

American Federation of Television and Radio Artists, Washington-Baltimore Local and First Media Corporation. Cases 5 CE 61 and 5 CC 854

January 29, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On March 20, 1978, Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding.¹ Thereafter, Respondent filed exceptions and a supporting brief, as well as a copy of its brief to the Administrative Law Judge; the Charging Party filed limited exceptions and a brief in support thereof and in support of the Administrative Law Judge's Decision; and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

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 briefs² and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.³

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, American Federation of

Television and Radio Artists, Washington-Baltimore Local, Washington, D. C., its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

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

WE WILL NOT maintain, enforce, or give effect to the clause contained in our Letters of Adherence to collective-bargaining agreements which states that "the performer reserves the right to withdraw his recorded production from any station at which AFTRA is engaged in an authorized strike," and WE WILL NOT enter into agreements containing a similar clause in the future.

WE WILL NOT induce or encourage individuals employed by advertising agencies or producers or other persons to strike or refuse to work, or coerce advertising agencies or producers or other persons, where an object is to cause such agencies or producers or other persons to cease doing business with First Media Corporation.

AMERICAN FEDERATION OF TELEVISION AND
RADIO ARTISTS, WASHINGTON-BALTIMORE LO-
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DECISION

BERNARD RIES, Administrative Law Judge: Respondent entered into bargaining agreements with advertising agencies which provided that performers on recorded radio commercials were authorized to withdraw their productions from any radio station at which Respondent was engaged in an authorized strike. The central issue here is whether that provision violates Section 8(e) of the Act. These consolidated cases were heard on November 28-30, 1977, at Washington, D.C.

Briefs were received from all parties on or about February 10, 1978. On the entire record,¹ the briefs, and my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

I. JURISDICTIONAL FINDINGS

The Charging Party, First Media Corporation, is a Delaware corporation engaged in the operation of radio stations throughout the United States, including WPGC AM/FM,

¹ The General Counsel's motion to correct the transcript is granted, with the exception of the proposed change at p. 161, l. 9. As requested, the motion is received in evidence as G.C. Exh. 42.

¹ The charges herein were filed on May 23 and 24, 1977, and the complaint was issued on August 16, 1977.

² On July 20, 1978, Respondent filed a letter seeking postponement of further consideration of this proceeding pending a later submission. On July 27, 1978, the General Counsel filed an opposition to that request, and on July 27, 1978, the Charging Party filed a letter also in opposition to Respondent's request for postponement. On the same date Respondent filed a formal motion for reopening of the record. Thereafter, the General Counsel, on August 2, 1978, and the Charging Party, on August 9, 1978, filed briefs in opposition to Respondent's motion to reopen the record. The motion to reopen the record is hereby denied. The evidence that Respondent now seeks to admit into the record concerns public perceptions regarding whether radio commercials are "pre-recorded" or "live." We find it unnecessary to consider such evidence as it is clear that the collective-bargaining contract clause found herein to have violated Sec. 8(e) of the Act is, as explained by the Administrative Law Judge, a "struck goods" provision rather than a "picket line" clause. The evidence proffered by Respondent, assuming it to be newly discovered within the meaning of the Board's Rules and Regulations, is irrelevant to that conclusion of the Administrative Law Judge which we herein affirm.

³ As Respondent's defenses herein are not frivolous, we deny the Charging Party's request for litigation expenses. *Orion Corporation*, 210 NLRB 633, 634 (1974); *Amalgamated Meat Cutters and Butcher Workmen of North America, and Local 222 (Iowa Beef Processors, Inc.)*, 233 NLRB 839 (1977).

located in Morningside, Maryland. The record shows, Respondent admits, and I find that First Media has been, at material times, an employer engaged in commerce and in an industry affecting commerce within the meaning of Sections 2(2), (6), (7), 8(b)(4), and 8(e) of the Act.

The parties have stipulated, and I find, that the advertising agencies and producers listed in the appendices to the complaint have been, at material times, persons and/or employers engaged in commerce or in an industry affecting commerce within the meaning of Sections 2(1), (2), 8(b)(4), and 8(e) of the Act.

At all material times, as the parties agree and I find, Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ISSUES

At the heart of this complaint is the question of whether Section 8(e) sanctions a contract clause enabling employees of advertising agencies represented by Respondent to instruct the agencies to withdraw commercials previously recorded by the employees from use on radio stations at which Respondent is engaged in an authorized strike. There are other allegations of unlawful conduct, but that is the one at which all parties address their fire.

III. THE BASIC ISSUE

Respondent is the bargaining representative for various units of radio and television performers in the Washington-Baltimore area. It is not only the bargaining agent for groups of full-time station employees, but it also represents performers who are hired by advertising agencies and producers to create advertising commercials to be played over radio and television stations. Although these performers are normally hired on an *ad hoc* basis, and engage in actual work for only short periods, the parties agree that they are employees of the agencies within the meaning of the Act.

The bargaining relationships between Respondent and the several hundred local advertising agencies and producers are technically consummated by the execution by the latter of "letters of adherence" to the national AFTRA contracts. The national contract here involved is the "1975 AFTRA Radio Recorded Commercials Contract," which has an effective period of November 16, 1975, to November 15, 1978; the letters of adherence were signed by each agency at some time after the former date.

The bargaining unit covered by each such letter of adherence is described in the national radio commercials agreement as consisting of "actors, singers, announcers, and sound effects men" who are engaged to produce commercial sound recordings to be played on radio broadcasts. The letter of adherence is a one-page document which essentially states that the agency agrees to be bound by the terms of the national agreement. The only substantive term and the one in issue here included in the letter of adherence prepared by Respondent for the Washington-Baltimore area, a term which does not appear in the national agreement,² is underlined below:

² The record indicates that this added clause has been included in the local contracts, although not in the master contract, for the past four con-

We wish to enjoy peaceful and pleasant relations with the American Federation of Television and Radio Artists (AFTRA) and its members, and to that end we agree to abide by and conform to all the terms and conditions specified in the aforementioned documents and, in addition, we agree that the performer reserves the right to withdraw his recorded production from any station at which AFTRA is engaged in an authorized strike.³

On May 3, 1977, Respondent, after fruitless contract talks, commenced a lawful economic strike against WPGC, an area radio station at which Respondent represents the on-air performers. Thereafter, Respondent's agents communicated, in ways alleged to be unlawful, with both the advertising agencies and employees with regard to the rights and obligations arising from the "right to withdraw" clause in the letters of adherence; these communications will be discussed below.⁴

The basic claim here is that the "right to withdraw" provision violates Section 8(e) of the Act. Section 8(e) makes it an unfair labor practice for an employer and a labor organization:

to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. . . .

In *National Woodwork Manufacturers Association, et al., v. N.L.R.B.*, 386 U.S. 612 (1967), the Supreme Court explained that Section 8(e) was designed by Congress in 1959 to supplement the existing proscriptions against secondary boycotts contained in Section 8(b)(4); its purpose was to plug the gap left by the Court in *Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, and Los Angeles County District Council of Carpenters and Nathan Fleisher [Sand Door & Plywood Co.], v. N.L.R.B.*, 357 U.S. 93 (1958), which had held that the pre-1959 Act did not prohibit unions and employers from voluntarily executing "hot cargo" contracts. Section 8(e), being complementary to Section 8(b)(4), was intended to have a reach coextensive with the latter provision.

Thus, despite the broad language of both sections

tract periods. The provision also is not contained in the model letter of adherence set out in the master agreement.

³ The addition of this provision seems inconsistent with the spirit of positive assertions contained in article 43 ("Unfair Stations") of the master agreement, which states:

AFTRA hereby notifies Producers that under AFTRA's rules, Performers may not authorize the Producer to use the recording of the Performer's performance for the purpose of strike-breaking. *The normal supply of tapes or records to a radio station shall not be considered strike-breaking. Producers are not bound by such rules of AFTRA, but neither AFTRA nor AFTRA members shall be subject to action for breach of contract or otherwise for complying with or enforcing such rules.* [Emphasis supplied.]

⁴ If successful, invocation of the "right to withdraw" clause would have been a powerful strike weapon against WPGC. The station derives 100 percent of its revenues from commercials, most of which are prerecorded by members of Respondent; the record indicates that advertising agencies would have been very reluctant to substitute "live" copy for the recorded advertisements.

("cease doing business with any [other] person"), the distinction previously recognized under Section 8(b)(4)(B) between lawful "primary" and unlawful "secondary" activity was intended to obtain under Section 8(e), making that provision applicable only to agreements having "secondary" objectives. *Id.*, at 620, 623-639. Accordingly, as with Section 8(b)(4)(B), the standard for testing the legality of a cease-doing-business agreement under Section 8(e) is whether, in all the circumstances, the agreement "is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees" or is "tactically calculated to satisfy union objectives elsewhere," *id.* at 644, 645, a test designed to accomplish the basic statutory objective of "shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1965).

Since the enactment of Section 8(e), the Board has analyzed a variety of contract clauses to determine whether they are protected as being primary in nature or proscribed as having a secondary thrust. For example, subcontracting agreements, preserving unit work by prohibiting the farming out of such work as is customarily performed by covered employees, is intended to regulate only intracompany labor relations and is thus primary in character, see *Local Union No. 98, of the Sheet Metal Workers' International Association (Cincinnati Sheet Metal & Roofing Co.)*, 174 NLRB 104, 110 (1969). A "union-signatory" agreement which restricts subcontracting only to employers under contract with the union, on the other hand, plainly has an objective extending beyond the walls of the bargaining relationship - seeking to protect the union and its members generally rather than the employees covered by the agreement - and thus affects neutral employers without the compensating factor of protection of the rights of the contracting employees. *District No. 9, International Association of Machinists, AFL-CIO [Greater St. Louis Automotive Trimmers & Upholsterers Assn.] v. N.L.R.B.*, 315 F.2d 33, 36 (D.C. Cir. 1962).

The present clause, authorizing performer employees of advertising agencies to forbid the use on struck stations of commercials previously recorded by the performers for the agencies, does not on its face have any redeeming primary value to the performers *vis-a-vis* their own employment relationship with the agencies; the plain effect of the clause shows it to be "tactically calculated to satisfy union objectives elsewhere" than at the agencies. *National Woodwork*, *supra* at 645.

Early on, the Board found similar provisions to be within the proscription of Section 8(e). *American Feed Company*, 133 NLRB 214, 219 (1961), (clause reading, "There is hereby excluded from the job duties, course of employment or work of employees covered by this agreement, any work whatsoever in connection with the handling or performing any service whatsoever on goods, products or materials coming from or going to the premises of an employer where there is a controversy with a Union"); *Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al., (Patton Warehouse, Inc.)*, 140 NLRB 1474, 1482-85, *enfd.* in pertinent part 334 F.2d 539 (D.C. Cir. 1964),

(clause reading, ". . . it shall not be a cause for discharge or disciplinary action if any employee refuses to handle any goods or equipment . . . used by any carrier or other person . . . at any of whose terminals or places of business there is a controversy between such carrier, or person, or its employees on the one hand and a Labor Union on the other hand . . .").

The gravamen of this line of cases is that an agreement is invalid which permits employees of a neutral employer to refuse to lend their skill and energy to their own employment in support of union objectives elsewhere. I see no meaningful distinction between those cases, where the employees were contractually authorized to refuse to perform current work, and the present case, where the employees are allowed to interdict the fruit of work performance which has occurred earlier but, through the magic of magnetic tape, has been preserved for future use. The difference between an option not to work on new materials and an option not to permit previously manufactured materials to be sent into labor disputes is one which I feel confident the Board would consider irrelevant.

Respondent contends, however, that the "struck goods" cases are inapposite, and that in fact the instant "right to withdraw" provision is the analogue of a "picket line" clause and, accordingly, a legitimate cease-doing-business agreement under prevailing case law. It is an interesting, if ultimately unpersuasive, argument.

In *Patton Warehouse, supra*, the Board carefully reviewed the legislative history of the Landrum-Griffin Act and noted that Congress had paid special attention to the relationship between Section 8(e) and the traditional right of employees not to breach picket lines, a right often embodied in bargaining agreements. The Board concluded that Congress intended to continue to permit unions and employers to safeguard those rights to the following extent (140 NLRB at 1481):

Stated otherwise, a contract clause which grants immunity to individual employees from disciplinary action for their failure to cross a picket line would be valid under Section 8(e) if it were limited (a) to protected activities engaged in by employees against their own employer and (b) to activities against another employer who has been struck by his own employees, where the strike has been ratified or approved by their representative whom the employer is required to recognize under the Act.

Limitation (b) derived from the consoling references during the legislative debates, when concern was evinced about the effect of Section 8(e) on picket line clauses, to the already existing proviso to Section 8(b), which states: "Provided, that nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act. . . ."

On review, the Court of Appeals for the District of Columbia Circuit encountered difficulty with the Board's second limitation. The court held that both legislative history

and case law pointed to a conclusion that "refusals to cross a [primary] picket line at another employer's premises where that line does *not* meet the conditions of the 8(b)(4) proviso" may also be the subject of contractual protection without running afoul of Section 8(e). 334 F.2d at 543.⁵

Under either reading of the statute, it may be seen, Respondent could have, in theory lawfully contracted for the right to have agency employees refuse to cross the WPGC picket line in May 1977.⁶ As an initial matter, however, I am constrained to conclude that the "right to withdraw" clause is not a picket line clause within the intendment of prior cases.

It is Respondent's first thesis that a performer's voice on a tape should be considered, for purposes of the statute, the performer himself, and that his contractual "right to withdraw his recorded production" is the equivalent of a right to refuse to pass his voice through a picket line. Respondent argues: "Without the voice the individual here ceases to be an employee—his employee status cannot exist without the other. . . . The rights belonging to the actual person cannot exist without the rights attaching to the person's taped voice." The largely metaphysical analysis which follows—including a contention advanced in a 1932 doctoral thesis that "persons are embodiments of situational relationships"—stresses the theme that a performer's contribution to a taped radio commercial should be considered the significant manifestation of his employment status for purposes of deciding the aspect of his personality which may lawfully be protected against having to cross a picket line.

Other considerations deferred, here I think the Board has already precluded my acceptance of such an argument. In *Patton Warehouse*, it quite clearly drew a distinction between the special congressional regard for the rights of a relatively restricted group of employees, generally drivers, confronting the prospect of transgressing a picket line, with all the symbolic freight that act entails, and all other employees whose labors may, from a greater distance, contribute to the business of the struck employer. The Board considered together and distinguished the two situations (140 NLRB at 1485):

We have previously noted that the *Rockaway News*

⁵ The Board seems to have accepted the court's holding. In *Cement Masons Local Union No. 97, AFL CIO (Interstate Employers, Inc.)*, 149 NLRB 1127, 1132, fn. 11 (1964), the Board expressly noted the Court's *Patton* decision and, instead of holding the clause before it unlawful because it was not limited to the two situations it had delineated in *Patton*, simply stated, "The clause in its broad scope can be read as applying to unlawful secondary picketing." The same formula was employed to hold clauses unlawful in several cases thereafter, as collected and discussed in *Teamsters Local No. 386, IBT (Valley Employers Association)*, 152 NLRB 780 (1965); see also *Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Local Union No. 695, IBT (Threlfall Construction Company)*, 152 NLRB 577, 581 (1965); but cf. *Local 1516, International Brotherhood of Electrical Workers, AFL CIO (Mercantile Bank)*, 172 NLRB 617, 619 (1968).

⁶ It should be noted at the threshold of discussion, however, that even if the disputed clause here were to be deemed a "picket line" provision, it would nonetheless be fatally overbroad, since it applies to "any station at which AFTRA is engaged in an authorized strike." Since the coverage thus potentially reaches "unlawful, albeit 'authorized' secondary activity," it is to that extent unlawful. *Threlfall Construction Company*, 152 NLRB at 581 (1965).

case stands for the proposition that an employer may by contract waive his right to discipline employees for their refusal to cross a legitimate picket line at a struck employer's premises. The waiver of these rights by an employer is for the benefit of individual employees; it does not confer a corresponding right on a union to insist that its policy against handling struck goods be embodied in the bargaining agreement. What the Respondents sought in section 2(b) and (c) was the effectuation of its policy against handling struck goods or equipment. The means, direct or indirect, by which this end is to be accomplished, is tainted by the illegality of its object.

In limning such a distinction between crossing a picket line "at a struck employer's premises" and the handling of struck goods, the Board plainly rejected the notion that the essence of employee status is to be found in the nature of the skill or physical characteristics which the individual brings to the task. I feel certain that respected counsel for Respondent does not intend to assert any such elitist contention as the inherent superiority of the vocal cords and larynx of a radio performer over the arm and back musculature of an assembler in a factory; and yet the Board maintains that the employer of the latter may not agree to permit him to refuse to flex his muscles over goods destined for the site of a labor dispute.⁷

Proceeding outward, Respondent argues that performers are considered, in general acceptance, to be actually appearing whenever their voices are heard on a commercial. Their method of reimbursement lends some slight support to this claim: performers receive an initial flat fee for recording a commercial, which entitles the agency to use the tape, as infrequently or as often as it sees fit, for 13 weeks; thereafter, if the agency wishes to make use of the tape for further 13-week periods, it must pay the performer additional fees. While the payment method thus hints at an industry perception of the replayed commercial as having temporal currency, the argument would be decidedly more substantial if the performers received a royalty for each play.

As all know, the radio broadcasting industry today largely consists of prerecorded music interspersed with commercials and live news reports. The record shows that while 20 years ago, most commercials promoting a product were read as "live copy" by station announcers, today nearly all commercials are prerecorded. Even the most casual radio listener cannot help being aware that the commercials presently used are considerably more complex in structure than they were in days past. Seldom, if ever, is an announcer's voice heard alone; most often, there are several speaking voices, perhaps music, possibly a chorus of singers, frequently sound effects. These relatively elaborate compositions are played with considerable (some argue disquieting) frequency, usually over several stations.

⁷ Respondent addresses its brief to the rather distinctive situation of a performer who uses his voice on a recording. No mention is made of sound effects men, who are within the bargaining units, who have a theoretical right under the clause to withdraw commercials they have helped to record, and whose routine employment functions are not so arrestingly, if superficially, dissimilar from the rest of the working community as those of a vocal performer.

I find it inconceivable that, as suggested at the hearing, the listening audience perceives these playlets, these repeated 60-second packages of voices, instruments, and miscellaneous sounds, as if they were actually being performed at the time of the hearing. The record indicates, and personal experience in the area confirms, that there is but a handful of radio personalities who make commercials and who are known to the listening public. It is perhaps possible that an unsophisticated listener, hearing over WPGC a recorded commercial by Frank Hardin (hailed at the hearing as the "Washington monument" of local radio personalities), might think that Hardin was appearing in person. But I think it safe to say, and certainly with no disrespect intended, that any listeners capable of associating the anonymous voices of Stan Brandorff or Edna Seasongood or the many other performers with their names and identities would likely also know them and the industry well enough to be aware of the fact that they were appearing on WPGC via recording and that they personally supported the strike.

In this regard, I acknowledge a declaration made by two Board members in *AFTRA, AFL-CIO (Radio Station WCKY)*, 133 NLRB 1736, 1739 (1961): "We find that the Local, as part of its lawful strike against WCKY, was merely encouraging its members, none of whom were shown to be secondary employees, to refuse to enter upon WCKY's premises to participate in a 'live' broadcast, or to do what any radio listener would find indistinguishable: participate in such a broadcast by means of making a transcription intended to be used over WCKY." Such an appeal to presumed primary employees or independent contractors of the station would, of course, as the Board said, have a "legitimate primary object;" there was, accordingly, no need for the Board to refer to the public perception of a transcription in reaching its conclusion.

This fleeting judgment of a minority of the Board seems presently questionable for the reasons given above and in view of the advancement of the state of the art since *Radio Station WCKY* was decided in 1961. As the record shows, there has been a rapid development toward the almost total use of prerecorded commercials in the last 20 years, and they have become, by and large, theatrical productions rather than simple one-voice sales pitches. Charging Party's brief points out that the rules of the Federal Communications Commission have, since 1927, undergone an evolution, from requiring express announcements of broadcasts of mechanical reproductions made through the agency, to the present rule, which only directs such announcements where the broadcast suggests immediacy and which grants a blanket exception for recorded announcements of a "commercial, promotional or public service nature." This fairly connotes, I think, a belief held by the Commission that listeners entertain little doubt about the source of most commercials.

It should further be pointed out that the asserted equation of voice and performer is, in the context of many commercials, unrealistic, because it fails to take into account the several components usually found. The evidence shows, as counsel for General Counsel asserts, that a radio commercial is indeed a "product." Usually created by an agency as part of a balanced multimedia advertising campaign, the recorded commercial blends the writer's creativi-

ty, the performers' voices, the musicians' melodies, the sound man's effects, and the technical skills of producer, director, and engineers, into an orchestrated array of sounds designed to seduce the listening public into spending money in a particular way. The overall quality of a taped commercial is usually so highly prized that the agency would prefer to forego a contracted-for time slot rather than substitute for the recording a reading of live copy by a staff announcer, since the planned effect will inevitably be lost. This record persuades that the general run of transcriptions represents a good deal more than the voice of a single performer who may appear on it; his voice is but one of a panoply of sounds (of which the sponsor's identifying jingle may be at least equally important) melded together into a product aimed at influencing consumption choices.⁸

I fully appreciate and respect the sentiments of those performers who testified that having their commercial played on a struck station was equivalent, in their view, to crossing the picket line, and anathema to them. That same sentiment was expressed in the contract in *Patton Warehouse, supra*,⁹ but the Board nonetheless drew the line as earlier discussed. I am required to follow suit. Accordingly, I find that Respondent violated Section 8(e) by entering into the contracts containing the "right to withdraw" clause.¹⁰

IV. THE REMAINING ISSUES

I shall discuss the four remaining issues as identified and stated in General Counsel's brief.

A. "Whether Respondent entered into an additional implied agreement with MBM Associates in violation of Section 8(e) of the Act."

Rhoda Schutz, vice president of MBM Associates Advertising, testified that a day or so after the strike began, Donald Gaynor, assistant executive secretary of Respondent, called her and said that "there was a strike, that we had tapes on the station, and that we would have to take them off." She told Gaynor that she would check to see what material her agency was playing on WPGC. Gaynor called again after Schutz had received a May 3 memorandum from Respondent to all agencies, referring to the "right to withdraw" clause, and told her that she "had to take them off the air because of the strike. . . . At that point, he told me that I had gotten a letter from the talents, which I had not at that point, and that we had to take them off." On or about May 9, Schutz and the other signatories received another memorandum from Respondent stating

⁸ Charging Party's brief notes that under the clause, a tape might have to be withdrawn if "a lone soprano in a chorus of 12" so requested.

⁹ The preamble to the "Struck Goods" clause read (140 NLRB at 1482):

Recognizing that many individual employees covered by this contract may have personal convictions against aiding the adversary of other workers, and recognizing the propriety of individual determination by an individual workman as to whether he shall perform work, labor or service which he deems contrary to his best interests, the parties recognize and agree that . . .

¹⁰ There is no 10(b) controversy here. By attempting to enforce the contracts after the strike began, Respondent "entered into" them within the contemplation of the statute. E.g., *Bricklayers and Stone Masons Union, Local No. 2 Bricklayers, Masons and Plasterers International Union of America, AFL-CIO (Gunnar I. Johnson & Son, Inc.)*, 224 NLRB 1021, 1025 (1976).

that "all recorded material produced by signatory advertising agencies . . . using AFTRA talent must be immediately withdrawn from the air at WPGC." Schutz received, around May 13, a request for withdrawal by a talent of the one commercial MBM was playing on WPGC. Thereafter, she received a May 17 letter from Respondent's counsel threatening suit for breach of contract. After consultation with the client, MBM took the commercial off WPGC.

Gaynor testified that at the beginning of the strike, he called a number of agencies then running commercials on WPGC. He said that "I would have advised the agency that we were on strike, if they weren't aware of it. And then in accordance with the performer's right, under the letter of adherence to the codes, that the recorded material should be withdrawn." He conceded on cross-examination, however, that he made no explicit reference to the contractual requirement for withdrawal requests by employees.

I see no need to make a credibility determination between the two accounts. The sequence of events makes it evident that the precipitating cause of the ultimate removal of the commercial was not the calls from Gaynor or the May 3 or 9 memorandums, but rather the May 17 letter from Respondent's counsel. If it can be said that any new agreement was "entered into," it was entered into upon the terms set forth in that letter.¹¹ As I read the May 17 letter, sent to only a few agencies, stating in part, "Specifically, you have failed to honor that section of the Letter of Adherence whereby you agreed that a performer reserved the 'right to withdraw his recorded production strike [sic]'" and threatening suit for continued breach, the letter simply sought to enforce compliance with the clause found above to be unlawful.

I therefore disagree with General Counsel's claim that this series of events resulted in "a new implied agreement . . . that MBM would remove all commercials from WPGC using members' voices regardless of whether the MBM employee requested such action." The only "agreement" reached was a reaffirmation and maintenance of the existing clause.

B. "Whether Respondent violated Section 8(b)(4)(i)(B) of the Act by sending a memorandum to its members . . . stating, *inter alia*: 'Further, performers employed on RADIO WILD SPOTS¹² should immediately contact advertising agencies and request their material be removed from WPGC AM/FM *immediately*. Performers must not record any material which may be broadcast on WPGC-AM/FM.'"

The foregoing message was part of a strike information letter sent to the local membership by Respondent on May 3.

Section 8(b)(4)(i)(B) makes it unlawful for a union "to induce or encourage any individual employed by any person engaged in commerce . . . to engage in a strike or a refusal in the course of his employment to . . . work on any goods . . . or to perform any services . . ." where an

unlawful secondary objective exists. General Counsel argues that the first sentence in the May 3 memorandum, urging employee invocation of the contract clause, violates the provision.

Recognizing the needs of the statute and the unusual character of these stipulated "employees," General Counsel asserts:

Since the performer is paid by the signatory for unlimited use of the tape for 13 weeks, and thereafter for additional unlimited use in 13 week periods if the signatory so desires, his employee status *vis-a-vis* that particular signatory would continue at least for the duration of time that the signatory may use the commercial.

While the parties agreed at the hearing that the performers are statutory "employees," the question of the period of time during which they enjoy that status was not explored. Respondent does not, on brief, argue that none of the performers were "employees" at the time of issuance of the May 3 memorandum,¹³ and I tend to generally subscribe to the theory advanced by General Counsel. As General Counsel notes, the employment contract contemplates the option of using the performer's services for a series of 13-week periods, thus indicating a continuing relationship, and inducement designed to frustrate exercise of that option is an inducement not to "perform . . . services." The necessary alternative would seem to be that the performers hold "employee" status only for the few hours actually spent in making recordings.

While not conclusive, the union security clause of the contract, agreed to by Respondent and the agencies, takes an expansive view of the employment relationship, and I am inclined to give it weight. That clause requires membership in AFTRA as a condition of employment "after the 30th day following the beginning of such employment." The provision continues:

AFTRA and the Producers interpret this sentence to mean that membership in AFTRA cannot be required of a Performer by a Producer as a condition of employment until 30 days after his first employment as a Performer in any field covered by an AFTRA contract; "first employment" meaning the first employment as a Performer in any field covered by an AFTRA contract which employment occurred on and after August 10, 1948.

The foregoing clearly indicates Respondent's own view that the employment relationship extends beyond the time actually spent in performing, and I think that is probably a correct assessment. Accordingly, I agree that the first sentence of the May 3 memorandum referred to above violated Section 8(b)(4)(i)(B).

The second sentence of the May 3 memorandum, inducing performers not to record material which might be broadcast on WPGC, is said to be violative because it appeals to applicants for employment, citing *Phelps Dodge Corporation v. N.L.R.B.*, 313 U.S. 177 (1962), and also to "[p]erformers who had agreed to make a commercial at the time of inducement but who had not yet recorded the

¹¹ Charging Party's brief puts it, "In the face of this letter, MBM pulled the tapes."

¹² A "RADIO WILD SPOT" is trade jargon for the ordinary commercial message, lasting no more than 3 minutes, used in irregular play on a station or stations.

¹³ Indeed, its "picket line" argument assumes the contrary.

commercial," the latter "clearly [being] employees." There is no record evidence that there were, on or about May 3, any such existing arrangements as referred to in the latter contention.

Phelps Dodge Corporation, applying former Section 8(3) of the Act (proscribing "discrimination in regard to hire or tenure or employment"), held that the provision forbade unlawful discrimination against applicants. That is a natural reading of such language. Section 8(b)(4)(i), however, applies to inducement of ". . . any individual employed by any person engaged in commerce . . . to engage in a strike or a refusal in the course of his employment. . . ." The textual differences makes it more difficult to apply this section the applicants.

But, as Justice Frankfurter wrote in *Phelps Dodge*, "the phrasing of such social legislation as this seldom attains more than approximate precision of definition." 313 U.S. at 185. It seems to me that the vice addressed by Congress in Section 8(b)(4)(i)(B) would properly include union appeals to applicants, especially when the neutral employer's business operates in the fashion of the secondary firms here; the embroilment of neutrals is potentially no less pronounced when inducement is made to applicants on whom the business routinely depends than when such appeals are directed at regular employees in a more commonplace form of enterprise.

The Board's opinion in *Local No. 636 of the United Association of Journeymen and Apprentices, etc. (The Detroit Edison Company)*, 123 NLRB 225, (1959) revd. on this point 278 F.2d 858, 865-866 (D.C. Cir. 1960), would tend to support such a conclusion, although heavy emphasis was there laid on the union's exclusive referral authority. In *American Federation of Television & Radio Artists, AFL-CIO (Radio Station WCKY)*, 125 NLRB 786, 788-789 (1959), the Board held that an employment environment virtually identical to the present one rendered the performers "employees" under the Act, subject to unlawful inducement. I do not view the Supplemental Decision in *Radio Station WCKY, supra*, 133 NLRB at 1738, as a direct reversal of this holding, since it relied on the absence of facts present here: "Moreover, there is no evidence in the record that any of National's members were in fact employees of any producer of transcriptions, or that any such producers had an arrangement with National which created an employee relationship for the members." As discussed above, the parties have stipulated to the existence of an employment relationship between the performers and the producers, and I have concluded that the relationship exists for a period of time after actual work is performed, as indicated by the mutually agreed construction of the union-security clause.¹⁴

I find, therefore, that the quoted second sentence of the May 3 letter also violated Section 8(b)(4)(i)(B).

C. "Whether Respondent violated Section 8(b)(4)(ii)(B) of the Act by sending a memorandum to the advertising agencies and producers . . . stating, *inter alia*: The AFTRA membership has been reminded that they are to record no material which is destined for use on WPGC-AM/FM."

¹⁴ In this connection, I note that 98 percent of all commercials produced by the agencies involved here are made with members of Respondent.

The quoted statement appeared in a memorandum of May 9 from Respondent to all contract signatories. As counsel for General Counsel notes, the Board has held that an unlawful inducement of secondary employees made in the presence of a secondary employer constitutes coercive conduct, proscribed by Section 8(a)(4)(ii)(b), as to the latter. *Local 171, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Joseph J. Banes, d/b/a Banes Floor Covering)*, 167 NLRB 981, 984 (1967), and cases cited. The statement in the May 9 memorandum, notifying signatories of the unlawful inducement of their employees, cannot be effectively distinguished. I find the violation as charged.

D. "Whether Respondent violated Section 8(b)(4)(ii)(B) of the Act by successfully inducing members to request that their employer withdraw their tapes from WPGC AM/FM."

The evidence discloses that a number of performers did in fact request withdrawal of their recorded productions, on forms provided by Respondent. Some agencies complied with the requests. The success of Respondent's campaign to implement the unlawful contract clause resulted in coercion and restraint of the signatory agencies, constituting a violation of Section 8(b)(4)(ii)(B). *International Association of Bridge, Structural & Ornamental Iron Workers, Affiliated Local Union No. 597, AFL-CIO (Linbeck Construction Corporation)*, 208 NLRB 524 (1974).¹⁵

CONCLUSIONS OF LAW

1. First Media Corporation is an employer engaged in commerce, within the meaning of the Act, as set out above.
2. The advertising agencies and producers listed in the appendices to the complaint are persons and/or employers engaged in commerce or in an industry affecting commerce, within the meaning of the Act, as set out above.
3. Respondent is a labor organization within the meaning of the Act, as set out above.
4. By entering into contracts with said advertising agencies and producers under which said employers agreed to cease doing business with other persons, Respondent engaged in unfair labor practices within the meaning of Section 8(e) of the Act.
5. By, in May 1977, inducing employees of advertising agencies and producers to engage in a strike or a refusal to perform services, and by coercing and restraining such advertising agencies and producers, an object thereof being to force or require said advertising agencies and producers to cease doing business with First Media Corporation, Respondent engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of the Act.
7. Except as found above, Respondent has committed no other unfair labor practices alleged in the complaint.

THE REMEDY

Having found that Respondent engaged in certain unfair

¹⁵ I see no need to discuss the May 3 memorandum sent to contract signatories. As General Counsel states on brief, the complaint makes no reference thereto, and "if such a violation were found, it would not change the remedy in the case."

labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take such affirmative action, including the posting of customary notices, as will serve the purposes of the Act. I shall also adopt General Counsel's recommendation that notices be sent to Respondent's members and to the signatories to the contracts containing the provision found unlawful here. Since the Section 8(b) violations arise out of conduct occurring during a single labor dispute, I agree with General Counsel that the entry of a cease-and-desist order relating only to WPGC will suffice. *District 65, Distributive Workers of America (S.N.S. Distributing Service)*, 211 NLRB 469, fn. 4 (1974).

Upon the foregoing findings and conclusions, and the entire record in this case, I hereby issue the following recommended:

ORDER ¹⁶

The Respondent, American Federation of Television and Radio Artists, Washington-Baltimore Local, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Maintaining, giving effect to, or enforcing that portion of its collective-bargaining agreements with advertising agencies and producers listed in the appendixes to the complaint in this proceeding which reads "and, in addition, we agree that the performer reserves the right to withdraw his recorded production from any station at which AFTRA is engaged in an authorized strike."

(b) Entering into, maintaining, giving effect to, or enforcing any other agreement, express or implied, whereby any employer ceases or refrains or agrees to cease or refrain from doing business with any other person, in a manner forbidden by Section 8(e) of the Act.

¹⁶ 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, 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.

(c) Engaging in, or inducing or encouraging individuals employed by the advertising agencies and producers listed in the appendixes to the complaint in this proceeding, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or refusal in the course of employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threatening, coercing, or restraining the advertising agencies and producers listed in the appendixes to the complaint in this proceeding, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require such advertising agencies and producers and other persons to cease doing business with First Media Corporation.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Post at its offices copies of the attached notice marked "Appendix." ¹⁷ Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by a representative of Respondent, shall be posted by Respondent and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail signed copies of said notice to all persons who were members of Respondent on May 3, 1977, and to all persons who have become members since that date; and mail copies of said signed notice to the advertising agencies and producers listed in the appendixes to the complaint in this proceeding.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

¹⁷ In the event that this Order is enforced by a judgment of the 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."