Winkler recited:

> On Monday, June 3, 1974, at approximately 3:00 P.M., you showed me a subpoena issued by the National Labor Relations Board in Tampa and asked what you should do. I informed you I would get back to you with an answer before your shift ended at 6:00 P.M. After checking with top management, I told you that you must report to work on Tuesday, June 4, and emphasized that you had prior committment to work at Walt Disney World. I also told you that you had five (5) days after receiving the subpoena to petition in writing to revoke the subpoena and that if you did not report to work on Tuesday you would be subject to severe disciplinary action.
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> You did not report to work as directed on Tuesday, June 4, nor did you attempt to contact me and tell me you would not be at work. This defiant attitude constitutes insubordination. Your failure to report to work also obstructed the work schedule, obligations and responsibilities of your Department.

As the written reprimands make clear, the acts of insubordination on the part of Winkler and Davis consisted in disobeying the instructions of their supervisors to ignore the subpenas and report to work. It was because they failed to follow these instructions that Winkler and Davis were disciplined. In attempting to dissuade the two employees from complying with the subpenas, Respondent disregarded the fact that, until the person served with the subpena petitions to have the subpena revoked, he continues to be under an obligation to appear pursuant to the subpena. And, although such person has the right to seek revocation, the employer cannot insist under threat of disciplinary action that the person subpenaed take such action.[9]

Accordingly, we find that the above-described conduct of Respondent interfered with the right of employees to participate in proceedings before the Board and that it tended to impede the Board in the exercise of its power to compel the attendance of witnesses at its proceedings and to obstruct the

[9] *Winn-Dixie Stores, Inc., supra.*

If Respondent anticipated that the attendance of Davis and Winkler at the hearing would be seriously disruptive of its operations, the remedy was not to warn the employees not to respond to the subpenas, but to work out an accommodation with other parties so as to minimize the time the employees would be away from work. *Neptune Meter Company, supra.* Respondent made no such attempt. Further, the stipulation contains no evidence which would warrant a finding that the presence of Davis and Winkler at the hearing seriously inconvenienced Respondent's operations

Board in its investigation. As this conduct had the tendency to deprive the employees of vindication by the Board of their statutory rights, it violated Section 8(a)(1) of the Act.[10] Moreover, as Respondent's disciplinary action against Winkler and Davis tended to restrain them and other employees from participating in Board proceedings, we find that by such conduct Respondent also violated Section 8(a)(4) of the Act.[11]

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

CONCLUSIONS OF LAW

1. Respondent Walt Disney World Co. is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. By discriminatorily suspending and issuing reprimands to employees Winkler and Davis for attending an NLRB hearing pursuant to subpena, Respondent violated Section 8(a)(1) and (4) of the Act.
3. The unfair labor practices engaged in by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in, and is engaging in, certain unfair labor practices, we shall order it to cease and desist therefrom. In order to effectuate the purposes of the Act, we shall also order Respondent to make whole employee Harry E. Winkler for any loss of earnings he may have suffered during the period from the beginning of his suspension to the date of his reinstatement, computed in accordance with the formula set forth in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962). We shall also order Respondent to treat as a nullity and to remove from the personnel files the reprimand notices issued to Winkler and Davis.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Walt Disney World Co., Lake Buena Vista, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending employees for attending hearings of the National Labor Relations Board pursuant to subpena.

(b) Issuing reprimands, written or otherwise, to employees because they attended hearings of the National Labor Relations Board pursuant to subpena.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make Harry E. Winkler whole, in the manner set forth in the section of this decision entitled "The Remedy," for any loss of earnings he may have suffered as a result of the discrimination practiced 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, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Remove from the personnel files the reprimand notices issued to Harry E. Winkler on June 14, 1974, and to Henry W. Davis on June 11, 1974, and consider those notices null and void.

(d) Post at its premises in Lake Buena Vista, Florida, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's representative, shall be posted by the Respondent 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

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[10] *Ibid.*

[11] *N L R.B.* v *Scrivener, supra. Fuqua Homes (Ohio), Inc*, 211 NLRB 399 (1974); *Neptune Meter Company, supra.*

In view of our finding that by the disciplinary action taken against employees Winkler and Davis Respondent violated Sec. 8(a)(1) and (4) of the Act, we find it unnecessary to decide whether, as alleged in the complaint, the foregoing conduct also violated Sec. 8(a)(3), inasmuch as the remedy would be the same even if the additional violation were found.

The parties by stipulation limited the issues to a question of whether Respondent's disciplinary actions constituted an unfair labor practice (see sec B, above) Accordingly, we make no findings with respect to the allegation that Respondent unlawfully threatened Winkler when, on June 3, Supervisor Loren Greenwood told Winkler that he would be subject to disciplinary action if he did not report to work on June 4

[12] 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."

customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent 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

We are posting this notice to comply with the order issued by the National Labor Relations Board which found that we violated the law and has ordered us to post this notice. We intend to carry out the order of the Board and abide by the following:

WE WILL NOT suspend employees for attending a hearing of the National Labor Relations Board pursuant to subpena.

WE WILL NOT issue reprimands, written or otherwise, to employees because they attended hearings of the National Labor Relations Board pursuant to subpena.

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

Because it has been decided that we discriminatorily suspended Harry E. Winkler and Henry W. Davis, WE WILL pay Harry E. Winkler for any wages he lost during his period of suspension. Henry W. Davis has already been reimbursed for pay lost during the period of his suspension.

Because it has been decided that we discriminatorily reprimanded Harry E. Winkler and Henry W. Davis, WE WILL remove from their personnel files the reprimand notices issued to Harry E. Winkler on June 14, 1974, and to Henry W. Davis on June 11, 1974, and will consider those notices to be null and void.

WALT DISNEY WORLD CO.