

American Federation of Television and Radio Artists,
AFL-CIO and WBEN, Inc. Case 3-CB-2018

DECISION

STATEMENT OF THE CASE

January 14, 1974

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On September 26, 1973, Administrative Law Judge Leonard M. Wagman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, American Federation of Television and Radio Artists, AFL-CIO, Buffalo, New York, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

¹ Respondent contends that the Administrative Law Judge's findings and recommended Order exceed the allegations of the complaint in that they apply to all employees covered by the collective-bargaining agreement between Respondent and the Employer, whereas par VIII of the complaint herein refers to Respondent requiring "part-time and/or temporary employees" covered by the aforementioned contract to pay an initiation fee which is excessive and discriminatory. We do not agree. Respondent has a single initiation fee that is applicable to all employees covered by the agreement referred to above, irrespective of whether they are full-time, part-time, or temporary employees. It is clear that Respondent increased that fee from \$100 to \$250 for all members, not just those employed on a part-time basis, in order to restrain the Employer from hiring part-time employees and to discourage nonmembers of Respondent from seeking part-time employment with the Employer, thereby violating Sec 8(b)(5) and (1)(A) of the Act. Consequently, there can be no question that the underlying basis of the unfair labor practices alleged in the complaint, though inartfully drafted, was Respondent's action increasing its initiation fee for all members. Since Respondent has but one initiation fee and it was excessively increased for a discriminatory purpose, it is appropriate that our Order apply to all affected employees of the Employer because had Respondent not been seeking to accomplish an unlawful object, none of these employees would have been required to pay the increased initiation fee. In addition, counsel for the General Counsel amended the complaint at the start of the hearing in this proceeding to add an allegation that Respondent's initiation fee increase violated Sec 8(b)(1)(A) of the Act by restraining and coercing "employees in general," which should have made Respondent aware that the unfair labor practices it was alleged to have committed were not limited to part-time employees.

LEONARD M. WAGMAN, Administrative Law Judge: This case was heard at Buffalo, New York, on June 12, 1973, based upon a charge filed January 23, 1973, and a complaint issued on May 2, 1973, alleging that Respondent, American Federation of Television and Radio Artists, AFL-CIO, referred to herein as AFTRA, violated Section 8(b)(5) of the Act by requiring WBEN, Inc.'s part-time and temporary employees to pay an excessive and discriminatory initiation fee. The complaint was amended at the hearing to allege that the initiation fee also violated Section 8(b)(1)(A) of the Act. Respondent denies any violation of the Act. The General Counsel and WBEN, Inc., the Charging Party, have filed briefs, which I have read and considered.

Upon the entire record in the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE CHARGING PARTY'S BUSINESS AND THE LABOR ORGANIZATION INVOLVED

WBEN, Inc., is a New York corporation with its principal office and place of business at Buffalo, New York. At all times material to this case, WBEN, Inc., has been engaged in the operation of a commercial radio station (WBEN) and a television station (WBEN-TV). Revenue from WBEN, Inc.'s radio and television operations during the 12 months preceding the hearing exceeded \$9 million. Approximately 70 percent of the gross revenues realized from the radio station, and about 40 percent of the television station's revenues arose from the advertisement of national brand products. WBEN, Inc., also subscribes to the wire services of Associated Press and United Press. Accordingly, I find that WBEN, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act. *Raritan Valley Broadcasting Company*, 122 NLRB 90, 91-92 (1958).

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issue presented is whether AFTRA's initiation fee of \$250 for part-time WBEN, Inc., employees seeking membership in its Buffalo, New York, Local is "excessive or discriminatory" within the meaning of Section 8(b)(5) of the Act. Also at issue is whether, if violative of Section 8(b)(5), the initiation fee also violates Section 8(b)(1)(A) of the Act, because it restrains or coerces employees in the exercise of their right to join AFTRA.

B. *The Facts*¹

Of the 5 television and 14 radio stations in the Buffalo area, only WBEN-TV and radio stations WBEN and WKBW have collective-bargaining agreements covering announcers. NABET (National Association of Broadcast Engineers and Technicians, AFL-CIO, CLC), which represents WKBW's announcers, has an initiation fee of \$75 for WKBW's part-time announcers, and requires payment of 1-1/2 weeks' salary as the initiation fee for the station's full-time announcers.

Under its current 3-year collective-bargaining agreement with AFTRA effective as of June 1, 1971, WBEN, Inc., referred to hereafter as WBEN, recognizes the Union as exclusive bargaining representative of the radio and television staff performers, news reporters, and staff announcers. Paragraph 2.1 of the contract provides in pertinent part:

Any employee covered by this Agreement shall, as a condition of employment, become a member of and maintain his membership in the Union on and after the thirtieth day following the beginning of his employment . . . by tendering the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The contract in paragraph 1.1(a), also permits WBEN to hire "temporary employees" including in that definition part-time employees, as follows:

The term "Temporary Employee" applies to, and is limited to, an employee of the Company within the bargaining unit covered by this Agreement, hired on a full time or part time basis and who is notified at the time of hiring that he will be scheduled to work on not more than one hundred and thirty (130) regular straight time programming days in any one (1) calendar year. A temporary employee may be used to cover such situations as vacation relief, seasonal programming, special news reporting, illness, leaves of absence, etc.

Temporary employees may be used to cover regular work, principally on weekends. In any one week, such work will not exceed thirty-two (32) hours for all such employees.

In December 1971, WBEN, implemented this provision for the first time when it hired a part-time employee, Ken Ruof. Ruof became a member of AFTRA upon the expiration of 30 days' employment, and payment of a \$100 initiation fee to the Buffalo Local. On December 3, 1972, WBEN hired a second part-time employee, Louis German, who was to be an announcer. At the time he was hired, WBEN advised German that after 30 days he would be required to join AFTRA, and that the initiation fee would be \$100. On December 5, WBEN advised William Masters, the president and chief steward of AFTRA's Buffalo Local, of German's hire. On the same date, WBEN sent a letter of welcome to German and again advised him that he

would be required to join AFTRA after 30 days' employment.

On December 15, 1972, AFTRA's Buffalo Local raised its initiation fee to \$250. Within a few days the Local, through Masters, notified WBEN of the increase. On December 28, when WBEN's Vice President and General Manager Leslie Arries, Jr., questioned him about the increase, Masters stated that one of the reasons for the action was that "some of the guys felt that we shouldn't have part-time employees." On December 29, Masters confirmed the new initiation fee in a letter to Arries but made no mention of whether the new fee was applicable to Louis German. Upon receipt of Masters' letter, Arries asked him whether German was subject to the increase and whether the increase had been discussed with AFTRA's local membership. Masters responded that "some of the fellows were against part-time employees and that this was the fee for Louis German. On January 2,² WBEN sent a letter to Masters protesting that the \$250 fee and the dues "makes the employment of temporary employees virtually impossible." WBEN also questioned the application of the fee to German and requested a meeting.

At the meeting which followed on January 12, WBEN's spokesman expressed concern that the increase would impair its ability to hire part-time or temporary employees. Masters, on behalf of AFTRA, explained that there were "several reasons" the initiation fee had been increased. One of the reasons was that the Local needed more money. Another was "that they did not want part-timers at the station because they were taking potential work from full timers, and secondly . . . they were opposed to part-timers as a matter of principle in the station." At this meeting, and thereafter, WBEN proposed a modification of the Buffalo Local's initiation fee for part-time employees to which the Local made no response. On or about January 24, AFTRA's national board approved the Buffalo Local's initiation fee increase.

In the meantime, German had tendered \$100 as payment of his AFTRA initiation fee. On January 3, AFTRA's Buffalo Local acknowledged receipt of German's check, but advised him that the "total initiation fee for union membership is \$250" and that unless he paid the remaining balance by January 5 "we expect that you will not take the air . . . as you will be a non-union member."³ However, AFTRA consented to German's employment at WBEN without payment of the remaining portion of the initiation fee, pending disposition of WBEN's protest. By its letter of January 23, AFTRA again notified German that unless he paid the \$150 due on his initiation fee, he could not perform on the air for WBEN. German did not tender the remaining \$150 until March 9. In the interim, WBEN did not call him for work.

Between December 3, 1972, when WBEN hired him, and the week ending June 3, German worked 17 days for WBEN at \$6.125 per hour. His gross pay for 1 day's work was \$49. Subtracting the approximately 6 weeks from January 23 until March 9 when AFTRA refused to permit him to work at WBEN because of his failure to pay the initiation fee, German was available for employment by

¹ The facts relating to the alleged violations are substantially undisputed

² Unless otherwise stated all subsequent dates refer to 1973

³ The transcript is hereby corrected at p. 153, 11 24 and 25 to reflect that AFTRA's letter of January 3 was received in evidence as G C Exh. 17

WBEN for about 20 weeks of the 26-week period. His gross pay for the entire period was \$859.94, including \$73.50 for holiday premium pay.

C. Analysis and Conclusions

Section 8(b)(5) of the Act makes it an unfair labor practice for a labor organization

. . . to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all of the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected.

In applying this section of the Act, the Board has held that an initiation fee increase "designed for the purpose of restraining the Employer in the hiring of part-time employees who were not union members, or to end the practice, thereby restricting employment to a full-time union members" is unlawful. *Television and Radio Broadcasting Studio Employees Local 804 (Radio and Television Division of Triangle Publications, et al.)*, 135 NLRB 632, 636 (1962), enfd. 315 F.2d 398, 399-400 (C.A. 3, 1963). Accord: *General Longshore Workers, International Longshoremen's Association, Local Union No. 1419, AFL-CIO (New Orleans Steamship Association)*, 186 NLRB 674, 676-678 (1970); *New York Local 11, National Association of Broadcast Employees and Technicians, AFL-CIO (American Broadcasting Company, et al.)*, 164 NLRB 242, 244-245 (1967).

Here, it is evident that AFTRA had a discriminatory motive in increasing the Buffalo initiation fee. The Local's President and Chief Steward Masters, on three occasions after the increase, revealed its hostility toward WBEN's employment of part-time employees. He also admitted that this sentiment was at least one of the considerations which motivated the increase. Masters' admissions coupled with the timing of the decision only 10 days after WBEN notified Masters that it had hired part-time employee German leave little doubt that AFTRA's intent was to restrain WBEN from hiring part-time employees and to discourage nonmembers of AFTRA from seeking part-time employment at WBEN.

Moreover, AFTRA has not offered an acceptable alternative explanation for the 150-percent increase in its Buffalo initiation fee. The increase from \$100 to \$250 was substantial and of sufficient magnitude to restrain part-time employees who, as Louis German, had no guarantee that WBEN would employ them at all. Further, the collective-bargaining agreement between AFTRA and WBEN limited the employment of a part-time employee to 130 days per year. Excluding the 6 week period when AFTRA prohibited German from working at WBEN⁴,

during the 6 months following his hire on December 3, 1972, WBEN employed him on the average of approximately 1 day per week for which it paid him at a rate of \$6.125 per hour, or \$49 per day. In such circumstances, the imposition of a \$250 initiation fee is also a financial burden sufficient to dissuade a nonmember of AFTRA from seeking or accepting part-time employment at WBEN. The explanation offered by AFTRA consists of Masters' assertion to WBEN's Arries that the Local needed more money, and the contention at the hearing that inflation was the reason for the need. However, the record is bare of any financial data to substantiate the proffered excuse. The absence of such proof leaves but one explanation for the increase—AFTRA's admitted objective of preventing WBEN from hiring part-time employees. Accordingly, I find that the increase in AFTRA's Buffalo initiation fee had a discriminatory purpose within the meaning of Section 8(b)(5) of the Act. *Television and Radio Broadcasting Studio Employees Local 804, supra*, 135 NLRB at 636; *New York Local 11, NABET, supra*, 164 NLRB at 245.

I also find the initiation fee increase violative of Section 8(b)(5) on the ground that it is excessive. In reaching this finding, I have taken into account the discriminatory intent which guided AFTRA in setting the amount of increase, the magnitude of the increase, the financial burden the increased fee places upon prospective part-time employees such as Louis German, and the fact that NABET, the only other union representing employees in the radio and television industry⁵ in the Buffalo area, charges part-time announcers an initiation fee of only \$75.⁶ *General Longshore Workers, International Longshoremen's Association, Local Union No. 1419, supra*, 186 NLRB at 678; *New York Local 11, NABET, supra*, 164 NLRB at 242, fn. 2, and 245; *TV & Radio Broadcasting Studio Employees Local 804, supra*, 135 NLRB at 636-637. Finally, as demonstrated by Louis German's efforts to join AFTRA, the initiation fee increase restrains and coerces part-time employees in the exercise of their right under Section 7 of the Act to join a labor organization. *Longshoremen's Local Union No. 1419, supra*, 186 NLRB at 678.

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

CONCLUSIONS OF LAW

1. WBEN, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. American Federation of Television and Radio Artists, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By increasing the initiation fee required for membership in its Buffalo, New York, Local on December 15, 1972, from \$100 to \$250, and by maintaining it at that level thereafter, Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(5) and (1)(A) of the Act.
4. The Respondent's unfair labor practices affect

⁴ There is no allegation that AFTRA violated Sec. 8(b)(2) of the Act.

⁵ I take judicial notice that the radio and television media constitute a single industry *Dictionary of Occupational Titles*, US Department of Labor-Manpower Administration, Vol. II, p. 612 (1965).

⁶ At the hearing, tables showing AFTRA's initiation fees at 32 other cities and areas in the United States were received in evidence. However, I have not considered those tables in reaching my findings. *Longshoremen's Local Union No. 1419, supra*, 186 NLRB at pp. 674, 678, fn. 9.

commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in the unfair labor practices set forth above, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent is now, and, on and since December 15, 1972, has been charging an initiation fee excessive and discriminatory in all the circumstances, I shall recommend that Respondent be required to cease giving effect to the requirement that the amount of \$250 be paid as the price of initiation I shall further recommend that all sums in excess of \$100 paid to the Respondent on and since December 15, 1972, as initiation fees by or on behalf of individuals employed by WBEN, Inc., working in classifications where membership in the Respondent is a condition of employment, be returned to such employees, together with 6 percent interest thereon to be computed as prescribed in *Seafarers International Union of North America, Great Lakes District, AFL-CIO*, 138 NLRB 1142, footnote 3 (1962). Upon the basis of the above findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following:

RECOMMENDED ORDER ⁷

Respondent, American Federation of Television and Radio Artists, AFL-CIO, and its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Requiring the sum of \$250 as the price of initiation from Louis German or other employees of WBEN, Inc., working in classifications covered by the bargaining agreement between the Respondent and WBEN, Inc., requiring membership in the Respondent as a condition of employment, or requiring any other sum which is excessive or discriminatory under all the circumstances for initiation.

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

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) Pay to Louis German and all employees of WBEN, Inc., working in classifications covered by the collective-bargaining agreement between Respondent and WBEN, Inc., requiring membership in the Respondent as a condition of employment, all sums in excess of \$100 paid to the Respondent towards the \$250 initiation fee on or since December 15, 1972, in the manner set forth above under "The Remedy."

(b) Make available to the Board or its agents upon request, for examination and copying all records pertinent to or convenient for a determination of the amounts so paid.

(c) Post at Respondent's Buffalo office, copies of the notice attached hereto marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for

Region 3, shall, after being signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places where notices to Buffalo Local members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director for Region 3 copies of the attached notice marked "Appendix" for posting by WBEN, Inc., at its place of business in Buffalo, New York, in places where notices to employees are customarily posted, if the said Employer is willing to do so. Copies of said notice to be provided by the Regional Director, after being signed by a representative of Respondent, shall be forthwith returned to the Regional Director.

(e) Notify the Regional Director for Region 3, in writing, within 20 days from the receipt of this Decision what steps have been taken to comply herewith.

⁷ In the event no exceptions are filed as provided by Sec 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁸ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of a United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

WE WILL NOT require Louis German or other employees working for WBEN, Inc., who are covered by a collective-bargaining agreement requiring membership in the American Federation of Television and Radio Artists, AFL-CIO, as a condition of employment, the payment of an initiation fee in the amount of \$250.

WE WILL NOT require of Louis German or any other such employees of WBEN, Inc., the payment of any initiation fee which is excessive or discriminatory.

WE WILL refund to Louis German and all other such employees of WBEN, Inc., any amounts in excess of \$100 paid to us as initiation fees on or since December 15, 1972, plus 6 per cent interest.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their right to join the American Federation of Television and Radio Artists, AFL-CIO.

WBEN, INC.
(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, Federal Building 9th Floor, 111 W. Huron Street, Buffalo, New York 14202, Telephone 716-842-3106.