Metromedia, Inc. (KLAC) *and* National Association of Broadcast Employees & Technicians, AFL-CIO-CLC. Case 31-CA-1256

April 29, 1970

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING, BROWN, AND JENKINS

On April 22, 1969, Trial Examiner Benjamin K. Blackburn issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal as to them. Thereafter the Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief, to which Respondent filed an answering brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.

The Trial Examiner found, and we agree, that Respondent was motivated to discharge 10 "producers"[1] on November 15, 1968, by their designation of the Union as their collective-bargaining representative and by Respondent's consequent desire to avoid bargaining with the Union, thereby violating Section 8(a)(3) and (1) of the Act.

As set forth in the Trial Examiner's Decision, the Petitioner won a representation election in a unit of "producers" employed by the Respondent. The election, held on August 30, 1968, was won by the Union 9-1, and the Union was certified on September 10. The Trial Examiner found, and we agree, that Respondent's decision to eliminate the producers was made, at the earliest, on October 4, and not communicated to subordinate management personnel until October 7. The Union and the producers were first informed of the decision in this respect at the first contract negotiating session on October 8.

Respondent's position, accepted by the Trial Examiner, seems to be that the advent of the Union would redound to Respondent's economic disadvantage in two respects, first, that "when the union organized, it made the economic factor even more important," and second, that "a great deal of time and effort would be spent in negotiations with them" These reasons, in the absence of any specific, express, or independent animus or hostility toward the Union, are regarded by the Trial Examiner as foreclosing the existence of unlawful discrimination. They establish, in his view, a valid defense of economic motivation for Respondent's decision to eliminate the producers. We disagree.

Such purported justification cannot justify conduct that is in fact related to the Union's presence in the plant. The employees here were discharged because the Union had organized them, and the unlawfulness of that discharge under the Act is in no way minimized or affected by the fact that Respondent may have believed, even accurately, that the Union's becoming the employees' exclusive bargaining representative would cost him money, or cost him the time and effort spent in bargaining. Indeed, if these kinds of business reasons could justify discrimination, the proscriptions and protections of the Act would be rendered largly nugatory.[2]

We also disagree with the Trial Examiner's conclusion that the Respondent did not "violate the mechanics and spirit of collective bargaining." As indicated above, the employees had voted 9 to 1 for union representation on August 30. On October 4, prior to the first scheduled bargaining session of October 8, Respondent determined to discharge its entire unit of producers. At all times Respondent has refused to bargain about any term or condition of their employment, except the sole question of their termination, which was effectuated on November 15. The unlawful termination of these employees is hardly a defense to a charge of an unlawful refusal to bargain. Nor does the fact that Respondent bargained about the issue of termination relieve it from the broader obligation to bargain about all terms and conditions of employment. Hopefully, Respondent in the future will fulfill its lawful obligations, but such a hope is not a substitute for an express order that it do so now.

Accordingly, we find that the Respondent's failure to engage in good-faith bargaining with the Union with respect to the producers' terms and conditions of employment, including any economic justification for the elimination of their jobs, violated Section 8(a)(5) and (1) of the Act. We shall modify the Trial Examiner's Conclusions of Law to delete No. 7 thereof; substitute the following as No. 6 and renumber the Trial Examiner's No. 6 as No. 7:

"6. By failing and refusing to bargain with the above-named labor organization as to the continued tenure and employment conditions for employees in the recently certified unit, Respondent violated Section 8(a)(5) and (1) of the Act."

[1] Respondent operates a two-way radio format on a 24-hour basis A person designated as a communicaster broadcasts over the air and invites and solicits listeners to telephone the radio station and discuss various and sundry subjects with the communicaster A producer would screen the telephone calls and in addition act as a factotum for the communicaster The term bears no relation to the job of a "producer" of shows as that term is more commonly used in the entertainment industry.

[2] *N L R B* v *Jones & Laughlin Steel Corp*, 301 U S 1, 33-34, *N L R B* v *Erie Resister Corp*, 373 U S 221; *N L R.B* v. *Great Dane Trailers, Inc*, 388 U S 26

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent, Metromedia, Inc. (KLAC), Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Reletter paragraph 1 as 1(a) and add the following as 1(b) and 1(c):

"(b) Cease and desist from refusing to bargain collectively with the above-named labor organization as the exclusive representative of all employees in the appropriate unit with regard to rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

"(c) Cease and desist from in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities."

2. Delete paragraph 2(a) of the Trial Examiner's Recommended Order and insert the following:

"(a) Offer to the employees named below immediate and full reinstatement of their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed and make each whole for any loss of pay suffered as a result of Respondent's discrimination against them in the manner set forth above under The Remedy."

3. Add the following as paragraph 2(c) and reletter the remaining paragraphs accordingly:

"(c) Upon request, bargain collectively with the above-named labor organization as exclusive representative of the employees in the appropriate unit with regard to rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All producers employed by Metromedia, Inc., at KLAC, excluding office clerical employees, the executive producer, assistant program director, program director, guards and supervisors as defined in the Act, and all other employees.

4. Substitute "Judgment" for "Decree" wherever it occurs in footnote 14 of the Trial Examiner's Recommended Order.

5. Substitute the attached notice for the one recommended by the Trial Examiner.

APPENDIX

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

WE WILL NOT discharge you because you designate a union as your representative to bargain collectively with us about your rates, of pay, wages, hours, or other terms and conditions of your employment.

WE WILL NOT refuse to bargain collectively with National Association of Broadcast Employees & Technicians, AFL–CIO–CLC, as the exclusive representative of all the employees in the appropriate unit described below.

WE WILL offer to reinstate the following employees to their former positions as producers or, if those positions no longer exist, to substantially equivalent positions, without any change in the seniority or other privileges they enjoyed before we discharged them and WE WILL pay them any money they lost as a result of our discrimination against them with interest at 6 percent:

Carmen Durand	Madeline Gartzman Rosen
James Ernsberger	Nancy Skiba
Robert La Pides	Arleen Starr
Edith Lund	Sondra Weinberg
Jack McClure	Paul Werth

WE WILL notify any of these employees who are presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL, upon request, bargain collectively with the above-named Union, as the exclusive representative of all the employees in the unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All producers employed by Metromedia, Inc., at KLAC, excluding office clerical employees, the executive producer, assistant program director, program director, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain

collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any and all such activities

All our employees are free to become, remain, or refrain from becoming members of the above named Union or any other labor organization

METROMEDIA INC
(KLAC)

(Employer)

Dated By

(Representative) (Title)

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

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

Any questions concerning this notice or compliance with its provisions, may be directed to the Board's Office, 10th Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California 90014, Telephone 213–688–5800

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

BENJAMIN K BLACKBURN, Trial Examiner This case arose on November 18, 1968,[1] when National Association of Broadcast Employees & Technicians, AFL–CIO, CLC, referred to herein as the Union or the Charging Party, filed an unfair labor practice charge against Metromedia, Inc (KLAC), referred to herein as Respondent or KLAC On the basis of that charge, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31 (Los Angeles, California), issued a complaint against Respondent on January 10, 1969, in which he alleged that Respondent had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended By its answer, duly filed on January 22, 1969, Respondent admitted, *inter alia,* the following facts alleged in the complaint

(a) Producers constitute a unit appropriate for the purposes of collective bargaining at KLAC

(b) The Union was certified as the collective-bargaining representative of the producers on September 10 following an election held on August 30 in Metromedia, Inc (KLAC), Case 31–RC–867, in which a majority of them selected the Union as their representative

(c) The Union has been the collective bargaining representative of the producers at all times since September 10

(d) The Union, by letter, requested Respondent to bargain on or about September 12

(e) Respondent's answer to the Union's letter of September 12 was notification to the Union on October 8 that it had decided to terminate the employment of all producers

(f) Respondent discharged all producers on November 15 and has since failed and refused to reinstate and/or recall them

Respondent's answer denied only that it discharged the producers "because said employees were members of and supported the Union or because a majority of them had designated the Union as their collective-bargaining representative or because Respondent was motivated by the desire to avoid recognition of or bargaining with the Union' and that unfair labor practices resulted Consequently, the only issue litigated before me was Respondent's motive for eliminating producers from its operations

At the hearing, duly held in Los Angeles on February 25 and 26, 1969, all parties appeared and were given full opportunity to participate, to adduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs

Upon the entire record, including briefs filed by Respondent and the General Counsel, and from my observation of the demeanor of the witnesses while testifying under oath, I make the following

FINDINGS OF FACT

I THE BUSINESS OF RESPONDENT

Metromedia, Inc , operates radio and television stations throughout the United States In Los Angeles it operates an AM radio station with call letters KLAC, the only one of its stations involved in this proceeding Metromedia, Inc , annually grosses more than $100,000 from its operations outside the State of California KLAC's gross volume of business annually exceeds $200,000, a substantial part of which is derived from the sale of air time for the advertisement of national brand products and for the sale of items produced outside California On the basis of these admitted facts, I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act

II THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act

III FACTS

KLAC is the pioneer among American radio stations in 24-hour-a-day two-way talk radio It converted to that format in February 1966 However, prior to that time, part of its daily programing was devoted to two-way radio Two-way radio is a type of programming in which a personality known as a communicaster

[1] All dates are 1968 unless otherwise specified

engages in telephone conversations with persons who call or are called by the station with the voices of both communicaster and caller being heard on the air.

The primary duty of a producer is to answer the telephone for his communicaster when the communicaster is on the air, screening out undesirable callers and passing desirable ones along to the communicaster. It is a relatively low-paying job[2] and bears no relation to the job of a "producer" of shows as that term is more commonly used in the entertainment industry. The title originated in the early days of two-way radio when a communicaster referred to his "producer" while on the air and, thereafter, like Topsy just grew.

Through the years the duties of producers also just grew. At the time Respondent abolished the job classification on November 15, the producers, in addition to screening incoming calls, were performing the following duties for their communicasters: researching questions posed to communicasters by callers; placing newsmaker calls; monitoring the program for adherence to the Federal Communications Commission's fairness doctrine and taking proper steps to rectify any possible deviations; booking and greeting guests whom communicasters sometimes have on their shows; opening and coping with the communicasters' mail; and cueing, pacing, and timing the shows.[3] A newsmaker call is a telephone call made by the station to a person in the news with the conversation broadcast in the same manner as a call made by a nonnewsmaker to the station. An example would be a call to a member of the California legislature for comment on a pending bill. All of the duties performed by producers prior to their termination are still being performed by other members of KLAC's staff with the exception of the primary duty of screening incoming calls for communicasters while they are on the air. Newsmaker calls, for example, are now made either by the communicaster himself or, more commonly, by newsmen.

Prior to the inception of the Union's campaign to organize Respondent's producers at KLAC, management had become dissatisfied with the contribution of the producers to its air sound. Jack G. Thayer, general manager of KLAC, was concerned that a format which had been exciting in the beginning was becoming lethargic and blamed the change on the role of the producers. He reasoned that the spontaneity of the shows had declined because the communicasters already knew, when they took a call on the air, who was on the other end of the line and what he wanted to talk about. He also reasoned that the communicasters were relying too heavily on their producers for research and background information to the detriment of their own ability to talk intelligently and entertainingly about affairs of the day. He also noted, when he reviewed KLAC's 1968 budget in February, that producers were costing the station approximately $50,000 a year and speculated whether that amount could be saved by eliminating them while, at the same time, upgrading the station's product, the sound which it broadcasts.[4] Consequently, he discussed the role of producers in two-way radio with various persons in or associated with the broadcasting industry. He also discussed with his program director, Willis Duff, whether it was possible to have two-way programing without producers, something KLAC had never tried before. Duff thought it was not possible. He took the position that, rather than being eliminated, the job of the producers should be upgraded. David Crane, KLAC's news director, was promoted to program director on March 15, replacing Duff. Thayer discussed the possibility of eliminating producers with Crane. Crane was more receptive than Duff to the idea but asked for time to study the problem.

The petition which ultimately led to the certification of the Charging Party as bargaining representative of the producers was filed on July 5 and received by Thayer within a day or two. He checked with his home office in New York. He was told by Robert E. Pantell, Metromedia's director of personnel administration, that he could not discriminate against the producers in any way, including discharging them, nor could he interrogate them, threaten them, or promise them benefits pending the election. Pantell advised Thayer what steps he could legally take to attempt to persuade the producers to vote against the Union. Consequently, Thayer sent two letters to the producers, one dated August 2 and the other August 13, and held one meeting with them a day or two before the election. The theme of the letters and speech is that Thayer had found opportunities in the radio business greater for him when he put union activities behind him in order to follow an individual course and that the producers would be unwise to select a union which normally represents nonbroadcasting technicians in the industry since to do so might inhibit their future chances for broadcasting careers.

In July installation of new telephone equipment at KLAC was completed.[5] This equipment expanded the service available but did not change the essential setup under which communicaster and producer worked at indentical but separate telephone call director sets.

The Union won the election, held on Friday, August 30, by a vote of 9 to 1.[6] Louise d'Usseau voted in the election.[7] On Friday, September 6, Mrs. d'Usseau asked Thayer whether she could take the place of a communicaster who was going to be absent that weekend. Mrs. d'Usseau had broadcast as a substitute communicaster on similar occasions in the past. Thayer told her that she could not because she was now represented by the Union, communicasters and other employees

[2] Approximately $2 an hour Communicasters earn from $20,000 to $150,000 a year

[3] David Crane, KLAC's program director, described producers as "these people who had become [the communicasters'] personal private secretaries" The phrase struck me as particularly apt

[4] KLAC's revenues were down $15,000 in February from January, down $600,000 in the first 10 months of 1968 from the first 10 months of 1967

[5] The record is unclear on exactly when this work began and ended Apparently it began in June, prior to the filing of the petition, and ended in July, after the filing

[6] The election was held pursuant to a stipulation for certification upon consent election entered into by Respondent and the Charging Party on August 5

[7] Mrs d'Usseau quit prior to November 15

who appear on the air for KLAC are represented by the American Federation of Television and Radio Artists, AFL–CIO,[8] and he did not want to cause a possible jurisdictional dispute in any negotiations with the Union. On September 10, Nancy Skiba was hired as a producer.

The possibility of eliminating producers continued under active study following the election. Crane had a communicaster present his show at least once without the help of a producer. After studying a tape of the show, Crane told Thayer he thought eliminating producers was a feasible idea. Thayer continued to discuss the subject with various radio experts who visited KLAC, Among them was the general manager of station WEEI in Boston, a two-way talk station which does not use producers, with whom he had first talked in February. As a result, Thayer visited WEEI on October 2 and 3 in order to study its operations. He went from Boston to New York on October 4, where he conferred with his superiors about eliminating producers at KLAC. He returned to Los Angeles on Friday, October 4. On Monday, October 7, he told his colleagues of his decision to terminate the employment of all producers.[9]

The Union and the producers first learned of Thayer's decision on the morning of October 8 at the first scheduled bargaining session between Respondent and the Union. Pantell, spokesman for Respondent, opened the meeting by announcing that Respondent had decided to eliminate the job classification of producer. He said that Respondent recognized its obligation to bargain with the Union about producers and that, if time should prove the decision wrong and find producers once more numbered among KLAC's employees, Respondent would recognize and bargain with the Union as their representative at that time. He also conceded Respondent's obligation to bargain with the Union about the termination of the producers' employment. Consequently, all bargaining which took place at that session as well as at meetings held on October 31, November 1 and 15 was limited to that subject.

On November 15 Respondent discharged all of the 10 producers then on its staff. They are Carmen Durand, James Ernsberger, Robert La Pides, Edith Lund, Jack McClure, Madeline Gartzman Rosen, Nancy Skiba, Arleen Starr, Sondra Weinberg, and Paul Werth.

IV. CONCLUSIONS

Respondent eliminated its producers (1) to improve its air sound and (2) to save money. With respect to the second reason, it admits that it was aware that additional costs could flow from their organization. Thus, Pantell at one point testified:

> The producers' union organization was certainly an ingredient in our consideration of the producers situation.

Crane testified:

> They [discussions with other persons in management about eliminating producers] were more frequent [from mid-August through September 1] and they were primarily with Mr. Thayer. And the reason that they were more frequent was because we were also aware that the producers were talking in the halls and so on about $225 a week that they wanted to get because that's what somebody was getting in San Francisco.

and Thayer testified:

> Q. I asked you—I think your answer was that one of the reasons that you decided to eliminate the producers was because of—
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> A. Because of economics, 50 thousand dollars, that was their current status [i.e., in February]. Secondly, was the programming. Next, I found out that the union was coming in. Mr. Pantell said it was going to cost more money, so the economic factor became even stronger.
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> Q. Your decision to terminate the producers was final in February? Tell us how the union's increased economic burden affected that decision.
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> A. No, not in February, I said, sir—
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> Q. You said—
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> A. I said my first consideration was, No. 1, economics, based on $50,000; No. 2, on programming spontaneity. That decision was there to begin with.
>
> Then when the union organized, it made the economic factor even more important.

Another facet of the economic half of Respondent's motive was the bother of negotiating with the Union, as Thayer testified on cross-examination:

> Q. Well, why didn't you do it [eliminate producers] in March?
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> A. I hadn't thought that much about it in March.
>
> Q. Tell me—you say the union was a factor—tell me how it was a factor again, please.
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> A. My concern was that a great deal of time and effort would be spent in negotiations with them.

Therefore, since Thayer did not finally decide to eliminate the producers until after they voted for the Union, regardless of how much thought he may have given to the possibility before, it is obvious that the economics

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[8] KLAC's engineers are represented by the International Brotherhood of Electrical Workers, AFL–CIO

[9] The only material point as to which there is any real dispute in this record is the date on which Thayer finally made up his mind to discharge the producers I do not credit belated assertion that he decided in February when he first talked to the manager of WEEI He first testified that he reached his decision on October 7, then changed to October 4 during his conference in New York with his superiors This discrepancy is immaterial since both dates are well after the election Thayer only stated that he had decided early in 1968, before any knowledge of the organizing campaign or the producers' interest in the Union, when the possible significance of the point dawned on him as he was testifying The record as a whole, especially the testimony of David Crane about his conversations with Thayer after the filing of the petition, Thayer's own testimony about the reason for his trip to Boston, and the fact that Nancy Skiba was hired after the election, makes it clear Thayer had come to no final decision about whether he could get along without producers before he left for Boston Therefore, I find that Respondent's decision to eliminate the producers was made, at the earliest, on October 4

of unionization were a moving cause of the discharges.[10] Even though Respondent also had a second reason, improvement of its product, if the economic motive resulting from the producers' selection of the Union is discriminatory within the meaning of the Act, the discharges violate Section 8(a)(3) and (1). *N.L.R.B.* v. *Electric Steam Radiator Corp.*, 321 F. 2d 733 (C.A. 6).

Respondent defends its decision to eliminate its producers because they had voted for the Union on two grounds First, it argues that this is a *Darlington*[11] case, and, since the General Counsel has admittedly not attempted to prove a motive of chilling unionism elsewhere in Respondent's business, no violation has been established. It equates the total elimination from its operation of the one task which producers alone performed, namely, the screening of calls for communicasters while they are on the air, with the closing of part of an employer's business found legal by the Supreme Court, and states, in its brief:

> Admittedly, the termination of the producers here did not constitute a partial closing of the Respondent's business in the sense that one plant was completely shut down and its doors bolted forever. Similarly, the Respondent's air product had not been changed substantially, as for example, from two-way radio to music. However, Respondent submits that the *Darlington* case does not require that the partial closing be evidenced by the bolted door or a complete change in the product. For example, let's assume that an employer who manufacturers [sic] automobiles decides to eliminate the use of a chrome feature strip as trim on the automobile. This chrome feature strip is manufactured by 10 employees in one plant located 20 miles from the assembly plant. If the employer closes down that one plant, clearly the *Darlington* case would apply. Assuming that the chrome strip is made in a separate building located on the same premises as the assembly plant, it would appear that a permanent closing of that building would also fall within the purview of the *Darlington* case. The Respondent submits that even if the 10 man department was located within the assembly plant itself the *Darlington* rule should apply. In each case the employer has partially terminated its business permanently, and the physical location of the part of the business terminated should have no effect on the legal result. It should also be noted that in the assumptions above, the ultimate product, namely, the automobile, has not substantially changed
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> In the present case, the Respondent permanently terminated that portion of its business which involved the screening of telephone calls by the producers. From Mr. Ernsberger's testimony, it appears that at least one communicaster, namely, Joe Pyne, conducted his show from his home while the producer was located in the broadcast studio. Thus, it would have been entirely possible to have all the communicasters broadcast from a building located some distance from the building housing the producers. If, under those circumstances, the Respondent terminated the producers and "bolted the door" of the building in which they were located, the *Darlington* case would clearly apply. The Respondent submits that the physical location of that part of its business which is permanently closed should not make the *Darlington* case less applicable. *The Darlington case was intended to cover a permanent partial closing of any part of an employer's business whether it is a division, plant or department and regardless of its location.* The permanent nature of the Respondent's closing of that portion of its business conducted by the producers is evidenced by the fact that no one is performing the work exclusively assigned to them and no replacements have been hired. [Emphasis supplied.]

I disagree. When Respondent eliminated the job classification and dropped from its operation the one task which was uniquely the producers', it did not close a part of its business in any reasonable sense of that expression. In both *Darlington* and *Motor Repair, Inc.*, 168 NLRB 1082, another case cited by Respondent in which the Board applied the *Darlington* principle to find a partial closing not a violation of the Act, an entire plant was shut down. I find nothing in either decision to justify an extension of *Darlington* to the situation presented here. Therefore, since Respondent did not close a part of its business, *Darlington* does not apply and the General Counsel did not have to prove a chilling-of-unionism motive in order to establish a violation.

Second, Respondent argues that this case is governed by *N.L.R.B.* v. *J. M. Lassing, et al.*, 284 F.2d 781, 783. There, the United States Court of Appeals for the Sixth Circuit held that an employer did not violate the Act when it accelerated a decision to eliminate one of its operations because the employees who performed it had selected a bargaining representative. The court reversed the Board in *Lassing* on the basis of the principle it had previously established in *N.L.R.B.* v. *Adkins Transfer Co.*, 226 F.2d 324, and *N.L.R.B.* v. *R. C. Mahon Co.*, 269 F. 2d 44, that

> . . . a company may suspend its operations or change its method of doing business, with the resulting loss of employment on the part of certain employees, so long as its change in operations is not motivated by the illegal intention to avoid its obligations under the National Labor Relations Act. A change in operations motivated by financial or economic reasons is not an unfair labor practice under the Act.

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[10] Pantell admitted that, at one of the negotiating sessions, he told the Union Respondent desired to eliminate the group of producers even absent any increase in cost The General Counsel cites this fact in arguing that Respondent's economic defense is a pretext I attach no such significance to the remark All it establishes is that Respondent, once it had announced its decision to the Union, was determined not to change it regardless of any arguments advanced by the Union

[11] *Textile Workers Union* v *Darlington Manufacturing Co* , 380 U S 263

Again, I disagree. In the first place, the Board has expressed its respectful disagreement with the Sixth Circuit's holding in *Lassing* and similar cases. See *Ox-Wall Products Manufacturing Co., Inc., et al.*, 135 NLRB 840, fn. 4 at 842; *Myers Ceramic Products Co.*, 140 NLRB 232, fn. 8 at 234. More importantly, this case is clearly distinguished from the *Lassing* line of cases by its facts. In *Lassing*, the employer only accelerated a firm decision already made and having an outside date for its implementation when the employees selected a bargaining representative. Here, Thayer did not finally make up his mind to eliminate the producers until well after the election when faced with the imminent necessity of negotiating with their representative. In *Adkins* and in *Mahon* the employer was motivated solely by its concern that it could not afford increased costs caused by unionization. Here, there is no evidence, nor does Respondent contend, that increased costs which undoubtedly would have resulted from organization of the producers posed any threat to KLAC's continuing profitable operation. The thrust of Respondent's economic argument is, rather, that it was privileged to attempt to improve its air sound and to save money in the process no matter what its financial situation. The *Lassing* principle has been applied in situations where, as here, the decision to eliminate employees preceded any demand for increased benefits from their bargaining representative on the ground that the employer's good-faith anticipation of such demands is sufficient to establish that his action is motivated by economic rather than antiunion considerations.[12] Here, however, Respondent's concern did not center on possible increases in its cost due to organization of its producers. As the two portions of Thayer's testimony which I have set forth verbatim above make clear, his concern was first with the approximately $50,000 a year the producers were already costing Respondent and second with the time that would be wasted in negotiations with the Union, money and time which could easily be saved if the producers were eliminated forthwith. Therefore, this case does not present "a change in operations motivated by financial or economic reasons" in the sense in which that phrase was used by the court since "motivated by financial or economic reasons" means, in the *Lassing* cases, motivated solely by the desire to avoid the increased costs of unionization.

Based on the foregoing, I find that Respondent was motivated to discharge all 10 of its producers on November 15 by their designation of the Union as their collective-bargaining representative and by Respondent's consequent desire to avoid bargaining with the Union, thereby violating Section 8(a) (3) and (1) of the Act. In reaching this result I rely especially on the timing of Respondent's decision to eliminate the producers and Respondent's admission that its concern at that time was over the money they were already costing as much as over future increased costs. I do not rely on Respondent's preelection campaign or the Thayer—d'Usseau conversation. The two letters which Thayer sent to the producers and the words he spoke to them just before the election contain no threats of reprisal or promises of benefit. They are a clear expression of Respondent's right under Section 8(c) of the Act to present to its employees its views on the merits of unionization. I credit the testimony of Thayer and Crane that they personally had no objection to the producers' selecting the Union as their representative if they so desired. As to Mrs. d'Usseau's conversation with Thayer, I find that Thayer was motivated only by the jurisdictional problem and not by resentment over the outcome of the election when he declined to let her go on the air as he had in the past.[13] The fact that an employer advanced arguments against unionization, without more, does not establish antiunion animus. Neither does the fact that he based a business decision on a valid bargaining consideration. Therefore, I find that Respondent was not motivated by antiunion animus when it eliminated producers.

The General Counsel does not contend that Respondent failed or refused to bargain with the Union about termination of the producers, once the decision to eliminate them had been announced. His 8(a)(5) theory is a derivative one. Once an 8(a)(3) violation is found under the circumstances of this case, he argues, a refusal to bargain follows because Respondent of necessity refused to bargain with the Union over the terms and conditions of the producers' continued employment. I agree with the General Counsel's factual premise but not with his legal conclusion. The fact that Respondent did bargain about the terms and conditions of the terminations establishes that Respondent did not violate the mechanics or spirit of collective bargaining. During these negotiations Robert Pantell, Respondent's spokesman, acknowledged a continuing obligation to bargain about terms and conditions of employment if conditions ever made such bargaining relevant. When Pantell couched this thought in terms of Respondent being "wrong" about its decision to get rid of the producers, he was thinking of the possibility that Respondent might subsequently find their role of screening calls for communicasters essential to Respondent's operations. But the outcome of this litigation may prove Respondent wrong in a totally different sense. If the eventual result of this Decision, a Board order or a court decree, is reinstatement of producers to their former positions, I have no doubt that Respondent will honor the commitment made in good faith by Pantell and bargain with the Union without the necessity of an express order herein. Therefore, I find that Respondent did not violate Section 8(a)(5) and (1) of the Act when its illegal decision to eliminate the producers precluded bargaining with the

[12] *Jays Foods, Inc* v *N L R B*, 292 F 2d 317 (C A 7) But see Weyerhaeuser Company, 134 NLRB 1371, 1374, and fns 9 and 10

[13] The General Counsel's brief takes contrary views There is no explanation in the record as to why the preelection letter aand speech are not alleged in the complaint as independent violations of Sec 8(a)(1) or the d'Usseau incident as a violation of Sec 8(a)(3) and (1) if they have the significance the General Counsel attributes to them All are well within the 10(b) period The charge is sufficiently broad to cover them

Union over the terms and conditions of their employment

Upon the foregoing findings of fact, and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1 Metromedia, Inc (KLAC) is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act

2 National Association of Broadcast Employees & Technicians, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act

3 All producers employed by Metromedia, Inc , at KLAC, excluding office clerical employees, the executive producer, assistant program director, program director, guards, supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act

4 At all times since September 10, 1968, the Union has been and presently is the representative for the purpose of collective bargaining of the employees in the unit described above and, by virtue of Section 9(a) of the Act, has been and now is the exclusive representative of all the employees in said unit for the purpose of collective bargaining in respect to rates of pay, wages, hours, or other terms and conditions of employment

5 By discharging Carmen Durand, James Ernsberger, Robert La Pides, Edith Lund, Jack McClure, Madeline Gartzman Rosen, Nancy Skiba, Arleen Starr, Sondra Weinberg, and Paul Werth on November 15, 1968, Respondent has discriminated with respect to their hire and tenure of employment, discouraging membership in the above-named labor organization and thereby has violated Section 8(a) (3) and (1) of the Act

6 The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Sec tion 2(6) and (7) of the Act

7 Respondent did not violate Section 8(a)(5) and (1) of the Act by announcing, on October 8, 1968, its decision to discharge the persons named above and thereafter failing and refusing to bargain with the above-named labor organization about the terms and conditions of their continued employment

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action which will effectuate the policies of the Act

Ordinarily, I would recommend that Respondent rein state the discharged producers to their former or substantially equivalent positions In this case, however, such an order would permit Respondent to circumvent the real purpose of the order to restore the *status quo ante* insofar as a bargaining unit limited to producers is concerned by reinstating them to positions other than producer Consequently, I will recommend that Respondent reinstate each of the discharged producers to his former position without prejudice to any seniority or other rights and privileges previously enjoyed and make each whole for any loss of earnings he may have suffered as a result of his discharge by paying to him a sum of money equal to that which he normally would have earned as wages from November 15, 1968, until the date of Respondent's offer of reinstatement, less his net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed in *F W Woolworth Company,* 90 NLRB 289, and *Isis Plumbing & Heating Co ,* 138 NLRB 716 This is not meant to imply that Respondent must again have them screen calls for its communicasters Screening calls occupied less than half of the producers' worktime prior to November 15 If Respondent feels that elimina tion of the producers' unique duty of screening calls has so improved its air sound that it does not want to go back to the old system, there is enough work involved in the producers' other duties to keep them busy as the communicasters' factotums for as many hours a week as they normally worked prior to November 15

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following

RECOMMENDED ORDER

Metromedia, Inc (KLAC), its officers, agents, successors, and assigns, shall

1 Cease and desist from discriminating against its employees in order to discourage membership in National Association of Broadcast Employees & Technicians, AFL-CIO, CLC, or any other labor organization

2 Take the following affirmative action which is necessary to effectuate the policies of the Act

(a) Offer to Carmen Durand, James Ernsberger, Robert La Pides, Edith Lund, Jack McClure, Madeline Gartzman Rosen, Nancy Skiba, Arleen Starr, Sondra Weinberg, and Paul Werth immediate and full reinstatement to their former positions as producers without prejudice to any seniority or other rights and privileges previously enjoyed and make each whole for any loss of pay suffered as a result of Respondent's discrimination against him in the manner set forth above under ' The Remedy ''

(b) Notify Carmen Durand, James Ernsberger, Robert La Pides, Edith Lund, Jack McClure, Madeline Gartz man Rosen, Nancy Skiba, Arleen Starr, and/or Paul Werth if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order

(d) Post at radio station KLAC in Los Angeles, California, copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicious places, including all places where notices to employees 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.

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[15]

[14] In the event that the Recommended Order is adopted by the Board, the words "This notice is posted by order of the National Labor Relations Board after a Trial at which all sides had the chance to give evidence, the National Labor Relations Board found that we, Metromedia, Inc (KLAC), violated the National Labor Relations Act, and ordered us to post this notice," shall be substituted for the words "Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act we hereby notify our employees that," in the notice In the further event that the Board's Order is enforced by a decree of the United States Court of Appeals, the words "This notice is posted by order of the United States Court of Appeals" shall be substituted for the words "This notice is posted by order of the National Labor Relations Board "

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