

Community Group for New Jersey Radio, Inc., Gilbert Broadcasting Corp. and Venture III Corp., a Partnership, d/b/a WNJR Radio Company and Sound Radio, Inc., Fidelity Voices, Inc., and Community Group for New Jersey Radio Inc., a Joint Venture d/b/a 1430 Associates and American Federation of Television and Radio Artists, AFL-CIO. Case 22-CA-6655

April 28, 1977

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND
WALTHER

On December 15, 1976, Administrative Law Judge Platonia P. Kirkwood issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

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

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing her findings.

DECISION

STATEMENT OF THE CASE

PLATONIA P. KIRKWOOD, Administrative Law Judge: This case was heard at Newark, New Jersey, on March 8, 1976 and March 29 and 30, 1976.¹ It is based upon a charge

¹ The hearing was opened by Administrative Law Judge Charles Schneider on March 8, 1976, and was adjourned by him without taking evidence on the merits because of a defect in the service of the complaint and notice of hearing on Respondent WNJR. The hearing on the merits was conducted before me on March 29 and 30.

² Hereinafter referred to as Respondent WNJR.

³ Hereinafter referred to as Respondent 1430 Associates.

⁴ At the hearing, counsel for Gilbert Broadcasting Company, after

and amended charge filed respectively on October 20, 1975 and November 17, 1975, and a complaint dated January 26, 1976, alleging the violations of Section 8(a)(3) and (1) of the Act by Respondent Community Group for New Jersey Radio, Inc., Gilbert Broadcasting Corp. and Venture III Corp., a Partnership, d/b/a WNJR Radio Company and Sound Radio, Inc.² and attributing to Respondent Fidelity Voices, Inc., and Community Group for New Jersey Radio, Inc., a Joint Venture d/b/a 1430 Associates³ responsibility for remedying the alleged unfair labor practice as a successor-employer. Respondents' answers respectively deny the merit of the substantive allegations of the complaint.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, and to file briefs.⁴ Posthearing briefs were received from counsel for the General Counsel and counsel for 1430 Associates.⁵

Upon the entire record in the case⁶ and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS

Respondent WNJR was engaged in the business of operating a radio station in Union, New Jersey, herein referred to as radio station WNJR, until October 31, 1975, under a license granted to it in December 1971 by the Federal Communications Commission (hereafter FCC) on an interim basis pending disposition by the FCC as to the grant of permanent authority. In the 12-month period preceding October 31, 1975, a representative period, Respondent WNJR had gross annual revenues in excess of \$100,000 and provided and performed radio broadcasting services and related services valued in excess of \$50,000 for customers outside the State of New Jersey.

Since October 31, 1975, Respondent 1430 Associates has operated WNJR in Union, New Jersey, under an interim license granted to it by the FCC. In the course and conduct of its operations since that time, it has had gross revenues, projected on an annual basis, in excess of \$100,000; and it has provided broadcasting services and related services to and for customers outside the State of New Jersey, valued in excess of \$50,000.

I find that the operations of each of the Respondents, in connection with the operations of radio station WNJR, affect commerce within the meaning of Section 2(6) and (7) of the Act.

entering an appearance, withdrew from the case and stated that the interests of Gilbert Broadcasting Company would be represented by Mr. Vogelman. Later in the hearing, Mr. Vogelman withdrew and stated that the interests of Respondent WNJR would be represented by Mr. Gerrard.

⁵ A letter received from Mr. Vogelman on May 10, 1976, states that Respondent WNJR "will stand upon the brief submitted by 1430 Associates."

⁶ Errors in the transcript have been noted and corrected.

II. THE LABOR ORGANIZATION INVOLVED AND ITS HISTORY OF BARGAINING FOR THE EMPLOYEES HERE INVOLVED

American Federation of Television and Radio Artists, AFL-CIO, hereafter the Union, is a labor organization within the meaning of the Act.

The Union is and for many years has been the exclusive representative of station WNJR's announcers — about 9 to 11 in number. During all times here relevant it had a bargaining contract with Respondent WNJR covering the announcing staff.⁷

III. THE ALLEGED DISCRIMINATORY DISCHARGE OF JOHN FRASIER

Introduction—The nature of the issue and the position of the parties

The violation issue posed in this case involves the motive of Respondent WNJR in discharging John Frasier, an announcer at the radio station who also served as the Union job steward at times here relevant. He had been employed at the radio station for about 5 years prior to his discharge on June 9, 1975; and he had served as the Union job steward during the last 2 years of his employment. Respondent discharged him for alleged unsatisfactory performance of his announcing tasks.⁸ The termination decision was made by Station Manager Harvey Lynch and/or Program Director Jeffrey Dixon.

In litigating the issue, General Counsel took the position that Lynch and/or Dixon, both of whom were hired in their managerial posts in late 1973,⁹ disapproved of Frasier because of his aggressive and diligent performance of his union-supportive activities as a union steward, in general, and his presentation of pronoun testimony at a grievance-arbitration hearing, in particular; that the discharge decision was the outgrowth of that disapproval; and that it was triggered by Respondent's receipt of information, just prior to June 9, 1975, that the Union had won the arbitration case at which Frasier had testified; and that Respondent's assigned reasons for the discharge were pretextual.

Respondent, in defense, claimed that it did not in fact harbor any resentment against Frasier for any of his union-supportive activities; that it had no knowledge at the time it terminated Frasier, of the result of the arbitration proceeding in which Frasier had testified; and that, in any event, Frasier was discharged solely for valid cause — unsatisfactory performance of his announcing tasks over an extended period of time, brought to a head by Frasier's poor performance, on the day before he was fired, and his

⁷ Following the takeover of the station by Respondent 1430 Associates, the latter also entered into a contract with the Union covering the announcing staff.

⁸ In this portion of the decision the word "Respondent," when used, shall refer to Respondent WNJR unless otherwise indicated.

⁹ Lynch was hired as station manager in October 1973 and Jeffrey Dixon was designated by him as the program director in December 1973.

¹⁰ Except for a few instances, I have not undertaken to identify the evidentiary source of the facts I here narrate. Unless otherwise stated, the "facts," as I relate them, appear in a composite of uncontested oral and documentary evidence adduced through both sides' witnesses. Conflicting

infraction, on the same day, of a rule prohibiting the broadcast of unauthorized material.

For the reasons set out below, I find that General Counsel did not meet his burden of proving his case.

1. Facts respecting Frasier's union activity and Respondent's alleged reaction thereto¹⁰

In his capacity as the union shop steward, Frasier policed the terms of the bargaining agreement between Respondent and the Union. As the contract did not authorize Frasier to present or discuss grievances with management,¹¹ Frasier's normal practice was to report the management actions about which he or other announcer unit members felt aggrieved to the Union business agent, Irving Lewis. Frasier felt free, however, to take minor grievances (involving such matters as management's denial of a time-off request) directly to management without going through the Union agent, and when he did so, management did not object.

During the period of Frasier's service as the union steward, three of the employee complaints about adverse actions were actually processed by the Union through the contractual grievance procedure.

The first of the above three grievances the Union took up involved a complaint about memoranda issued by Dixon, at Lynch's direction, to several announcers (one of whom was Frasier) on November 18, 1974. These memos variously criticized the on-the-air performance of each of four affected announcers and warned each that he was being given a 2-week period to "improve." In reporting on the employees' complaint, Frasier apparently told Lewis that the memoranda had been preceded by a series of oral and written highly critical and strongly worded comments to announcers about job performance. For, in response, Lewis sent Lynch a letter on November 26, 1974, stating that he (Lewis) had been "advised by all of the staff announcers . . . that they had been subjected to and are being subjected to constant harassment by you and Jeff Dixon with respect to their employment at the station." The letter went on to state that the Union was not raising "any objection to advice given to the announcers or reminders given them" but that it was "raising" serious objection to threats of any kind.¹² In response to this grievance, management softened the tone of its subsequent critical comments to announcers, and had some of them issued as suggestions and offers of help by staff members other than Dixon and Lynch. There is no evidence, however, that any management agent mentioned the grievance to Frasier or indicated in any way to any announcer that Respondent resented the matter.¹³

evidence on critical points at issue is, however, summarized together with my resolutions of the conflicts.

¹¹ The contract specifically provided that the authority to process and resolve employee grievances was vested in the Union business agent.

The grievance procedure contained two steps. The first step involved a meeting between the Union and the Company in an attempt to settle the matter amicably. In the event no amicable settlement was reached at that stage, either party could then institute arbitration.

¹² The letter to Lynch noted that a copy was sent to Program Director Dixon and to Frasier.

¹³ However, Rose Penner, sales manager for Respondent at times here

(Continued)

The second formally grieved complaint involved the discharge by Lynch, in June 1974, of three veteran announcers. Lynch fired them because, in his opinion, they did not satisfactorily meet the requirements of a "new" type of programming and on-the-air format he had instituted shortly after he became the radio station manager.¹⁴

In grieving this matter, the Union claimed that Lynch had violated the provisions of the bargaining contract regulating permissible discharge action. These provisions stated, in section 23(f) of the contract, that "otherwise competent announcers" could not be terminated unless Respondent had instituted a "substantial change of overall program structure that was different from that existing at the date the contract was executed," and the announcers could not "satisfactorily meet" the new program structure requirements. The Union took the position that Lynch's changes in programming and format were not "substantial changes" within the intended meaning of the contract. The Company disagreed; and the Union then instituted arbitration proceedings to resolve the issue of contractual interpretation involved.

The arbitration panel did not meet to conduct the hearings until January 30. Either shortly before or shortly after the hearings were begun, Frasier lodged two new complaints against management. One involved a complaint about Program Director Dixon's having taped and aired a broadcast of a program without an announcer being present — a matter which appeared to be in violation of the contract. Union Agent Lewis brought this to Lynch's attention while the arbitration hearing was going on. The grievance was settled when Lynch promised that he would look into the matter and that it would not be repeated. The other complaint involved the alleged failure by management to pay Frasier extra or overtime compensation when Frasier was serving as a member of a "music committee" which, it appears, occasionally met after Frasier had

material, attributed certain statements of resentment to Lynch which the latter denied. She testified, *inter alia*, that Lynch, in a number of conversations she held with her in the fall of 1974, stated that he would like to "get the Union out of WNJR . . . because it would make him look good in the eyes of the Board [of directors]"; and that, on a number of those occasions, Lynch also indicated that he was "very unhappy" with Frasier, and that he did not want "that kind of a shop steward because he [Frasier] was too Union-oriented." Penner, however, did not impress me favorably by her demeanor. And I detected in her a personal bias against Lynch due to animosity engendered by Lynch's termination of her employment at the radio station, which, together with other considerations of demeanor, caused me to suspect the reliability of her versions of the here relevant conversations she reportedly held with Lynch. In sum, I do not credit Penner's testimony and place no reliance on it in determining the issues in this case.

¹⁴ The record establishes that, late in 1973, Lynch instituted certain changes he believed would help the station attract a larger share of the primarily black or black-oriented segment of the public to which the station catered. *Inter alia*, Lynch required announcer disc jockeys to play more pre-taped music with a "black rock" sound; to use less "talk" in introducing their material, to play music under almost all of the "talk"; to "cluster" announcements, and to use an "up-tempo" sound in presenting them, or news broadcasts; to eliminate or put less emphasis on "personality" gimmicks it had been announcers' practice to project. (For example, Frasier in announcing one of his programs would use a "rooster" sound as a personality gimmick.)

The critical comments given announcers thereafter all concerned failures to deliver the material in accord with the format dictated by Lynch and/or the standards he deemed appropriate.

completed his regularly scheduled announcing tasks.¹⁵ That complaint was apparently made to management by Frasier himself, rather than through the Union and was apparently settled to his satisfaction.¹⁶ His complaint, however, resulted in management's removal of Frasier from the music committee — action which neither he nor the Union appears to have protested. For reasons hereafter appearing, General Counsel, however, now claims that Frasier's removal from the committee is part of the circumstantial evidence supporting his case.

Frasier became directly involved in a major union-sponsored grievance when he testified, on February 3, 1975, as a union witness at the arbitration hearing relating to the earlier mentioned June discharge action taken in June. In his testimony, Frasier took the position, contrary to that of management witnesses, that the changes in programming and format which Lynch had instituted had not effected any material changes in preexisting program structure; and that, in fact the station continued to have the same type of programming as it had pre-Lynch, and continued to play the same type of music.¹⁷ Among those present when Frasier testified were Lynch, Dixon, and the then station operations manager, one Charles Green.

There is no evidence that any of the three management agents present at the arbitration hearing or any other supervisor even made any comment about the testimony Frasier gave at the hearing to any rank-and-file employee. Management agents did, however, discuss the hearing's course and Frasier's testimony among themselves immediately after the hearing. And there is plausible testimony by former Operations Manager Charles Green,¹⁸ which I credit, that, during that discussion, Dixon said, *inter alia*, that "since John Frasier did not know the difference between what we had been doing as a format and we were currently doing, then perhaps he should not be employed at WNJR."

¹⁵ The "music committee" appears to have been set up to serve a joint management-announcer interest in selecting and compiling a list of the tapes or records suitable for airing by the announcers on their "shows" giving due regard to the type of audience to which the station appealed and the kind of "sound" that Lynch was seeking to project when he instituted changes in format, etc. The announcers made their selections for their particular programs from the committee list.

The committee was composed of three management agents, Lynch, Dixon, and Herman Amis then music director, and three announcer disc jockeys, Harry Williams, Jake Jordan, and John Frasier. Membership on that committee on the part of rank-and-file announcers appears to have been a voluntary matter, rather than a job requirement.

There is no evidence that any announcer other than Frasier made any claim similar to Frasier's for "extra" compensation for committee-related services.

¹⁶ There is no evidence that any formal union grievance resulted from that complaint.

¹⁷ It was the apparent position of the management agents, in part, that preexisting music selections which had been aired, were largely of a "rhythm and blues" nature, whereas the music which Lynch wanted the disc jockeys to emphasize was that having more of a "black rock" sound.

¹⁸ Green was not employed at the radio station when he appeared as a witness. He had served as the operations manager until April 1975. He was then demoted to a newsman-announcer post and was subsequently discharged. Although I have some question as to his overall credibility on the basis of demeanor factors, I am satisfied, on the basis of the record as a whole, and the "inherent probabilities," that Dixon made a comment on Frasier's testimony along the lines above quoted, and I have therefore credited Green's testimony on that point.

On the day after the arbitration hearing at which Frasier had testified, Frasier posted a notice on the bulletin board stating, in part, that the arbitration hearing had been held but that it would be some time before the results would be known. The notice also stated that a "new year" of the contract was beginning and that from then on, "all rules of the contract would have to be abided to by the letter. All extra hours such as music meetings, production time, etc., will be compensated for by the Company."¹⁹ The following day — February 5 — Frasier received a memo from Herman Amis, then the station's music director, advising him that he was no longer on the music committee. And, on the same evening, when a change in the announcers' schedule appeared on the bulletin board it showed that Frasier had been taken off the 7 p.m. to midnight shift and placed on the midnight to 6 a.m. shift. That shift, according to Frasier, was less desirable to him.

The final events which form part of the structure on which General Counsel's case is built occurred some 3 to 4 months later. They are as follows:

The arbitration panel's written decision in the proceeding in which Frasier had testified was signed on May 27, 1975. It sustained the Union's position partly on the basis of Frasier's testimony and partly on other facts. Although there is no evidence as to the exact date on which the panel sent that decision to the parties, Union Agent Lewis gave credible testimony indicating that Union counsel had advised him (Lewis), shortly before June 6, that the Union had won the case. Lewis further testified that on June 6 (a Friday) he had a telephone conversation during which Lewis asked Lynch whether he had heard the results of the arbitration hearing. Lynch replied that he had not heard anything and he asked Lewis what the results were. Lewis told him that since he was not his attorney he did not think he ought to respond to that, but that Lynch ought to speak to his own attorney with respect to that matter.

Frasier gave his last "show" as announcer on Sunday, June 8, 1975. He was fired the following day. Notice of the termination decision was first phoned to Union Agent Lewis by Steel Colony, then the assistant program director, and by Dixon. About 11:30 a.m., Dixon and Colony told Lewis, in effect, that Frasier was being fired because on the preceding day he had added a "live tag" to the programmed "log" material²⁰ and had thereby violated a "rule" prohibiting the broadcast of unauthorized material. Later, about 2 p.m., Dixon telephoned Frasier (who was then off duty and at home) and advised him of his termination. Dixon also told Frasier that Frasier's unauthorized addition of the "live tag" for J. H. J. Productions was the reason for his discharge. In the course of the conversational exchange on the matter, Dixon apparently conveyed to Frasier the impression that he (Dixon) believed Frasier was still associated with that business enterprise. Frasier responded that he had liquidated his holdings in March 1975, and that he was unaware that he had violated any station policy by adding the "live tag" as he did.

¹⁹ The notice indicated, on its face, that a copy was given to Lynch and to Union Agent Lewis.

²⁰ The term "live tag," as used in the trade, connotes an announcer's airing of material additional to and/or different than that the station "log"

Acting under the contract's grievance procedures, Lewis set up a meeting with Dixon for Wednesday, June 11, and brought Frasier with him. At that meeting, Dixon handed Frasier the letter of termination set out below. And, in response to Lewis' questions concerning the discharge, Dixon told Lewis that he was firing Frasier primarily because he did not like his announcing work; that Frasier's broadcast of the "live tag" was an additional reason for the termination; and that a further reason therefor was that an economic cutback was to be made. The letter given to Frasier said as follows:

June 9, 1975

Dear John,

I hereby notify you of the termination of your employment with WNJR Radio Company, effective June 9, 1975.

The reason for your dismissal is in accordance with the provisions of subparagraph (f) of paragraph 23 in schedule I of the Afra-WNJR contract.

It is regrettable that I have to make this decision, after exploring for over a year, all the avenues I knew possible to help make your sound compatible with the rest of the WNJR air sound. Unfortunately your commercial production, on-air mechanics and delivery do not satisfactorily meet the top notch performance needed at this time. Let me also state that your adding to the log and announcing a live tag for the JHJ spot on 8/6/75, as well as passing that instruction on to a junior announcer can only be viewed as either irresponsible or disrespectful of station rules. This is not only with WNJR, but every radio station. An announcer cannot arbitrarily add nor alter commercial copy in the studio without proper approval. Its been only six months that I relieved an announcer here for the same violation.

Notwithstanding these shortcomings, I wish you the best of luck in your future endeavors and please don't hesitate to call upon me if I can be helpful.

Yours truly,

Jeff Dixon
Program Director

2. The facts relating to Respondent's asserted reasons for discharging Frasier

Frasier's overall performance as an employee

Throughout the period at WNJR, Frasier's assigned work was of a type known in the trade as that of a "disc jockey." While "on the air" he introduced and played recorded music and taped commercials and made public service announcements. He also did some "production" of commercials—i.e., recording the commercials that he was required to air. At all times here relevant, Lynch was Frasier's ultimate or overall supervisor, and Dixon was his immediate supervisor. Both regularly monitored his broad-

explicitly authorizes. The "log" programs each announcer's "show" by dividing the total time allotted for this "show" into the minutes or seconds required for airing each part of the taped announcements and other programmed material.

casts—as well as those of other staff announcers—as part of their supervisory routine and, where dissatisfied, expressed their dissatisfaction and their reasons either orally or in written memos.

It is undisputed that, over the approximately 18-month period beginning in January 1974, Lynch and Dixon had talked to Frasier on numerous occasions about unsatisfactory on-the-air performance and that their oral admonitions were supplemented by a number of written memoranda addressed to Frasier either by Dixon or by other staff members at Dixon's direction. The record contains a series of five memos to Frasier, each of which criticizes Frasier's on-the-air performance, points out the specific areas in which his performance fell short, and suggests corrective steps. These five memos are respectively dated in January 9, November 18, and early December 1974, and May 1975.²¹ In several of the oral or written admonitions, it mentioned that Lynch has heard Frasier's "show" over the weekend and that he was "totally dissatisfied" with Frasier's presentation.²²

On Sunday, June 8—the last day that Frasier performed any announcing work—Frasier's assigned on-the-air tasks included the playing of a taped commercial advertising a live musical show produced by JHJ Productions—a firm now owned by staff announcer Herman Amis and in which Frasier, as well as Lynch and Dixon, had once had a partnership interest.²³ The copy on the tape had been written by the station production staff from material supplied by Amis; and it contained, among other things, information describing the locations at which tickets could be purchased. As some of those locations were not open on Sundays, Amis telephoned Frasier at the studio and asked him to correct the taped material by adding a statement that tickets could be purchased only at the box office on that day—a matter known in the trade as "adding a live tag" to the programmed material set out in the station "log." Frasier complied with Amis' request in the course of his broadcast, and also noted the additional material on the

²¹ In the November 18, 1974, memo—one similar to that given three other announcers at the time—Dixon told Lynch he had a 2-week probationary period in which to improve. As earlier mentioned, the Union grieved the threatening tone of those memos. One of the subsequent critical memos issued to Frasier was written, at Dixon's direction, by Lia Afriat, production director of the station, in December 1974; another, also at Dixon's direction, in May 1975, by Steel Colony, a fellow announcer who had been appointed assistant program director and who was designated as the Union job steward after Frasier's discharge.

²² Dixon was put on a part-time on-the-air schedule in 1974 for an undisclosed period of time. During that period, he was assigned other duties to fill in the balance of his full-time schedule.

Frasier testified that this change in his duties occurred because he asked Dixon to relieve him of his on-the-air duties, while Dixon testified that the suggestion came from him and Frasier "agreed" with it. Frasier further testified that he told Dixon he wanted to get off the air because he "had something else that he was doing," but that his real reason—one unexpressed to Dixon—was that he was "tired" of being constantly "harassed" about his on-the-air performances and wanted "any excuse" to get relief. Frasier admitted, however, that at or near the time of the above events, he, Lynch, Dixon, and Amis had joined together as partners in a business enterprise called JHJ Productions. That enterprise produced live musical shows.

²³ Frasier withdrew from the partnership arrangement in March 1975. Lynch and Dixon apparently withdrew prior to that time.

²⁴ Afriat had looked over the "log" in the course of her routine functions, and found the discrepancy (i.e., the "live tag" noted on it. She therefore

program "log" so that announcers who followed him would also add it on when broadcasting Amis' commercial.

According to Lynch, he was informed of Frasier's "live tag" addition on the following morning by Production Director Lia Afriat.²⁴ But, so he testified, he had already considered firing Frasier because, on hearing Frasier's weekend broadcasts, he found that Frasier's presentation of his material continued to be "lousy" and felt that "we had gone as far as we could go with this employee." He called in Dixon to discuss the matter with him, and according to their mutually corroborative testimony, both men agreed that Frasier should no longer be retained. Referring to the "live tag" incident, both men also agreed that it was not a significant violation of the rules, but rather, "frosting on the cake" as the incident had just occurred, it should be stated to Frasier as "a" reason for terminating him.²⁵ Lynch further testified that, but for the addition of the "live tag," the decision to terminate Frasier would not have been implemented until the Friday marking the end of the next pay period.

In further testimony, Dixon and Lynch both denied that they bore any hostility to the Union, that they regarded Frasier's performance of any of his union steward duties to be objectionable, or that their mutual decision to fire Frasier was influenced in any way by Frasier's appearance as a union witness at the arbitration hearing or by the content of his testimony. Finally, on the important point concerning whether or not Lynch or any other management agent who played a critical role in the events here in issue was actually aware — at the time that Frasier was discharged — that Respondent had lost the arbitration case, Lynch testified that he did not know about the adverse decision until June 12, when Respondent's counsel advised him by letter and by phone on that day, that "at long last, a decision from the arbitrator" had been received, and that it was unfavorable.²⁶

telephoned Frasier at his home to inquire about the matter. Frasier explained the circumstances to her and told her also that he had written the pertinent information he should have put on a "discrepancy form" on a plain sheet of paper as there were no discrepancy forms readily available for him to fill out. Afriat told Frasier to use the forms next time. She then reported the matter to Lynch.

²⁵ Both maintained in their testimony, however, that, contrary to Frasier's claim, it was well-known station "policy" — though admittedly of unwritten character — that announcers were not to be permitted to add "live tags" to programmed material contained on the "log" without obtaining advance authorization from management. That claim, I find, is independently supported by the testimony of Harry Amis who testified as a witness for General Counsel. Amis admitted that additions of "live tags" are regulated by FCC rules, and that "all announcers" are "usually familiar" with the station's requirement that they cannot add "live tags" to programmed material without permission from station personnel authorized to give it. Although he also testified that, during the course of his 14 years as an announcer, he had, on occasion, added live tags to programmed material on weekends without being disciplined therefor — (there being no management agent present at the station) he admitted, that he had not done so since Lynch's designation as station manager; and that he had heard that, some 6 months before, Lynch had discharged an announcer for adding a "live tag" to his broadcast — albeit one much longer in length than that Frasier had added.

²⁶ The letter of Attorney Gerald Dickler, who represented Respondent at the arbitration hearing, is in evidence as Resp. Exh. 6, and is dated June 12, 1975.

Analysis and Conclusion

The question I am here called upon to decide is whether, as General Counsel claims, Respondent's asserted reasons for discharging Frasier — his repeated failure or inability over an extended period of time to perform his on-the-air announcer tasks in the manner dictated by Lynch, followed by his turning in what was described by Lynch as an unsatisfactory or "lousy" performance on the day before he was discharged — were pretextual in character; and that the real reasons were rooted in an unlawful design — i.e., to "get rid" of Frasier because management found his overall activities as a Union steward objectionable and/or regarded his testimony at the arbitration hearing to be erroneous or unjustified to the extent that it characterized as "insubstantial" the program and format changes Lynch had instituted when he became the station manager.

The burden of establishing that claim and its essentials rests of course on General Counsel. I am not persuaded that he has met that burden on the facts that he has proved.

To begin with, General Counsel adduced no credible evidence that any management agent who played a critical role in the events here in issue was virulently hostile to unions in general, and/or to the Union or any of its agents in particular. Nor is there any suggestion that management agents engaged in any consistent efforts to undermine the enforcement of the bargaining contract's provisions or to deliberately violate its terms. All grievable matters taken up by the Union under the terms of the bargaining agreement at times here relevant — but one — were resolved to the Union's satisfaction at the first stage of the grievance procedure. The single matter that was made the subject of arbitration was plainly a dispute grounded in good-faith belief, on the part of management, on the one hand, that the contract authorized the action involved, and on the part of the Union, on the other, that the contract did not do so. Furthermore, General Counsel produced no evidence at all that management had interfered with any employee's exercise of his right to complain to the Union or to Frasier about management actions, or that it sought to deter the filing of such complaints. I must therefore conclude, as a threshold matter, that Respondent harbored no deep-seated hostility to the principles of collective bargaining or to its employees' exercise of statutory protected rights.

Nor do I find that General Counsel's postulate of a "design" to punish Frasier for his "diligent" policing of the contract and/or for his testimony at the arbitration hearing derives support from the events known to Frasier which occurred after the arbitration hearing — namely, those depicting that Frasier was removed from the music committee after asserting a contract right to get overtime pay at about the same time that he appeared at the arbitration hearing, and that he was also taken off the shift he had been assigned to at that time and placed on another shift he didn't like. The timing of both these events is explainable on grounds independently of Frasier's contract-policing activity. For, admittedly, Frasier had asked for overtime pay for serving on the music committee

shortly before his removal, and his change of shift concededly occurred as a result of Respondent's concurrent rescheduling of the shifts of all announcers in the course of business routine. Furthermore, Respondent's purpose in removing Frasier from the music committee was proven to have an economic base — i.e., to avoid paying wages for services it did not demand of Frasier as part of his job, and which Frasier and other members of the committee were free to reject;²⁷ and the removal action was, moreover, taken in response to the indication given by Frasier himself that he no longer wanted to serve on the committee unless he got overtime pay.

The sole evidence I regard to be of significance to the General Counsel's case is to be found in the proven facts that: (a) management agents made comments after the arbitration hearing, during a discussion among themselves, which tend to indicate that they regarded the content of Frasier's testimony at the arbitration hearing might justify their looking for some reason to "get rid" of Frasier; (b) the arbitrators' decision carries, as its signature date, May 27, 1975, and as its result was made known to union representatives soon after, it is possible that it was also made known to the Respondent's representatives and conveyed by them to Lynch or Dixon *before* Frasier was terminated. These facts, in short, would seem, as a *prima facie* matter, at least, to give rise to an inference that the decision to discharge Frasier was influenced by, or was rooted in, resentment of Frasier's protected activity in testifying at the arbitration hearing to the effect that the radio station's program format post-Lynch was substantially the same as it had been pre-Lynch. But, close as the question may appear to be, I am not persuaded that this evidence is of sufficient strength to overcome the force of countervailing evidence adduced by the Respondent which argues for a conclusion that there was no connection between Respondent's displeasure with, or disapproval of, Frasier's testimony at the arbitration hearing and its decision to discharge Frasier, as it did. For I was persuaded that Lynch was telling the truth when he testified that he had no knowledge until June 12 about how the arbitration panel had decided the dispute the parties had presented to it; that he had monitored Frasier's weekend broadcasts and found them "lousy"; and that he had decided to terminate Frasier because, despite repeated management efforts over the prior 18 month period to help Frasier to meet the standards of on-the-air delivery Lynch had established, Frasier's performance had consistently fallen short of satisfying those standards, and had fallen short again on the weekend of June 8. I base this critical credibility finding partly on the basis of the impression Lynch made upon me as I observed him on the stand—that he was trying earnestly to tell the truth; and partly on the fact that much of his significant oral testimony was inherently plausible and that it was moreover consistent with and affirmed by documentary evidence that: (a) information about the arbitration decision was not transmitted to Lynch by the Respondent's counsel until June 12; (b) Frasier had been repeatedly taken to task for turning in an unsatisfactory on-the-air performance on

²⁷ The economic considerations prompting that removal action were affirmed both by the testimony of Amis — a witness called by General Counsel, and by the testimony of Dixon, testifying as Respondent's witness.

numerous occasions over the 18 month period preceding his discharge, but that, on each occasion, he would again turn in another poor performance; and (c) he was not the only announcer whose performance had been criticized and, so far as appears from the record, there is no evidence that management's evaluation of his abilities or his performance was based on standards different from those on which other announcers were evaluated and which they were expected to meet. I note, also, that the last critical memo addressed to Frasier about his performance was dated in May 1975, and that there is no evidence that Frasier in fact turned in a satisfactory performance on the weekend of June 8 when measured by the preestablished standards of quality management had set. And, finally, I cannot wholly discount the fact that there was a hiatus of several months between the date on which Frasier testified at the arbitration hearing and displeased Respondent, accordingly, and the date of his discharge.

It may well be that Lynch's standards of acceptable announcer performance were higher than those maintained or demanded by prior management. But it is not for me to judge whether or not his standards were too high, or whether his supervisory criticism was too harsh. The only

²⁷ For obvious reasons, I need not and do not therefore undertake to resolve the merits of disputed claims as to the "successor" status of Respondent 1430 Associates and its liability for the conduct engaged in by Respondent WNJR.

²⁸ In the event no exceptions are filed as provided by Sec. 102.46 of the

issue before me is whether or not his and his subordinate supervisors' evaluations of Frasier as an employee were based on discriminatory considerations and whether the discharge action was prompted by antiunion or otherwise unlawful motives. I cannot, on this record, hold with General Counsel on those questions.

In sum, on the entire record of this case, I conclude that General Counsel has not successfully carried the burden of proving by a fair preponderance of credible evidence that Respondent's asserted reasons for discharging Frasier were pretextual and that the real reasons were in fact rooted in unlawful considerations. Accordingly, and as the only alleged violation of the complaint concerns the discharge of Frasier, I shall recommend that the complaint be dismissed in its entirety.²⁷

Upon all of the foregoing findings and conclusions, and the record as a whole, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER ²⁸

It is hereby ordered that the complaint herein be dismissed in its entirety.

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.