CENTRAL KENTUCKY BROADCASTING COMPANY, INCORPORATED *and* RADIO BROADCAST ENGINEERS' LOCAL UNION 1224, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL. *Case No. 9–CA–258. April 10, 1951*

Decision and Order

On November 29, 1950, Trial Examiner Lloyd Buchanan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

The Board [1] has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications:

1. We find, in agreement with the Trial Examiner, that the Respondent is engaged in commerce within the meaning of the Act.[2]

2. The Trial Examiner recommended a limited cease and desist order because in his opinion the Respondent "naively" committed violations of the Act. We do not agree. The Respondent's unlawful conduct of interrogating its employees concerning their union membership and the discriminatory discharge of four employees, naive though it may have been, goes to the heart of the Act, disclosing a fixed purpose to defeat self-organization and its objectives. Because of the Respondent's unlawful conduct and its underlying purpose, we are convinced that the unfair labor practices are persuasively related to the other unfair labor practices proscribed by the Act and that the danger of their commission in the future is to be anticipated from the course of the Respondent's conduct in the past. The preventive purpose of the Act will be thwarted unless the cease and desist order is coextensive with the threat. In order, therefore, to make effective the interdependent guarantees of Section 7, to prevent a recurrence of unfair labor practices, and thereby to minimize indus-

[1] Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Reynolds and Murdock].

[2] *WWEZ Radio, Inc.*, 91 NLRB No 232, *WBSR, Inc.*, 91 NLRB 630; *Western Gateway Broadcasting Corporation*, 77 NLRB 49

trial strike which burdens and obstructs commerce, and thus to effectuate the policies of the Act, we will order that the Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.[3]

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Central Kentucky Broadcasting Company, Incorporated, Lexington, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their union membership, sympathy, or activities.

(b) Discouraging membership in Radio Broadcast Engineers' Local Union 1224, International Brotherhood of Electrical Workers, AFL, or in any other labor organization of its employees by discharging any of its employees or discriminating in any other manner in respect to their hire and tenure of employment, or any term or condition of employment.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, to to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

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

(a) Offer to Alphonso F. Nuzzo, Gordon N. Hall, Adrian B. Currens, and William K. Hagan immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner set forth in the section of the Intermediate Report entitled "The Remedy".

(b) Make said employees whole for any loss of pay they may have suffered by reason of the interference, restraint, coercion, and discrimination against them, in the manner set forth in the section of the Intermediate Report entitled "The Remedy".

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[3] *May Department Stores etc.* v. *N. L. R. B.*, 326 U. S. 376.

(c) Post at its offices in Lexington, Kentucky, copies of the notice attached hereto and marked Appendix A.[4] Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Ninth Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

Appendix A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT interrogate our employees concerning their union membership, sympathy, or activities.

WE WILL NOT discourage membership in RADIO BROADCAST ENGINEERS' LOCAL UNION 1224, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL, or in any other labor organization of our employees by discharging any of our employees or discriminating in any other manner in respect to their hire or tenure of employment, or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL OFFER to Alphonso F. Nuzzo, Gordon N. Hall, Adrian B. Currens, and William K. Hagan immediate and full reinstatement to their former or substantially equivalent positions,

[4] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay suffered as a result of the interference, restraint, coercion, and discrimination against them.

All of our employees are free to become, remain, or to refrain from becoming or remaining, members in good standing of RADIO BROADCAST ENGINEERS' LOCAL UNION 1224, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL, or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) of the Act.

CENTRAL KENTUCKY BROADCASTING COMPANY, INCORPORATED,
Employer.

By _____
(Representative) (Title)

Dated_____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Intermediate Report and Recommended Order

Mr Seymour Goldstein, for the General Counsel.
Mr. Samuel Milner, of Paris, Ky., for the Respondent.
Mr J. F. Atwood, of Cincinnati, Ohio, for the charging party.

STATEMENT OF THE CASE

Upon a charge duly filed on February 27, 1950, by Radio Broadcast Engineers' Local Union 1224, International Brotherhood of Electrical Workers, AFL, herein called the Union, the General Counsel of the National Labor Relations Board,[1] by the Regional Director for the Ninth Region (Cincinnati, Ohio), issued a complaint dated August 28, 1950, against Central Kentucky Broadcasting Company, Incorporated, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act.

With respect to unfair labor practices, the complaint alleged in substance that the Respondent violated Section 8 (a) (3) of the Act by discharging and failing and refusing to reinstate four employees[2] named therein because of and to discourage membership in, sympathy for, and activity on behalf of the Union; and Section 8 (a) (1) of the Act by said alleged acts and by questioning its employees in regard to their union membership, sympathy, and activities.

In its answer, the Respondent denied the allegations of the complaint with respect to unfair labor practices, and stated that the employees named were discharged because they were incapable of performing the duties prescribed for them by the Respondent.

Pursuant to notice, a hearing was held at Lexington, Kentucky, from October 17 to 20, 1950, inclusive, before the undersigned Trial Examiner duly des-

[1] The General Counsel and his representative at the hearing are herein referred to as the General Counsel, and the National Labor Relations Board as the Board.

[2] Adrian B. Currens, Gordon N. Hall, Alphonso F. Nuzzo (referred to in the complaint as Franklin Nuzzo), and William K. Hagan.

ignated by the Chief Trial Examiner. General Counsel and the Respondent were represented by counsel, and the Union appeared by its representative. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues.

During the course of General Counsel's case-in-chief, the Respondent moved to dismiss the complaint for lack of jurisdiction; a similar motion and one to dismiss on the ground of failure to prove the commission of an unfair labor practice by the Respondent were made at the conclusion of General Counsel's case-in-chief. These motions were denied. At the close of the hearing, the motions were renewed and an additional one made to strike the name of Gordon N. Hall on the ground that he was a supervisory employee. Decision was at that time reserved, and said motions are now disposed of in accordance with the conclusions and recommendations below.

Prospective witnesses were excluded from the hearing room on the Respondent's motion to separate. On General Counsel's statement that all but one of his witnesses were parties in interest, the right was granted the respective witnesses to be present when their interests or actions were being directly considered.[3] At the conclusion of the hearing, General Counsel's motion to conform the pleadings to the proof in all minor variances was granted without objection. Oral argument was waived at the close of the hearing; briefs were thereafter filed by General Counsel and the Respondent.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Kentucky corporation, owns and operates radio broadcasting station WLEX, near Lexington, Kentucky, under license of the Federal Communications Commission issued in March 1947. The station is operated under a power output of 250 watts and on a frequency of 1340 kilocycles. It is classified at a Class IV[4] station operating on a local channel, AM only. Until approximately 2 weeks prior to the hearing and 7 or 8 months after the alleged unfair labor practices herein described, the Respondent was not affiliated with any national network. The station's so-called "principal coverage" extends over a radius of 20–25 miles, while it has a maximum operating radius of 60–65 miles, in which the quality of receptivity is lessened. While it was testified that the maximum operating radius does not cross the State line, an advertising brochure earlier prepared but which the Respondent has continued to use refers to thousands of letters received from listeners in four States. The Respondent utilizes the leased wire services of the Associated Press, for which it pays approximately $2,400 per year. "The majority of the (Respondent's) local newscasts are commercially sponsored"; it does not appear whether such sponsorship extends to AP news. The Respondent obtains transcriptions on a rental basis from the Kentucky office of Muzak Corporation at an annual cost of $1,500, and pays royalties in the amount of approximately $2,000 to ASCAP, BMI, and SESAC, all New York corporations, for the right to broadcast copyrighted material. Total operating costs are approximately $6,500 per month, compared with gross revenue of approximately $6,000. About 10 percent of the latter accrues from advertising sold to firms or agencies outside of Kentucky, and the station has carried commercials sponsored by automobile manufacturers and other national advertisers.

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[3] The witnesses did not avail themselves of the opportunity.

[4] It was erroneously described at the hearing as Class A.

Whether such commerce[5] will now prompt the Board to assert jurisdiction must be considered in the light of the policy governing the exercise of jurisdiction which has recently been enunciated.[6] The station in the *WBSR* case was affiliated with a national network, and the Board there affirmed its policy of asserting jurisdiction over "instrumentalities and channels of interstate and foreign commerce, *such as this radio station*" [Emphasis supplied.] But that the Board did not intend to limit itself to affiliated stations is suggested by its footnote reference to *Western Gateway Broadcasting Corporation*[7] where jurisdiction was asserted over an independent station which had a limited arrangement with national networks and which did not appear otherwise to meet in amount the inflow or outflow standards enunciated for general application. It must therefore be concluded that the Board will assert jurisdiction over local stations on proof of commerce during the preceding year as hereinabove shown.

General Counsel has raised the further point that the Respondent is to be considered an affiliated station because it became part of the Liberty Broadcasting System some months after the acts which allegedly constitute unfair labor practices. It is noted that the alleged violations were unremedied. But such a situation is not analogous to those involved in successorship and unlawful interference inasmuch as the latter recognize unfair labor practices over which jurisdiction existed prior to the change under consideration. That the determination of jurisdiction may be clear-cut, the undersigned will state at this time that if the discharge of employees did not have the "effect of burdening or obstructing commerce" and was therefore not a violation of the Act when it occurred (assuming that the Respondent was not then in commerce within the meaning of the Act), liability is not thereafter to be imposed only because the Respondent later engaged in commerce, and without proof of commission of an act which was unlawful and over which there was jurisdiction when it was committed.

As indicated, it is found that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Radio Broadcast Engineers' Local Union 1224, International Brotherhood of Electrical Workers, AFL, is a labor organization and admits to membership employees of the Respondent.

III. THE UNFAIR LABOR PRACTICES

A. *Chronology*

Where there are conflicts in the evidence, the undersigned has resolved them; findings are made herein on the basis of reliable, probative, and substantial evidence on the record considered as a whole and the preponderance of the testimony taken.

Herbert N. Boys, Alphonso F. Nuzzo, Gordon N. Hall, and Adrian B. Currens constituted the Respondent's nonsupervisory technician-engineering staff prior to 1950. The first two were employed on a full-time basis, while the other two were part-time; the last named, the youngest in point of service, was hired in June 1949. The entire staff consisted of these four and Warner, the chief engineer.

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[5] Cf *Veteran's Broadcasting Company*, 87 NLRB 199.
[6] *WBSR, Inc.*, 91 NLRB 630.
[7] 77 NLRB 49.

Late in December 1949, pursuant to an economy program previously decided upon by the Respondent, General Manager Bouldin advised Warner, the chief engineer, that a combination policy was being adopted and that engineers would be expected to double as announcers. When they learned of the proposed policy, the engineers, although displeased, undertook to practice, reading scripts, making and listening to self-recordings, and criticizing one another. The combination work began on January 15, 1950, and the men joined the Union on the following day. On the 25th, dissatisfied with the quality of the announcing by the technicians, the Respondent curtailed their announcing.

At about that time, Bouldin called a staff meeting so that "gripes could be aired" and problems cleared up. He was told that there were no gripes although Hall testified that he objected to doing combination work because he felt that the additional duties detracted from the quality of work that he could do and were generally detrimental to an engineer's work. When Coleman, one of the announcers, described the announcing as pathetic, Bouldin replied that it was not pathetic at all; while not up to network standards, it was improving. General Counsel's witnesses placed this meeting at about January 29, a few days after the technicians' announcing was curtailed. Bouldin, on the other hand, placed it at about the 20th, and he testified further that by the 25th he had made up his mind that the technicians were not qualified. The question of the date of the meeting is hereinafter resolved.

It was stipulated on the record that the Union, by letter dated January 30 addressed to the Respondent's president, claimed to be the collective bargaining representative of the Respondent's technicians and requested a meeting; and that the letter was received the following day by Kimbro, acting program director and announcer, on behalf of the Respondent. The stipulation was entered into to show that the Respondent had knowledge of union affiliation, not in connection with any question of refusal to bargain.

Warner had previously notified the Respondent of his intention to resign as chief engineer, effective February 9. During the week immediately prior to the latter date, Bouldin had three conversations, first with Hall and then with Hall and Boys, concerning assumption of Warner's duties.

On or about February 8, William K. Hagan, who was recommended by Hall, was given an audition by Warner, who said he "thought he would be all right." Hall thereupon took Hagan to see Bouldin, and without any further test Hagan was hired on a part-time basis.

On February 12, Bouldin called a meeting of the technicians, all attending except Hagan, who was on duty. It is undisputed that Bouldin at that time announced that he had received the letter from the Union. On February 20 all of the technicians except Boys were discharged.

Arrangements were made about February 14 to replace Warner with Bates, an experienced combination man. Two others, Roach and Miller, were hired about February 15 or 17. All three were made acquainted with the operation of the equipment late on the night of the 19th, and were on the job and working by the 20th. During this period and thereafter, pursuant to a change in operations, the Respondent effected a sharp reduction in personnel

B. *The alleged violation of Section 8 (a) (1)*

Hall testified that during the first or second conversation between Bouldin and himself concerning assumption of Warner's duties, Bouldin asked whether the men had joined the Union. Without denying this, Bouldin admitted asking on February 12 whether all of the men were members of the Union. (Currens

testified that on the latter date Bouldin asked whether Hagan, who was not at the meeting, was a union member.) Perhaps to justify such questioning, Bouldin pointed out that he did "know there was a Union involved." He had received the Union's letter claiming representation, but he did not know which employees were members and in any event violated Section 8 (a) (1) when he asked those questions [8]

Currens also declared that Bouldin asked at that meeting whether the men wanted the Union. Bouldin denied that he asked that question In the light of other indications that Bouldin was not a reliable witness and the finding hereinafter made that employees were discharged because of union activity, the undersigned credits the testimony that the question was asked, again in violation of Section 8 (a) (1).

It was variously testified and Bouldin admitted that he asked why the men joined the Union. This was not an argumentative and rhetorical question within the scope of Section 8 (c), but was further violative of the Act. It was answered, and the answer was considered at some length at the hearing.[9]

Hall further testified that at the meeting with the technicians Bouldin expressed his regret that the men felt that they had to join a union, and declared that they had been able to get along as one happy family. Without more, this does not appear to be a threat that they would now not be able to get along or otherwise an interference with the right to self-organization. Likewise covered by Section 8 (c) as an expression of view or opinion without threat is the statement attributed to Bouldin by Currens that the question of security could be worked out without the intervention of a third part. In any event, the issue of threats is not raised by the pleadings and was not litigated [10]

C. *The alleged violation of Section 8 (a) (3)*

A preliminary question to be determined with respect to Hall is whether, as claimed by the Respondent, he was a supervisory employee. On or about February 5, with Warner soon to leave, Bouldin asked Hall to accept the post of chief engineer. The latter declined, saying that he would not be able to handle the job satisfactorily since he was still attending school, and he recommended Boys. After further discussions, Hall and Boys "took over (Warner's) duties."

In addition to any supervisory power (the extent and nature thereof was not made clear at the hearing) which he exercised, Warner himself performed technical services, including maintenance work. It was now agreed that Hall would undertake to maintain the equipment. It does not appear that in the short time during which this arrangement was continued either Hall or Boys had or exercised supervisory power.[11] Hall testified that they "were assuming the chief engineer's duties with no increase in authority or pay." Hall performed Warner's technical, but not the supervisory, duties.

Bouldin testified that when Hall introduced Hagan, he "assumed . . . that he had been hired by the chief engineer." Later, attempting to show Hall's authority, he declared that he "assumed that in (his) conversation with Hall that Hall had been responsible for hiring (Hagan)." Finally in this connection he declared that Boys, Hall, and Warner each had the authority to hire on the day that Hagan was hired. Also to be considered is Bouldin's testimony that

[8] *Standard-Coosa-Thatcher Company*, 85 NLRB 1358.

[9] See footnote 18, *infra*.

[10] It cannot be found that the matter was "litigated" by virtue of such direct testimony alone.

[11] Whether Boys became a supervisor because he succeeded to certain paper work does not call for further consideration.

Hall and Boys told him just before Warner left that "they would not be able to assume these extra duties that (they) had talked about as co-chief engineers," and that "the work continued to be done by the four remaining engineers."

Bouldin did not announce that Hall was in charge of the equipment, but "left that up to (Hall and Boys) to inform the other men." Earlier, to justify Hall's discharge, Bouldin had testified that at the time of the alleged delegation of authority to Hall, he had already decided to replace him. It would be an understatement to say that Bouldin's testimony is unreliable. Hall, it is found, was not a supervisor within the meaning of the Act.

Whether or not the Respondent announced or intended a trial period of *undefined* duration as it contended, is not material. Several witnesses testified to an indefinite trial period. But even if, as maintained by General Counsel, there was no trial period so-called, the Respondent might properly decide that the combination operation was economically necessary, and that the engineers were unable to conduct such an operation and should be discharged. The Respondent could have discharged them for cause during the month preceding the actual discharges. Its failure to do so earlier did not preclude it from discharging them for cause later. As distinguished from what might have been, what was the Respondent's motive? The issue is, therefore, whether trial period or none, the engineers were discharged for incompetence or because of their organizational activities.

The uncontradicted and unopposed evidence is that, had proper replacement been indicated, Nuzzo, the full-time employee ranking lowest in seniority, would have been replaced. (Bouldin stated this as Warner's reason for auditioning Nuzzo alone of all of the technicians.)

It may also be that the Respondent would at some time have replaced some or all of the other technicians because of dissatisfaction with their announcing. There is substantial and sufficient evidence to show that none of the technicians was a satisfactory announcer: Hall testified that as late as February 12, when he "commended" them, Bouldin declared that they "were improving . . . although (they) did not sound like polished network announcers." (To explain the retention of Boys, Bouldin could say only that he "showed the greatest promise" although he was "comparable" with the others.) To say that in the meantime they fell short is not to introduce any novel factor. They were weak: Bouldin's encouragement was posited on that fact. Again, therefore, determination of the issue does not depend on their quality as announcers, but on whether the discharges were due to such quality or lack of it. The question is not whether the Respondent would have been justified in discharging for incompetence, but whether it was justified when it effected the discharges. Discharges for concerted activity are unlawful even where discharges for unsatisfactory performance have been contemplated.[12] Here the evidence is clear that the employees at some time had served or were serving a trial period;[13] it does not appear that their discharge was under contemplation immediately prior to knowledge of their concerted activities.

Thus recognition of the Respondent's right to replace its technicians for cause is not equivalent to a finding that it properly did so. Nor does it warrant and answer speculation when such discharges for cause would have been effected, if at all, but for the prior unlawful discharges. The Respondent referred to an indeterminate trial period. There is no evidence that such period would have terminated on a given date in the face of any finding that the discharges were

[12] *Air Products, Incorporated,* 91 NLRB 1381

[13] When the plan went into effect, Bouldin left it to Warner to tell the others. Currens believed that Warner had told him that combination work was on a trial basis; Boys testified similarly, while Hall "gathered" as much but was never so told.

precipitate and terminated it prematurely. Proof having been adduced of union activity, the employer's knowledge, and discharge because of such activity, it became the Respondent's duty to go forward with probative evidence to establish that the discharge was not discriminatory, but for cause.[14]

Whether the Respondent knew that Boys was a leader in the organizational activities does not appear. It did know that he had joined. Nor is it necessary to speculate whether he was kept on because he showed greater aptitude or because he expressed a willingness to work with new combination men. "Clearly, a complete housecleaning of union members and supporters is not essential to a finding that some employees have been discriminated against." [15]

Bouldin's testimony that the general staff meeting was held about January 20 and not, as otherwise testified, about January 29, taxes credulity: We must believe that although he had encouraged the men 5 days before, there was no discussion and they expressed no concern when their work was thereafter curtailed. It is more likely that Bouldin, while he limited their announcing, did not decide on the 25th that the technicians would have to be discharged, but that the latter, discouraged perhaps by both their efforts and the curtailment of their work, thereafter at about the end of the month admitted their shortcomings as announcers, only to be encouraged by Bouldin at that later date. This conclusion and the important corollary, as noted, that there was no decision to discharge when their announcing was curtailed are supported by Bouldin's actions or failure to act to obtain replacements, as will hereinafter be considered.

Although Bouldin claimed that he had earlier decided to discharge the technicians, he encouraged [16] Hall to purchase a house on the expectation that he would be continued in employment, offered him the position of chief engineer (only at Hall's suggestion was Boys given some of the chief engineer's duties), and employed Hagan as a part-time combination man on Hall's original introduction. (Hagan made no claim to such announcing experience as would indicate greater ability than Hall or the others had.) Also, significantly, not only did those events occur after the alleged termination of the trial period and the decision to discharge,[17] but no steps were then taken to obtain replacements.

Only 2 weeks before the discharges, Bouldin told Hall that Warner had recommended him and that the stockholders thought a great deal of him, and urged him to accept Warner's duties These facts and Warner's testimony that both he and Bouldin approved Hall over Boys, heighten the implausibility of Bouldin's defense that all of the engineers except Boys were at that time and had been for approximately 3 weeks slated for discharge. Further, Warner testified that when he left on February 9, he had not been told and "had no indication" that any of the engineers would be replaced.

Not until the staff meeting of February 12, when he mentioned receipt of the letter from the Union, questioned them further about what they expected to get from the Union, and was told that they looked to the Union for security [18] and by

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[14] *Sioux City Brewing Company*, 82 NLRB 1061; *Universal Camera Corporation*, 79 NLRB 379

[15] *Stewart Warner Corporation*, 55 NLRB 593. See also *Inter-City Advertising Company*, 89 NLRB 1103.

[16] Bouldin's version of this conversation, with the multiplicity of conditions which he allegedly laid down, is not credited.

[17] As noted above, Bouldin, probably in the second of the three conversations early in February concerning assumption of Warner's duties, inquired of Hall whether the men had joined the Union. Hall had replied that he "did not feel free to answer that question until (he) had consulted the other engineers." The following day, Hall and Boys told Bouldin that all of the technicians (Hagan had not yet been employed) had joined the Union.

[18] Hall distinguished between terms of a contract voluntarily met on a day-to-day basis, and a contract which is binding on the parties for a fixed period.

each that he had joined the Union, circumstances which indicated that they would not cease organizational activities, did Bouldin arrange to employ others.[19]

That he had opportunity to proceed earlier is clear from the fact that on January 25 he had checked on advertisements in a trade magazine and initiated the correspondence with Bates in view of Warner's imminent departure.[20] Even this proceeded at a leisurely pace, suggesting an expectation that Hall and Boys would perform Warner's duties. But a Protean aspect is marked as on February 14, via long distance telephone, he offered Bates employment. Had he intended earlier to make the discharges, Bouldin would at least have initiated a search for replacements. Yet, although Roach had gotten in touch with him before the first of the year, as late as "the latter part of the first week in February," when he was available for employment, according to Roach, Bouldin told him only that "if there was an opening, he would hire" him. Roach was hired when Bouldin went to Frankfort on February 17, while fortuitously (still without earlier search by Bouldin), Miller applied about the 15th and was hired on that or the following day.

It appears that, when he undertook to encourage them, and thereafter, Bouldin fully intended to keep the technicians as combination men. He testified that it would take him no more than 1 day to judge whether a man would make a good announcer, and his experience supports the conclusion that the technicians were becoming and would be satisfactory announcers In the light of all of the facts, there can be little doubt but that the discharges were made because of union activities, and it is so found.

At no time was there any suggestion of insubordination or refusal to do combination work. The stated objection that it would be detrimental to their work as engineers, whether well founded or not, indicated an attitude favorable to the Respondent's interests, and it was apparently so regarded by Bouldin as late as the meeting of February 12, when he thanked the men for their cooperation and declared that their work was improving.

Mention may also be made of the claim of necessity or right to "vote in" a new employee. This was no more than a harmless although erroneous impression, which remained uncorrected, of the engineers' rights as members of the Union. There was no question of refusal to work with other combination men.

Finally, whether when he was told that he had been "let go," Hall stated that it was or would be "bad for WLEX" (he explained that he meant that it would be detrimental to the station to bring in a staff of new men), or whether as Bouldin testified Hall was angry and threatened him with loss of his job, is of no present moment. Hall's statement was brought on by the discharge and was based on it. Any animus so caused would be no greater than that which normally attaches to discriminatory discharge and would presumably be removed by remedying the cause.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above,

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[19] Connection between such activities and the discharges may be seen further in Bates' reply to Boys' question on February 21 why he alone had been kept on: "He (Bates) didn't want an agitator to be kept." While Bates went to work after the discharges, he had been hired as chief engineer during the preceding week; his decision, as quoted, was made before and he presumably knew of the discharges and the reason therefore before they occurred.

[20] Bouldin's reference to a trade magazine to obtain a replacement was prompted, not by desire to replace the staff engineers, but, as he testified, by Warner's notice of intention to quit.

have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Since it has been found that the Respondent has engaged in certain unfair labor practices affecting commerce, it will be recommended that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

It has been found that the Respondent, by interrogation in regard to union membership, sympathy, and activities, interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act. It will therefore be recommended that the Respondent cease and desist from such or similar acts.

It has been further found that the Respondent, by discharging Nuzzo, Hall, Currens, and Hagan, discriminated against them in regard to their hire and tenure of employment in violation of Section 8 (a) (1) and (3) of the Act. It will therefore be further recommended that the Respondent cease and desist from such or similar acts, and offer to Nuzzo, Hall, Currens, and Hagan immediate reinstatement to their former or substantially equivalent positions,[21] without prejudice to their seniority or other rights and privileges; if, because of a change in the Respondent's operations, there are not sufficient positions remaining for all these employees, the available positions should be distributed among them without discrimination because of their union membership or activity, following such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of the Respondent's business. Those for whom no employment is immediately available after such distribution should be placed on a preferential hiring list with priority determined among them by such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of the Respondent's business and thereafter, in accordance with such list, should be offered reinstatement as positions become available and before other persons are hired for such work.

It will also be recommended that the Respondent make Nuzzo, Hall, Currens, and Hagan whole for any loss of pay they may have suffered by reason of the discriminatory action and interference, restraint, and coercion afore-mentioned by payment to each of them of a sum of money which shall be computed [22] on the basis of each separate calendar quarter or portion thereof during the period from the discriminatory discharge to the date of a proper offer of reinstatement. The quarterly periods, hereinafter called quarters, shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which each would normally have earned for each quarter or portion thereof, his net earnings,[23] if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay

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[21] In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent positions" is intended to mean "former positions wherever possible, and if such positions are no longer in existence, then to substantially equivalent positions." See *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch* 65 NLRB 827.

[22] *F. W. Woolworth Company*, 90 NLRB 289.

[23] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for these unlawful practices, and the consequent necessity of his seeking employment elsewhere. *Crossett Lumber Company*, 8 NLRB 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered earnings. *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7.

liability for any other quarter. It is also recommended that the Board order the Company to make available to the Board upon request payroll and other records to facilitate the checking of the amount of back pay due.[24]

It will not be recommended that the Board issue a broad cease and desist order because in the opinion of the undersigned the Respondent committed the unlawful acts naively rather than with such intent as would warrant reasonable apprehension of danger that it will commit unfair labor practices different from and not related to those found herein.

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. Radio Broadcast Engineers' Local Union 1224, International Brotherhood of Electrical Workers, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Alphonso F. Nuzzo, Gordon N. Hall, Adrian B. Currens, and William K. Hagan, thereby discouraging membership in the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By such discrimination and by interrogating its employees concerning union membership, sympathy, and activities, thereby interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

[Recommended Order omitted from publication in this volume.]

[24] *F. W. Woolworth Company, supra.*

C. B. ROLLINS, SR., D/B/A NASHVILLE DISPLAY COMPANY *and* UNITED STEELWORKERS OF AMERICA, CIO. *Case No. 10-CA-941. April 10, 1951*

Decision and Order

On January 12, 1951, Trial Examiner Eugene E. Dixon issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief.

The Board [1] has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the

[1] Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Houston and Reynolds].